No.

In the Supreme Court of the United States

LEBAMOFF ENTERPRISES, INC., *et al.*,
Petitioners,

v.

GRETCHEN WHITMER,
GOVERNOR OF MICHIGAN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Granholm v. Heald*, 544 U.S. 460 (2005), this Court applied the nondiscrimination principle of the Commerce Clause to invalidate a state liquor law that allowed in-state wineries to ship directly to consumers but prohibited out-of-state wineries from doing so. In *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct. 2449 (2019), this Court applied the nondiscrimination principle to invalidate a state liquor law that allowed residents to obtain retailer licenses but prohibited nonresidents from doing so. Despite these precedents, the Sixth Circuit in this case did not apply the nondiscrimination principle to a Michigan liquor law that allows in-state retailers to ship wine to consumers but prohibits out-of-state retailers from doing so. Instead, it held that the restriction was a valid exercise of state authority under the Twenty-first Amendment that was immune from Commerce Clause scrutiny. The question, upon which the courts of appeals disagree, is:

Whether a state liquor law that allows in-state retailers to ship wine directly to consumers but prohibits out-of-state retailers from doing so, is invalid under the nondiscrimination principle of the Commerce Clause or is a valid exercise of the state's Twenty-first Amendment authority to regulate the sale of alcoholic beverages within its borders.

PARTIES TO THE PROCEEDINGS

Petitioners are Lebamoff Enterprises, Inc., Joseph Doust, Jack Stride, Jack Schulz, and Richard Donovan. They were Plaintiffs-Appellees below.

Respondents are Gretchen Whitmer, Governor of Michigan; Dana Nessel,[1] Michigan Attorney General; and Pat Gagliardi,[2] Chairperson of the Michigan Liquor Control Commission, in their official capacities, and Michigan Beer & Wine Wholesalers Association (intervenor). They were Defendants-Appellants below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Lebamoff Enterprises, Inc., has no parent corporation and there is no publicly held company that owns 10% or more of its stock.

RELATED PROCEEDINGS

Lebamoff Enterprises, Inc., v. Snyder, No. 2:17-cv-10191, U. S. District Court for the Eastern District of Michigan. Judgment entered Sep. 28, 2018.

Lebamoff Enterprises, Inc., v. Whitmer, Nos 18-2199/2200, U.S. Court of Appeals for the Sixth Circuit. Judgment entered Apr. 21, 2020.

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[1] Substituted for William Schuette per Sup. Ct. R. 35.3.

[2] Substituted for Andrew Deloney per Sup. Ct. R. 35.3.

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JURISDICTION

The opinion of the court of appeals was entered on April 21, 2020. A petition for rehearing was denied on May 26, 2020 (App., *infra*, 47a). This Court has jurisdiction under 28 U.S.C. § 1254(1) to hear this case by writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. The Commerce Clause, U.S. Const., Art. I, § 8, cl. 3: The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

B. The 21st Amendment, U.S. Const., Amend. XXI, § 2: 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.

C. Michigan Comp. L. § 436.1203: Relevant sections are reprinted in the appendix. App., *infra*, 48a-59a.

STATEMENT OF THE CASE

This case challenges the constitutionality of a provision in Michigan's Liquor Control Code that prohibits out-of-state retailers from shipping wine to consumers but allows in-state retailers to do so. This difference in treatment violates the Commerce Clause and is not saved by the Twenty-first Amendment, because it discriminates against interstate commerce and gives economic protection to local businesses.

In 2005, this Court declared unconstitutional two state laws that prohibited out-of-state wineries from shipping to consumers but allowed in-state wineries to do so. *Granholm v. Heald*, 544 U.S. 460 (2005). The Court said that "If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." 544 U.S. at 493. In the fifteen years since then, forty-four states have modernized their alcoholic beverage laws to allow both in-state and out-of-state wineries to sell and ship to consumers on evenhanded terms.

The states have been slower to modernize their beverage laws to allow retailers to sell wine online and ship it to consumers' homes. At least thirteen states now allow both in-state and out-of-state retailers to ship wine to consumers, but many others have repeated the pattern that existed before *Granholm*. They allow in-state retailers to deliver wine but prohibit out-of-state retailers from doing so. This case is one of a dozen filed around the country asking the courts to extend *Granholm* to online sales by retailers and rule that if a state chooses to allow direct shipment of wine by retailers, it must do so on evenhanded terms.

This case challenges Michigan's law that only retailers "located in this State" may sell wine online and ship it to consumers. Mich. Comp. L. § 436.1203(3), (15). App., *infra*, 49a, 52a. Petitioners brought this action in the Eastern District of Michigan pursuant to 42 U.S.C. § 1983. They sought a declaratory judgment that this law violated the nondiscrimination principle of the Commerce Clause. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 which confers original jurisdiction on federal district courts to hear suits arising under the Constitution and laws of the United States. On cross-motions for summary judgment, the district court declared the law unconstitutional. It ruled that the difference in treatment violated the Commerce Clause and was not saved by the Twenty-first Amendment because the State had not proved that it advanced a legitimate local purpose that could not be adequately served by reasonable alternatives. *Lebamoff Enterpr., Inc. v. Snyder*, 347 F.Supp. 3d 301, 308-10 (E.D. Mich, 2018) (App., *infra*, 39a-43a).

The court of appeals reversed and upheld the law despite its discriminatory nature. *Lebamoff Enterpr., Inc. v. Whitmer*, 956 F.3d 863 (6th Cir. 2020). It declined to subject the law to Commerce Clause analysis and ruled that the Twenty-first Amendment authorized states to restrict shipping to in-state retailers only, *id.* at 867 (App., *infra*, 2a, disregarding this Court's holding to the contrary that "discrimination is contrary to the Commerce Clause and is not saved by the 21st Amendment." *Granholm v. Heald,* 544 U.S. at 489. It did not require the State to prove that the ban advanced a local purpose that

could not be served by reasonable alternatives, ignoring this Court's repeated holdings that such scrutiny is required. *E.g., Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct 2449, 2461 (2019); *Granholm v. Heald*, 544 U.S. at 472.

The court of appeals denied a petition for rehearing and rehearing *en banc*. App., *infra*, 47a.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for a writ of certiorari and reverse. The Sixth Circuit upheld the constitutionality of a Michigan law that discriminated against interstate commerce by allowing in-state, but not out-of-state, retailers to sell wine online and ship it to consumers. The court of appeals explicitly declined to apply this Court's prior decisions that other kinds of discriminatory state liquor laws violate the Commerce Clause unless the state can prove that there are no reasonable regulatory alternatives. The decision is wrong and conflicts with cases from other circuits.

The issue is important. Throughout the country, states are considering how best to balance the need to regulate wine as an alcoholic beverage against the growing demand from consumers for online ordering and home deliveries.[3] There has been a surge of online ordering of all kinds of products during the pandemic,[4]

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[3] See Nat'l Org. of Wine Retailers, Legislation. https://nawr.org/issues/legislation/ (last visited June 27, 2020).

[4] Natalie Gagliordi, *Online retail sales surge 49% during pandemic shutdown* (May 12, 2020) https://www.zdnet.com/article/online-retail-sales-surge-49-during-pandemic-shutdown/ (last visited June 27, 2020).

and wine is no exception. Wine ordered online now accounts for 10.8% of domestic retail wine sales, or $3.2 billion annually, and the demand for home delivery is expanding.[5] This Court has not heretofore given a definitive answer on the extent to which states may expand their online sales market but prohibit out-of-state wine retailers from participating. It should grant the writ of certiorari in this case and resolve the issue.

A. The Sixth Circuit's decision to uphold a discriminatory state liquor law under the Twenty-first Amendment conflicts with decisions from other circuits that discrimination violates the Commerce Clause

The constitutionality of state laws that prohibit out-of-state businesses from selling wine online and shipping it to consumers, but allow in-state businesses to do so, depends on the interaction between the Commerce Clause and Section 2 of the Twenty-first Amendment. The Commerce Clause prohibits discrimination against out-of-state interests, while the Amendment gives states broad authority to regulate the sale of alcohol within their borders. This Court seemingly resolved the balance between these two provisions in *Granholm v. Heald*, ruling that "[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." 544 U.S. at 493. It held

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[5] Thomas Pellechia, *Direct-To-Consumer Captures 10.8% Of The 2019 Domestic Wine Retail Market*, FORBES, Feb. 20, 2020, https://www.forbes.com/sites/thomaspellechia /2020/ 02/20/direct-to-consumer-captures-108-of-the-2019-domestic-wine-retail-market/#2e04c5817eb6 (last visited June 27, 2020).

that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," *id*. at 487, and "is not saved by the 21st Amendment. " *Id.* at 489.

Despite this clear language, the Sixth Circuit upheld a Michigan law that did exactly what *Granholm* said the Constitution forbids. It gave the exclusive right to sell wine online and deliver it to consumers to retailers located in Michigan. Mich. Comp. L. § 436.1203(3). App., *infra*, 49a.The court held that *Granholm* did not apply and that Michigan could constitutionally discriminate against out-of-state wine retailers and limit direct shipping rights to in-state retailers. 956 F.3d at 870. App., *infra*, 7a. It held that the law was "immune" from challenge under the Commerce Clause, *id.* and "the Twenty-first Amendment permits Michigan to treat in-state retailers ... differently from out-of-state retailers." *Id*. at 867. App., *infra*, 2a.

This conflicts with the Seventh Circuit's recent opinion on the constitutionality of a similar Illinois law. The Seventh Circuit held that *Granholm* did apply and was the controlling law. *Lebamoff Enterpr, Inc. v. Rauner*, 909 F.3d 847, 853 (7th Cir. 2018). Laws regulating retailers were not immune from challenge under the Commerce Clause, and the Twenty-first Amendment did not permit states to treat in-state retailers more favorably than out-of-state retailers because "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause" *Id.* Limiting online wine sales to in-state retailers only is not authorized by the Twenty-first Amendment unless the State proves that it has no other way to

protect its interests. *Id*. at 853-55.

In the Seventh Circuit opinion, Chief Judge Wood noted that there was a "split over the best reading" of *Granholm* and its applicability to laws that discriminate against out-of-state wine retailers. *Lebamoff Enterpr., Inc. v. Rauner*, 909 F.3d at 853. Judge Wood wrote:

> Some [courts] see *Granholm* as establishing a rule immunizing the three-tier system from constitutional attack so long as it does not discriminate between in-state and out-of-state producers or products. The idea is that the Twenty-first Amendment overrides the Commerce Clause and permits states to treat in-state retailers and wholesalers differently from their out-of-state equivalents. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190–91 (2d Cir.2009); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir.2006) (Niemeyer, J., writing only for himself); *Southern Wine & Spirits of Am., Inc. v. Division of Alcohol & Tobacco Control*, 731 F.3d 799, 809–10 (8th Cir.2013). More courts have read *Granholm* simply to reaffirm a general non-discrimination principle, although the principle may carry greater or lesser weight at different tiers of a three-tier system. *Brooks,* 462 F.3d at 354; *Cooper v. Tex. Alcoholic Beverage Comm'n,* 820 F.3d 730, 743 (5th Cir.2016); *Byrd v. Tenn. Wine & Spirits Retailers Assoc.*, 883 F.3d 608, 618 (6th Cir.2018); *Siesta Vill. Mkt., LLC v. Granholm*, 596 F.Supp.2d 1035, 1039 (E.D. Mich. 2008);

> *Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F.Supp.2d 200, 221 (D. Mass. 2006). Finally, one judge understands *Granholm* to preclude any Twenty-first Amendment protection for state laws that otherwise violate the dormant Commerce Clause. *Brooks,* 462 F.3d at 361 (Goodwin, J., concurring in part and dissenting in part).

909 F.3d at 853-54.

This disagreement among the Circuits is significant because there are seven cases currently pending in lower federal courts on the validity of state laws that allow in-state, but not out-of-state, retailers to engage in online sales and home deliveries of wine. *Sarasota Wine Market, LLC v. Schmitt*, No. 19-1948 (8th Cir.); *Lebamoff Enterpr., Inc. v. O'Connell*, No. 1:16-cv-08607 (N.D. Ill.)*; Chicago Wine Co. v. Holcomb*, 1:19-cv-02785 (S.D. Ind.); *Tannins of Indianapolis, LLC v. Taylor*, 3:19-cv-00504 (W.D. Ky.); *B-21 Wines, Inc. v. Guy*, 3:20-cv-00099 (W.D.N.C.); *Bernstein v. Graziano*, 2:19-cv-14716 (D.N.J.); *Anvar v. Tanner*, 1:19-cv-523 (D. R.I.); *State of Ohio v. Wine.com, Inc.*, 2:20-cv-03430 (S.D. Ohio). The issue will be a matter of first impression in some circuits, and the courts need to know which legal standard to apply.

B. The Sixth Circuit's decision that the Twenty-first Amendment allows states to enact discriminatory liquor laws so significantly departs from this Court's prior rulings that it would call for an exercise of the Court's supervisory power even if no Circuit split existed

The Sixth Circuit held that the Twenty-first Amendment gives states the authority to regulate wine sales regardless of whether those regulations discriminate against out-of-state interests, 956 F.3d at 873-74 (App., *infra*, 13a-15a), and immunizes those laws from being challenged under the Commerce Clause. *Id.* at 870. App, *infra*, 7a. This decision conflicts with prior cases from this Court, every one of which holds to the contrary, that *if a state liquor law is discriminatory*, it is no longer protected by the Twenty-first Amendment and must be reviewed under Commerce Clause principles.

The precedents are clear and unambiguous. In *Bacchus Ltd. v. Dias*, 468 U.S. 263, 276 (1984), this Court held that the Amendment did not "empower States to favor local liquor industries by erecting barriers to competition." In *Granholm v. Heald,* the Court held that "*Bacchus* forecloses any contention that § 2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny." 544 U.S. at 487-88. A discriminatory liquor law "is not saved by the Twenty-first Amendment." *Id.* at 489. The Amendment gives a state the authority to ban all direct shipping, but not to ban direct shipments from out of state while simultaneously authorizing in-state direct shipments.

"If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." *Id* at 493. In *Tenn. Wine & Spirits Retailers Ass'n v. Thomas,* 139 S.Ct at 2470, the Court reiterated that although the Amendment grants States latitude to regulate alcohol, it "has repeatedly declined to read § 2 as allowing the States to violate the nondiscrimination principle" of the Commerce Clause. *Accord Healy v. Beer Inst*., 491 U.S. 324, 342 (1989) (Twenty-first Amendment does not immunize state laws from the Commerce Clause).

The precedents of this Court require that a form of strict scrutiny be applied – an "exacting standard" where the "burden is on the State to show that the discrimination is demonstrably justified" with "concrete record evidence [that] nondiscriminatory alternatives will prove unworkable." *Granholm v. Heald*, 544 U.S. at 492-93. Real evidence is required and "mere speculation or unsupported assertions are insufficient to sustain a law that would otherwise violate the Commerce Clause." *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S.Ct. 2449, 2474 (2019). "When a state statute ... 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." *Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth.,* 476 U.S. 573, 579 (1986).

The Sixth Circuit did not apply strict scrutiny. Indeed, it explicitly rejected what it called the "skeptical" review that had been applied in other Commerce Clause/Twenty-first Amendment cases. 956 F.3d at 869. App., *infra*, 6a. Instead, it applied only the minimal scrutiny used when laws are not

discriminatory. It presumed that the discriminatory ban on interstate shipping promoted temperance even in the absence of any evidence from the State and shifted the burden to the plaintiffs to prove that the law served no legitimate purpose. *Id.* at 872-74. App., *infra*, 15a. Perhaps most troubling was the panel's criticism of this Court's prior decisions invalidating discriminatory state liquor laws on the grounds that the propriety of alcoholic beverage laws should be left to the states, "not to federal judges." *Id.* at 875. App., *infra*, 19a.

This Court has repeatedly held that if a state statute discriminates against interstate commerce, it can be upheld only if the State proves that reasonable nondiscriminatory alternatives are unworkable. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct. at 2474, 2475; *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008); *Granholm v. Heald*, 544 U.S. at 492-93; *Or. Waste Sys., Inc. v. Dept. of Envirtl. Quality*, 511 U.S. 93, 100–101 (1994); *New Energy Co. of Ind.* v. *Limbach*, 486 U.S. 269, 278 (1988); *Maine v. Taylor,* 477 U.S. 131, 138 (1986). The Sixth Circuit opinion does not even mention this requirement, let alone discuss the availability of alternatives used in Michigan and other states which were brought to its attention by the parties. *See* Brief of Plaintiffs-Appellees at 29-30, 32-33, 39 (Doc. No. 33, 18-2199).

The Sixth Circuit has openly refused to follow this Court's Commerce Clause/Twenty-first Amendment precedents. If the opinion is allowed to stand, it will create an intolerable situation in which the Sixth Circuit could become the only circuit where heightened scrutiny is not given to laws with discriminatory

effects. This reason alone would call for an exercise of this Court's supervisory power to vacate the opinion even if no Circuit split existed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A. Opinion of the Court of Appeals for the Sixth Circuit [Filed Apr. 21, 2020]

Nos. 18-2199/2200

Lebamoff Enterprises Inc.; Joseph Doust; Jack Stride; Jack Schulz; Richard Donovan,
Plaintiffs-Appellees,

v.

Gretchen Whitmer; Dana Nessel; Pat Gagliardi,
Defendants-Appellants (18-2199),

Michigan Beer & Wine Wholesalers Association,
Intervenor Defendant-Appellant (18-2200).

Before: Sutton, McKeague, and Donald, Circuit Judges.

SUTTON, Circuit Judge.

The parties agree that the Twenty-first Amendment allows Michigan to distribute alcohol within its borders solely through a three-tier system, one composed of producers, wholesalers, and retailers. And the parties agree that Michigan may impose all manner of regulations on its wholesalers (*e.g.*, that they be in the State, adhere to minimum prices, and decline to offer volume discounts) as well as on its retailers (*e.g.*, that they be present in the State, sell only within the State, and comply with health-and-safety rules). What separates the parties is whether Michigan may permit its retailers to offer at-home deliveries within the State while denying the same option to an Indiana retailer who does not have a Michigan retail license. Because the Twenty-first Amendment permits Michigan to treat in-state retailers (who operate within the three-tier system)

differently from out-of-state retailers (who do not), we uphold the law.

I.

Some history is in order. Before Prohibition, alcohol producers typically sold their beer and liquor through "tied-house" saloons. They set up saloonkeepers with a building and equipment in exchange for promises to sell only their drinks and to meet minimum sales goals. The system efficiently brought alcohol to market, keeping prices low and choices aplenty. But not all efficient markets are useful markets. You can have too much of a good thing. Excessive alcohol consumption came with costs for individuals and the public—addiction, crime, violence, and family troubles among them. As "absentee owners," the producers in the tied-house system rarely had to come to grips with these costs: They "knew nothing and cared nothing about the community." Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* 33 (Ctr. for Alcohol Policy 2011) (1933). When this market structure approached its peak, the Supreme Court remarked that "[t]he statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source." *Crowley v. Christensen*, 137 U.S. 86, 91, 11 S.Ct. 13, 34 L.Ed. 620 (1890).

Extreme problems sometimes prompt extreme solutions. With ratification of the Eighteenth Amendment, the American people chose national prohibition as the way to address these problems. This experiment solved some problems but generated others. With ratification of the Twenty-first Amendment, the people brought this thirteen-year trial

to a close. While Prohibition prompted a significant expansion of the federal government's role in law enforcement, *see generally* Lisa McGirr, *The War on Alcohol: Prohibition and the Rise of the American State* (2015), its demise returned control over alcohol regulation to the States. Section 2 of the Twenty-first Amendment delegates to each State the choice whether to permit sales of alcohol within its borders and, if so, on what terms and in what way. Some States initially kept a ban on alcohol in place. Others permitted it through highly regulated markets to prevent the problems associated with tied-house saloons from resurfacing. To tighten the reins, States developed "three-tier" systems for alcohol distribution. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, —— U.S. ——, 139 S. Ct. 2449, 2463 n.7, 204 L.Ed.2d 801 (2019). To this day, most States retain three-tier systems. Count Michigan as one of them.

In a three-tier system, the State forbids alcohol producers (the first tier) to sell directly to retailers or consumers. To access the market, producers must sell to wholesalers located within the State (the second tier). After that, in-state wholesalers sell exclusively to in-state retailers (the third tier), who make final sales to consumers. To avoid the tied-house system's "absentee owner" problem, businesses at each tier must be independently owned, and no one may operate more than one tier. *See* Mich. Comp. Laws § 436.1603(4), (13). States also restrict cooperation and joint marketing efforts that have similar effects.

Wholesalers play a key role in three-tier systems. Typically few in number and often state-owned, they are the in-state path through which all alcohol passes before reaching consumers. That allows States, if they

wish, to control the amount of alcohol sold through price controls, taxation, and other regulations. Michigan, for example, imposes minimum prices and prohibits wholesalers from offering volume discounts or selling on credit. *See, e.g.*, *id.* § 436.2013. When it comes to liquor (though not wine and beer), the State is the wholesaler in Michigan. *See id.* § 436.1231.

Michigan is not the strictest State when it comes to alcohol distribution. Take Utah. For all alcoholic products save light beer, the State is the sole importer and main retailer, making it essentially a two-tier system. *See* Utah Code Ann. §§ 32B-2-202, 204, 501; *id.* § 32B-7-202.

Whether in Michigan, Utah, or elsewhere, this is not Adam Smith's idea of an efficient market. Then again, efficiency is not the goal of the Twenty-first Amendment, whether in the form of easy-to-get alcohol or easy-to-pay-for alcohol. The Amendment gave each State the choice whether to allow any alcohol to be sold within its borders, to allow alcohol to be sold through a market heavily regulated by the visible hand of the State, or to allow alcohol to be sold with little regulation at all.

Against this backdrop, Michigan recently amended its Liquor Control Code. The law allows in-state retailers to deliver directly to consumers using state-licensed "third party facilitators" or common carriers like FedEx or UPS. 2016 Mich. Pub. Acts 520, § 203(3), (15).

In response, Lebamoff Enterprises, a wine retailer based in Fort Wayne, Indiana, along with several Michigan wine consumers filed this lawsuit. They allege that the new law violates the Commerce Clause

and the Privileges and Immunities Clause. The Michigan Beer & Wine Wholesalers Association intervened as a defendant.

Both sides moved for summary judgment. The court ruled for the claimants. In choosing a remedy for the violation, the court extended delivery rights to out-of-state retailers rather than returning matters to the no-delivery status quo. Michigan obtained a stay pending appeal.

II.

A.

Resolution of this case turns on the accordion-like interplay of two provisions of the United States Constitution. One is the Commerce Clause, which gives Congress the power "[t]o regulate Commerce ... among the several States." U.S. Const. art. I, § 8, cl. 3. The Clause grants Congress power to preempt or permit state laws that interfere with interstate commerce, and it impliedly "prohibits state laws," as determined by the federal courts, "that unduly restrict interstate commerce." *Tenn. Wine & Spirits*, 139 S. Ct. at 2459. Under the implied prohibition, if a state law discriminates against "out-of-state goods or nonresident economic actors," it may survive only if tailored to advance a legitimate state purpose. *Id.* at 2461.

The other provision is the Twenty-first Amendment. While the Commerce Clause grants Congress power to eliminate state laws that discriminate against interstate commerce, the Twenty-first Amendment grants the States the power to regulate commerce with respect to alcohol. Section 2 of the Amendment bars "[t]he 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." U.S. Const. amend. XXI, § 2. The section gives the States broad latitude to regulate the distribution of alcohol within their borders. *See North Dakota v. United States*, 495 U.S. 423, 432–33, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990) (plurality opinion); *see also id.* at 447–48, 110 S.Ct. 1986 (Scalia, J., concurring in the judgment). Indeed, had Congress (as opposed to the people through the ratification process) enacted this exact law, it is doubtful there would be any role for the federal courts to play. When faced with a dormant Commerce Clause challenge to an alcohol regulation, as a result, we apply a "different" test. *Tenn. Wine & Spirits*, 139 S. Ct. at 2474. Rather than skeptical review, we ask whether the law "can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* But if the "predominant effect of the law is protectionism," rather than the promotion of legitimate state interests, the Twenty-first Amendment does not "shield[ ]" it. *Id.*

At the outset, it's worth acknowledging that case law authorizes several features of Michigan's system for regulating the distribution of alcohol within its borders.

The courts have frequently said that the Twenty-first Amendment permits a three-tier system of alcohol distribution, and the Commerce Clause does not impliedly prohibit it. Nothing stops States, the Court has explained, from "funnel[ing] sales through the three-tier system," a practice that is "unquestionably legitimate." *Granholm v. Heald*, 544 U.S. 460, 489, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005)

(quotation omitted); *see Tenn. Wine & Spirits*, 139 S. Ct. at 2471–72; *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). *Granholm*, a case from Michigan, left no drama about the issue: "States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment." 544 U.S. at 466, 125 S.Ct. 1885. We have echoed the point: A State's "decision to adhere to a three-tier distribution system is immune from direct challenge on Commerce Clause grounds." *Jelovsek v. Bredesen*, 545 F.3d 431, 436 (6th Cir. 2008); *see Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608, 616, 623 (6th Cir. 2018).

The courts also have permitted States to regulate wholesalers (the second tier) as a way to control the volume of alcohol sold in a State and the terms on which it is sold. *See North Dakota*, 495 U.S. at 432–33, 110 S.Ct. 1986 (plurality opinion); *see also id.* at 447–48, 110 S.Ct. 1986 (Scalia, J., concurring in the judgment); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853–54 (7th Cir. 2000); *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 810–11 (8th Cir. 2013). The Michigan system shows how this works. The State is *the* wholesaler for liquor, and it sells at an inflated price through state-authorized distribution agents. *See* Mich. Comp. Laws §§ 436.1231, 1233. As for private wholesalers of beer and wine, Michigan imposes many restrictions: minimum prices, no sales on credit, no volume discounts. *See id.* §§ 436.2013, 1609a(5); Mich. Admin. Code R. 436.1726(4). The State also regulates retail prices indirectly. It heavily taxes wholesalers, prohibits consignment sales, and restricts the terms on which wholesalers may buy from producers. *See* Mich. Comp.

Laws §§ 436.1301, 1409(2). To avoid the "tied-house" problem, Michigan prohibits wholesalers from giving anything of value to retailers, and it prohibits them from having a financial interest in any producer, retailer, or other wholesaler. *See id.* § 436.1603; Mich. Admin. Code R. 436.1651(3), 1735. To enforce these rules, Michigan requires wholesalers to post and hold their prices (to ensure uniformity across retailers and compliance with the pricing restrictions) and to keep records of all sales ready for random inspection. Mich. Admin. Code R. 436.1726.

The federal courts also have permitted States, like Michigan, to require retailers to be physically based in the State. *Byrd*, 883 F.3d at 622–623 & n.8; *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 743 (5th Cir. 2016). The Michigan licensing process for retailers ensures no violations of "tied-house" rules and no suspect sources of capital. To ensure compliance with its many regulations, the Commission conducts random inspec-tions, over 18,000 in 2016 alone, and sting operations. Retailers also must comply with rules governing their physical layout, storage of alcohol, recordkeeping, advertisements, and employee training. Mich. Admin. Code R. 436.1007, 1023, 1025, 1309–25, 1501–33.

B.

All of this leaves a narrow question. If Michigan may have a three-tier system that requires all alcohol sales to run through its in-state wholesalers, and if it may require retailers to locate within the State, may it limit the delivery options created by the new law to in-state retailers? The answer is yes.

"[A]ny notion of discrimination assumes a

comparison of substantially similar entities." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997). That is not clear when it comes to a comparison between Michigan retailers and Indiana retailers like Lebamoff. True, they both sell the same product to consumers. True also, retailers in Northern Indiana and Southern Michigan presumably compete with each other for those consumers. But they operate in distinct regulatory environments, the most notable distinction being that Michigan-based retailers may purchase only from Michigan wholesalers and must operate within its three-tier system and comply with its other regulations. That may affect whether the kind of discrimination targeted by the dormant Commerce Clause is afoot. *See Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 820 (5th Cir. 2010) (upholding a similar statute on this ground). But we need not decide the case on this basis.

Even if Indiana and Michigan retailers count as similarly situated under the dormant Commerce Clause, Lebamoff's claim overlooks the restless specter of the Twenty-first Amendment. Due to the Amendment, Commerce Clause challenges to alcohol regulation face a "different" test. *Tenn. Wine & Spirits*, 139 S. Ct. at 2474. We ask only whether the law "can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.*

Michigan's law promotes plenty of legitimate state interests, and any limits on a free market of alcohol distribution flow from the kinds of traditional regulations that characterize this market, not state protectionism. The States, the Court has explained, have legitimate interests in "promoting temperance and controlling the distribution of [alcohol]." *North*

Dakota, 495 U.S. at 433, 438–39, 110 S.Ct. 1986 (plurality opinion); *see id.* at 447–48, 110 S.Ct. 1986 (Scalia, J., concurring in the judgment); *Granholm*, 544 U.S. at 484, 125 S.Ct. 1885; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984); *cf. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504–07, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). To promote these interests, States have "virtually complete control over whether to permit importation or sale of liquor and how to structure the[ir] liquor distribution system[s]." *Granholm*, 544 U.S. at 488, 125 S.Ct. 1885; *see North Dakota*, 495 U.S. at 424, 110 S.Ct. 1986 (plurality opinion); *Midcal Aluminum*, 445 U.S. at 110, 100 S.Ct. 937.

Consistent with these decisions, several lower courts have permitted the States to prohibit out-of-state direct deliveries as a valid exercise of their Twenty-first Amendment authority.

The Seventh Circuit got the ball rolling. In an opinion by Judge Easterbrook, the court upheld an Indiana statute that prohibited direct alcohol deliveries from out of state but allowed in-state retailers and wholesalers to "deliver directly to consumers' homes." *Bridenbaugh*, 227 F.3d at 853–854. The Twenty-first Amendment, he explained, necessarily authorizes *some* discrimination, as any regulation of the "transportation or importation into any state," U.S. Const. amend. XXI, § 2, necessarily protects local sellers by "leav[ing] intrastate commerce unaffected," *Bridenbaugh*, 227 F.3d at 853. And the Amendment's historical backdrop confirms that, at the very least, it authorized bans on direct deliveries from out of state. *Id.* at 851–53. All in all, the court concluded, Indiana's delivery ban was not functionally

discriminatory at all. It simply "channel[ed]" all alcohol, from within the State and outside of it, through in-state distributors to facilitate state taxation and regulation, "precisely" what the Twenty-first Amendment was for. *Id.*at 854. In view of the Seventh Circuit's decision to uphold the Indiana law, consider the inequities that would arise if we invalidated the Michigan law. It would mean that Indiana retailers could make direct deliveries within Michigan, but Michigan retailers could not do the same in Indiana. That's no way to run a railroad—or manage cross-border trade.

The Second Circuit upheld a similar law. It permitted in-state retailers to deliver to customers' homes (through their own vehicles or trucking companies) but barred out-of-state retailers from doing the same. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 187, 191 (2d Cir. 2009). Banning direct deliveries from out-of-state, the court reasoned, was necessary to ensure "all liquor sold within" the state passed through in-state wholesalers. *Id.* at 186. And state control of the wholesalers, it added, promoted "core" Twenty-first Amendment interests by "promoting temperance [and] ensuring orderly market conditions." *Id.* at 188, 191 (quotation omitted). The court rejected the claim that the law amounted to a cover for economic protectionism and held that *Granholm* confirmed its validity. *Id.* at 191.

The Fifth Circuit upheld a Texas statute that allowed local delivery by in-state retailers but prohibited deliveries from outside the State. *Steen*, 612 F.3d at 812. It upheld the law for much the same reasons as the courts that went before it: Differential treatment of out-of-state deliveries was necessary to preserve the three-tier system and the regulatory

objectives it served. *Id.* at 819–20. Nor did in-state delivery privileges undermine this rationale. Like "carry[ing] the beverages to a customer's vehicle parked in [a retailer's] lot, or across the street," in-state deliveries were a "a constitutionally benign incident" of a three-tier a system. *Id.* at 819, 820.

As these opinions suggest, there is nothing unusual about the three-tier system, about prohibiting direct deliveries from out of state to avoid it, or about allowing in-state retailers to deliver alcohol within the State. Opening up the State to direct deliveries from out-of-state retailers necessarily means opening it up to alcohol that passes through out-of-state wholesalers or for that matter no wholesaler at all. *See Arnold's Wines*, 571 F.3d at 185 n.3. That effectively eliminates the role of Michigan's wholesalers. If successful, Lebamoff's challenge would create a sizeable hole in the three-tier system. Michigan imposes heavy taxes on all alcohol products at the wholesale level. Mich. Comp. Laws § 436.1233(1). And the State itself is the wholesaler for all liquor products, prompting higher prices than a free market would bear. *Id.* That leaves too much room for out-of-state retailers to undercut local prices and to escape the State's interests in limiting consumption.

There's ample reason to think Indiana retailers like Lebamoff would do just that. While Michigan and Indiana both have three-tier systems, they regulate them differently. Unlike Michigan, Indiana permits wholesalers to sell to retailers below cost, with volume discounts, on credit, and with no minimum prices. *See id.* § 436.1609a(5); Mich. Admin. Code R. 436.1055. Nor would it end there. Lebamoff itself identifies close to 2,000 retailers who could use direct deliveries if

allowed. That is just the beginning. Once out-of-state delivery opens, the least regulated (and thus the cheapest) alcohol will win. That's good news for people who like a drink or two. But it's not great news for the people responsible for dealing with those who have trouble stopping. In the absence of delivery restrictions, there is a "substantial" risk that out-of-state alcohol will get "diver[ted] into the retail market[,] ... disrupti[ng] the [alcohol] distribution system" and increasing alcohol consumption. *North Dakota*, 495 U.S. at 433, 110 S.Ct. 1986 (plurality opinion).

The alert reader may wonder if Michigan can respond to this problem by controlling prices set by out-of-state wholesalers and producers. No, it may not. The extraterritoriality doctrine, also rooted in the dormant Commerce Clause, bars state laws that have the "practical effect" of controlling commerce outside their borders. *Healy v. Beer Inst.*, 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989); *see Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 377 (6th Cir. 2013) (Sutton, J., concurring). Although Michigan may regulate the business relationship and prices between *in-state* wholesalers and retailers, it may not do the same for *out-of-state* wholesalers and retailers. *See Healy*, 491 U.S. at 337–38, 109 S.Ct. 2491.

That Michigan permits direct deliveries by in-state retailers does not alter this conclusion. These retailers all live with the bitter and sweet of Michigan's three-tier system—the bitter of being able to buy only from Michigan wholesalers (and the price and volume regulations that go with it) and the sweet of being subject only to intrastate competition. Permitting these retailers to deliver directly to consumers is nothing

new. Michigan has long allowed retailers to use third-party delivery to serve customers who live in areas "surrounded by water and inaccessible by motor vehicle." Mich. Comp. Laws § 436.1203(13); 2008 Mich. Pub. Acts 474, § 203(12). More recently, Michigan has allowed retailers to deliver alcohol using their own employees. Mich. Comp. Laws § 436.1203(14). One could imagine other examples—say, permitting retailer's employees to bring the customers' goods to their cars or permitting drive-through liquor stores. New delivery options are simply new ways of allowing the heavily regulated third tier to do business. Anyone who wishes to join them can get a Michigan license and face the regulations that come with it. Lebamoff seizes the sweet and wants to take a pass on the bitter.

The text and history of the Twenty-first Amendment support this conclusion. Recall that the text grants the States authority over the "importation" of alcohol into their borders. U.S. Const. amend. XXI, § 2. This suggests state power is "at its apex" when regulating importation, as the challenged Michigan statute does. *See Tenn. Wine & Spirits*, 139 S. Ct. at 2471. The historical backdrop confirms as much. Section 2's text tracks the pre-Prohibition Webb-Kenyon Act, "suggest[ing] that § 2 was meant to have a similar meaning." *Id.* at 2467. The Webb-Kenyon Act "fix[ed] [a] hole" in state regulatory authority that permitted out-of-state producers to evade state regulations by delivering directly to state residents. *Id.* at 2466. Lebamoff's lawsuit is nothing less than an effort to re-create that hole. Allowing States to "channel" alcohol sales through in-state wholesalers is "precisely what § 2 is for." *Bridenbaugh*, 227 F.3d at 854.

C.

Lebamoff challenges this conclusion in several ways, each unconvincing. It argues that ordinary dormant Commerce Clause analysis applies (false) and that the Twenty-first Amendment is not a complete defense (true). What the Twenty-first Amendment purports to give, it is true, the dormant Commerce Clause sometimes takes away. To respect the States' authority to regulate "importation" slights the dormant Commerce Clause's efforts to halt barriers to free commerce. There is no way around the problem. "[E]very statute limiting importation leaves intrastate commerce unaffected. If that were the sort of discrimination that lies outside state power, then § 2 would be a dead letter." *Id.* at 853. That's why a "different" dormant Commerce Clause test applies to alcohol regulations. *Tenn. Wine & Spirits*, 139 S. Ct. at 2474. The Twenty-first Amendment "gives the States regulatory authority that they would not otherwise enjoy." *Id.*

Lebamoff tries to minimize the State's interest in preserving a three-tier system, criticizing the costs it imposes. But Michigan could not maintain a three-tier system, and the public-health interests the system promotes, without barring direct deliveries from outside its borders. No amount of additional money through spending appropriations or "rais[ed] license fees," Appellee Br. 28, could change that reality.

Lebamoff is skeptical of other potential justifications for Michigan's law: preventing sales to minors, facilitating tax collection, and ensuring safe products. *Granholm* rejected many of these justifications in the context of direct-delivery restrictions, it is true. 544 U.S. at 491–92, 125 S.Ct.

1885. There is room for skepticism, we agree, over whether Michigan's delivery restrictions prevent sales to minors in any material way. Concurring Op. at 878–79. But even if Michigan could protect minors and ensure retailer accountability in other ways, there is no other way it could preserve the regulatory control provided by the three-tier system.

Granholm's holding does not change this calculus. It concerned a discriminatory *exception* to a three-tier system. *Granholm*, 544 U.S. at 466, 125 S.Ct. 1885. In-state wineries could avoid in-state wholesalers and retailers and thus deliver directly to consumers, while out-of-state wineries could not. That was the "explicit discrimination" in *Granholm*, not delivery privileges by themselves. *Id.* at 467, 125 S.Ct. 1885. Lower courts have characterized *Granholm* in exactly this way and rejected challenges like Lebamoff's. *See, e.g.*, *Arnold's Wines*, 571 F.3d at 190–91 (upholding state law that permitted in-state, but not out-of-state, retailers to deliver alcohol to consumers' homes); *Steen*, 612 F.3d at 818–19 (same). There is no appellate decision to the contrary.

Lebamoff suggests that a state senator's statement conveys a discriminatory motive. Here is the statement: "[Michigan retailers] currently cannot [deliver wine] legally. And they are under tremendous disadvantage, competitive disadvantage, with out-of-state entities that are doing it illegally right now. So this is a bill to help out our constituents, our local businesses to be more competitive in the marketplace." Dec. 8, 2016, MacGregor Statement on S.B. 1088 at 40:50–41:16, https://www.house.mi.gov/SharedVideo/PlayVideoArchive.html?video=COMM120816.mp4. As the senator said elsewhere, however,

the amendment's purpose was not to give Michigan businesses an advantage but to "level[ ] the playing field." *Id.* at 40:15. Even if one legislator's voice offered a meaningful insight into a collective body's objectives (doubtful), the statement in context shows only the legitimate goal of evening the playing field.

Nor does Michigan's past treatment of direct deliveries upset this conclusion. Before the 2017 amendment, Michigan permitted out-of-state retailers to deliver alcohol using *their own* vehicles and employees. 2008 Mich. Pub. Acts 474, § 203(11). Even that narrow exception was adopted grudgingly. Michigan originally had a scheme much like the present one: prohibiting out-of-state deliveries and permitting in-state retailers to make them in limited circumstances. But a federal district court, purportedly relying on *Granholm*, found that scheme violated the dormant Commerce Clause. *Siesta Vill. Mkt., LLC v. Granholm*, 596 F. Supp. 2d 1035, 1037–38 (E.D. Mich. 2008). Rather than test this conclusion on appeal, Michigan amended the law, ending all direct deliveries and permitting a generally-applicable employee-delivery exception. 2008 Mich. Pub. Acts 474, § 203(11). About a decade later, concerned with increasing problems related to cross-border deliveries and reassured by a growing lower court consensus, *see Arnold's Wines, Inc.*, 571 F.3d at 190–91; *Steen*, 612 F.3d at 818–19, Michigan enacted the 2017 amendment. There's nothing wrong with that.

What of the consumer plaintiffs, the Michigan wine purchasers who cannot buy the types of wine they want without inconvenience? The record for one suggests these concerns may be exaggerated. Wine wholesalers have their own profit incentive to carry enough brands

to meet consumer demand and answer requests for more. And wine consumers have yet another avenue: the more than 1,200 wineries excepted from the law as long as they make no more than a minimal volume of direct deliveries. Perhaps for these reasons, there are over 44,000 brands of wine available in Michigan, the vast majority of them from out-of-state producers. To be sure, some brands are not available. But the extent of the State's responsibility for that gap is not clear. Some winemakers may seek higher margins by selling exclusively at "high-end" restaurants or at their own vineyards, and others may lack the capacity to produce enough wine for wide distribution. R. 34-3 at 3–5. As Lebamoff's expert admits, fewer than 50,000 of the roughly 200,000 wines sold in the country are available nationwide. That's not Michigan's fault.

Even so, it's likely the case that some wine producers do not sell to Michigan wholesalers due to these regulatory costs. Some rare wines, for example, apparently are available only through specialty retailers located primarily in California, New York, New Jersey, and Chicago. Concurring Op. at 877. But some reduction in consumer choice, it seems to us, flows ineluctably from a three-tier system. The purpose of the system, for better or worse, is to make it harder to sell alcohol by requiring it to pass through regulated in-state wholesalers. Those middlemen unsurprisingly impose added costs, sometimes choice-limiting costs. Still, it's worth noting that Michigan has loosened some regulations to increase choice. That was the point of allowing limited direct deliveries by out-of-state wine producers. Perhaps more amendments are in order. Broadening product options seems far afield from the tied-saloon system that the three-tier system was designed to replace. The internet has widened that

gap. Today "[w]e live in a global economy and we shop in virtual marketplaces for everything from luxuries to necessities." *Id.* at 878. But the Twenty-first Amendment leaves these considerations to the people of Michigan, not to federal judges.

D.

Also unavailing is Lebamoff's claim that the law violates the Privileges and Immunities Clause of Article IV of the United States Constitution. "The Citizens of each State," the Clause says, "shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const., art. IV, § 2, cl. 1. The point of the Clause is to "plac[e] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *McBurney v. Young*, 569 U.S. 221, 228, 133 S.Ct. 1709, 185 L.Ed.2d 758 (2013) (quotation omitted).

Long ago, the Court rejected the idea that the right to sell alcohol was a privilege or immunity under the similarly-worded Fourteenth Amendment. U.S. Const. amend. XIV, § 1, cl. 2. "There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States." *Crowley*, 137 U.S. at 91, 11 S.Ct. 13; *see Mugler v. Kansas*, 123 U.S. 623, 657, 675, 8 S.Ct. 273, 31 L.Ed. 205 (1887); *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 132, 135, 21 L.Ed. 929 (1874). The words of the Twenty-first Amendment, ratified long after 1868, show that a State may prohibit sales of alcohol if it wishes.

On top of that, the Clause concerns discrimination based on state citizenship or residency, *see McBurney*,

569 U.S. at 228, 133 S.Ct. 1709, and Michigan's law does not discriminate on that basis. Residents *876 of Indiana are on "the same footing" as residents of Michigan. *Id.* To sell alcohol in Michigan, they simply have to play by the Michigan rules—just as they have to do in Indiana. So far, over 1,800 non-residents have gotten Michigan retail licenses. Lebamoff can do the same. There is no residency requirement, only the requirement that it set up a store within the State—a physical presence requirement that the U.S. Supreme Court and our court permit. *See Tenn. Wine & Spirits*, 139 S. Ct. at 2475; *Byrd*, 883 F.3d at 622–623 & n.8.

Lebamoff offers no good reason to depart from these principles or to treat this claim in a different way from the dormant Commerce Clause claim. To its credit, Lebamoff admits that "[n]o prior case in this or any other circuit" has found a state regulation of alcohol violated the Privileges and Immunities Clause. Appellee Br. 54. We see no good reason to be the first.

III.

Even if the district court had been right in deciding that the law violated the dormant Commerce Clause, it bears adding, the court chose the wrong remedy. Rather than altering Michigan's alcohol distribution system by extending delivery rights to out-of-state retailers, it should have returned things to the pre-2017 status quo.

At stake was whether to invalidate a new law or extend the prior law's reach. In answering that question, we ask what the legislature would have preferred had it known of the constitutional problem, *see Murphy v. NCAA*, —— U.S. ——, 138 S. Ct. 1461, 1482, 200 L.Ed.2d 854 (2018), doing our best to "limit

the solution to the problem," *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–29, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006). The imperative is not to "rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." *Murphy*, 138 S. Ct. at 1482 (quotation omitted).

Look no further than the text of this law for guidance. "If any provision of this act is found to be unconstitutional," it says, "the offending provision shall be severed and shall not affect the remaining portions of the act." Mich. Comp. Laws § 436.1925. The 2017 amendment created the alleged discrimination by granting delivery privileges only to in-state retailers. The severability clause in no uncertain terms says that we should invalidate that provision and leave the rest of the statute—and the rest of the three-tier system—intact.

Another clue points in the same direction. A statutory purpose of the provision at issue, §436.1203, is to "maintain strong, stable, and effective regulation by having beer and wine sold by retailers consumed in this state [ ] pass[ ] through the 3-tier distribution system established under this act." *Id.* § 436.1203 (2)(b). How could obliterating that system be consistent with this provision? Any other approach amounts to wholesale surgery, not statutory interpretation.

The district court's solution was to strike the amendment *and* parts of the original statute. The court held the 2017 amendment unconstitutional "insofar as" it precluded direct delivery "in conjunction with [Mich. Comp. Laws] Section 436.1607." R. 43 at 20. Section 1607 provides that only in-state retailers can get delivery licenses, and it was not part of the 2017 amendment. It was enacted over a decade earlier. *See*

2008 Mich. Pub. Acts 218, § 607(1). The court had no basis for touching § 1607 in view of the severability clause.

Some cases, it is true, suggest courts may remedy discrimination by extending benefits rather than retracting them. *See, e.g.*, *Heckler v. Mathews*, 465 U.S. 728, 733, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984); *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 435 (6th Cir. 2008). But that is a rule of thumb for approximating the "touchstone" of the severability question: legislative intent as captured by the words of the statute. *Ayotte*, 546 U.S. at 330, 126 S.Ct. 961. Today's severability clause clearly conveys the Michigan legislature's intent, and it distinguishes our case from the one on which Lebamoff most heavily leans: *Cherry Hill*, 553 F.3d at 435. Another of Lebamoff's supposedly favorable cases notes the imperative of following "the intent of the legislature" by "consider[ing] the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation."*Heckler*, 465 U.S. at 739 n.5, 104 S.Ct. 1387 (quotation omitted). The district court's two-paragraph analysis on this score reveals no consideration or appreciation of that disruption.

We reverse and remand for proceedings consistent with this opinion.

McKEAGUE, Circuit Judge, concurring.

CONCURRENCE

I ultimately agree that Michigan has presented enough evidence, which the plaintiffs have not sufficiently refuted, to show its in-state retailer requirement serves the public health. *Tennessee Wine and Spirits Retailers Ass'n v. Thomas*, —— U.S. ——,

139 S. Ct. 2449, 2474, 204 L.Ed.2d 801 (2019).

However, what I believe is the crux of this case is the online shipping component. That Michigan prohibits out-of-state retailers from selling wine online and shipping directly to consumers—but permits wineries and in-state retailers to do so—adds two distinct wrinkles into an otherwise protected three-tier system. First, it asks us to conduct a reexamination of regulations that impede internet commerce generally, given the " 'far-reaching systemic and structural changes in the economy' and 'many other societal dimensions' caused by the Cyber Age." *South Dakota v. Wayfair, Inc.*, —— U.S. ——, 138 S. Ct. 2080, 2097, 201 L.Ed.2d 403 (2018) (quoting *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 135 S. Ct. 1124, 1135, 191 L.Ed.2d 97 (2015) (Kennedy, J., concurring)). Second, it weakens the public health justifications—thus strengthening the dormant Commerce Clause challenge in this case—but not enough to change the result.

Let's look at it from the perspective of a consumer. The Michigan consumers in this appeal all have varying reasons for buying wine online. Some purchase wine online due to time restraints. Others purchase wine online because the wine they desire is available only online. This is especially true when it comes to imported wine. For example, from 2012 to 2016, 511,437 different wines were approved for sale in the United States. Of those, 65% were of imported origin. And while consumers in most states, including Michigan, may purchase wine directly from wineries across the country, imported wine may only be purchased from retailers within their state and may not be shipped directly from the producer located out of

the country or from retailers located outside the state of Michigan. Unsurprisingly, a number of specialty wines are housed only at specialty retailers located primarily in California, New York, New Jersey, and Chicago. So, as evidenced, there's a market for buying wine online, especially from retailers.

But Michigan allows only in-state retailers access to this online market. Only in-state retailers that hold a specially designated merchant license may ship wine directly to consumers. Mich. Comp. Laws § 436.1203(3), (15).

A consumer looking to buy wine for a special occasion can go online, research different varieties of wine, read reviews from aficionados, and select a bottle or two for purchase, only to be told at checkout: "Sorry, you live in Michigan." What a frustration that must be considering this is how we all buy things nowadays. We live in a global economy and we shop in virtual marketplaces for everything from luxuries to necessities. And we now rely even more on online shopping in the recent pandemic.

Obviously, this case involves wine and therefore the Twenty First Amendment complicates things. But does that mean a state's regulation of virtual marketplaces for wine should be seen as simply an extension of its existing three-tier scheme, or as an exception to the scheme warranting judicial rethinking? In some ways, as the lead opinion notes, in-state online sales are analogous to brick-and-mortar wine merchants carrying cases of wine to customers' cars. *See also Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 820 (5th Cir. 2010) (viewing "local deliveries as a constitutionally benign incident of an acceptable three-tier system"). But that analogy loses

force when viewed in context of the ubiquity of online sales. Michigan's direct retailer-to-consumer shipping law isn't just a "local delivery." It allows for wide range shipping, even through use of a simple "mobile application." Mich. Comp. Laws § 436.1203(15). It's a whole new market; a market that early twentieth century state legislatures didn't anticipate when crafting the three-tier systems the Supreme Court has since approved. So I'm not so sure that the in-state retailer requirement is just a coda to Michigan's three-tier regulations. A state that opens up direct online shipping to consumers presents the "changing economic and social" circumstances that may call for a different balance between the dormant Commerce Clause and the Twenty First Amendment. *Steen*, 612 F.3d at 819 (citing *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 198–201 (2d Cir. 2009) (Calabresi, J., concurring)). But until a different balance is struck, we are bound by the Supreme Court's protection of a traditional three-tier system.

And with the existing balance now, Michigan's position prevails. Michigan's amendment permitting only in-state retailers to ship directly to consumers must have a public health justification on its own. Because Michigan chose to allow in-state retailers to ship wine directly to consumers, it "must do so on evenhanded terms." *Granholm*, 544 U.S. at 493, 125 S.Ct. 1885. If not evenhanded, Michigan must present sufficient evidence to show a public health justification. *Id.*; *Tennessee Wine*, 139 S. Ct. at 2474.

While the online shipping component of Michigan's regulations weakens its public health rationales, Michigan can still show that the in-state retailer requirement protects public health. But to their credit, the plaintiffs offer persuasive counterarguments.

Start with the flaws in Michigan's public health rationales. Take for example Michigan's argument that the in-state requirement allows it to monitor the sale of alcohol to underage individuals. Michigan argues that in the five years before the conclusion of discovery in this case, there had been 3,125 violations for sales to minors uncovered by sting operations involving a minor decoy. Opening up online sales to out-of-state retailers, the argument goes, would make a bad situation worse.

But the fact that in-state retailers can sell online cuts against this rationale. If Michigan thinks there is such a risk of underage sales in the state, why expand that risk by allowing online sales? True, the common carrier delivering alcohol to the consumer's door must be licensed by Michigan and check the consumer's identification and age at the time of delivery. Mich. Comp. Laws § 436.1203(3), (15). For this to happen, though, it's not necessary that the retailer be in-state. Michigan has already proven that. Out-of-state wineries can ship directly to consumers, and Michigan requires consumer identification and age verification. *Id.* § 436.1203(4). So Michigan's shot itself in the foot. Its own evidence tends to show "nondiscriminatory alternatives" could sufficiently further its interests. *Tennessee Wine*, 139 S. Ct. at 2474.

However, in the end, Michigan prevails in its justifications. The tricky part is that Michigan can largely rely on what has already been found to inherently protect public health. For example, requiring retailers to be in-state to sell online allows Michigan to "monitor the stores' operations through on-site inspections." *Tennessee Wine*, 139 S. Ct. at 2475. For retailers that don't comply with the law, this allows Michigan to revoke licenses (and even recall all products), and this has already been found to "provide[

] strong incentives not to sell alcohol in a way that threatens public health or safety." *Id.* (citing *Granholm*, 544 U.S. at 490, 125 S.Ct. 1885) (internal quotation marks omitted). In 2016, Michigan conducted 18,039 on-site physical inspections and related contacts at retail establishments for licensing and enforcement purposes. And these inspections "routinely uncover evidence of violations of the Code and administrative rules." Moreover, whether online sales are an extension to traditional three-tier systems or not (which, again, I question), there are the other baked-in public health justifications that flow from such systems, like promoting temperance. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). The plaintiffs here have not produced sufficient countervailing evidence showing that these public health concerns are "mere speculation" or "unsupported assertions," or that the "predominant effect" of the in-state retailer requirement is not the protection of public health. *Tennessee Wine*, 139 S. Ct. at 2474.

With these reservations, I concur.

APPENDIX B. Opinion of the U. S. District Court for the Eastern District of Michigan [Filed Sep.28, 2018].

No. 2:17-cv-10191

Lebamoff Enterprises, Inc., et al.,
Plaintiffs,

v.

Snyder, et al.,
Defendants,

Opinion and Order Denying Defendants' Motions for Summary Judgment [33], Denying Intervenor's Motion for Summary Judgment [34], and Granting Plaintiffs' Motion for Summary Judgment [31]

Arthur J. Tarnow, Senior United States District Judge

Plaintiffs—individual wine consumers (Jack Strike, Jack Schulz, and Richard Donovan), an individual wine merchant (Joseph Doust), and an Indiana corporation that operates fifteen alcohol retail stores in Indiana (Lebamoff Enterprises, Inc.)—filed this 42 U.S.C. § 1983 action to challenge the constitutionality of Michigan Senate Bill 1088, 2016 Mich. Pub. Laws Act 520 ("2016 PA 520"). They claim that Defendants—Governor of Michigan Rick Snyder, Attorney General William Schuette, and Chairperson of the Michigan Liquor Control Commission ("MLCC") Andrew J. Deloney—have violated their rights under the Commerce Clause and the Article IV Privileges and Immunities Clause of the United States Constitution.

Plaintiffs ask the Court to declare 2016 PA 520

unconstitutional to the extent that it amends M.C.L § 436.1203 to prohibit non-Michigan wine retailers from 1) selling and distributing wine directly to Michigan consumers, and 2) obtaining licenses and engaging in their occupations in Michigan. They seek an injunction prohibiting Defendants from enforcing 2016 PA 520 and requiring them to allow out-of-state wine retailers to distribute wine directly to consumers in Michigan

FACTUAL BACKGROUND

The laws governing wine retailing in Michigan were amended by 2016 PA 520 on March 29, 2017. The old laws allowed licensed Michigan retailers, and retailers from other states with similar licenses, to ship wine to Michigan consumers only by using their own employees and not by using a third party-delivery service. M.C.L.A. 436.1203, *effective* from March 25, 2014 to March 28, 2017. The new laws permit certain Michigan wine retailers to sell, ship, and deliver alcoholic beverages directly to Michigan customers by using a licensed third party carrier, but they prohibit out-of-state retailers from shipping to Michigan customers by any means. M.C.L.A. 436.1203. The law thus expanded the shipping rights of Michigan retailers while eliminating the shipping rights of out-of-state retailers.

The MLCC, by way of the Michigan Liquor Control Code, controls and regulates the sale and importation of alcohol through a three-tier distribution system of suppliers, wholesalers, and retailers. Licensed suppliers sell beer, wine, and mixed spirits to licensed wholesalers, who in turn sell these products to licensed retailers. Licensed retailers may only purchase wine from licensed Michigan wholesalers. Licensed retailers then sell alcohol to consumers. The MLCC exercises its

powers over the three tiers of distribution to regulate the behavior of market participants. For instance, retailers are forbidden to negotiate volume discounts with wholesalers or purchases on credit. Mich. Comp. L. § 436.1609a(5); Mich. Admin. Code, R, 436.1625(5), 436.1726(4). Michigan also requires wholesalers to "post-and-hold" prices to police against industry favoritism or covert volume discounts. Mich. Admin. Code, R. 436.1726.

PLAINTIFFS' LAWSUIT

Plaintiffs challenge the new version of M.C.L. § 436.1203(2), as enacted on January 5, 2017. The law permits retailers who obtain specially designated merchant ("SDM") licenses to deliver wine to Michigan consumers using a common carrier, their own vehicle, or a third-party facilitator. M.C.L. §§ 436.1203(3), (12), and (15). These provisions do not apply to Lebamoff Enterprises, Inc., however, because as an "outstate seller of wine," it is ineligible to become "licensed as a specially designated merchant." M.C.L. § 436.1607(1).

Plaintiff Lebamoff Enterprises, Inc. ("Lebamoff") operates fifteen retail wine and liquor stores—called Cap n' Cork—in the Fort Wayne, Indiana area. Many of Lebamoff's customers live in cities in southwest Michigan and have requested that Lebamoff ship wine to them. (Pls.' Ex. 2 at ¶ 2). Lebamoff is unable to do so however, despite being fully equipped to ship and deliver wine. (*Id.* at ¶ 6). Plaintiff Joseph Doust is a wine merchant and one of the co-owners of Lebamoff Enterprises. Plaintiffs Richard Donovan, Jack Strike, and Jack Schulz are Michigan wine consumers who wish to be able to order wine from out-of-state retailers. They prefer to order wine on the internet, and they allege that many of their desired vintages are

not available in the Michigan market. (Pls. Ex. 5, 6, & 7).

PROCEDURAL HISTORY

Plaintiffs filed a Complaint [1] on January 20, 2017 and an Amended Complaint [5] on February 6, 2017.

On March 17, 2017, the Michigan Beer & Wine Wholesalers Association moved, unopposed, to intervene as a defendant. The Court entered an Order permitting intervention [13] on April 6, 2017.

Plaintiffs filed a Motion for Summary Judgment [31] on February 28, 2018. Intervenors and the original Defendants filed Motions for Summary Judgment [33, 34] on April 2, 2018. The motions have been fully briefed, and a hearing was held before the Court on September 6, 2018.

LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Defendants bear the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that Plaintiffs lack evidence to support an essential element of their case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Plaintiffs cannot rest on the pleadings and must show more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd.*, 475 U.S. at 586-87, 106 S.Ct. 1348. Plaintiffs must "go beyond the

pleadings and by ... affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp.*, 477 U.S. at 324, 106 S.Ct. 2548 (quoting Fed. R. Civ. P. 56(e)); *see also United States v. WRW Corp.*, 986 F.2d 138, 143 (6th Cir. 1993).

ANALYSIS

A.

The Commerce Clause gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const., art. I, § 8, cl. 3. The United States Supreme Court has "interpreted 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, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994). Relatedly, the Commerce Clause "encompasses 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 n.1, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989). The dormant Commerce Clause prevents states from "unjustifiably [ ] discriminat[ing] against or burden[ing] the interstate flow of articles of commerce." *Or. Waste Systems, Inc. v. Dep't of Env't Quality of Or.*, 511 U.S. 93, 98, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994).

The dormant Commerce Clause inquiry is two-fold. First, the Court must determine whether the statute at issue "directly regulates or discriminates against interstate commerce, or [whether] its effect is to favor

in-state economic interests over out-of-state interests." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 644 (6th Cir. 2010). Plaintiffs bear the burden of showing that Michigan's law is discriminatory. *Id.*

If Plaintiffs prove that the law discriminates against interstate commerce, the law "will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable alternatives." *Dep't of Revenue of Ky.,* 553 U.S. at 338, 128 S.Ct. 1801; *see also Or. Waste Systems*, 511 U.S. at 100, 114 S.Ct. 1345. If the defendant fails to meet its burden at this stage of the inquiry, the law is upheld "unless the burden it imposes upon interstate commerce is clearly excessive in relation to the putative local benefits." *Int'l Dairy Foods Ass'n*, 622 F.3d at 644 (citations and quotation marks omitted); *see also Tenn. Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 449 (6th Cir. 2009) ("Protectionist laws are generally struck down without further inquiry, because absent an extraordinary showing the burden they impose on interstate commerce will always outweigh their local benefits.") (Citations omitted).

B.

Plaintiffs have met their burden of proving that the regulatory system created by 2016 PA 520 discriminates against interstate Commerce. The new statute permits only those who "hold a specially designated merchant license located in this state" to use a common carrier to ship to consumers in Michigan. 2016 PA 520 § 203(3). Though Defendants argue that Plaintiffs have every right to open a retail location in Michigan and ship from that store while

maintaining their Indiana residency, courts have "viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). In 2005, the Supreme Court ruled that Michigan and New York laws permitting direct shipment of wine from in-state wineries, but forbidding the same from out-of-state wineries, violated the Commerce Clause. *Granholm v. Heald*, 544 U.S. 460, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005). Michigan and New York both argued in *Granholm* that excluding out-of-state wineries from selling directly to their consumers unless they had a physical presence in the state was nondiscriminatory because wineries need only open up an in-state storefront. The Court rejected the states' argument, referencing the "prohibitive" costs of establishing brick-and-mortar distribution centers in states that require retailers to do so. *Id.* at 475, 125 S.Ct. 1885.

Defendants argue that a ruling for the Plaintiffs would allow Lebamoff to do what no Michigan retailer may do: ship wine to Michigan consumers that has not passed through the Michigan three-tier system. The dormant Commerce Clause is enforced against states, however, and the constitutionality of state action is of primary concern in this case. The governing question, therefore, is whether Michigan is permitted to enforce a statute that explicitly denies out-of-state retailers a privilege available to their in-state competitors. The answer at this stage must be no, for "[s]tate laws that discriminate against interstate commerce face a 'virtually per se rule of invalidity." *Granholm*, 544 U.S. at 476, 125 S.Ct. 1885 (quoting *Phila. v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978)

).

Michigan departed from a hermetically-sealed three-tier system when it chose to permit its wine retailers to join the digital marketplace and engage in direct shipping to customers. The State created a market for Michigan consumers that implicated interstate commerce in a manner above-and-beyond that of a traditional three-tier system. These same laws then closed off this Michigan-sized portion of American interstate commerce to out-of-state competition. State laws that so favor in-state business presumptively violate the dormant Commerce Clause because they undermine "strong federal interests in preventing economic Balkanization." *Bacchus Imps. v. Dias*, 468 U.S. 263, 276, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984) (finding that a tax exemption for an indigenously produced Hawaiian brandy, *Okolehao*, skewed competition within the liquor market and therefore was subject to the Commerce Clause).

C.

Because this case concerns the regulation of alcohol, the Court must undertake an additional step in its analysis before determining whether Defendants meet their burden on the second prong of the Commerce Clause test. The Court must determine "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). Section Two of the Twenty-first Amendment provides, "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." U.S. Const. amend. XXI, § 2.

Courts have interpreted the Amendment "to allow states to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." *Granholm*, 544 U.S. at 484, 125 S.Ct. 1885; *see also Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986) ("[T]he Twenty-first Amendment and the Commerce Clause 'each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case." (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964)). The *Granholm* Court rejected the two states' contention that Section Two of the Twenty-first Amendment immunized laws that discriminated against out-of-state wineries. "The Amendment did not give States the authority to pass non-uniform laws in order to discriminate against out-of-state goods." *Granholm,* 544 U.S. at 484-85, 125 S.Ct. 1885. The Court went on to reiterate its holdings in *Bacchus*, *Brown-Forman*, and *Healy* that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Id.* at 487, 125 S.Ct. 1885.

The question here is whether discrimination against interstate commerce on the retail tier—as opposed to the producer tier at issue in *Granholm*—is forbidden by the Commerce Clause or sanctioned by the Twenty-first Amendment.

Courts have answered this question in different ways. In *Siesta Village Market, LLC v. Granholm*, 596 F.Supp.2d 1035 (E.D. Mich. 2008), this court declined

to distinguish between retailers and producers when determining the constitutionality of a very similar Michigan statute, and ultimately enjoined the enforcement of Michigan laws that discriminated against out-of-state wine shippers. Following this decision, the Michigan legislature repealed the problematic provisions of the statute and the Court vacated the decision as moot.

By contrast, the Second Circuit declined to interpret *Granholm* as authorizing a Commerce Clause challenge to a New York state wine retail shipment law that privileged in-state retailers. *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2nd Cir. 2009). The Eighth Circuit went further and held that residency requirements for wholesalers are permissible under the Commerce Clause. *S. Wine and Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799 (8th Cir. 2013). Implicit to both the Second and Eighth Circuit's decisions was their refusal to extend the logic of *Granholm* from the producer tier to the retailer tier.

This bright-line distinction between producer and retailer tiers is incompatible with Sixth Circuit precedent. In *Byrd*, the Sixth Circuit found that Tennessee residency requirements for the owners of retail businesses applying for alcoholic beverage licenses did in fact violate the Commerce Clause, and it embraced the Fifth Circuit's interpretation of *Granholm* as "reaffirming the applicability of the Commerce Clause to state alcohol regulations, but to a lesser extent when the regulations concern the retailer or wholesaler tier as distinguished from the producer tier, of the three-tier distribution system." *Byrd v. Tenn Wine and Spirits Retailers Ass'c*, 883 F.3d 608 (6th Cir. 2018), *cert. granted,* (U.S. Sept. 27, 2018) (No. 18-96), (quoting *Cooper v. Texas Alcoholic Beverage Comm'n*,

820 F.3d 730, 743 (5th Cir. 2016)).

The Sixth Circuit held that whether the Twenty-first Amendment saves a dormant commerce clause violation will depend on "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Id.* at 621-22. Put another way, "[d]istinctions between in-state and out-of-state retailers and wholesalers are permissible only if they are an inherent aspect of the three-tier system." *Id.* This is the test the Court applies to Michigan's retail wine shipment laws.

Michigan fails this test because it cannot demonstrate that permitting in-state retailers to ship directly to consumers while denying out-of-state retailers the right to do the same is inherent to its three-tier system. Michigan retains its Twenty-first Amendment powers to maintain a closed three tier system, just as it remained free after *Granholm* to prohibit wineries from shipping directly to consumers. But when it starts carving exceptions out of that system, it must do so without resorting to economic protectionism. The State's Twenty-first Amendment powers do not extend so far as to spare protectionist laws from the Commerce Clause. *See Granholm*, 544 U.S. at 487, 125 S.Ct. 1885 (2005) (holding that "regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause."). A law favoring local businesses that strays too far from the protection of the Twenty-first Amendment must withstand a Commerce Clause challenge on its own merits.

D.

Defendants therefore must defend their regulatory regime on the second prong of the dormant Commerce Clause analysis. A facially discriminatory law will only be upheld if it "advances a legitimate local purpose that cannot be adequately served by reasonable alternatives." *Dep't. of Revenue of Ky.*, 553 U.S. at 328, 128 S.Ct. 1801. Given that simply outlawing retail wine shipping without providing an exception for SDMs would likely accomplish the following four objectives, and that the State has operated a non-discriminatory retail regime in the past, Defendants seem foreclosed from meeting their burden.

Nevertheless, Defendants argue that four legitimate local purposes will save wine retailer-delivery discrimination from a Commerce Clause challenge. The Court considers each in turn.

1. Administrative Overburdening

The State argues that Michigan cannot feasibly regulate a nationwide market of wine retailers. The MLCC opines that 338,000 retailers nationwide could be eligible for licenses and references the heavy burden that licensing and regulating out-of-state wine retailers will entail. (Defs.' Ex. B, at ¶ 13). Plaintiffs argue that only a tiny fraction of these retailers will in fact apply for a license, as was the case in New Hampshire, and that the costs of running a shipping business will prevent the market from becoming saturated with out-of-state retailers. (Pls.' Ex. 14 & 15). It is impossible to know just how many applicants an expanded SDM license eligibility would create, but the State has not demonstrated that no reasonable alternatives exist to prevent administrative overflow. The MLCC could for instance tighten regulations with

other non-discriminatory requirements or increase its application fees. The State cannot justify restricting market access to local businesses merely by pleading regulatory frugality and pointing out that Michigan has fewer potential licensees than the whole country.

2. Youth Access

The State argues that licensing out-of-state retailers to deliver wine would substantially increase the risk of minors obtaining alcohol. Defendants provide evidence that out-of-state direct shippers have sold more wine to minors during investigatory control sales. (Defs.' Ex. D at ¶ 18; Ex. C at ¶ 14). The *Granholm* Court already considered and rejected the justification of preventing youth access for winery direct shipments, finding that the states needed not only to show that a problem existed but also that alternative mechanisms could not solve that problem. *Granholm*, 544 U.S. at 489-91, 125 S.Ct. 1885 (finding that online wine shipping is an unattractive means for minors to procure alcohol, and noting less restrictive alternatives to foreclosing youth access to wine).

Preventing underage wine sales fails as a justification because the point-of-enforcement is on the delivery end. Michigan law provides that wine must be shipped in a specially marked package, and that only someone at least 21 years of age can accept delivery. M.L.C. 436.1203(15). Third party shippers must be approved by the MLCC and must keep records of their shipments for inspection. M.L.C. 436.1203(20)-(21). Michigan does not advance any theory on how its wine retailing websites better screen out minors than their out-of-state rivals, and in fact both websites would be equally accessible to Michigan officials seeking to investigate underage sales, as would both company's

deliveries (presumably accomplished by the same common carrier). Further, as Plaintiffs argue, there are many forms of leverage the state can hold over out-of-state retailers short of the threat of property abatement. Bonds can be required from retailers where the MLCC sees fit, and, along with the SDM license itself, subject to forfeiture where necessary. The *Granholm* Court found that Michigan failed in 2005 to make the "clearest showing" that was necessary to justify discrimination. *Granholm*, 544 U.S. at 489-91, 125 S.Ct. 1885 (quoting *C & A Carbone, Inc.*, 511 U.S. at 393, 114 S.Ct. 1677). The state has not adequately demonstrated that replacing wineries with wine retailers has made a significant enough difference.

3. Tax Collection

The State argues that collecting Michigan taxes from out-of-state retailers would be unworkable. Defendants base this conclusion off the MLCC's experience taxing out-of-state wineries. Direct shipper licensees pay the excise tax directly to the MLCC, but the Commission believes itself to be unable to collect the full taxes owed on such transactions. (Defs.' Ex. E). Defendants advance evidence that out-of-state wineries have disproportionately failed to timely file required tax documentation and have routinely underpaid taxes. *Id.* The fact that much of Michigan's evidence comes from winery direct shipping suggests that the State's problem lies with *Granholm* itself, a problem that this Court is not in a position to remedy.

Indeed, the Court in *Granholm* found that there were reasonable alternative methods available to collect taxes without burdening interstate commerce. Michigan can simply require retailers to post a bond for taxes, as it already does in certain circumstances,

and condition continued licensing on proper payment of taxes. *Granholm*, 544 U.S. at 491, 125 S.Ct. 1885 ("If licensing and self-reporting provide adequate safeguards for wine distribution through the three-tier system, there is no reason to believe that they will not suffice for direct shipments."); *see also* Mich. Comp. L. 436.1801 on current wine retailing bond requirements. Indeed, tax collection is substantially less of a justification now than it was in 2005, when the nexus requirements of *Quill Corp v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) were still in effect. *South Dakota v. Wayfair*, —— U.S. ——, 138 S. Ct. 2080, 201 L.Ed.2d 403 (2018) overruled *Quill* and allowed states to collect taxes from out-of-state retailers delivering goods to their citizens "as if the seller had a physical presence in the states." *Id.* Michigan has every right to demand out-of-state sellers collect taxes from its Michigan customers and remit those taxes to the state.

4. Product Safety

Michigan argues that permitting out-of-state retailer delivery would defeat the MLCC's product safety function. The only U.S.-specific research the defendant cited for this argument was an article that concluded that fake alcohol is not a large problem in the U.S. precisely because of the efficacy of state and federal regulation. *See* Robert M. Tobiassen, *The Fake Alcohol Situation in the United States: The Impact of Culture, Market Economics, and the Current Regulatory System*, Center for Alcohol Policy (2014) at https://www.centerforalcoholpolicy.org/

wp-content/uploads/2015/04/The_Fake_Alcohol_Situation_in_the_United-States_compressed.pdf (last visited Sep. 24, 2018). The one case of unsafe retailed wine

reported by the article was that of certain wines containing diethylene glycol, that were recommended for recall by the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives. *See Banfi Products Corp. v. United States*, 41 Fed.Cl. 581 (1998). While the success of regulation should never undermine the regulation that made it possible, Michigan has not demonstrated that the regulatory efforts of the Federal Government and other state governments is so deficient as to require Michigan to keep all retail shippers within its state lines. Defendants have not demonstrated that they lack alternative mechanisms (such as collecting wine samples or barring the shipment of suspect wines) for achieving their goal of product safety. The product-safety justification thus lacks merit.

E.

Defendants have not proven that the discriminatory elements of 2016 PA 520 advance a legitimate local objective that can only be met through discriminating against out-of-state commerce. Michigan is therefore operating an unjustifiable protectionist regime in its consumer wine market, a privilege unsanctioned by the Twenty-first Amendment and forbidden by the dormant Commerce Clause.

REMEDY

Plaintiffs urge the Court to remedy the unconstitutionality of 2016 PA 520 by extending the benefits of the bill to out-of-state retailers. The Sixth Circuit has held that district courts have broad discretion in fashioning the terms of injunctive relief, including in wine commerce clause cases.

> When a district court finds that a statute is constitutionally defective, the court may either

> declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.

Cherry Hill Vineyards, LLC v. Lilly, 553 F.3d 423, 435 (2008) (citations omitted).

Extension is generally preferred over nullification. *See Welsh v. United States*, 398 U.S. 333, 361, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970) ("Where a statute is defective because of under-inclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion.") Therefore the Court chooses to extend the provisions to Plaintiffs.

CONCLUSION

With an aim to creating minimal interference in the complex and interdependent statutory infrastructure of Michigan alcohol, the Court holds that 2016 PA 520 is unconstitutional insofar as the Act, in conjunction with MLCC Section 436.1607 (restricting SDM licensees to Michigan entities) precludes out-of-state sellers of wine from shipping to Michigan customers. The law as amended by the Act—which allows sellers of wine who hold a "specially designated merchant license located in this state ... to use a common carrier to deliver wine to a consumer in this state ..."—may remain unaltered insofar as it permits otherwise compliant out-of-state wine retailers to either apply for and receive SDM licenses or ship to Michigan customers with comparable out-of-state

licenses. Finding the Commerce Clause sufficient grounds for relief, the Court declines to reach Plaintiffs' Privileges and Immunities claim.

The Court finds that there are no genuine issues of material fact which would preclude judgment as a matter of law in this case that 2016 Public Act 520—read in conjunction with MLCC Section 436.1607—violates the dormant Commerce Clause.

Consequently, Plaintiffs' Motion for Summary Judgment [31] IS HEREBY GRANTED.

IT IS FURTHER ORDERED that Defendants' and Intervenor's Motions for Summary Judgment [33, 34] are DENIED.

For the reasons stated herein, the Court DECLARES that Michigan's wine retail shipping laws are unconstitutional insofar as they forbid out-of-state retailers from shipping wine to Michigan customers.

Therefore, IT IS HEREBY ORDERED that Defendants Michigan Governor Rick Snyder and Michigan Attorney General Bill Schuette, in their official capacities, and the State of Michigan ARE PERMANENTLY RESTRAINED AND ENJOINED from enforcing provisions of M.C.L. §§ 436.1607 and 436.1203 to preclude out-of-state retailers of wine from shipping through interstate commerce to Michigan customers. This order shall not prevent the State of Michigan from collecting all appropriate taxes due on the sale of the wine or from requiring licenses and permits for direct interstate sales and deliveries.

SO ORDERED.

APPENDIX C. U. S. Court of Appeals for the Sixth Circuit, Order Denying Rehearing [Filed May 26, 2020].

Nos. 18-2199/2200

Lebamoff Enterprises Inc.; Joseph Doust; Jack Stride; Jack Schulz; Richard Donovan,
Plaintiffs-Appellees,

v.

Gretchen Whitmer; Dana Nessel; Pat Gagliardi,
Defendants-Appellants (18-2199),

Michigan Beer & Wine Wholesalers Association,
Intervenor Defendant-Appellant (18-2200).

ORDER

Before: Sutton, Mckeague, and Donald, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

Entered by Order of the Court
Deborah S. Hunt, Clerk

APPENDIX D. Michigan Comp. L. § 436.1203*

(1) Except as provided in this section and section 301, a person shall not sell, deliver, or import alcoholic liquor, including alcoholic liquor for personal use, in this state unless the sale, delivery, or importation is made by the commission, the commission's authorized agent or distributor, an authorized distribution agent approved by order of the commission, a person licensed by the commission, or by prior written order of the commission.

(2) Notwithstanding R 436.1011(7)(b) and R 436.1527 of the Michigan Administrative Code and except as provided in subsections (3), (12), (13), (14), (15), and (16), a retailer shall not deliver alcoholic liquor to a consumer in this state at the home or business of the consumer or at any location away from the licensed premises of the retailer. The purpose of this subsection is to exercise this state's authority under section 2 of amendment XXI of the constitution of the United States, to maintain the inherent police powers to regulate the transportation and delivery of alcoholic liquor, and to promote a transparent system for the transportation and delivery of alcoholic liquor. The regulation described in this subsection is considered necessary for both of the following reasons:

(a) To promote the public health, safety, and welfare.

(b) To maintain strong, stable, and effective regulation by having beer and wine sold by retailers to consumers in this state by passing hrough the 3-tier distribution system established

* Sections pertaining only to spirits or beer omitted.

under this act.

(3) For purposes of subsection (1), a retailer that holds a specially designated merchant license located in this state may use a common carrier to deliver wine to a consumer in this state. A retailer that uses a common carrier to deliver wine to a consumer under this subsection shall comply with all of the following:

(a) Pay any applicable taxes to the commission and pay any applicable taxes to the department of treasury as directed by the department of treasury. On the request of the department of treasury, a retailer shall furnish an affidavit to verify payment.

(b) Comply with all laws of this state, including, but not limited to, the prohibition on sales to minors.

(c) Verify the age of the individual placing the order by obtaining from him or her a copy of a photo identification issued by this state, another state, or the federal government or by using an identification verification service. The person receiving and accepting the order on behalf of the retailer shall record the name, address, date of birth, and telephone number of the individual placing the order on the order form or other verifiable record of a type and generated in a manner approved by the commission and provide a duplicate to the commission.

(d) On request of the commission, make available to the commission any document used to verify the age of the individual ordering or receiving the wine from the retailer.

(e) Stamp, print, or label on the outside of the

shipping container that the package "Contains Alcohol. Must be delivered to a person 21 years of age or older". The recipient at the time of the delivery shall provide identification verifying his or her age and sign for the delivery.

(f) Place a label on the top panel of the shipping container containing the name and address of the individual placing the order and the name of the designated recipient if different from the name of the individual placing the order.

* * *

(5) For a delivery of wine through the use of a common carrier under subsection (3), a person taking the order on behalf of the retailer shall comply with subsection (3)(b) to (f). For a sale, delivery, or importation of wine occurring by any means described in subsection (4), a person taking the order on behalf of the direct shipper shall comply with subsection (4)(c) to (g).

* * *

(10) A direct shipper shall not sell, deliver, or import wine to a consumer unless it applies for and is granted a direct shipper license from the commission. This subsection does not prohibit wine tasting or the selling at retail by a wine maker of wines he or she produced and bottled or wine manufactured for that wine maker by another wine maker, if done in compliance with this act. Only the following persons qualify for the issuance of a direct shipper license:

(a) A wine maker.

(b) A wine producer and bottler located inside this country but outside of this state holding both a federal basic permit issued by the Alcohol and Tobacco Tax and Trade Bureau of the United

States Department of Treasury and a license to manufacture wine in its state of domicile.

* * *

(12) A retailer that holds a specially designated merchant license, a brewpub, a micro brewer, or an out-of-state entity that is the substantial equivalent of a brewpub or micro brewer may deliver beer and wine to the home or other designated location of a consumer in this state if all of the following conditions are met:

(a) The beer or wine, or both, is delivered by the retailer's, brewpub's, or micro brewer's employee.

(b) The retailer, brewpub, or micro brewer or its employee who delivers the beer or wine, or both, verifies that the individual accepting delivery is at least 21 years of age.

(c) If the retailer, brewpub, or micro brewer or its employee intends to provide service to consumers, the retailer, brewpub, or micro brewer or its employee providing the service has received alcohol server training through a server training program approved by the commission.

(13) A retailer that holds a specially designated merchant license may use a third party that provides delivery service to municipalities in this state that are surrounded by water and inaccessible by motor vehicle to deliver beer and wine to the home or other designated location of that consumer if the delivery service is approved by the commission and agrees to verify that the individual accepting delivery of the beer and wine is at least 21 years of age.

* * *

(15) A retailer that holds a specially designated

merchant license located in this state may use a third party facilitator service by means of the internet or mobile application to facilitate the sale of beer or wine to be delivered to the home or designated location of a consumer as provided in subsection (12) or this subsection, and a third party facilitator service may deliver beer or wine to a consumer on behalf of a retailer that holds a specially designated merchant license located in this state, if all of the following conditions are met:

(a) If the third party facilitator service delivers beer or wine under this subsection, the third party facilitator service verifies that the individual accepting the delivery of the beer or wine is at least 21 years of age.

(b) A manufacturer, warehouser, wholesaler, outstate seller of beer, outstate seller of wine, supplier of spirits, or outstate seller of mixed spirit drinks does not have a direct or indirect interest in the third party facilitator service.

(c) A manufacturer, warehouser, wholesaler, outstate seller of beer, outstate seller of wine, supplier of spirits, or outstate seller of mixed spirit drinks does not aid or assist a third party facilitator service by gift, loan of money or property of any description, or other valuable thing as defined in section 609, and a third party facilitator service does not accept the same.

(d) The retailer or consumer pays the fees associated with deliveries provided for under this subsection.

(e) The third party facilitator service offers services for all brands available at the retail

location.

(16) A retailer that holds a specially designated distributor license located in this state may use a third party facilitator service by means of the internet or mobile application to facilitate the sale of spirits to be delivered to the home or designated location of a consumer as provided in subsection (14) or this subsection, and a third party facilitator service may deliver spirits to a consumer on behalf of a retailer that holds a specially designated distributor license located in this state, if all of the following conditions are met:

(a) If the third party facilitator service delivers spirits under this subsection, the third party facilitator service verifies that the individual accepting the delivery of the spirits is at least 21 years of age.

(b) A manufacturer, warehouser, wholesaler, outstate seller of beer, outstate seller of wine, supplier of spirits, or outstate seller of mixed spirit drinks does not have a direct or indirect interest in the third party facilitator service.

(c) A manufacturer, warehouser, wholesaler, outstate seller of beer, outstate seller of wine, supplier of spirits, or outstate seller of mixed spirit drinks does not aid or assist a third party facilitator service by gift, loan of money or property of any description, or other valuable thing as defined in section 609, and a third party facilitator service does not accept the same.

(d) The retailer or consumer pays the fees associated with deliveries provided for under this subsection.

(e) The third party facilitator service offers services for all brands available at the retail location.

(17) A third party facilitator service shall not deliver beer, wine, or spirits to a consumer under subsection (15) or (16), as applicable, and shall not facilitate the sale of beer, wine, or spirits under subsection (15) or (16), as applicable, unless it applies for and is granted a third party facilitator service license by the commission. The commission may charge a reasonable application fee, initial license fee, and annual license renewal fee. The commission shall establish a fee under this subsection by written order.

(18) If a third party facilitator service used by a retailer that holds a specially designated merchant or specially designated distributor license under subsection (15) or (16), as applicable, violates this section, the commission shall not treat the third party facilitator service's violation as a violation by the retailer.

* * *

(20) A common carrier that carries or transports alcoholic liquor into this state to a person in this state shall submit quarterly reports to the commission. A report required under this subsection must include all of the following about each delivery to a consumer in this state during the preceding calendar quarter:

(a) The name and business address of the person that ships alcoholic liquor.

(b) The name and address of the recipient of alcoholic liquor.

(c) The weight of alcoholic liquor delivered to a

consignee.

(d) The date of the delivery.

(21) A common carrier described in subsection (20) shall maintain the books, records, and documents supporting a report submitted under subsection (20) for 3 years unless the commission notifies the common carrier in writing that the books, records, and supporting documents may be destroyed. Within 30 days after the commission's request, the common carrier shall make the books, records, and documents available for inspection during normal business hours. Within 30 days after a local law enforcement agency's or local governmental unit's request, the common carrier shall also make the books, records, and documents available for inspection to a local law enforcement agency or local governmental unit where the carrier resides or does business.

(22) A third party facilitator service that delivers beer, wine, or spirits to a consumer under subsection (15) or (16), as applicable, shall submit quarterly reports to the commission. A report required under this subsection must include all of the following about each delivery to a consumer in this state during the preceding calendar quarter:

(a) The name and business address of the person that ships beer, wine, or spirits.

(b) The name and address of the recipient of beer, wine, or spirits.

(c) The weight of beer, wine, or spirits delivered to a consignee.

(d) The date of the delivery.

(23) A third party facilitator service shall maintain the books, records, and documents supporting a report submitted under subsection (22) for 3 years unless the commission notifies the third party facilitator service in writing that the books, records, and supporting documents may be destroyed. Within 30 days after the commission's request, the third party facilitator service shall make the books, records, and documents available for inspection during normal business hours. Within 30 days after a local law enforcement agency's or local governmental unit's request, the third party facilitator service shall also make the books, records, and documents available for inspection to a local law enforcement agency or local governmental unit where the third party facilitator service resides or does business.

* * *

(25) As used in this section:

(a) "Common carrier" means a company that transports goods, on reasonable request, on regular routes and at set rates.

(b) "Computer" means any connected, directly interoperable or interactive device, equipment, or facility that uses a computer program or other instructions to perform specific operations including logical, arithmetic, or memory functions with or on computer data or a computer program and that can store, retrieve, alter, or communicate the results of the operations to a person, computer program, computer, computer system, or computer network.

(c) "Computer network" means the interconnection of hardwire or wireless

communication lines with a computer through remote terminals, or a complex consisting of 2 or more interconnected computers.

(d) "Computer program" means a series of internal or external instructions communicated in a form acceptable to a computer that directs the functioning of a computer, computer system, or computer network in a manner designed to provide or produce products or results from the computer, computer system, or computer network.

(e) "Computer system" means a set of related, connected or unconnected, computer equipment, devices, software, or hardware.

(f) "Consumer" means an individual who purchases beer, wine, or spirits for personal consumption and not for resale.

(g) "Device" includes, but is not limited to, an electronic, magnetic, electrochemical, biochemical, hydraulic, optical, or organic object that performs input, output, or storage functions by the manipulation of electronic, magnetic, or other impulses.

(h) "Diligent inquiry" means a diligent good faith effort to determine the age of an individual, that includes at least an examination of an official Michigan operator's or chauffeur's license, an official Michigan personal identification card, or any other bona fide picture identification that establishes the identity and age of the individual.

(i) "Direct shipper" means a person who sells, delivers, or imports wine, to consumers in this

state, that he or she produces and bottles or wine that is manufactured by a wine maker for another wine maker and that is transacted or caused to be transacted through the use of any mail order, internet, telephone, computer, device, or other electronic means, or sells directly to consumers on the winery premises.

(j) "Identification verification service" means an internet-based service approved by the commission specializing in age and identity verification.

(k) "Mobile application" means a specialized software program downloaded onto a wireless communication device.

(*l*) "Qualified micro brewer" means a micro brewer that produces in total less than 1,000 barrels of beer per year. In determining the 1,000-barrel threshold, all brands and labels of a micro brewer, whether brewed in this state or outside this state, must be combined.

(m) "Third party facilitator service" means a person licensed by the commission to do any of the following:

(*i*) Facilitate the sale of beer or wine to a consumer as provided in subsection (15) on behalf of a retailer that holds a specially designated merchant license located in this state.

(*ii*) Facilitate the sale of spirits to a consumer as provided in subsection (16) on behalf of a retailer that holds a specially designated distributor license located in this state.

(*iii*) Deliver beer or wine to a consumer as provided in subsection (15) on behalf of a retailer that holds a specially designated merchant license located in this state.

(*iv*) Deliver spirits to a consumer as provided in subsection (16) on behalf of a retailer that holds a specially designated distributor license located in this state.