

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

**BRIEF OF 23 WINE CONSUMERS
AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

J. GREGORY TROUTMAN

Counsel of Record

TROUTMAN LAW OFFICE, PLLC.

4205 Springhurst Boulevard,

Suite 201

Louisville, KY 40241

(502) 412-9190

jgtatty@yahoo.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE*. 1

SUMMARY OF THE ARGUMENT. 4

ARGUMENT 7

I. Certiorari is needed to bring certainty and finality to the question of whether discriminatory state alcoholic beverage control laws must be analyzed under both the Commerce Clause and the Twenty-first Amendment . . . 7

 A. *Granholm* and *Thomas* settled the analysis required when adjudicating the constitutionality of state alcoholic beverage laws 8

 B. The Sixth Circuit’s opinion evidences a split among the circuits regarding the application of *Granholm* which warrants a grant of certiorari 10

 C. *Granholm* brought about a paradigm shift regarding the remote sale and delivery of alcoholic beverages. 12

II. The market changes resulting from the Covid-19 pandemic highlight the discriminatory effects of the challenged statute . . 15

III. The mandate of *Granholm* and *Thomas* is clear and should be reinforced. 19

CONCLUSION 21
APPENDIX. Names of Individual *Amici*..... A-1

TABLE OF AUTHORITIES

CASES

<i>Arnold's Wines v. Boyle</i> , 571 F.3d 185 (2d Cir. 2009)	10
<i>Brooks v. Vassar</i> , 462 F.3d 341 (4th Cir. 2006)	11, 20
<i>Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth.</i> , 476 U.S. 573 (1986)	11
<i>Capital Cities Cable, Inc. v. Crisp</i> , 467 U.S. 691 (1984)	18
<i>CBOCS West, Inc. v. Humphries</i> , 553 U.S. 442 (2008)	8
<i>Cherry Hill Vineyards v. Lilly</i> , 553 F.3d 423 (6th Cir. 2008)	10
<i>Cooper v. Texas Alcoholic Beverage Comm'n</i> , 820 F.3d 730 (5th Cir. 2016)	10
<i>Granholt v. Heald</i> , 544 U.S. 460 (2005)	<i>passim</i>
<i>H.P. Hood & Sons, Inc. v. DuMond</i> , 336 U.S. 525 (1949)	3
<i>Hostetter v. Idlewild Bon Voyage Liquor Corp.</i> , 377 U.S. 324 (1964)	4

Hutto v. Davis,
460 U.S. 533 (1983) 8

Lebamoff Enterpr., Inc. v. Rauner,
909 F.3d 847 (7th Cir. 2018) 10

Lebamoff Enterpr., Inc. v. Whitmer,
956 F.3d 863 (6th Cir. 2020) 10

North Carolina v. Rice,
404 U.S. 244 (1971) 8

South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984) 11

So. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control, 731 F.3d 799 (8th Cir. 2013). 10

Tenn. Wine & Spirits Retailers Ass’n v. Thomas, 588 U.S. ____, 139 S.Ct 2449 (2019) *passim*

CONSTITUTION AND STATUTES

U.S. CONST., amend. XXI. *passim*

U.S. CONST., art. I, § 8, cl. 3 *passim*

235 ILCS 5/6-29.1. 13

2016 MICH. PUB. ACTS 520 14

ARIZ. REV. STAT. ANN. § 4-203.04 13

CAL. BUS. & PROF. CODE § 23661.3. 13

COLO. REV. STAT. § 12-47-104 13

COLO. REV. STAT. § 44-3-104 13

CONN. GEN. STAT. § 30-16(c)(1) 13

FLA. STAT. § 561.545 13

IND. CODE § 7.1-3-26-6	13
IND. CODE § 7.1-3-26 9	13
KY. REV. STAT. ANN. § 243.240(1)	13
LA. REV. STAT. ANN. § 26:359(B)	13
LA. REV. STAT. ANN. § 26:85(6).	13
ME. REV. STAT. ANN. tit. 28-A, §1403-A	13
MD. ALCO. BEV. CODE ANN. § 2-142	13
MASS. GEN. L. ch. 138, §19F.	13
MICH. COMP. L. § 436.1203.	<i>passim</i>
MINN. STAT. § 340A.417	13
MO. REV. STAT. § 311.185	13
NEB. REV. STAT. § 53-123.15.	13
N.J. REV. STAT. § 33:1-10	13
N.Y. ALCO. BEV. CONT. LAW § 79-c	13
N.C. GEN. STAT. § 18B-1001.1	13
OHIO REV. CODE ANN. § 4303.232	13
OR. REV. STAT. § 471.282	13
TENN. CODE ANN. § 57-3-217	13
TEX. ALCO. BEV. CODE ANN. § 54.01	13
VA. CODE ANN. § 4.1-209.1	13
WASH. REV. CODE §§ 66.20.360	13
WYO. STAT. § 12-2-204.	13

OTHER AUTHORITIES

<u>ABC News, States Explore Keeping Alcohol On-Demand Delivery Permanent after COVID</u> (May 29, 2020)	19
<u>American Addiction Center, The Average Adult Spent 172 Hours Drunk During Lockdown,</u> July 7, 2020	16, 17

<u>BBC News, Coronavirus: How the pandemic is relaxing US drinking laws.</u> (May 15, 2020)	18
<u>Detroit Metro Times, Yes, Michigan Liquor Stores Are Considered 'Essential' Under the Coronavirus. Executive Order</u> (March 24 2020)	16
Eric Asimov, <i>Wines are No Longer Free to Travel Across State Lines</i> , N.Y. Times (Oct. 23, 2017)	2
<u>Forbes, Michigan Bans Many Stores From Selling Seeds, Home Gardening Supplies, Calls Them "Not Necessary"</u> (April 16, 2020).	16
<u>Forbes, Nielsen Says Beverage Alcohol Retail Sales Are Soaring During The Crisis.</u> (March 2020)	17
<u>Fortune, How the On-Demand Liquor Delivery Business Changed Overnight During the Coronavirus Pandemic</u> (April 11, 2020)	17
Laurence H. Tribe, <i>How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment</i> , 12 CONST. COMMENT. 217 (1995)	7

INTEREST OF THE *AMICI CURIAE*¹

The application of MICH. COMP. L. § 436.1203 and the effect of the Sixth Circuit’s opinion result in a not-so-unusual situation experienced by many wine consumers across the nation. The following hypothetical scenarios represent examples of their shared experiences:

- A woman in Coldwater, Michigan seeks to purchase a 2000 Lafite Rothschild from her local wine shop to celebrate a special occasion, but the shop informs her that it does not carry any product either that old or expensive. She learns, however, that a specialty wine shop in Indianapolis, Indiana stocks the desired product. But alas, she also learns the shop cannot fill her order because Michigan does not allow Indiana retailers to obtain the license necessary to make direct sales and deliveries to Michigan residents;
- A man in Louisville, Kentucky, who loves Oregon Pinot Noir, tries to order his preferred product directly from Cherry Hill Winery in Rickreall, Oregon, only to be rebuffed because Kentucky’s licensure requirements do not make such

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part or made a monetary contribution. Pursuant to Supreme Court Rule 37.2, counsel for *amici curiae* state that Petitioners and Respondents have all articulated their consent to the filing of the subject *amici curiae* brief.

transaction legal although Kentucky allows its small in-state wineries to directly sell and deliver to residents;

- Members of a wine tasting club in Carmel, Indiana desire to taste recent red wines from a specific part of Tuscany, but they can find only a handful of such products in the town.

In each of the above instances, the availability of these particular wine products is not the problem, as they are readily available from out-of-state sources and through various e-commerce platforms. The problem is that each of these people live in one of the 36 states that imposes a prohibition upon out-of-state manufacturers and retailers which prevent them from obtaining the licenses necessary to serve these in-state consumers.² In the case of Michigan, MICH. COMP. L. § 436.1203 requires an in-state residency by a retailer in order to conduct remote sales and deliveries to consumers.

² Fourteen states allow some kinds of internet sales. Eric Asimov, *Wines are No Longer Free to Travel Across State Lines*, N.Y. Times (Oct. 23, 2017). (https://www.nytimes.com/2017/10/23/dining/drinks/in-terstate-wine-sales-shipping-laws.html?_r=0). However, because of regulatory complexity, not all internet retailers will ship to all fourteen. *E.g.*, K&L Wine Merchants, one of the biggest, will ship only to ten states. See <https://www.klwines.com/Shipping/StateLegality>. (all web sites last visited August, 14, 2020).

The *Amici* are 23 wine consumers. They are all over age 21, and are like those hypothetical customers represented in the above situations.³ These consumers live in six different states. These consumers share a common two-fold frustration: the inability to find their desired wines locally and the laws of their respective states prevent them from buying the desired products from out-of-state sellers. These laws, like MICH. COMP. L. § 436.1203, however, allow in-state retailers to make remote sales and deliveries to residents but require that out-of-state retailers establish a physical presence in the state in order to receive the same privilege. This Court specifically prohibited such requirement in *Granholm* because laws like MICH. COMP. L. § 436.1203 serve the singular purpose of promoting economic tribalism by protecting local retailers from out-of-state competition, and are unconstitutional.

The *Amici* is before the Court because they have a keen interest as wine enthusiasts in ensuring that states like Michigan adhere to the constitutional boundaries set by this Court's prior decisions with respect to the prohibition of discrimination based upon the location of the producers and purveyors of alcoholic beverages. The *Amici* adhere to the proposition which this Court articulated in *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949) that "every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any."

³ The names of all *amici* are listed in the Appendix and include Ray Heald, one of the lead plaintiffs in *Granholm v. Heald*, 544 U.S. 460 (2005).

The *Amici*, as interested wine consumers, urge this Court to grant certiorari to determine whether the Sixth Circuit's understanding of the interplay between the Commerce Clause and the Twenty-first Amendment comports with its precedent.

SUMMARY OF THE ARGUMENT

Since 1964, this Court has consistently held the powers granted states by Section 2 of the Twenty-first Amendment do not override the Commerce Clause's non-discrimination policy. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964). This Court left no doubt of this principle in *Granholm* when holding that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," and discriminatory laws are "not saved by the Twenty-first Amendment." 544 U.S. at 487-89. The Court reiterated this principle just last year in *Thomas*, and thus settled any question regarding the proper constitutional analysis when a state alcoholic beverage law is challenged under the Commerce Clause.

The Petitioners correctly note the present split of authority among the circuits regarding the proper application of *Granholm vis-a-vis* the interplay between the Commerce Clause and Section 2 of the Twenty-first Amendment. Presently, the Fifth and Seventh Circuits strictly adhere to the non-discrimination principles articulated in *Granholm* with respect to the analysis of challenged laws, while the Second, Sixth and Eighth Circuits have deviated from such principles. The *Amici* agree with the Petitioners that such split of authority among the circuits warrants a grant of certiorari in order to bring about an understood uniform standard of analysis.

Otherwise, state policy makers can put their thumbs on the scale and subject out-of-state retailers and consumers to a patchwork of discriminatory laws depending on where they live.

This Court should resolve such split of authority because the Sixth Circuit failed to give accord to the fact that *Granholm* and *Thomas* brought about paradigm shifts regarding the remote sale and delivery of alcoholic beverages. *Granholm* requires that states grant privileges to in-state and out-of-state stakeholders on an equal basis and prohibits states from requiring that out-of-state stakeholders establish a physical presence as a condition of exercising such privileges. States thus cannot act in a way which benefits local interests but prevents out-of-state competition. New technologies now enable alcoholic beverage retailers the opportunity to offer novel purchasing and delivery options to consumers. States have shown an increasing willingness to embrace these novel options, but only for in-state retailers. *Amici* assert this violates *Granholm* and *Thomas*.

Next, the Court should view the Sixth Circuit's ruling through the prism of the paradigm-shifting market changes resulting from the Covid-19 pandemic *vis-a-vis* the sale, delivery and consumption of alcoholic beverages. The pandemic has resulted in states such as Michigan significantly relaxing long-sacred prohibitions regarding the manner of selling, delivering and consuming alcoholic beverage in the name of protecting the economic interests of its licensees. Such paradigm shift amplifies both the effect of the Sixth Circuit's ruling and the discriminatory effect of MICH. COMP. L. § 436.1203 with respect to the

prohibition against out-of-state retailers obtaining Michigan licenses.

Finally, this Court's mandate in *Granholm* and *Thomas* is clear and should be reinforced to clarify that the appropriate analysis of a challenged state alcoholic beverage law must first consider its viability under the Commerce Clause before considering its viability under the Twenty-first Amendment. The Sixth Circuit viewed MICH. COMP. L. § 436.1203 only through the prism of the Twenty-first Amendment without considering the predicate issue of whether the statute violated the Commerce Clause's non-discrimination principles and satisfied its strict scrutiny threshold.

ARGUMENT

I. Certiorari is needed to bring certainty and finality to the question of whether discriminatory state alcoholic beverage control laws must be analyzed under both the Commerce Clause and the Twenty-first Amendment.

[T]HERE ARE TWO WAYS, AND TWO WAYS ONLY, IN WHICH AN ORDINARY PRIVATE CITIZEN, ACTING UNDER HER OWN STEAM AND UNDER COLOR OF NO LAW, CAN VIOLATE THE UNITED STATES CONSTITUTION. ONE IS TO ENSLAVE SOMEBODY, A SUITABLY HELLISH ACT. THE OTHER IS TO BRING A BOTTLE OF BEER, WINE, OR BOURBON INTO A STATE IN VIOLATION OF ITS BEVERAGE CONTROL LAWS.⁴

This case requires the Court to again direct traffic at the intersection of the Constitution's Commerce Clause⁵ and its Twenty-first Amendment.⁶ The *Amici* concur with the Petitioners' suggestion that the Court should grant certiorari to determine whether the Sixth Circuit's opinion is consistent with prevailing jurisprudence. In *Granholm*, this Court settled which direction

⁴ Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217, 219 (1995).

⁵ U.S. CONST. art. I, § 8, cl. 3.

⁶ U.S. CONST. amend. XXI.

traffic must flow through the intersection. This Court reiterated its settlement of any reasonable doubts on the issue in *Thomas* when it upheld and followed *Granholm*. The Sixth Circuit's opinion expresses its obvious disagreement with the proposition that it must give credence to the constitutional analysis articulated in these decisions.

The principle of *stare decisis* is intended to bring certainty and stability in the law. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008). This principle mandates that lower courts follow this Court's decisions. *Hutto v. Davis*, 460 U.S. 533, 535 (1983). The Sixth Circuit's opinion demonstrates why this case has constitutional significance. The Court should accept certiorari to put to rest once and for all any question about which direction traffic must flow when a state alcoholic beverage law faces a Commerce Clause challenge.

A. *Granholm* and *Thomas* settled the analysis required when adjudicating the constitutionality of state alcoholic beverage laws.

This Court's current jurisprudence articulated in *Granholm* and *Thomas* dictates that any constitutional analysis of a challenged state alcoholic beverage control law must first cross the Commerce Clause part of the intersection before proceeding to cross the Twenty-first Amendment part.

This Court does not render advisory opinions. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). It

is thus well understood that this Court says what it means, and means what it says, when rendering an opinion.

This Court certainly said what it meant and meant what it said in *Granholm* when holding that: (1) the Commerce Clause's policy against economic discrimination curbs the power which the Twenty-first Amendment grants states to regulate alcoholic beverages, 544 U.S. at 487-89; (2) a state cannot make direct sales of alcoholic beverages by out-of-state interests impractical from an economic standpoint, *Id.*, at 465; and (3) a state cannot compel an out-of-state company to establish a physical presence in order to compete on equal terms with in-state interests. *Id.*, at 475. *Granholm* viewed and analyzed the effect of discriminatory laws at the manufacturer-consumer level.

This Court's 2019 opinion in *Thomas* did not retreat in the least from its holding in *Granholm*. In fact, *Thomas* expanded the Commerce Clause's non-discrimination principles from the manufacturer-consumer level down to the retailer-consumer level. In *Thomas*, this Court held firm in its commitment to the principle that any authority granted to states by Section 2 of the Twenty-first Amendment must be viewed in context with the Commerce Clause's broader non-discrimination principles. 139 S.Ct. at 2469-70.

In this instance, the Sixth Circuit allowed the State Respondents to jay walk across the intersection by ignoring this Court's mandate that a Commerce Clause analysis is a predicate to any Twenty-first Amendment analysis. Not only did the

Sixth Circuit ignore *Granholm* and *Thomas*, it also ignored its own precedent regarding how traffic must flow through the intersection. See *Cherry Hill Vineyards v. Lilly*, 553 F.3d 423 (6th Cir. 2008), confirming and applying *Granholm*.

B. The Sixth Circuit's opinion evidences a split among the circuits regarding the application of *Granholm* which warrants a grant of certiorari.

Some circuits⁷ have taken this Court at its word with respect to the scope and application of *Granholm* while other circuits,⁸ among them the Sixth Circuit, have not heeded this Court's words. The existing split among the circuits means that retailers and consumers located in the three states comprising the Seventh Circuit are potentially treated differently than similarly-situated retailers and consumers in the neighboring states located in either the Sixth Circuit or Eighth Circuit.

The fact that alcoholic beverage retailers (or even consumers like the *Amici*) find themselves on one side of a state border should not make a Difference in how they are treated if a state grants the privilege of remote sale and delivery to in-state

⁷ See e.g., *Cooper v. Texas Alcoholic Beverage Comm'n*, 820 F.3d 730 (5th Cir. 2016); *Lebamoff Enterpr., Inc. v. Rauner*, 909 F.3d 847 (7th Cir. 2018).

⁸ See e.g., *Arnold's Wines v. Boyle*, 571 F.3d 185 (2d Cir. 2009); *Lebamoff Enterpr., Inc. v. Whitmer*, 956 F.3d 863 (6th Cir. 2020); *So. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799 (8th Cir. 2013).

retailers.⁹ The central purpose of the Commerce Clause was “to avoid the tendencies toward economic Balkanization” among the states. *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984). Plain and simple, any disparity in treatment between in-state interests and out-of-state interests constitutes state-sanctioned and state-enforced economic protectionism which the Constitution’s framers sought to prevent. This is why the Court requires any such laws to pass the rigors of strict scrutiny. *Brown–Forman Dist. Corp. v. N.Y. State Liq. Auth.*, 476 U.S. 573, 578-79 (1986); *Granholm*, 544 U.S. at 492-93.

State-sanctioned and state-enforced economic protectionism is precisely what Michigan is attempting to perpetrate as MICH. COMP. L. § 436.1203 allows a privilege to in-state retailers

⁹ For example, consider a conceivable scenario resulting from the Sixth Circuit’s opinion in border cities like Bristol, Tennessee and Bristol, Virginia. Assume hypothetical laws in which Tennessee permitted in-state retailers to make remote sales and deliveries to its residents but withheld such privilege from out-of-state retailers while Virginia allowed both in-state and out-of-state sales and deliveries to its residents. The alcoholic beverage consumers on the Tennessee side of town, located in the Sixth Circuit, would have an entirely different experience than the consumers on the Virginia side of town, located in the Fourth Circuit, given that *Brooks v. Vassar*, 462 F.3d 341 (4th Cir. 2006) strictly adhered to *Granholm*. Undoubtedly, this Court did not intend in *Granholm* and *Thomas* that the retail sale of alcoholic beverages on one side of the street would be treated differently than on the other side.

which it withholds from out-of-state retailers unless they choose to establish a physical presence. *Granholm*, however, specifically prohibited such requirement.

By failing to conduct the required Commerce Clause analysis, the Sixth Circuit not only failed to expose MICH. COMP. L. § 436.1203 to the strict scrutiny required by this Court's precedents, the *Amici* suggest that it hardly subjected the statute to any scrutiny.

C. *Granholm* brought about a paradigm shift regarding the remote sale and delivery of alcoholic beverages.

While *Granholm* dealt with the direct sales and deliveries from wineries to consumers, its impact, combined with the advent of new technologies, ushered in a paradigm-shift in the way alcoholic beverages are sold and delivered to consumers.

Prior to *Granholm*, the requirement that sales to consumers occur in a face-to-face transaction was one of the most sacrosanct principles of state alcoholic beverage laws. Perhaps this was attributable to the desire of state policy makers to strictly adhere to their post-Prohibition traditions. Perhaps this was also attributable to the fact that existing technologies did not make remote sales and deliveries economically viable for many alcoholic beverage retailers.

Since *Granholm*, however, more and more states have amended their post-Prohibition laws to embrace the concept of in-state alcoholic beverage sales and deliveries to consumers of some types of products without the necessity of a face-to-face

transaction.¹⁰ In this regard, the law has in some measure caught up to the realities of e-commerce and the technological advances brought about by the advent of numerous mobile device applications (or apps).

Such technologies now allow alcoholic beverage retailers to offer consumers the ability to make direct purchases from either a website portal or mobile device application without them ever stepping foot in a store and then receive delivery or shipment of those purchases directly from the retailer. This technology, in its infancy at the time of *Granholm*, it is now at its zenith given the fact that internet access is available virtually everywhere in the United States via high speed digital networks or wireless connectivity. This means that any consumer within arms-reach of a computer keyboard, a tablet, or a mobile phone can

¹⁰ See *e.g.* ARIZ. REV. STAT. ANN. § 4-203.04; CAL. BUS. & PROF. CODE § 23661.3; COLO. REV. STAT. § 44-3-104, previously codified as COLO. REV. STAT. § 12-47-104; CONN. GEN. STAT. § 30-16(c)(1); FLA. STAT. § 561.545; 235 ILCS 5/6-29.1; IND. CODE §§ 7.1-3-26-6 - 7.1-3-26 9; KY. REV. STAT. ANN. § 243.240(1); LA. REV. STAT. ANN. §§ 26:85(6); 26:359(B); ME. REV. STAT. ANN. tit. 28-A, §1403-A; MD. ALCO. BEV. CODE ANN. §§ 2-142 *et seq.*; MASS. GEN. L. ch. 138, §19F; MINN. STAT. § 340A.417; MO. REV. STAT. § 311.185; NEB. REV. STAT. § 53-123.15; N.J. REV. STAT. § 33:1-10; N.Y. ALCO. BEV. CONT. LAW § 79-c; N.C. GEN. STAT. § 18B-1001.1; OHIO REV. CODE ANN. § 4303.232; OR. REV. STAT. § 471.282; TENN. CODE ANN. § 57-3-217; TEX. ALCO. BEV. CODE ANN. §§ 54.01 *et seq.*; VA. CODE ANN. § 4.1-209.1; WASH. REV. CODE §§ 66.20.360 *et seq.*; and WYO. STAT. § 12-2-204.

readily access any number of alcoholic beverage choices.

MICH. COMP. L. § 436.1203 is a prime example of this phenomena as Michigan has willingly embraced the new methods of commerce brought about by technological advances. Michigan, as this case demonstrates, has not done so on an evenhanded basis. This is evident from the fact that the statute allowed the sale and delivery of alcoholic beverages by both in-state and out-of-state retailers prior to March 2017. Michigan amended the statute to strip the remote sale and delivery privilege from out-of-state retailers while preserving such privilege for in-state retailers.¹¹ The occurrence of unforeseen circumstances, such as a pandemic, only works to enhance artificially-enacted trade barriers like those created by MICH. COMP. L. § 436.1203. This is nothing short of the type of economic tribalism the Commerce Clause sought to prohibit.

The Court should accordingly grant certiorari to reaffirm that the non-discriminatory principles of *Granholm* and *Thomas* apply to the new methods of purveying alcoholic beverages resulting from subsequent advances in technology.

¹¹ 2016 MICH. PUB. ACTS 520, Effective March 29, 2017.

II. The market changes resulting from the Covid-19 pandemic highlight the discriminatory effects of the challenged statute.

Suffice it to say, we live in a vastly different world today than at the start of 2020. Hardly anyone alive today can recall such a seismic shift occurring in pretty much all aspects of life, society and the economy over such a short period of time. The manner of selling and delivering alcoholic beverages at the retail levels has not been exempt from this rapid shift.

The economic and market changes brought about by the Covid-19 pandemic have demonstrated the significance of the willingness of states to marry a liberalized attitude regarding alcoholic beverage retail regulations with the aforementioned technological advances. These changes have also highlighted the discriminatory effect of MICH. COMP. L. § 436.1203 as Michigan has eagerly afforded expanded retail sales opportunities to in-state retailers in order to protect their economic fortunes while withholding such opportunities from those retailers located out-of-state.

This importance of this was borne out after the onset of the pandemic saw many people across the nation ordered to shelter-in-place with only “essential” businesses being permitted to operate. Michigan imposed some of the most Draconian

restrictions upon its citizens and businesses.^{12/13} Ironically, many states and localities, including Michigan, classified alcoholic beverage retailers as “essential” businesses and allowed them to continue operating.¹⁴

Preliminary evidence shows that consumers have also considered alcoholic beverage retailers to be essential, albeit for different reasons. Statistics demonstrate that Americans consumed all types of alcoholic beverages at unprecedented levels as they were cooped up at home during the initial months of the pandemic’s lockdowns.¹⁵ Michigan was no

¹² https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-521789--,00.html (Accessed August 14, 2020).

¹³ Forbes, [Michigan Bans Many Stores From Selling Seeds, Home Gardening Supplies, Calls Them “Not Necessary”](https://www.forbes.com/sites/nicksibilla/2020/04/16/michigan-bans-many-stores-from-selling-seeds-home-gardening-supplies-calls-them-not-necessary/#55b4e3ad5f80) (April 16, 2020). <https://www.forbes.com/sites/nicksibilla/2020/04/16/michigan-bans-many-stores-from-selling-seeds-home-gardening-supplies-calls-them-not-necessary/#55b4e3ad5f80> (Accessed August 14, 2020).

¹⁴ Detroit Metro Times, [Yes, Michigan Liquor Stores Are Considered 'Essential' Under the Coronavirus Executive Order](https://www.metro-timetimes.com/table-and-bar/archives/2020/03/24/yes-michigan-liquor-stores-are-considered-essential-under-the-coronavirus-executive-order-and-are-still-open) (March 24 2020). <https://www.metro-timetimes.com/table-and-bar/archives/2020/03/24/yes-michigan-liquor-stores-are-considered-essential-under-the-coronavirus-executive-order-and-are-still-open> (Accessed August 14, 2020).

¹⁵ American Addiction Center, [The Average Adult Spent 172 Hours Drunk During Lockdown, July 7, 2020](https://americanaddictioncenters.org/blog/drunk-during-lockdown). <https://americanaddictioncenters.org/blog/drunk-during-lockdown> (Accessed August 14, 2020).

exception to this reality.¹⁶ Not surprisingly, nationwide alcohol sales in March 2020 increased 27.6% for wine, 26.4% for spirits and 14% for beer, flavored malt beverages and cider over the same period in 2019.¹⁷ It can be empirically argued that the availability of remote sale and delivery options contributed to this increased consumption of alcoholic beverages.¹⁸

The Covid-19 pandemic has also brought about another radical paradigm shift regarding the way consumers purchase and consume alcoholic beverages. The forced closure of the indoor seating spaces at many restaurants and bars exposed them to unprecedented economic pressures as many were confined to delivery and pick-up options. Yet, customers still wished to consume alcoholic beverages with their food.

In true American fashion, the old adage held true that “necessity is the mother of invention” as many states took unprecedented steps to relax sacrosanct Prohibition-era retail alcoholic beverage regulations, particularly those which required a

¹⁶ *Id.* The American Addiction Center study evidenced that the average Michigan resident was drunk for 94 hours during the pandemic lockdown.

¹⁷ Forbes, Nielsen Says Beverage Alcohol Retail Sales Are Soaring During The Crisis. (March 2020)

¹⁸ Fortune, How the On-Demand Liquor Delivery Business Changed Overnight During the Coronavirus Pandemic. (April 11, 2020).

face-to-face transaction.¹⁹ Again, Michigan was no exception.²⁰

Prior to the pandemic, it was practically unheard of for states to allow by-the-drink retailers, such as restaurants and bars, to either deliver alcoholic beverages with food or allow the sale of alcoholic beverages on a to-go basis. Just as no one would have fathomed being legally compelled to wear a mask in public at the start of 2020, no one would have also fathomed the neighborhood pizzeria being allowed to deliver beer along with a pepperoni pizza or the local Mexican restaurant being allowed to deliver a pitcher of margaritas along with an order of Chimichangas.²¹ Ironically, at least two states, Illinois and New Jersey, are seeking to make these

¹⁹ BBC News, [Coronavirus: How the pandemic is relaxing US drinking laws](https://www.bbc.com/news/world-us-canada-52656756) (May 15, 2020). <https://www.bbc.com/news/world-us-canada-52656756> (Accessed August 14, 2020).

²⁰ https://www.michigan.gov/documents/lara/cohol_to_go_695532_7.pdf. (Accessed August 14, 2020).

²¹ Promoting temperance is recognized as one of the core values underlying the Twenty-first Amendment. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). In light of the eagerness of states like Michigan to relax their regulation of alcoholic beverage sales in the name of both protecting the economic interests of licensed retailers and satisfying heightened consumer demand, the Court should perhaps reconsider whether the core Twenty-first Amendment principle of promoting temperance can hereafter be considered a viable defense to a Commerce Clause discrimination challenge.

changes permanent, at least on a trial basis.²² *Amici* predict the genie is out of the bottle and there will be increased pressures on states to continue these relaxed sales and delivery policies after the pandemic subsides.

Because of MICH. COMP. L. § 436.1203, in-state licensed retailers are offered these new economic opportunities to sell and deliver alcoholic beverages to Michigan residents. However, it withholds these new economic opportunities from retailers licensed in neighboring states. This means a restaurant in the northern part of Elkhart, Indiana can deliver alcoholic beverages with food to the city's residents, but it better not dare make a delivery to a customer a few miles away on the Michigan side of the border.

This case has constitutional significance because Michigan is clearly not regulating remote retail sales and deliveries of alcoholic beverages on an evenhanded basis as between in-state interests and out-of-state interests.

III. The mandate of *Granholm* and *Thomas* is clear and should be reinforced.

The crux of *Granholm* and *Thomas* is clear on two key points. First, Section 2 of the Twenty-first Amendment grants the states broad latitude to

²² ABC News, States Explore Keeping Alcohol On-Demand Delivery Permanent after COVID (May 29, 2020). <https://abcnews.go.com/US/states-explore-keeping-alcohol-demand-delivery-permanent-covid/story?id=70902208> (Accessed August 14, 2020).

regulate the sale of alcoholic beverages within their borders. Second, once a state employs its Twenty-first Amendment authority to grant a particular privilege to in-state alcoholic beverage stakeholders, the Commerce Clause mandates that it must also grant that same privilege to out-of-state stakeholders on identical terms. 544 U.S. at 493.

The analysis of such question is quite binary. This is evidenced by the following policy articulated by the Fourth Circuit in support of the above proposition in discussing *Granholm*:

“a State’s regulation of the transportation, importation and use of alcoholic beverages in the State is protected by the Twenty-first Amendment, but economic protectionism is not....”

Brooks, supra., at 354. Plain and simple, *Granholm* (and now *Thomas*) prohibit states from using their Twenty-first Amendment authority as a pretext to promote economic protectionism.

In this instance, Michigan has seen fit by way of MICH. COMP. L. § 436.1203 to exercise its Twenty-first Amendment authority to grant in-state alcoholic beverage retailers the privilege of direct sales and deliveries to the state’s consumers. *Granholm* and *Thomas* dictate that Michigan’s Twenty-first Amendment authority ended at that point and that it must also extend the same privilege to out-of-state retailers upon identical terms, as it did prior to March 2017.

Granting certiorari is warranted in this case for the Court to remind the Sixth Circuit and the other circuits that its decisions in *Granholm* and *Thomas* were not merely suggestions and must be taken seriously. Much as a traffic cop works to control traffic flow in order to prevent collisions at a congested intersection, this case screams for the Court to pick up its Stop sign to restrain the lower courts from ignoring the clear mandates of *Granholm* and *Thomas* with regard to the proper flow of traffic. In this instance, the Sixth Circuit has allowed Michigan to disregard the traffic rules and barrel its way through the intersection.

CONCLUSION

For the above reasons, the *Amici Curiae* respectfully ask this Court to grant certiorari to the United States Court of Appeals for the Sixth Circuit in order to determine whether MICH. COMP. L. § 436.1203 violates the Commerce Clause and is unconstitutional *per se*.

Respectfully submitted,

J. GREGORY TROUTMAN
Counsel of Record
TROUTMAN LAW OFFICE, PLLC.
4205 Springhurst Boulevard,
Suite 201
Louisville, KY 40241
(502) 412-9190
jgtatty@yahoo.com
Attorney for amici curiae

August 17, 2020

**APPENDIX
NAMES OF INDIVIDUAL *AMICI***

Ray Heald, Troy, Michigan (plaintiff in *Granholm v. Heald*)
Kambis Anvar, East Greenwich, Rhode Island
Linda Atkinson, Channing, Michigan
Steven A. Bass, Louisville, Kentucky
Russell G. Bridenbaugh, Bloomington, Indiana
Joseph H. Cohen, Louisville, Kentucky
Vincent Colapietro, Narragansett, Rhode Island
Robert A. Donald, III, Prospect, Kentucky
Richard Donovan, Fennville, Michigan
Myra Gassman, Charlotte NC
David Kittle, Louisville, Kentucky
Robert Kunkle, North Carolina
Ron Marshall, Victor, Montana
Deanna Marshall, Victor, Montana
Michael Rash, Charlotte, North Carolina
Lila Rash, Charlotte, North Carolina
Dr. Walter Rudzinski, Christian, Michigan
Patrice Rudzinski, Christian, Michigan
Stan Springer, Indianapolis, Indiana
Cindy Springer, Indianapolis, Indiana
Jack Stride, Detroit, Michigan
James E. Troutman, Louisville, Kentucky
Bobbie K. Troutman, Louisville, Kentucky