In the United States Court of Appeals
for the Seventh Circuit

No. 17-2495

LEBAMOFF ENTERPRISES, Inc., JOSEPH DOUST,
and IRWIN BERKLEY
Plaintiffs - Appellants

vs.

BRUCE RAUNER, Governor of Illinois, LISA MADIGAN, Attorney-General of Illinois, CONSTANCE BEARD, Chairperson of the Illinois Liquor Control Commission, and DONOVAN BORVAN, Executive Director of the Illinois Liquor Control Commission, in their official capacities
Defendants - Appellees

and

WINE AND SPIRITS DISTRIBUTORS OF ILLINOIS,
Intervening Defendant - Appellee

On appeal from the United States District Court for the Northern District of Illinois, No. 1:16-cv-08607, Hon. Samuel Der-Yeghiayan, District Judge

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Reply Brief of Appellants

Howard Marks
Berger, Newmark & Fenchel, P.C.
1753 N. Tripp Ave.
Chicago, IL 60639
(312) 782-5050
Fax: 312-782-6491
hmarks@bnf-law.com

James A. Tanford, *Counsel of record*
Robert D. Epstein
Kristina Swanson
Epstein Cohen Seif and Porter, LLP
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
Tel. (317) 639-1326
Fax (317) 638-9891
rdepstein@aol.com
tanford@indiana.ed

Attorneys for Appellants

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Summary of disputes

Illinois allows in-state retailers to ship wine to consumers, but prohibits out-of-state retailers from doing so. Lebamoff Enterprises and its owner, Joseph Doust, are Indiana retailers and therefore are completely closed out of the Illinois market, which is reserved for state residents only. They would like the opportunity to ship wine to customers in Illinois, but the state will neither issue licenses to them nor allow them to ship wine without a license. This kind of disparate treatment of in-state and out-of-state commercial entities has long been held to violate the Commerce Clause and the Privileges and Immunities Clause.

With respect to the Commerce Clause, there is no dispute that the Illinois law would be unconstitutional if the product were anything other than an alcoholic beverage. The question is whether the Twenty-first Amendment overrides the normal operation of the Commerce Clause and allows Illinois to discriminate against out-of-state retailers when the product is wine. Lebamoff contends that it does not. It relies on three Supreme Court cases which held, in three different contexts, that the Commerce Clause applies to state alcohol laws, prohibits discrimination, and has not been nullified by the Twenty-first Amendment. *Bacchus Imports, Ltd, v. Dias,* 468 U.S. 263 (1984), *Healy v. Beer Institute*, 491 U.S. 324 (1989), and *Granholm v. Heald,* 544 U.S. 460 (2005). The State[1] contends that those cases should be read narrowly, and relies on two lower court cases and *dicta* in

[1]The intervening defendant, Wine and Spirits Distributors of Illinois, has adopted the State's brief by reference.

Granholm to argue that in the context of retailer shipping, the Twenty-first Amendment does override the Commerce Clause and permits states to discriminate against interstate shippers of wine.

Whether the Privileges and Immunities Clause forbids discrimination against nonresident wine merchants is a matter of first impression. Although the Clause generally requires that nonresidents be allowed to do business in a state upon the same terms as residents, no court has previously considered whether that is also true for the liquor business. The State argues that selling and shipping wine is not the kind of fundamental privilege protected by the Clause because it is heavily regulated. Doust replies that the courts have said repeatedly that the Clause protects the right to engage in all legitimate occupations, including heavily regulated ones. *See Supreme Ct. of N.H. v. Piper*, 470 U.S. 274, 280 (1985) (practice of law). The State does not argue that the Twenty-first Amendment has any direct effect on this question, and indeed, the Supreme Court has said several times that because the Amendment refers to the transportation of alcohol, it has no effect on any parts of the Constitution other than the Commerce Clause.

There are also two procedural issues -- whether the district court abused its discretion by refusing to allow the plaintiffs to amend the complaint, and whether a new judge should be assigned on remand because Judge Der-Yeghiayan displayed the kind of bias and behavior that justifies such an order. The State disputes the first but did not respond to the second. Both will be discussed briefly at the end of this reply brief.

Argument in reply

I. The Illinois wine shipping laws violate the nondiscrimination principle of the Commerce Clause and are not saved by the Twenty-first Amendment

Lebamoff Enterprises contends that its complaint should not have been dismissed, because it adequately alleges that the Illinois Liquor Control Act discriminates against out-of-state wine retailers in violation of the Commerce Clause.[2] The Act allows in-state retailers to ship wine to Illinois consumers but prohibits out-of-state retailers from doing so and denies them access to the licenses needed to do business in Illinois. The Supreme Court has held repeatedly that the nondiscrimination principle of the Commerce Clause applies to state liquor laws and prohibits a state from treating in-state economic interests more favorably than those from out of state. *E.g., Granholm v. Heald,* 544 U.S. at 484-85. Although the Twenty-first Amendment gave states broad discretion over how to structure their alcohol distribution systems, it "did not immunize state alcohol laws from challenge under other parts of the Constitution," *Ind. Petroleum Mktrs. & Convenience Store Ass'n v. Cook*, 808 F.3d 318, 320-21 (7th Cir. 2015), and is not a defense to a charge of discrimination. *Healy v. Beer Institute*, 491 U.S. at 341-42. A state is free to decide whether to allow or prohibit Internet wine sales, but once it creates a mail-order market, authorizes Internet sales, and allows in-state retailers to deliver using common carrier, it must operate that system in a nondiscriminatory way that allows equal participation by out-of-state sellers.

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[2]U.S. Const., art. I, § 8, cl. 2.

The State responds with two arguments: (A) that Illinois law does not in fact discriminate against out-of-state retailers like Lebamoff, Brief of Def. at 24-32, and (B) even if it did, the Twenty-first Amendment makes such discrimination constitutionally permissible despite holdings to the contrary in *Granholm v. Heald* and related Supreme court cases. Brief of Def, at 17-24. Neither argument has merit.

A. The Illinois scheme is patently discriminatory

The State's argument that it is not actually discriminating against out-of-state wine retailers can be disposed of easily. Illinois allows retailers located in Illinois to obtain a license, sell wine to consumers, and ship it to their homes. 235 Ill. Comp. Stat. 5/5-1(d). It prohibits out-of-state retailers from doing so. 235 Ill. Comp. Stat. 5/6-29.1(b); 235 Ill. Comp. Stat. 5/2-1; Ill. Admin. Code tit. 11, § 100.480.[3] The State's own website clarifies any ambiguities in these statutes:

> Holders of a State of Illinois Retailer's Liquor License will continue to be allowed to ship product to Illinois residents; however, ... out-of-state retailers are prohibited from shipping alcoholic liquor directly to Illinois consumers.

"New License Required to Ship Wine Directly into Illinois" (May 6, 2008), https://www.illinois.gov/ilcc/News/Pages/New-license-required-to-ship-wine-directly-to-consumers.aspx (last visited August 21, 2017). This is the very definition of discrimination, and the State's argument to the contrary is disingenuous.

[3]The text of these provisions is set out on page 3 of Lebamoff's opening brief.

The State points out that some aspects of its Liquor Control Act are not facially discriminatory, such as the requirement that everyone engaged in the wine business have a license and that all retailers must comply with the Liquor Control Act. Brief of Def. at 25-27. These observations miss the point completely. Illinois discriminates against out-of-state entities because it will not issue licenses to them in the first place nor allow them the opportunity to comply with its Liquor Code. It reserves the entire retail mail-order market for its own in-state businesses. Limiting participation in a market to businesses located in the state is itself unconstitutionally discriminatory and protectionist. *E.g., Granholm*, 544 U.S. at 475 (in-state presence requirement unconstitutional; states cannot require an out-of-state winery to become a resident in order to compete on equal terms); *Cooper v. McBeath*, 11 F.3d 547, 548 (5th Cir. 1994) (residency requirement for obtaining a liquor license unconstitutional).

If the Illinois statutory scheme were not discriminatory, there would be a way for Lebamoff Enterprises to gain the legal privilege to ship wine to Illinois residents. It is telling that, for all the ink spent by the State in arguing that there is no discrimination, it never identifies any such avenue -- because none exists.

B. The Twenty-first Amendment does not override the Commerce Clause and allow Illinois to discriminate against out-of-state wine retailers

The State's second response is more complicated, and is at the heart of this case. The State argues that the Twenty-first Amendment overrides the normal operation

of the Commerce Clause[4] and allows it to discriminate against out-of-state retailers without proving that no nondiscriminatory alternative will advance its interests. Brief of Def. at 17-24, 28-30. This argument is implausible on its face. The Supreme Court holds to the contrary:

> Time and again, the Supreme Court has held that state laws -- including liquor laws -- violate the Commerce Clause if they treat out-of-state and in-state economic interests differently, burden the former, and give a competitive advantage to the latter.

Granholm v. Heald, 544 U.S. at 472. It is hard to imagine how the Justices could have made themselves any clearer.

Nevertheless, the State puts forward several theories why the Twenty-first Amendment allows it to discriminate against out-of-state wine retailers despite the fact that in every other context courts have held to the contrary. *See Granholm v. Heald, supra*, (discrimination against out-of-state wineries), *Healy v. Beer Institute*, 491 U.S. at 324 (1989) (discrimination against out-of-state beer distributors), *Bacchus Imports, Ltd, v. Dias,* 468 U.S. at 274-76 (discriminatory tax on imported liquor), *Freeman v. Corzine*, 629 F.3d 146, 160-61 (3d Cir. 2010)[5] (discriminatory restrictions on personal transportation of wine bought out of state), *Cooper v. McBeath*, 11 F.3d at 548 (discrimination against out-of-state applicants for retail

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[4]The normal operation of the Commerce Clause is described in Appellants' Opening Brief at 10-12 and not disputed by the State.

[5]The State misstates the *Freeman* case in its Brief at 31, claiming that the only issues in *Freeman* involved discrimination against wineries. It also struck down a ban on personal importation of more than a gallon of wine regardless of whether it was purchased from a winery or a retailer. 629 F.3d at 160 ("N.J. Stat. Ann. § 33:1–2(a) caps the importation of out-of-state wine for personal use at one gallon...").

liquor licenses). The only court to have previously considered a facially discriminatory ban on shipping by out-of-state wine retailers declared it unconstitutional and rejected the State's argument that retailer shipping laws were somehow exempt from the nondiscrimination principle of the Commerce Clause. *Siesta Village Mkt. v. Granholm,* 596 F. Supp.2d 1035, 1038-39 (E.D. Mich. 2008).

We will reply to the State's arguments in the order presented in its brief, but before we do, it is important to address the State's contention that two Circuits have upheld "nearly identical" laws. Brief of Def. at 19-21. The State is correct that *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809 (5th Cir. 2010) and *Arnold's Wines, Inc. v. Boyle,* 571 F.3d 185 (2d Cir. 2009) upheld state laws banning direct-to-consumer wine shipments from out-of-state retailers, but it is wrong that the laws were nearly identical. Neither state law was discriminatory, and only discriminatory laws trigger strict scrutiny under the Commerce Clause. *E.g.*, *Nat'l Paint & Coatings Ass'n v. City of Chicago,* 45 F.3d 1124, 1131 (7th Cir. 1995) (discriminatory laws are "generally struck down ... without further inquiry"). In *Wine Country Gift Baskets.com v. Steen*, Texas did not allow its own retailers to ship wine statewide, but only to deliver within their local areas. 612 F.3d at 812. In *Arnold's Wines, Inc. v. Boyle*, New York did not allow in-state retailers to ship state-wide, but only to deliver using their own vehicles. 571 F.3d at 188. Whatever those cases have to say about the power of a state to forbid shipping by out-of-state

retailers in *nondiscriminatory* contexts is not germane to this case.[6]

1. The State contends that this case is an attack on the three-tier system itself and is therefore foreclosed by *Granholm* which "held" that the three-tier system was unquestionably legitimate. Brief of Def. at 17-19. The passage the State erroneously refers to as a "holding" is just *dictum*. The Court's actual holding was:

> We hold that the laws in both States discriminate against interstate commerce in violation of the *Commerce Clause*, Art. I, § 8, cl. 3, and that the discrimination is neither authorized nor permitted by the Twenty-first Amendment.

544 U.S. at 466 ("the laws" refer to state bans on retail shipping by wineries).

The Court is quoting a plurality opinion in a Supremacy Clause case, *North Dakota v. U.S.,* 495 U.S. 423 (1990), which involved neither the Commerce Clause nor discrimination. 544 U.S. at 466, 489. It stands for the innocuous point that a state may legitimately create a three-tier system for wine distribution despite the economic burden this places on the product. It does not mean that individual regulations are immune from Commerce Clause scrutiny if they discriminate,[7] as the *Granholm* Court made clear when it rejected this very argument:

> The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding.... The discrimination is

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[6]The State also relies on *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006). The statute in that case (which concerned personal importation of wine, not retail shipping) had been rendered moot by legislative changes so two judges did not concur in the section of the opinion quoted by the State, see 462 F.3d at 361, which means it is not actually an opinion of the Fourth Circuit.

[7]Indeed, Justice Scalia joined the North Dakota plurality only because the law at issue was not discriminatory. 495 U.S. at 444 (Scalia, J., concurring).

> contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.

Granholm, 544 U.S. at 488-89.

There is an important difference between a three-tier system as a general distribution system and a three-tier system in which only in-state businesses may obtain licenses. The former is undoubtedly legitimate, the latter is protectionist and discriminatory. Lebamoff does not ask to be allowed to evade the three-tier system and sell wine without a license. It asks to be allowed to participate in the system as a retailer. *See* Complaint, ¶¶ 6, 19, App. 14, 16. The State takes for granted that its authority to establish a three-tier system includes the authority to issue licenses at each tier only to in-state businesses and deny them to out-of-state businesses like Lebamoff. The State cites no clear authority for such a proposition, and the case law is to the contrary. Residency requirements for liquor licenses are usually unconstitutional. See *Granholm*, 544 U.S. at 472 (winery licenses), *Cooper v. McBeath*, 11 F.3d at 548 (retail licenses), *Peoples Super Liquor Stores v. Jenkins,* 432 F. Supp. 2d 200, 218 (D. Mass. 2006) (retail licenses); *Byrd v. Tenn. Wine & Spirits Retailers Assoc.*, 259 F. Supp. 3d 785, 790 (M.D. Tenn. 2017) (retail licenses).[8]

[8]The lone exception is *Southern Wine & Spirits of Am, Inc. v. Div. of Alcohol & Tobacco Control,* 731 F.3d 799, 807 (8th Cir. 2013), which upheld a residency requirement for a wholesaler license on the ground that the state had shown that it was necessary, which is a question of fact that cannot be determined at this stage of the proceedings.

To justify a discriminatory licensing rule, the State would have to prove that no reasonable non-discriminatory alternative exists that would adequately advance its interests. *Granholm*, 544 U.S. at 489. The State claims, for example, that it must require all licensed retailers to obtain their wine only from Illinois-licensed (and maybe Illinois-resident) wholesalers in order to advance the "regulatory protections that Illinois has established." Brief of Def. at 19. It does not explain what those protections are, nor prove that the wine sold by Lebamoff would threaten those protections, nor that no nondiscriminatory alternative exists. Such a showing would require proof and cannot be resolved at this stage of the litigation on a motion to dismiss.

2. The State argues that the three prior Supreme Court cases that struck down discriminatory state liquor laws can be distinguished because they reviewed laws that were not "inherent" aspects of the three-tier system. The State contends that laws that are inherent to the three-tier system remain exempt from the nondiscrimination principle of the Commerce Clause, and the ban of retailer shipping is such an inherent law. It derives this novel argument from the *dicta* in *Granholm* that the Court has previously held that the three-tier system is unquestionably legitimate. Brief of Def. at 19-23.

This supposed distinction between inherent and noninherent aspects of the three-tier system does not appear in *Granholm, Healy or Bacchus, supra,* nor in *North Dakota v. U.S., supra,* from which the *dictum* about the legitimacy of the three-tier system comes. The State provides no coherent explanation of how a court

would determine what is an inherent aspect of the three-tier system. Indeed, the Eighth Circuit has commented that "there is no archetypal three-tier system from which the 'integral' or 'inherent' elements of that system may be gleaned. States have discretion to establish their own versions of the three-tier system." *Southern Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control,* 731 F.3d 799, 810 (8th Cir. 2013).

The Second and Fifth Circuits created this distinction to justify not following *Granholm*'s holding that liquor laws violate the Commerce Clause if they discriminate against out-of-state interests, 544 U.S. at 472, and that "discrimination is neither authorized nor permitted by the Twenty-first Amendment." Id. at 466. Judge Calabresi on the Second Circuit simply disagreed with the result in *Granholm*, writing a concurring opinion to criticize the Court's "evolving interpretation" of the Amendment as inappropriate judicial activism. *Arnold's Wines v. Boyle,* 571 F.3d at 197-98.[9] The Fifth Circuit was more circumspect but it also criticized and declined to follow the Supreme Court's "developing interpretation" of the Amendment, contending that it was deviating from the Amendment's original intent, which was to exempt basic aspects of a state's three-tier system from Commerce Clause scrutiny. With respect to retailers, the exempt laws are those inherent to what retailing "must" include, which it says are over-the-counter sales and deliveries to local customers. *Wine Country Gift Baskets.com v. Steen*, 612 F.3d at 818-20.

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[9]It is likely that Judge Wesley, who wrote the opinion in *Arnold's Wines* also disagreed with the result in *Granholm*. He had also written the opinion in *Swedenburg v. Kelley,* 358 F.3d 223 (2d Cir. 2004), which was reversed by the Supreme Court in *Granholm*.

Even if this inherent/noninherent distinction were an approach the Supreme Court might some day adopt, it would not help the State, because Internet ordering and FedEx shipping is not an inherent part of the traditional wine retailing business. Only about 14 states allow it.[10] Most require retail purchases to be made in person at a bricks-and-mortar store that can verify age and level of intoxication before making the sale. Illinois might be able to discriminate against nonresidents if it reverted to the 1930s version allowing local retailing only, but not when it creates a new market for Internet orders placed remotely and delivered by common carrier.

3. The State contends that when alcoholic beverages are involved, the Commerce Clause only forbids discrimination against products and producers and does not protect retailers like Lebamoff. Brief of Def. at 28-31. The argument is implausible on its face, since the courts regularly apply the nondiscrimination principle to all kinds of commercial activity, including retailing. *See, e.g., Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641 (1994) (mail-order sellers); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940) (retail sellers); *Cooper v. McBeath*, 11 F.3d at 548 (retail liquor licenses), *Peoples Super Liquor Stores v. Jenkins,* 432 F. Supp. 2d at 218 (retail liquor licenses); *Byrd v. Tenn. Wine & Spirits Retailers Assoc.*, 259 F. Supp. 3d at 790 (retail liquor licenses). Indeed, the very case that announced the dormant Commerce Clause nondiscrimination principle 180 years ago did not involve

[10]Paul Knettel, *Constitutional Mixologists: Muddling the Analysis of Protectionist Alcoholic Beverage Laws After* Granholm v. Heald, 93 WASH. U. L. REV. 1071, 1081 (2016) (text accompanying notes 80-82).

products and producers, but boat companies ferrying passengers and goods across the Hudson River. *Gibbons v. Ogden*, 22 U.S. 1, 231 (1824) (Johnson, J., concurring).

The State has not cited a single case in which the Supreme Court actually upheld a state law discriminating against out-of-state retailers and denying them the ability to do business upon the same terms as in-state retailers.[11] Instead, the State asks this court to interpret *Granholm's* holding that states may not discriminate against out-of-state wineries as if it said states may discriminate against any entity except a winery. Such an interpretation is unjustified. The reason the *Granholm* Court limited its holding to discrimination against wineries is because the case only concerned wineries. Nowhere in the opinion does the Court say it would have reached a different result if the case had involved retailer shipments instead of winery shipments, and the Court has repeatedly cautioned that its opinions are not to be interpreted as ruling on issues not presented or addressed. *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004); *Texas v. Cobb*, 532 U.S. 162, 169 (2001). The State's argument also distorts the *Granholm* opinion. It did not just say that discrimination against producers and products is unconstitutional, it said that all state liquor laws are subject to Commerce Clause scrutiny, 544 U.S. at 466, 487, and states may not enact laws that burden out-of-state "producers or *shippers*" or that give a competitive

[11]The three Circuit Court opinions the State erroneously claims upheld discriminatory retail shipping laws are discussed *supra* at pages 7-8.

advantage to in-state "*businesses*" of any kind. *Id*. at 472 (emphasis added). It is not possible to read the entire opinion and think that the Court meant to limit its holding to wine producers.

One Circuit has suggested that *Granholm* should be read as the State suggests -- drawing a bright constitutional line between producers and retailers that would allow states to discriminate against out-of-state retailers. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d at 189. It is hard to give this language much weight. The Second Circuit simply disagreed with the holding in *Granholm*, so it built a theory for limiting it based on *dicta,* dissenting opinions and ignoring the fact that *Healy v. Beer Inst*., 491 U.S. at 325, had struck down a statute that discriminated against out-of-state importers and shippers. *See, e.g.,* 571 F.3d at 190-91, n.2. The Second Circuit's suggestion about how to limit the Supreme Court's holding in Granholm was unnecessary *dicta* -- there was no issue of discrimination against retailers before the court, since the New York shipping statute was not discriminatory in the first place. See discussion at page 7, *supra.* It has not been adopted by other courts *See Wine Country Gift Baskets.com v. Steen*, 612 F.3d at 819-20; *Byrd v. Tenn. Wine & Spirits Retailers Assoc.*, 259 F. Supp. 3d at 793; *Cooper v. Texas Alcoholic Beverage Com'n*, 820 F.3d 730, 743 (5th Cir. 2016).

C. Whether discrimination against out-of-state retailers is necessary requires proof and cannot be resolved in a motion to dismiss.

The State argues that its decision to prohibit out-of-state retailers from shipping directly to consumers advances a number of laudable state interests that are implicit in its regulatory system, although it does not articulate exactly what those

interests are. Brief of Def. at 26-27. The only one it identifies is preventing direct marketing via the Internet, but this cannot be taken seriously because in-state retailers are allowed to advertise on the Internet. See https://www.binnys.com// (last visited December 22, 2017).

The State is correct that discrimination may indeed be justified on those rare occasions when the State can prove that the rule advances important regulatory interests *and that no reasonable non-discriminatory alternative exists.* This is the State's burden of proof, however, and the evidentiary standards for such justifications are high. *Granholm v. Heald*, 544 U.S. at 489. Such evidence will not be developed until summary judgment or trial, so the argument is not germane at this stage.

II. Illinois denies nonresidents the privilege to engage in the wine retail business upon the same terms as its own citizens in violation of the Privileges and Immunities Clause

Plaintiff Joseph Doust contends that his complaint should not have been dismissed because it adequately alleges that the Illinois Liquor Control Act violates the Privileges and Immunities Clause[12] by denying nonresidents the opportunity to engage in their occupations in Illinois upon the same terms as Illinois citizens. The Act allows residents to obtain licenses that give them the privilege operate a wine retail business that sells and ships wine to the public, but prohibits nonresidents like Doust from doing so. The Supreme Court has long held that the Clause forbids states from barring nonresidents from practicing their professions in the state. *E.g.,*

[12]U.S. Const., art IV, § 2, cl. I.

Sup. Ct. of N.H. v. Piper, 470 U.S. at 280. Although the Twenty-first Amendment gives states the authority to license and regulate the liquor business, it did not repeal the Privileges and Immunities Clause. Once Illinois has decided to allow its own citizens to become wine merchants, it must extend that privilege to non-citizens as well.

The State makes two arguments in response: (1) that the complaint identified no interest that would trigger the protections of the Privileges and Immunities Clause, and (2) that there was no disparate treatment, i.e., that Illinois was in fact treating residents and nonresidents alike. Neither has merit. The State did not argue that the Twenty-first Amendment significantly affects the normal operation of the Privileges and Immunities Clause.

1. Contrary to the State's first argument, Mr. Doust has clearly alleged a deprivation of a fundamental privilege that triggers the protection of the Privileges and Immunities Clause, namely the privilege to engage in one's occupation. Complaint ¶¶ 22-28, App. 16-17. The courts have repeatedly held that engaging in one's occupation is fundamental, whether a person is practicing law, *Sup. Ct. of N.H. v. Piper*, 470 U.S. *at* 280-81, working on the Alaska pipeline, *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978), fishing for shrimp, *Toomer v. Witsell*, 334 U.S. 385, 398-99 (1948), working construction, *United Bldg. & Const. Trades Council v. City of Camden*, 465 U.S. 208, 210-11 (1984), or selling goods by mail-order. *Ward v. State,* 79 U.S. 418, 424-25 (1870). *See also W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 497 (7th Cir. 1984) (privilege to work in another state is protected). The State has

not cited to a single case in which any bona fide occupation was deemed not fundamental.[13] The State points out that selling alcoholic beverages is not a "right" under Illinois law, Brief of Def. at 34, but this observation is irrelevant because the Privileges and Immunities Clause protects "privileges" regardless of whether they amount to rights of citizenship. There may be no "right" to sell liquor without a license in Illinois, but once the state gives its own citizens the privilege to apply for a license to do so, it must extend that privilege to nonresidents. See *Sup. Ct. of N.H. v. Piper*, 470 U.S. at 280-81 (law licenses); *O'Reilly v. Bd. of App. of Montgomery Co., Md.*, 942 F.2d 281, 284-85 (4th Cir. 1991) (taxi licenses).

2. The State's second argument is that Illinois law treats residents and nonresidents alike, so there is no disparate treatment. This argument is disingenuous. Illinois allows residents to obtain retail licenses, sell wine, and ship to consumers, but prohibits nonresidents from doing so. The culprits are 235 Ill. Comp. Stat. 5/5-1(d) and 235 Ill. Comp. Stat. 5/6-29.1(b).[14] Section 5/5-1(d) authorizes the issuance of a retailer's license to a resident which allows that person to sell, deliver and ship wine to a consumers in the state. By contrast, Section 5/6-

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[13]The State cites an old Illinois opinion that supposedly held that engaging in the liquor business was not a fundamental privilege protected by the Privileges and Immunities Clause, but the State has mixed up two similar constitutional provisions. The Illinois court was addressing the clause in the Fourteenth Amendment that "No State ... shall abridge the privileges or immunities of citizens of the United States." *Hornstein v. Ill. Liquor Control Com'n*, 106 N.E.2d 354, (Ill. 1952). That Clause was interpreted into oblivion by the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873). Plaintiffs, on the other hand, are asserting a violation of the Privileges and Immunities Clause of Article IV, § 2, which governs state law privileges, and is alive and well. *McBurney v. Young,* 569 U.S. 221 (2013).

[14]The statutes are set out at page 3 of Appellants Opening Brief..

29.1(b) makes it unlawful for a nonresident to ship wine into the state to a consumer, and the Act contains no provision for nonresidents to obtain any kind of permit that would allow them to ship to consumers lawfully. *See* 235 Ill. Comp. Stat. 5/2-1 (shipping into Illinois is unlawful unless the person has been issued a license by the Commission). Without access to a license, the nonresident is prevented from engaging in the same kind of business activity-- retailing -- as residents. This is disparate treatment.

At various places, the State characterizes Doust's complaint as seeking to evade the Illinois three-tier system and sell wine into Illinois without a license and outside its regulatory framework. Brief of Def. at 33, 35. This is either a misreading or deliberate distortion of the complaint, which clearly states to the contrary that he seeks to sell wine upon terms equivalent to those given citizens of Illinois, Complaint, Intro., App. 13, and would pay all taxes and comply with all other non-discriminatory state regulations, Complaint ¶ 6, App. 14, including its licensing laws. Complaint ¶ 20, App. 16.[15]

The State does not respond to Doust's argument that the Twenty-first Amendment does not immunize state liquor laws from the commands of the Privileges and Immunities Clause, nor does it dispute that the Supreme Court has previously said that the Twenty-first Amendment "places no limit whatsoever" on

[15]Paragraph 20 refers to Plaintiff Doust's business name, Lebamoff Enterprises, and is incorporated by reference into the Privileges and Immunities claim in ¶ 21. To the extent that there is any ambiguity about the application of these allegation's to Doust's claim, it could have been clarified had the district court allowed an amended complaint. *See* Section III, *infra*.

any constitutional provision other than the Commerce Clause, *e.g., 44 Liquormart v. R.I.,* 517 U.S. 484, 515 (1996). Therefore, no reply is necessary, and the issue is fully addressed in plaintiffs' opening brief at pages 21-23.

III. If there were defects in the complaint, the district judge abused its discretion by refusing to let the plaintiffs amend it

Lebamoff and Doust contend that the district court abused its discretion by granting the State's motion to dismiss and then immediately closing the case without giving them the opportunity to amend the complaint. The action violated *Runnion v. Girl Scouts of Greater Chicago*, 786 F.3d 510, 518-19 (7th Cir. 2015), which held that a plaintiff should be given at least one opportunity to amend a complaint before the case is dismissed. In the event that this Court finds that either Lebamoff's Commerce Clause claim or Doust's Privileges and Immunities Clause claim as alleged in the first complaint is inadequate under Rule 12(b)(6), it should follow *Runnion*, remand the case, and give the plaintiffs the opportunity to amend it.

The State does not dispute that *Runnion* requires that a plaintiff ordinarily should be given an opportunity to amend the complaint. Brief of Def. at 37. Instead it argues that Lebamoff and Doust have waived the right to raise this issue on appeal because they failed to address the district court's ruling that an amendment would be futile in their opening brief. Brief of Def, at 36-39. The argument is without merit.

In their opening brief, Lebamoff and Doust identified the reasons given by the district court for dismissing the complaint, explained how they could have been

corrected by an amended complaint, and cited authority under both the Federal Rules of Civil Procedure and case law. Brief of Appellants at 24-25, They provided the motion to amend, the proposed amended complaint and the court's rulings in the Appendix. *Id.* at App. 2, 11, 20, 22. The case cited by the State in support of its waiver argument -- *Gross v. Town of Cicero,* 619 F.3d 697 (7th Cir. 2010) -- is inapposite. It merely re-states the well-known principle that perfunctory arguments presented in footnotes and without authority are waived. *Id.* at 705. That is not the situation here. The *Runnion* argument was developed in the body of the brief, supported by citations to the record and case authority, and has not been waived. It could not have addressed the district court's decision in more detail because the district court provided no explanation for it. See App. at 11.[16]

The State points out that *Runnion* does not necessarily require an opportunity to amend the complaint if the district court determines that doing so would be futile. Brief of Def. at 37. It then tries to persuade this Court that an amended complaint would in fact have been futile. *Id.* at 37-39. The problem with this argument is twofold. First, an amended complaint could easily have corrected the district court's central reason for dismissing the complaint -- its misperception that plaintiffs were seeking the right to evade the Illinois licensing and regulatory system. It could have made clearer that they were asking only to participate in it upon the same terms as state residents. This misperception was cited by the district court in its opinion, and

[16]The only statement by the district court was "The record also reflects that any attempt by Plaintiffs at amending the complaint would be futile." It does not say why. App. 11.

the State in its brief, as a critical reason for granting the motion to dismiss. Mem. Opinion, App. 5-7, 9; Brief of Def. at 35. An amended complaint would not have been legally futile.

Second, the district court's decision to deny leave to amend a complaint is reviewed for abuse of discretion, not *de novo*. The State concedes as much. Brief of Def. at 13-14. *Runnion* holds that denying the opportunity to amend at least once is almost always an abuse of discretion, so that a judge's refusal to so on the basis of futility must be rigorously explained, so its reasons and the legal standard on which it is based can be reviewed. 786 F.3d at 519-21. The district court provided no explanation, so there is no basis on which this Court can find that it properly exercised its discretion. The State is merely speculating as to what the court's legal reasoning might have been, which is not germane to a review for abuse of discretion.

Federal R. Civ. P. 15(a)(2) requires a district court judge to grant leave to amend "freely," but the district court did not do so. In these circumstances, under the authority of *Runnion*, the case at a minimum should be remanded to give Lebamoff and Doust an opportunity to amend their complaint to address the defects perceived by the district court.

IV. The case should be assigned to a different judge on remand.

Lebamoff and Doust have requested that a new judge be assigned on remand under the authority of *Stuart v. Local 727, Intern. Broth. of Teamsters*, 771 F.3d 1014, 1020 (7th Cir. 2014). In *Stuart*, this Court held that it had the discretion to

order that a new judge be assigned in a case like this one, where the original judge had behaved abruptly and irregularly, dismissed a complaint without giving plaintiff the opportunity to amend it, and issued an opinion with an unmistakable tone of derision. The State did not respond or object to this request, so no reply is needed. This issue was fully briefed in Appellants' opening brief at 24-26.

Conclusion

The judgment of the district court should be reversed and the case remanded and assigned to a new judge.

Respectfully submitted,
Attorneys for Appellants

s/ James A. Tanford
James A. Tanford
Robert D. Epstein
Kristina Swanson
Epstein Cohen Seif & Porter, Llp
50 S. Meridian St., Suite 505
Indianapolis, IN 46204
Tel. (317) 639-1326
Fax (317) 638-9891
tanford@indiana.edu
rdepstein@aol.com

Howard Marks
Berger, Newmark & Fenchel, P.C.
1753 N. Tripp Ave.
Chicago, IL 60639
(312) 782-5050
Fax: 312-782-6491
hmarks@bnf-law.com

Certification of Word Count

I certify that this brief, including footnotes and the statement of issues, but excluding tables and certificates, contains 5927 words according to the word-count function of WordPerfect, the word processing program used to prepare this brief.

s/ James A. Tanford
James A. Tanford
Attorney for Appellants

Certificate of Service

I certify that on January 3, 2018, I electronically filed the foregoing with the Clerk of the Court for the U. S. Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ James A. Tanford
James A. Tanford
Attorney for Appellants