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,

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

Intervenor-Respondent.

**On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Sixth Circuit**

BRIEF OF INTERVENOR-RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The narrow question presented is whether the Sixth Circuit was correct in following this Court's recent decision in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, ___ U.S. ___, 139 S. Ct. 2449 (2019), and applying the "different inquiry" "§2 analysis" this Court found was dictated by the history of §2 of the Twenty-first Amendment and Supreme Court precedents.

CORPORATE DISCLOSURE STATEMENT

Intervenor-Respondent Michigan Beer & Wine Wholesalers Association has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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

INTRODUCTION

This case involves the straightforward application of the standard for evaluating a dormant Commerce Clause challenge to alcoholic beverage laws in the face of the Twenty-first Amendment. This Court provided guiding principles concerning that standard just last year in *Tennessee Wine and Spirits Retailers Ass'n v. Thomas*, ___ U.S. ___, 139 S. Ct. 2449 (2019). After a detailed review of the jurisprudence concerning the interplay between the dormant Commerce Clause and §2 of the Twenty-first Amendment, this Court "appl[ied] the §2 analysis dictated by the provision's history and [Supreme Court] precedents," holding that it must "engage in a different inquiry" and ask whether the challenged alcoholic beverage law "can be justified as a public health or safety measure or some other legitimate nonprotectionist ground." 139 S. Ct. at 2474. Incomprehensibly, Petitioners do not even *mention* this different inquiry analysis in their Petition, let alone purport to apply it or explain why the Sixth Circuit's application of it was incorrect.

Despite these omissions, Petitioners contend that a circuit split warrants granting the Petition. It does not. The Sixth Circuit's ruling on Michigan's alcoholic beverage retailer delivery law was correct and, in any event, is the only court of appeals to apply the different inquiry §2 analysis to determine whether the challenged alcoholic beverage law was shielded by the Twenty-first Amendment. And even if the Seventh Circuit's pre-*Tennessee Wine* decision in *Lebamoff Enterprises, Inc. v. Rauner*, 909 F.3d 847

(7th Cir. 2018), presented a decision in conflict with the Sixth Circuit's (it does not), this Court should decline to review this case and allow the issue to "percolate" further. As this Court has noted: "[w]e have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsberg, J., dissenting).

Petitioners also argue that the Sixth Circuit's ruling conflicts with Supreme Court authority. It does not. The Sixth Circuit diligently applied *Tennessee Wine*'s §2 analysis. Petitioners fail to acknowledge this Court's instruction that its precedents "dictated" the application of this §2 analytical framework. They also fail to acknowledge that the Sixth Circuit expressly adopted *Tennessee Wine*'s mandated §2 analysis and determined "whether the challenged [retailer delivery law] can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground."

The Petition thus does not meet this Court's high standard for granting certiorari. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955) (certiorari should not be granted '"except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals'" (internal citation omitted)).

STATEMENT OF THE CASE

As allowed under the Twenty-first Amendment, Michigan is one of many states that regulate the importation and distribution of alcoholic beverages through a three-tier system under which suppliers must sell to licensed wholesalers in the state who, in turn, sell to licensed retailers in the state. The challenged statute, a 2016 amendment to the Michigan Liquor Control Code, allowed certain licensed retailers in the state to deliver alcoholic beverages to Michigan consumers.

Petitioner Lebamoff Enterprises, Inc.–an out-of-state Indiana retailer whose Indiana license for its Indiana premises requires it to purchase product from an Indiana wholesaler–along with three Michigan wine consumers challenged the retailer delivery law under the dormant Commerce Clause. Following cross-motions for summary judgment, the district court granted the Petitioners' motion, ruling that the law was discriminatory, did not advance a legitimate local purpose, and was therefore not saved by the Twenty-first Amendment. Pet. App. 39a-43a. In its holding, the district court relied in part on the then recent decision of the Sixth Circuit in *Byrd v. Tennessee Fine Wines and Spirits, LLC,* 883 F. 3d 608 (6th Cir. 2018). Pet. App. 37a-38a.

Following the appeal of the district court's decision, the parties sought a stay for the specific purpose of waiting for this Court's decision in *Tennessee Wine*. Notwithstanding the parties had the benefit of that June 2019 decision when briefing the Sixth Circuit appeal, Petitioners' appellate brief–like

their Petition–did not mention *Tennessee Wine*'s different inquiry §2 analysis.

The Sixth Circuit decision hewed to *Tennessee Wine*'s ruling; having assumed the law was discriminatory, the Sixth Circuit found that the §2 analysis to be applied was to "ask whether the law 'can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground,'" 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." Pet. App. 6a.

In applying that §2 analytical framework, the Sixth Circuit discussed the state's "legitimate state interests" such as promoting temperance, maintaining orderly markets to prevent product diversion, and preventing low and below cost pricing (*id.* at 9a-13a), addressed other potential justifications for the law (preventing sales to minors, facilitating tax collection, and ensuring safe products) (*id.* at 15a-16a), and refuted the out-of-state retailer's argument that the statute was protectionist (*id.* at 16a-17a). The court also addressed the "consumer inconvenience" argument (*id.* at 17a-19a) and discussed why alternatives would not be feasible (*id.* at 12a-13a, 16a).

In the concurring opinion, Judge McKeague stated that the state's evidence was enough "to show its in-state retailer requirement serves the public health" and that Petitioners had "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." *Id*. at 22a, 27a.

Petitioners' petition for rehearing *en banc* was denied. Pet. App. 46a.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit's decision did not create a circuit split.

Petitioners argue that the Sixth Circuit decision creates a circuit split concerning the constitutionality of state alcoholic beverage retailer delivery laws, pointing to the Seventh Circuit's 2018 decision in *Lebamoff Enterprises, Inc. v. Rauner,* 909 F. 3d 847 (7th Cir. 2018). But Petitioners overlook the critical fact that *Rauner* was decided *before* this Court decided *Tennessee Wine*. Because the Seventh Circuit did not–and could not–apply *Tennessee Wine*, there can be no circuit split.

Petitioners' circuit-split argument is also untenable because it is based on a gross misstatement of the Sixth Circuit's holding and a misreading of *Rauner*. Petitioners assert that the Sixth Circuit held that the Michigan retailer delivery "law was 'immune' from challenge under the Commerce Clause." Petition at 6. Petitioners are wrong. The Sixth Circuit "echoed" the point made by this Court in *Granholm v. Heald*, 544 U.S. 460, 466 (2005), that "'States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment,'" (Pet. App. 7a), by quoting a prior Sixth Circuit decision: "A State's '*decision to adhere to a three-tier distribution system is immune from*

direct challenge on Commerce Clause grounds,'" (*id.*, quoting *Jelovesek v. Bredesen*, 545 F. 3d 431, 436 (6th Cir. 2008) (emphasis added)).

Petitioners' mischaracterization of the pre-*Tennessee Wine* decision in *Rauner* also undercuts their circuit-split contention. In reversing the granting of a motion to dismiss, the Seventh Circuit ruled only on whether *Granholm*'s nondiscrimination principle applied to alcoholic beverage wholesalers and retailers–not whether the challenged Illinois retailer delivery law violated the Commerce Clause. *Rauner*, 909 F. 3d at 854-55. In remanding, the Seventh Circuit set the stage for the district court to determine whether the Illinois retailer delivery law was "necessitated by permissible Twenty-first Amendment interests." *Id.* at 856. On remand, the district court will no doubt consider the effect of *Tennessee Wine* on its Twenty-first Amendment assessment of the Illinois retailer delivery law; but the Seventh Circuit's 2018 *Rauner* decision creates no circuit split warranting this Court's review of the Sixth Circuit's decision.

Consistent with this Court's guidance in *Arizona v. Evans*, the issue of the proper application of this Court's *Tennessee Wine* different inquiry § 2 analysis should be allowed a "period[ ] of 'percolation' in, and diverse opinions from, … federal appellate courts" to foster "a better informed and more enduring final pronouncement by the Court." 514 U.S. at 23, n.l (Ginsberg, J., dissenting).

II. The Sixth Circuit's decision adheres to Supreme Court authority.

Petitioners offer as a second purported basis for granting certiorari that the Sixth Circuit's decision conflicts with Supreme Court precedent. That is incorrect. Petitioners present no argument at all that the Sixth Circuit wrongly engaged in the §2 analysis that this Court in *Tennessee Wine* said was "dictated by [its] precedents" and the language of the Twenty-first Amendment provision (*id*. at 2474). Indeed, the Petition does not even mention that different inquiry §2 analysis, so no conflict can plausibly exist with this Court's most recent Commerce Clause/Twenty-first Amendment opinion.

Instead, Petitioners repeat their incorrect description of the Sixth Circuit holding as "immuniz[ing]" alcoholic beverage laws "from being challenged under the Commerce Clause" in an attempt to manufacture a conflict "with prior cases from this Court." Petition at 9. As discussed above, Petitioners' reliance on this false predicate–i.e., that the Sixth Circuit "immunized" the retailer delivery statute from a Commerce Clause challenge–undermines their second purported conflict claim.

Rather than "significantly depart[ing] from this Court's prior rulings," (*id*.), the Sixth Circuit's decision reflects a straightforward application of *Tennessee Wine*. In *Tennessee Wine*, after finding that the retailer residency law discriminated against non-residents, this Court, "because of §2," engaged in "a different inquiry" and asked "whether the challenged [retailer residency] requirement can be justified as a public health or safety measure or on some other

legitimate nonprotectionist ground." 139 S. Ct. at 2474. The Sixth Circuit, after assuming the in-state and out-of-state retailers were similarly situated and further assuming the retailer delivery law discriminated against the out-of-state retailers, held that, "[d]ue to the Amendment," the "'different' test" required the court to determine "whether the law 'can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground.'" Pet. App. 6a. The Sixth Circuit then discussed the state's proffered "legitimate state interests" and analyzed why the "predominant effect" of the law was not protectionism. *Id.* at 9a-17a.

Petitioners make no effort to argue that the Sixth Circuit erroneously applied this Court's *Tennessee Wine* §2 analysis because they make no effort even to acknowledge that different inquiry analytical approach. The Petition thus fails to establish any conflict with this Court's precedent, and this case is certainly not the "rare" case for certiorari based on asserted error.

CONCLUSION

Having stayed the appeal for the express purpose of waiting for this Court to decide *Tennessee Wine*, the Sixth Circuit undertook to, and did, apply this Court's §2 analysis. In attempting to manufacture a conflict in the circuits and one with this Court's authority, Petitioners completely ignore *Tennessee Wine*'s different inquiry §2 analytical approach and the Sixth Circuit's application of it, and then misstate the Sixth Circuit's holding. The Sixth Circuit decision creates no circuit split and is faithful to this Court's precedent. For these reasons,

Intervenor-Respondent requests that the Court deny the Petition.

Respectfully submitted,

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