UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

LEBAMOFF ENTERPRISES, LLC, et al.
Plaintiffs

vs.

RICK SNYDER et al.
Defendants

MICHIGAN WINE & BEER WHOLESALERS ASSOCIATION
Intervening Defendants
_____/

Civil No. 2:17-cv-10191-AJT-SDD

Arthur J. Tarnow
United State District Judge

Stephanie Dawkins Davis
Magistrate Judge

PLAINTIFFS' CONSOLIDATED RESPONSE/REPLY BRIEF ON ALL CROSS-MOTIONS FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Michigan allows in-state retailers to sell wine over the Internet and ship those purchases directly to consumers, but prohibits out-of-state retailers from doing so. Plaintiffs claim that the disparate treatment of in-state and out-of-state wine sellers violates the Commerce Clause and the Privileges and Immunities Clause.

Plaintiffs moved for summary judgment, Dkt. No. 31, and the Defendants and Intervening Defendant have filed cross-motions for summary judgment. Dkts. 33, 34. This brief is Plaintiffs' consolidated response in opposition to the motions filed by the Defendants, and reply in support of Plaintiffs' motion. The state defendants and intervening wholesalers make essentially the same arguments, so separate response briefs are not necessary.

All parties agree that there are no material factual disputes, the issues are matters of law, and a previous version of the statute at issue was held unconstitutional by this Court in *Siesta Village Mkt. v. Granholm*, 596 F. Supp. 2d 1035 (E.D. Mich. 2008) (vacated as moot after the legislature amended the statute). That's where the agreement ends.

Plaintiffs contend that the law prohibiting interstate wine shipping violates the Commerce Clause because it discriminates against out-of-state wine retailers and reasonable nondiscriminatory alternatives are available that would protect the state's regulatory interests. Plaintiffs rely on Supreme Court and Sixth Circuit

cases that have held that the nondiscrimination principle applies to state liquor laws, and have rejected arguments that the Twenty-first Amendment immunizes discriminatory laws from Commerce Clause scrutiny. Defendants argue that this particular law is not discriminatory in the first place, but even if it were, no less discriminatory alternative exists that would protect Michigan's interests. They also argue that the Twenty-first Amendment overrides the Commerce Clause and allows the state to discriminate against out-of-state retailers. The Defendants have no direct authority, but rely on reasoning from general principles, dicta, and cases not involving discrimination.

Plaintiffs also contend that the law violates the Privileges and Immunities Clause[1] because Michigan has given its own citizens the privilege to sell wine over the Internet but denied that privilege to the citizens of other states. Plaintiffs rely on cases holding that laws preventing nonresidents from engaging in their occupations upon terms similar to those given to residents are unconstitutional unless that State proves that no less restrictive means are available that would protect its interests. Defendants argue that the selling of alcoholic beverages is not the kind of occupation protected by the Clause, but even if it were, Michigan

[1] U.S. Const., Art. IV. There is a similarly named Privileges or Immunities Clause in the 14th Amendment, which is not involved in this case. The 14th Amendment protects rights and privileges that flow from national citizenship, rather than state cirizenship. Plaintiffs make no claim that participation in Michigan's online wine retail market is a privilege of national citizenship.

satisfies the Clause by allowing nonresidents to open a physical location in the state from which they could sell and ship wine. They rely on reasoning from general principles but have no specific case authority. The Defendants have not argued either that the Twenty-first Amendment overrides the Privileges and Immunities Clause, or that no less restrictive means are available. See State's Brief at 40-44; Wholesalers' Brief at 29-31.

II. STANDARD OF REVIEW ON CROSS-MOTIONS

The standards upon which the court evaluates motions for summary judgment do not change because the parties present cross-motions. Each motion is separately evaluated to determine whether there is a genuine dispute as to the facts material to its resolution and whether the movant is entitled to judgment as a matter of law. *Taft Broadcasting Co. v. U.S.*, 929 F.2d 240, 248 (6th Cir. 1991).

III. COMMERCE CLAUSE VIOLATION

A. Summary of Plaintiffs' contention

Plaintiffs are contending that Mich. Comp. L. § 436.1203 discriminates against interstate commerce and therefore violates the Commerce Clause. U.S. Const., art. I, § 8, cl. 3. In 2017, Michigan amended that statute to create a new Internet market for selling wine. It allows in-state retailers to take online orders and deliver them state-wide using third-party facilitators or common carriers without ever seeing the customer in person, but prohibits out-of-state retailers from doing so. The

legislature also repealed the portion of the statute that had allowed out-of-state retailers to deliver wine in their own vehicles, thereby completely cutting off their access to Michigan consumers. The bill's sponsor said that this was needed "to help out our local businesses to be more competitive in the marketplace." See Plaintiff's Opening Brief at 8, 11-12.

Laws that discriminate against interstate commerce on their face or purposely are given strict scrutiny and are almost always struck down.[2] The Supreme Court has said repeatedly that this nondiscrimination principle applies to state liquor laws and the Twenty-first Amendment is not a defense. Therefore, Michigan's law could survive strict scrutiny only if the State proved that the difference in treatment was the *only* way it could advance its legitimate regulatory interests and no less-discriminatory alternative was available. Michigan cannot possibly meet this exacting standard, given that it already allows direct shipments from out-of-state wineries as long as they get a license, meet reporting rules and remit taxes. See Plaintiff's Opening Brief at 13-14.

B. Defendants' contentions

Defendants make three arguments in response. First, they argue that the law is

[2] Non-discriminatory laws that burden interstate commerce are subject to the lower-scrutiny *Pike* balancing test, and usually upheld unless the burden is clearly excessive in relation to the local benefit. *Pike v. Bruce Church, Inc,* 397 U.S. 137 (1970). This is not a *Pike* balancing case.

not discriminatory in the first place for any of several reasons -- in-state retailers are not similarly situated to out-of-state retailers, the Commerce Clause only prohibits discrimination against out-of-state producers, and/or requiring every retailer to have in-state premises is equal treatment. Second, they argue that no reasonable nondiscriminatory alternative exists that would allow Michigan to regulate a large number of Internet sellers, protect minors, collect taxes, and maintain product safety. Third, they argue that the Twenty-first Amendment immunizes this law from the nondiscrimination principle because requiring Internet sellers to be located in Michigan is integrally related to the core concerns of the Amendment. They distinguish *Granholm v. Heald* because this case involves neither wineries nor an exception to the three-tier system.

These are complex issues, in part because there is almost no direct authority. Only one case has actually considered the constitutionality of a discriminatory law that regulated interstate wine sales by retailers -- this Court's prior decision in *Siesta Village Market v. Granholm*, 596 F. Supp. 2d 1035 (E.D. Mich. 2008). Therefore, the bulk of the arguments ask this Court to reason from cases that addressed different issues, and either struck down discriminatory liquor laws that did not involve shipping by retailers, or upheld even-handed laws that prohibited retail shipping but were not discriminatory. Many of these cases also contain language suggesting that the decisions should be interpreted broadly or narrowly,

so it will be important throughout to distinguish holdings from dicta.

C. Responses to Defendants' arguments

1. The Michigan law is discriminatory within the meaning of the Commerce Clause

Under the Commerce Clause, laws are discriminatory "if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald*, 544 U.S. at 472. Although it seems obvious that Mich. Comp. L. § 436.1203 does just that, the Defendants assert three arguments why the statute might not be discriminatory. They are without merit, and may be quickly disposed of.

First, the Defendants contend that intra-state shipping by Michigan retailers is not the same thing as interstate shipping by out-of-state retailers. They are different because the former are licensed and subject to Michigan regulations, but the latter are not. State's Brief at 24; Wholesalers' Brief at 14, 22. The argument is disingenuous. The reason out-of-state retailers are not licensed and regulated by Michigan is because Michigan will not give them licenses or allow them to sell and ship to consumers in the state. For Commerce Clause purposes, discrimination occurs when an out-of-state business is prevented from engaging in a transaction that an in-state business is allowed to do. That was the situation in *Granholm v. Heald,* where in-state wineries were allowed to ship to consumers but out-of-state

wineries were not. The Court declared the law unconstitutionally discriminatory, 544 U.S. at 473-74, despite the fact that the former were licensed and subject to Michigan regulations, but the latter were not. The only situations in which bans on interstate shipping have been found not to be discriminatory are those where in-state sellers were also prohibited from shipping. E.g., *Jelovsek v. Bredesen*, 545 F.3d 431, 436-37 (6th Cir. 2008) (Tennessee did not allow in-state wineries to direct-ship); *Arnold's Wines, Inc. v. Boyle,* 571 F.3d 185, 188 (2d Cir. 2009) (New York only allowed in-state retailers to deliver using their own vehicles); *Wine Country Gift Baskets.com v. Steen,* 612 F.3d 809, 812 (5th Cit. 2010) (Texas only allowed in-state retailers to deliver within their immediate areas).[3]

Second, the Defendants contend that the Commerce Clause only prohibits discrimination against out-of-state products and producers. The State goes so far as to erroneously claim that there is now a consensus among the circuits on this point. State's Brief at 27. The Defendants do not develop this argument or provide any authority for it, and it was rejected by this Circuit in *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608, 619, 621 (6th Cir. 2018). Inside and outside the realm of alcoholic beverage laws, the courts have routinely applied the

[3] The Defendants also cite *Lebamoff Enterprises v. Rauner*, 2017 WL 2486084, an unreported decision from the Northern District of Illinois. State's Brief at 28; Wholesalers Brief at 24-25. It dismissed a similar claim because the judge erroneously thought Plaintiffs were seeking the right to make unlicensed and unregulated wine shipments. He did not treat the case as involving discrimination.

nondiscrimination principle to all kinds of commercial activity other than production, including retailing. *See, e.g., Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641 (1994) (mail-order sellers); *Healy v. Beer Inst*., 491 U.S. 324 (1989) (beer distributors); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940) (retail sellers). It protects citizens as well as products. *Byrd*, 883 F.3d at 619.

Third, the Wholesalers argue that the law is not discriminatory because it evenhandedly requires all retailers who want to ship wine to Michigan consumers to locate their premises in the state. Brief at 14-15, 22-23. The argument is without merit. The discrimination complained of is being prohibited from shipping wine from premises located outside the state (movement of goods across state lines), not being prohibited from opening a retail outlet in Michigan (movement of people). Whether or not Michigan discriminates against nonresidents who wish to open a wine store in the state is irrelevant to whether it discriminates against direct shipping from retailers located outside the state. The Wholesalers present no authority for the argument that providing a nonresident with the opportunity to open a store in Michigan eliminates the discriminatory character of the rule banning direct cross-border shipping. In any event, the Supreme Court has clearly rejected this argument, holding to the contrary that states cannot require an out-of-state firm to establish a physical presence in a the state in order to compete and do business there. *Granholm v. Heald,* 544 U.S. at 475.

2. Reasonable nondiscriminatory alternatives exists that can protect Michigan's legitimate regulatory objectives

Once a court determines that a law is discriminatory, the burden shifts to the State to prove that the difference in treatment of in-state and out-of-state entities advances a legitimate local purpose that cannot adequately be served by less discriminatory alternatives. The standards for such justification are exacting and require concrete record evidence clearly proving that alternatives will not work. *Granholm v. Heald*, 466 U.S. at 492-93. The burden of proof is so high that only one case has met it -- *Maine v. Taylor*, 477 U.S. 131 (1986), in which extensive expert scientific evidence showed that bait fish from out of state had parasites that would harm local fishing industries and there was no way to screen them, test for them, or treat them to prevent the parasite's spread.

Defendants have not met this burden. See Plaintiffs' Opening Brief at 13-15. Michigan already allows direct shipments from out-of-state wineries if they get a direct shipper permit. Mich. Comp. L. § 436.1203(4). The Defendants have not explained why the system of licenses and regulations it uses for wineries would not work for wine retailers. Indeed, the Supreme Court has said that licensing and regulating out-of-state wine shippers is a reasonable nondiscriminatory alternative to banning them, *Granholm v. Heald*, 544 U.S. at 490-93, and a number of other states use this alternative. *E.g.*, N.H. Rev. Stat § 178:27; Or. Rev. Stat. § 471.229.

To justify discrimination, the state must show that the product being shipped by out-of-state retailers is somehow more dangerous than the product being shipped from in-state retailers. *Chemical Waste Mgmt., Inc. v. Hunt*, 504 US 334, 348 (1992). The Defendants have made no such showing, nor could they. A bottle of Joel Gott Cabernet Sauvignon is the same whether it comes from an in-state or out-of-state retailer.

The State vigorously disputes this and argues that Michigan has no reasonable nondiscriminatory alternative that will protect its regulatory interests. Its brief is full of citations to the opinions of state officials that it will be much more difficult to regulate out-of-state retailers, collect taxes from them, and protect against youth access. However, the Supreme Court holds that in order to prohibit interstate commerce, a State must prove that the product coming from out of state is more dangerous, not just more difficult to regulate. *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. at 348.

a. Ability to regulate

The Defendants' primary argument is that there are 388,000 retailers in the country and Michigan lacks the resources to regulate them all. State's Brief at 16, 23-32. The argument is irrelevant, because Michigan only has to regulate wine shipments from the fraction of those retailers who actually sell over the Internet and ship in interstate commerce. The 388,000 American retailers the State refers to

includes convenience stores, grocery stores, drug stores, and a host of small businesses that do not ship wine. The cost of setting up and staffing an Internet operation, establishing separate bookkeeping systems for each state shipped to, and complying with each state's reporting requirements, is prohibitive for most wine retailers. The actual number of retailers who take online orders is approximately 1947, and not all of them try to run a nationwide operation. Wark Supp. Report at 1, Plaintiffs' Exhib. 14; Bailey Aff. ¶¶ 7-8, Plaintiffs; Exhib. 15. For example, New Hampshire has allowed out-of-state retailers to obtain a direct shipper license and ship into the state since 2011. N.H. Rev. Stat. § 178:27. Only 81 retailers have signed up. Wark Supp. Report at 1. The State has offered no proof that it lacks the capacity to monitor and regulate shipments by this small number of retailers.

As part of its argument that it cannot feasibly regulate out-of-state retailers, the State pleads budget woes. It says the legislature will not give it the financial resources it would need. State's Brief at 30-31. It is hard to see how Michigan's intentional underfunding of its own enforcement agency would constitute a defense to discrimination, and the State cites no authority for the proposition. Indeed, the authority is to the contrary. Increased regulatory cost and difficulty is not a justification for discrimination, *Chemical Waste Mgmt., Inc. v. Hunt,* 504 U.S. at 348, because the State has the nondiscriminatory alternatives of appropriating more money or raising license fees to give the agency the budget it needs. *Dean Milk*

Co. v. City of Madison, 340 U.S. 349, 354-55 (1951) (charging inspection fees a reasonable alternative).

The State argues that all wineries have a federal permit, but retailers only have state permits, and that this somehow makes a difference, but it does not explain why this matters. State's Brief at 31-32. We assume the State is suggesting that it is easy to get federal assistance in investigating possible liquor law violations, but hard or impossible to get state assistance, so they are left helpless. They offer no evidence of this, and the suggestion that state alcohol control agencies outside Michigan would not care about or help investigate a retailer who was violating alcoholic beverage laws is absurd. Even if true, it would not be justification for banning interstate commerce, because the State has two nondiscriminatory options. It can invoke the Twenty-first Amendment Enforcement Act, 27 U.S.C. § 122a, that gives states authority to use federal courts to enforce their laws against unlawful shipping by out-of-state retailers, and/or can use exactly the same system it uses for regulating other direct wine shippers (wineries and in-state retailers) -- issue direct shipping licenses on condition the retailer complies with state laws, and suspend or revoke it if the retailer violates them. Mich. Comp. L. § 436.1903.

b. Youth access

The State argues that allowing direct wine shipments by out-of-state retailers would increase the risk of minors obtaining alcohol. State's Brief at 32-35. This is

a tired argument that Michigan raised in *Granholm v. Heald* and the Court rejected. The Supreme Court, citing a study by the Federal Trade Commission[1] found that direct wine shipping did not increase youth access to alcohol, because minors are less likely to drink wine than beer or spirits, have more direct means of acquiring unlawful alcohol (parents, older siblings, fake IDs, etc), and usually want alcohol for immediate consumption. 544 U.S. at 490. Even if online ordering and direct shipping posed a slightly increased risk of youth access, the Supreme Court held that it would not justify discriminating against interstate commerce because the risk would be the same whether the shipment originated from an in-state or out-of-state source. 544 U.S. at 490. The Court held that states had a reasonable nondiscriminatory alternative -- use the same protocol involving package labeling and adult signature requirements that it uses for shipments originating within the state. 544 U.S. at 491. Michigan already requires this (plus online age verification) for other kinds of Internet wine orders. Mich. Comp. L. § 436.1203(3), (5). The Sixth Circuit has also rejected the argument that fear of youth access can justify banning only interstate shipping. *Cherry Hill Vineyards, Inc. v. Lilly*, 553 F.3d 423, 434 (6th Cir. 2008).

The State offers evidence from various sting operations that supposedly shows that out-of-state retailers would be more likely to sell to minors than in-state

[1] See FTC Report, Plaintiffs' Exhib. 11, Dkt. No. 31.

retailers, but the evidence is irrelevant for six reasons. First, placing an order is not the same thing as having it successfully delivered, and there is no youth access until the alcohol is delivered. That is why the state requires shippers to label the boxes, check IDs, and obtain an adult signature upon delivery. The same delivery services that are currently handling alcohol shipped from in-state retailers and out-of-state wineries would deliver shipment from out-of-state retailers, and the State has failed to show that when the FedEx delivery driver sees that the return address is an out-of-state retailer, the driver will suddenly stop asking for an adult signature. Second, much of the evidence is derived from operations targeting *unlicensed* sellers. Erickson Aff. ¶ 14, State's Exhib. C; Donley Aff. ¶ 17, State's Exhib. D. Third, the evidence shows that similar problems arise regardless of whether the seller is in-state or out-of-state. Erickson Aff. ¶¶ 15-16; Donley Aff. ¶ 18. Fourth, the evidence that a 2017 sting operation netted 19 violations by out-of-state sellers and none from those in-state is misleading because only three in-state sellers were contacted. Erickson Aff. ¶ 17; Donley Aff. ¶ 18. Fifth, none of the State's math-based conclusions that there are more violations by out-of-state sellers are admissible because they are not supported by any competent expert testimony that the conclusions are scientifically reliable. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Sixth, some of the evidence concerns enforcement investigations of on-site sales, not Internet sales. State's Brief at 33-

34. This hardly meets the exacting requirement that concrete evidence clearly show that alternatives will not work. *Granholm v. Heald*, 466 U.S. at 492-93.

c. Collecting taxes.

The State argues that it would have difficulty collecting taxes on wine sales from out-of-state retailers. It bases this on the fact that some vague number of out-of-state wineries did not pay proper excise taxes, and some consumers do not pay use taxes on their Internet purchases. State's Brief at 35-37. This argument has been rejected by the Supreme Court in *Granholm,* 544 U.S. at 491, and by the Sixth Circuit in *Cherry Hill Vineyards, Inc. v. Lilly*, 553 F.3d at 434. A reasonable nondiscriminatory alternative is to require a direct shipping license, condition it upon regular reporting of sales and remitting taxes, and revoke the license if the shipper does not pay. Michigan already uses this system for wine shipped from out-of-state wineries to consumers, Mich. Comp. L. § 436.1203(3), and to wholesalers. Mich. Admin. Code R. 436.1725(1)-(2). The State can also secure proper tax payment by requiring a bond, as it currently does for out-of-state wineries who owe taxes on wine sold to wholesalers. Mich. Comp. L. 436.1801.. Michigan could decide to forbid all online ordering and direct shipping because of the risk of tax evasion, but if it decides to allow such sales despite the risk, it cannot discriminate against out-of-state retailers when it could just as easily apply the same rules to them as it applies to direct shipments from wineries.

d. Product safety

Finally, the State makes the argument that allowing direct wine shipping from out-of-state retailers would impede its ability to police dangerous or defective products. State's Brief at 37-39. The argument is specious. The State never explains exactly what danger it is worried about. It cites no evidence that there have ever been any dangerous bottles wine that could be sold into the state by a retailer. The only instance it refers to involved tainted spirits sold to tourists in Mexico. Wine sold in the U.S. is regulated at the federal and state levels, and any wine shipped by an out-of-state retailer has gone through its home-state process of state regulation and inspection, and the State has not shown that there is any actual chance of tainted wine entering Michigan.

The State refers vaguely to the fear that the Liquor Control Commission will not be able to effectively engage in product safety recalls for defective wine if it does not know what wines are being shipped into the state. This is an absurd argument. First, the State cites no instance in which it has ever done a product recall for wine. A search of the recall notices issued by the U.S. Consumer Products Safety Commission and the Food and Drug Administration shows that there have been none.[2] Second, if there were, the recall would be handled by the

[2] See https://www.cpsc.gov/Recalls and https://www/fda.gov/Safety/Recalls (last visited April 16, 2018).

federal government, the manufacturer and the seller, not a state government agency. *See* 21 U.S.C. § 423. Third, the Liquor Control Commission lacks the statutory authority to conduct such recall campaigns. *See* Mich. Comp. L. §§ 436.1217, 436.1919, 436.2005. Fourth, the State has three reasonable nondiscriminatory alternatives that would allow it to keep track of wine products being shipped into the state. It can require shippers to register the brand as it does for all other wine sold in Michigan. See State's Brief at 15 (discussing product registration). It can require shippers to submit copies of invoices to the LCC showing the names of wines shipped, as many states do. *E.g.*, Tenn. Code Ann. § 57-3-217(e)(3). It can require shippers to submit test samples. Mich. Admin. Code R. 436.1728. The State has not shown that these alternatives would be ineffective.

3. The Twenty-first Amendment is not a defense

The Supreme Court and this Circuit have held repeatedly that the Twenty-first Amendment is not a defense to a charge of discrimination. It gives states virtually unlimited power to structure how liquor is sold within their borders, but not to discriminate against interstate commerce and protect local liquor interests from competition. States are free to decide whether to restrict wine sales to traditional brick-and-mortar stores or allow it to be sold over the Internet. However, once a state decides to open an Internet market where age is verified online and wine delivered by common carrier without the purchaser ever appearing in person at a

physical store, it must operate that market in a nondiscriminatory way that allows participation by out-of-state sellers. Plaintiffs' Opening Brief at 15-16.

The Defendants vigorously argue to the contrary. They piece together dicta and phrases taken out of context from cases that did not involve retail sales, interstate commerce or discrimination, and create an argument that the Twenty-first Amendment "immunizes" Michigan's discriminatory retail wine shipping law from Commerce Clause scrutiny, the complete opposite result from the actual decisions in *Granholm v. Heald* and *Cherry Hill Vineyards v. Lilly*, 553 F.3d 423 (6th Cir. 2008). The Defendants' argument depends upon mischaracterizations of leading precedents, is unsupported by any actual relevant authority, and cannot withstand close scrutiny.

a. Background and context

This case has not arrived on a blank slate. There are dozens of prior cases that have ruled on the balance between the nondiscrimination principle of the Commerce Clause and the Twenty-first Amendment. They have been unanimous: the Twenty-first Amendment does not allow states to discriminate against interstate commerce in alcoholic beverages.

The Supreme Court says so explicitly. In *Granholm v. Heald*, it held that "discrimination is neither authorized nor permitted by the Twenty-first Amendment," 544 U.S. at 466, which "does not allow States to regulate the direct

shipment of wine on terms that discriminate." 544 U.S. at 476. It said that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," 544 U.S. at 487, precedent "forecloses any contention that § 2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny," 544 U.S. at 487-88, "discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment," 544 U.S. at 489, and "[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." 544 U.S. at 493. In *Bacchus Imports, Ltd. v. Dias*, the Court held that the Amendment did not "empower States to favor local liquor industries by erecting barriers to competition." 468 U.S. 263 276 (1984). In *Healy v. Beer Inst*., Justice Scalia wrote that a liquor "statute's invalidity is fully established by its facial discrimination against interstate commerce .. despite the fact that the law regulates the sale of alcoholic beverages, since its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." 491 U.S. 324, 344 (1989) (concurring).

The Sixth Circuit also says so. In *Jelovsek v. Bredesen*, 545 F.3d at 436, the court said that the Twenty-first "Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods." In *Byrd v. Tenn, Wine & Spirits Retailers Ass'n*, 883 F.3d at 614. the court said that "the Twenty-first Amendment does not immunize Tennessee's [discriminatory]

durational-residency requirements from scrutiny under the dormant Commerce Clause."[3]

No modern case has held otherwise. In every case involving a state liquor law that discriminated against out-of-state interests, favored in-state businesses, and erected barriers to interstate commerce, the courts have held that the law violated the Commerce Clause and could not be saved by the Twenty-first Amendment.

In response, Defendants point to several cases in which courts upheld *nondiscriminatory* liquor laws and said (mostly in dicta) that the Twenty-first Amendment limits the scope of the Commerce Clause, gives states virtually unlimited power over the importation and sale of liquor, and legitimates the creation of a three-tier distribution system. They rely particularly on four such cases: *Arnold's Wines v. Boyle* 571 F.3d 185 (2d Cir. 2009); *Wine Country Gift Baskets.com v. Steen,* 612 F.3d 809 (5th Cir. 2010); *Southern Wine & Spirits of Am. v. Div. of Alcohol & Tobacco Control,* 731 F.3d 799 (8th Cir. 2009); *North Dakota v. U.S.*, 495 U.S. 423 (1990). State's Brief at 20-28; Wholesalers' Brief at 12-13, 16-21. The first two upheld state laws banning shipping by out-of-state

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[3] The court left open the possibility that a state liquor law might survive Commerce Clause scrutiny if it were "closely related to the powers reserved by the Twenty-first Amendment," 883 F.3d at 615, but did not elaborate. The extent to which this is an open question for facially discriminatory laws will be discussed in subsection d, infra.

retailers, but those laws were not discriminatory because the states also banned shipping by in-state retailers. *Arnold's Wines*, 571 F.3d at 190-91; *Wine Country*, 612 F.3d at 819. The third upheld a law requiring the owners of an in-state wholesaler to be state residents, but the case did not involve either retail sales or discrimination against interstate commerce, *Southern Wine,* 731 F.3d at 809-10, and its view of the expansive scope of the Twenty-first Amendment has not been adopted by the Sixth Circuit. *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608, 617 et seq. The fourth -- which is the source of the dictum that a state's three-tier system is unquestionably legitimate -- is a plurality Supreme Court opinion from a case that did not involve either the Commerce Clause[4] or discrimination. Indeed, the fifth vote in that case to uphold a state law requiring liquor sold on military bases to be labeled for on-base use only, was based on the fact that the law was not discriminatory. *North Dakota v. U.S.*, 495 U.S. at 448 (Scalia, J., concurring) ("That is not to say, of course, that the State may enact regulations that discriminate").[5]

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[4] It was a Supremacy Clause case.

[5] They also refer to two non-precedential cases. *Lebamoff Enterpr., Inc. v. Rauner*, 2017 WL 2486084 (N.D. Ill. 2017) (appeal pending) is an unreported case upholding a law banning direct shipping that the judge dismissed because he thought (erroneously) that out-of-state retailers were seeking the right to engage in totally unregulated and unlicensed shipping. The part of *Brooks v. Vassar,* 462 F.3d 341, 347-48 (4th Cir. 2006) cited by the State (Brief at 24-25) was the opinion of one judge that the other two did not join because the issue had become moot

Defendants also rely heavily on *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, but that reliance is misplaced. Reading the Defendants' summaries of the case, State's Brief at 19-23; Wholesalers' Brief at 17-18, one would think the *Byrd* court had upheld Tennessee's residency requirement for liquor licenses because of the states' virtually unlimited authority to regulate the sale of alcohol. It did the opposite. It struck down the residency rule, holding that the Twenty-first Amendment did *not* immunize it from Commerce Clause scrutiny. *Id.* at 614.

> Because Tennessee's durational-residency requirements are facially discriminatory and there is no evidence that Tennessee cannot achieve its goals through nondiscriminatory means, we hold that § 57-3-204(b)(2)(A), (3)(A)-(B), and (3)(D) are unconstitutional.

883 F.3d at 624. It rejected the argument that *Granholm* or any other case has held that the Twenty-first Amendment gives states power to enact discriminatory laws, re-affirming what every other case has held -- "discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment." 883 F. 3d at 617, n. 3.

b. The nondiscrimination principle applies to laws regulating retailers

Despite the unanimity of the case law, the Defendants argue that the nondiscrimination principle somehow does not apply to laws regulating retailers. State's Brief at 1, 18, 23-24. This is a novel argument that no other court has

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from legislative changes. One judge wrote about it anyway, but neither of the other two judges on the panel did, so it is not an opinion of the court. *Id*. at 361.

accepted. Every court that has reviewed a discriminatory law regulating retail alcohol sales has declared it unconstitutional. The only case directly on point is this Court's previous decision in *Siesta Village Market v. Granholm,* 596 F. Supp. 2d 1035 (E.D. Mich. 2008),[6] striking down a prior Michigan law that allowed in-state but not out-of-state retailers to ship wine to consumers. However, cases reviewing other laws affecting retailers have all held them unconstitutional if they discriminated against out-of-state entities. They have struck down residency rules for retail licenses, *Byrd v. Tenn. Wine & Spirits Retailers Ass'n,* 883 F.3d at 624; *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994); *Cooper v. Texas ABC*, 820 F.3d 730, 741 (5th Cir. 2016); *Peoples Super Liquor Stores v. Jenkins,* 432 F.Supp.2d 200, 218 (D. Mass. 2006), and restrictions on personal transportation of purchases from out-of-state retailers. *Freeman v. Corzine*, 629 F.3d 146, 160-61 (3d Cir. 2010). Some of these opinions may have contained language that they were limited to the facts and did not necessarily mean that all discriminatory laws were unconstitutional, but they struck down the laws in front of them.

The Defendants argue in part that because *Granholm* involved wineries and referred a couple of times to wine as a "product," it should be interpreted as drawing a constitutional distinction between the producer tier and the retailer tier,

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[6] The Wholesalers argue that *Byrd v. Tenn. Wine & Spirits Retailers Ass'n* now would require a different result in *Siesta Village*, but does not say why or develop this point. Brief at 22.

prohibiting discrimination against producers but not against retailers.[7] The State has forgotten that the issue in *Granholm* was retail shipping, not wine production.[8] *Granholm* and its progeny, including *Cherry Hill Vineyards v. Lilly,* 553 F.3d 423, struck down discriminatory bans on direct shipping by wineries of retail purchases from their salesrooms to consumers. The ability of Michigan's in-state wineries to ship directly to consumers derived not from their authority to manufacturer wine, but from their authority to "sell alcoholic liquor at retail." Mich. Comp. L. § 436.1537 (2005). The same was true for the statute struck down by the Sixth Circuit in *Cherry Hill Vineyards*, which had allowed small wineries to sell "at retail" to consumers. Ky. Rev. Stat. § 243.155(1(c) (2006).

c. The nondiscrimination principle applies to liquor laws whether or not they create "exceptions" to the three-tier system

The Wholesalers argue that the nondiscrimination principle applies only to laws that create exceptions to the three-tier system. They base this on the fact that the law struck down in *Granholm* had allowed small wineries to both produce wine and sell it at retail, without going through a wholesaler. They contend that *Granholm* should therefore be read as applying only to laws that specifically create

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[7] In dicta, the Eighth Circuit suggested just such a bright line rule. *Southern Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F. 3d 799 (8th Cir. 2013). This Circuit rejected it in *Byrd*, 883 F.3d at 617-18.

[8] See State's Brief at 19, characterizing Granholm as pertaining only to the producer tier of the three-tier system.

an exception to the three-tier system. Wholesalers Brief at 15-16.

The argument is without merit. *Granholm* did not say its decision was limited to situations where a state created exceptions to the three-tier system. Its discussion of Michigan's exception was to illustrate discrimination -- in-state wineries could bypass the wholesaler tier and its added costs but out-of-state wineries could not. The Court specifically said its decision had nothing to do with the legitimacy of the three-tier system. 544 U.S. at 488-89. The wholesalers cite no direct authority and can point to no court that has upheld a discriminatory law because it was not an exception to the three-tier system. Indeed, *Byrd v. Tenn. Wine & Spirits Retailers Ass'n* declared unconstitutional Tennessee's residency requirement for a retail liquor license that would operate entirely within the state's three-tier system. 883 F.3d at 626.

d. ***Byrd v. Tenn. Wine & Spirits Retailers Ass'n*** **does not change the result**

While this case has been pending, the Sixth Circuit decided *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608 (6th Cir. 2018).[9] *Byrd* affirmed the general rule that the Twenty-first Amendment did not give states unlimited control over the structure of its liquor distribution system and does not validate discriminatory laws. 883 F.3d at 617, n.3. Thus, it was consistent with the prior three Sixth Circuit

[9] In their briefs, the Defendants chide Plaintiffs for not discussing *Byrd* in their opening brief. The *Byrd* decision was handed down only a few days before the opening brief was due.

cases on discriminatory liquor laws: *Heald v. Engler,* 342 F.3d 517, 520 (6th Cir. 2003), *aff'd sub nom Granholm v. Heald*, 544 U.S. 460 (2005) (discriminatory shipping laws violate the Commerce Clause and cannot be justified as advancing the traditional "core concerns" of the Twenty-first Amendment); *Jelovsek v. Bredesen*, 545 F.3d at 436 (the Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods); *Cherry Hill Vineyards v. Lilly,* 553 F.3d at 431 (Amendment does not allow states to discriminate). *Byrd* did not change the law.

The *Byrd* court suggested in dictum, however, that not all discriminatory liquor regulations were necessarily unconstitutional. It pointed to language in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. at 275, that set a more flexible standard -- "[both] the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case." *Byrd*, 883 F.3d at 615. It cited language in a Fifth Circuit case, *Cooper v. Texas ABC*, 820 F.3d at 743, that the Commerce Clause may apply to a lesser extent (but would still apply) when states are regulating in-state wholesalers and retailers than when they are regulating producers or the flow of goods. *Byrd*, 883 F.3d at 617, 622. It engaged in a detailed analysis of all the jurisprudence in this area, and concluded that courts should balance the extent to which a liquor regulation is inherently necessary to

advance the core concerns of the Twenty-first Amendment against the extent to which it frustrated the core concerns of the Commerce Clause. *Id*. at 616-22. In other words, a discriminatory state law might survive strict scrutiny either because the state proved there were no reasonable nondiscriminatory alternatives (the traditional Commerce Clause rule) or because those alternatives would require the state to change an integral component of its distribution system. It did not explain what laws might survive strict scrutiny under the Commerce Clause, but ruled that the law before it (Tennessee's three-year residency requirement) was not one of them. *Id.* at 614.

The Supreme Court has said that the core concerns of the Twenty-first Amendment are "promoting temperance, ensuring orderly market conditions, and raising revenue," in furtherance of which, a state may decide for itself what kind of distribution system to establish. *North Dakota v. U.S.*, 495 U.S. at 432 (plurality opinion). This language has been adopted by the Sixth Circuit, *Heald v. Engler* 342 at 523-24, but with the caveat that a law is not immune from scrutiny just because it advances one of these concerns. It must still do so in a nondiscriminatory fashion if such an option is available. *Accord Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d at 625-26 (citing North Dakota's summary of the core concerns, but adding that they must be pursued in a nondiscriminatory way if possible).

The *Byrd* court gave few clues about what might constitute a law so inherently

and integrally related to these core concerns that it might be constitutional despite discriminating against interstate commerce. The Eighth Circuit doubts that in reality there are any such inherent laws because there is no archetypal three-tier system. Every state is different. *Southern Wine*, 731 F.3d at 810. Many states even have different systems within their own borders. For example, in Michigan, spirits are distributed from producers to the Liquor Control Commission to retailers, while beer and some wine is distributed from producers to private wholesalers to retailers. Weber Aff. ¶ 2, State Exhib. F. Other wine is distributed from producers to direct shippers to consumers, bypassing the wholesalers, Mich. Comp. L. § 436.1203(4); and some beer is distributed directly from microbreweries to consumers. Mich. Comp. L. § 436.1203(12).

The Wholesalers characterize the *Byrd* decision as deciding that a state may constitutionally require a retailer to establish a physical presence in the state. Brief at 17. *Byrd* did nothing of the sort. That issue was not before the court because the *Byrd* plaintiffs wanted to open an in-state retail store. The Sixth Circuit did not decide that a physical presence requirement would be constitutional; it only speculated that there might be circumstances under which such a requirement could be an inherent part of a state's distribution system and so integral to its chosen method of selling alcohol that it would survive strict scrutiny.

One such situation is illustrated by *Wine Country Gift Baskets.com v. Steen*,

612 F.3d at 811-14, the case from which the Sixth Circuit drew the concept. Texas required all liquor to be sold over the counter on the premises of a retail store, after a face-to-face appearance by the customer. Only then could the retailer deliver the purchase, including by use of a package delivery service, but such deliveries were limited to the immediate area of the premises. This assured an in-person appearance at a store located in a county where the citizens had approved the sale of alcohol by local option. Texas could constitutionally forbid shipments originating out of state, even though it allowed them if originating within the state, because delivery rights were tied to face-to-face transactions and local option laws. A physical location in the state (and in a wet county) was therefore essential to its system of liquor sales.

A similar example is illustrated by contrasting the Sixth Circuit's decisions in *Jelovsek v. Bredesen* and *Cherry Hill Vineyards v. Lilly*. Tennessee required that all alcohol sales had to be made face-to-face including those made at wineries. It allowed its own in-state wineries to sell directly without going through a wholesaler, but only on their own premises. *Jelovsek*, 545 F.3d at 436-37. Kentucky also required alcohol sales at wineries to be made face-to-face and allowed its own in-state wineries to sell directly without going through a wholesaler. *Cherry Hill*, 553 F.3d at 427-28. Both states's regulations gave in-state wineries an advantage over out-of-state wineries which could only sell through

wholesalers, and thus had a discriminatory effect. However, Tennessee had decided not to allow any direct shipping, while Kentucky allowed it after a face-to-face visit. The Sixth Circuit upheld Tennessee's ban on direct shipping from out-of-state wineries, 545 F.3d at 435-36, but struck down Kentucky's. 553 F.3d at 432-34. Although neither Court expressed their decisions in terms of whether the shipping ban was inherent or integral to its regulatory system, their decisions reflected that concept. Once Kentucky decided to allow some direct shipping, it could no longer claim that a ban was an integral part of its alcohol distribution system.

Given the Supreme Court's consistent holding that all liquor laws are subject to Commerce Clause scrutiny, an exemption for "inherent" laws would have to be a narrow category. Given the emphasis in *Bacchus* and *Byrd* that this is a balancing act that must consider both the Twenty-first Amendment and the nondiscrimination principle of the Commerce Clause, it is not enough that a state law be an integral part of the liquor distribution system. All its liquor laws are part of its regulatory system. It must be an inherent component of the state's regulatory system independent of its discriminatory aspect. Thus, a law requiring liquor to be sold *only by in-state businesses* who obtain a retail license would be unconstitutional because the discriminatory part (residency) can be removed from the nondiscriminatory part (licensing) without undermining the state's authority to

require that all liquor be sold by licensees. The discrimination is not inherent in the rule. On the other hand, a law requiring all liquor to be sold only on the premises of an in-state business whose license has been locally approved (the Texas situation) would probably survive constitutional scrutiny because the discriminatory part (residency) cannot be removed from the nondiscriminatory part (local option). Discrimination is inherent in a local-option system. The *Byrd* court phrased this question as whether the system could still function without the discriminatory restrictions. 883 F.3d at 623.

Where does Michigan's ban on direct shipping by out-of-state retailers fall? To paraphrase the law, Michigan has created a new online market for wine sales, in which only in-state businesses with the right licenses may accept and ship Internet orders. The discriminatory part (residence) is not inherent and integral to the regulatory part (licensing). The law is indifferent to where the online business is located within the state, indifferent to whether the buyer ever sets foot on the premises, and indifferent to the distance between the seller and buyer. It satisfies its core regulatory concern by requiring licenses and reporting. It satisfies its core concern about youth access by accepting online age verification and requiring common carriers to obtain an adult signature upon delivery, both of which requirements are independent of the physical location of the retailer. It satisfies its core concern about raising revenue by requiring the shipper to remit taxes, which

they may do by mail, so the rule is also independent of the physical location of the person remitting taxes. Requiring that an out-of-state seller establish a physical presence in the state might be inherent to a different, old-fashioned system that requires all sales to take place in person on physical premises, but it is not inherent to this new system that allows remote ordering and delivery by common carrier where the location of the business is no longer important.

Michigan's law banning interstate wine shipments from retailers also frustrates the core concern of the Commerce Clause -- to establish the nation as a single economic union in which all citizens have the right of access to the markets of all states on equal terms. *Granholm v. Heald,* 544 U.S. at 472-73. Michigan citizens are denied access to the wine sellers in other states, and those sellers are denied access to Michigan customers. This is significant, because the majority of wines available for sale in the U.S. are available to Michigan consumers only from out-of-state retailers. See Plaintiffs' Opening Brief, Statement of Facts ¶¶ E-F.

Michigan has created a new online market for wine sales. It no longer matters where the seller and buyer are located, because the buyer does not have to appear in person on the seller's premises. It no longer requires proof of age to be made at the point of purchase; it can be made upon delivery. It no longer requires the seller to take responsibility for assuring that deliveries go to adults who are not visibly intoxicated, because the seller may use a common carrier or third-party facilitator.

Nothing in this new distribution method inherently requires the seller to be located in the state, and imposing that requirement discriminates against out-of-state retailers, prevents consumers from having access to the markets of other states, and violates the core concern of the Commerce Clause. It is unconstitutional.

IV. PRIVILEGES AND IMMUNITIES CLAUSE VIOLATION

A. Summary of Plaintiffs' contentions

Plaintiffs contend that Mich. Comp. L. § 436.1203 deprives nonresidents of their privilege to practice their occupations in the state upon terms equivalent to those given to citizens of Michigan, in violation of the Privileges and Immunities Clause. U.S. Const., art. IV., § 2, cl. 1. Michigan residents may sell and deliver wine directly to consumers; nonresidents may not. Selling wine is a lawful occupation, and engaging in one's occupation is a fundamental privilege protected by the Clause. The State has a significant interest in regulating the wine business, but that interest does not justify banning nonresidents if less discriminatory alternatives are available. Such an alternative is obvious here -- require the same kind of permits, reports, and tax payments the state requires its own citizens to do. The Twenty-first Amendment does not overrule the Privileges and Immunities Clause. See Plaintiffs' Opening Brief at 17-23.

B. The only federal court to ever looked at this issue held that a residency requirement for a liquor license violated the Privileges and Immunities Clause

In Plaintiffs' opening brief, we represented to this Court that no prior federal case had ever considered how the Privileges and Immunities Clause applied to the liquor business, or whether the Twenty-first Amendment gave states authority to discriminate against nonresidents who wanted liquor licenses. Opening Brief at 22. Plaintiffs were wrong and have since located one such case: *Wilson v. McBeath,* 1991 WL 540043 (W.D. Tex. 1991)[10] (unreported). In a thoughtful and detailed opinion, District Judge Nowlin determined that engaging in the liquor trade was protected by the Privileges and Immunities Clause, just like all other lawful occupations. *Id*. at *8-*9. He rejected the State's arguments that excluding nonresidents was justified because they would significantly increase administrative burdens and weaken enforcement. *Id.* at *9-*10. He did not find that the Twenty-first Amendment played any role,[11] and declared that Texas' 3-year residency requirement for a retail liquor license violated the Privileges and Immunities Clause. The case is consistent with the argument made by Plaintiffs in their opening brief.

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[10] *Aff'd on other grounds in Cooper v. McBeath,* 11 F.3d 547 (5th Cir. 1994). The Fifth Circuit decided the case on Commerce Clause grounds and did not address the Privileges and Immunities Clause.

[11] Judge Nowlin discussed the Amendment at length in the first part of the opinion that concerned the Commerce Clause. Id. at *3-*5.

C. Responses to the Defendants' counter-arguments

1. No recent authority precludes a corporation from bringing a Privileges and Immunities claim

The Complaint invokes the Privileges and Immunities Clause on behalf of a corporation (Lebamoff Enterprises) and an individual (Doust). The Defendants argue that Lebamoff Enterprises's claim fails because it is a corporation, and only individuals may invoke the protection of the Privileges and Immunities Clause. They cite a case from 1839. State's Brief at 40; Wholesalers Brief at 29. They could have cited somewhat more recent authority, *e.g., Asbury Hospital v. Cass County, N. D.*, 326 U.S. 207, 210-11 (1945). This no-corporation principle has not been re-asserted by the Supreme Court in many years, *e.g., Saenz v. Roe*, 526 U.S. 489 (1999), even when it had the opportunity to do so. For example, one of the plaintiffs in *McBurney v. Young*, 569 U.S. 221 (2013), the Supreme Court's most recent Privileges and Immunities case, was Roger Hurlbert, the owner of Sage Information Service, a California corporation. Hurlbert challenged a Virginia law that denied nonresidents access to its Freedom of Information process and the Supreme Court ignored the fact that it was actually the corporation that contracted to supply the information to clients. *See McBurney v. Ciccinelli*, 616 F.3d 393, 398 (4th Cir. 2010).

Old cases do not settle a contemporary issue in a dynamic field. *U. S.*

Industries, Inc. v. Gregg, 540 F.2d 142, 151 (2d Cir. 1976).[12] Although the Supreme Court has not explicitly revisited its old rule that corporations are not citizens in the context of the Privileges and Immunities Clause, it has done so in other contexts and has rejected this outmoded concept. *See Citizens United v. Fed. Elec. Comm'n*, 558 U.S. 310, 342-43 (2010) (corporations have same First Amendment right as persons to engage in political speech); *Burwell v. Hobby Lobby Stores, Inc*., 134 S.Ct. 2751, 2768 (2014) (corporations are persons for purpose of exercising religious freedom). If corporations are citizens for purposes of the First Amendment, they are citizens for purposes of other constitutional provisions.

2. Engaging in the wine business is a fundamental privilege just like any other occupation

Defendants argue that Plaintiff Doust's claim fails because selling wine is not the kind of activity that is fundamental to the nation's livelihood, and only "fundamental" privileges are protected by the Clause. State's Brief at 40-41. They cite no authority for this proposition and the only court to consider the question held to the contrary. *Wilson v. McBeath*, discussed *supra* at 34. This is consistent with the fact that in every case involving a lawful occupation of any kind, the courts have held that the right to pursue one's trade is exactly the kind of

[12] Plaintiffs appreciate the irony of citing a forty-year-old case for the proposition that old cases do not control contemporary issues.

fundamental privilege the Clause was designed to protect. See Plaintiffs' Opening Brief at 18-19. The Defendants cite an old Michigan case to the effect that no one has an "inherent right" to sell liquor, Wholesalers Brief at 31, but the point is irrelevant.[13] The Privileges and Immunities Clause concerns privileges, not rights, and requires that if a state elects to give its own citizens the privilege to engage in the wine business, whether or not they otherwise had a right to do so, it may not deny that privilege to nonresidents.

Michigan is not required to allow Internet wine sales. No one would have the right to engage in online sales if state law prohibited them. However, once Michigan has given its own citizens permission to sell wine online, the Privileges and Immunities Clause provides that citizens of other states must be given the same privilege unless the state proves no less restrictive means are available to protect its regulatory interests. *Sup. Ct. of N.H. v. Piper*, 470 U.S. at 284.

3. Michigan has less restrictive alternatives that would protect its interests

The State argues that it has important interests that underlie its prohibition against letting nonresidents sell and ship wine to Michigan citizens, but it completely fails to discuss any of the less discriminatory alternatives or prove that

[13] It also confuses the Privileges or Immunities Clause of the 14th Amendment, which protects the natural rights of American citizens,with the Privileges and Immunities Clause of Article IV, which covers fundamental privileges of state citizenship.

they would not work. State's Brief at 41-44. This is the State's burden of proof. *Sup. Ct. of N.H. v. Piper*, 470 U.S. at 284.

The only important policy the State says is at risk is its policy against volume discounts. State's Brief at 43. It fails to give any coherent explanation how this policy would be undermined by allowing competition. Presumably, the policy is intended somehow to stabilize prices, but the State has not offered any evidence to show that it is a significant factor in retail pricing or that out-of-state shippers would actually be able to sell wine in Michigan at significantly cheaper prices. Nor has the State shown that reasonable nondiscriminatory alternatives would be ineffective, such as replacing the volume discount rule with minimum pricing rules and requiring nonresidents to adhere to them. In any event, the Supreme Court has held that trying to control liquor prices in other states so as to make them the same as prices in the regulating state and reduce price competition violates the Commerce Clause rule against extraterritorial legislation. *Healy v. Beer Inst.*, 491 U.S. 324, 337-38 (1989).

In the course of their discussions of the Commerce Clause, the Defendants described a number of other policies they claimed were important and would be undermined by allowing out-of-state retailers to sell and ship wine directly to consumers. They contended that if they allowed interstate sales, it would be more difficult to regulate out-of-state retailers, collect taxes, protect against youth

access, and protect public safety. State's Brief at 29-40. We presume they intend those argument to also stand as reasons why Michigan is entitled to deny equal privileges to nonresidents. The State has the burden of proving that less discriminatory alternatives would not be effective, but it has failed to do so. Michigan has plenty of less discriminatory alternatives it already uses to regulate other parts of the liquor distribution system, especially those that allow out-of-state wineries to ship directly to consumers. The issue is thoroughly discussed earlier in this brief at pages 10-17. It is also worth noting that the Supreme Court has held specifically in the context of the Privileges and Immunities Clause, that fears by state officials that they will face greater costs and difficulties enforcing the law against nonresidents does not justify discriminating against them. *Toomer v. Witsell,* 334 U.S. 385, 398-99 (1948).

4. The Twenty-first Amendment is not relevant

The Twenty-first Amendment is not relevant. It gives states the authority to choose whether to ban alcohol altogether, distribute it itself through state-run stores, or allow private citizens to engage in retailing. *Granholm v. Heald*, 544 U.S. at 488-89. However, once it gives its own citizens the privilege to sell wine at retail, it must extend that privilege to nonresident to sell on similar terms. Plaintiffs' Opening Brief at 22-23. The Defendants do not dispute this point or present any argument to the contrary.

5. The State cannot require a nonresident to establish a physical presence in Michigan before exercising the privilege to be a wine merchant

The State 's primary argument is that the Privileges and Immunities Clause is not actually being violated at all. It claims Mr. Doust and other nonresidents are being treated exactly the same as Michigan's own citizens. They can move to Michigan, obtain a license, open a retail business located in the state, and thereby earn the privilege to sell wine online and ship it to consumers. That's what residents do. State's Brief at 41-42.

The State cites no authority for the proposition that a state can require nonresidents to establish a physical presence in the state, and the case law is to the contrary. In *Sup. Ct. of N.H. v. Piper*, 487 U.S. at 287, the state made a similar argument that it should be allowed to require out-of-state attorneys to open an office in the state so their clients could easily contact them and they would be available on short notice to appear in court proceedings. The Supreme Court rejected the argument, pointing out that the state could solve the problem by requiring a nonresident to associate with local counsel. This is generally the option states use for nonresident businesses -- requiring them to appoint a local agent. See Mich. Comp. L. §§ 450.2011, 450.2015 (foreign corporation must obtain a certificate of authority and a local agent).

A similar argument was made by New York and rejected in *Granholm*, albeit

in the context of the Commerce Clause rather than the Privileges and Immunities Clause. New York allowed nonresidents to open a facility in New York and thereby gain the same rights as New Yorkers to ship wine. The Supreme Court held that the in-state presence requirement was just another form of impermissible discrimination, stating clearly that "States cannot require an out-of-state firm to become a resident in order to compete on equal terms." 544 U.S. at 475.

6. It is irrelevant whether allowing nonresidents to sell wine in Michigan would give them an advantage over residents

Finally, the State argues that allowing nonresidents to sell wine online would not just make them equal, but more than equal. It would give them "advantages" not enjoyed by Michigan citizens. State's Brief at 42-43. It cites no authority that the possibility that a nonresident might end up with a commercial advantage is grounds for denying them the privilege to practice their occupations in a sister state. The Privileges and Immunities Clause does not care whether nonresidents are favored, only whether they are disfavored. After all, it is entirely within the control of the Michigan legislature whether to give its own citizens these same advantages. *See State of Virginia v. Friedman,* 487 U.S. 59, 69 (1987) ("alternatives exist that the State, in the exercise of its legislative prerogatives, is free to implement").

In any event, the argument is without merit, because the State has not proved that nonresidents would actually enjoy substantial advantages that are denied to

residents.

First, the State says nonresidents would be able to sell from premises located outside Michigan, which no resident can do. It does not explain why the location of the premises outside Michigan would be an advantage in operating an Internet business. State's Brief at 42. In any event, the assertion is false. The Privileges and Immunities Clause would require Indiana to allow Michigan residents to do business in Indiana just like it requires Michigan to allow Indiana residents to do business in Michigan.

Second, the State says that nonresidents would be allowed to sell wine that they had not obtained from a wholesaler, which no Michigan retailer can do. State's Brief at 43. It does not present any evidence to support this assertion, which is implausible on its face. As a general rule, all retailers obtain their wine from wholesalers through the three-tier system. See State's Brief at 3 (Statement of Facts). Indeed, the evidence shows that Mr. Doust in fact gets all his wine through wholesalers. Doust Depo. at 20, lines 21-23, State's Exhib. H.[14]

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[14] If the State meant that out-of-state retailers do not obtain their wine from a wholesaler *located in Michigan*, the argument is tautological. If the Commerce and Privileges and Immunities Clauses prohibit Michigan from discriminating against out-of-state retailers directly, they would also prohibit Michigan from discriminating "in effect." *Granholm v. Heald*, 544 U.S. at 487 (statutes can discriminate against interstate commerce on their face or in practical effect). *See Cherry Hill Vineyards v. Lilly,* 553 F.3d at 432-33 (rather than ban direct shipping from out-of-state wineries directly, Kentucky required that the customer appear in person before each purchase; court found this discriminatory in effect because the

Third, the State says that nonresident retailers would be able to get wine from suppliers at volume discounts, which no Michigan retailer can do. State's Brief at 43. The argument is incomprehensible -- discount from what starting point and ending up at what price? If Mr. Doust obtains wine in Indiana at a "volume discount," it is an advantage only if the price he pays is substantially lower than the price for the same wine sold to a Michigan retailer, and only if it results in his delivering the wine to a Michigan consumer at a lower cost (after shipping fees are included). The State has presented no evidence of any of this -- it is pure speculation.

V. REMEDY

In our opening brief, Plaintiffs argued that the Court should resolve the inequality by severing the unconstitutional part of the Liquor Control Code that banned out-of-state retailers from shipping wine, rather than taking away the shipping privilege from in-state retailers. This would be consistent with *Cherry Hill Vineyards v. Lilly*, 553 F.3d at 435, in which the Sixth Circuit held that when a state had been allowing resident winery owners to ship directly to consumers but improperly denying that privilege to nonresidents, the proper remedy was to extended the privilege to all. See Plaintiffs' Opening Brief at 23-25.

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result was essentially the same as a direct prohibition). In any event, the State presented no evidence or explanation how it would be an advantage to get wine from a wholesaler located outside Michigan rather than one located in the state.

In response, the State makes a similar argument that the unconstitutional part should be severed, but adds that the Plaintiffs should not be allowed to begin shipping "immediately." State's Brief at 45. A district judge has broad discretion in choosing the remedy and fashioning the terms of an injunction, *U.S. v. Miami Univ*., 294 F.3d 797, 806 (6th Cir. 2002), so the Court can easily provide for a few months' time for the State to decide whether to require out-of-state retailers to get a direct shipper's license like out-of-state wineries do, or allow them to ship if they are licensed in a sister state like Michigan used to do, see former Mich. Comp. L. § 436.1203(2), (11) (eff. 2009-2017), and California currently does. Cal. Bus. & Prof. Code § 23661.2. Plaintiffs are not contending that they should be allowed to sell wine without any license at all. It is up to the State to make that decision.

The Wholesalers suggest a far different remedy -- taking away the statutory rights of in-state retailers to sell online. This would resolve the disparate treatment in one sense -- in-state and out-of-state retailers would now be treated equally badly. This proposal is difficult to square with the Code's severability clause, which says the part of a statute found unconstitutional is the part to be severed. Mich. Comp. L. § 436.1925(2). The part giving Internet sales rights to in-state retailers is not the part that is unconstitutional. It is also difficult to square taking away rights from people who were not parties with ordinary concepts of Due Process. See *Nguyen v. INS*, 533 U.S. 53, 95-96 (2001) (Scalia J., concurring).

The Wholesalers cite *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003), in which the Fourth Circuit ruled that it was more consistent with the intent of the North Carolina legislature to take away shipping rights from in-state wineries and make everyone go back to the old rules requiring in-person purchasing only. The case is an outlier, was based on the generally restrictive nature of North Carolina's alcoholic beverage code, and is inconsistent with cases from this Circuit. In *Cherry Hill Vineyards v. Lilly*, 553 F.3d at 435, the Sixth Circuit set three principles to govern remedies in alcohol shipping cases: 1) the choice of remedy is for the trial judge's discretion, 2) extension of rights to out-of-state entities is usually the proper remedy, rather than nullifying the rights of in-state businesses, 3) the court must remain conscious not to circumvent the intent of the legislature.

There is no question in this case about the intent of the Michigan legislature. When *Granholm v. Heald* required it to chose whether to take away shipping rights from in-state wineries or extend them to out-of-state wineries, it extended them, see Mich. Comp. L. § 436.1203(4), despite all their fears that allowing direct shipping would undermine the state's ability to police underage drinking, collect taxes, protect public health and safety, ensure regulatory accountability, adequately monitor sales, conduct background checks of license applicants, and review financial records and sales data. *Granholm v. Heald*, 544 U.S. at 489-92 (summarizing states' arguments). Actions speak louder than words.

VIII. CONCLUSION

Ten years ago, this Court declared a similar Michigan law unconstitutional in *Siesta Village Market v. Granholm*. The result this time should be the same. The law violates the Commerce and Privileges and Immunities Clauses.

Respectfully submitted:
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CERTIFICATE OF SERVICE

I certify that on April 23, 2018, I electronically filed the foregoing Brief and exhibits with the Clerk of the Court using the ECF system which will send notification of such filing to the attorneys for Defendants and Intervening Defendant.

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