Case No. 01-2720

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELEANOR HEALD; RAY HEALD; JOHN ARUNDEL;
KAREN BROWN; RICHARD BROWN; BONNIE MCMINN;
GREGORY STEIN; MICHELLE MORLAN; WILLIAM HORWATH;
MARGARET CHRISTINA; ROBERT CHRISTINA; TRISHA HOPKINS;
JIM HOPKINS, AND DOMAINE ALFRED, INC.,
Plaintiffs - Appellants
v.

JOHN ENGLER, Governor; JENNIFER M. GRANHOLM,
Attorney-General; JACQUELYN STEWART, Chairperson,
Michigan Liquor Control Commission, in their Official Capacities;
Defendants-Appellees
and

MICHIGAN WINE & BEER WHOLESALERS ASSOCIATION
Intervening Defendant-Appellee

Appeal from a Final Judgment
of the U. S. District Court for the Eastern District of Michigan

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BRIEF OF PLAINTIFFS - APPELLANTS

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STATEMENT OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Circuit Rule 26.1, Domaine Alfred, Inc., makes the following disclosure:

1. Is said party a subsidiary of affiliate of a publicly owned corporation? No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No

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James A. Tanford Date
Attorney for Plaintiffs

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs request oral argument. This case presents a Commerce Clause challenge to the constitutionality of a state liquor law prohibiting direct shipments of wine to consumers. Given the importance of the issues presented, Appellants respectfully suggest that the Court's review of the case will be assisted and enhanced through oral argument.

STATEMENT OF JURISDICTION

Jurisdiction of district court. The case was brought pursuant to 42 U.S.C. §1983 to vindicate Plaintiffs' rights under the United States Constitution. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3), which confer original jurisdiction on federal district courts to hear suits alleging the violation of rights and privileges arising under federal law. Plaintiffs sought declaratory relief authorized by 28 U.S.C. §§ 2201-2202.

Jurisdiction of Court of Appeals. Plaintiffs appeal from a final decision of the district court granting summary judgment to Defendants and against Plaintiffs. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, which authorizes the courts of appeals to hear appeals from final decisions of the district court. The district court entered final judgment on September 28, 2001. (R. 92 Judgment, Apx. p. 219). Plaintiffs filed a Rule 59 motion to reconsider, which was denied on November 5, 2001. (R. 94 Order, Apx. p. 220). Plaintiffs filed timely notice of appeal on December 4, 2001. (R. 95 Notice of Appeal, Apx. p. 222).

Finality. This appeal is from a final judgment that disposes of all parties' claims.

STATEMENT OF THE ISSUES

1. Whether Michigan's law prohibiting out-of-state merchants from selling and shipping wine directly to consumers, but permitting in-state merchants to do so, violates the Commerce Clause and exceed the state's authority under the Twenty-first Amendment by discriminating against interstate commerce?

2. Whether the district court erred by not ruling on Plaintiffs' motion to strike the Defendants' supporting affidavits before granting summary judgment in the Defendants' favor?

STATEMENT OF THE CASE

Nature of the case

This is a constitutional challenge to Michigan's "direct shipment law" that prohibits out-of-state wineries and other retailers from selling and shipping wine directly to consumers in Michigan, but permits in-state wineries and retailers to do so.[1] Plaintiffs assert that this discriminatory treatment violates the Commerce Clause and exceeds the state's Twenty-first Amendment authority. Plaintiffs rely primarily on three Supreme Court decisions from the 1980s holding that state

[1] The Michigan Liquor Control Code is extremely difficult to decipher. There is no express provision that an out-of-state merchant may not sell and deliver wine directly to Michigan residents. Rather, this result is achieved by the combined effect of four statutory provisions and the practice of the Liquor Control Commission. Section 203 (Mich. Comp. L. §436.1203) prohibits the sale and delivery of wine except in accordance with the terms of a license. Section 109(9) (Mich. Comp. L. §436.1109(9)) creates only one license for an "outstate seller of wine," which only allows it to sell its product "to a wholesaler." Section 537 (Mich. Comp. L. §436.1537) allows only "specially designated merchants" (SDMs), "specially designated distributors" (SDDs), and "wine makers" to sell wine for home consumption. Section 607 (Mich. Comp. L. §436.1607) provides that outstate sellers of wine cannot be either SDMs or SDDs, and may not sell or deliver wine to consumers at retail. No statute says explicitly that out-of-state sellers cannot also be "wine makers," but this is how the Liquor Control Commission interprets the law, and it will not license an out-of-state seller of wine as a "wine maker" or give it any other license that will allow it to direct ship. (R. 37 Stewart Interrogatory 16, Apx. pp. 104-05). In-state wine makers and SDMs may sell wine at retail, Mich. Comp. L. §436.1537; which includes the right to ship or deliver that wine directly to the customer. Mich. Comp. L. §436.1111(7) (license to sell includes right to ship and deliver); Mich. Admin. Code §436.1011(6)(b) (retail licensees may deliver liquor to a customer). The State agrees that this is a correct interpretation of the Liquor Control Code. (R. 37 Stewart Interrogatories 6 & 8, Apx. pp. 97-100).

liquor laws which facially discriminate against interstate commerce violate the Commerce Clause and cannot be saved by the Twenty-first Amendment. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *Healy v. Beer Institute*, 491 U.S. 324 (1989); and *Bacchus Imports v. Diaz*, 468 U.S. 263 (1983). This case is one of seven similar cases throughout the United States.[2]

Course of proceedings and disposition below.

Plaintiffs sued Michigan government officials for a declaratory judgment that Michigan's direct shipment law is unconstitutional, and for an injunction against its enforcement. The complaint names three state officials as defendants in their official capacities: Governor John Engler, Attorney General Jennifer Granholm, and Chairperson of the Liquor Control Commission Jacquelyn Stewart. (R. 48 Amended Complaint, Apx. p. 23). The Michigan Beer & Wine Wholesalers Association intervened as a defendant.

[2] The courts have reached different conclusions. Direct shipment laws were thought to be unconstitutional in *Bridenbaugh v. O'Bannon*, 78 F. Supp. 2d 828 (N.D. Ind. 1999), *rev'd*, 227 F.3d 848 (7th Cir. 2000); *Dickerson v. Bailey*, 87 F.Supp.2d 691 (S.D. Tex. 2000); *Swedenburg v. Kelly*, 2000 WL 1264285 (S.D.N.Y. 2000) (preliminary ruling only); *Bolick v. Roberts*, 2002 WL 508349 (E.D. Va. 2002); and *Beskind v. Easley*, 2002 WL 550247 (W.D. N.C. 2002). Laws were thought to be constitutional in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. den. sub nom. Bridenbaugh v. Carter*, 121 S.Ct. 1672 (2001); and *Bainbridge v. Bush*, 148 F. Supp. 2d 1306 (M.D.Fla. 2001).

All parties filed cross motions for summary judgment, (R. 37 Plaintiffs' Motion for Summary Judgment, Apx. p. 40; R. 16 Defendants' Motion for Summary Judgment, Apx. p. 33; R. 74 Defendants' Supplemental Motion for Summary Judgment, Apx. p. 189; R. 36 Intervenor's Motion to Dismiss, Apx. p. 37; R. 81 Intervenor's Supplemental Motion, Apx. p. 473); and submitted affidavits and other evidence in support. On November 21, 2000, Plaintiffs filed a motion to strike most of the evidence submitted by the State, (R. 64 Motion to Strike, Apx. p. 148), which was never ruled on by the district court. In the six months between the filing of the motion to strike and the summary judgment hearing, the Defendants filed no additional affidavits.

On June 13, 2001, the district court heard oral argument on the cross-motions for summary judgment. The court did not permit Plaintiffs to argue their motion to strike the State's evidence. On September 27, 2001, the district court entered summary judgment for the defendants and against Plaintiffs, (R. 92 Judgment, Apx. p. 219; R. 91 Opinion and Order, Apx. p. 208); without ever having ruled on the evidentiary motions. Plaintiffs filed a Rule 59 motion asking the court to reconsider its decision after first ruling on the evidentiary motions, (R. 93 Motion for Reconsideration, Apx. p. 205); which the court denied. (R. 94 Order, Apx. p. 220). No issues remained in the district court, so Plaintiffs filed timely notice of appeal. (R. 95 Notice of Appeal, Apx. p. 222).

STATEMENT OF FACTS

The case arises against a complicated background concerning the way wine is produced, marketed and consumed, and the changing economics of the wine industry.[3] There are approximately 2100 wineries in the United States that produce and sell wine. A few large wineries, such as Gallo and Kendall-Jackson, dominate the national market. They supply most of the wine that is found in Michigan retail stores. (R. 43 Bridenbaugh Affidavit ¶ 4, Apx. p. 235). These wines are distributed through what is known as the three-tiered system: producers sell their wine to wholesalers who sell to retailers. (R. 37 Heald Affidavit ¶¶ 5, 8, 14, Apx. p. 43-48; R. 37 Stewart Interrog. 16, Apx. p. 104-05).

However, the vast majority of wineries are small enterprises with limited sales and small profit margins. (R. 37 Siegl Affidavit ¶ 2, Apx. pp. 87-90). Some are able to distribute their wines through a separate wholesaler, but many do not produce enough wine or have a large enough customer base for wholesale distribution. The problem is becoming increasingly accute as the number of

[3] This background has been thoroughly laid out in affidavits submitted to the district court by expert witness Russell Bridenbaugh (R. 43 Bridenbaugh Affidavit, Apx. pp. 234-44); the president of the American Vinters' Association Simon Siegl (R. 37 Siegl Affidavit, Apx. pp. 87-90); and two Michigan wine writers and critics, Eleanor and Ray Heald (R. 37 Heald Affidavit, Apx. pp. 43-49). The nature of the wine industry is also summarized in James Molnar, *Under the Influence: Why Alcohol Direct Shipment Laws Are a Violation of the Commerce Clause*, 9 U. MIAMI BUS. L. REV. 169, 171-77 (2001).

small wineries is growing, and the number of wholesalers is rapidly shrinking (Id.). Wineries that do not have wholesale distributors depend for their economic existence on direct sales and shipments to customers who have discovered their wines from Internet advertising, wine periodicals such as *Wine Enthusiast*, visiting their tasting rooms, and word-of-mouth. (Id.; R. 37 Stonington affidavit ¶ 12, Apx. p. 70). Such direct shipments can legally be made to some states, but are prohibited to others. (R. 43 Bridenbaugh Affidavit ¶ 10, Apx. p. 238).[4]

There are tens of thousands of different wines produced. To wine enthusiasts, wines are not interchangeable; each is unique. (R. 43 Bridenbaugh Affidavit ¶ 17, Apx. pp. 235-43). Retail stores cannot possibly carry them all, so only about 10% of the world's wine production is available on the shelves of Michigan retailers. (Id.). Which wines end up on retail shelves depends on choices made by wholesalers and retailers concerning which wines to carry. (Id. at ¶ 23). Wine enthusiasts who want wines not selected for distribution in Michigan can often find them for sale at retailers or auctions in other states, or directly from the winery. (Id. at ¶ 8-9, 17). Some of the wines most desired by enthusiasts are not sold through retail stores at all. Many allocated wines are

[4]See also Duncan Baird Douglass, *Constitutional Crossroads: Reconciling the Twenty-first Amendment and the Commerce Clause to Evaluate State Regulation of Interstate Commerce in Alcoholic Beverages*, 49 DUKE L.J. 1619, 1648-53 (2000) (reviewing state laws).

sold exclusively by wineries directly to a waiting list of customers. (Id., at ¶ 7). Although sometimes these purchases can be arranged by special order through a Michigan retailer, most can be completed only by a direct sale and shipment from the out-of-state source to the customer's residence. (Id., at ¶¶ 6-9, 23). The problem is that Michigan law prohibits interstate direct shipments.

Thirteen Michigan residents and an out-of-state winery are challenging Michigan's direct shipment law. Eleven of the individual Plaintiffs are adult wine consumers who enjoy collecting and drinking wine. They would like to buy unusual wines from out-of-state sources which are not available in Michigan, but are unable to do so because of the direct shipment law. They would be willing to report all such purchases and shipments, pay taxes on them, and comply with any other reasonable state regulations. (R. 37 Plaintiffs' affidavits; Apx. pp. 50-68).

For two plaintiffs, wine is more than an avocation. Eleanor and Ray Heald are professional wine writers, critics, consultants and educators. Their ability to maintain their occupation requires that they obtain advance samples of wine sent directly to them from out-of-state wineries so that they can critique, preview and write about them. Because of the direct shipment prohibition, they have been unable to obtain those samples and have lost income. (R. 37 Heald affidavit ¶¶ 4-7, 16-17; Apx. pp. 43-48).

The other plaintiff is Domaine Alfred, Inc., a California winery. Because of its small size, it cannot obtain a wholesaler to distribute its wine nationally, and instead relies primarily on Internet sales and direct shipments. It has received requests for wine from Michigan customers, but cannot fill them because the direct shipment law forbids direct shipments except by appropriately licensed businesses, and only an in-state winery can obtain the necessary license. The only license Domaine Alfred could get would limit it to distributing its wine through a wholesaler,[5] which it cannot afford to do.[6] It would be willing to obtain a license, remit taxes and comply with other regulations on direct shipments on the same basis as similar small wineries in Michigan, (R. 37 Domaine Alfred affidavit ¶¶ 11-15, Apx. pp. 85); but the State will not allow it to do so. (R. 37 Stewart interrogatory 16, Apx. pp. 104-05).

Michigan treats in-state and out-of-state wine producers differently. It prohibits out-of-state wineries from shipping wine directly to consumers, but allows in-state wineries to do so. (R. 37 Stewart Interrogatories 6-8, Apx. pp. 97-100; R. 37 O'Keefe affidavit ¶¶ 3-5, Apx. pp. 78-79). That means Michigan

[5] See explanation of Michigan's direct shipment law at footnote 1, supra.

[6] Both the wholesaler and retailer would mark up the price of the wine. Domaine Alfred would have to discount the price to the wholesaler in anticipation of the mark-ups, which would mean lower profits per bottle. It cannot afford this reduction in revenue without putting itself out of business. (R. 37 Domaine Alfred Affidavit ¶ 14, Apx. p. 85).

wineries may sell their wines directly to consumers, bypassing the clogged three-tiered system through which out-of-state wines must travel, and avoiding the extra costs added by wholesalers and retailers. This scheme gives Michigan wineries a competitive advantage in the marketplace. Their wines are relatively cheaper to consumers than out-of-state wines, and they realize more profit per bottle. (R. 43 Bridenbaugh Affidavit ¶ 14-15, Apx. pp. 239-40).

In order to sell and deliver wine directly to consumers, in-state wine sellers are required to obtain a license, take steps to assure that wine is not delivered to minors,[7] remit taxes, and comply with a variety of administrative regulations. (R. 37 O'Keefe affidavit ¶ 5, Apx. p. 78; R. 37 Stewart Interrogatories 6, 8, 11, 13, 15, Apx. pp. 97-104). Out-of-state sellers would be willing to comply with these same requirements in order to engage in direct sales and deliveries on an equal footing with their Michigan competitors, (R. 37 Heald Affidavit ¶ 10, Apx. p. 46; R. 37 World Beer Direct affidavit ¶ 2, Apx. p. 81; R. 37 Domaine Alfred Affidavit ¶ 15, Apx. p. 85); as they have done in other states; (R. 43 Bridenbaugh Affidavit ¶¶ 10, 19, 22, Apx. pp. 238-42; R. 37 Heald Affidavit ¶ 12, Apx. pp. 46); but Michigan will not allow them to do so. (R. 37 Stewart interrogatory 16, Apx. pp. 104-05).

[7] Mich. Comp. L. 1203 (as amended 2000)

SUMMARY OF ARGUMENT

1. The direct shipment law is unconstitutional

Michigan's direct shipment law violates the Commerce Clause on its face. It prohibits out-of-state wineries and retailers from selling and shipping wine directly to Michigan residents, while permitting in-state businesses to do so. This unequal treatment gives Michigan retailers and wineries a competitive price advantage and better access to the market. The Supreme Court has held that when a state liquor law discriminates against interstate commerce and favors in-state interests, the law is invalid as a per se violation of the Commerce Clause, and is usually struck down without further inquiry. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986); *Healy v. Beer Institute*, 491 U.S. 324, 341-42 (1989); *id.* at 344 (Scalia, J., concurring); *Bacchus Imports v. Diaz*, 468 U.S. 263, 275-76 (1983).

The Twenty-first Amendment cannot save Michigan's discriminatory scheme. The Supreme Court has explicitly rejected the argument that the Amendment immunizes state liquor laws from Commerce Clause scrutiny. Discriminatory liquor laws are presumptively unconstitutional despite the Twenty-first Amendment, because the discriminatory character of a law eliminates its Twenty-first Amendment protection. *Bacchus,* 468 U.S. at 275-76.

The State has in any event not proved that a total ban in direct sales and shipments from out of state is necessary to advance its asserted interests in raising revenue, limiting minors' access to alcoholic beverages, and ensuring an orderly market. These goals could be achieved by less restrictive alternatives such as licensing and regulating out-of-state wine sellers on the same basis as in-state sellers, and requiring them to remit taxes and demand proof of age.

2. The district court's failure to rule on evidentiary motions before summary judgment was error

Plaintiffs moved to strike much of the evidence submitted by the State for summary judgment because it did not meet the requirements of FED. R. CIV. P. 56. The district court never ruled on these motions. The failure to rule on pending evidentiary motions prior to granting summary judgment is error. The error is not harmless because Plaintiffs were objecting to the State's evidence on the very issues that the court deemed dispositive in its summary judgment order: whether the direct shipment law significantly facilitates the collection of taxes, whether it significantly reduces the risk of alcohol falling into the hands of minors, and whether the burden on interstate commerce is minor. (R. 91 Opinion pp. 9-10, Apx. pp. 216-17). Despite having six months to present additional admissible evidence, the State did not do so. Without evidence, the State cannot meet its burden of proving the need to prohibit interstate commerce.

ARGUMENT

I. MICHIGAN'S LAW PROHIBITING INTERSTATE DIRECT SHIPMENT OF WINE IS UNCONSTITUTIONAL

A. Standard of review

The district court decided this case on cross-motions for summary judgment. The Court of Appeals reviews a grant of summary judgment *de novo.* *Perez v. Aetna Life Ins. Co.*, 96 F.3d 813, 819 (6th Cir. 1996). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56. In reviewing a summary judgment, the Court of Appeals reviews the factual evidence and draws all reasonable inferences in favor of the non-moving party. *Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 326 (6th Cir. 2001).

The district court also denied a Rule 59 motion to alter or amend its judgment. When the Court of Appeals reviews a Rule 59 decision in conjunction with an appeal from summary judgment, the same *de novo* standard of review is employed; the Rule 59 motion is not reviewed separately *Perez,* 96 F.3d at 819.

B. Michigan's direct shipment law discriminates against out-of-state wineries and favors in-state wineries, and therefore violates the Commerce Clause

The Supreme Court has repeatedly held that state laws that discriminate against interstate commerce violate the Commerce Clause. The central purpose

of the Commerce Clause[8] was to prevent "economic Balkanization" brought about by protectionist laws and trade barriers that had plagued relations among the colonies. *Camps Newfound/Owatonna v. Town of Harrison,* 520 U.S. 564, 577 (1997); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 334 (1996); *Oregon Waste Sys. v. Dept. of Environmental Quality*, 511 U.S. 93, 98 (1994); *Bacchus Imports v. Dias,* 468 U.S. at 276*; Hughes v. Oklahoma,* 441 U.S. 322, 325 (1979). Yet, economic Balkanization is exactly the result of Michigan's discriminatory direct shipment law.

Discriminatory laws are unconstitutional even if they advance important state interests. A state must further its goals by even-handed regulation that does not discriminate against out-of-state merchants or give economic protection to local businesses. *See, e.g., Camps Newfound/Owatonna,* 520 U.S. at 581-82 (discriminatory tax exemption struck down); *Oregon Waste Sys.,* 511 U.S. at 101 (surcharge imposed only on out-of-state waste struck down); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988) (discriminatory tax exemption struck

[8] The Commerce Clause states that "Congress shall have Power…to regulate Commerce with foreign nations, and among the several States…" U.S. Const., Art. I, §8. By implication, if Congress has the exclusive power to regulate interstate commerce, the States may not interfere with it. This is known as the "dormant" commerce clause principle, first suggested by Justice Johnson in his concurring opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231-232, 239 (1824). *See also South Carolina State Hwy. Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 (1938) (Commerce Clause "by its own force" prohibits certain state actions that interfere with interstate commerce).

down); *Philadelphia v. New Jersey*, 437 U.S. at 617, 623-24 (1978) (statute prohibiting interstate shipment of trash struck down).

The Court has also said repeatedly that the nondiscrimination rule applies to state liquor laws. Although Section 2 of the Twenty-first Amendment[9] gives states the authority to regulate the transportation and sale of alcoholic beverages within their borders, all such regulations must be even-handed and non-discriminatory. Discrimination against interstate commerce remains a per se violation of the Commerce Clause even when alcohol is involved. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986); *Healy v. Beer Institute*, 491 U.S. 324, 341-42 (1989); *id*. at 344 (Scalia, J., concurring); *Bacchus Imports v. Diaz*, 468 U.S. 263, 275-76 (1983).

The Supreme Court uses a two-tiered test for scrutinizing state liquor laws to decide if they violate the Commerce Clause:

> This Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate

[9] "The transportation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited," U.S. Const., Amend. XXI, § 2.

> commerce clearly exceeds the local benefits. We have also recognized that there is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church*[10] balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.

Brown-Forman, 476 U.S. at 578-79.

Under first-tier analysis, if a state liquor statute "on its face… discriminates against brewers and shippers… engaged in interstate commerce," it violates the Commerce Clause, *Healy*, 491 U.S. at 340-41; and is "virtually per se invalid." *Brown-Forman*, 476 U.S. at 579.

In *Healy*, the Court struck down a Connecticut law that required out-of-state beer shippers, but not in-state shippers, to affirm that their prices in Connecticut were no higher than in surrounding states. This discrimination between in-state and out-of-state shippers was fatal.

> The Connecticut statute ... violates the Commerce Clause in a second respect: On its face, the statute discriminates against brewers and shippers of beer engaged in interstate commerce. In its previous decisions, this Court has followed a consistent practice of striking down state statutes that clearly discriminate against interstate commerce, unless that discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.

Healy, 491 U.S. at 340-41 (citation omitted). *See also id*. at 344 (Scalia, J.

[10] 397 U.S. 137 (1970).

concurring) (statute's invalidity established by discrimination).

In *Bacchus*, the Court struck down a Hawaii law that exempted wine manufactured in the state from a 20% tax imposed on wine coming from out of state. The discrimination again proved fatal.

> A cardinal rule of Commerce Clause jurisprudence is that "[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce ... by providing a direct commercial advantage to local business.'

Bacchus, 468 U.S. at 268 (citation omitted).

Michigan's direct shipment law has the same defects as the laws found unconstitutional in *Healy* and *Bacchus*. Like the law struck down in *Healy,* Michigan's direct shipment law restricts the commercial activity of out-of-state businesses but not in-state businesses. In-state wine retailers (including small wineries) may sell wine directly to Michigan residents and ship it to their homes; out-of-state retailers and wineries may not.[11]

Like the law struck down in *Bacchus,* Michigan's direct shipment law gives impermissible economic protection to in-state wineries, and protects in-state wholesalers from direct-shipment competition. It does not matter whether this

[11] Mich. Comp. L. §436.1607 (out-of-state sellers may not sell or deliver wine to consumers at retail); Mich. Comp. L. §436.1537 (in-state wine makers and merchants may sell wine at retail); Mich. Comp. L. §436.1111(7) (in-state retailers may ship directly). The direct shipment law is explained in detail in footnote 1, *supra.*

was the purpose of the law. The Court in *Bacchus* held that a finding of economic protectionism may be based on discriminatory effect as well as discriminatory purpose. 468 U.S. at 270. Michigan's direct shipment law has obvious discriminatory effects. A Michigan winery may sell and deliver its wine directly to consumers; an out-of-state winery may not. The out-of-state winery may only sell through a separate wholesaler, who marks up the price and sells it to a separate retailer, who will mark up the price again before selling the wine to consumers.[12] Michigan wineries can therefore sell their wines to consumers at a price advantage. (R. 43 Bridenbaugh Affidavit ¶ 14-15, Apx. pp. 239-40). In addition, in-state wineries and retailers may make direct shipments to consumers' homes, and out-of-state sellers may not. MICH. ADMIN. CODE R. 436.1011(6)(b). This rule gives in-state businesses a monopoly on serving customers who desire home delivery. This is a significant advantage in Michigan where many parts of the state (e.g., the Upper Peninsula) are a long way from the nearest well stocked wine store. For the limited privilege of selling its wines through a wholesaler at a competitive disadvantage, a small out-of-state winery must pay $300.00 for a license -- twelve times as much as the $25.00 license fee for a small Michigan winery. MICH. COMP. L. § 436.1525(1)(d)-(e).

[12]See Molnar, *supra* note 3, at 186 (quoting Wall Street Journal as calling this the most expensive distribution system for any package good).

The direct shipment law also appears to be part of an intentional effort by Michigan to provide economic protection to its native wine industry. This protectionist purpose can be inferred from companion sections of the 1998 Liquor Control Code. Section 301(5) provides for the creation of special farm mutual cooperative wineries that are allowed to sell wine directly from the premises because it is "beneficial to the Michigan grape and fruit industry." MICH. COMP. L. § 436.1301(5). Section 303(7)(d) creates a grape and wine industry council to "Provide for the promotion of the sale of Michigan wine grapes and wines for the purposes of maintaining or expanding present markets and creating new and larger domestic and foreign markets," MICH. COMP. L. §436.1303(7)(d); at the expense of similar industries in other states.

Because the Michigan direct shipment law discriminates against interstate commerce and provides economic protection to the in-state wine business, it is a per se violation of the Commerce Clause.

C. Michigan's direct shipment law also violates the Commerce Clause because it regulates commerce occurring in other states

The Supreme Court holds that a state liquor law is unconstitutional when it regulates commerce occurring in other states. This extraterritorial effect both establishes a per se violation of the Commerce Clause, and removes the law from the scope of the Twenty-first Amendment, which gives states authority to

regulate alcohol only within their own borders. The Court in *Healy* explained:

> [O]ur cases concerning the extraterritorial effect of state economic regulations stand at a minimum for the following propositions: First, the "Commerce Clause…precludes the application of a State statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the state...." Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial effect was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.

491 U.S. at 336. *See Brown-Forman*, 476 U.S. at 579-80 (law which regulates price of liquor in other states has impermissible extraterritorial effect). *See also Edgar v. MITE Corp.*, 457 U.S. 624, 643-46 (1982) (Illinois law regulating takeovers of companies doing business in Illinois is unconstitutional because it regulated some transactions occurring outside the state); *Baldwin v. G.A.F. Selig, Inc.*, 294 U.S. 511, 528 (1935) (New York milk-price statute that effectively regulated milk prices in Vermont had impermissible extraterritorial effect).

The Michigan direct shipment law's extraterritorial effect establishes a first-tier violation of the Commerce Clause. Like the statute struck down in *Healy*, the direct shipment law "by its plain terms... applies solely to interstate ... shippers, " 491 U.S. at 341; prohibiting only those shipments originating outside the state. The law "has the practical effect" of controlling transactions between a

Michigan resident and an out-of-state retailer that take place in another state. Plaintiffs on vacation in the Napa Valley cannot buy a case of wine at a tasting room and have it shipped home because of the direct shipment law. (R. 37 Stonington Affidavit ¶ 10, Apx. p. 70; R. 37 Eberle Affidavit ¶ 10, Apx. p. 73; R. 37 Cobb Affidavit ¶ 10, Apx. p. 76).

The direct shipment law's extraterritorial effect also removes it from the ambit of the Twenty-first Amendment. The Twenty-first Amendment generally allows states the authority to regulate liquor sales within its borders, but not to regulate commerce in other states.

> [T]he Twenty-first Amendment does not immunize State laws from invalidation under the Commerce Clause when those laws have the practical effect of regulating liquor sales in other states. A finding of extraterritorial effects disposes of the Twenty-first Amendment issue."

Healy, 491 U.S. at 341.

Because Michigan's direct shipment law has the practical effect of regulating wine sales that take place wholly or mostly in other states, its extraterritorial effect renders it unconstitutional.

D. The Twenty-first Amendment cannot save the constitutionality of Michigan's direct shipment law

The fact that the direct shipment law regulates an alcoholic beverage does not exempt it from Commerce Clause scrutiny. The Supreme Court has rejected the

argument that Section 2 of the Twenty-first Amendment immunizes discriminatory liquor laws from Commerce Clause scrutiny. In *Bacchus*, the Court stated:

> [O]ne thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization. State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.

468 U.S. at 276.

In this regard, the Supreme Court's interpretation of the relative powers of the Commerce Clause and Twenty-first Amendment has changed since the ratification of that Amendment in 1933. Originally, the Supreme Court read the Twenty-first Amendment as overriding the Commerce Clause and empowering states to enact any kind of regulation, including laws that discriminated against interstate commerce. *State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939). The *Young's Market* doctrine has since been abandoned by the Court as "absurd" and "patently bizarre." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-332 (1964). The "Twenty-first Amendment does not immunize state laws from invalidation under the Commerce Clause." *Healy*, 491 U.S. at 342. *See also*

Brown-Forman, 476 U.S. at 584 (it is "well settled that the Twenty-first Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause"); *Bacchus,* 468 U.S. at 275 ("the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause"); *Hostetter,* 377 U.S. at 331-332 (Twenty-first Amendment did not "'repeal' the Commerce Clause whenever regulation of intoxicating liquors is concerned"); *Cooper v. McBeath*, 11 F.3d 547, 555 (5th Cir. 1994) ("The assertion that § 2 of the Twenty-first Amendment automatically trumps the rigors of the Commerce Clause cannot stand").[13]

The State continues to press the repudiated *Young's Market* doctrine by pointing to one line in a plurality opinion in *North Dakota v. United States,* 495 U.S. 423, 431 (1990) to the effect that "within the area of its jurisdiction, the State has 'virtually complete control' over the importation and sale of liquor." The passage is merely dictum in a four-Justice plurality opinion in a case that did not involve the Commerce Clause and did not involve a discriminatory law.[14] The plurality did not discuss (or even mention) *Brown-Forman* and *Healy*, did

[13]See also Douglass, *supra* note 4, at 1631-38 (legislative history of 21st Amendment ambiguous, but generally does not support "unlimited power" argument).

[14] *North Dakota* was a Supremacy Clause case. The plurality opinion was authored by Justice Stevens who dissented from *Brown-Forman* and *Healy*. Justice Scalia concurred only because the case involved no discriminatory law. 495 U.S. at 444.

not purport to be announcing a rule for analysis of Commerce Clause violations, and gave no indication that this "broad power" extends to the enactment of discriminatory laws. The "virtually complete control" language is not an authoritative statement of the proper standard for weighing the constitutionality of state liquor laws that burden interstate commerce. The Supreme Court does not decide questions of law in cursory dictum inserted in unrelated cases. *In re Permian Basin Area Rate Cases,* 390 U.S. 747, 775 (1968). *See also Kastigar v. United States*, 406 U.S. 441, 454-55 (1972) (dictum is not binding authority); *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) (brief observations about the scope of a constitutional provision in a case where the particular provision was not directly at issue "though weighty and respectable, are nevertheless dicta" and not controlling). The district court therefore erred when it adopted this portion of the State's argument relying on *North Dakota.* (R. 91 Opinion and Order 6-7, 9, Apx. pp. 213-16).

The district court also relied on *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. den. sub nom. Bridenbaugh v. Carter*, 121 S.Ct. 1672 (2001), in which the Seventh Circuit upheld the constitutionality of Indiana's wine shipment law. (R. 91 Opinion and Order 7-8, Apx. pp. 214-15). Its reliance is misplaced. The Seventh Circuit ruled only that a state may require out-of-state wine sellers to abide by the *same* rules as in-state sellers. 227 F.3d at 853. If a

state requires in-state merchants to obtain permits and collect taxes, it may require out-of-state merchants to do likewise. Out-of-state sellers cannot use the Commerce Clause to argue that they have a right to be exempt from all state regulations, e.g., to be treated more favorably than in-state sellers.[15] However, *Bridenbaugh* did not hold, or even suggest, that a state could go beyond requiring that everyone play by the same rules, and create laws that favor in-state businesses. The issue of whether the Twenty-first Amendment authorizes laws that discriminate against out-of-state wine merchants was not addressed by the Seventh Circuit.[16] In contrast, it is squarely presented here.[17]

The Sixth Circuit has previously recognized that the scope of the Twenty-first Amendment is limited. Although "the states possess broad powers under the

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[15] The Seventh Circuit limited its opinion to deciding whether the state could prohibit consumers from obtaining wine from out-of-state sellers who "lack and do not want Indiana permits." 227 F.3d at 854.

[16] None of the plaintiffs in *Bridenbaugh* was an out-of-state winery, 227 F.3d at 849; so no one had standing to complain about the fact that the Indiana law discriminated against out-of-state wineries. The issue was therefore not developed at summary judgment and was not before the Seventh Circuit. 227 F.3d at 854 ("Plaintiffs do not complain about the statute that apparently limits distribution permits to Indiana's citizens"). The court therefore limited its holding to whether there was a constitutional violation from the consumers' point of view. 227 F.3d at 854 ("So far as these plaintiffs are concerned," the law treats all wines alike).

[17] In the present case, an out-of-state winery appears as a plaintiff and complains that it is treated less favorably than in-state wineries, and wants to be treated *the same* as Michigan wineries.

Twenty-first Amendment, ... this state power may not be abused to violate a person's federal constitutional rights." *37712, Inc. v. Ohio Dept. of Liquor Control*, 113 F.3d 614, 618 (6th Cir. 1997).[18] This principle should be invoked in the present case as well. The State's authority to regulate alcohol does not override a clear violation of the Plaintiffs' federal constitutional right to engage in interstate commerce. *See Dennis v. Higgins*, 498 U.S. 439, 448 (1991) (Commerce Clause confers individual right to engage in intertstate commerce).

E. Because the State could achieve its goals in a non-discriminatory manner, the direct shipment law fails the Commerce Clause/Twenty-first Amendment balancing test

The State's discriminatory treatment of out-of-state versus in-state direct shipments of wine is not necessary to advance its purported goals of raising revenue, limiting minors' access to alcoholic beverages, and ensuring an orderly market. Even assuming arguendo that any goals other than temperance are within the scope of the Twenty-first Amendment,[19] the State does not have

[18] The case involved a First Amendment/21st Amendment conflict.

[19] The Fifth Circuit has stated that the only significant purpose of the Twenty-first Amendment was to permit "dry" states to enforce local prohibition. *Wine Indus. of Michigan v. Miller*, 609 F.2d 1167, 1170 (5th Cir. 1980). *See Bacchus,* 468 U.S. at 276 (suggesting only core purpose of Twenty-first amendment is to "combat the perceived evils of an unrestricted traffic in liquor"); *Cooper v. McBeath,* 11 F.3d at 555 (regulating licensees not within core powers). *See also* Douglass, *supra* note 4, at 1631-36 (review of legislative history of 21st Amendment shows that it was meant to refer only to state dry laws).

unlimited power to regulate alcoholic beverages in furtherance of those purposes in any fashion it chooses. The Supreme Court has held that discriminatory laws, such as the Michigan direct shipment law, are "virtually per se invalid," *Brown-Forman,* 476 U.S. at 579; and may be upheld only if the State demonstrates that it is unable to achieve its goals in a nondiscriminatory manner.

Indeed, the legitimacy of the State's purpose is only marginally relevant, if at all. The Supreme Court has expressed doubts that a discriminatory law can ever survive strict Commerce Clause scrutiny. *Hughes,* 441 U.S. at 337 ("facial discrimination by itself may be a fatal defect"). Nevertheless, the Supreme Court has acknowledged the possibility that such a law might conceivably be constitutional if the state is unable to achieve its goals in a nondiscriminatory manner.

> Our cases leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. This is perhaps just another way of saying that what may appear to be a "discriminatory" provision in the constitutionally prohibited sense -- that is, a protectionist enactment -- may on closer analysis not be so. However it be put, the standards for such justification are high.

New Energy Co., 486 U.S. at 278. *Accord Camps Newfound/Owatonna v. Town of Harrison,* 520 U.S. 564, 581-82 (1997); *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality*, 511 U.S. 93, 101 (1994) (all containing similar

language). To Plaintiffs' knowledge, the Court has never actually found such a compelling situation to exist.

This principle appears to extend to liquor law cases, although direct precedent is sparse. In his concurring opinion in *Healey,* Justice Scalia indicated his understanding that the less-discriminatory alternative rule applied in liquor caes:

> [A state liquor] statute's invalidity is fully established by its facial discrimination against interstate commerce ... and by [the state's] inability to establish that the law's asserted goal ... cannot be achieved in a nondiscriminatory manner.

491 U.S. at 344 (citations omitted). In *Cooper v. McBeath,* 11 F.3d at 553, the Fifth Circuit stated its view that discriminatory liquor statutes theoretically "may survive a Commerce Clause challenge if the State can demonstrate that the statutes advance 'a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives,'" but that the state faces a "towering" burden of proof.[20]

The State of Michigan has not satisfied its towering burden of proof. Speculation and bald assertions are not enough. For summary judgment, factual allegations are not presumed to be true, but must be supported by evidence. FED.

[20]See also Douglass, *supra* note 4, at 1625, 1627, 1653 (direct shipment laws invalid unless state can show they are least discriminatory means); Molnar, *supra* note 3, at 185 ("where a law affirmatively discriminates against interstate commerce the burden is on the state to show that the statute serves a legitimate local purpose and that this purpose could not be achieved through available nondiscriminatory means").

R. CIV. P. 56 (conclusory allegations inadequate); *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 888 (1990) (claims of state interest require evidence in the record). This requirement of proof extends to assertions that liquor laws advance a state's Twenty-first Amendment interests. *See California Retail Liquor Dealers Assn. v. Midcal Aluminum,* 445 U.S. 97, 114 (1980) (unsubstantiated concerns not enough; state must demonstrate that a liquor regulation directly serves a 21st Amendment interest); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 350 (1987) (rejecting state's avowed interest in protecting small retailers as "unsubstantiated"); *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 212 (4th Cir. 2001) (state must prove its avowed interests; trial judge cannot rely on common sense); *Miller v. Hedlund*, 813 F.2d 1344, 1352 & n.7 (9th Cir. 1987) (Twenty-first Amendment issues "ultimately rest upon findings and conclusions having a large factual component"). *See also* Vijay Shanker, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment,* 85 VA. L. REV. 353, 367, 381 (1999) (in Twenty-first Amendment cases, courts "are requiring that a proffered rationale be borne out by evidence").

The evidence shows that the State could achieve its goals by reasonable nondiscriminatory alternatives. The state's concerns about ensuring an orderly market can be advanced by issuing permits to out-of-state wineries on the same

basis as in-state wineries, and imposing on them the same investigation, inspection, reporting, labeling and financial regulations. Out-of-state wineries are already heavily regulated (R. 43 Bridenbaugh affidavit ¶ 19, Apx. p. 241); and are perfectly willing to abide by Michigan regulations, (R. 37 Heald Affidavit ¶ 10, Apx. p. 46; R. 37 World Beer Direct affidavit ¶ 2, Apx. p. 81; R. 37 Domaine Alfred Affidavit ¶ 15, Apx. p. 85); as they have done in other states where direct shipments are allowed. (R. 43 Bridenbaugh Affidavit ¶¶ 10, 22, Apx. pp. 238-42; R. 37 Heald Affidavit ¶ 12, Apx. p. 46). The mere fact that a seller's main office may be out of the state cannot justify excluding it from the market altogether. As one court put it, "[i]n this age of ... computer networks, fax machines, and other technological marvels," it is no harder to inspect and regulate out-of-state license holders than in-state ones. *Cooper v. McBeath*, 11 F.3d at 554.

The State's concerns about raising revenue can be furthered by requiring out-of-state wineries to collect and remit taxes on the same basis as in-state wineries who do not use a wholesaler, or by collecting taxes from consumers. Both out-of-state wineries and in-state consumers are willing to pay these taxes. (R. 37 Plaintiffs' affidavits; Apx. p. 50-68; R. 37 Heald Affidavit ¶¶ 10-12, Apx. p. 46; R. 37 Domaine Alfred affidavit ¶¶ 11-15, Apx. p. 85; R. 37 World Beer Direct Affidavit ¶ 2, Apx. p. 81). Out-of-state wineries already remit the appropriate

taxes in other states where direct shipments are allowed. N.H. REV. STAT. § 178:14-a(II) (2000); LA. REV. STAT. § 26:359(B) (2000). (R. 43 Bridenbaugh affidavit ¶ 22, Apx. p. 242). Consumers are already required to pay taxes on wine they personally transport into Michigan. Mich. Comp. L. §436.1203(7). (R. 37 Stewart Interrogatory 11, Apx. pp. 100-01).

The State's goal of keeping alcohol out of the hands of minors could be achieved by requiring out-of-state sellers to demand proof of age before selling or delivering wine, and by threatening them with loss of the privilege to sell in Michigan if they do not take sufficient safeguards. This is how the State assures that in-state wineries and retailers do not deliver to minors. *See* MICH. COMP. L. § 436.1203(2) (as amended 2000); MICH. ADMIN. CODE R. 436.1011(6)(b). There is no evidence that what works for in-state businesses would not work equally well for out-of-state sellers.[21] Out-of-state sellers are willing to take diligent steps to keep wine out of the hands of minors, (R. 37 Heald Affidavit ¶ 10, Apx. p. 46); and indeed, already do so. (R. 37 Stonington Affidavit ¶ 5, Apx. p. 70; R. 37 Domaine Alfred Affidavit ¶ 5, Apx. p. 84). They already face loss of state and federal licenses if caught selling to minors. (R. 43 Bridenbaugh Affidavit ¶ 19, Apx. p. 241; R. 37 Stonington Affidavit ¶ 4-6, Apx. p. 69-70; R. 37 Eberle Affidavit ¶4-6, Apx. p. 72-73). Other states permit direct shipping, and

[21] See Douglass, *supra* note 4, at 1652.

there are no reports that minors are gaining frequent or easy access to wine through these licensed shipments. (R. 43 Bridenbaugh Affidavit ¶ 22, Apx. p. 242).[22]

Because Plaintiffs' admissible evidence offered at summary judgment shows that the State can achieve its goals by licensing and regulating wine shipments originating out of state on the same basis as they do in-state shipments, the law totally banning direct sales and shipments of wine by out-of-state sellers violates the Commerce Clause and is not saved by the Twenty-first Amendment.

II. THE DISTRICT COURT ERRED BY NOT RULING ON PLAINTIFFS' EVIDENTIARY MOTIONS PRIOR TO GRANTING SUMMARY JUDGMENT

A. Standard of review

A district court's failure to rule on evidentiary motions prior to granting summary judgment is reviewed for abuse of discretion. Although Plaintiffs are unable to find a Sixth Circuit case directly on point, a district court's failure to rule on other types of motions has been reviewed for abuse of discretion. *See Ellison v. Ford Motor Co.*, 847 F.2d 297, 300 (6th Cir. 1988) (failure to rule on motion to amend complaint prior to granting summary judgment is abuse of discretion).

[22] See Molnar, *supra* note 3, at 179 (few complaints from California where direct shipments are legal and regulated).

If the district court's failure to rule is deemed a *sub silentio* denial of Plaintiffs' evidentiary objections, those rulings are reviewed by two different standards. Most of the district court's evidentiary determinations are reviewed for abuse of discretion. However, the court's conclusions on points of evidence law, such as whether testimony constitutues hearsay within the meaning of the Federal Rules of Evidence, are reviewd de novo. *Hancock v. Dodson*, 958 F.2d 1367, 1371 (6th Cir. 1992).

B. The failure to rule on Plaintiffs' evidentiary motions prior to granting summary judgment was error

Prior to summary judgment, Plaintiffs filed a Motion to Strike a number of affidavits and other exhibits submitted by the State. Plaintiffs' asserted that these exhibits were not based on personal knowledge, did not set forth admissible evidence, or did not show that the affiant was competent to testify, all of which are required under FED.R.CIV.P. 56(e). (R. 64 Motion, Apx. p. 148). Plaintiffs requested that the district court strike these exhibits and not consider them in arriving at a summary judgment decision. *See State Mutual Life Ass. Co. v. Deer Creek Park*, 612 F.2d 259, 264 (6th Cir. 1979) (evidence which does not meet the Rule 56 standard may not be considered at summary judgment). The district court failed to rule on Plaintiffs' evidentiary motions prior to granting

Defendants' motion for summary judgment.[23]

Precedent on whether the district court has a duty to rule on pending evidentiary motions prior to granting summary judgment is sparse. The leading case in the Sixth Circuit is *Wimberly v. Clark Controller Co.*, 364 F.2d 225, 227 (6th Cir. 1966), which holds that it is "the better practice" to rule on pending evidentiary motions prior to granting a motion to dismiss, although a ruling is not absolutely necessary if the judge does not rely on any of the objected-to evidence in his decision. *See also Ellison v. Ford Motor Co.*, 847 F.2d 297, 300 (6th Cir. 1988) (failure to rule on motion to amend complaint prior to granting summary judgment is abuse of discretion). Cases from other circuits agree that the trial judge normally must rule on motions. *U.S. East Telecomm., Inc., v. U.S. West Information Sys., Inc.*, 15 F.3d 261, 263 (2nd Cir. 1994) (court must decide a properly filed motion); *Chudasama v. Mazda Motor Corp.,* 123 F.3d 1353, 1367 (11th Cir. 1997) (failure to rule on pending motion abuse of discretion). A ruling must be accompanied by a reasoned explanation of its basis. *See Tolefree v. Cudahy*, 49 F.3d 1243, 1244 (7th Cir. 1995). In this case, the district judge neither ruled on the motions, nor explained his basis, nor made it clear that he

[23] The court stated at the conclusion of its opinion that "the remaining motions are denied as moot," but this does not constitute a ruling on the merits of Plaintiffs' objections. Plaintiffs brought the failure to rule to the attention of the judge in a Motion to Reconsider (R. 93 Motion, Apx. pp. 205), which was denied. (R. 94 Order, Apx. p. 220).

did not rely on any of the objected-to evidence.

The failure to rule is not harmless error. As discussed in the next section, the evidence objected to constituted all the evidence submitted by the State on the very issues that the court deemed dispositive in its summary judgment order -- whether the direct shipment law significantly facilitates the collection of taxes, reduces the risk of alcohol falling into the hands of minors, and places no real burden on interstate commerce. (R. 91 Opinion and Order 9-10, Apx. pp. 216-17). Without the evidence, the State cannot meet its burden of proving that discriminating against interstate commerce is the only realistic way to advance its Twenty-first Amendment goals,[24] so awarding summary judgment to the State was error. The State had six months from the time Plaintiffs filed their motion until the summary judgment hearing in which to develop and submit other admissible evidence on these issues, but failed to do so.

C. If the failure to rule is deemed a *sub silentio* denial of Plaintiffs' objections, the district court's rulings were prejudicial error

If the district court's failure to rule is deemed a *sub silentio* denial of Plaintiffs' evidentiary motions,[25] the rulings are erroneous.

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[24] The requirement that the state prove that it cannot advance its interests by nondiscriminatory alternatives is discussed in section I. E. of this Brief, *supra* at pages 26-32.

[25] A court may implicitly rule on a motion by taking action inconsistent with it. *Lohnes v. Level 3 Comm., Inc*., 272 F.3d 49, 59 (1st Cir. 2001).

Plaintiffs moved to strike all of the evidence Defendants submitted on the key issues of collection of taxes, minors' access to alcohol, and the burden on interstate commerce. The exhibits in question failed to comply with the basic requirements of FED. R. CIV. P. 56(e):

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Evidence which would be inadmissible at trial may not be considered at summary judgment. *Smoot v. United Transp. Union*, 246 F.3d 633, 649 (6th Cir. 2001).

Plaintiffs objected to the only two items of evidence offered by the Defendants concerning whether the direct shipment law significantly facilitates the collection of taxes. The first is a document called "Taxation of Remote Sales Tax Revenue Loss Estimates." (R. 54 exhibit 2, Apx. p. 299). This exhibit is irrelevant under Fed.R.Evid. 402 because it contains an official estimate of tax revenues lost to mail order sales generally (e.g., clothing), but contains nothing concerning wine taxes. *See Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365, 374 (6th Cir. 1999) (irrelevant evidence may not be considered on summary judgment). It is also unauthenticated under Fed.R.Evid. 902(4). Although it purports to be a copy of a record of the Michigan Department of Treasury, it is not certified. Unauthenticated and uncertified copies of documents are not

acceptable evidence at summary judgment. *Carter v. Western Res. Psych. Habilitation Ctr.*, 767 F.2d 270, 272 n.2 (6th Cir. 1985). The second item of evidence is paragraph 11 of the Smith affidavit (R. 54 exhibit 5, Apx. p. 322). It contains an improper opinion that out-of-state sellers will not comply with Michigan tax laws if direct shipping is permitted. Given that direct wine shipments are currently prohibited, the affiant cannot possibly have any personal knowledge about the behavior of out-of-state sellers if direct shipping were to become legal, so the opinion violates Fed.R.Evid. 701. See *Citizens to Preserve Overton Park v. Volpe*, 432 F.2d 1307, 1319 (6th Cir. 1970), *rev'd on other grounds* 401 U.S. 402 (1971) (affidavits not based on personal knowledge may not be considered on summary judgment). Despite having six months to submit additional exhibits, the State neither corrected the defects in these two exhibits, nor presented other evidence to prove that the direct shipment law facilitates the collection of taxes.

Plaintiffs also objected to the only four items of evidence offered by the Defendants in support of their assertion that the direct shipment law significantly reduces the risk of alcohol falling into the hands of minors. The first is paragraph 10 of the Smith affidavit (R. 54 exhibit 5, Apx. at p. 322), which contains the affiant's opinion that in-state retailers have a greater incentive to check minors' identification that out-of-state sellers. This opinion violates FED.

R. EVID. 701. The affidavit describes over 3,000 investigations concerning sales to minors by in-state sellers, but does not assert that the Commission has conducted similar investigations of out-of-state sellers' willingness to check identification. Therefore, to the extent that the opinion compares in-state to out-of-state sellers, it is not based on the perception of the witness, but constitutes speculation. The second exhibit is the Mead affidavit (R. 54 exhibit 6, Apx. pp. 325-27) which contains several references to minors' access to alcohol. Irene Mead is counsel of record for the Defendants, and as such, is not a competent witness.[26] *E.g., Petrilli v. Drechsel*, 94 F.3d 325, 330 (7th Cir. 1996); *United States v. Angiulo*, 897 F.2d 1169, 1194 (1st Cir.1990). The third exhibit was a document entitled "Americans for Responsible Alcohol Access" (R. 54 exhibit 7, Apx. pp. 356-59) which is unsworn and unauthenticated. Unsworn statements are not admissible in support of summary judgment. *Pollock v. Pollock*, 154 F.3d 601, 612 (6th Cir. 1998).[27] The fourth exhibit is a press release from Utah Senator Orrin Hatch (R. 54 exhibit 10, Apx. pp. 446-47), containing his views

[26] Fed. R. Civ. P. 56 requires that an affidavit "shall show affirmatively that the affiant is competent to testify to the matters stated therein."

[27] The document also appears to be some kind of social science survey, but no foundation has been laid establishing the author as an expert or his methods of collecting and analyzing data as scientifically reliable. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). *See also* FED.R.EVID. 702 (amendment eff. 12/1/00) (expert evidence must be "product of reliable principles and methods").

about alcohol and minors based on what he has seen on television. It is unsworn, and therefore not admissible in support of summary judgment. *Pollock v. Pollock, supra*.[28] Despite having six months to submit additional exhibits, the State neither corrected the defects in these four exhibits, nor presented other evidence to prove that the direct shipment law reduced the risk of alcohol falling into the hands of minors.

Finally, Plaintiffs objected to the only item of evidence offered by Defendants purporting to show that the direct shipment law's burden on interstate commerce is trivial. The Wendt affidavit (R. 54 exhibit 4, Apx. pp. 315-17) contains her opinion concerning how to interpret the law governing Outstate Seller of Wine licenses and the conditions under which wine "can legally be sold in Michigan." These statements are inadmissible legal opinions which are not permitted under FED.R.EVID. 701. *See Torres v. County of Oakland*, 758 F.2d 147 (6th Cir. 1985). Despite having six months to submit additional exhibits, the State neither corrected the defects in this exhibit, nor presented other evidence to prove that the direct shipment law's impact on interstate commerce was minor.

These erroroneous *sub silentio* rulings are prejudicial. The evidence objected

[28] The press release also is not based on personal knowledge, but refers to a report Sen. Hatch saw on television about an irrelevant incident that occurred in Utah.

to constituted all the State's evidence in support of its claim that the direct shipment law advances its interests under the Twenty-first Amendment. Other federal courts have held that the legitimacy of a state's Twenty-first Amendment claim rests upon conclusions that have a large factual content. *TFWS, Inc. v. Schaefer*, 242 F.3d at 212-13; *Miller v. Hedlund*, 813 F.2d at 1352. The State bears the burden of proof on its Twenty-first Amendment defense, and has submitted no admissible evidence on the issue.

CONCLUSION

Michigan's direct shipment law discriminates against interstate commerce and gives a competitive advantage to in-state wine sellers. It has the practical effect of regulating wine sales that take place in other states. These are Commerce Clause violations. The U.S. Supreme Court has acknowledged that the Twenty-first Amendment gives states authority to regulate alcohol sales within their borders, but not to ignore the Commerce Clause. State liquor laws like this one that discriminate against interstate commerce and have extraterritorial effect, are "virtually per se invalid." This Court should reverse the district court's grant of summary judgment to the State, and remand with instructions that the district court enter judgment in favor of the Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with Rule 32(a)(7)(b) and contains fewer than 14,000 words. According to the word count program of the word processing system used to prepare it (WordPerfect 9.0), this brief including footnotes contains 9606 words.

May 9, 2002

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CERTIFICATE OF SERVICE

The undersigned declares under penalties of perjury that on April 30, 2002, he filed the final Brief for Plaintiffs-Appellants with the clerk of the 6th Circuit U.S. Court of Appeals, and served copies on the attorneys of record, by placing said documents into envelopes with first-class postage prepaid and depositing them into the U.S. mail addressed as follows:

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STATUTORY ADDENDUM

MICH. COMP. L. § 436.1109

* * *

(9) "Outstate seller of wine" means a person licensed by the commission to sell wine which has not been manufactured in this state to a wholesaler in this state in accordance with rules promulgated by the commission and to sell sacramental wine as provided in section 301.

MICH. COMP. L. § 436.1111

* * *

(7) "Sale" includes the exchange, barter, traffic, furnishing, or giving away of alcoholic liquor. In the case of a sale in which a shipment or delivery of alcoholic liquor is made by a common or other carrier, the sale of the alcoholic liquor is considered to be made in the county within which the delivery of the alcoholic liquor is made by that carrier to the consignee or his or her agent or employee, and venue for the prosecution for that sale may be in the county or city where the seller resides or from which the shipment is made or at the place of delivery.

* * *

(11) "Specially designated distributor" means a person engaged in an established business licensed by the commission to distribute spirits and mixed spirit drink in the original package for the commission for consumption off the premises.

(12) "Specially designated merchant" means a person to whom the commission grants a license to sell beer or wine, or both, at retail for consumption off the licensed premises.

MICH. COMP. L. § 436.1113

* * *

(9) "Wine maker" means any person licensed by the commission to manufacture wine and sell, at wholesale or retail, wine manufactured by that person.

MICH. COMP. L. § 436.1203 (as it existed when case was filed)

(1) Except as provided in this section and section 301, a sale, delivery, or importation of alcoholic liquor, including alcoholic liquor for personal use, shall not be made 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. 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. This section shall not apply in the case of an alcoholic liquor brought into this state for personal or household use in an amount permitted by federal law by a person of legal age to purchase alcoholic liquor at the time of reentry into this state from without the territorial limits of the United States if the person 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.

(2) Notwithstanding subsection (1), a person who is of legal age to purchase alcoholic liquor may import from another state for that person's personal use not more than 312 ounces of alcoholic liquor that contains less than 21% alcohol by volume.

MICH. COMP. L. § 436.1203 (as amended 2000)

(1) Except as provided in this section and section 301 [MCL §436.1301], a sale, delivery, or importation of alcoholic liquor, including alcoholic liquor for personal use, shall not be made 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) For purposes of subsection (1), the sale, delivery, or importation of alcoholic liquor includes, but is not limited to, the sale, delivery, or importation of alcoholic liquor transacted or caused to be transacted by means of any mail order, internet, telephone, computer, device, or other electronic means. Subject to subsection (3), if a retail sale, delivery, or importation of alcoholic liquor occurs by any such means, the retailer must comply with all of the following:

(a) Be appropriately licensed under the laws of this state.

(b) Pay any applicable taxes to the commission.

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

(d) Verify the age of the individual placing the order by obtaining from him or her an affirmation that he or she is of legal age to purchase alcoholic liquor. The person receiving and accepting the order shall record the name, address, date of birth, and telephone number of the person placing the order on the order form or other verifiable record of a

type and generated in a manner approved by the commission.

(e) Upon request of the commission, make available to the commission any document used to verify the age of the individual ordering the alcoholic liquor from the retail seller.

(f) Stamp, print, or label on the outside of the shipping container language that clearly establishes in a prominent fashion that the package contains alcoholic liquor and that the recipient at the time of the delivery is required to provide identification verifying his or her age along with a signature.

(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 any.

(3) Notwithstanding subsection (2), in the case of a retail sale, delivery, or importation of alcoholic liquor occurring by any means described in subsection (2), a person taking the order on behalf of the retailer must comply with subsection (2)(c) through (g).

(4) The person who delivers the alcoholic liquor shall verify that the individual accepting delivery is of legal age and is either the individual who placed the order or the designated recipient residing at the same address or is 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 of legal age, the delivery person shall return the alcoholic liquor to the retailer. A delivery person who returns alcoholic liquor to the retailer due to inability to obtain the purchaser's or designated recipient's legal age is not liable for any damages suffered by the purchaser or retailer.

* * *

(7) A person who is of legal age to purchase alcoholic liquor 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 person's personal use, notwithstanding subsection (1).

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

MICH. COMP. L. § 436.1301

* * *

(5) On approval by the commission, the corporation and securities bureau shall incorporate a limited number of farm mutual cooperative wineries as the commission determines to be beneficial to the Michigan grape and fruit industry. These wineries shall be licensed under this act and the payment of 1 license fee annually by the corporation shall authorize wine making on the premises of the corporation and also on the premises of the grape and fruit growing farmers who are members of or stockholders in the corporation. Upon incorporation of a farmers' cooperative corporation as provided for in this section, the members of or the stockholders in the corporation shall be certified to be Michigan grape and fruit growing farmers. Wine making by cooperative corporations on farm premises is allowed, but all sales of the wine shall be made by the corporation and from the corporation premises.

MICH. COMP. L. § 436.1525

(1) The following license fees shall be paid at the time of filing applications or as otherwise provided in this act:

* * *

(d) Wine makers, blenders, and rectifiers of wine, including makers, blenders, and rectifiers of wines containing 21% or less alcohol by volume, $100.00. The small wine maker license fee shall be $25.00.

(e) Outstate seller of wine, delivering or selling wine in this state, $300.00.

MICH. COMP. L. § 436.1537

(1) The following classes of vendors may sell alcoholic liquors at retail as provided in this section:

(a) Taverns ...

(b) Class C license where beer, wine, mixed spirit drink, and spirits may be sold for consumption on the premises.

(c) Clubs ...

(d) Hotels ....

(e) Specially designated merchants, where beer and wine may be sold for consumption off the premises only.

(f) Specially designated distributors where spirits and mixed spirit drink may be sold for consumption off the premises only.

(g) Special licenses where beer and wine or beer, wine, mixed spirit drink, and spirits may be sold for consumption on the premises only.

(h) Dining cars ...

(i) Brewpubs ...

(j) Micro brewers ...

(2) A wine maker may sell wine made by that wine maker in a restaurant for consumption on or off the premises if the restaurant is owned by the wine maker or operated by another person under an agreement approved by the commission and located on the premises where the wine maker is licensed.

(3) A wine maker, with the prior written approval of the commission, may conduct wine tastings of wines made by that wine maker and may sell the wine made by that wine maker for consumption off the premises at a location other than the premises where the wine maker is licensed to manufacture wine, under the following conditions:

(a) The premises upon which the wine tasting occurs conforms to local and state sanitation requirements.

(b) Not more than 1 wine tasting location as described in this subsection, per wine maker, may be approved by the commission in a licensing year.

(c) Payment of a $100.00 fee per location is made to the commission.

(d) The wine tasting locations shall be considered licensed premises.

(e) Wine tasting does not take place between the hours of 2 a.m. and 7 a.m. Monday through Saturday, or between 2 a.m. and 12 noon on Sunday.

(f) The premises and the licensee comply with and are subject to all applicable rules promulgated by the commission.

MICH. COMP. L. § 436.1607

(1) Except as provided in section 537(2), a warehouser, mixed spirit drink manufacturer, wholesaler, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits shall not be licensed as a specially designated merchant or a specially designated distributor or permitted to sell or deliver to the consumer any quantity of alcoholic liquor at retail.

(2) A specially designated distributor or specially designated merchant or any other retailer shall not hold a mixed spirit drink manufacturer, wholesale, warehouse, outstate seller of beer, outstate seller of mixed spirit drink, or outstate seller of wine license.

MICH. ADMIN. CODE R. 436.1011 (MLCC Rule 11)

* * *

(6) A retail licensee shall not sell any alcoholic liquor off the licensed premises except as follows:

* * *

(b) An off-premises licensee may deliver a pre-ordered quantity of alcoholic liquor to a customer; however, a delivery shall not be made to any customer on the campus of any 2- or 4-year college or university, unless the customer is licensed by the commission.

APPELLANTS' DESIGNATION OF APPENDIX CONTENTS

Appellant, pursuant to Sixth Circuit Rule 28(d), hereby designates the following filings in the district court's record as items to be included in the joint appendix:

Description of Entry	Date filed in District Court	Record Entry Number
Defendants' Motion for Summary Judgment	6/15/00	16
Intervenor's Motion to Dismiss	9/29/00	36
Plaintiffs' Motion for Summary Judgment with exhibits Ex. 3-A, Heald affidavit Ex. 3-B, Arundel affidavit Ex. 3-C, Brown affidavit Ex. 3-D, McMinn affidavit Ex. 3-E, Stein affidavit Ex. 3-F, Horwath affidavit Ex. 3-G, Christina affidavit Ex. 3-H, Hopkins affidavit Ex. 4-A, Stonington affidavit Ex. 4-B, Eberle Affidavit Ex. 4-C, Cobb (Karly) Affidavit Ex. 4-E, O'Keefe affidavit Ex. 4-F, World Beer Direct Affidavit Ex. 4-G, Domaine Alfred affidavit Ex. 5-A, Siegl Affidavit Ex. 6-A, Stewart's Answers to Interrogatories 6, 7, 8, 10, 11, 13, 15, 16, 19	10/2/00	37
Plaintiffs' Appendix, Exhibit 3, Bridenbaugh Affidavit	10/5/00	43
Amended Complaint	10/13/00	48

Description of Entry	Date filed in District Court	Record Entry Number
Defendants' Exhibits in Response to Plaintiffs' Motion for Summary Judgment Ex. 2, Taxation of Remote Sales Ex. 4, Wendt affidavit Ex. 5, Smith affidavit Ex. 6, Mead affidavit Ex. 7, Alcohol Survey Ex. 10, Statement of Sen. Hatch	11/3/00	54
Plaintiffs' Motion to Strike Exhibits	11/20/00	64
Defendants' Supplemental Motion for Summary Judgment	12/18/00	74
Intervenor's Supplemental Motion to Dismiss	12/27/00	81
Opinion and Order	9/28/01	91
Judgment	9/27/01	92
Plaintiffs' Motion for Reconsideration	10/15/01	93
Order Denying Motion for Reconsideration	11/5/01	94
Plaintiffs' Notice of Appeal	12/4/01	95