No. 03-1120

IN THE

Supreme Court of the United States

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,

v.

ELEANOR HEALD, *et al.*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Of Counsel:
LOUIS R. COHEN
C. BOYDEN GRAY
TODD ZUBLER
WILMER CUTLER
PICKERING LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

ANTHONY S. KOGUT
Counsel of Record
JOHN A. YEAGER
CURTIS R. HADLEY
WILLINGHAM & COTÉ, P.C.
333 Albert Avenue, Suite 500
East Lansing, Michigan 48826
(517) 351-6200

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The questions presented in MB&WWA's petition are plainly ripe for this Court's review, and this case is an excellent vehicle. Six different federal Circuits have now considered the constitutionality of broadly similar state statutes barring shipment of wine across the state's borders directly to resident retail customers.[1] (The most recent decision, rendered since MB&WWA's petition was filed, is *Swedenburg* v. *Kelly*, 358 F.3d 223 (2d Cir. Feb. 12, 2004), upholding the New York statute.) The Circuits have disagreed sharply

[1] *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) (Indiana) (upheld statute); *Bainbridge* v. *Turner*, 311 F.3d 1104, 1115 n.17 (11th Cir. 2002) (Florida) (remanded for application of "far less than . . . strict scrutiny"); *Beskind* v. *Easley*, 325 F.3d 506 (4th Cir. 2003) (North Carolina) (invalidated only in-state exception); *Dickerson* v. *Bailey*, 336 F.3d 388 (5th Cir. 2003) (Texas) (invalidated statute); *Heald* v. *Engler*, 342 F.3d 517 (6th Cir. 2003) (Michigan) (invalidated statute); *Swedenburg* v. *Kelly*, 358 F.3d 223 (2d Cir. 2004) (New York) (upheld statute).

and explicitly about (a) whether the Twenty-first Amendment allows states to bar such shipments while they permit licensed in-state wineries to ship directly to retail customers, and (b) if not, whether the proper remedy is to strike the exception for in-state wineries or invalidate the entire statutory scheme, leaving the importation of intoxicating beverages for use within the state entirely uncontrolled. This case presents both of these questions, in the context of a typical state statute. The Court should grant both the present petition (No. 03-1120) and the petition of the State of Michigan (No. 03-1116).

1. As the petition noted, the Sixth Circuit authorized respondents to do exactly what the Twenty-first Amendment expressly prohibits: "import[] [intoxicating liquors] into [Michigan] for delivery or use therein . . . in violation of the laws thereof." U.S. Const. amend. XXI, § 2. No decision of this Court—indeed, no individual Justice—has ever suggested that the dormant Commerce Clause somehow overrides or limits the explicit Twenty-first Amendment power to regulate the physical importation of alcohol for use within a state's borders. *See* Pet. 10-11; *see also Swedenburg*, 358 F.3d at 233, 236-237. On the contrary, as respondents acknowledge (Opp. 9-10), the purpose of section 2 of the Amendment was to override the dormant Commerce Clause.

2. This Court's cases have consistently acknowledged broad state power over physical importation, unconstrained by the dormant Commerce Clause. As respondents grudgingly admit, "[T]he Court [in *Young's Market*] . . . reject[ed] the argument that, under section 2, 'if [a State] permits [the] manufacture and sale [of alcohol], it must let imported liquors compete with the domestic on equal terms.'" Opp. 12 (citation omitted) (last three alterations in original). All of this Court's decisions bearing on physical importation are consistent. *See* Pet. 7-9. All of the cases cited by respondents (Opp. 12-17) involved very different issues: inapplicability of the Twenty-first Amendment by its own terms, or state legislation regulating prices in other states, or Congress's right to exercise its own Commerce Clause power, or

state violations of constitutional provisions other than the Commerce Clause in contexts other than physical importation. *See* Pet. 9-11; *Swedenburg*, 358 F.3d at 234-237.

In particular, *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), involved New York's attempt to regulate alcohol intended to be delivered and used "not in New York, but in a foreign country," *id.* at 333, and the issue was whether New York must abide by "a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations," *id.* at 334. It was in that context—the coexistence of federal and state regulatory power, not competing constitutional demands on the states—that the Court said "both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution." *Id.* at 332.[2] And as respondents recognize, *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986), and *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324 (1989), dealt with state statutes that "had the impermissible effect of regulating [alcohol] prices in *other* States." Opp. 16 (emphasis added); *see also id.* at 16-17 (*Healy* rested on principle that "the Twenty-first Amendment conferred no authority on States to regulate extraterritorially."). Finally, *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), did not involve importation but rather a discriminatory tax imposed after beverages had crossed

[2] There is no competing congressional enactment in this case. On the contrary, after the adoption of the Twenty-first Amendment, Congress exercised its Commerce Clause power in 1935 to readopt the Webb-Kenyon Act, 27 U.S.C. § 122 (1935), which is similar to section 2 of the Amendment. In light of Webb-Kenyon, the dormant Commerce Clause has no proper application here, because Congress has dealt explicitly with the precise question at issue. *See Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982) ("Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action.").

state lines.[3] As the *Swedenburg* court noted, the state sought to defend the tax as not affecting commerce (and raised the Twenty-first Amendment only in this Court), and the Court struck it down (5-3) because "the purpose of the tax was to stimulate a local industry, not to regulate the use and distribution of alcohol." *Swedenburg*, 358 F.3d at 236 n.10.

3. Respondents' contention that the six Circuit decisions can "readily be reconciled" (Opp. 22), ignores what the courts did and said. In particular, the Sixth Circuit, below, struck down a Michigan statute that is indistinguishable from the Indiana statute upheld by the Seventh Circuit in *Bridenbaugh*. The Sixth Circuit asserted (erroneously, as we show immediately below) that the cases were factually distinguishable, but it also rejected Judge Easterbrook's *Bridenbaugh* opinion for "failure to engage in the requisite dormant Commerce Clause analysis" and it cited the Eleventh Circuit's disagreement in *Bainbridge* with "the analytical framework used in *Bridenbaugh*." Pet. App. 16a. But it is not just the Sixth and Seventh Circuits that conflict on the merits. In *Swedenburg*, the Second Circuit roundly condemned the "flawed" approach taken by all four of the Circuits that have struck down state statutes, before declining to address the specifics of those other decisions. *See* 358 F.3d at 231.

a. The decision below conflicts with *Bridenbaugh* because, contrary to the assertions of both the court below (Pet. App. 16a) and respondents (Opp. 1, 22-24), Indiana's rules are indistinguishable from Michigan's. Both states allow licensed in-state wineries, but not out-of-state wineries, to ship directly to consumers. The Seventh Circuit said, correctly, "Indiana permits *local [Indiana]* wineries, but not

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[3] "Nothing in *Bacchus* . . . overrules the principles iterated in [earlier Supreme Court cases]," including the "authority of the state under the [Twenty-first] Amendment over *importation* of intoxicants." *Milton S. Kronheim & Co.* v. *District of Columbia*, 91 F.3d 193, 203 (D.C. Cir. 1996) (emphasis added).

wineries '*in the business of selling* [alcohol] . . . in another state or country', to ship directly to Indiana consumers." *Bridenbaugh*, 227 F.3d at 851 (emphases added) (ellipsis in original). Respondents strain (Opp. 23) to read this as saying that in-state wineries that also sell out of state are similarly restricted, but that is not what the statute says.[4] And respondents' Counsel of Record, who was also lead counsel for the plaintiffs in *Bridenbaugh*, told both the Seventh Circuit *and this Court in Bridenbaugh* that Indiana draws the same in-state/out-of-state distinction as Michigan and other states do. *See* Br. of Pls.-Appellees 5, *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) (Nos. 00-1044, 00-1046) ("Indiana law prohibits any person in the business of selling alcoholic beverages in another state from shipping wine directly to an Indiana resident. The prohibition applies only to out-of-state businesses. Indiana wholesalers, retailers and small wineries are allowed to make such direct shipments to consumers' homes."); No. 00-1323 Pet. 2 n.1 ("Indiana Code §§ 7.1-5-11-1.5(a) and 7.1-5-1-9.5(b) . . . make direct shipments of wine from an out-of-state seller a felony. By contrast, in-state wine sellers have statutory authority to ship wine directly to private residences.").[5]

b. The decision below also conflicts with *Swedenburg*, which upheld New York's three-tier law because the Second Circuit fundamentally disagreed with the "dormant Commerce Clause first" approach of the Sixth Circuit. *See Swe-*

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[4] Ind. Code § 7.1-5-11-1.5 ("It is unlawful for a person in the business of selling alcoholic beverages in another state or country to ship or cause to be shipped an alcoholic beverage directly to an Indiana resident who does not hold a valid wholesaler permit under this title.").

[5] Respondents cite the Seventh Circuit's statement that Indiana requires "*every* drop of liquor [to] pass through its three-tiered system and be subjected to taxation" (Opp. 23), but neither Indiana nor Michigan requires wine sold by in-state wineries to pass through *all three tiers*, a fact that the Seventh Circuit explicitly understood as to Indiana. Both states require all alcoholic beverages to pass through a state licensee with a substantial in-state presence, who is responsible for compliance with the state's revenue, beverage consumption, and other important laws.

denburg, 358 F.3d at 231. The Twenty-first Amendment, the court said, "should not . . . be subordinated to the dormant Commerce Clause." *Id.* at 233. Instead, the court asked whether the challenged state statute falls within the Twenty-first Amendment's express grant of authority to regulate the "transportation or importation" of alcohol into the State "for delivery or use therein." U.S. Const. amend. XXI, § 2. Because New York's law "falls squarely within the ambit" of that authority, the Second Circuit upheld it. *Swedenburg*, 358 F.3d at 237. *Swedenburg* did not turn on the uniqueness of the New York statutory scheme, but rather on the inherent power of the states under the Twenty-first Amendment and the Court's conclusion that "[a]llowing dormant Commerce Clause concerns to restrict state regulatory schemes that focus on the importation of liquor would render section 2 a nullity." *Id.* at 233.[6]

c. The decision below also conflicts with the Fourth Circuit's decision in *Beskind* regarding remedy, and contrary to respondents' repeated assertion, this case does squarely present the remedy question, which has been framed by several decisions. In holding Michigan's law unconstitutional because it permits in-state wineries but not out-of-state wineries to ship alcohol directly to customers' homes, the Sixth Circuit struck down the state's entire regime regulating the importation of wine. *See* Pet. App. 17a, 20a; *see also* Pet. 5, 14. The Fifth Circuit did the same thing to Texas's regime in Dickerson. *See Dickerson*, 336 F.3d at 407-410. The Fourth Circuit, by contrast, preserved North Carolina's

[6] The decision below also conflicts, albeit in approach and not necessarily in final result, with the Eleventh Circuit's decision in *Bainbridge*. Respondents state that the Eleventh Circuit held that Florida's laws are subject to "something less than strict scrutiny" (Opp. 25 n.14), but its actual holding was that the applicable standard is "*far less* than . . . strict scrutiny," *Bainbridge*, 311 F.3d at 1114 n.17 (emphasis added), and the court remanded the case for district court determination whether the Florida statute met its test. There is a clear conflict with the Sixth Circuit's ruling that "strict scrutiny" is "required by Supreme Court precedent." Pet. App. 17a.

overall regime, allowing it to continue to bar imports by anyone other than a licensed in-state wholesaler, and threw out only the regulatory exception that permitted direct shipment by in-state firms. *See Beskind*, 325 F.3d at 517-520.

Respondents' assertion that the Sixth Circuit was "entirely silent on the issue of the appropriate remedy" (Opp. 27) is just wrong. The Sixth Circuit reversed the district court and remanded "the case for entry of judgment in favor of the plaintiffs," who were seeking to invalidate the restriction on imports. Pet. App. 17a, 20a. On petition for rehearing *en banc*, MB&WWA asked the Sixth Circuit to amend its ruling to specify the narrower remedy of striking the in-state-winery exception or leave the issue open for the district court to decide, but the Sixth Circuit did neither, denying the petition without comment. *Id.* at 21a-22a. The issue of remedy is clearly present in this case and ready for this Court's review. As noted, two other circuits have squarely (but inconsistently) addressed the remedy issue, and especially in light of the substantial split of authority on the constitutional issue, the Court would gain nothing by deferring any consideration of these issues until yet another circuit addresses remedy.[7]

4. Respondents' position that these issues are not ripe for review is a lonely one. The petitioners in *Swedenburg*, who have the same interests as respondents here, have characterized the splits as "[m]ultifaceted, [g]rowing, and [i]rreconcilable." *Swedenburg*, No. 03-1274, Pet. 10. The respondents in *Swedenburg*—who ask this Court to review *both Swedenburg and the present case*—agree that there is

[7] There is an element of gamesmanship in respondents' suggestion that the Court should "wait for a case that presents not only the constitutional question, but also the remedial one." Opp. 28. Since the remedy issue will be reached only in a case where the constitutional issue is decided in respondents' favor, they are tacitly asking the Court to leave them the fruits of their Sixth Circuit victory until they win another victory.

"a substantial conflict among the circuits . . . both as to the mode of analysis and as to the result" and that there is "a compelling need for this Court to review these important issues." *Swedenburg*, No. 03-1274, Br. for Private Resp'ts 7; *see also Swedenburg*, No. 03-1274, Br. for State of N.Y. Resp'ts 7. And 36 state attorneys general and state alcohol beverage regulators (some of whose state statutes allow some form of direct shipping) have filed amicus briefs urging this Court to resolve the circuit conflicts and give states needed guidance regarding how they may constitutionally regulate alcohol imports. *See* No. 03-1116, Br. of *Amici* Ohio and 35 Other States; Br. of *Amici* National Alcohol Beverage Control Ass'n, *et al.*

5. Finally, there is no good reason to grant respondents' suggestion that the Court seek the views of the United States. The United States has no separate interest here and has not chosen to participate on either side, at any stage, in any of the six cases creating the present conflicts. The Federal Trade Commission has claimed no expertise on the unique constitutional questions presented by the Twenty-first Amendment framework for regulating the physical importation of alcohol across state lines.

The issues have been well developed in the circuits. They have been briefed to and considered by six courts of appeals. As some of those courts have themselves indicated, guidance is now needed from this Court. *See Bainbridge*, 311 F.3d at 1112, 1113 n.4 (referring to the interplay between the Twenty-first Amendment and the Commerce Clause as a "never-never land" and opining that "[t]he Supreme Court cases are confusing because many of them implicate different issues and, at the same time, borrow quotations from one another"); Pet. App. 10a ("Since *Bacchus* the Supreme Court has been less than prolific in construing the content of the Twenty-first Amendment's 'core concerns' . . . ."). Further delay would serve no purpose.

CONCLUSION

For the reasons stated in the petition and this brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
LOUIS R. COHEN
C. BOYDEN GRAY
TODD ZUBLER
WILMER CUTLER
PICKERING LLP
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

ANTHONY S. KOGUT
Counsel of Record
JOHN A. YEAGER
CURTIS R. HADLEY
WILLINGHAM & COTÉ, P.C.
333 Albert Avenue, Suite 500
East Lansing, Michigan 48826
(517) 351-6200

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