No. 20-47

In the Supreme Court of the United States

LEBAMOFF ENTERPRISES, INC., ET AL., PETITIONERS

v.

GRETCHEN WHITMER, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Did the Sixth Circuit Court of Appeals correctly apply the "different inquiry" that *Tennessee Wine & Spirits Retailers Ass'n* v. *Thomas*, ___ U.S. ___; 139 S. Ct. 2449 (2019), requires to be applied to Commerce Clause cases involving alcohol regulations?

PARTIES TO THE PROCEEDING

Petitioners are Lebamoff Enterprises, Inc., its part-owner and general manager, Joseph Doust, and three Michigan wine consumers—Jack Stride, Jack Schultz, and Richard Donovan.

Respondents are Gretchen Whitmer, Governor of the State of Michigan; Dana Nessel, Michigan Attorney General; Pat Gagliardi, Chairperson of the Michigan Liquor Control Commission; and the Michigan Beer & Wine Wholesalers Association, which was the intervening defendant below.

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Petitioners seek review of the Sixth Circuit Court of Appeals' decision in *Lebamoff Enterprises, Inc.* v. *Whitmer*, which is reported at 956 F.3d 863. The decision of the United States District Court for the Eastern District of Michigan is reported at 347 F. Supp. 3d 301.

JURISDICTION

Respondents agree that Petitioners timely filed a petition for a writ of certiorari and that this Court has jurisdiction over the petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are:

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.

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.

Mich. Comp. Laws § 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.

* * *

(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. . . .

* * *

(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 . . . .

(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 . . . .

(14) A retailer that holds a specially designated distributor license may deliver spirits to the home or other designated location of a consumer in this state . . . .

(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 . . . .

(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 . . . .

INTRODUCTION

The Twenty-first Amendment allows states to control alcohol importation and distribution within their borders through a three-tier system. In 2016, the Michigan Legislature amended the Michigan Liquor Control Code (Code) to allow certain licensed retailers within Michigan's three-tier system to ship or deliver alcohol to Michigan consumers.

While this case was pending before the United States Court of Appeals for the Sixth Circuit, this Court issued its decision in *Tennessee Wine & Spirits Retailers Ass'n* v. *Thomas*, ___ U.S. ___; 139 S. Ct. 2449 (2019). The analysis in *Tennessee Wine* examined precedent concerning the interplay between the Twenty-first Amendment and the Commerce Clause. *Id*. at 2462–74. Based on that review, this Court recognized that alcohol regulations are subject to a "different inquiry" from other regulations challenged under the Commerce Clause; if alcohol regulations are discriminatory, this Court asks "whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id*. at 2474. Such regulations are saved by § 2 of the Twenty-first Amendment if the "predominant effect" of the regulation is "the protection of public health or safety[.]" *Id*. The Sixth Circuit applied *Tennessee Wine* and upheld the challenged statute as a valid exercise of State power under § 2 of the Twenty-first Amendment. Pet. App. 6a, 15a–19a.

Petitioners and their amici assert two bases for this Court to grant review. Neither withstands scrutiny.

First, they contend that the Sixth Circuit's decision conflicts with two cases decided before *Tennessee Wine*. Those cases do not address the relevant issue—applying the "different inquiry" from *Tennessee Wine*.

Second, Petitioners ask this Court to correct a perceived error in the Sixth Circuit's decision. Not only do Petitioners inaccurately describe the Sixth Circuit's opinion, they fail to demonstrate any error. Critically, Petitioners all but ignored *Tennessee Wine* in their briefing before the Sixth Circuit, instead insisting that alcohol regulations are subject to the same strict-scrutiny test as other regulations challenged on Commerce Clause grounds. Petitioners continue down the wrong path in this Court, failing to even mention the "different inquiry" that *Tennessee Wine* requires for examining alcohol regulations. Petitioners still fail to acknowledge that *Tennessee Wine*, 139 S. Ct. at 2474, allows a discriminatory alcohol regulation to be saved by § 2 of the Twenty-first Amendment if its predominant effect is protection of public health or safety. Their argument is *not* that the Sixth Circuit applied the *Tennessee Wine* "different inquiry" in an incorrect manner. Instead, they argue that the Sixth Circuit should have applied strict scrutiny, as though the *Tennessee Wine* "different inquiry" did not exist.

Because Petitioners fail to demonstrate a "compelling reason" under Rule 10 for this Court to grant certiorari, this Court should deny the petition.

STATEMENT OF THE CASE

The Code and the Michigan Liquor Control Commission's (MLCC) administrative rules regulate

alcohol importation and distribution in Michigan. Like many states, Michigan controls alcohol sales through a three-tier system of licensed suppliers, wholesalers, and retailers. Retailers selling alcohol to consumers located in Michigan must purchase that alcohol from the State or a state-licensed wholesaler in almost all instances. Mich. Comp. Laws §§ 436.1203(1); 436.1901(1), (3), (4), (6). In late 2016, the Michigan Legislature amended Mich. Comp. Laws § 436.1203 to permit certain MLCC-licensed retailers located in Michigan to ship or deliver wine and other forms of alcohol to Michigan consumers.

The principal petitioner, Lebamoff Enterprises, is an Indiana wine retailer that is not licensed by the MLCC and does not obtain its alcohol products from a licensed Michigan wholesaler. Therefore, the Code prohibits Lebamoff Enterprises from shipping alcohol directly to Michigan consumers. Three of the individual petitioners are Michigan wine consumers who wish to receive shipments from Lebamoff Enterprises. Petitioners hope to bypass Michigan's three-tier system, so they sued Michigan, challenging its new law under the dormant aspect of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3.

After discovery, the parties filed cross-motions for summary judgment. The State and intervening defendant submitted affidavits and other evidence demonstrating that the distinction between in-state and out-of-state retailers serves numerous health and safety goals closely related to the powers reserved by the Twenty-first Amendment, under the then-prevailing standard in *Byrd* v. *Tennessee Wine & Spirits Retailers Ass'n,* 883 F. 3d 608, 616–22 (6th Cir. 2018).

But the district court granted Petitioners' motion for summary judgment, concluding that the law was discriminatory and that it was not saved by the Twenty-first Amendment because the State failed to establish that it advanced a legitimate local purpose that could not be adequately served by reasonable alternatives. Pet. App. 39a–43a.

While the State's appeal of the district court's decision was pending, this Court issued its decision in *Tennessee Wine*. That decision thoroughly examined the interplay between the Commerce Clause and the Twenty-first Amendment and analyzed cases such as *Granholm* v. *Heald*, 544 U.S. 460 (2005), and *Bacchus Imports*, *Ltd*. v. *Dias*, 468 U.S. 263 (1984). Based on its precedent, this Court held that Commerce Clause cases involving discriminatory alcohol regulations are subject to a "different inquiry" because of the Twenty-first Amendment. *Tennessee Wine*, 139 S. Ct. at 2474. If the "predominant effect" of the discriminatory law is "the protection of public health or safety" rather than protectionism, the law is shielded by the Twenty-first Amendment. *Id*.

On appeal, the State and intervening defendant argued that Michigan's retailer-delivery law satisfied the *Tennessee Wine* standard. Among other things, the State contended that the requirement for physical in-state retailer presence and the requirement for alcohol to first be sold to an in-state wholesaler enabled licensee oversight and regulatory inspections of alcohol—unlike the durational-residency requirement on retail license holders struck down in *Tennessee Wine*. See *Tennessee Wine*, 139 S. Ct. at 2475 (recognizing that retail stores' in-state location enabled

"monitor[ing] the stores' operations through on-site inspections, audits, and the like").

Significantly, Petitioners did not argue that the law was invalid under the "different inquiry" in *Tennessee Wine*. Rather, they improperly asserted that the Michigan law should be subject to strict scrutiny in the same manner as laws unrelated to alcohol regulation. Pet. App. 15a.

The Sixth Circuit properly applied *Tennessee Wine*'s "different inquiry." Pet. App. 6a. The Sixth Circuit began its analysis by assuming that the law was discriminatory. Pet. App. 8a–9a. The court recognized that the law serves "plenty of legitimate state interests" and that "any limits on a free market of alcohol distribution flow from the kinds of traditional regulations that characterize this market, not state protectionism." Pet. App. 9a.

The Sixth Circuit further observed that allowing out-of-state retailers to deliver alcohol into Michigan would "create a sizable hole in the three-tier system" that would, in turn, permit alcohol to be imported into Michigan without passing through its wholesaler tier. Pet. App. 12a. Eliminating the wholesaler tier would harm the State's interest in controlling consumption. *Id*. at 12a–13a.

The court also recognized that creating such a hole in Michigan's three-tier system would leave Michigan with the same problem that pre-Prohibition dry states faced—out-of-state producers dodging state restrictions with direct-to-consumer deliveries. *Id*. at 14a. The court said that the Webb-Kenyon Act, the model for § 2 of the Twenty-first Amendment, fixed

that problem, but "Lebamoff's lawsuit is nothing less than an effort to re-create [it]." *Id.* (citing *Tennessee Wine*, 139 S. Ct. at 2466–67). Further, in this case, the State "could not maintain a three-tier system, and the public-health interests the system promotes, without barring direct deliveries from outside its borders." Pet. App. 15a.

The court concluded by recognizing that while there may be policy reasons for loosening state regulation of alcohol in the internet-era, "the Twenty-first Amendment leaves these considerations to the people of Michigan, not to federal judges." Pet. App. 19a.

Although joining Judge Sutton's opinion of the court, Judge McKeague issued a concurrence, stating that "Michigan has presented enough evidence, which [Petitioners] have not sufficiently refuted, to show its in-state retailer requirement serves the public health." Pet. App. at 22a (McKeague, J., concurring). While expressing "reservations," he ultimately concluded that Petitioners had not shown that Michigan's "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." *Id.* at 27a (citing *Tennessee Wine*, 139 S. Ct. at 2474). Judge Donald joined both opinions.

The Sixth Circuit denied Petitioners' subsequent petition for rehearing en banc. Pet. App. 46a.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit's decision does not conflict with decisions of other circuits.

The petition fails to establish a circuit split providing a "compelling reason" to grant certiorari under Rule 10. Petitioners argue that the Sixth Circuit's decision conflicts with the Seventh Circuit's analysis in *Lebamoff Enterprises*, *Inc.* v. *Rauner*, 909 F.3d 847 (7th Cir. 2018). Crucially, however, *Rauner* was decided before this Court decided *Tennessee Wine* and cannot, therefore, conflict with the Sixth Circuit's application of *Tennessee Wine*.

Moreover, Petitioners misunderstand *Rauner*. At issue there was whether the nondiscrimination principle of *Granholm* applied to the wholesaler and retailer tiers of the three-tier system *at all*. *Rauner*, 909 F.3d at 855. The Seventh Circuit reversed the district court's dismissal at the pleadings stage, holding that *Granholm* did not support treating the wholesaler and retailer tiers of the three-tier system differently than the producer tier. *Id*. at 854–55. But the Seventh Circuit did not decide whether the challenged retailer-delivery statute violated the Commerce Clause. Rather, it remanded the case for discovery to allow the district court to consider whether that law was "necessitated by permissible Twenty-first Amendment interests[.]" *Id*. at 856.

Notably, the Sixth and Seventh Circuits were not even split on the issue actually decided in *Rauner*. The Sixth Circuit had already declined to limit *Granholm* to the producer tier in *Byrd*, 883 F. 3d at 616–22, and

Rauner cited *Byrd* to support its conclusion. See *Rauner*, 909 F.3d at 855 (citing *Byrd*, 883 F.3d at 621).

Amici 23 Wine Consumers also attempt to manufacture a circuit split based on a Fifth Circuit case decided before *Tennessee Wine*—*Cooper* v. *Texas Alcoholic Beverage Comm'n*, 820 F.3d 730 (5th Cir. 2016) (*Cooper II*). Amici 23 Wine Consumers br. at 10. Their argument fares no better. Like *Rauner*, *Cooper II* cannot conflict with the Sixth Circuit's application of *Tennessee Wine*. Additionally, *Cooper II* is merely another decision declining to limit *Granholm* to the producer tier, *id*. at 742, like *Rauner* and *Byrd*.

Not only do *Rauner* and *Cooper II* not conflict with the Sixth Circuit's opinion, *Tennessee Wine* definitively resolved the question they examined. *Tennessee Wine* held that *Granholm* applies to the wholesaler and retailer tiers of the three-tier system, concluding that there is "no sound basis" for an argument that a different rule applies to in-state alcohol distribution. *Tennessee Wine*, 139 S. Ct. 2470–71. That conclusion is not disputed in this case.

No circuit split exists on the question actually before this Court—whether the Sixth Circuit properly chose to apply the "different inquiry" articulated in *Tennessee Wine*. Although some pending cases involve the application of *Tennessee Wine*, Pet. at 8, it would be premature for this Court to examine how *Tennessee Wine* applies just one year after it was decided, instead of allowing the circuits to consider the question. Waiting for the issue to percolate is particularly merited here because *Tennessee Wine* instructed that "each variation [of a three-tiered system] must be judged based on its own features." 139 S. Ct. at 2472.

What one circuit has said about one state's retailer-delivery law may not apply to other variations of three-tiered systems.

II. The Sixth Circuit's decision does not conflict with this Court's precedent.

Stripped of the illusory circuit conflict, the petition rests only on Petitioners' dissatisfaction with the Sixth Circuit's decision. "A petition for a writ of certiorari is rarely granted" in such a circumstance. Sup. Ct. R. 10. And the Sixth Circuit's correct application of the "different inquiry" that *Tennessee Wine* requires, see Pet. App. 6a, 9a, falls far short of the rare error-assertion case that merits this Court's review.

Even so, the petition fails to demonstrate error. Petitioners begin by misarticulating the Sixth Circuit's holding. They contend that "[t]he 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 . . . and immunizes those laws from being challenged under the Commerce Clause." That is incorrect. The Sixth Circuit did not announce a new rule of law; it applied the rule that *Tennessee Wine* discerned from prior cases like *Bacchus* and *Granholm*—that, in fact, discriminatory alcohol regulations *can be* saved from invalidation under the Commerce Clause based on § 2 of the Twenty-first Amendment depending on the regulations' predominant effect. *Tennessee Wine*, 139 S. Ct. at 2474.

At issue in *Tennessee Wine* was Tennessee's durational-residency requirement for a retail liquor-

license holder. *Id.* at 2456. This Court recognized that the durational-residency requirement "plainly favors Tennesseans over nonresidents[.]" *Id.* at 2461–62. But that alone did not trigger applying strict scrutiny, as Petitioners urge. Under Petitioners' theory, the opinion could have quickly concluded—a discriminatory liquor law receives strict scrutiny. Full stop. But that was not the end of this Court's opinion.

After analyzing caselaw interpreting the interplay between the Commerce Clause and § 2 of the Twenty-first Amendment, this Court acknowledged that the discriminatory two-year residency requirement "could not be sustained if it applied across the board to all those seeking to operate any retail business in the State." *Id.* at 2474 (citations omitted). Applying strict scrutiny would have sounded the death knell for the residency requirement *if* it had applied across the board.

But because the durational-residency requirement did *not* apply across the board and applied only to alcohol retailers, the mere presence of discrimination did not trigger strict scrutiny. "[B]ecause of § 2, we engage in a different inquiry." *Id.* at 2474. This Court then articulated that "different inquiry":

> [W]e ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground. . . . Where the predominant effect of the law is protectionism, not the protection of public health or safety, it is not shielded by § 2.

Id.

In other words, this Court concluded that a discriminatory alcohol law is subject to strict scrutiny *only if* its predominant effect is economic protectionism. If protection of public health or safety predominates, then the law—even if discriminatory—is protected by the Twenty-first Amendment. *Id.*

Applying this test to the durational-residency requirement, this Court held that the law had "at best a highly attenuated relationship to public health or safety." *Id.* For example, this Court disagreed that the durational-residency law was necessary to maintain oversight over liquor store operators. *Id.* at 2475. Specifically, this claim was not persuasive because:

> the stores at issue are physically located within the State. For that reason, the State can monitor the stores' operations through on-site inspections, audits, and the like. . . . Should the State conclude that a retailer has "fail[ed] to comply with state law," it may revoke its operating license. *Granholm*, 544 U.S. at 490[]. This "provides strong incentives not to sell alcohol" in a way that threatens public health or safety. *Ibid.*

Id. at 2475.

Ultimately, this Court concluded that the predominant effect of the durational-residency requirement was to protect in-state residents from out-of-state competition. Because the requirement was not shielded by the Twenty-first Amendment and did not survive strict scrutiny, this Court affirmed the Sixth Circuit's decision invalidating the law. *Id.* at 2474–76.

Significantly, Petitioners do not mention *Tennessee Wine*'s "different inquiry" *at all*, instead arguing that strict scrutiny applies in the same manner as it applies in any other Commerce Clause case involving a discriminatory law. And the phrases "public health" and "predominant effect" do not appear in the petition. Petitioners do not contend that the Sixth Circuit incorrectly applied the "different inquiry." They simply ignore its existence.

But as this Court explained in *Tennessee Wine*, its decision to apply a "different inquiry" in light of § 2 flows directly from both *Bacchus* and *Granholm* and is consistent with the Webb-Kenyon Act, which was the model for § 2 of the Twenty-first Amendment. Petitioners extensively quote those cases, but they fail to recognize the nuances and distinctions that led this Court to hold in *Tennessee Wine* that strict scrutiny does not automatically apply to discriminatory liquor laws because of § 2 of the Twenty-first Amendment.

There is no dispute here that "[t]he central purpose of [§ 2 of the Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Bacchus*, 468 U.S. at 276. In *Bacchus*, the tax exemption at issue was held discriminatory because Hawaii clearly intended to favor local products by exempting them from taxation; the state's interest in subsidizing a financially troubled local industry was not sufficient to permit that intentional discrimination. *Id*. at 270–73.

But because of the Twenty-first Amendment, this Court continued its analysis. It recognized that even a discriminatory alcohol regulation *could be upheld* if it was "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 275–76. Petitioners' argument—that strict scrutiny always applies—cannot survive that aspect of *Bacchus*.

The regulation in *Bacchus* was ultimately invalidated. By Hawaii's own admission, however, the exemption was not designed to promote temperance, control the import of alcohol into the state, or serve any other traditional Twenty-first Amendment purpose. *Id.* at 275. Rather, it was designed to protect a local alcoholic beverage industry. *Id.* Thus, the exemption was struck down because it was discriminatory *and* constituted "mere economic protectionism." *Id.* at 276. Therefore, the exemption was not saved by the Twenty-first Amendment. *Id.*

The same approach was adopted in *Granholm*. At issue in *Granholm* were discriminatory laws from Michigan and New York that allowed only in-state wineries to bypass the three-tier system and ship wine directly to consumers. *Granholm*, 544 U.S. at 466–67. In light of *Bacchus*, the Sixth Circuit had rejected Michigan's argument that *all* state liquor laws are shielded by the Twenty-first Amendment from Commerce Clause scrutiny. *Id.* at 470 (citing *Heald* v. *Engler*, 342 F.3d 517 (6th Cir. 2003)).

Although the *Granholm* Court ultimately concluded that not *all* liquor laws are protected by the Twenty-first Amendment, see *id.* at 488, it did not contradict *Bacchus* and hold that *no* liquor laws can be saved by the Twenty-first Amendment. Just as in *Bacchus*, the *Granholm* Court analyzed whether the

laws at issue—exceptions to the three-tier system—were consistent with the Twenty-first Amendment's purpose. This Court examined the history of pre-Prohibition laws limiting the importation of alcohol into "dry" states. *Id*. at 476–87. Of particular note were the Wilson Act, which allowed states to regulate imported liquor to the same extent and in the same manner as domestic liquor; and the Webb-Kenyon Act, which forbade shipment or transportation of alcohol into a state where it runs afoul of the state's generally applicable laws governing receipt, possession, sale, or use. *Id*. at 478, 482 (citations omitted).

Granholm reiterated that the language of § 2 closely followed the Wilson and Webb-Kenyon Acts and discerned that § 2 was intended to "allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." *Id*. at 484. But § 2 "did not give states the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time." *Id*. at 484–85.

Nevertheless, *Granholm* determined that New York and Michigan had done just that—created nonuniform exceptions to the three-tier system in order to discriminate against out-of-state wineries. *Id*. at 486–89. Like the tax law in *Bacchus*, the three-tier exceptions were both discriminatory *and* protectionist and, thus, were not protected by the Twenty-first Amendment. *Id*. at 489. Petitioners wrongly assert that *Granholm* held that *any* discriminatory state liquor law is not saved by the Twenty-first Amendment. Pet. at 9. On the contrary, it held that the laws at issue in

that case (which were unlike the law at issue in this case) were not saved by the Twenty-first Amendment.

Thus, this Court's precedents do not require that strict scrutiny always applies to a discriminatory liquor law. Rather, they explain that strict scrutiny may or may not apply, depending on the provision's effects. *Tennessee Wine* clarified that a three-step analysis applies to alcohol regulations challenged under the dormant Commerce Clause.

The first step is to ask whether the law is discriminatory in nature. *Bacchus*, 468 U.S. at 273; *Granholm*, 544 U.S. at 473–76; *Tennessee Wine*, 139 S. Ct. at 2461–62. If so, the second step is to conduct the "different inquiry" to determine whether the law is saved by § 2 of the Twenty-first Amendment. *Tennessee Wine*, 139 S. Ct. at 2474. If the evidence shows that protection of public health or safety is the law's predominant effect, then the regulation is saved by the Twenty-first Amendment and no further analysis is necessary. If the predominant effect of the law is economic protectionism rather than public health or safety, the third step is to apply the traditional strict-scrutiny test. *Granholm*, 544 U.S. at 489.

That is the process the Sixth Circuit used to analyze this case. First, the court assumed for purposes of its opinion that Michigan's retailer-delivery statute is discriminatory.[1] Pet. App. 8a–9a. Second, the Sixth

[1] The State has argued throughout the case that its retailer-delivery statute is not discriminatory because in-state and out-of-state retailers are not similarly situated for Commerce Clause purposes. Pet. App. 8a–9a. The Sixth Circuit did not decide this issue. *Id*. Thus, even if this Court were to grant certiorari and

Circuit conducted the "different inquiry" that *Tennessee Wine* requires, analyzing whether the predominant effect of the statute is protecting public health or safety or engaging in economic protectionism. In so doing, the court noted that the challenged law serves an important role in protecting public health and safety—such as by promoting temperance and controlling the flow of alcohol into the state. Pet. App. 9a–10a (lead opinion); 22a–23a (McKeague, J., concurring).

More specifically, the Sixth Circuit saw that allowing an out-of-state retailer like Lebamoff to deliver to Michigan customers would allow alcohol to avoid the wholesaler tier of the three-tier system. Pet. App. 12a. The court explicitly recognized that Michigan's taxation and pricing scheme, implemented significantly through the wholesaler tier, serves a vital public safety function by ensuring alcohol is not sold at such a low price that it stimulates overconsumption. *Id*. With close to 2,000 retailers already in the digital marketplace, there is no mechanism through which the State could maintain its pricing scheme. See *id*. at 12a–13a. Thus, the court agreed that allowing out-of-state retailers to deliver into Michigan would create "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." *Id*. (quoting *North Dakota* v. *United States*, 495 U.S. 423, 433 (1990) (plurality opinion)).

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hold that the Sixth Circuit misapplied *Tennessee Wine*, the State would still be entitled to a remand to the Sixth Circuit to decide the "similarly situated" argument. For that reason, this case is a poor vehicle for review of *Tennessee Wine*, and this Court should deny the petition on that ground.

Because the Sixth Circuit concluded that the retailer-delivery statute has the predominant effect of protecting public health or safety, the statute constitutes *permissible* discrimination, and the Sixth Circuit did not need to complete the third step of applying strict scrutiny to the statute.

Again, the petition does not argue that the Sixth Circuit misapplied *Tennessee Wine*'s "different inquiry." Rather, it ignores it altogether. But the Sixth Circuit applied the test this Court articulated in *Tennessee Wine* and it reached the correct result. As such, there is no error, and this Court should deny the petition for a writ of certiorari.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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