No. 18-2200
(Related Appeal: No. 18-2199)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEBAMOFF ENTERPRISES, INC.; JOSEPH DOUST; JACK STRIDE; JACK SCHULZ; RICHARD DONOVAN,

Plaintiffs-Appellees,

v.

RICK SNYDER; WILLIAM SCHUETTE; ANDREW J. DELONEY,

Defendants-Appellants,

and

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

Intervenor Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
HONORABLE ARTHUR J. TARNOW (SENIOR JUDGE)

BRIEF FOR INTERVENOR DEFENDANT-APPELLANT MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION

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Dated: October 3, 2019

CORPORATE DISCLOSURE STATEMENT

Michigan Beer & Wine Wholesalers Association ("MB&WWA") is a non-profit membership association of Michigan beer and wine wholesalers. It has no parent corporation. No publicly held corporation owns 10 percent or more of its stock.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This appeal comes on the heels of the Supreme Court's June 2019 decision in *Tennessee Wine and Spirits Retailers Association v. Thomas*, 544 U.S. ___, 139 S. Ct. 2449 (2019), which analyzed a state alcohol beverage retailer durational residency statute under the dormant Commerce Clause and Twenty-first Amendment and, in doing so, contrasted that residency requirement with state alcohol beverage retailer presence requirements—the very retailer presence regulation that is the subject of this appeal.[1] *See Tenn. Wine*, 139 S. Ct. at 2475. And it is that comparison of durational residency and mere presence that this Court undertook in its decision in *Byrd v. Tennessee Wine and Spirits Retailers Association*, 883 F.3d 608, 622-23 (2018), which decision the Supreme Court affirmed.

Oral argument in this case will assist this Court in applying the important constitutional principles set out in its *Byrd* decision and the Supreme Court's *Tennessee Wine* decision to this case in which the challenge to the Michigan's presence requirement for alcohol beverage retailers puts at risk the fundamental components of the State's regulatory system that serve to protect public health and safety.

[1] This Court, recognizing the impact a Supreme Court decision in *Tennessee Wine* could have on this case, agreed to stay the briefing of this appeal pending that decision. *See* Order entered 11/6/2018, Dkt. Entry #9.

JURISDICTIONAL STATEMENT

Plaintiffs filed a complaint on January 20, 2017 (Record Entry ("RE") 1, Page ID # 1) and a first amended complaint on February 6, 2017 (RE 5, Page ID # 18). Jurisdiction was based on 28 U.S.C. §§ 1331 and 1343(a)(3), as well as 28 U.S.C. §§ 2201 and 2202.

The District Court entered an opinion and order on September 28, 2018 that decided the parties' respective summary judgment motions (RE 43, Page ID # 845), and a final judgment the same day (RE 44, Page ID # 867).[2] The District Court judgment appealed from disposed of all the parties' claims. The MB&WWA filed a timely notice of appeal on October 12, 2018. RE 50, Page ID # 901; Fed. R. App. R. 4(a)(1)(A). The State Defendants also filed a timely notice of appeal on October 12, 2018. RE 48, Page ID # 897. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and Fed. R. App. R. 3(a)(1).

[2] On October 11, 2018, the District Court entered an order staying the injunctive relief pending appeal. RE 47, Page ID # 895. On August 23, 2019, the District Court entered an order clarifying that the stay will continue during the pendency of the appeal. RE 55, Page ID # 913.

STATEMENT OF THE ISSUES PRESENTED

I. **The challenged Michigan law allows licensed in-state alcoholic beverage retailers operating within Michigan's comprehensive three-tier distribution system to sell wine to Michigan consumers and have it delivered to those consumers. Michigan law does not allow retailers located outside the State to import wine into Michigan for sale and delivery to Michigan consumers. Did the District Court err in holding that Michigan's requirement that licensed retailers have a physical presence in the State is not a permissible exercise of the State's Twenty-first Amendment authority, thereby sustaining the District Court's erroneous holding that the retailer delivery statute was discriminatory under the dormant Commerce Clause?**

II. **Did the District Court err in its remedy that allows alcoholic beverage retailers across the country to import wine to Michigan consumers and fails to follow the Liquor Control Code's mandate to sever an unconstitutional provision (i.e., sever the provision permitting Michigan retailers to have the wine they sell delivered to Michigan consumers)?**

STATEMENT OF THE CASE

Pursuant to the power granted by Section 2 of the Twenty-first Amendment,[3] Michigan, like many other states, has adopted a three-tier system for distribution of alcohol. Under that regulatory system, Michigan licensed retailers may purchase wine from Michigan licensed wholesalers (Mich. Comp. L § 436.1113(8)), who in turn may purchase from Michigan licensed suppliers. Licensed in-state retailers (and wineries holding a direct shipper license) may sell and deliver wine to Michigan consumers. Mich. Comp. L. §§ 436.1111(6) and 436.1203(3) and (4). Retailers purchasing wine from a wholesaler for resale to a Michigan consumer must purchase only from a licensed in-state Michigan wholesaler. *See* Mich. Comp. L. §§ 436.1203(1) and 436.1901(1). *See also* Hagan Aff., ¶¶ 3-6, RE 34-2, Page ID # 455-457; Donley Aff., ¶¶ 3-5, RE 34-5, Page ID # 476-477.

Michigan does not have any residency requirement to obtain an alcohol beverage retailer license (Wendt Aff., ¶ 8, RE 34-3, Page ID # 478), but all licensed retailers must be physically present in the State. In this lawsuit, Plaintiffs challenge that requirement. *See* First Amended Complaint, ¶¶ 15-18, RE 5, Page ID # 21. The

[3] Section 2 of the Twenty-First Amendment states:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

challenged law, 2016 Mich. Pub. Laws Act 520 ("2016 P.A. 520"), amends part of the Michigan Liquor Control Code ("Code") to allow in-state retailers holding a specially designated merchants ("SDM") license to sell and deliver wine to Michigan consumers using a common carrier. Mich. Comp. L. § 436.1203(3).

Plaintiff-Appellant Lebamoff Enterprises, Inc. ("Lebamoff") is an Indiana corporation that operates 15 wine retail stores in Fort Wayne, Indiana. RE 5, ¶ 4, Page ID # 19. Lebamoff is not a licensed Michigan retailer and does not seek to purchase its wine from a licensed Michigan wholesaler or to otherwise operate within Michigan's three-tier system of distribution; nor is Lebamoff willing to have a location in Michigan. Doust Dep. Tr., pp. 8, 20-21, RE 34-9, Page ID # 601, 614-615; First Amended Complaint, ¶¶ 15-18, RE 5, Page ID # 21; Tr. of Motion Hrg., p. 48, RE 41, Page ID # 839. Lebamoff is therefore ineligible for an SDM retailer license. *Id.*; Mich. Comp. L. § 436.1607(1).

Plaintiff Joseph Doust is a co-owner of Lebamoff and a wine consultant who resides in Indiana. RE 5, ¶ 22, Page ID # 22; Doust Dep. Tr., pp. 5-6, RE 34-9, Page ID # 598-599. The remaining Plaintiffs are residents of Michigan who allege they would purchase wine from out-of-state retailers and have it directly shipped to their residences if Michigan law allowed them to do so. RE 5, ¶ 3, Page ID # 19.

After discovery, both sides filed motions for summary judgment under Fed. R. Civ. P. 56. Plaintiffs' motion, RE 31, Page ID # 203; MB&WWA's motion,

RE 33, Page ID # 287; and State Defendants' motion, RE 34, Page ID # 393. On September 28, 2018, the District Court entered an opinion and order ("Order") denying the motions filed by the State Defendants and the MB&WWA, and granting Plaintiffs' motion, finding that 2016 P.A. 520 violates the dormant Commerce Clause by discriminating against out-of-state retailers, and is not saved by Section 2 of the Twenty-first Amendment. RE 43, Page ID # 845.

The District Court stated that once Michigan chose to give licensed in-state retailers the right to deliver wine by common carrier to consumers in the State (which the District Court incorrectly characterized as an "exception" to the three-tier system (*id.*, Page ID # 857), the State forfeited its Section 2 authority to require that licensed retailers be present in the State (*id.*, Page ID # 853).

With respect to the remedy, the District Court failed to consider that the Code mandates that if a provision is found to be constitutionally invalid, the offending provision must be severed, and the enforcement of the remaining parts shall not be affected. Mich. Comp. L. § 436.1925(2). The District Court thus disregarded not only that declaration of legislative intent, but its duty to weigh the potential disruption of the statutory scheme that would occur by extension as opposed to nullification.

While asserting that it was fashioning a remedy "with an aim to creating minimal interference in the complex and interdependent statutory infrastructure of

Michigan alcohol" (RE 43, Page ID # 864), the District Court ruled that all retailers across the country can import wine directly to Michigan consumers via a common carrier, thus creating a gaping exception to Michigan's three-tier system and eviscerating the health, safety, and other consumer protections that the regulatory system provides (*id.*, Page ID # 864-866). The District Court suggested SDM retailer licenses or some type of newly created comparable license could be issued to out-of-state retailers, but failed to recognize that such "licensees" would not operate within Michigan's three-tier system (and would therefore not comply with the very regulatory requirements that the District Court set forth when describing that system—i.e., purchasing from a Michigan licensed wholesaler, purchasing only those products whose prices were posted by the State licensed wholesalers, and purchasing products from State licensed wholesalers at the price offered to all other retailers).[4]

The District Court declined to reach Plaintiffs' arguments under the Privileges and Immunities Clause. RE 43, Page ID # 864.

[4] Michigan's three-tier system does not allow in-state retailers or out-of-state retailers to import wine into Michigan. That can be done only by a wine manufacturer or supplier with the appropriate license (an out-of-state seller of wine license or a direct shipper license available only to wineries). Mich. Comp. L. § 436.1203(4), (10) and (11).

SUMMARY OF THE ARGUMENT

I. The District Court's misunderstanding of Michigan's three-tier system resulted in its flawed dormant Commerce Clause and Twenty-first Amendment analysis.

Recognizing that alcoholic beverages can be abused, Michigan established a comprehensive regulatory system, with many interrelated parts, to protect the health, safety, and welfare of Michiganders. The District Court found that, because the Michigan Legislature allowed physically present in-state licensed retailers to deliver wine to Michigan consumers, the dormant Commerce Clause dictates that out-of-state retailers must also be allowed to import wine into this State directly to Michigan consumers, notwithstanding the wine never passes through Michigan's regulatory three-tier system—in essence, equating alcoholic beverages to common products such as clothing and books.

The District Court's Order evidences a fundamental misunderstanding of Michigan's three-tier system. The Order correctly described some parts of the three-tier system, including that State licensed retailers must purchase wine from licensed Michigan wholesalers (not out-of-state wholesalers) and may then sell that wine to Michigan consumers. RE 43, Page ID # 847. But the holding—allowing out-of-state retailers to sell and deliver to Michigan consumers wine that those out-of-state retailers did *not* purchase from licensed Michigan wholesalers—is wholly at odds

with the precise requirements of the State's three-tier system that the District Court cited.

The Order correctly noted that the Michigan Liquor Control Commission ("MLCC" or "Commission") "exercises its powers over the three tiers of distribution to regulate the behavior of market participants" by means of regulations forbidding retailers "to negotiate volume discounts with wholesalers or purchases on credit" and requiring wholesalers to post their prices to retailers. *Id.* But *none* of those Code provisions could be applied to "regulate the behavior" of out-of-state retailers because *none* of those out-of-state retailers will be purchasing wine from Michigan licensed wholesalers.[5] The District Court failed to appreciate that its holding subverted the very provisions of Michigan's statutory scheme it set forth in its Order in describing the State's three-tier system—provisions that Plaintiffs purportedly do not challenge and that the District Court cited as cornerstones of that three-tier system.

If allowed to stand, the ruling means that hundreds of thousands of out-of-state retailers must be allowed to do what *no retailer* is allowed to do under Michigan

[5] Lebamoff purchases its beer and wine from Indiana wholesalers. Doust Dep. Tr. , pp. 8, 20-21, RE 34-9, Page ID # 601, 613-614. Lebamoff does not seek to operate within Michigan's three-tier system by purchasing wine from licensed Michigan wholesalers. Indeed, to comply with its home state retailer license, Lebamoff can legally purchase wine only from an Indiana wholesaler. Ind. Code § 7.1-3-14-4(a).

law: (1) import wine into Michigan and (2) sell and deliver to Michigan consumers wine that has not passed through the State's three-tier system. Under the Order, Michigan licensed retailers will be subject to the State's comprehensive laws and regulations designed to protect public health and safety, but Lebamoff and hundreds of thousands of other out-of-state retailers will be allowed to operate outside of Michigan's regulatory scheme.[6]

Michigan does not require any licensed alcoholic beverage retailer to be a Michigan resident. Wendt Aff., ¶ 8, RE 34-3, Page ID # 478.[7] Many non-residents operate as licensed retailers within Michigan's three-tier system and have the same rights and obligations as any Michigan resident holding such a license. *Id.* Nor is this a case where Michigan is treating alcoholic products produced in Michigan more favorably than those produced in other states.

The challenged law is not impermissibly discriminatory because in-state retailers (whether residents or non-residents) must comply with Michigan's three-tier system (as must licensees at the supplier and wholesaler tiers) which protects the

[6] There are more than 385,000 alcoholic beverage retailers in the United States. Donley Aff., ¶ 20, RE 34-5, Page ID # 521. Not all would ship into Michigan, but the District Court's Order does not limit their number in any way.

[7] The fact that Michigan does not require residency is also shown by the MLCC's Retailer License & Permit Application, which contemplates out-of-state applicants by requesting certificates of good standing "from the state where incorporated." RE 33-3, Page ID # 384.

health and safety of Michigan consumers with respect to potentially dangerous alcoholic beverages. The challenged statute, Mich. Comp. L. § 436.1203, states in subsection (2)(a) and (b):

> (2) *** 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 deliver 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.

See Addendum at Section II.

Requiring physical presence of licensed alcoholic beverage retailers is within Michigan's authority under Section 2 of the Twenty-first Amendment. In *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 588 U.S. ___, 139 S. Ct. 2449 (2019), the Supreme Court held that Section 2 gives the states leeway to enact provisions appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests, but does not license the state to adopt protectionist measures with no demonstrable connection to those interests. States remain free to pursue their legitimate interests addressing the risks posed by the alcohol trade, but if the "predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by § 2." *Id.* at 2474.

There are numerous laws and regulations that are part of Michigan's three-tier system that protect the public health and safety of Michigan consumers and promote other goals such as establishing rules for responsible sales and consumption and orderly markets. For example, Michigan law requires detailed record-keeping as to alcohol products sold and purchased at all three levels of the three-tier system. Audits of wholesalers' and retailers' inventory and records, and the cross-checking of those records, ensure that laws are being followed and that alcoholic beverages are not being illegally bought and sold outside the three-tier system—e.g., preventing bootlegging, illegal cross-border sales, and grey goods transactions. Kaminski Aff., ¶¶ 6 and 9, RE 33-2, Page ID # 380.

Likewise, all Michigan licensed wholesalers and retailers must allow MLCC to conduct on-site inspections of their records and their premises. Mich. Comp. L. § 436.1217; Wendt Aff., ¶ 13, RE 34-3, Page ID # 481-482. During an on-site inspection, MLCC is authorized to seize evidence of violations of the Code, including removal of alcohol products from the licensed retailers' and wholesalers' shelves. Mich. Comp. L. § 436.1217. The practical enforcement of these provisions requires that retailers (and wholesalers) be physically present in the State. The evidence in this case establishes that the predominant effect of Michigan's physical presence requirement for retailers is not protectionism, but the regulation of the alcohol trade so as to protect the health and safety of its citizens.

In striking down Tennessee's two-year durational residency requirement for retailers, the Supreme Court in *Tennessee Wine* distinguished between residency and physical presence. The Court treated a retailer's presence in the state as a presumptively valid requirement that made residency unnecessary for enforcement. Judicial acceptance of a retailer's physical presence is supported by other Supreme Court cases such as *North Dakota v. United States*, 495 U.S. 423 (1990), and *Granholm v. Heald*, 544 U.S. 460 (2005). It is also supported by this Court's decision in *Byrd v. Tenn. Wine and Spirits Retailers Ass'n,* 883 F.3d 608, 623 (6th Cir. 2018), *aff'd sub nom. Tennessee Wine, supra.*

II. The District Court's disregard of the Liquor Control Code's express severability mandate resulted in an erroneous remedy ruling.

Assuming *arguendo* that the District Court was correct in finding that the challenged law violates the dormant Commerce Clause[8] and is not saved by the Twenty-first Amendment, the Court erred in expanding the statute rather than severing the wine delivery provision. Michigan's Liquor Control Code expressly mandates that if a provision of the Code is found to be unconstitutional, the offending

[8] The District Court found that the challenged retail delivery statute discriminated against out-of-state retailers in violation of the dormant Commerce Clause, but did so without considering the threshold issue of whether out-of-state retailers are similarly situated to licensed Michigan in-state retailers. They are not similarly situated; the District Court's incomplete and incorrect dormant Commerce Clause analysis is therefore erroneous.

provision shall be severed without affecting the enforcement of the remaining part of the Code. Mich. Comp. L. § 436.1925(2). The District Court did not follow, and did not even mention, that controlling Code provision; nor did it perform any analysis of the facts weighing against extension of the challenged statute's retailer delivery rights.

As a result, the District Court's Order is internally inconsistent—on the one hand saying that its aim was to create "minimal interference in the complex and interdependent three-tier statutory infrastructure of Michigan alcohol" (RE 43, Page ID # 864), yet proceeding to do just the opposite. Disregarding the uncontroverted evidence that no licensed Michigan retailer has the right to bypass the State's three-tier system, that no licensed Michigan retailer may purchase wine from an out-of-state wholesaler, and that no licensed Michigan retailer has the right to import wine into the State and sell and deliver that wine to Michigan consumers, the District Court's remedy creates a new category of retailers who would be allowed to operate outside the three-tier system and do things no Michigan licensee can do.

While the District Court said that Michigan retained the right to require a license of out-of-state retailers, it is inappropriate for a court to suggest that a state legislature create a whole new licensing scheme for entities to operate outside of Michigan's comprehensive alcoholic beverage regulatory system, with rights that no in-state licensed retailer possesses. Only the legislature, not the court, should grant

privileges to sell alcoholic beverages. True adherence to the aim of "minimal interference" in the regulatory system would have been to restrict delivery rights rather than expand them. And restricting those rights would have shown adherence to the governing severability provision in the Code.

ARGUMENT

The Court reviews *de novo* a district court's decision to grant summary judgment, and also reviews *de novo* a district court's determination of the constitutionality of a state statute. *Byrd*, 883 F.3d at 613. "Given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly." *North Dakota v. United States*, 495 U.S. 423, 433 (1990).

I. Requiring Michigan licensed retailers to be physically present in the State is a permissible exercise of Michigan's Twenty-first Amendment authority.

Regardless of whether the challenged law would violate the Commerce Clause if it involved some commodity other than alcohol, requiring licensed retailers to be present in Michigan is a permissible exercise of the State's Twenty-first Amendment powers.

The Supreme Court's recent *Tennessee Wine* opinion, which affirmed this Court's decision striking down Tennessee's two-year durational residency for retailers, supports this proposition. As in *Granholm*, the Supreme Court affirmed

the "basic model" of the three-tier system, but stated that Section 2 of the Twenty-first Amendment does not sanction "every discriminatory feature that a State may incorporate into its three-tier scheme." 139 S. Ct. at 2471. The Supreme Court further held that the test is whether the "predominant effect" is economic protectionism rather than protection of public health or safety:

> [Section 2] allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests, but it does not license the States to adopt protectionist measures with no demonstrable connection to those interests.
>
> ***
>
> Recognizing that § 2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens, we ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground. Section 2 gives the States regulatory authority that they would not otherwise enjoy but as we pointed out in *Granholm*, 'mere speculation' or 'unsupported assertions' are insufficient to sustain a law that would otherwise violate the Commerce Clause. 544 U.S., at 490, 492. Where the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by § 2.

Id. at 2474.

After setting out its "predominant effect" guideline, the Supreme Court in *Tennessee Wine* acknowledged that retailers are presumptively present in the state. In discussing reasonable alternatives to a durational residency requirement, the Supreme Court distinguished between presence and residence, emphasizing that

Tennessee retailers were already physically located in the state, which was sufficient for the state to maintain oversight such that residency was unnecessary:

> In this case, the argument [in support of residency] is even less persuasive since the stores at issue are physically located within the State. For that reason, the State can monitor the stores' operations through on-site inspections, audits, and the like. *See* § 57-3-104. Should the State conclude that a retailer has 'fail[ed] to comply with the state law,' it may revoke its operating license. *Granholm,* 544 U.S., at 490. This 'provides strong incentives not to sell alcohol' in a way that threatens public health or safety. *Ibid.*

139 S. Ct. at 2475.

That is consistent with the holding in *North Dakota v. United States, supra.* Although *North Dakota* was a plurality decision, all justices agreed with the point that a state can mandate a three-tier system with its requirement that all beverage alcohol pass through licensed *in-state* firms. 445 U.S. at 432. The issue was whether the state was unlawfully discriminating against the federal government with respect to liquor sold to military bases located within the state. The plurality held the federal government, as a retailer of liquor, was no worse off than any other retailer in the state because all other retailers had to buy from licensed in-state wholesalers. Only because of that requirement could the plurality be assured that there was no other retailer receiving better terms of sale than those available to the federal government where the federal government bought from licensed in-state wholesalers. Justice Scalia concurred, stating that the Twenty-first Amendment authorized the state to

require the federal government, as well as other retailers, to purchase only from licensed in-state wholesalers. *North Dakota*, 495 U.S. at 477 (Scalia, J., concurring).

Funneling distribution through licensed in-state wholesalers served to guaranty a level playing field for all North Dakota retailers. Therefore, while the Court did not specifically address the requirement that retailers be located in the state, it was obvious that out-of-state retailers were not part of the mandated three-tier system though which North Dakota funneled beverage alcohol. It was also obvious that out-of-state retailers could not deliver to federal military bases in North Dakota, which would potentially undercut prices at federally operated base facilities.

Requiring retailers to be physically in the state is also consistent with *Granholm*, which reaffirmed the holding in *North Dakota* that a state can mandate a three-tier system using *in-state* wholesalers and retailers to ensure compliance with the state's regulatory system. *Granholm*, 544 U.S. at 488-89. In *Granholm*, the Supreme Court struck down *exceptions* to Michigan's and New York's three-tier systems that allowed in-state wineries to sell and ship wine they produced directly to in-state consumers (thereby allowing in-state wineries to operate in two tiers—supplier and retailer—and to completely bypass the wholesaler tier), while prohibiting out-of-state wineries from doing the same. The Court said the Twenty-first Amendment's aim was "to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation and use,"

but "[t]he amendment did not give states the authority to pass nonuniform laws in order to discriminate against out-of-state goods…." *Id*. at 484-485. Because the direct shipment laws created *exceptions* to the states' three-tier systems favoring in-state wine producers while out-of-state producers remained subject to the three-tier system, the Court found the laws "involve[d] straightforward attempts to discriminate in favor of local producers," and thus violated the dormant Commerce Clause. At the same time, the Court reaffirmed that a state's law requiring all alcohol sold within its border to pass through a three-tier system is an '"unquestionably legitimate"' exercise of a state's authority under the Twenty-first Amendment. *Granholm*, 544 U.S. at 489 (quoting *North Dakota,* 495 U.S. at 432).

The District Court in this case noted that *Granholm* had invalidated a physical presence requirement for wineries, and suggested the same result should follow here. RE 43, Page ID # 852. But that is a misreading of *Granholm* and ignores the fact that *Granholm*, like *Tennessee Wine*, affirmed the right of states to enact laws to protect public health and safety and other legitimate state interests in the regulation of alcohol beverages.[9] The District Court's finding likewise disregards *Granholm*'s description of Michigan's three-tier system:

[9] The District Court's holding also conflates the "exceptions" to the three-tier systems present in *Granholm* (i.e., where the in-state winery bypassed the system and sold directly to the in-state consumer) and the retailer delivery statute here

> Producers or distillers of alcoholic beverages, whether located in state or out of state, generally may sell only to licensed in-state wholesalers. Wholesalers, in turn, may sell *only to in-state retailers*. Licensed retailers are the final link in the chain, selling alcoholic beverages to consumers at retail locations and, subject to certain restrictions, through home delivery.

544 U.S. at 469 (emphasis added) citations omitted).

In the context of wineries, the vast majority of which are located in other states,[10] the Supreme Court in *Granholm* found that requiring out-of-state wineries to establish a storefront in New York in order to take advantage of the *exception* to the normal operation of New York's three-tier distribution system served no purpose other than economic protectionism. In contrast, as to retailers who sell directly to consumers as part of (not an exception to) the three-tier system as "the final link in the chain" (*Granholm*, 544 U.S. at 469), physical presence is essential to enforcement of state laws that protect the health and safety of Michigan consumers.

This Court's decision in *Byrd, supra*, likewise supports holding that requiring retailers to be physically present is an essential part of a state's three-tier system. Critically, this Court distinguished *durational residency* requirements from a requirement that a retailer be *physically* located in the state, adopting the reasoning

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(where the wine being sold and delivered by the licensed Michigan retailer to the Michigan consumer has traveled through Michigan's three-tier system).

[10] Wendt Aff., ¶ 11, RE 34-3, Page ID # 480-481. Over 90 percent of wine sold in Michigan is produced outside the state.

of the Fifth Circuit in *Cooper v. Texas Alcoholic Beverage Comm'n* (*Cooper II*), 820 F.3d 730, 743 (5th Cir. 2016). After quoting from *Cooper II,* this Court stated:

> In this language, the Fifth Circuit created an important distinction: requiring retailer- or wholesaler- alcoholic-beverages businesses to be within the state may be essential to the three-tier system, but imposing durational-residency requirements is not, particularly when those durational-residency requirements govern owners. n8
>
> n8 The dissent asserts that in-state distribution regulations are always discriminatory in some manner, and in some ways, the dissent is correct that "[w]hat matters is what type of discrimination is *permissible.*" However, the Fifth Circuit acknowledged this dilemma, and it rectified the issue—requiring wholesalers and retailers to be in the state is permissible, but requiring owners to reside within the state for a certain period is not. *Cooper II*, 820 F.3d at 743.

Byrd, 883 F.3d at 623. *See also Wine Country Gift Baskets.com v. Steen,* 612 F.3d 809, 820 (5th Cir. 2010) ("When analyzing whether a State's alcoholic beverage regulation discriminates under the dormant Commerce Clause, a beginning premise is that wholesalers and retailers may be required to be within the state.").

This Court should follow the principles it set forth in *Byrd*—which principles were highlighted in the Supreme Court's distinction between the rejected residency statute and a presumptively accepted presence requirement—and reverse the District Court's erroneous Order.

II. The challenged retail delivery statute meets the Supreme Court's *Tennessee Wine* guideline because the presence requirement enables Michigan to protect public health and safety concerning alcohol products.

The Supreme Court in *Tennessee Wine* held: "Because we agree with the dissent that, under § 2, States 'remai[n] free to pursue their legitimate interests in regulating the health and safety risks posed by the alcohol trade, *post*, at 2482-2483, each variation must be judged on its own features." *Id.* at 2472.

Here, the District Court did not correctly judge the features of the challenged retailer delivery statute,[11] resulting in an erroneous analysis of the critical nature of a presence requirement in Michigan's three-tier system and the function of that presence requirement in enabling the State to "monitor the [retailer] stores' operations through on-site inspections, audits, and the like" and thereby protect Michiganders from the retailers' sale of alcohol "in a way that threatens public health

[11] The challenged amendment also eliminated a provision in prior Mich. Comp. L. § 436.1203(11) that allowed a Michigan retailer holding an SDM license and an out-of-state retailer holding a substantially equivalent license from its home state to deliver beer and wine to consumers in Michigan, but only if delivered by the retailer's own employee and only if certain other conditions were met. The Michigan Legislature's decision to close that limited gap in the three-tier system is consistent with the intent to assist the MLCC in preventing illegal cross-border shipments that were being experienced under the prior law. *See* comments of Senator MacGregor at a December 8, 2016 committee hearing on the bill that became 2016 P.A. 520. http://www.house.mi.gov/MHRPublic/videoarchive.aspx. (To obtain the recording of the committee hearing, enter "commerce and trade" in the search box and 2016 in the drop box for year. Senator MacGregor's testimony starts at 40:13.)

or safety." *Tennessee Wine*, 139 S. Ct. at 2475. The evidence in the record demonstrates the attributes of the challenged statute within Michigan's three-tier system that the District Court disregarded.

A. Monitoring retailers' operations through on-site inspections and audits

Retail licensees are required to make their licensed premises and their product sale/purchase records available for inspection by the MLCC. Mich. Comp. L. § 436.1217; Mich. Admin. Code, R. 436.1007 and R. 436.1645. The MLCC makes thousands of visits per year to retail establishments to enforce compliance with Michigan laws. These include physical inspections of premises and inventories which disclose myriad violations, including inventories that contain adulterated or misbranded alcohol products, purchasing of products outside the three-tier system (e.g., bootlegged alcohol), and receiving of aid and assistance in violation of "tied house" provisions. Hagan Aff., ¶¶ 9-10, 20, RE 34-2, Page ID # 458-459, 464-466. The inspections of retailer premises also help insure compliance with local health and sanitation laws, to make sure the premises and the products being stored and sold are not infested or otherwise unsafe. *See id.*, ¶ 24, Page ID # 467.

Physical audits of inventory and sale/purchase records of retailers and wholesalers allows the MLCC to cross-check records and to assure that the alcoholic beverages are not being sold illegally outside the regulatory system. Kaminksi Aff., ¶ 6, RE 33-2, Page ID # 380.

Relatedly, there have been instances of federal or state recalls of wine products, such as where the wine has been found to contain ingredients that are not acceptable. The recalls have been successful because of the enforcement of record keeping and on-site inspections requirements. *Id.*

B. Illegal or unsafe products: State bans and on-premises seizures

The MLCC enforces Michigan's labeling and packaging requirements (*see* Mich. Comp. L. § 436.2005 and Mich. Admin. Code, R. 436.1611) which protect consumers from tainted or fraudulent products. Wendt Aff., ¶ 21, RE 34-3, Page ID # 486-487.

Certain alcohol beverage products that may be sold in some other states cannot be legally sold in Michigan because the State considers them to be a health and safety risk. Wendt Aff., ¶¶ 20-21, RE 34-3, Page ID # 486-487. For example, in 2018, Michigan enacted a statute prohibiting, with certain narrow exceptions, the sale, use or possession of marijuana-infused alcoholic beverages. Mich. Comp. L. § 436.1914b. Prior to that, the Commission de-listed an alcohol infused whipped cream product, making it no longer for sale in the State, because of concerns regarding the improper sale/purchase and use/consumption of the "Cream" product. And the Commission likewise banned alcohol energy drinks because they were found to be a threat to public health and safety "by directly appealing to a younger customer, encouraging excessive consumption, while mixing alcohol with various

other … stimulants." *See* Department of Licensing and Regulatory Affairs press release, available at https://www.michigan.gov/lara/0,4601,7-154-89334_10570_67570-247758--,00.html. The MLLC ordered licensed Michigan wholesalers to remove the banned products from all retailer accounts and ordered licensed Michigan retailers to cease sales of the banned products—all within 30 days of the Commission's order. *Id.* The Commission would be unable to screen products that are shipped from out-of-state retailers directly to Michigan consumers where the products are not purchased from a licensed Michigan wholesaler. Wendt Aff., ¶¶ 20-21, RE 34-3, Page ID # 486-487. Nor would MLCC be able to remove those banned products from the retailers' shelves (as directed under the regulatory orders) if the retailers did not have in-state premises.

More recently, the MLCC successfully seized and impounded certain wine and cider products that were being illegally sold at the tasting room of a small wine maker licensee. *See Greenbush Brewing Co. v. Michigan Liquor Control Comm.*, unpublished opinion of the U.S. District Court for the Western District of Michigan, Southern Division, case no. 1:19-cv-536, contained in the Addendum. Because licensed retailers (and wholesalers) must be physically present, the State has the ability to actually seize tainted, dangerous, bootlegged or other illegal alcohol.

C. Necessary role of local law enforcement

The enforcement activities of the MLCC are assisted by Michigan law enforcement officers. Mich. Comp. L. § 436.1201(4).[12] That is a common means by which the Commission fulfills its public health and safety functions. Hagan Aff., ¶¶ 23-34, RE 34-2, Page ID # 466-471. This assistance in enforcement duties would not be available from officers in another state. Further, since local Michigan law enforcement officers would have no jurisdiction to act in another state, this critical means of enforcement would be lost if retailers (and wholesalers) are not required to be physically present in the state. *Id.*, ¶¶ 30-33, Page ID # 469-470.

D. License revocation: jurisdictional limits

The District Court said the MLCC could have "leverage" over out-of-state retailers by requiring bonds or through the threat of license forfeiture. RE 43, Page ID # 860. But no bond or threat of license revocation can adequately take the place of the State's ability to seize dangerous or illegal alcohol directly from a retailer's (or a wholesaler's) licensed premises in this State in order to protect the public. Effective enforcement, including by seizure, would be impossible if retail (and wholesale licensees) were not required to be physically present. The MLCC would have no jurisdiction to go into another state and seize alcohol products.

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[12] This includes local police departments, sheriff's departments and health departments. Wendt Aff., ¶¶ 14-15, RE 34, Page ID # 482-483.

While the threat of suspension or revocation of a Michigan retailer's license *is* a significant deterrent, that is because the Michigan licensed retailer knows that if it loses its license it will be out of business. The Supreme Court in *Tennessee Wine* recognized this deterrent effect regarding in-retailers:

> Should the State conclude that a retailer has "fail[ed] to comply with state law," it may revoke its operating license. *Granholm*, 544 U. S., at 490. This "provides strong incentives not to sell alcohol" in a way that threatens public health or safety. *Ibid.*

139 S. Ct. at 2475. If some type of new license is devised for issuance to out-of-state retailers as indicated by the District Court, the threat of suspension or revocation would be a much less significant incentive to a licensee whose business does not depend on selling to Michigan consumers where MLCC had no authority to revoke the out-of-state retailers' home state license. Wendt Aff., ¶ 15, RE 34-3, Page ID # 483.

E. Orderly local markets promote health and safety

Michigan's three-tier system also advances public health and safety by promoting responsible sales and consumption and orderly markets. Retailers are prohibited from warehousing alcohol on unlicensed premises. Mich. Comp. L. § 436.1901(1); Mich. Admin. Code, R. 436.1025. The premises of a retailer upon which an unlawful sale occurs are deemed a public nuisance and subject to abatement. Mich. Comp. L. § 600.3801(d). The threat of being "padlocked" is a strong deterrent to practices that would threaten the health and safety of Michigan

consumers. These enforcement mechanisms would not exist without physical presence.

As noted by the District Court (RE 43, Page ID # 847), the law prohibits wholesalers from providing quantity discounts to retailers, which could make alcoholic beverages less expensive and lead to more consumption. Mich. Comp. L. § 436.1609a(5); Mich. Admin. Code, R. 436.1625(5), R. 436.1726(4).[13] But since the out-of-state retailers would not be purchasing from the licensed Michigan wholesalers, they would avoid this quantity discount ban.

Likewise, the District Court (RE 5, Page ID # 847) acknowledged that Michigan wholesalers must "post and hold" the prices at which they sell wine to retailers for a certain period of time. Mich. Admin. Code, R. 436.1726. Every "SKU" of every product offered by the licensed Michigan wholesalers must be posted. This effectively requires that a wholesaler sell to all its retailers at the same price, thus promoting orderly markets. Price posting also provides a fully transparent mechanism by which the licensed wholesalers and retailers can see all alcohol products that are approved by the State for sale. It allows for a level playing field between retailers since the largest and smallest (and urban and rural) retailers

[13] In contrast, Indiana does not prohibit credit purchases or volume discounts. Doust Dep. Tr., pp. 21-22, RE 34-9, Page ID # 614-615.

pay the same price for the same wine within the same market area.[14] It also ensures that only those alcohol products that are approved by the State are being sold in the State. But, once again, since the out-of-state retailers would not be purchasing from the licensed Michigan wholesaler, they would be able to sell alcohol products that the State has not approved and at prices that would be illegal in Michigan.

The District Court (RE 5, Page ID # 847) also pointed to Michigan's "cash law" that prohibits wholesalers from selling and retailers from buying wine on credit. Mich. Comp. L. § 436.2013. This ensures that retailers are operating a viable business (and thus less likely to skirt the law). It also prevents wholesaler "aid and assistance" through the granting of credit, which could be used to induce a retailer to only sell the products carried by the wholesaler offering credit terms, leaving disfavored retailers less viable and more likely to violate Michigan laws. *See* Kaminksi Aff., ¶ 5, RE 33, Page ID # 379-380. Relatedly, Michigan law prohibits retailers from selling alcohol at a loss, which could foster over-consumption. Mich. Admin. Code, R. 436.1055; Erickson Aff., ¶ 8, RE 34-4, Page ID # 496.[15] None of

[14] Michigan has strong "anti-tied house" provisions to prevent integration among the three-tiers and to ensure that suppliers and wholesalers do not dominate or hold any financial interests in a retailer. Mich. Comp. L. § 436.1605.

[15] In contrast, Indiana allows retailers to sell alcohol below cost. Doust Dep. Tr., p. 34, RE 34-9, Page ID # 627.

these regulations would apply to an out-of-state retailer like Lebamoff who will not buy wine from a licensed Michigan wholesaler.

F. No federal regulation of retailers

Years of experience have demonstrated the utility and effectiveness of state-based regulation of beverage alcohol, which enables a state to regulate both persons involved in the sale of alcohol beverages as well as the alcohol beverage products being sold within the state. It is especially important that states have the ability to require licensed retailers to be present because retailers (unlike producers, importers, and wholesalers) are not required to hold any federal permit in order to operate. Rather alcoholic beverage retailers are regulated by the states.[16]

[16] There is no *federal* permit available to, or required of, beverage alcohol retailers. Retailers are licensed and regulated by the individual states, under each state's own laws which reflect local needs, local history, and local views on how beer, wine and spirits should be distributed and sold. There is no federal retailer permit that can be revoked or suspended if a retailer fails to comply with Michigan law. In contrast, wineries and wine wholesalers are required to have a federal permit and to comply with federal and state laws. *See* Federal Alcohol Administration Act of 1935, 27 U.S.C. §§ 201, *et seq.* ("FAA"). *See also* Bureau of Alcohol, Tobacco and Firearms ("ATF"), ATF Ruling 2000-1 (available at https://www.ttb.gov/rulings/2000-1.htm) which explains that "[r]etailers are not required to obtain basic permits under the FAA Act," and "while ATF is vested with authority to regulate interstate commerce in alcoholic beverages pursuant to the FAA Act, the extent of this authority does not extend to situations where an out-of-State retailer is making the shipment into the State of the consumer."). The Alcohol and Tobacco Tax and Trade Bureau ("TTB"), the successor agency to ATF, confirms that ATF Ruling 2000-1 "remains in effect and reflects the policy of TTB today." *See* http://www.ttb.gov/publications/direct_shipping.shtml.

The MB&WWA respectfully submits that these and other protections that are part of Michigan's three-tier system, explained in more detail in the affidavits filed by the State Defendants and the MB&WWA in connection with their respective combined motions for summary judgment and responses to Plaintiffs' motion for summary judgment (RE 33-2, Page ID # 378-382; RE 34-1–34-9, Page ID # 454-681), establish that physical presence of retailers is necessary to enforcement of public health and safety interests, is not "predominantly protectionist," and is a valid exercise of Michigan's powers under the Twenty-first Amendment based on the standard articulated in *Tennessee Wine.*

III. Because the out-of-state and licensed in-state retailers are not similarly situated, there is no discrimination arising from the physical presence requirement.

Of course, the above discussion assumes, for the sake of argument, that the challenged law would be impermissibly discriminatory if it involved a commodity other than alcohol. In *Tennessee Wine*, no party argued that the two-year durational residency requirement would stand if it involved a product other than alcohol. 139 S. Ct. at 2462. But because this case involves only a requirement that retailers be present, and because the District Court acknowledged the propriety of the three-tier system requirement that retailers purchase wine from licensed Michigan wholesalers, MB&WWA submits the law does not violate the dormant Commerce Clause, even apart from the Twenty-first Amendment.

Under the dormant Commerce Clause, states may not pass laws that discriminate against out-of-state economic interests unless those laws "advanc[e] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988). *See also Tennessee Wine*, 139 S. Ct. at 2461. ("Under our dormant Commerce Clause cases, if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to '"advanc[e] a legitimate local purpose."' (citations omitted)).

The District Court found Michigan's law discriminatory because it allows licensed retailers located in Michigan to make *intrastate* sales of wine purchased from Michigan licensed wholesalers to their Michigan customers by direct shipment,[17] but does not allow unlicensed retailers *outside* of Michigan to *import into* the State wine which was *not* purchased from Michigan licensed wholesalers (and which therefore has *not* passed through Michigan's three-tier system) and to sell and deliver that wine directly to Michigan consumers. In doing so, the District Court failed to consider the argument that the State Defendants and the MB&WWA asserted based on the well-established principle that "any notion of discrimination

[17] Mich. Comp. L. § 436.1203(3).

[in a dormant Commerce Clause analysis] assumes a comparison of substantially similar entities." *Gen. Motors v. Tracy*, 519 U.S. 278, 298-300 (1997).

The Fifth Circuit recently affirmed this principle in a case involving a Texas alcoholic beverage retailer licensing statute, holding: "'[A] statute impermissibly discriminates only when it discriminates between two similarly situated in-state and out-of-state interests.'" *Walmart Stores, Inc. v. Texas Alcoholic Beverage Comm.*, 935 F.3d 362, 376 (5th Cir. 2019), quoting *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 163 (5th Cir. 2007), and citing *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978). Licensed Michigan retailers operating within the three-tier system are not similarly situated to out-of-state retailers like Lebamoff who seek to sell and deliver wine to Michigan consumers without being bound by Michigan's comprehensive regulatory system. Michigan law extends the right to deliver wine *intrastate* to any person or entity who becomes a Michigan licensed retailer, regardless of the licensee's residence. *See* Wendt Aff., ¶ 8, RE 34-3, Page ID # 478. The MLCC has issued more than 1,800 retail licenses for premises in Michigan to hundreds of entities that are headquartered or incorporated in other states. *Id.* But that license mandates that the retailer purchase wine from a Michigan licensed wholesaler (not an out-of-state wholesaler) and otherwise comply with all other regulatory requirements and prohibitions. Here, the out-of-state retailers are not similarly situated because they will not, and do not seek to, purchase wine from a licensed Michigan wholesaler.

Indiana law would not allow Lebamoff to do so. Ind. Code, § 7.1-3-14-4(a) ("The holder of a wine retailer's permit is entitled to purchase wine only from a permittee entitled to sell to the wine retailer under this title.").

Michigan evenhandedly imposes delivery and shipment restrictions on *all* licensed retailers as part of "an effective and uniform system for controlling liquor." *Granholm*, 544 U.S. at 484-485. A law is not discriminatory merely because it might not provide an out-of-state retailer with the same economic opportunities as licensed in-state retailers. *See Exxon, supra.* Nor is it discriminatory simply because the out-of-state retailer's preferred business model (direct shipping) is not allowed. *Id.*; *Breard v. Alexandria*, 341 U.S. 622, 638 (1951) (it was constitutionally "immaterial" under a Commerce Clause analysis that alternative methods of doing business did not produce as much business as the method subject to regulation).

The Commerce Clause forbids the states from imposing economic burdens on out-of-state economic interests in order to create an advantage for in-state economic interests. *Granholm*, 544 U.S. at 472 ("States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses"). But states are not obligated to ensure equally efficient access to out-of-state business interests. *Exxon, supra.* That is particularly so here where the statute that is preventing an out-of-state retailer from being able to sell and deliver to Michigan consumers is its own home state licensing requirement that it purchase

from its home state licensed wholesalers–it is not the Michigan statute regulating the sale and delivery of wine purchased from a Michigan licensed wholesaler.

The markets in which the in-state and out-of-state retailers compete are not the same. Just as the Michigan licensed in-state retailers must do business with Michigan licensed wholesalers, Lebamoff must do business with licensed wholesalers of its home state of Indiana. Neither an in-state nor an out-of-state retailer can engage in a cross-border/interstate market transaction because of the equivalent prohibition on importing wine that exists in their respective alcohol beverage codes.[18]

This has even greater force with respect to alcohol regulation where the states have unique authority under the Twenty-first Amendment to regulate the importation and distribution of alcohol, including undisputed authority to "funnel sales through the three-tier system." *Granholm*, 544 U.S. at 489. *See also Wine Country Gift Baskets.com,* 612 F.3d at 820 (unlicensed out-of-state retailers were not similarly

[18] During oral argument on the parties' summary judgment motions, Lebamoff's counsel recognized the problem facing Lebamoff and cavalierly suggested to the District Court that the "solution to this problem" was for "Michigan to license the wholesalers that Lebamoff is buying from"—i.e., the *Indiana* wholesalers. Tr. of Motion Hrg., p. 48, RE 41, Page ID # 839. This so-called "solution" would mean that Michigan would need to create yet another type of license that presumably would be available to *wholesalers* across the country—clearly in contravention of many provisions of Michigan's three-tier statutory scheme.

situated to licensed in-state retailers and therefore "cannot make a logical argument of discrimination.").

For the reasons stated above, this Court should reverse the decision of the District Court and hold that the challenged Michigan statute does not violate the dormant Commerce Clause and that, in any event, the Twenty-first Amendment allows the State to require retailers to be physically present in the State.

IV. If the Court reaches the issue of remedy, it should follow the Code's severability mandate and sever the provision that allows Michigan retailers to ship to Michigan consumers rather than allowing all retailers across the country to import alcohol into Michigan outside the State's three-tier distribution system.

This Court reviews the terms of an injunction under an abuse of discretion standard. *Herman Miller, Inc. v. Palazzetti Imports and Exports, Inc.,* 270 F.3d 298, 326 (6th Cir. 2001). A court abuses its discretion if it "'applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact.'" *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 435 (6th Cir. 2008), quoting *United States v. Szoka*, 260 F.3d 516, 521 (6th Cir. 2001).

The District Court performed almost no analysis as to the proper remedy. It quoted *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 435 (6th Cir. 2008), regarding the choice of nullification versus extension, then said, "[e]xtension is generally preferred over nullification," citing *Welsh v. United States*, 398 U.S. 333, 361 (1970), and ruled, without further discussion or analysis, "[t]herefore, the Court

chooses to extend the provisions to Plaintiffs." RE 43, Page ID # 863-864. Respectfully, the District Court misapplied the applicable remedy law and abused its discretion in this case.

Whether a portion of a state statute is severable is determined by the law of that state. *Byrd,* 883 F.3d 608, 626. Michigan's Liquor Control Code includes an express severability provision, Mich. Comp. L. § 436.1925(2), which provides:

> If any provision of this act is found to be unconstitutional by a court of competent jurisdiction and all rights of appeal have expired or been exhausted, the offending provision shall be severed and shall not affect the remaining portions of the act.

The District Court did not follow this statute or even mention it. The Court cited *Cherry Hill, supra*, but did not reference the important part of the opinion: "When making this choice [between nullification and extension], the district court must remain conscious not to circumvent the legislature's intent." 553 F.3d at 435. The District Court erred in failing to consider the legislature's clear intent as expressed in the Code's severability provision, which plainly requires that the offending provision be severed but the remaining part of Michigan's laws and regulations comprising the three-tier system be enforced.

In *Heckler v Matthews*, 465 U.S. 728 (1984), the Supreme Court considered a severability clause that was part of the Social Security Act, which, similar to Mich. Comp. L § 436.1925(2), stated that if any provision of the subsection was held invalid, "the remainder of this section shall not be affected thereby …". 465 U.S. at

734, quoting 1977 Amendments, § 334(g)(3), 42. U.S.C. § 402 note. The Court held:

> Congress has, through the severability clause, clearly expressed its preference for nullification, rather than extension, of the pension offset exception in the event it is found invalid. 465 U.S. at 739 n.5. Thus, while "the choice between 'extension' and 'nullification' is within the 'constitutional competence of a federal district court' *Califano v Westcott*, 443 U.S. 76, 91 (1979), and ordinarily 'extension rather than nullification is the proper course,' *id.* at 89, the court should not, of course, 'use its remedial powers to circumvent the intent of the legislature,' *id.* at 94 (opinion of POWELL, J.) and should therefore 'measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.' *Welsh v. United States,* [398 U.S. 333 (1970)] at 365 (Harlan, J., concurring in the result)."

Heckler, 465 U.S. at 739.

This Court routinely applies a state severability mandate. *See, e.g., Byrd, supra*; *Garcia v. Wyatt-Ayerst Labs*, 385 F.3d 961, 965-967 (6th Cir. 2004); *Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587, 591-592 (6th Cir. 2001); and *Larkin v. Michigan*. 883 F. Supp. 172, 179 (E.D. Mich. 1994), *aff'd* 89 F.3d 285 (6th Cir. 1996). Michigan courts likewise follow the rule of severability. *See, e.g., Avis Rent-a-Car System, Inc. v. City of Romulus Schools*, 400 Mich. 337, 348-349, 254 N.W.2d 555 (Mich. 1977); *Detroit Osteopathic Hospital Corp. v. City of Southfield*, 377 Mich. 128, 137-138, n. 2, 139 N.W.2d 728 (Mich. 1966).

The District Court contravened the intent of the legislature as reflected in Mich. Comp. L. § 436.1925(2), and adopted a remedy that would not only disrupt,

but would essentially abrogate Michigan's three-tier system and the public health and safety protections it provides. The remedy ordered by the District Court was not "extension" at all, but the grant of new, special privileges to retailers outside Michigan who choose not to (indeed, cannot, consistent with their home state licenses) participate in Michigan's three-tier system. In effect, the District Court took on the role of the Michigan Legislature by expanding Michigan's law to allow out-of-state retailers to import beverage alcohol into Michigan and deliver it to Michigan consumers outside Michigan's three-tier system of distribution.

The District Court recognized that Michigan has a "complex and interdependent statutory structure" that regulates the sale and use of alcoholic beverages. RE 43, Page ID # 864. It even noted, as examples of important aspects of the three-tier system, the requirement that Michigan retailers purchase from Michigan (not out-of-state) wholesalers, the prohibition of volume discounts and purchases on credit, and the requirement that wholesalers must post and hold prices to "police against industry favoritism or covert volume discounts." *Id.*, Page ID # 847. Yet the Court's ruling granted a remedy that would broadly abrogate those provisions and much of Michigan's three-tier system for up to 385,000 out-of-state retailers–who would not be bound by any of those fundamental components of Michigan's regulatory scheme.

This Court should adopt the remedy that least infringes on Michigan's sovereign authority over its own affairs. *Alden v. Maine,* 527 U.S. 706, 758-759 (1999). Prohibiting licensed in-state retailers from delivering to Michigan consumers would do the least harm to the structure of Michigan's regulatory system and would be most consistent with the ruling in *Granholm* that "'the Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor control system,'" 544 U.S. at 488, quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 110 (1980), and *Granholm's* recognition that the Twenty-first Amendment empowers a state "'to require that all liquor sold for use in the State be purchased through a licensed in-state wholesaler,'" *id.* at 489, quoting *North Dakota*, 495 U.S. at 432 (concurring opinion of Justice Scalia).

The District Court incorrectly applied the law when it failed to follow or even acknowledge the Michigan's Legislature's express preference for severance rather than broad extension. Even if this Court upholds the invalidation of physical presence for retailers, it should reverse the District Court's remedy decision and sever and nullify those portions of Mich. Comp. L. § 436.1203 that allow licensed in-state retailers to deliver wine to Michigan consumers, leaving the remainder of Michigan's three-tier system intact.

CONCLUSION AND RELIEF REQUESTED

Because of several missteps, the District Court's Order is erroneous in three material respects:

- Failing to consider the threshold issue of whether licensed Michigan in-state retailers and out-of-state retailers like Lebamoff were "similarly situated" for purposes of a dormant Commerce Clause analysis (they are not), the District Court erroneously found that the challenged retailer delivery statute discriminated against out-of-state retailers.

- Misunderstanding Michigan's three-tier system, incorrectly characterizing as an "exception" to that regulatory scheme the challenged retail delivery statute, and failing to consider the evidence establishing the critical role of the retailer presence requirement in the State's efforts to protect the public's health and safety concerning the sale and use of alcohol beverage products, the District Court erroneously held that requiring retailers to be physically present in the State was not a permissible exercise of the State's power under the Twenty-first Amendment.

- Compounding those two erroneous rulings, the District Court failed to consider the express severability provision set forth by the Michigan Legislature in the Liquor Control Code and therefore abused its discretion in extending the retail delivery rights to out-of-state retailers across the country, rather than following the statutory mandate to sever the challenged statute.

With respect to the first two errors of the District Court, this Court should reverse and remand, directing the District Court to grant summary judgment to MBWWA.

In the alternative, if this Court finds that only the District Court's remedy ruling was erroneous, then that ruling should be reversed and the retailer delivery provision should be severed.

Dated: October 3, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 13,000 words. This document contains 9,682 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 365 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I certify that on October 3, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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ADDENDUM

Intervenor Defendant-Appellant Michigan Beer & Wine Wholesalers Association, pursuant to Federal Rules of Appellate Procedure 28(c), 28(f) and 32.1(b), and Sixth Circuit Rules 28(a)(1), 28(b)(1)(A)(i), 28(b)(2), 30(g), and 32.1(a), hereby sets forth the following documents in its Addendum and designates the following portions of the record on appeal:

I. DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

	Description of Document	Date of Document	Record Entry No.	Page ID No. Range
1.	Complaint	1/20/2017	1	1-8
2.	First Amended Complaint	2/6/2017	5	18-25
3.	Kaminski Affidavit	4/2/2018	33-2	377-382
4.	Retailer License & Permit Application Form	4/2/2018	33-3	384-392
5.	Hagan Affidavit	4/2/2018	34-2	454-474
6.	Wendt Affidavit	4/2/2018	34-3	475-490
7.	Erickson Affidavit	4/2/2018	34-4	491-511
8.	Donley Affidavit	4/2/2018	34-5	512-524
9.	Hamilton Affidavit	4/2/2018	34-6	525-532
10.	Weber Affidavit	4/2/2018	34-7	533-540
11.	Doust Deposition Transcript	4/2/2018	34-9	593-681
12.	Transcript of Motion Hearing	9/19/2018	41	792-842

	Description of Document	Date of Document	Record Entry No.	Page ID No. Range
13.	Opinion and Order	9/28/2018	43	845-866
14.	Judgment	9/28/2018	44	867-868
15.	Order Granting Motion to Stay	10/11/2018	47	895-896
16.	Notice of Appeal	10/12/2018	50	901
17.	Order Clarifying Continuation of Stay	8/23/2019	55	913

II. RELEVANT STATUTES

Mich. Comp. L. § 436.1203

III. UNPUBLISHED DECISIONS

Greenbush Brewing Co., et al. v. Michigan Liquor Control Commission, et al., Case No. 1:19cv536 (W.D. Mich. Sept. 16, 2019) (ECF No. 24)

ADDENDUM

II.

RELEVANT STATUTES

Michigan Compiled Laws Annotated
Chapter 436. Alcoholic Beverages
Michigan Liquor Control Code of 1998 (Refs & Annos)
Chapter 2

M.C.L.A. 436.1203

436.1203. Sale, delivery, or importation of alcoholic liquor, wine, spirits, and beer; limitations and conditions; direct shipper license; application and issuance; use of common carrier or third party facilitator service; licensure; reporting requirements

Effective: March 29, 2017
Currentness

Sec. 203. (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, warehouser, 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, warehouser, 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, warehouser, 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, warehouser, 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 403[3] 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 hardwire 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.

Credits

P.A.1998, No. 58, § 203, Imd. Eff. April 14, 1998. Amended by P.A.2000, No. 289, Imd. Eff. July 10, 2000; P.A.2005, No. 268, Imd. Eff. Dec. 16, 2005; P.A.2008, No. 474, Eff. March 31, 2009; P.A.2014, No. 50, Imd. Eff. March 25, 2014; P.A.2016, No. 520, Eff. March 29, 2017.

Footnotes

1 M.C.L.A. § 436.1301.

2 M.C.L.A. § 436.1609.

3 M.C.L.A. §§ 436.1401 and 436.1403.

M. C. L. A. 436.1203, MI ST 436.1203

The statutes are current through P.A.2019, No. 49, of the 2019 Regular Session, 100th Legislature. Some statute sections may be more current; see credits for details.

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ADDENDUM

III.

UNPUBLISHED DECISIONS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GREENBUSH BREWING CO., et al.,
Plaintiffs,

-v-

MICHIGAN LIQUOR CONTROL COMMISSION, et al.,
Defendants.

No. 1:19-cv-536

Honorable Paul L. Maloney

OPINION

Plaintiffs Greenbush Brewing Company, Michigan Cider Association, Farmhaus Cider Company, and Vander Mill, LLC, filed this motion for a preliminary injunction (ECF No. 11), claiming that Defendants Michigan Liquor Control Commission (MLCC), Andrew J. Deloney, Kurt Cox, and Jon Reeder have irreparably harmed them by seizing Greenbush's wine and hard cider inventory. Plaintiffs contemporaneously filed a motion for a temporary restraining order, which this Court denied (ECF No. 13). For the reasons to be explained, the motion for a preliminary injunction will be denied.

I. Background

Wine[1] is "in bond" or "bonded" when it has been produced and packaged but has not been sent to distribution or to a tasting room for consumption. Bonded alcohol is "untaxpaid," and a "bonded premises" is a federally authorized area where untaxpaid alcohol may be stored and handled. When a winemaker sells product to a distributor, retailer, or

[1] This case involves both wine and cider. Cider is treated as wine under state and federal law.

individual customer, federal excise tax liability is incurred and paid, and the wine is no longer in bond. A winemaker may also transfer its wine in-bond to a different bonded premises, and the receiving party becomes responsible for the eventual tax liability. Federal tax law places no restrictions on these bonded transfers of wine.

In Michigan, "small wine maker" licenses allow licensees to manufacture not more than 50,000 gallons of wine per year and sell that wine to wholesalers, retailers, consumers by direct shipment, and at retail on the licensed winery premises such as tasting rooms. MCL 436.1111(12); MCL 436.1113(10). Small wine maker licenses cost $25 and are not subject to Michigan's Liquor License quota. MCL 436.1525(1)(d). However, small wine maker licenses do not allow licensees to sell wine manufactured by other wineries. To sell wine or beer manufactured and bottled off-site, a licensee needs a tavern license. MCL 436.1113a(2). Tavern licenses are limited by Michigan's Liquor License quota, which is based on population in local geographic units. MCL 436.1531(1). Thus, tavern licenses are usually only obtainable by transfer from another party.

In December 2018, the Michigan Legislature placed restrictions on bonded transfers of wine for wine makers and small wine makers. MCL 436.1204a provides, in relevant part:

> (1) A manufacturer shall not sell or transfer alcoholic liquor to a licensed manufacturer in this state except as provided in subsections (2) and (3).
>
> (2) Notwithstanding any provision in this act to the contrary, a manufacturer may sell or transfer wine or spirits to a licensed manufacturer, and a licensed manufacturer may purchase or receive wine or spirits, under any of the following conditions:
>
> (a) For a sale or transfer of wine:
>
> (*i*) The selling or transferring manufacturer is a wine maker, small wine maker, or out-of-state entity that is the substantial equivalent of a wine maker or small wine maker and is selling or transferring the wine to a wine maker,

> small wine maker, or out-of-state entity that is the substantial equivalent of a wine maker or small wine maker.
>
> (*ii*) The purchasing or receiving wine maker or small wine maker manufactures wine at its licensed premises or the purchasing or receiving small wine maker bottles wine at its licensed premises.
>
> * * *
>
> (3) A wine maker, small wine maker, distiller, or small distiller may not sell alcoholic liquor purchased or received under this section unless 1 of the following conditions is met:
>
> (a) The purchasing or receiving manufacturer modifies the purchased or received alcoholic liquor by performing a portion of the manufacturing process as described in section 109(1).
>
> (b) The purchasing or receiving small wine maker bottles the purchased or received wine.
>
> (c) The purchasing or receiving wine maker or small wine maker is selling a shiner[2] on which the wine maker or small wine maker has placed a label under section 111(10).
>
> (4) This section does not prevent a manufacturer from selling, purchasing, or receiving nonalcoholic ingredients to or from another manufacturer.

The Legislature also amended the definition of "manufacture" to read:

> "Manufacture" means to distill, rectify, ferment, brew, make, produce, filter, mix, concoct, process, or blend an alcoholic liquor or to complete a portion of 1 or more of these activities. Manufacture does not include bottling or the mixing or other preparation of drinks for serving by those persons authorized under this act to serve alcoholic liquor for consumption on the licensed premises. In addition, manufacture does not include attaching a label to a shiner. All containers or packages of alcoholic liquor must state clearly the name, city, and state of the bottler.

MCL 436.1109(1). Essentially, the Legislature now allows a purchasing small wine maker to sell bonded wine for consumption only if it has modified the bonded wine by performing part of the manufacturing process on it or if it has bottled the bonded wine. Small wine

[2] A "shiner" is an unlabeled sealed container of wine that the purchasing wine maker must label before selling. MCL 436.1111(10).

makers may also receive unlabeled sealed bottles of wine called "shiners," label them, and sell them.

Plaintiff Greenbush holds both a microbrewer license and a small wine maker license. Greenbush operates a tasting room on its licensed premises in Sawyer, Michigan. At some point, the MLCC became aware that Greenbush possessed and offered for sale unaltered bonded wine and cider. On June 19, 2019, Defendants Cox and Reeder investigated Greenbush's premises and spoke with Greenbush's Director of Operations, Anna Rafalski, and Brewer, Joseph Hinman. The investigators asked Rafalski and Hinman how Greenbush manufactured wine and cider; Rafalski explained that Greenbush only manufactured beer on the premises.

Cox and Reeder also asked about the wine and cider stored on the premises. Rafalski stated that Greenbush possessed wine produced by Fenn Valley Vineyards, which it received in unlabeled shiner bottles or 1/6-barrel kegs. Greenbush did not label the shiners. Rafalski also stated that Greenbush's cider was manufactured by Vander Mill, which shipped cider to Greenbush in 1/2-barrel kegs. Cox and Reeder requested copies of any federally required filings regarding wine production, but Rafalski conceded that no such forms were available.

Based on this investigation, Reeder and Cox determined that Greenbush was violating the new Michigan law, seized and impounded all wine and cider on Greenbush's property, and informed Greenbush that it could no longer sell wine or cider. At Greenbush's request, Reeder and Cox left for an hour so that Greenbush could move the wine and cider into cold storage. When Reeder and Cox returned, Rafalski had spoken with counsel, and informed the investigators that Greenbush did, in fact, produce wine and cider at the brewery. Rafalski

explained that Greenbush had made sangria from bonded wine and that Greenbush had attempted to brew cider. Cox and Reeder filed a violation report and submitted it to the MLCC; this administrative matter is still pending, and the seized inventory is being held awaiting MLCC's decision. Plaintiffs now seek a preliminary injunction and the return of their inventory, arguing that federal law preempts the new Michigan statutes and that the statutes are void for vagueness.

II. Legal Framework

A trial court may issue a preliminary injunction under Federal Rule of Civil Procedure 65. A district court has discretion to grant or deny preliminary injunctions. *Planet Aid v. City of St. Johns, Mich.*, 782 F.3d 318, 323 (6th Cir. 2015). A court must consider each of four factors: (1) whether the moving party demonstrates a strong likelihood of success on the merits; (2) whether the moving party would suffer irreparable injury without the order; (3) whether the order would cause substantial harm to others; and (4) whether the public interest would be served by the order. *Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008) (quoting *Northeast Ohio Coal. for Homeless & Service Employees Int'l Union v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006)).

The four factors are not prerequisites that must be established at the outset but are interconnected considerations that must be balanced together. *Northeast Ohio Coal.*, 467 F.3d at 1009; *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006). "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002)

(internal citation omitted); see *Patio Enclosures, Inc. v. Herbst*, 39 Fed. App'x 964, 967 (6th Cir. 2002) (citing *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000)).

The purpose of a preliminary injunction is to preserve the status quo. *Smith Wholesale Co., Inc. v. R.J.R. Tobacco*, 477 F.3d 854, 873 n. 13 (6th Cir. 2007) (quoting U.S. v. Edward Rose & Sons, 384 F.3d 258, 261 (6th Cir. 2004)). The Sixth Circuit has noted that "[a]lthough the four factors must be balanced, the demonstration of some irreparable injury is a sine qua non for issuance of an injunction." *Patio Enclosures*, 39 Fed. App'x at 967 (citing *Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982)).

III. Analysis

A. Success on the Merits

1. Federal Preemption

Preemption claims are grounded in the Supremacy Clause of the Constitution, which provides that the laws of the United States "shall be the supreme Law of the land; . . . any Thing in the constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. This gives Congress the power to enact statutes that preempt state law. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509 (1989). Congressional intent to preempt is the most important factor to consider in a preemption claim. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76-77 (2008). Federal law may expressly preempt state law, but if it does not, intent may "also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law." *Id.*

"[T]here is a strong presumption against federal preemption of state law[.]" *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 694 (6th Cir. 2015). This presumption also applies to federal agency regulations. *Schoolcraft Mem'l Hosp. v. Mich. Dep't of Cmty. Health*, 570 F. Supp. 2d 949, 958 (W.D. Mich. 2008). The presumption can only be overcome by a showing that preemption was the "clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Plaintiffs concede that Congress did not expressly preempt state law on this issue; instead, they first argue that Congress has pervasively regulated the field of bonded transfers of wine, so the Michigan statutes at issue are preempted. The Court disagrees.

The core of Plaintiffs' argument is that Congress intended to preempt state law on this issue because it has published so many regulations regarding the production of wine. However, as Plaintiffs stated at oral argument, the federal government regulates production of alcohol while states retain control over the distribution and sales of alcohol. *See e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). MCL 436.1204a fits squarely inside the realm of distribution and sales, governing the process of distribution for small wine makers, and dictating which small wine makers may sell wine they have purchased in bond. The sheer volume of federal regulations concerning the production of wine has no bearing on whether this statute, concerning distribution and sales, is preempted.

In their pleadings, Plaintiffs cited several specific statutes as illustrative points. However, each statute discusses the tax liability for or the logistics of bonded transfers. 26

U.S.C. 5362(b) permits bonded transfers under the IRS code and discusses excise tax liability. This section explicitly does not consider the removal of wine "for consumption or sale." 26 U.S.C. 5362(b)(4). 27 C.F.R. § 24.101 permits bonded transfers under the Department of Treasury's Alcohol and Tobacco Tax and Trade Bureau (TTB). 27 C.F.R. § 25 governs beer and is wholly inapplicable. Even giving Plaintiffs the benefit of the doubt and reviewing 27 C.F.R. §§ 24.280-24.284 (which govern bonded transfers of wine) reveals only a discussion of the logistics and paperwork required for bonded transfers of wine. In contrast, MCL 436.1204a concerns *who* may participate in the bonded transfers of wine, and who may remove wine from in-bond status to sell it for consumption. None of the federal statutes Plaintiffs cite govern who may operate bonded premises, nor do they consider the removal from bonded status. Plaintiffs have failed to show that MCL 436.1204a is barred because of field preemption.

Plaintiffs next argue that the statute is in direct conflict with federal law. Conflict preemption exists where compliance with both federal and state law is physically impossible, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Plaintiffs have not identified what specific provisions conflict; rather, they argue broadly that the state's impairment of a license issued under a federal regulatory scheme is improper. This argument is misplaced: Plaintiffs cite cases involving a license issued by the federal government under a federal regulation that later was subject to stricter state requirements. *See, e.g., Ray v Atlantic Richfield Co.*, 435 U.S. 151 (1978) (a state's judgment that a vessel was unsafe was preempted

by the federal government's judgment that it was safe); *Leslie Miller, Inc., v. Arkansas*, 352 U.S. 187 (1956) (per curiam) (federal certification of a contractor as "responsible" preempted inconsistent state licensing requirements). This is classic conflict preemption, and the federal law preempts the state law.

However, that is not the issue presented here. In the case at bar, licenses are issued by the state government under state regulations. The relevant federal regulations permit certain actions to be taken by licensed individuals, and the state then places some conditions on the permitted actions. In this case, states may not "impair significantly, the exercise of a power that Congress explicitly granted." *Barnett Bank of Marion Cty, N.A., v. Nelson*, 517 U.S. 25, 33 (1996). States may not take actions that amount to "suspension or revocation" of a federally-granted "right to operate." *Castle v. Hayes Freight Lines*, Inc., 348 U.S. 61, 64 (1954). However, if Congress intends to subject a grant of power to state and local restrictions, these restrictions do not amount to a significant impairment. *Barnett Bank*, 517 U.S. at 33-34.

Plaintiffs set forth a conclusory allegation that MCL 436.1204a amounts to the suspension of a federally-granted right to operate, but again fail to acknowledge that the federal regulatory scheme intentionally leaves the distribution and sales of alcohol to the states. As discussed above, federal law governs bonded transfers of wine and state law governs the sale of wine for consumption; a restriction on the sale of wine for consumption does not suspend, revoke, or substantially impair Plaintiffs' ability to engage in the federally-granted power to perform bonded transfers of wine. Rather, MCL 436.1204a concerns who may

remove wine from bonded status and sell it to consumers. Therefore, the statutes are not in direct conflict, and federal law does not preempt the state law at issue.

Finally, Plaintiffs make a brief argument that MCL 436.1204a has no cognizable relation to state interests, and therefore, the statute is unenforceable. In the context of the Commerce Clause, the Supreme Court recently reaffirmed that states have the leeway to enact laws that address the public health and safety effects of alcohol or other state interests, but states cannot enact protectionist measures that do not serve legitimate interests. *Tenn. Wine and Spirits Retailers Ass'n. v. Thomas*, 139 S. Ct. 2449, 2474 (2019). Plaintiffs argue that the new legislation advances no state interest because bonded wine is already carefully monitored for unlawful activity: the TTB requires careful measurements of bonded wine transfers at both the shipping port and the receiving port, so no threat of diversion is present. Again, the Court disagrees.

Defendants explain that the Michigan Legislature was concerned with the exact fact pattern presented here: a small wine maker license being used to circumvent the Michigan Liquor Control Code by selling bonded wine without actually using the small wine maker license to manufacture wine. This controverts the state interest in controlling the amount of available liquor licenses, the carefully monitored issuance of those licenses, and the ability to adequately monitor compliance with those licenses. This state interest sufficiently justifies the restrictions imposed by MCL 436.1204a, which directly relates to that interest by ensuring that "small wine maker" licenses are to make, rather than simply to sell, wine.

2. Vagueness

Plaintiffs also argue that parts of MCL 436.1204a and all of MCL 436.1109(1) (the definition of manufacture) are void for vagueness. A statute is void for vagueness if it fails "(1) to define the offense with sufficient definiteness that ordinary people can understand prohibited conduct," and (2) fails to articulate standards that allow enforcement officers to enforce the law in a non-arbitrary manner. *Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553, 556 (6th Cir. 1999). Statutes are not rendered void simply because they contain "flexibility and reasonable breadth, rather than meticulous specificity." *Platt v. Bd. of Comm'rs on Grievances and Discipline of the Ohio Supreme Court*, 894 F.3d 235, 246 (6th Cir. 2018) (quoting *Grayned v. City of Rockford*, 408 US 104, 110 (1972)).

Looking first to MCL 436.1109(1): the statute defines "manufacture" as:

> to distill, rectify, ferment, brew, make, produce, filter, mix, concoct, process, or blend an alcoholic liquor or to complete a portion of 1 or more of these activities. Manufacture does not include bottling or the mixing or other preparation of drinks for serving by those persons authorized under this act to serve alcoholic liquor for consumption on the licensed premises. In addition, manufacture does not include attaching a label to a shiner. All containers or packages of alcoholic liquor must state clearly the name, city, and state of the bottler.

Plaintiffs argue that the terms "make," "produce," "concoct," and "process" are insufficiently vague and render this statute void. The Court disagrees. These four words appear at the end of a list of specific wine manufacturing techniques, and each of the disputed words are readily definable by consulting a dictionary. The inclusion of these four words does not render the statute insufficiently vague; rather, they provide flexibility and breadth for wine manufacturing techniques not identified by name. Further, the statute specifically

outlines what manufacturing is *not*. This definition provides sufficient guidance for an ordinary person to understand what "manufacture" means. *See Platt*, 894 F.3d at 246.

Plaintiffs next contest MCL 436.1204a(2)(a)(*ii*). This subsection allows only winemakers that meet the following condition to purchase or receive wine: "The purchasing or receiving wine maker or small wine maker manufactures wine at its licensed premises or the purchasing or receiving small wine maker bottles wine at its licensed premises." Given the definition of "manufacture," the Court believes that this statute provides reasonable guidance for an ordinary person. Plaintiffs argue that it is unclear what quantity of wine manufacturing qualifies under the statute. True, the statute does not define exactly how much wine must be manufactured (or bottled), but the statute plainly states that the wine maker must engage in the process of manufacturing or bottling wine in any quantity. The statute need not define a quantity with meticulous specificity to be understood. *See id.* It follows that MCL 436.1204a(2)(a)(*ii*) provides sufficient guidance for an ordinary person to understand its meaning. *See Belle Maer Harbor*, 170 F.3d at 556.

Finally, MCL 436.1204a(3) provides:

> (3) A wine maker, small wine maker, distiller, or small distiller may not sell alcoholic liquor purchased or received under this section unless 1 of the following conditions is met:
>
> (a) The purchasing or receiving manufacturer modifies the purchased or received alcoholic liquor by performing a portion of the manufacturing process as described in section 109(1).
>
> (b) The purchasing or receiving small wine maker bottles the purchased or received wine.
>
> (c) The purchasing or receiving wine maker or small wine maker is selling a shiner on which the wine maker or small wine maker has placed a label under section 111(10).

Again, given the definition of "manufacturing," this statute is reasonably clear. An ordinary person can read the statutes together and understand that to sell bonded wine, the receiving wine maker must either perform a portion of the manufacturing process on it or bottle it. MCL 436.1204a(3) provides sufficient guidance for an ordinary person to understand its meaning. *See id.*

Plaintiffs also argue that the MLCC has enforced MCL 436.1204a randomly and arbitrarily around the state. However, this argument is misplaced. When considering a void-for-vagueness argument, the "question is not whether discriminatory enforcement occurred here, as we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility." *Gentile v State Bar of Nev.*, 501 U.S. 1030, 1051 (1991). Plaintiffs have not identified what parts of the statute are so vague that they lead to inconsistent or discriminatory enforcement. Plaintiffs have failed to show a reasonable likelihood of success on their claims.

B. Irreparable Harm

"To be granted an injunction, the plaintiff must demonstrate, by clear and convincing evidence, actual irreparable harm or the existence of an actual threat of such injury." *Patio Enclosures, Inc. v. Herbst*, 39 Fed. Appx. 694, 969 (6th Cir. 2002), quoting *Clark v. Mt. Carmel Health*, 124 Ohio App. 3d 308, 339 (1997) (quotation marks omitted). The loss of customer goodwill "often amounts to irreparable injury because the damages flowing from such losses are difficult to compute." *Basicomputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Cir. 1992).

Greenbush has alleged that it has suffered a loss of customer goodwill because it has not been able to sell wine, cider, or other fruit-based alcoholic drinks. However, Greenbush has failed to present any evidence to support these claims beyond conclusory statements that some customers may prefer fruit and wine products over beer. Greenbush has attempted to demonstrate the loss of some customer goodwill, but has failed to show irreparable harm by clear and convincing evidence. Vander Mill, Farmhaus, and the Michigan Cider Association make a conclusory claim that "some" of their customers have stopped purchasing cider as a result of the MLCC's actions. However, this is a vague assertion and these Plaintiffs have provided no evidence, let alone clear and convincing evidence, to show that they have suffered irreparable harm.

C. The Equities

The equities slightly disfavor the issuance of a preliminary injunction. Issuing an injunction enjoining Defendants from enforcing MCL 436.1204a would hinder the MLCC's ability to enforce the Liquor Code and the state's interest in regulating liquor sales within its borders. Further, issuing an injunction would harm the public interest of regulation of alcohol sales, and the public interest of avoiding oversaturation of taverns or bars. Therefore, both the possible harm to Defendants and the public interest weigh against granting a preliminary injunction.

D. Conclusion

After consideration of the factors together, the Court does not find that a preliminary injunction is warranted, primarily because Plaintiffs have not established a substantial likelihood of success on their claims that the statutes at issue are unconstitutional.

However, the Court is sympathetic to Plaintiff Greenbush's desire for guidance from the MLCC, and Greenbush's complaint that it may not receive answers to its statutory interpretation questions for months because a hearing has not yet been scheduled on the administrative complaint. Plaintiffs deserve answers from the MLCC to their questions about the meaning of the new legislation, which are questions that this Court cannot consider on the pleadings before it. To the extent that a ruling from the MLCC's administrative process would provide guidance about MCL 436.1109(1) and MCL 436.1204a, Plaintiffs deserve that guidance. Therefore, the Court orders the MLCC to hold a hearing on the administrative complaint within 60 days of the date of this order. The Court also orders that a final decision on that complaint shall issue within 120 days of the date of this order.

ORDER

For the reasons stated in the Court's Opinion, Plaintiffs' motion for a preliminary injunction (ECF No. 11) is **DENIED**.

IT IS FURTHER ORDERED THAT Defendant MLCC shall arrange and hold a hearing on Plaintiff Greenbush's administrative complaint by December 10, 2019, and that a final decision shall issue in Greenbush's case by January 24, 2020.

IT IS SO ORDERED.

Date: September 16, 2019

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge