Case No. 18-2200
(Companion case no 18-2199)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEBAMOFF ENTERPRISES, Inc., JOSEPH DOUST,
JACK STRIDE, JACK SCHULZ, RICHARD DONOVAN
Plaintiffs - Appellees

vs.

RICK SNYDER, WILLIAM SCHUETTE, ANDREW J. DELONEY
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

SURREPLY BRIEF OF PLAINTIFFS-APPELLEES

Robert D. Epstein
James A Tanford, *of counsel*
Epstein Cohen Seif & Porter, LLP
50 S. Meridian St. #505
Indianapolis IN 46204
(317) 639-1326

Table of contents

Table of authorities

Cases:

Statutes and Constitutions

Other Authorites

ARGUMENT[1]

The Supreme Court in *Tennessee Wine* did not suddenly abandon decades of consistently applying strict scrutiny to discriminatory state liquor laws

In the modern era, the Supreme Court and this Circuit have consistently applied a form of strict scrutiny to state liquor laws that discriminate against out-of-state economic interests and favor local ones. This nondiscrimination principle has two elements.[2]

First: If a state liquor law discriminates against out-of-state interests on its face, purposefully, or in practical effect, it presumptively violates the Commerce Clause. *Granholm v. Heald*, 544 U.S. 460, 476 (2005) ("State laws that discriminate against interstate commerce face 'a virtually per se rule of invalidity'[and may not] regulate the direct shipment of wine on terms that discriminate in favor of in-state producers"); *Healy v. Beer Inst*., 491 U.S. 324, 337 (1989)("When a state

---

[1] This Surreply Brief is intended only to address the argument by the Wholesalers Association in their Reply Brief that *Tennessee Wine* modified the strict scrutiny standard used by the Supreme Court in prior cases. It is not intended to expand upon or retreat from any other argument made by Appellees in their main Brief.

[2] The Court uses a different test to review nondiscriminatory regulations. Even-handed laws that burden interstate commerce are usually upheld as long as they advance a legitimate state interest and the burden is not clearly excessive. *Pike v. Bruce Church, Inc,* 397 U.S. 137 (1970).

statute ... favor[s] in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry"). *Accord Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S.Ct. 2449, 2461 (2019); *Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth.*, 476 U.S. 573, 578–79 (1986); *Bacchus Imports Ltd., v. Dias,* 468 U.S. 263, 276 (1984); *American Beverage Ass'n v. Snyder,* 735 F.3d 362, 369-70 (6th Cir. 2013); *Cherry Hill Vineyards LLC v. Lilly,* 553 F.3d 423, 432 (6th Cir. 2008); *Jelovsek v. Bredesen*, 545 F.3d 431, 435 (6th Cir. 2008); *Heald v. Engler,* 342 F.3d 517, 524 (6th Cir. 2003), *aff'd* 544 U.S. 460 (2005). Discrimination is "neither authorized nor permitted by the Twenty-first Amendment." *Granholm*, 544 U.S. at 466. *Accord Tennessee Wine,* 139 S.Ct. at 2470 (Amendment does not allow states to violate nondiscrimination principle).

Second: A discriminatory liquor law may be upheld only if the State proves that the law advances a legitimate state interest that cannot adequately be served by reasonable nondiscriminatory alternatives. *Tennessee Wine,* 139 S.Ct at 2474 (State must prove that the law " actually promotes public health or safety" and "that nondiscriminatory alternatives would be insufficient to further those interests"). *Accord*

Granholm, 544 U.S. at 489; *American Beverage Ass'n v. Snyder,* 735 F.3d at 370*; Cherry Hill Vineyards*, 553 F.3d at 432. Concrete evidence is required, and "mere speculation" and "unsupported assertions" are insufficient to sustain a law that would otherwise violate the Commerce Clause. *Tennessee Wine*, 139 S.Ct. at 2474. *See also Granholm*, 544 U.S. at 490 ("concrete evidence" and "clearest showing" required to justify a discriminatory law). *Accord*, *Cherry Hill Vineyards*, 553 F.3d at 434.

In the opening briefs, all parties accepted this as the proper framework within which this Court should resolve the constitutionality of Michigan's retailer shipping law. Plaintiffs-Appellees Br. at 16-17; State's Opening Br. at 27-28; Wholesalers Opening Br. at 31.

The Wholesalers have now changed course and propounded a new theory. For the first time in their Reply Brief, they argue that the Supreme Court in *Tennessee Wine* abandoned the strict scrutiny test for reviewing discriminatory state liquor laws that it has consistently used in previous cases, and created a new and more lenient constitutional standard. Under this new test, discriminatory liquor laws are no longer subject to the Commerce Clause-based strict scrutiny, Reply Br. at 1-2, 5-6, 8, and the State no longer has to prove that a discriminatory law

advances a legitimate state interest that could not adequately be served by reasonable nondiscriminatory alternatives. It need only show that the law promotes public health and safety. Reply Br. at 3, 7, 13.

The Supreme Court does not actually say it is adopting a new standard for determining whether a discriminatory state liquor law is constitutional. Nor does it act like it is. To the contrary, it reaffirms that *Granholm* is the leading precedent, 139 S. Ct. at 2461, and cites it 39 times.[3] It repeats the strict scrutiny standard that "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 "'advanc[e] a legitimate local purpose,'" 139 S.Ct. at 2470. It reaffirms that the Twenty-first Amendment is not a defense:

> To summarize, the Court has acknowledged that § 2 grants States latitude with respect to the regulation of alcohol, but the Court has repeatedly declined to read § 2 as allowing the States to violate the "nondiscrimination principle" that was a central feature of the regulatory regime that the provision was meant to constitutionalize."

139 S.Ct. at 2470. It reiterates that the burden is on the State to

[3] The two Justices still on the Court who were in the majority in *Granholm* (Breyer and Ginsburg) joined the majority in *Tennessee Wine*, which they surely would not have done (without at least a concurrence) if they thought it was abandoning the nondiscrimination principle that was central to *Granholm.*

present "'concrete evidence' showing that the [law] actually promotes public health or safety" and "that nondiscriminatory alternatives would be insufficient to further those interests." 139 S.Ct at 2474

The Wholesalers are basically arguing that we should ignore the bulk of what the Supreme Court said and did in *Tennessee Wine*, and focus instead on five words from that opinion taken out of context: "different inquiry," "predominant effect," and "nor." These are slender reeds upon which to base the contention that the standards for determining the constitutionality of discriminatory state liquor laws have radically changed.

First, the Wholesalers contend that when the Court in *Tennessee Wine* said that a "different inquiry" was required, it was retreating from the strict scrutiny it used in *Granholm*. In context, it means nothing of the sort. The Court wrote:

> [T]he residency requirement ... could not be sustained if it applied across the board to all those seeking to operate any retail business in the State [b]ut because of § 2, we engage in a different inquiry [asking] whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground."

139 S.Ct. at 2474. This is not, and does not purport to be, a description

of a new framework for analyzing the constitutionality of discriminatory state liquor laws. It was only the first of eleven paragraphs in which the Court explained why it was holding the Tennessee law unconstitutional. In those subsequent paragraphs, the Court in fact applied the same strict-scrutiny principles it had used in *Granholm,* citing *Granholm* throughout the discussion. *Id.* at 2474-75. It held that the residency rule at issue "expressly discriminates against nonresidents," 139 S.Ct at 2474, the "record is devoid of any 'concrete evidence' showing that the 2-year residency requirement actually promotes public health and safety," *id*., and "there are obvious alternatives that better serve [its] goal without discriminating against nonresidents," *id.*, at 2476, so "this provision violates the Commerce Clause and is not saved by the Twenty-first Amendment." *Id.* It cites *Granholm* four times.

The "different inquiry" the Court referred to was simply a contrast between liquor-law cases and other kinds. When analyzing discriminatory statutes not involving liquor, the Court often uses a rule of *per se* invalidity. *E.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575 (1997) (property tax exemptions); *Philadelphia v. N.J.* 437 U.S. 617, 624 (1978) (solid waste). When

analyzing discriminatory liquor laws, the Court gives states the opportunity to prove that the law is necessary to advance a core concern of the Twenty-first Amendment, such as temperance, and that nondiscriminatory alternatives will not be effective. This "different inquiry" is not new; it has been used in prior cases in which the Court also applied strict scrutiny. *E.g., Granholm*. 544 U.S. at 489.

Second, the Wholesalers contend that when the Court at one point used the phrase "predominant effect," it was adopting a balancing test that would make it easier for the State to justify a discriminatory law. The sentence it refers to is this:

> Where the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by § 2.

139 S.Ct. at 2474. Obviously, this one sentence says nothing about replacing strict scrutiny with a balancing test. The Court has made similar statements in other cases while also applying strict scrutiny. *Brown-Forman Distillers Corp.,* 476 U.S. at 578-79 ("the critical consideration" in applying strict scrutiny to state liquor laws is the "overall effect of the statute on both local and interstate activity"); *Bacchus* 468 U.S. at 273 ("a discrimination claim, by its nature,

requires a comparison" of the burden on the out-of-state party against the local benefit).

This sentence says nothing more than to repeat what the Court has always said -- discrimination and protectionism[4] are *not* among the legitimate interests of the Twenty-first Amendment, so protectionist laws are not shielded from strict scrutiny. See *Granholm*, 544 U.S. at 489 (discrimination is not saved by the Twenty-first Amendment); *Bacchus*, 468 U.S. at 276 (the Amendment does not empower States to favor local liquor industries by erecting barriers to competition); *Healy,* 491 U.S. at 344 (Scalia, J., concurring) (the "statute's invalidity is fully established by its facial discrimination against interstate commerce . . ., since its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment").

Third, the Wholesalers contend that *Tennessee Wine* reduced the State's evidentiary burden needed to justify a discriminatory law. Before *Tennessee Wine*, the courts used a two-prong test. The State must prove both that a law actually advances a legitimate purpose and

[4] Discrimination against out-of-state interests and protecting in-state interests are the same thing constitutionally. *Bacchus,* 468 U.S. at 270.

also that there are no workable nondiscriminatory alternatives. E.g., *Granholm*, 544 U.S. at 489; *Cherry Hill Vineyards,* 553 F.3d at 432. The Wholesalers assert that when the Court used the word "nor" to describe Tennessee's failure to prove either prong, it changed the requirement to an either/or standard. The word appears in this sentence:

> [T]he 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.

139 S.Ct at 2474. Under this new standard, the State's so the failure to prove that nondiscriminatory alternatives are unworkable would no longer be fatal

The argument is untenable. If the Supreme Court in *Tennessee Wine* meant to eliminate the requirement that the State must prove the absence of workable alternatives, it certainly did not say so. 139 S.Ct. at 2475-76. It also did not act as if it were doing so. Elsewhere in the opinion, it continues to require the State to prove the absence of workable alternatives even after conceding that fostering responsible sales practices is a legitimate state interest. *Id.,* at 2476. The Wholesalers argument is also based on an erroneous assumption that

"nor" is always disjunctive. The actual definition is to the contrary. It can mean either "and not" or "or not," WEBSTER'S NEW WORLD DICTIONARY 983 (2007), so tells us nothing about whether it is being used conjunctively or disjunctively.

The Wholesalers' argument also is inconsistent with the way courts actually use the word "nor" when discussing a party's failure to prove multiple elements. One example from this Circuit will suffice. In *U.S. v. Banyan,* 933 F.3d 548 (6th Cir. 2019), the defendants were charged with bank fraud under 18 U.S.C. 1344(2), which has two elements: intent to obtain bank property and making false representations. This Circuit reversed because the government had not proved either. The court said:

> [T]he government did not prove that Banyan or Puckett "intend[ed] to obtain bank property" as required by § 1344(2). Nor, more briefly, did the government prove that the defendants sought to obtain bank property "by means of" a misrepresentation.

933 F.3d at 955. The court's use of the word "nor" clearly did not mean the government only had to prove one or the other element.

The entire argument by the Wholesalers is a last-ditch attempt to circumvent the fact that the record in this case is entirely devoid of any concrete evidence that obvious nondiscriminatory alternatives would be

ineffective. Michigan already employs nondiscriminatory alternatives to allow out-of-state wineries to ship wine directly to consumers. Mich. Comp. L. § 436.1203(4-6). *See* Appellees Br. at 29-36. At least thirteen states have found nondiscriminatory ways to protect public safety while still allowing interstate wine shipping. *Id.* at 39. *Granholm* held that evenhanded licensing requirements and regulations should be able to protect public health and safety and ensure accountability. 544 U.S. at 492. This Circuit has held that "age verification upon delivery of wine is a reasonable nondiscriminatory alternative" to guard against underage access. *Cherry Hill Vineyards v. Lilly*, 553 F.3d at 434. The Eleventh Circuit held that requiring out-of-state wine sellers to obtain licenses which could be revoked (and penalties imposed) for violations of state regulations was a reasonable alternative. *Bainbridge v. Turner,* 311 F.3d 1104, 1110 (11th Cir. 2002). Without concrete evidence that those alternatives will not work in this case, Michigan's discriminatory ban on shipping will have to be struck down -- unless the Wholesalers can somehow convince this Court that the evidence requirement no longer exists. Their attempt to do so is supported only by wishful thinking and should be rejected.

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:

Attorneys for plaintiffs-appellees

s/ James A. Tanford
James A. Tanford, *counsel of record*
Robert D. Epstein
Epstein Cohen Seif & Porter, LLP
50 S. Meridian St. #505
Indianapolis IN 46204
(317) 639-1326
tanford@indiana.edu
rdepstein@aol.com

CERTIFICATE OF COMPLIANCE

This brief contains 2341 words as calculated by the word count program in WordPerfect X7. It complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it was prepared in 14-point Century Schoolbook.

s/ James A. Tanford
James A. Tanford

CERTIFICATE OF SERVICE

I certify that on January 2, 2020, the foregoing brief was filed as an attachment to a motion for leave to file it, in both 18-2199 and 18-2200 and therefore served on all parties through the court's CM/ECF system.

s/ James A. Tanford
James A. Tanford