No. 20-47

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

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT IN REPLY

In a long line of cases, this Court has repeatedly held that the states' broad power to regulate the distribution of alcoholic beverages is limited by the nondiscrimination principle of the Commerce Clause. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct. 2449, 2470 (2019); *Granholm v. Heald,* 544 U.S. 460, 487 (2005); *Healy v. Beer Inst.*, 491 U.S. 324, 342 (1989); *Bacchus Ltd. v. Dias*, 468 U.S. 263, 276 (1984).

The Sixth Circuit declined to follow this precedent. The panel upheld a blatantly discriminatory Michigan law that allowed in-state retailers to sell wine online and ship it to consumers, but prohibited out-of-state retailers from doing so. Mich. Comp. L. § 436.1203(3), (15). It ignored the Commerce Clause and ruled that the Twenty-first Amendment gave states the authority to restrict shipping to in-state retailers only. 956 F.3d at 867. It disregarded this Court's contrary holding that "[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." *Granholm,* 544 U.S. at 493. It did not employ the exacting-scrutiny standard used by this Court under which the state must prove that the ban advances a local purpose that could not be served by reasonable nondiscriminatory alternatives. *See Tenn. Wine,* 139 S.Ct at 2461; *Granholm,* 544 U.S. at 472.

Instead, the panel followed an earlier dissenting opinion by Judge Sutton that the Twenty-first Amendment should be read to allow states to enact discriminatory liquor laws, *Byrd v. Tenn. Wine & Spirits Retailers Assoc.*, 883 F.3d 608, 628-36 (6th Cir.2018) (Sutton, dissenting), which this Court rejected last year in *Tennessee Wine,* 139 S.Ct. at 2458-59.

The Sixth Circuit's decision has sown confusion in the lower courts, where seven similar cases are pending. *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). It has created uncertainty in state legislatures which are considering authorizing direct shipping to meet growing demand from consumers for online sales and home delivery. *See, e.g.*, Ill. S.B. 3830, https://www.ilga.gov/ legislation/billstatus.asp?DocNum=3830&GAID=15&GA=101&DocTypeID=SB&LegID=125925&SessionID=108; Mich. H. B. 5579, http:// legislature.mi.gov/ doc.aspx?2020-HB-5579; N.H. S. B. 512, https://legiscan.com/NH/text/SB512/id/2082 181; N.Y. A. B. A00494, https://nyassembly. gov/leg/?bn=A00494&leg_video=. It has complicated the Uniform Law Commission's attempt to draft a model direct shipping law. *See* https://www.uniform laws.org/ viewdocument/2019-june-report-to-scope-and-pro. (All websites viewed Nov. 14, 2020).

The question is straightforward. May states prohibit out-of-state retailers from shipping wine to consumers when it allows its own in-state retailers to do so? This Court has struck down similar discrim-inatory regimes that regulated shipping by wineries, *Granholm*, 544 U.S. at 466, 493, and has held that the nondiscrimination principle applies to laws regulating retailer licensing, *Tenn. Wine,* 139 S.Ct. at 2470-71, but the Court has not

directly answered the retail-shipping question. The fact that the Sixth Circuit felt free to depart from *Granholm* and decline to apply the non-discrimination principle to wine retailers shows that such a decision is needed. This Court should grant the writ of certiorari and resolve the issue.

A. The Sixth Circuit's decision that the Twenty-first Amendment allows states to discriminate against interstate commerce conflicts with decisions from other circuits.

The circuits are divided over how to apply *Granholm* to the issue of direct shipping by retailers. Even before the Sixth Circuit issued its anomalous decision, the Seventh Circuit 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. Some courts thought the non-discrimination principle did not apply to retailers, some thought it applied but to a lesser extent, and some (including the Seventh Circuit) thought it fully applied. *Id.* at 853-54 (citing cases).

The respondents contend there is no conflict among the circuits because this is the first decision after *Tennessee Wine*. They have misunderstood the nature of the conflict. *Tennessee Wine* concerned a residency requirement for operators of in-state liquor stores and this petition is not based on any conflict among the circuits concerning residency rules. The relevant conflict is over how to apply *Granholm's* holding that state direct-shipping laws may not discriminate against out-of-state wineries to direct-shipping laws that discriminate against out-of-state retailers. That conflict has been brewing since 2008. *See Siesta Vill. Mkt. v.*

Granholm, 596 F.Supp.2d 1035 (E.D. Mich., 2008) (striking down a discriminatory retailer-shipping law); *Arnold's Wines, Inc. v. Boyle*, 515 F.Supp.2d 401 (S.D. N.Y.2007) (upholding a discriminatory retailer law); *Siesta Vill. Mkt., LLC v. Perry,* 530 F.Supp.2d 848 (N.D. Tex. 2008) (striking down one part of a direct-shipping law and upholding another). *Tennessee Wine* did not address this issue and therefore could not have resolved the circuit split.

B. The decision conflicts with this Court's prior rulings applying the nondiscrimination principle.

The precedents from this Court are clear and consistent. Although the Twenty-first Amendment grants States latitude to regulate alcohol in even-handed ways, it does not allow states to discriminate against out-of-state liquor interests unless the state proves that the law serves a regulatory interest that cannot be advanced by nondiscriminatory alternatives. This is an "exacting standard" which requires the State to present concrete evidence showing that non-discriminatory alternatives will be unworkable. *Granholm,* 544 U.S. at 492-93; *Tenn. Wine*, 139 S.Ct. at 2474-75.

The Sixth Circuit explicitly refused to apply this "skeptical" standard. 956 F.3d at 869. It did not require the State to prove that the ban actually advanced a legitimate state interest but shifted the burden to the plaintiffs to prove that it did not. *Id.* at 872-74. It criticized the exacting-scrutiny standard set down by this Court on the ground that the propriety of alcoholic beverage laws should be left to the states, "not to federal judges." *Id.* at 875. It did not even discuss the

availability of nondiscriminatory alternatives. *See* McDermott Will & Emery, *Examining Lebamoff Enterprises v. Whitmer*, JDSUPRA (May 28, 2020) (Sixth Circuit substantially departed from *Granholm* and *Tennessee Wine*), available at https://www.jdsupra.com/legalnews/examining-lebamoff-enterprises-v-whitmer-86470/ (viewed Nov. 17, 2020).

Respondents make a two-step argument that the Sixth Circuit decision does not conflict with this Court's rulings despite its refusal to apply exacting-scrutiny, require the State to produce evidence, or consider non-discriminatory alternatives. They contend that this Court replaced the exacting-scrutiny standard with a "different inquiry" in *Tennessee Wine*, and that the Sixth Circuit diligently applied this new standard. Neither is correct.

First, the argument that the Court's use of the phrase "different inquiry" constituted an abandonment of the long-standing exacting-scrutiny standard for discriminatory laws is nonsense. "Legal reasoning hardly consists of finding isolated sentences in wholly different contexts and using them to overrule *sub silentio* prior holdings." *U.S. v. Sharpe,* 470 U.S. 675, 694, n.6 (1985) (Marshall, J., concurring).

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

liquor laws, the Court gives states the opportunity to prove that the law is necessary to advance a core concern of the Twenty-first Amendment, such as temperance, and that nondiscriminatory alternatives will not be effective. This is immediately clear when the phrase is put in its full context.

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

Tenn. Wine, 139 S.Ct. at 2474. It explained that such justification requires "concrete evidence." *Id.*

It is also clear that *Tennessee Wine* did not repudiate *Granholm* or retreat from its principles. The Court applied and cited *Granholm* thirty times without a single negative comment. It affirmed that there was a "good reason for [the] holding" *Id*. at 2467. All Justices still on the Court from the *Granholm* majority also joined in *Tennessee Wine's* 7-2 majority. Nowhere does there appear any language suggesting that *Granholm* no longer controls direct-shipping cases.

Second, even if *Tennessee Wine* could be read as relaxing the exacting-scrutiny standard of *Granholm,* the Sixth Circuit did not make even the slightest attempt to apply the full *Tennessee Wine* opinion. To the contrary, it criticized the very concept of judicial review of state alcoholic beverage laws. 956 F.3d at 875. This Court declared the Tennessee residency rule

unconstitutional because it "expressly discriminates against nonresidents," 139 S.Ct at 2474, the "record is devoid of any 'concrete evidence' showing that [it] actually promotes public health and safety," *id.*, and "there are obvious alternatives that better serve [its] goal without discriminating against nonresidents," *id.*, at 2476, so "this provision violates the Commerce Clause and is not saved by the Twenty-first Amendment." *Id.* By contrast, the Sixth Circuit did not require the State to produce actual evidence, did not examine nondiscriminatory alternatives and held that the Twenty-first Amendment alone justified the law. McDermott Will & Emery, *Examining Lebamoff Enterprises v. Whitmer, supra.*

The Sixth Circuit has openly refused to follow this Court's Commerce Clause/Twenty-first Amendment precedents. It has rejected the very idea that federal judges should scrutinize state liquor laws. If the opinion is allowed to stand, it will create a legal standard unique to the Sixth Circuit whereby exacting scrutiny is not given to laws with discriminatory effects and alcoholic beverage laws are immune from Commerce Clause challenge. This reason alone would call for review by this Court even if no Circuit split existed.

C. There is no reason to wait for more circuit opinions before resolving this issue.

Intervenor-Respondent essentially concedes that the issue of discriminatory retailer direct-shipping laws is cert-worthy, but suggests that the Court wait for more circuit opinions before resolving it. Interv. Opp. Brief at 7. Nothing would be gained by such a delay. This Court has twice reviewed the interplay between the Twenty-first Amendment and the Commerce Clause. It held in

Granholm that discriminatory shipping regulations for wineries are unconstitutional, 544 U.S. at 476-93, and in *Tennessee Wine* that retailer laws are subject to the same standard of review as winery laws. 139 S.Ct. at 2462-75 The only real question is whether this Court in *Tennessee Wine* meant to abandon the exacting standard of review announced in *Granholm*. No circuit court can answer that question.

CONCLUSION

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

Respectfully submitted,

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