Case No. 18-2199

Case No. 18-2200

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LEBAMOFF ENTERPRISES, Inc., ET AL.,
Plaintiffs - Appellees
vs.
RICK SNYDER, ET AL.,
Defendants - Appellants in 18-2199
and
MICHIGAN BEER &WINE WHOLESALERS ASSOC.,
Intervening Defendant - Appellant in 18-2200

Appeal from a Final Judgment of the United States District Court
for the Eastern District of Michigan, Hon. Arthur J. Tarnow
District Court no. 2:17-cv-10191

BRIEF OF THE NATIONAL ASSOCIATION OF WINE RETAILERS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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Corporate disclosure statement

National Association of Wine Retailers has no parent corporation, and no publicly held corporation owns more than 10% of its stock.

Table of contents

Table of authorities

Statutes, Constitutional Provisions and Rules

STATEMENT OF INTEREST[1]

The National Association of Wine Retailers (NAWR) represents and promotes the unique interests of wine sellers nationwide. Through advocacy, education and research, NAWR seeks to expand the opportunities for America's wine retailers whether they serve the wine buying public via small brick and mortar establishments, large retail chains, Internet-based businesses, grocery stores, auction houses or clubs.

NAWR has an interest in growing the marketplace for wine retailers across the country and to change state laws that close off marketplaces for our members. NAWR will represent its interest when states act unconstitutionally and enforce

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[1] All parties have consented to the filing of this brief. See Fed. R. App. P. 29(a). No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person, other than NAWR, its members or its counsel, contributed money intended to fund the preparation or submission of this brief. See Fed. R. App. P. 29(c)(5).

discriminatory state laws that shut off the marketplace to our members. NAWR desires an open and fair marketplace where everyone can partake in commerce on equal terms. NAWR seeks to remove these arbitrary and protectionist obstacles to operating in a modern marketplace.

Thus, NAWR has an interest in this case because we desire to ensure fair and equitable markets for every retailer in America.

SUMMARY OF THE ARGUMENT

Michigan's statute that prohibits out-of-state retailers from shipping wine to consumers in Michigan while allowing in-state retailers to exercise this privilege, is discriminatory and protectionist and violates the nondiscrimination principles of the Commerce Clause.

The great debate in liquor circles for nearly 15 years has been whether *Granholm v. Heald's* nondiscrimination principles, which held that a state could not discriminate against an out-of-state winery, also apply to retailers? In *Granholm* the Supreme Court held that New York and Michigan laws that allowed in-state wineries to ship to New York and Michigan customers but didn't allow out-of-state wineries the same privilege violated the Commerce Clause. *Granholm v Heald*, 544 U.S. 460 (2005)

In its recent term the U.S. Supreme Court answered this question resoundingly and held that the nondiscrimination principles of *Granholm* extend to all out-of-state interest, including retailers:

"The Association and the dissent point out that *Granholm* repeatedly spoke of discrimination against out-of-state products and producers, but there is an obvious explanation: The state laws at issue in *Granholm* discriminated against

out-of-state producers. See 883 F. 3d, at 621. And *Granholm* never said that its reading of history or its Commerce Clause analysis was limited to discrimination against products or producers. On the contrary, the Court stated that the Clause prohibits state discrimination against all "'out-of-state economic *interests*,'" *Granholm*, 544 U. S., at 472 (emphasis added), and noted that the direct-shipment laws in question "contradict[ed]" dormant Commerce Clause principles because they "deprive[d] *citizens* of their right to have access to the markets of other States on equal terms." *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S. Ct 2429, 2471(2019)

Justice Alito's resounding statement leaves no doubt that *Granholm* extends to retailers and states cannot utilize laws to discriminate in favor of in-state retailers at the expense of their out-of-state counterparts.

Another consequence of *Tennessee Wine's* is it endorsed the District Court's ruling that extended *Granholm* to retailers. *Lebamoff Enters. V. Snyder*, 347 F. Supp. 3d 301, 313, 314 (E.D. Mich. 2018). *Lebamoff* was decided before *Tennessee Wine* and the Supreme Court confirmed the legitimacy and righteousness of the District Court's ruling.

In opposition to well settled legal precedent, Michigan sets up an alcohol regulatory system that discriminates against out-of-state retailers and has an

adverse effect on commerce. In the United States there are over 500,000 wines and many are not available in Michigan. See Wark Statement, RE 31-9, Page ID # 263. Under Michigan's regulatory system the wholesaler tier determines the availability of product in the marketplace. See Wark Statement, RE 31-9, Page ID # 264. Consumers sometimes demand product that Michigan's system does not provide and seek product from out-of-state retailers. Bridenbaugh Decl. ¶¶ 4-5, RE 31-9, Page ID # 258-259.

Michigan prohibits consumers from obtaining wines unavailable in Michigan and forces them to buy product only allowed by the Michigan regulatory system. Michigan's unconstitutional system essentially shuts off interstate commerce and puts a hard, protectionist border around the state.

Michigan and their amici defend their system on three grounds: by claiming that under *Tennessee Wine*, Michigan's law is constitutional; that in-state and out-of-state retailers are not similarly situated for Commerce Clause purposes; and Michigan requiring an out-of-state retailer maintain physical presence in the state is constitutionally permissible.

Michigan and its advocates claim the Michigan law is constitutionality justified under *Tennessee Wine* because the Supreme Court abandoned the Commerce Clause strict scrutiny test and replaced it with a "predominant effect"

test. Under the "predominant effect" test the states must show that "the predominant effect of a law" is the protection of public health and safety (or other legitimate state interests)—not protectionism." WSWA Brief at Page 8. The claim is that Michigan meets the "predominant effect" test and hence its law is constitutional.

This conclusion misreads *Tennessee Wine,* which endorsed the Commerce Clause strict scrutiny test set forth in *Granholm, Bacchus*, *Brown-Forman Distillers Corp.* and *Healy.* Nowhere in *Tennessee Wine* did the Court deviate from strict scrutiny and endorse a different test.

Likewise, the state's claim that out-of-state retailers are not similarly situated for Commerce Clause analysis is also without merit. The parties are identical in what they sell (wine) and are seeking the same market (Michigan consumers). Michigan and its advocates claim that in-state and out-of-state retailers are not similarly situated because their products are procured under a different state's regulatory system. The Supreme Court has never endorsed this view. In fact, this theory would fatally undermine *Granholm,* which held that a Michigan law that banned out-of-state wineries from shipping into the state was unconstitutional. In *Granholm*, the winery litigants produced their wines under different regulatory systems than that of the state into which they desired to ship,

yet this did not give the Court reason to declare out-of-state wineries were not similarly situated to in-state wineries.

The state also argues that the Supreme Court distinguishes between residency and physical presence. The state claims it can require physical presence in order for a retailer to do business in the state. This position runs contrary to the lessons of *Granholm*.

Finally, Michigan and its advocates fail to mention that there are alternatives to shutting down commerce by sealing the border. Under Commerce Clause strict scrutiny analysis, the law "will only survive if it advances a legitimate local purpose that cannot be adequately served by reasonable alternatives." *Dep't of Revenue of Ky. V. Davis*, 553 U.S. 328, 338 (2008)

The state could subject an out-of-state retailer to Michigan's regulatory and legal system in exactly the same way the state brings out-of-state wineries under its regulatory and legal umbrella.

Michigan fails to entertain any less burdensome alternative.

ARGUMENT

I. Michigan's statute which prohibits out-of-state retailers from shipping wine to consumers in Michigan while allowing in-state retailers to exercise this privilege, is discriminatory and protectionist and violates the nondiscrimination principles of the Commerce Clause.

A. Under a strict scrutiny constitutional analysis, Michigan's law should be deemed unconstitutional.

The Commerce Clause gives Congress the power to regulate commerce among the several states.[2] The United States Supreme Court interprets the "Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of state." *C & A Carbone, Inc., v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994).

Additionally, the Supreme Court interprets the Commerce Clause to encompass an "implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. The Beer Institute, Inc.,* 491 U.S. 324, 326 (1989)

[2] U.S. Const., art. I, § 8, cl. 3

The Dormant Commerce Clause is meant to prevent a state from discriminating against out-of-state actors and interest and favoring their in-state competitors. *Or. Waste Systems, Inc. v. Dep't of Env't Quality of Or.,* 511 U.S. 93 (1994)

The 6th Circuit utilizes a two-part test in Commerce Clause cases to determine whether discrimination exist. *American Beverage Ass'n v. Snyder*, 735 F.3d at 369-70 (citing *Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth*., 476 U.S. 573, 578–79 (1986)).

The Court looks at the level of scrutiny required. "A [state regulation] can discriminate against out-of-state interests in three different ways: (a) facially, (b) purposefully, or (c) in practical effect." Id. at 370. If the state law discriminates in any of these three different ways against out-of-state interest or products, the court will apply strict scrutiny.

Under strict scrutiny the law "will only survive if it advances a legitimate local purpose that cannot be adequately served by reasonable alternatives." *Dep't of Revenue of Ky. V. Davis*, 553 U.S. 328, 338 (2008)

If a court finds the law does not violate the nondiscrimination principles of the Commerce Clause, it will be subject to the *Pike* balancing test, where the law which burdens interstate commerce will be sustained unless the burden is clearly

excessive as related to the local interest or benefit. *Pike v. Bruce Church, Inc*., 397 U.S. 137 (1970).

Under the dormant Commerce Clause cases, a state law that discriminates against out-of-state goods or nonresident economic actors can be sustained only on a showing that it is narrowly tailored to "advance[] a legitimate local purpose." *Department of Revenue of Ky. V. Davis*, 553 U. S. 328, 338.

If a facially discriminatory law related to a commodity other than alcohol, the analysis would be complete and the law would be found unconstitutional for violating for the Commerce Clause. However, since we are dealing with Section 2 of the 21st Amendment, there must be an additional analysis.

Under Section 2 of the 21st Amendment:[3]

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

The Supreme Court has indicated that Section 2 "gives each State leeway in choosing the alcohol-related public health and safety measures that its citizens find

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[3] U.S. Const., amend. XXI, § 2

desirable. But § 2 is not a license to impose all manner of protectionist restrictions on commerce in alcoholic beverages." *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S. Ct 2449, 2457 (2019)

The Court has stated that public health and safety concerns or other legitimate interest used to justify discrimination cannot be sustained by mere speculation or unsupported assertions. Id. at 2474. The state must provide hard data or evidence to support its claims that its interests are legitimate enough to overcome a Commerce Clause challenge.

Tennessee Wine has adopted a standard that is consistent with the rule set forth in *Granholm, Bacchus, Brown-Forman Distillers Corp.* and *Healy* that "`[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.'" Id. at 2471 citing *Granholm, supra,* at 487, 125 S. Ct. 1885 (quoting *Brown-Forman, supra,* at 579, 106 S. Ct. 2080; emphasis added).

Michigan's law facially discriminates against out-of-state wine retailers by allowing in-state wine retailers to ship into Michigan, but not affording out-of-state retailers this same privilege. Mich. Comp. L. § 436.1203

What results is a discriminatory law that severely impacts commerce and does not allow retailers to meet consumer demand. There are over 500,000 wines approved for sale in United States (U.S.). See Wark Statement, RE 31-9, Page ID # 263. A vast majority of wines are unavailable for consumers, because their in-state distribution network does not carry the product. Bridenbaugh Decl. ¶¶ 4-5, RE 31-9, Page ID # 258-59. A consumer can order certain unavailable domestic wines via winery direct shipping. But an estimated 65% of the wines for sale in the U.S. are foreign based wines. See Wark Statement, RE 31-9, Page ID # 263-264. Only retailers can sell foreign based wines. If a Michigan retailer wants to sell a specific foreign wine, it is dependent on its wholesaler network's stock.

If a consumer in Michigan desires a certain specific foreign wine, it must hope that its retailer carries the product.

If the retailer does not or cannot (because the Michigan wholesaler network does not carry the specific brand) carry the product, the Michigan consumer's only option is to locate a retailer outside Michigan that carries the wine, travel to that state, procure the wine, then bring it back with them via train, plane or automobile.

However, there is an alternative to this burdensome method for Michigan consumers obtaining the wine they want, but can't find locally. Create a permit regulating the shipment of wine into Michigan by out of state retailers.

Bridenbaugh Decl. ¶¶ 7-8, RE 31-9, Page ID # 258-60. There is a high likelihood that specialty retailers in state like California, Florida, New Jersey and New York would carry a rare foreign wine not available in Michigan. Bridenbaugh Decl. ¶¶ 7, RE 31-9, Page ID # 259. Those retailers could ship this rare, foreign wine to Michigan customers.

Michigan's law hampers commerce and clearly imposes a commercial barrier against articles of commerce based on the state of origin.

Unless the state provides evidence that its law serves to protect the health and safety of its citizens or some other legitimate interest and the state's interest cannot be served by less discriminatory means, according to the strict scrutiny standard set down in numerous Supreme Court Cases, the law is unconstitutional.

However, according to the state and its amici, the long held strict scrutiny constitutional standard was changed by the *Tennessee Wine* decision and a new standard was adopted. Under Commerce Clause strict scrutiny analysis, "if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to advance a legitimate local purpose." *Tenn. Wine & Spirits Retailers Assoc. v. Thomas* 139 S. Ct. 2449, 2461 (2019)

Under the state and their amicis' newly created standard the state must "show that 'the predominant effect of a law' is the protection of public health and safety (or other legitimate state interests)—not protectionism." WSWA's Brief at Page 8. To prove this the state may provide "'concrete evidence' that the state law "actually promotes" legitimate, "nonprotectionist" interests or that there are no "obvious alternatives that better serve" the states' goals. WSWA's Brief at 8.

First, this new newly created standard confuses what the "predominant effect of the law" standard constitutes. The "predominant effect" is the law's result or consequence and not the evidentiary standard. The evidentiary standard for strict scrutiny is whether a discriminatory law is narrowly tailored to advance a legitimate local purpose. *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S. Ct. 2449, 2461 (2019) citing *Department of Revenue of Ky. V. Davis,* 553 U.S. 328, 338, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008). See also, *e.g., Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.,* 511 U.S. 93, 100-101, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994); *Maine v. Taylor,* 477 U.S. 131, 138, 106 S.Ct. 2440, 91 L.Ed.2d 110

Second, the state and their amici advance the "predominant effect" standard as a way to get around the narrowly tailored requirements, because their law

cannot meet these requirements. Under *Tennessee Wine* the Court determined that the states needed to provide evidence that discrimination was justified and that speculation and unsupported assertions were not enough to sustain a law that violates the Commerce Clause. *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S. Ct. 2449, 2474 (2019). It states in the opinion:

"As a result, the record is devoid of any "concrete evidence" showing that the 2-year residency requirement actually promotes public health or safety; nor is there evidence that nondiscriminatory alternatives would be insufficient to further those interests." Id.

WSWA's brief indicated that *Tennessee Wine* did not support this reading and that if the state had some competent evidence that its law promotes a legitimate interest, they could meet the *Tennessee Wine* standard. WSWA's Brief at Page 9.

Under WSWA's theory the state has an interest in maintaining an independent alcohol distribution system and there are no obvious feasible alternatives to meet this. Hence the *Tennessee Wine* "predominant effect" test is met. WSWA's Brief at Page 11.

Problematically, this theory ignores what the Supreme Court required in *Tennessee Wine* and numerous other cases including *Granholm.* There must be

concrete evidence that the discrimination is necessary to promote public health and safety. The state may believe there is an interest in maintaining an independent alcohol distribution system, but there is no evidence provided under the *Tennessee Wine* standard that this system would promote public health or safety; nor is there evidence that nondiscriminatory alternatives would be insufficient to further those interests.

If the state could provide evidence that the in-state independent alcohol distribution system played a role in alcohol safety or minimized deaths, they could meet the first prong of the test. Unfortunately for the state and their amici, evidence as required by *Tennessee Wine* does not meet this standard. The state would also need to show there are less discriminatory alternatives to discriminating. For example, if this was a health and safety issue, could the state achieve its objections through higher state spending on alcohol educational and health program?

If the in-state distribution system is necessary because of dangerous alcohol coming into the state, couldn't the state utilize alcohol testing and provide samples.

In *Tennessee Wine* and a series of cases that precluded it, the Court required the state to engage in a rigorous exercise to determine whether they can justify

discrimination, and if the state could justify discrimination, the Court then required the states to look for alternatives to discriminating.

By adopting the "predominant effect" test the state attempts to avoid this rigorous analysis that is required by Constitutional jurisprudence.

Finally, this "predominant effect" alternative legal standard ignores long held precedent and rewrites the Supreme Court endorsed standard for evaluating Commerce Clause cases. They are re-writing this out of desperation to avoid the obvious implications of the *Tennessee Wine* court confirming that retailers are covered under the same non-discrimination principles that were applied to producers in *Granholm*. *Tennessee Wine* explicitly endorsed the strict scrutiny standard from numerous Supreme Court decisions. *Tennessee Wine* did not create or endorse a new "predominant effect" theory.

B. Lebamoff is similarly situated with Michigan retailers because it wants to sell and deliver the same product to the same customer base as Michigan retailers.

Michigan argues that a Commerce Clause analysis is precluded because an Indiana retailer is not similarly situated with a Michigan retailer. Specifically, Michigan argues "Lebamoff is not in 'competition' with in-state retailers and,

therefore, is not 'similarly situated' with them, preventing any finding of discrimination under the dormant Commerce Clause." States Brief at 35.

The state's position that retailers in different states that sell the same product (wine) to the same consumers in the same market (Michigan) are not in competition is a bit puzzling. These circumstances are the very definition of competition.

The Supreme Court has been clear on this question: Entities are similarly situated when there exists "actual or prospective competition between the supposedly favored and disfavored entities in a single market." *Gen. Motors Corp. v. Tracy*, 519 U.S 278, 300 (1997)

In the present case in-state Michigan retailers and out-of-state wine retailers engage in the same business—selling wine to consumers—and both seek access to the same market: Michigan consumers. Lebamoff is unquestionably a potential competitor that is "similarly situated" for purposes of the Commerce Clause analysis.

However, the state argues there is no competition since Lebamoff's procurement of wine inventory is not done under the same regulatory regime and under the same set of laws as Michigan retailers, it is therefore not in competition

with Michigan retailers and thus there can be no discrimination and no commerce clause claim. States Brief at 35.

This argument turns the idea of "market" on its head where all of a sudden, a market is defined by the source of a retailer's inventory rather than where and to whom the inventory is meant to be sold.

Finally, we point out one final absurdity with the state's claim. Were it accepted that in order to find two entities similarly situated they must both be governed by a single state's regulatory code, no more Commerce Clause cases could ever be raised since Commerce Clause cases always involve economic entities in two different states. While we agree that too often courts are overburdened, we don't believe that eliminating the possibility of bringing any future Commerce Clause claims is the best way to lighten that burden.

C. A state is not allowed to require physical presence as a means of shutting a retailer out of the marketplace.

Michigan cannot require a retailer to maintain physical presence as a condition for obtaining a license to ship wine to Michigan customers.

The Michigan Beer and Wine Wholesalers ("MB&WWA") brief claims that requiring licensed retailers be physically present is a permissible exercise of the State's Twenty-First Amendment powers. MB&WWA Brief at 23. The brief takes

the position that the Supreme Court distinguished between presence and residency in *Tennessee Wine*, and that a retailer's in-state physical presence was required for the state to maintain oversight and to inspect a retailer's premises.

MB&WWA's physical presence position does not square with the realities of *Granholm* and *Tennessee Wine.*

In *Granholm* the Court looked suspiciously upon a law which required physical presence as a condition for competing in the marketplace:

"We have viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Granholm v.* Heald, 544 U.S. 460, 475 (2005) citing *Pike v. Bruce Church, Inc*., 397 U. S. 137, 145 (1970). New York's in-state presence requirement runs contrary to our admonition that States cannot require an out-of-state firm "to become a resident in order to compete on equal terms." Id. citing *Halliburton Oil Well Cementing Co. v. Reily*, 373 U. S. 64, 72 (1963).

"For most wineries, the expense of establishing a bricks-and-mortar distribution operation in 1 State, let alone all 50, is prohibitive." *Granholm v. Heald*, 544 U.S. 460, 475 (2005)

The Court recognized in *Granholm* that imposing burdens that require out-of-state businesses to incur expense in order to compete with in-state businesses is a clear violation of the Commerce Clause and favors in-state wineries.

Tennessee Wine adopted the *Granholm* principles of nondiscrimination when it extended *Granholm's* principles to retailers:

"The state laws at issue in *Granholm* discriminated against out-of-state producers. See 883 F. 3d, at 621. And *Granholm* never said that its reading of history or its Commerce Clause analysis was limited to discrimination against products or producers. On the contrary, the Court stated that the Clause prohibits state discrimination against all "'out-of-state economic interests.'" *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S. Ct. 2449, 2471 (2019)

Tennessee Wine's language states clearly that the nondiscrimination principles embedded in *Granholm* apply equally to retailers as they do to producers. Moreover, nowhere in *Tennessee Wine* did the Court deviate from *Granholm*'s holding that the state could not require out-of-state shippers to have a physical presence in the state. The intervenor's brief reaches this conclusion without specific evidence.

What *Tennessee Wine* did state is a law could discriminate against out-of-state goods or nonresident economic actors, if the law is narrowly tailored to

advance a legitimate local purpose "that cannot be adequately served by reasonable nondiscriminatory alternatives." Id. at 2461

The theory that a state can discriminate based on physical presence because it has an interest in inspecting retailers and maintaining oversight over them, fails the constitutionally-mandatory test that requires a state to exercise nondiscriminatory alternatives before it can discriminate.

The state and their amici acknowledge that a state cannot pass laws that discriminate against out-of-state economic interests "unless those laws "advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." MB&WWA's Brief at 40 citing *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S. Ct. 2449, 2471 (2019).

The aforementioned physical presence test that the state and their amici advance, fails to take into account the nondiscriminatory alternatives that they acknowledge are necessary for a law to be deemed constitutional.

The state's interest position assumes that in-state and out-of-state retailers are identical for inspection purposes. However, Michigan residents engaging an out-of-state retailer to deliver product will most likely never visit the premises of the retailer. So, whether the retailer commits a tied-house violation, an infraction of

an advertising law at its location or fails to posts a "21 years and older sign" on its premises is generally irrelevant.

What is relevant for the health and safety of Michigan residents is the state ensures the product shipped is safe for consumption.

In other words, the state's interest is more closely akin to the state's interest in *Granholm*. In *Granholm* an out-of-state winery was not required to maintain an in-state physical presence because based on technological improvements there were alternatives to physical presence:

"Michigan and New York offer a handful of other rationales, such as facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability. These objectives can also be achieved through the alternative of an evenhanded licensing requirement. FTC Report 40—41. Finally, it should be noted that improvements in technology have eased the burden of monitoring out-of-state wineries. Background checks can be done electronically. Financial records and sales data can be mailed, faxed, or submitted via e-mail." *Granholm v. Heald*, 544 U.S. 460, 492 (2005)

Granholm was decided in 2005, fourteen years ago. Since then technology has advanced considerably, making product tracking even more efficient and a far less burdensome alternative to banning all wine shipments as a way to advance the

state's interests. Similar to *Granholm*, an out-of-state retailer wants to ship product into the state and also similar to *Granholm,* technology offers a nondiscriminatory alternative to requiring physical presence. So, it begs the question with so many similarities to *Granholm,* how could Michigan justify discrimination against retailers shipping wine into the state? Further, and most importantly, how could it not utilize the nondiscriminatory alternative's road map that *Granholm* sets out so clearly?

Since *Granholm* demonstrates that there are alternatives to physical presence based on technological advancements, Michigan must attempt to exercise "reasonably discriminatory alternatives" before shutting a retailer out of the marketplace based on physical presence.

Michigan offers a handful of rationales of why the state requires physical presence for a retailer, such as ensuring illegal and tainted alcohol does not come into the state, a claim that policing out-of-state retailers is too great a burden for the Michigan Liquor Control Commission, and maintaining the three system to avoid social harm and properly regulate alcohol.

Michigan could protect against illegal or tainted product by closely monitoring out-of-state retailers. This could be achieved through the alternative of an evenhanded licensing requirement. Michigan could license out-of-state retailers

and obtain the retailers consent to monitoring and jurisdiction. The state could require all wines shipped into the state possess a federally-issued Certificate of Label Approval (COLA) just as it does for all wines sold within the state, and ensure the product coming into the state goes through rigorous federal registration requirements.

Issuing state shipping licenses to retailers as it does for wineries, would go a long way towards enforcing laws against of out-of-state retailers. Ten other states license out-of-state retail shipping and none of them have claimed the shipments from out-of-state retailers have compromised the health and safety of local residents.

Further, Michigan could subject the retailer to onsite inspections in their state. As many states do, especially for tax audits, Michigan could utilize out-of-state personnel for inspections if they deem it necessary.

Michigan also justifies discrimination based on the burden that wine retailer shipping would put on the Michigan Liquor Control Commission. "No state has the ability to inspect even a fraction of the 388,000 alcohol retailers nationwide, and the State cannot depend on out-of-state law enforcement to enforce Michigan law." State Brief at 36.

However, Michigan provides little concrete evidence that they cannot police direct shipments by out-of-state wine retailers. As the Supreme Court stated in *Granholm:*

"In summary, the States provide little concrete evidence for the sweeping assertion that they cannot police direct shipments by out-of-state wineries. Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods. The "burden is on the State to show that `the discrimination is demonstrably justified,'" *Chemical Waste Management, Inc. v. Hunt*, 504 U. S. 334, 344 (1992) (emphasis in original). The Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable. See, e. g., *Maine v. Taylor*, 477 U. S. 131, 141-144 (1986). Michigan and New York have not satisfied this exacting standard." *Granholm v. Heald,* 544 U.S. 460, 492, 493 (2005)

Without providing concrete evidence on how technology or other alternatives would fail to alleviate the enforcement burden, Michigan does not satisfy the *Granholm* standards which require a state to demonstrate that the state's nondiscriminatory alternatives are not workable.

Finally, Michigan rationalizes that its physical presence standard is necessary for maintaining the three system as a way to avoid social harm and properly regulate alcohol. State Brief at 21 & 22. However, as *Granholm* held, any state that wants to proffer a rationale for restricting commerce, must look at all reasonable nondiscriminatory alternatives. In *Granholm* the Court dismissed the same unsupported claims that facilitating an orderly market, protecting public health and safety and ensuring regulatory accountability could not be interests achieved by the alternative of an evenhanded licensing requirement for out-of-state shippers. *Granholm v. Heald,* 544 U.S. 460, 492 (2005).

Each of Michigan's rationales for maintaining its discriminatory wine shipping law fails under *Granholm* because the state does not consider less burdensome alternatives, nor did Michigan provide concrete evidence that alternatives were unworkable. The state and their amicis' position ignores *Granholm* or wants to wish out of existence an important principle of *Granholm* that a law that discriminates against out-of-state interest can only survive if "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives", and that the state must provide concrete evidence that nondiscriminatory alternatives proved unworkable. Id. at 492.

The state and its allies are attempting to relitigate the *Granholm* case with many of the same arguments that were dismissed by the Supreme Court in both *Granholm* and *Tennessee Wine*. In order for the state to prevail, they must convince this Court to overrule the United States Supreme Court's 2005 *Granholm* precedent as well as the most recent *Tennessee Wine* case and the 6th Circuit's own decision in *Byrd v Tennessee Wine*. *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*., 883 F.3d 608 (6th Cir. 2018)

CONCLUSION

This Court should affirm the District Court, hold that Michigan's ban on interstate shipping by out-of-state wine retailers is unconstitutional, and confirm that it was within the District Court's discretion to enjoin enforcement of the offending provision.

Respectfully submitted:

s/ Sean M. O'Leary

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 5178 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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

s/ Sean M. O'Leary
Sean M. O'Leary

CERTIFICATE OF SERVICE

I certify that on _____, 2019, the foregoing brief was served on all parties through the court's CM/ECF system.

s/ Sean O'Leary

Sean M. O'Leary

ADDENDUM

A. Designation of District Court Documents

Amicus Curaie National Association of Wine Retailers, per Sixth Circuit Rules 28(a), 28(b) and 30(g), designate the following district court documents as relevant to this appeal:

RE 31-9 Bridenbaugh Declaration Page ID # 258-61

RE 31-10 Wark Statement Page ID # 262-66

RE 43 Opinion and order Page ID # 845-66