No. 18-2199

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEBAMOFF ENTERPRISES, INC, et al.,

Plaintiffs-Appellees,

v.

RICK SNYDER, et al.,

Defendants-Appellants,

and

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

Intervenor Defendant.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Honorable Arthur J. Tarnow

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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INTRODUCTION

Plaintiffs' argument rests on a fundamental misunderstanding of the interplay between the dormant Commerce Clause and the Twenty-first Amendment. Contrary to their argument, alcohol regulations are not subject to the same strict scrutiny test as every other product. As the Supreme Court recently explained, otherwise discriminatory laws involving alcohol are subject to a "different inquiry." *Tennessee Wine & Spirits Ass'n v. Thomas*, 139 S. Ct. 2449, 2474 (2019). That "different inquiry" results in the Twenty-first Amendment shielding state alcohol regulations that would otherwise violate the dormant Commerce Clause if those regulations have the "predominant effect" of protecting public health and safety. *Id.* If the challenged law does not meet the "predominant effect" test, then it is subject to the same strict scrutiny analysis that applies in other dormant Commerce Clause cases. Here, strict scrutiny does not apply because the predominant effect of Michigan's retailer-delivery statute is to protect public health and safety.

ARGUMENT

I. Plaintiffs ignore that alcohol regulations are subject to a "different inquiry" under the dormant Commerce Clause.

Plaintiffs and their amici assert that the dormant Commerce Clause applies in the same way to alcohol as it does to widgets or any other product in the stream of commerce. Appellee Br. at 22. But Plaintiffs ignore that the United States Supreme Court has repeatedly reached the opposite conclusion. Recognizing that § 2 of the Twenty-first Amendment "gives the States regulatory authority that they would not otherwise enjoy," the Court has held that state alcohol regulations that would otherwise violate the dormant Commerce Clause are subject to a "different inquiry." *Tennessee Wine*, 139 S. Ct. at 2474.

Most recently, the Court reached this conclusion in *Tennessee Wine*, stating that Tennessee's facially discriminatory two-year residency requirement "could not be sustained if it applied across the board to all those seeking to operate any retail business in the state . . . ." *Id.* But that was not the end of the case. The residency requirement was an alcohol regulation. Thus, the Court said, "because of § 2 we engage in a different inquiry." *Id.* That inquiry "ask[s] whether the

challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.*

Plaintiffs' arguments do not merely fail to account for the Court's analysis in *Tennessee Wine*. Applying a different inquiry to alcohol regulations does not represent a sudden shift in the law. For example, the Supreme Court recognized that alcohol regulations are subject to a different inquiry under the Twenty-first Amendment in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). At issue in *Bacchus* was whether Hawaii's decision to exempt locally produced products from its alcohol tax violated the dormant Commerce Clause. The Court concluded that Hawaii clearly intended to favor local products and that the State's interest in subsidizing a financially troubled local industry constituted economic protectionism that violated the Commerce Clause. *Id.* at 270-73. But Hawaii claimed that the Twenty-first Amendment saved its tax. *Id.* at 274.

If Plaintiffs here were correct in asserting that this Court should apply the same analysis to alcohol regulations as non-alcohol regulations, the Supreme Court would have immediately rejected Hawaii's argument. But it did not. Instead, the Court recognized that

regulations related to alcohol are subject to a different test than regulations of other products because of the Twenty-first Amendment. *Id.* at 274-76. Specifically, the Court phrased the question as "whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption for okolehao and pineapple wine to outweigh the Commerce Clause principles that would otherwise be offended." *Id.* at 275. Continuing, the Court quoted *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984), which asked "'whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.'" *Bacchus*, 468 U.S. at 275-76. Hawaii, however, had not argued that the tax was intended to promote temperance or carry out any other Twenty-first Amendment purpose; instead, it had admitted that the regulation was designed to promote the local wine industry. *Id.* at 276. The power to protect local industry is not a power reserved to the State by the Twenty-first Amendment. *Id.* Because "the tax violates a central tenet of the Commerce Clause but is not supported by any clear concern of the Twenty-first

Amendment," the Court rejected Hawaii's claim that its discriminatory tax was saved by the Amendment. *Id.*

Granholm v. Heald, 544 U.S. 460 (2005), likewise supports the principle that the Twenty-first Amendment is not simply disregarded in a dormant Commerce Clause analysis. At issue in *Granholm* were laws from Michigan and New York that allowed in-state wineries to bypass the ordinary three-tier system of alcohol distribution and ship alcohol directly to consumers instead of first selling to wholesalers who would then sell to retailers for sale to consumers. The Court held that laws allowing only in-state wineries to bypass the ordinary three-tier system were discriminatory. *Id.* at 473-76.

But instead of immediately proceeding to apply strict scrutiny, the Court first analyzed whether the laws were saved by § 2 of the Twenty-first Amendment. *Id.* at 476. The Court focused on whether the Twenty-first Amendment's purpose was served by the challenged laws, beginning by examining the history of pre-prohibition laws limiting the importation of alcohol into "dry" states. Of particular importance were the Wilson Act, which allowed States to regulate imported liquor to the same extent and in the same manner as domestic liquor, and the Webb-

Kenyon Act, which forbade shipment or transportation of alcohol into a state "where it runs afoul of the State's generally applicable laws governing receipt, possession, sale, or use." *Id.* at 478, 482 (citations omitted).

The Court observed that the language of § 2 of the Twenty-first Amendment closely followed the Wilson and Webb-Kenyon Acts and discerned that the provision was intended to "allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." *Id.* at 484. But, in light of the Wilson and Webb-Kenyon Acts and the Twenty-first Amendment's history, the Court concluded that States did not receive with the Twenty-first Amendment new "authority to pass nonuniform laws in order to discriminate against out-of-state goods." *Id.* at 484-85. Rather than forbidding shipments that ran afoul of the State's generally applicable alcohol distribution laws, as the Webb-Kenyon Act would have supported, *id.* at 482, New York and Michigan had created *exceptions* to their generally applicable alcohol distribution laws and had done so on a discriminatory basis. *Id.* at 486-89. Therefore, the

Court held that the Twenty-first Amendment did not save the challenged laws.

Plaintiffs' position that this Court should mechanically apply strict scrutiny in this case cannot be reconciled with *Tennessee Wine, Bacchus,* or *Heald*. Those cases make clear that alcohol regulations challenged under the dormant Commerce Clause are subject to a three-step analysis. The first step is to ask whether the law is discriminatory in nature. *Bacchus,* 468 U.S. at 273; *Heald*, 544 U.S. at 473-76; *Tennessee Wine*, 139 S. Ct. at 2461-62. If so, then the Court must conduct the "different inquiry" to determine whether the discriminatory law is saved by § 2 of the Twenty-first Amendment. *Tennessee Wine*, 139 S. Ct. at 2474; *Bacchus*, 358 U.S. at 274-276; *Heald,* 544 U.S. at 476-489. If it is not, only then does the Court apply its traditional strict scrutiny test. *Heald*, 544 U.S. at 489.

Tennessee Wine articulated the standard by which a Court determines whether § 2 of the Twenty-first Amendment shields a discriminatory alcohol regulation from operation of the dormant Commerce Clause. Such a law is shielded when it has the "predominant effect" of protecting public health or safety rather than

protectionism. *Tennessee Wine*, 139 S. Ct. at 2474. The State satisfies this standard by providing "concrete evidence" that the challenged law protects public health and safety. *Id.* This is not an overly burdensome standard. Rather, concrete evidence is real, tangible evidence that the state's laws protect public health and safety; "'mere speculation' or 'unsupported assertions' are insufficient to sustain a law that would otherwise violate the Commerce Clause." *Id.* (quoting *Heald*, 544 U.S. at 490).

Plaintiffs, attempting to examine the law under strict scrutiny, assert that the state must show *both* that the predominant effect of the law is to protect public health and safety *and* that "nondiscriminatory alternatives would be insufficient to further these interests." Appellee Br. at 26. Not so. The *Tennessee Wine* court held that "the record is devoid of any "concrete evidence" showing that the 2-year residency requirement actually promotes public health or safety; *nor* is there evidence that nondiscriminatory alternatives would be insufficient to further those interests." *Tennessee Wine*, 139 S. Ct. at 2474 (emphasis supplied). The Court's use of "nor" indicates that two separate alternatives were not met. In other words, an otherwise discriminatory

law will survive if the State can establish *either* (1) the predominant effect of the law is to protect public health and safety; or (2) that the law survives under strict scrutiny analysis. *Id.* This Court should not take Plaintiffs' lead and read "nor" as "and." Instead, it should follow *Tennessee Wine* and the Fifth Circuit's articulation of *Tennessee Wine*'s requirements: "In conducting the inquiry, courts must look for 'concrete evidence' that the statute 'actually promotes public health or safety,' *or* evidence that 'nondiscriminatory alternatives would be insufficient to further those interests.'" *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm.* (opinion on petition for reh'g), __ F.3d __ ; 2019 WL 6694560 at *4 (5th Cir. 2019) (emphasis added).

II. The predominant effect of Michigan's retailer-delivery law is the protection of public health and safety.

The uncontested record in this case provides real, tangible evidence that Michigan's retailer-delivery statute has the predominant effect of protecting the health and safety of Michigan citizens, not protectionism, in three significant ways. First, as the *Tennessee Wine* Court itself recognized, on-site inspections of retailers physically located in the state serve a critical public safety role, *Tennessee Wine*, 139 S. Ct.

at 2475 (internal citations omitted); the uncontested record below supports their necessity and that the challenged statute preserves the ability to conduct these inspections. (R.34-2, ¶¶ 9, 20, 24-26, Page ID #458-59, 464-68.) Second, expert testimony also established that the three-tier system with a physical presence (but not residency) requirement is a primary defense against adulterated or counterfeit alcohol entering Michigan's market. (R. 34-4, ¶ 21, Page ID # 508-10; R. 34-2, ¶ 20, Page ID #464-66.) Third, the State has shown that MLCC investigators had determined that out-of-state wineries ship wine to minors at a higher rate than in-state entities, and this evidence was supported by expert testimony. (R. 34-5, ¶¶ 13-20 Page ID # 517-21.) But before discussing those points in further detail, attention must be turned to Plaintiffs' meritless attempts to show that protectionism motivated the challenged statute.

A. The retailer-delivery statute is not motivated by protectionism.

Faced with this uncontested record, Plaintiffs unsuccessfully attempt to show that protectionism was the primary motivator for the legislation by manipulating a quote from the sponsor of the retailer-

delivery statute, Senator Peter MacGregor. Appellee Br. at 10, citing (R. 31-10, Wark Statement, Page ID # 265.) But an examination of the actual quote shows that was not the case. Rather, Senator MacGregor testified that that the bill was necessary to put Michigan retailers on an equal footing "with out-of-state entities *that are doing it* [shipping alcohol directly to Michigan customers] *illegally right now*." Michigan House of Representatives Commerce and Trade Committee Hearing, December 8, 2016, at 40:13 (emphasis on the portion of the quote omitted from appellees' brief added).[1] Placing Michigan retailers on equal footing with out-of-state entities actually serves the dormant Commerce Clause's purposes, rather than offends them. *See Heald*, 544 U.S. at 482 (noting that the Webb-Kenyon Act was "an attempt to eliminate the regulatory advantage . . . afforded imported liquor under [cases interpreting the Wilson Act]."); *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 820 (5th Cir. 2010) (criticizing granting out-of-state retailers greater delivery rights than in-state retailers). Plaintiffs also conveniently removed Sen. MacGregor's reference to another major

[1] Available at http://www.house.mi.gov/SharedVideo/PlayVideoArchive.html?video=COMM-120816.mp4

purpose of the bill—to "provide tools to help the Commission and AG with gathering [data related to direct shipments] and also helping us with the illegal shipments that are happening as well." *See* Michigan House of Representatives Commerce and Trade Committee Hearing, December 8, 2016. Specifically, the bill also required common carriers and third-party facilitators who deliver alcohol on behalf of licensed retailers to submit quarterly reports to the MLCC detailing all deliveries of alcohol made on behalf of licensed retailers. Mich. Comp. Laws § 436.1203(20), (22). In addition, they must maintain records of those deliveries for 3 years. Mich. Comp. Laws § 436.1203(21), (23). Moreover, retailers who use their own employees to deliver beer and wine must receive server training through an MLCC-approved program. Mich. Comp. Laws § 436.1203(14)(c).

Plaintiffs also miss the mark by citing the Legislature's decision not to follow a vacated decision of the Eastern District of Michigan as further proof that the statute was motivated by protectionism. In *Siesta Village Market v. Granholm*, 596 F. Supp. 2d 1035 (E.D. Mich. 2008), vacated by *Siesta Village Market v. Granholm*, No. 06-CV-13041 (E.D. Mich., July 17, 2009), the district court held that the Twenty-first

Amendment did not insulate a retailer-delivery statute from dormant Commerce Clause challenge. But this decision was vacated and not binding on anyone. Moreover, *Siesta Village*'s reasoning was rejected by two different courts of appeal. *See Arnold's Wines v. Boyle*, 571 F.3d 185, 190 (2d Cir. 2009); *Southern Wine and Spirits of America v. Division of Alcohol and Tobacco Control*, 731 F.3d 799, 809-810 (8th Cir. 2013). It was not "protectionist" for the Michigan Legislature to rely on *Arnold's Wines* and *Southern Wine* as accurately describing the law and to reject counsel for Lebamoff's reliance on a vacated district court opinion to the contrary. Moreover, the Legislature was aware of the serious problems with shipments from out-of-state wine producers.

It was not "protectionist" for the Legislature to remove the ability of a much larger body of out-of-state retailers from being able to ship into Michigan and thus create the same problem on a significantly larger scale. Notably, the illegal out-of-state shipment of wine into Michigan has become a growing problem. Michigan licenses 1,203 direct shippers out of the 9,000 wineries in the United States. (R. 34-5, ¶¶ 13-20 Page ID # 517-21.) The remaining wineries choose not to be licensed in Michigan or are ineligible for licensure, but that does not mean

they do not ship. To date, the Michigan Attorney General has issued over 675 cease and desist letters, mostly to unlicensed small wineries, to combat those illegally shipping alcohol into Michigan. (*See id.*, stating the number of cease and desist letters that had been sent at that time.) And the entities that have gotten caught are only a fraction of the entities that are illegally shipping. Allowing the national mass of out-of-state retailers to directly ship alcohol into the state would simply be unworkable and eviscerate the three-tier system as we know it.

Plaintiffs also incorrectly assert that "[t]he State effectively concedes that the law was motivated in part by protectionism." Appellee Br. at 21. Not so. A significant consideration involved in any alcohol regulatory scheme is the fact that alcohol has the potential to create great social harm. (R. 34-4, Erickson Aff., at ¶ 7; Page ID # 495.) One such concern is that if alcohol is too inexpensive, it will stimulate overconsumption to the detriment of public health. (*Id.* at ¶ 8, Page ID #495-97.) In order to combat price-driven overconsumption and the accompanying threats to public safety, Michigan's Liquor Control Code requires the Commission to set minimum prices for spirits, restricts manufacturers and wholesalers from offering volume discounts, and

restricts retailers from selling alcohol at a loss. (*Id.*) Michigan also has in place a quota system that limits the number of retailers that can sell alcohol in a given area. Mich. Comp. Laws § 436.1531. In other words, Michigan's price-based laws are not protectionist; they are designed to protect the public health and safety by balancing product availability with a price that does not stimulate overconsumption. Allowing Plaintiffs to deliver to Michigan customers without following Michigan's price laws would undercut this important health and safety function. By no means have Defendants conceded that the law was motivated by protectionism—nor was it.

B. Requiring retailers to be located within the state serves a vital public safety role.

Requiring physical presence for retailers allows the state to "monitor the stores' operations through on-site inspections, audits, and the like. . . . Should the State conclude that a retailer has 'failed to comply with state law,' it may revoke its operating license. . . . This 'provides strong incentives not to sell alcohol' in a way that threatens public health and safety." *Tennessee Wine*, 139 S. Ct. at 2475 (internal citations omitted).

Critically, Plaintiffs do not contest the importance of onsite inspections or the fact that such inspections promote public health and safety. Rather, they suggest that Michigan should just blindly rely on Indiana's inspections of its own retailers—even if Indiana permits those retailers to sell alcohol that Michigan deems dangerous. Appellee's Br. at 29. Plaintiffs take exception to the State's citation of instances of tainted alcohol entering the stream of commerce in countries around the world. Appellee Br. at 28-9. But they miss the point. Tainted alcohol is less of a problem in the United States *because of* the pervasive protections provided by the three-tier system. (R. 34-4, ¶ 21, Page ID #509.) As explained by MLCC Enforcement Director Tom Hagan, adulterated alcohol is generally found in retail stores after being purchased outside of the wholesaler chain. (R. 34-2, ¶ 20, Page ID #464-66.).

Plaintiffs' argument that it should be allowed to deliver because Michigan allows certain manufacturers and its own retailers to deliver to consumers lacks merit. When a product is purchased directly from a licensed manufacturer, the State has assurance that it is safe and not a counterfeit product. And the State allows this only on a limited basis.

Likewise, a product that is sold by a Michigan retailer goes through the three-tier system from the manufacturer to the wholesaler to the customer. A decision in Plaintiffs' favor would hamper State efforts to bar the importation of alcohol it deems dangerous—such as marijuana-infused alcohol, alcoholic energy drinks, and powdered alcohol. This would have the ironic effect of putting states back in the same position they were in before passage of the Webb-Kenyon Act—unable to stop customers from receiving direct shipments of alcohol from out of state even if that alcohol is banned in Michigan. *See,* e.g., *Tennessee Wine,* 139 S. Ct. at 2465-66. Michigan has assurance that products on its shelves are safe and genuine because of the three-tier system and a robust inspection and seizure regime that is only possible to enforce within the State. No such assurance exists for a product of unknown origin that comes into the state from a retailer not subject to Michigan's strict inspection regime.

Aware that Michigan could not possibly regulate a nationwide market of 388,000 retailers, (R. 34-4, Erickson Aff., ¶ 18, Page ID #504-5), Plaintiffs try to downplay the States' legitimate concerns by asserting that "only" 1,947 retailers take online orders. Appellee Br. at

35. This is very misleading. First, Plaintiffs' repeated assertion that this case is only about wine is wrong. Any decision by this Court that Michigan must allow out-of-state retailers to deliver on the same terms that it allows in-state retailers to deliver will *not* be limited to just wine retailers and would most likely be applied equally to all alcohol products sold in all four states in the Sixth Circuit. This includes products like spirits and beer that are much more desirable to minors than wine.[2]

Second, Plaintiffs' calculation of the number of wine retailers taking online orders was derived from searching a single self-selected website that sold only wine. (R. 35-1, Wark Supp. Rep., p. 1, Page ID #731.) There is nothing in the record that demonstrates how many of the nation's 388,000 retailers sell beer and spirits for delivery. But there is evidence to show that this number is likely much larger than that offered by Plaintiffs and that the number is growing exponentially.

[2] Amicus Curiae American Trucking Associations, Inc., incorrectly states that Michigan already allows direct shipments of beer by out-of-state microbrewers to customers. Any transportation of beer from microbrewers to customers in Michigan by FedEx, UPS, or similar carrier is currently illegal. Mich. Comp. Laws § 436.1203(3) (requiring use of the entity's employees to deliver beer).

In 2017, U.S. online alcohol sales reached $1.7 billion, with growth of online sales "dwarfing that of brick-and-mortar retail." See RaboResearch, *The Times They Are E-Changin'—Where Alcohol Brands Can Win Online*.[3] The owner of Drizly, the nation's largest online alcohol delivery service, estimates that "alcohol e-commerce in the US will continue to grow in the 30%-40% range year on year for the next five years, which would scale the market to about US$6bn-US$9bn by 2023[.]" Kiely, *How e-commerce is Changing the Spirts Industry*.[4] Simply put, the potential nationwide scope of retailers who could deliver all forms of alcohol into Michigan if this Court were to affirm the district court is staggering and growing every day.

Third, Plaintiffs' insistence that setting up a website for online sales is prohibitively expensive and, thus, there is no concern about voluminous alcohol sales, is completely unsupported and defies the common experience of ordinary people who sell goods and services over the internet independently at very little cost.

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[3] Available at https://research.rabobank.com/far/en/sectors/beverages/times-are-e-changin.html (accessed December 6, 2019)

[4] Available at https://www.thespiritsbusiness.com/2018/11/how-e-commerce-is-evolving-the-spirits-industry/ (accessed December 6, 2019).

No single state can regulate a nationwide market that is adding new retailers to its ranks every day. If Plaintiffs win this case, as a practical matter, Michigan will be completely unable to regulate the alcohol imported into this state. In the place of a well-regulated, three-tier system there would be chaos and lawlessness. The health and safety of Michigan citizens would be undeniably harmed by the "wild west" alcohol marketplace sought by Plaintiffs.

C. Requiring retailers to be located within the state reduces minor access to alcohol.

Plaintiffs raise six meritless objections to the uncontested evidence that Michigan's retailer-delivery statute protects public health and safety by limiting access to alcohol for minors. Appellee Br. at 30-31. First, they assert that "placing an order is not the same as having it successfully delivered." But the controlled buys performed by the MLCC on out-of-state direct shippers involved the sale *and delivery* of alcohol to the minors working with the MLCC. (R. 34-5, Donley Aff., ¶ 18, Page ID #519-20.) Second, they claim that much of the evidence is irrelevant because it concerns illegal shipments from unlicensed sellers, not those with direct shipper permits. Not true. The record showed

that the MLCC issued 198 violation complaints against licensed direct shippers. (*Id.* at ¶ 17, Page ID # 519.) The overwhelming number of successful purchases and deliveries of wine from licensed direct shippers were from out-of-state. (*Id.* at ¶ 18, Page ID #519-20.)

Third, they claim that the evidence shows that similar problems arise regardless of whether the seller is in-state or out-of-state. Not true. Twenty-three of the twenty-seven controlled buys of wine by minors conducted by the MLCC were sold by out-of-state retailers. (R. 34-5, ¶ 18, Page ID #519-20.) Moreover, there is ample record evidence that out-of-state entities are more likely to sell to minors than their in-state counterparts. (R. 34-4, ¶¶ 14-17, Page ID #501-04.) Indeed, Doust essentially admitted this when he testified at deposition that Lebamoff would use less-stringent training for deliveries to Michigan than it does for sales in its home state. (R. 34-9, at p. 41, Page ID #634.) Fourth, they claim that 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. Not true. The facts speak for themselves and are consistent with expert testimony

that out-of-state entities sell alcohol to minors at higher rates. (R. 34-4, ¶¶ 14-17, Page ID #501-04.)

Fifth, the State's "math-based conclusions" assailed by Lebamoff are simple grade-school arithmetic that this Court is capable of understanding without the assistance of an expert. Sixth, they claim that some of the evidence was irrelevant because it concerned enforcement investigations of on-site sales, not internet sales. But evidence that licensed, in-state retailers sell alcohol to minors at a lower rate is, of course, highly relevant.

III. Lebamoff is not similarly situated to an in-state retailer.

The Court need not address the Commerce Clause analysis above if it agrees that, as the State has argued, out-of-state unlicensed retailers are not similarly situated to licensed in-state retailers. Plaintiffs claim that they are similarly situated because they are selling the same product as Michigan retailers to the same customers. Appellee Br. at 22. But simply selling the same product does not make two entities "similarly situated" for constitutional purposes. *See Wal-Mart Stores*, slip op at *8-9. All forms of alcohol sold in Michigan enter through the three-tier system, by way of the wholesaler tier (with the

State as the wholesaler of spirits), and wholesalers then distribute that alcohol to the retailer tier for ultimate sale to consumers. Retailers within the three-tier system who obtain alcohol from the wholesale tier are permitted to deliver that alcohol directly to customers.

But Lebamoff is not a part of Michigan's three-tier system and does not obtain its alcohol from a Michigan wholesaler. Moreover, an out-of-state retailer may be allowed to sell products not allowed to be sold in Michigan. Simply put, Lebamoff is not part of the Michigan alcohol distribution system and is not similarly situated to entities that are within that system.

This Court made a similar distinction in *LensCrafters, Inc. v. Robinson*, 403 F.3d 798 (6th Cir. 2005). At issue in *LensCrafters* was whether a Tennessee law that prohibited optical companies from leasing space to optometrists to perform eye exams in their retail eyewear stores violated the dormant Commerce Clause. The plaintiffs argued that optometrists and out-of-state optical companies are similarly situated because they both compete for the same customers in the same market for retail eyewear. *Id.* at 804. This Court rejected that argument, noting that optometrists are healthcare providers

licensed by Tennessee law, while optical stores were not. *Id.* Critically, the Court noted that in-state and out-of-state optometrists had the same opportunity to practice optometry and sell eyewear incident to their practice. *Id.* at 805.

Similarly, under Michigan's retailer-delivery law, out-of-state entities and non-Michigan residents have the same opportunity as in-state entities and Michigan residents to obtain a retailer license, purchase alcohol from wholesalers within the three-tier system, and to sell and deliver that alcohol to Michigan customers. *Id.* *See also Ford Motor Co. v. Texas Dep't of Transportation*, 264 F.3d 493, 502 (5th Cir. 2001). In *Ford Motor*, the Fifth Circuit upheld a Texas law prohibiting manufacturers from operating car dealerships. The Court concluded that "out-of-state corporations, which are non-manufacturers, have the same opportunity as in-state corporations to obtain a license and operate a dealership in Texas. Thus, [the law] does not discriminate among in-state and out-of-state manufacturers[.]" *Ford Motor,* 264 F.3d at 502. Here, Michigan has issued over 1,800 retail licenses to entities that are incorporated and headquartered in other states. (R. 34-3, at ¶ 8, Page ID #478.) Thus, Michigan's retailer-delivery law does not

protect Michigan retailers from out-of-state competition, it protects the public from alcohol that has not passed through the three-tier system by ensuring that all wholesalers and retailers are subject to the same three-tier regulatory distribution, sales, and inspection system. As such, in-state retailers within the three-tier system are not similarly situated with out-of-state retailers that are not within that system. Therefore, there is no impermissible discrimination.

IV. Selling wine over the internet is not a Privilege of United States Citizenship.

This issue was not decided by the district court. Regardless, it fails as a matter of law. Notably, although plaintiffs Doust *and* Lebamoff raised this claim below, Lebamoff has apparently abandoned it on appeal, and with good reason. Its claim fails because it is a corporation, not a "citizen" of the United States. *See Bank of Augusta v. Earle*, 38 U.S. 519, 519 (1839).

But Doust's claim fares no better. Most simply, his claim fails because Michigan law does not prohibit a non-resident from selling alcohol in Michigan and, therefore, the distinction his claim relies on does not exist. As mentioned previously, Michigan has issued over

1,800 licenses to persons and entities that are not Michigan residents. But more to the point, Doust does not even want to be a licensed retailer in Michigan. He views himself as a professional wine merchant but he is not even a licensed retailer in Indiana. Rather, the company he operates, Lebamoff Enterprises, is licensed to sell alcohol in Indiana. Perhaps because the corporate entity's claim fails, he, as an individual, has attempted to adopt its interests on appeal. He should not be allowed to do so.

Nevertheless, selling alcohol is not an activity "sufficiently basic to the livelihood of the Nation" that "fall[s] within the purview of the Privileges and Immunities Clause." *State of Virginia v. Friedman*, 487 U.S. 59, 64 (1988) (quotations omitted). "There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States." *Crowley v. Christensen*, 137 U.S. 86, 91 (1890). The Michigan Supreme Court agrees: "no one has an inherent right to a [liquor] license." *Case v. Michigan Liquor Control Comm'n*, 314 Mich. 632, 643 (1946). Because selling alcohol is not a fundamental right, the Privileges and Immunities clause of U.S. const. art. IV, § 2 does not apply.

V. The district court's failure to consider legislative intent in fashioning a remedy was, in and of itself, an abuse of discretion.

According to Plaintiffs, the district court could not have abused its discretion in this case because it fashioned the same remedy as the Courts in *Califano v. Westcott*, 443 U.S. 76 (1979), and *Cherry Hill Vineyards v. Lilly*, 553 F.3d 423 (6th Cir. 2008). However, despite *Califano*'s general preference for extension, the Court found "no need . . . to elaborate here the conditions under which invalidation rather than extension of an underinclusive federal benefits statute should be ordered, for no party has presented that issue for review." *Califano*, 444 U.S. at 90. But *Cherry Hill* does elaborate on at least one of the conditions under which invalidation rather than inclusion should be ordered—when extension would circumvent the legislature's intent. *Cherry Hill*, 553 F.3d at 435. The district court in this case did not even *consider* the intent of Michigan's Legislature, let alone weigh that intent against the benefits of extension. In other words, the correct legal standard under *Cherry Hill* required the district court to consider the intent of Michigan's Legislature and it failed to do so. This, in and of itself, was an abuse of discretion.

CONCLUSION AND RELIEF REQUESTED

The Supreme Court has made clear that dormant Commerce Clause cases involving discriminatory alcohol regulations are subject to a "different inquiry" that examines whether the regulation has the predominant effect of protecting public health and safety. The State has provided real, tangible, and uncontested evidence that shows that its retailer-delivery statute has the predominant effect of protecting public health and safety. As such, the law is shielded by § 2. This Court should reverse the district court's decision on Plaintiffs' dormant Commerce Clause claim and remand with instructions to grant summary judgment to the State Defendants. Alternatively, this Court should reverse the district court's decision to extend the retailer-delivery law to out-of-state retailers because this remedy violates the Michigan Legislature's intent.

This Court should also reject Doust's legally meritless Privileges and Immunities claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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1. This reply brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this reply brief contains no more than 6,500 words. This document contains 5,307 words.

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CERTIFICATE OF SERVICE

I certify that on December 16, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system as they are registered users

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