Nos. 03-1116 and 03-1120

IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM, *et al.*,
Petitioners,

v.

ELEANOR HEALD, *et al.*,
Respondents.

MICHIGAN BEER & WINE WHOLESALERS ASSOC.,
Petitioner,

v.

ELEANOR HEALD, *et al.*,
Respondents.

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

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BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violates the dormant Commerce Clause in light of Section 2 of the 21st Amendment.

STATEMENT PURSUANT TO RULE 29.6

Respondent Domaine Alfred, Inc. has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

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COUNTERSTATEMENT OF THE CASE

At issue in this case is whether the Twenty-First Amendment displaces the fundamental principle of nondiscrimination in trade across state borders that underlies our national economic union. Michigan and its partisans contend that section 2 of the Twenty-First Amendment grants each State such broad authority over the importation of liquor that a State may favor its own wine industry over wine producers from other States. The Sixth Circuit correctly rejected this claim of license to engage in geographic favoritism, holding that Michigan's discrimination against commerce—based solely upon origin outside the State—violates the dormant Commerce Clause and cannot be saved from unconstitutionality by section 2 of the Twenty-First Amendment.

1. The interstate commerce in which the plaintiffs seek to engage arises from the growth of small family farm wineries across the nation in recent decades. Domestic grape production tripled between 1985 and 2000, and domestic wine production now contributes $45 billion annually to the national economy. WineAmerica, *Wine Facts*.[1] A relatively small number of large wineries dominate the national market, producing large quantities of wine and distributing it nationally through the so-called "three-tier" regulatory system for alcohol distribution that arose after the repeal of Prohibition. Under this system, producers of alcoholic beverages are typically required to sell their products to licensed wholesalers or distributors, who in turn sell to retailers, who in turn sell to consumers. *See* 03-1120 Br. 6; 03-1116 Br. 6; *see also* Staff of the Federal Trade Commission, *Possible Anticompetitive Barriers to E-*

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[1] Available at http://www.americanwineries.org/winedata/winefacts04.htm (last visited Sept. 20, 2004).

Commerce: Wine 5 (July 2003) (hereafter "FTC Report").[2]

An increasing proportion of American wine, however, is being produced by family farm wineries, which are now found in all 50 States and by some estimates number over 3,000—more than twice as many as 30 years ago. *See* WineAmerica, *supra*. These small, start-up concerns are often the engines of innovation in the wine industry, and have become a dynamic source of employment and productivity in many of the nation's rural areas. There has been an accompanying explosion in wine-related tourism—even in States not previously known for their wine production. *See id.*

Because many of these farm wineries produce relatively small amounts of wine, direct sales to consumers are not merely an efficient commercial vehicle, but a necessary channel for doing business. Small wineries are, as a practical matter, foreclosed from participating in the traditional three-tier distribution system because their small volumes render their products economically unattractive to wholesale distributors. The problem is compounded because the number of wholesalers that distribute wine has decreased from several thousand in the 1950s to a few hundred today, making it increasingly difficult for small wineries to find wholesalers willing to carry their products. *See* FTC Report at 6.

2. The majority of States have responded to the consumer demand for access to wines from small wineries by permitting direct shipment of wine to consumers across state lines. Twenty-six States now permit some form of direct

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[2] The comprehensive FTC Report can be found at www.ftc.gov/os/2003/07/winereport2.pdf (last visited Sept. 14, 2004). It is based on "testimony from all sides of the wine issue, including wineries, wholesalers, state regulators, and a Nobel laureate in economics." FTC Report at 2.

sales and shipments from out-of-state wineries to in-state consumers, and three other States permit limited direct ordering by consumers pursuant to a consumer permit. Some States, like New Hampshire, allow any winery to obtain a state license and make direct shipments to consumers. *See* N.H. Rev. Stat. § 178:27. Some, like Iowa, allow wineries to make direct shipments from States that extend reciprocal shipping privileges to their own wineries. *See* Iowa Code § 123.187 (2003). Some, like Arizona, allow direct shipments only for purchases made in person on site at the winery's tasting room. *See* Ariz. Rev. Stat. § 4-203.04(J) (2003). Many of these States require that out-of-state wineries obtain licenses, report sales and remit taxes on their shipments, and require that shippers obtain an adult signature to prevent wine from being delivered to minors. *See* FTC Report at 8, 26-40. States that allow direct shipping report no problems with underage access or tax evasion due to the direct shipment of wine from out of state. *See* FTC Report at 31, 38.

Reflecting this trend among the States to allow direct shipment of wine to consumers from out-of-state wineries, the National Conference of State Legislatures adopted a Model Direct Shipping Bill in 1997. The model legislation restricts the sale of wine to those persons at least 21 years of age; requires all beverages to be labeled for adult receipt only; requires all out-of-state shippers to pay appropriate taxes and keep detailed sales records; requires out-of-state shippers to obtain licenses; and requires them to submit to the importing state's regulatory authority for enforcing the act and any related statutes or regulations. *See* http://www.wineinstitute.org/MODEL%20DIRECT%20SHIPMENT%20BILL.htm (last visited Sept. 20, 2004). The model legislation addresses state concerns so effectively that, as recently as 2003, Virginia, North Carolina, and South Carolina each abandoned discriminatory regimes and enacted the model direct-shipping legislation. *See* N.C. St. § 18B-

1001.1 (2004); S.C. Code Ann. § 61-4-747 (2003); Va. Code § 4.1-112.1 (2003).

This trend among the States is facilitated by enforcement mechanisms provided by federal law. No winery may operate in any State without a federally mandated "basic permit." 27 U.S.C. § 203 (2004). The United States Tax and Trade Bureau (previously known as the BATF) may revoke the winery's federal permit if it violates the laws of any state. *Id.* § 204. And the federal Twenty-First Amendment Enforcement Act gives state Attorneys General authority to use the federal courts to sue out-of-state wineries to compel compliance with state laws. 27 U.S.C. § 122a(b) (2004).

3. Michigan has eschewed this national trend and has adopted instead discriminatory wine shipment laws that allow only in-state wineries, but not out-of-state wineries, to make direct shipments to Michigan consumers. There is no dispute that Michigan treats out-of-state wineries differently from in-state wineries. *See* 03-1116 Br. 7-9. Out-of-state wineries may not sell wine at retail and are ineligible for any license that would allow them to ship directly to Michigan consumers. *See* Mich. Comp. L. § 436.1607(1).[3] The only license available to out-of-state wineries is an "outstate seller of wine" license. Mich. Admin. Code R. 436.1705(2)(d). This license costs $300, *see* Mich. Comp. L. § 436.1525(1)(d), and enables out-of-state wineries to sell only to Michigan wholesale distributors under the traditional three-tier system, *see* Mich. Comp. L. § 436.1109(9); Mich. Admin. Code R. 436.1719(5). These two intermediate layers of transaction ensure that out-of-state wineries may sell their product to Michigan consumers only at a substantially higher

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[3] Contrary to the wholesalers' assertion that Michigan requires only a "substantial in-state physical presence" in order to direct ship, *e.g.*, 03-1120 Br. 3, 13, 35, Michigan actually does not allow an out-of-state winery to direct ship unless the winery actually becomes an in-state winery (*i.e.*, plants grapes in Michigan), *see* C.A. App. 101-02 (Stewart Interrog. 13).

price, or lower profit, than in-state products sold directly to consumers. C.A. App. 239-40 (Bridenbaugh Aff. ¶¶ 15-16); *see also* FTC Report at 22. If it cannot find a wholesaler, an out-of-state winery is foreclosed from the market altogether.

In contrast, an in-state winery may obtain a "wine maker" license that allows it to sell its own wines at retail without going through a wholesaler, Mich. Comp. L. § 436.1113(9); Mich. Comp. L. § 436.1537(2)-(3), and to ship its wine directly to consumers. Mich. Admin. Code R. 436.1011(7)(b). For a small wine maker, this license costs only $25—one-twelfth the cost to an out-of-state winery. Mich. Comp. L. § 436.1525(1)(e). The license entitles the in-state winery to receive orders from Michigan consumers via phone, Internet, or mail, and to fill those orders by shipping directly to the home of the consumer who places the order.

4. Plaintiff Domaine Alfred is one of those out-of-state wineries that is excluded from the Michigan market. It is a small winery in San Luis Obispo, California, owned and operated by Terry Speizer. Mr. Speizer produces a mere 3000 cases of wine a year.[4] Because of this limited production and small customer base, he cannot obtain a wholesaler to distribute his wine in Michigan. Even if he could find a wholesaler willing to list his wine, he could not afford to sell it through the three-tier system. Because both the wholesaler and retailer would mark up the price, Mr. Speizer would have to discount the price to the wholesaler in anticipation of those mark-ups, which would mean an unsustainable loss of revenue. He has received requests for wine from Michigan customers, but cannot fill them because of the direct shipment prohibition. C.A. App. 85 (Domaine Alfred Aff. ¶¶ 11-15).

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[4] Domaine Alfred would meet Michigan's definition of a small winery, which is a winery producing less than 50,000 gallons (20,000 cases) per year. Mich. Comp. L. § 436.1111(9).

Joining Mr. Speizer as plaintiffs are 13 Michigan wine consumers and journalists who, although stymied by Michigan's discriminatory laws, seek to purchase out-of-state wine by direct shipment. Eleanor and Ray Heald are professional wine critics, consultants and educators, who write wine reviews for major national publications. Their occupation requires that they obtain advance samples of wine sent directly to them from out-of-state wineries so that they can critique, preview and write about them. Because of the direct shipment prohibition, they have been unable to obtain those samples, have lost income, and have been hamstrung in their ability to inform the public about new wines from out of state. C.A. App. 43-48 (Heald Aff. ¶¶ 4-7, 16-17).

5. The plaintiffs filed this action against various Michigan state officials, contending that the Michigan direct shipment law discriminated against interstate commerce in violation of the dormant Commerce Clause. The state defendants argued that the Michigan regulatory scheme constituted a valid exercise of the State's power under section 2 of the Twenty-First Amendment. The Michigan Beer & Wine Wholesalers Association (hereafter "the wholesalers"), a lobbying organization for the Michigan liquor-distribution industry, intervened in support of the discriminatory regime in which out-of-state wineries must sell only to the wholesalers that comprise its membership. In a brief unpublished opinion, the district court granted summary judgment to the defendants, upholding Michigan's law based on the view that section 2 of the Twenty-First Amendment "authorizes the states to control alcohol in ways that it [sic] cannot control cheese." 03-1116 Pet. App. 33a; 03-1120 Pet. App. 33a (internal quotation omitted).

6. The Sixth Circuit (Daughtrey, J., joined by Guy and Boggs, JJ.) reversed. *See* 03-1116 Pet. App. 1-18a; 03-1120 Pet. App. 1a-17a. The court of appeals began by recognizing that, in a series of decisions immediately after ratification of the Twenty-First Amendment, the Supreme Court had

"afforded the states nearly limitless power to regulate alcohol under the new amendment." 03-1116 Pet. App. 8a; 03-1120 Pet. App. 8a. The court reasoned, however, that Michigan's reliance on those cases was "disingenuous at best because, as early as the 1960s, the Supreme Court signaled a break with this line of reasoning." 03-1116 Pet. App. 9a; 03-1120 Pet. App. 8a. Under this Court's subsequent cases, the court continued, challenges to state alcohol laws should be assessed by "determining how closely related the law in question is to the 'core concerns' of the Twenty-first Amendment." 03-1116 Pet. App. 10a; 03-1120 Pet. App. 9a.

After reviewing this Court's more recent cases, the Sixth Circuit concluded that facially discriminatory laws regulating commerce in alcohol remain subject to strict scrutiny under the dormant Commerce Clause, and that the State must prove that no reasonable nondiscriminatory alternatives are available to advance the State's compelling purposes. *See* 03-1116 Pet. App. 11a; 03-1120 Pet. App. 11a. The court "reject[ed] the implication that a state's 'virtually complete control' over liquor regulation enables it to discriminate against out-of-state interests in favor of in-state interests." 03-1116 Pet. App. 12a; 03-1120 Pet. App. 11a. According to the court, such an approach was "simply forbid[den]" by this Court's decision in *Bacchus Imports, Ltd., v. Dias,* 468 U.S. 263 (1984), which struck down a discriminatory tax exemption favoring certain locally produced alcoholic beverages at the expense of out-of-state liquor imports. 03-1116 Pet. App. 12a; 03-1120 Pet. App. 11a.

Applying this framework to the Michigan statute, the Sixth Circuit concluded that "it is clear that the Michigan statutory and regulatory scheme treats out-of-state and in-state wineries differently, with the effect of benefiting the in-state wineries and burdening those from out of state." 03-1116 Pet. App. 14a; 03-1120 Pet. App. 13a. The court noted that, under the Michigan system, in-state wineries would enjoy both greater access to consumers and greater profits by virtue

of their exemption from the three-tier system to which out-of-state wineries were subject. *See* 03-1116 Pet. App. 14a; 03-1120 Pet. App. 13a. Noting that "the relevant inquiry is not whether Michigan's three-tier system *as a whole* promotes the goals of temperance, ensuring an orderly market, and raising revenue, but whether the discriminatory scheme challenged in this case ... does so," the Sixth Circuit concluded that Michigan had not proved that it was necessary to discriminate against out-of-state wineries in order to further any of the "core concerns" of the Twenty-First Amendment and declared the law unconstitutional. *See* 03-1116 Pet. App. 15a; 03-1120 Pet. App. 14a.

7. Both Michigan and the wholesalers petitioned for rehearing by the panel and rehearing *en banc*. The Sixth Circuit denied both petitions without dissent. *See* 03-1116 Pet. App. 21a-22a; 03-1120 Pet. App. 21a-22a. Both Michigan and the wholesalers timely filed petitions for writ of certiorari on February 2, 2004. This Court consolidated the two petitions and a petition to review the Second Circuit's decision in *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004), granting certiorari on May 14, 2004 on a single question presented: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the 21st Amendment?"

7. In addition to this case and *Swedenburg*, four other Courts of Appeals have recently addressed the constitutionality of state laws prohibiting the direct shipment of wine. In each, the court agreed with the Sixth Circuit that discriminatory shipment laws violate the dormant Commerce Clause despite the Twenty-First Amendment. *See Dickerson v. Bailey*, 336 F.3d 388, 403 (5th Cir. 2003); *Beskind v. Easley*, 325 F.3d 506, 516-17 (4th Cir. 2003); *Bainbridge v. Turner*, 311 F.3d 1104, 1112-13 (11th Cir. 2002); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir.

2000). The two Courts of Appeals that upheld such bans did so only because they found no discrimination. *See Swedenburg*, 358 F.3d at 239 ("New York's regulatory scheme allows [all] licensed wineries ... direct access ... in a non-discriminatory manner"); *Bridenbaugh*, 227 F. 3d at 853 (statute does not discriminate because "Indiana insists that *every* drop of liquor pass through its three-tiered system and be subjected to taxation").

SUMMARY OF ARGUMENT

The court of appeals' decision invalidating Michigan's discriminatory regime was clearly correct. Its holding that discriminatory wine shipment rules violate the Commerce Clause and are not saved by the Twenty-First Amendment comports with every other Court of Appeals decision to have addressed the question. The two decisions upholding state laws, upon which petitioners rely, held nothing more than that the state regimes at issue did not, in fact, discriminate against interstate commerce.

Under settled dormant Commerce Clause jurisprudence, a State's explicit discrimination against out-of-state articles of commerce faces "a virtually *per se* rule of invalidity." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Michigan draws just such an impermissibly invidious line at the state border. The winery "outside the gates" is forbidden to engage in precisely the same commercial activity permitted "within the city walls." That distinction, based solely on geography, is utterly inimical to the idea of national economic union. It is forbidden by the Commerce Clause.

Nor is Michigan's discriminatory apparatus saved by section 2 of the Twenty-First Amendment. This Court's cases make clear that States enjoy greater authority over liquor than they do over, say, milk. Yet this Court has also consistently invalidated state liquor regulations (no less than state milk regulations) that discriminate against out-of-state commerce. Michigan may regulate wine sales, and it may

regulate intensively, even to the point of prohibition. But it may not discriminate. This Court's cases have long made clear that "the greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms." *Bridenbaugh*, 227 F.3d at 853 (Easterbrook, J.) (summarizing cases). As this Court said in rejecting a Twenty-First Amendment defense of a discriminatory state tax on alcoholic beverage imports, "[d]oubts about the scope of the Amendment's authorization notwithstanding, one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition." *Bacchus Imports*, 468 U.S. at 276.

For the same reasons, the Webb-Kenyon Act, 27 U.S.C. § 122, first enacted in 1913 and re-enacted in 1935 after the repeal of Prohibition, provides no affirmative authority from Congress for state discrimination against out-of-state wine shipments. That Act merely mirrors the language of section two of the Twenty-First Amendment, and no more authorizes discrimination against out-of-state wine shipments than does the Amendment itself. Indeed, this Court already has construed the Act narrowly, as only prohibiting shipments into dry areas; it thus cannot be read as authorizing States to discriminate against out-of-state sellers in favor of local interests. *See, e.g., Seaboard Air Line Ry. v. North Carolina,* 245 U.S. 298, 303 (1917).

Under the appropriately exacting scrutiny these constitutional principles require, Michigan's discriminatory wine shipment laws must fall. Even granting the strength of the State's interests in preventing access by minors, regulating the distribution of wine, and collecting taxes, those interests can readily be served by nondiscriminatory alternatives, such as the evenhanded direct shipment bills already enacted by a growing majority of Michigan's sister States.

ARGUMENT

I. MICHIGAN'S DISCRIMINATION AGAINST OUT-OF-STATE WINE PRODUCERS VIOLATES THE DORMANT COMMERCE CLAUSE.

It is undisputed that Michigan's wine shipment law discriminates explicitly against out-of-state commerce. Michigan provides that in-state wineries may sell and ship their wine directly to consumers, but out-of-state wineries may not. No matter how law-abiding the Virginia, California, Arizona (or other out-of-state) winery may be, and no matter how spotless its record of scrupulous compliance with State and federal law, Michigan says no. That winery simply may not sell its products directly to consumers, but rather must sell its products only through state-licensed wholesalers (who have, not surprisingly, intervened in this litigation and attempted to defend this discriminatory system). But while saying no to out-of-state wineries, Michigan says a hearty yes to the approximately 40 wineries now dotting the Michigan landscape.

There can be no doubt that this amounts to textbook discrimination within the meaning of the dormant commerce clause, namely "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). Because such discrimination against an out-of-state product violates the core principle of our national economic union, it faces a "virtually *per se* rule of invalidity," *Philadelphia*, 437 U.S. at 624. This is so even though wine rather than garbage or milk is the product at issue.

A. The Principle of Nondiscrimination Against Interstate Commerce Lies at the Core of the National Economic Union.

Since Justice Johnson's concurring opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), this Court has been steadfast in protecting a fundamental proposition of national economic union: The Commerce Clause, by its own force, prohibits state-imposed discrimination against interstate commerce. *See id.* at 231 ("If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."). All Justices now sitting on this Court have embraced this proposition. *See, e.g., S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 169 (1999) (Breyer, J., for a unanimous Court); *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 646 (1994) (Thomas, J., for a unanimous Court). Eight of the now-sitting Justices have authored opinions for the Court embracing it.[5] An entire body of decades-old law has grown up explicating and applying the principle. The principle is simple and easy of application: States are not to discriminate against interstate commerce. To do so is presumptively wrong and

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[5] *See, e.g., D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 29-30 (1988) (Rehnquist, C.J.); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192-93 (1994) (Stevens, J.); *New Energy Co. v. Limbach*, 486 U.S. 269, 273-74 (1988) (Scalia, J.); *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994) (Kennedy, J.); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330-31 (1996) (Souter, J.); *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 646 (1994) (Thomas, J.); *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 311 (1994) (Ginsburg, J.); *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 169 (1999) (Breyer, J.). *See also C & A Carbone*, 511 U.S. at 402 (O'Connor, J. concurring in the judgment) ("Where ... a regulation 'affirmatively' or 'clearly' discriminates against interstate commerce on its face or in practical effect, it violates the Constitution unless the discrimination is demonstrably justified by a valid factor unrelated to protectionism.").

unconstitutional.[6]

The nondiscrimination principle abundantly found in this Court's jurisprudence is firmly grounded in the structure of our national economic union. In no small part, the Founding itself—expressly aimed to form a more perfect union—was animated by the need to quash parochial jealousies embodied in trade barriers betraying the Framers' vision of a vast commercial market. "The Framers granted Congress plenary authority over interstate commerce in 'the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" *Oregon Waste Sys.*, 511 U.S. at 98 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-36 (1979)). As Justice Jackson observed on behalf of the Court:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

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[6] Although several Justices have critiqued aspects of the Court's dormant Commerce Clause jurisprudence with respect to balancing even-handed state regulations against the burden they place on interstate commerce, *see e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 609-20 (1997) (Thomas, J., dissenting); *West Lynn Creamery*, 512 U.S. at 210-12 (Scalia, J., concurring in the judgment), none have suggested abandoning the nondiscrimination principle.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

It was "[t]he 'negative' aspect of the Commerce Clause"—the presumptive prohibition of discriminatory and partial legislation—that James Madison and the Founders recognized to be "the more important" towards the creation of a national market. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994).[7] "[T]he peoples of the several states must sink or swim" together, as Justice Cardozo taught in a passage often quoted by this Court. *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935). Therefore, "[i]f a restriction on commerce is discriminatory, it is virtually *per se* invalid." *Oregon Waste Sys.*, 511 U.S. at 99.

The cases are legion. For example, New York dairy farmers have been instructed that our national economic union requires competition with more efficient Vermont dairies, even when the putative justification for discrimination is public health. *See Baldwin*, 294 U.S. at 523. Oklahoma wildlife officials have learned that they may not conserve the local minnow population by closing their rivers to fishermen who would sell their catch out of the State. *See Hughes*, 441 U.S. at 337. And, North Carolina apple growers have been told that they may not avoid competition with Washington growers through a state law prohibiting those growers from advertising their higher out-of-state standards, even when the law purportedly is necessary to prevent consumer confusion. *See Hunt v. Wash.*

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[7] As Madison explained, the Commerce Clause "grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government." 3 M. Farrand, *Records of the Federal Convention of 1787*, at 478 (1911). *See also Federalist* No. 22, at 143-45 (A. Hamilton) (Clinton Rossiter ed., 1961); James Madison, *Vices of the Political System of the United States*, in 2 *Writings of James Madison* 362-63 (G. Hunt ed., 1901).

State Apple Adver. Comm'n, 432 U.S. 333, 351 (1977).

This nondiscrimination principle enjoys such force in the Court's jurisprudence that New Jersey was told that it must accept Philadelphia's garbage, *Philadelphia*, 437 U.S. 617, Alabama was told that it must accept hazardous wastes from around the country, *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992), Oregon was told it must not impose a surcharge on out-of-state garbage, *Oregon Waste Sys.*, 511 U.S. 93, and Clarkstown, New York was told it could not require all garbage to be processed through its home-grown plant rather than processed out of state, *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994). From these cases, it cannot reasonably be questioned that Michigan must treat in-state and out-of-state commerce the same.

B. The Nondiscrimination Principle Applies in Full Force to the Sale of Alcohol.

This Court has made clear that the same nondiscrimination principle applies with force to the sale of alcoholic products. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273, 275-76 (1984), the Court held that the Commerce Clause prohibited Hawaii from exempting the makers of local pineapple wine and a local brandy from a tax applied generally to all liquor imported from out of the State. The Court reiterated that "[o]ne of the fundamental purposes" of the Commerce Clause "was to insure against discriminating State legislation." *Id.* at 271 (internal quotation omitted). This Court reaffirmed that "[i]t has long been the law that States may not 'build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States." *Id.* at 272 (quoting *Guy v. Baltimore*, 100 U.S. 434, 443 (1880)). Whatever the motives of the state legislature, the tax discriminated against out-of-state producers in favor of local producers, and the tax therefore violated a "cardinal rule of Commerce Clause jurisprudence." *Id.* at 268. The Constitution simply does not

tolerate any efforts by the State to discriminate between the products of in-state and out-of-state sellers, even of alcoholic beverages.

This Court's holding in *Bacchus* confirms that the nondiscrimination principle is deeply rooted in the constitutional fabric of the union, and admits of no exception for alcoholic beverages. "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," the Court has "generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (applying strict scrutiny to a state regulation that sought to regulate beer prices outside the territory of the State). In *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), for example, the Court applied the nondiscrimination principle to invalidate a statute regulating the importation of beer by requiring out-of-state beer shippers, but not in-state shippers, to affirm that their prices in Connecticut were no higher than in surrounding states. *See id.* at 340-41; *see also id.* at 344 (Scalia, J., concurring in the judgment). The national economic union does not permit Michigan to carve out a market for its local wineries in which they may operate free from competition with those out of state, any more than it entitled Connecticut to protect its own beer shippers against price competition. The court of appeals' decision did nothing more than faithfully apply this well-established rule to invalidate Michigan's discriminatory ban on direct shipping.

C. Michigan's Shipment Law Violates the Nondiscrimination Principle.

Michigan's wine shipment rule discriminates against out-of-state wineries in several respects. In contrast to in-state wineries, an out-of-state winery must find a wholesaler willing to distribute its wine or else be totally excluded from

the market. *See* FTC Report at 23-25; C.A. App. 88-90 (Siegl Aff. ¶ 2). And because out-of-state wineries may only sell their wine through a separate wholesaler and retailer, both of which mark up the price, their wine is relatively more expensive to consumers. C.A. App. 239-40 (Bridenbaugh Aff. ¶¶ 15-16). State laws that raise the price of out-of-state goods in relation to in-state products are "paradigmatic examples" of discrimination against interstate commerce. *West Lynn Creamery*, 512 U.S. at 193. By allowing only in-state wineries to direct ship, Michigan gives its in-state wineries a competitive advantage over out-of-state wineries—a residents-only express lane that enables in-state wineries to bypass the wholesaler's toll booth. In addition, the ban on interstate direct shipment gives in-state businesses a monopoly on serving customers who want home delivery. This is a significant commercial advantage in Michigan, which has many areas (*e.g.*, the Upper Peninsula) that are far from the nearest well-stocked wine store.

Michigan asserts that the State did not enact the wine shipment rule with the intent to engage in economic protectionism, so the rule should not be characterized as impermissibly discriminatory. 03-1116 Br. 29; 03-1120 Br. 31. Similar arguments have been rejected by this Court many times. A "pure motive" is not a defense, and "a court need not inquire into the purpose or motivation behind a law to determine that in fact it impermissibly discriminates against interstate commerce." *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 653-54 (1994); *see also Oregon Waste Sys.*, 511 U.S. at 100 ("the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory").

II. THE TWENTY-FIRST AMENDMENT DOES NOT IMMUNIZE MICHIGAN'S DISCRIMINATION AGAINST OUT-OF-STATE WINE PRODUCERS.

Faced with a statute that blatantly discriminates against

out-of-state wineries in violation of the Commerce Clause, Michigan and the in-state wholesalers who benefit from its protectionism summon forth the Twenty-First Amendment, asserting that a State has utterly unrestricted authority when it "exercises its core power to regulate the importation of alcohol for use in the State." 03-1120 Br. 30. But the Twenty-First Amendment is not nearly as powerful as Michigan and the wholesalers would have it. Indeed, elsewhere in their briefs, Michigan and its partisans concede, as they must, that the Twenty-First Amendment does not "immunize" Michigan "from other provisions of the Constitution," or from federal legislation under the affirmative authority of the Commerce Clause. *See* 03-1116 Br. 17-18, 31-32; 03-1120 Br. 15, 27-29. It follows inexorably from this concession, and from the text, history and jurisprudence of the Twenty-First Amendment, that the Amendment likewise provides no shield from the Commerce Clause's nondiscrimination principle.

A. The Twenty-First Amendment Does Not Displace Other, Pre-Existing Constitutional Provisions.

If the terms of section 2 were as powerful as Michigan and the wholesalers claim, then the Twenty-First Amendment would save state liquor regulations from violating all other constitutional provisions. Indeed, a State could rely upon section 2 to bar the importation of wine produced by African-American-owned wineries, but allow importation of wine produced by white-owned ones. That cannot be so. Indeed, no one would contend that such a flagrant equal protection violation would somehow be rendered constitutional by virtue of the later-ratified Twenty-First Amendment. Just as the First Amendment's seemingly absolute proscription, "Congress shall make no law ... abridging the freedom of speech," does not preclude reasonable time, place and manner regulations, so too the Twenty-First Amendment

does not provide the all-encompassing power that would be suggested by the literal terms of section 2.

To the contrary, the Twenty-First Amendment is to be understood as a part of the whole Constitution, and a proper understanding of its terms requires an analysis of where that narrowly focused amendment falls in our constitutional structure. As this Court has recognized with respect to the Commerce Clause (and the same could be said for the other provisions of the Constitution as well):

> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964). Ordinary rules of constitutional interpretation are not suspended with respect to the Twenty-First Amendment. The judicial task remains to afford the language of section 2 a reasonable construction in harmony with the rest of the founding document.

Accordingly, this Court has consistently rejected States' attempts to use the Twenty-First Amendment to wash away their constitutional sins. For example, the Twenty-First Amendment has been held not to create a zone where free speech principles are suspended. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (invalidating a state regulation of alcohol price advertising). Nor does the Amendment permit violations of the Equal Protection Clause. *See Craig v. Boren*, 429 U.S. 190, 204-09 (1976) (invalidating a state regulation discriminating on the basis of gender in setting the legal age for purchase of beer). Even a state regulation imposing a tax on liquor imported from abroad, a regulation falling squarely within the terms of the Twenty-First Amendment, has been held to fall under the prohibition of the Export-Import Clause. *See Department of*

Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 345-46 (1964). Such cases illustrate that the text of the Twenty-First Amendment is not to be read as erasing all preceding constitutional text. After all, the First Amendment upheld in *44 Liquormart* preceded the Twenty-First Amendment's ratification by 140 years, and the Fourteenth Amendment vindicated in *Craig* by 70 years.

Nor does the Twenty-First Amendment shield state regulation from Congress's affirmative exercise of power under the Commerce Clause. Alcoholic beverage industries are governed by federal legislation enacted under Congress's affirmative Commerce Clause power, such as the Sherman Act, even though that charter of free enterprise is not embedded in a constitutional amendment and long preceded the Twenty-First Amendment. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 711-16 (1984); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106-14 (1980). Indeed, if the Twenty-First Amendment conferred such expansive plenary power on the States as Michigan contends, then a vast array of federal regulations of alcoholic beverages could be trumped by state laws, turning the ordinary operation of the Supremacy Clause on its head. This is not and has never been the law.

B. The Twenty-First Amendment Does Not Displace the Nondiscrimination Principle of the Dormant Commerce Clause.

Michigan and the wholesalers nonetheless contend that even if other constitutional provisions restrict aspects of the state regulation of alcohol, the Commerce Clause does not restrict *in any way* a State's Twenty-First Amendment power to regulate the importation and sale of alcohol. *See* 03-1120 Br. 24 (claiming the power to regulate importation is absolutely unlimited by the Commerce Clause); *see also* 03-1116 Br. 31. This statement proves too much, since there can be no doubt of Congress's *affirmative* authority under the

Commerce Clause to pass the vast array of federal laws that now exist governing interstate commerce in alcohol. *See Hostetter*, 377 U.S. at 332 (rejecting the proposition that the Twenty-First Amendment overrode Congress' Commerce Clause power as "patently bizarre and ... demonstrably incorrect").

Even if understood as limited to the *negative* implications of the Commerce Clause, however, Michigan's statement is belied by the history and jurisprudence of the Twenty-First Amendment as it meets *discriminatory* state liquor legislation. It is common ground that a State enjoys broad power to regulate the importation and sale of liquor within its borders. *See, e.g.*, *California Retail Liquor Dealers Ass'n*, 445 U.S. at 110; *North Dakota v. United States*, 495 U.S. 423, 432 (1990). But this Court has never held that such power is unlimited, even with respect to regulating importation. Both the history of the Amendment's passage and this Court's case law make clear that a State is forbidden from discriminating against interstate commerce in alcohol as much after the Twenty-First Amendment as before it.

1. The Enactment of the Twenty-First Amendment Did Not Undermine The Nondiscrimination Principle.

The Twenty-First Amendment ended Prohibition, and its section 2 granted States authority to regulate and thus burden interstate commerce in a way that would otherwise run afoul of the Commerce Clause. Section 2 entitles a dry State or a State with dry counties, for example, to exclude liquor at its borders in order to reinforce a ban on sale or consumption within the State. But the Twenty-First Amendment does *not* allow States to violate the fundamental principle of national economic union by explicitly discriminating against alcohol producers situated out of state. The touchstone of the authority granted the States over alcohol by the Twenty-First Amendment is evenhandedness toward those in and out of

state. "[T]he greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000) (Easterbrook, J.).

The continuity of the nondiscrimination principle is clear from the history of the rise and fall of Prohibition. Before the Civil War, the Court held that States had essentially plenary power to regulate the production and trade of alcoholic beverages within their borders. *See License Cases*, 46 U.S. (5 How.) 504, 577 (1847) (Taney, C.J.). In the late nineteenth century, however, as an increasing number of States became "dry," the Court, applying its then-prevailing view of the dormant Commerce Clause, began to whittle away at that power. Thus, while the Court continued to allow States to prohibit the production and consumption of alcohol within their borders, *see Mugler v. Kansas*, 123 U.S. 623, 661-63 (1887), the Court also held that States could not restrict the importation of liquor to persons possessing a permit, *see Bowman v. Chicago & Northwestern Ry.*, 125 U.S. 465, 499-500 (1888), and then held that States could not regulate the importation or resale of alcohol as long as the alcohol remained in its original package, *see Leisy v. Hardin*, 135 U.S. 100, 108-10 (1890).

The effect of these decisions was that States could regulate alcohol produced by in-state persons, but not alcohol imported into the State from out-of-state persons, rendering state dry laws unenforceable as a practical matter. In order to eliminate this problem, Congress enacted the Wilson Act, which authorized States to regulate imported alcohol "to the same extent and in the same manner" as non-imported alcohol. 26 Stat. 313 (1890). The Wilson Act did not accomplish its purpose, however, because this Court construed the measure narrowly as empowering States to regulate only the *resale* of imported alcohol in its original package, not the direct *shipment* of alcohol to consumers. *See Rhodes v. Iowa*, 170 U.S. 412, 423 (1898); *Vance v. W.A.*

Vandercook Co., 170 U.S. 438, 446 (1898). Again seeking to eliminate the *Bowman/Rhodes* loophole by which out-of-state producers had an advantage over in-state producers and could help in-state parties circumvent state alcohol law, Congress passed the Webb-Kenyon Act, which states, in relevant part, that "[t]he shipment or transportation ... of ... intoxicating liquor of any kind from one State, Territory, or District of the United States into any State, Territory or District of the United States ... to be received, possessed, sold, or in any manner used ... in violation of any law of such State, Territory, or District ... is prohibited." 37 Stat. 699 (1913), now codified at 27 U.S.C. § 122. The Webb-Kenyon Act thus granted States the power to remain "dry" by regulating imported alcohol just as they regulated alcohol produced or sold inside the State.

Prior to Webb-Kenyon, the Court had also held that the Commerce Clause prohibited States from discriminating against out-of-state products. *See Walling v. Michigan*, 116 U.S. 446, 460 (1886). Webb-Kenyon was addressed only to the *Bowman/Rhodes* line of cases, and did not affect the rule against discrimination (although it would have been easy for Congress to do so). Therefore, the statute did not authorize discrimination against alcohol brought into one State from another. *See Pacific Fruit & Produce Co. v Martin,* 16 F. Supp. 34, 39-40 (W. D. Wash. 1936).[8]

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[8] A review of state statutes extant at the time of Webb-Kenyon's passage likewise reveals no origin-based discrimination. Most regulation was aimed at morality by, for example, prohibiting sales to certain enumerated categories of persons, including "drunkards" and "Indians," and prohibiting card-playing and female musicians in saloons. *See e.g.*, N.M. Stat. Ann. § 2926 (1915); S.D. Rev. Code § 2856 *et seq.* (1903). Otherwise, alcohol regulation was largely a matter of local, rather than statewide, control. Although a few States had statewide prohibition, *see e.g.*, N.C. Rev. L. § 2058 (1908); Ann. Code. Ga. § 1770nn (1907), the majority of state regulations involving prohibition allowed localities the option of prohibiting alcohol. *See e.g.*, Mass. Rev. L. ch. 100 §§ 13, 48 (1902); S.D. Rev. Code § 2856 (1903); Gen. Code Ohio §§ 6097, 6108 *et*

In 1919, the Eighteenth Amendment was ratified, and the "Noble Experiment" began. *See, e.g.*, William E. Leuchtenburg, *The Perils of Prosperity 1914-1932*, at 212-17 (2d ed. 1993). That experiment came to an end 14 years later with the Twenty-First Amendment's ratification. Section 1 repealed the Eighteenth Amendment, and thereby ended nationwide Prohibition. For its part, the lesser-known section 2 "closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes." *Craig v. Boren*, 429 U.S. 190, 205-06 (1976); *see also* 76 Cong. Rec. 4172 (1933) (section 2 effectively "incorporate[d] [the Webb-Kenyon Act] permanently in the Constitution") (statement of Sen. Borah). Section 2, whose language tracks that of the Webb-Kenyon Act almost exactly, was designed to put to rest any lingering doubts about the Webb-Kenyon Act's own constitutionality. *See* 76 Cong. Rec. 4170 (1933) (statement of Sen. Borah).

Despite Michigan and its wholesalers' efforts to portray isolated statements in the debates as evidencing States' absolute power over all alcohol importation, *see* 03-1116 Br. 19-20; 03-1120 Br. 21-23, nothing in the legislative or ratification history of the Twenty-First Amendment or the Webb-Kenyon Act in fact indicates that section 2 was intended to allow States *to discriminate* in favor of in-state

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seq. (1910); N.M. Stat. Ann. § 2927 (1915); Ann. Consol. Laws of N.Y. §§ 13, 23 (1917); Mo. Stat. Ann. § 3027 *et seq.*; Pierce's Wash. Code § 5713 (1905). Few States, including those with statewide prohibition, had any regulations regarding the shipment of alcohol, but those that did prohibited shipping to localities that opted to be dry. Those laws did not distinguish between in-state and out-of-state shippers. *See e.g.*, Ky. Stat. §§ 2554, 2557a, 2569a (Carroll 1915); Ann. Consol. Laws of N.Y. §§ 13, 23 (1917).

producers.[9] To the contrary, the entire history of legislative efforts in this area is one of ensuring *evenhanded* regulation of in-state and out-of-state producers in order to effectuate local prohibition and to eliminate the rather odd discrimination against in-state producers that had prevailed as a result of this Court's earlier interpretation of the dormant Commerce Clause.

In a series of short opinions in the period following ratification of the Twenty-First Amendment, this Court suggested that the power of States to regulate under section 2 was quite generous. *See, e.g., State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 62-64 (1936); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403-04 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138-39 (1939). But despite some broad statements to the effect that a State's power under section 2 is "unfettered by the Commerce Clause," *Ziffrin*, 308 U.S. at 138, even those early cases do not support Michigan and the wholesalers' assertion that section 2 trumps the nondiscrimination principle. *See* 03-1116 Br. 21-22; 03-1120 Br. 24-27.

In *Young's Market*—the case on which all of this Court's other early cases rest and upon which Michigan and the wholesalers rely so heavily—this Court considered a constitutional challenge by wholesalers to California's post-

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[9] The core concern of the legislative drafters of section 2 of the Twenty-First Amendment was "to assure the so-called dry States against the importation of intoxicating liquor into those States." 76 Cong. Rec. 4141 (1933) (statement of Sen. Blaine); *see also id.* at 4518 ("Section 2 attempts to protect dry States.") (statement of Rep. Robinson). The core concern of the state ratifying conventions was temperance, and the only state convention delegate to make a recorded comment on shipment repeated what the drafters had said: "All those who traffic in liquor across state lines *which have dry laws* may and will be prosecuted." *Ratification of the Twenty-First Amendment to the Constitution of the United States* 104 (Everett S. Brown ed., 1938) (reprinted 1970) (statement of Mr. Wilson).

Prohibition regulatory scheme, under which wholesalers were required to pay $50 for a wholesaler's license in order to distribute beer, and importers were required to pay an additional $500 in order to import beer into the State. 299 U.S. at 60-61. At the very beginning of its analysis, the Court squarely rejected the contention that this scheme was discriminatory and thereby violated the dormant Commerce Clause. *See id.* at 61-62. The Court reasoned that, while the scheme may have imposed a burden on interstate commerce, "there is no discrimination against [plaintiffs] qua wholesalers," since wholesalers paid the same fee to sell either imported or domestic beer. *Id.* at 61. The Court therefore concluded that "the case does not present a question of discrimination prohibited by the commerce clause." *Id.* at 62. Insofar as subsequent cases (and the wholesalers) characterized *Young's Market* as affirmatively holding that "discrimination against imported liquor is permissible," *e.g., Mahoney*, 304 U.S. at 403, that characterization does not comport with the decision's express understanding of the state regulation in question as nondiscriminatory.[10]

To the extent language in the Court's early Twenty-First Amendment cases suggested that state power under section 2 was effectively unlimited, *see, e.g., Mahoney*, 304 U.S. at 403-04 (rejecting Equal Protection challenge to state liquor regulation), this Court has long since distanced itself from such a sweeping view. The Court has expressly stated that section 2 does not give States unfettered power to regulate

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[10] The wholesalers incorrectly assert that *Young's Market* affirmed a discriminatory law that "imposed a $500 license fee for wholesalers to import beer [but] imposed no analogous fee for locally produced beer." 03-1120 Br. 25. The Court noted that California did in fact impose an analogous fee of $750 for the privilege of producing beer locally. 299 U.S. at 64. They similarly mischaracterize *Indianapolis Brewing Co.* as affirming a discriminatory statute, 03-1120 Br. 26, but again the law at issue was actually characterized by the Court as nondiscriminatory in nature. 305 U.S. at 392, 394.

interstate commerce in liquor. *See, e.g.*, *Bacchus*, 468 U.S. at 275. Thus, in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (invalidating a State's effort to terminate duty-free sales of alcohol to departing international airline travelers), the Court conceded that "in the early years following adoption of the Twenty-first Amendment," it had suggested that a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders," *id.* at 330, but promptly added that "[t]o draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would ... be an absurd oversimplification." *Id.* at 331-32.

2. This Court Has Applied The Nondiscrimination Principle To Strike Down State Regulations Of Alcohol Importation.

The Twenty-First Amendment no more operates to repeal the negative implications of the Commerce Clause than it does to eliminate Congress's affirmative authority to regulate interstate alcohol shipments. In three key cases, this Court has decisively rejected any claim that the Twenty-First Amendment immunizes from strict dormant Commerce Clause scrutiny those state liquor laws that discriminate against or directly regulate interstate commerce. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *and Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989). In each case, the Court applied the nondiscrimination principle to strike down state regulations that fell squarely within the plain language of the Twenty-First Amendment by covering the importation of alcohol.

Bacchus stands in the way of Michigan's vision. As noted

above, *Bacchus* considered the validity of a Hawaii statute that provided a tax exemption for certain locally produced alcoholic beverages. After concluding that this discriminatory exemption violated a "cardinal rule of Commerce Clause jurisprudence," 468 U.S. at 268, the Court then considered whether the provision could be "saved" by the Twenty-First Amendment, *see id.* at 274-76. The Court acknowledged *Young's Market* and other early cases, but it refused to extend the "broad language" in those cases and noted instead that "[i]t is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." *Id.* at 275. The Court determined that "[t]he question in this case is thus whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption ... to outweigh the Commerce Clause principles that would otherwise be offended." *Id.*

Applying that approach, the Court concluded that the Twenty-First Amendment would not save the discriminatory state law. *See id.* at 276. The Court reasoned that it was "certain" that "[t]he central purpose of the [Twenty-First Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.* It was "also beyond doubt that the Commerce Clause itself further strong federal interests in preventing economic Balkanization." *Id.* Therefore, the Court refused to afford the "same deference" to "[s]tate laws that constitute mere economic protectionism" that it would to those "enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* Hawaii simply could not rely upon the Twenty-First Amendment to justify an otherwise discriminatory law. *See id.*

To be sure, not everyone on the Court at the time agreed with *Bacchus*. But since Justice White's opinion for a clear majority of the Court was handed down, every Justice in dissent in *Bacchus* has since relied upon that case for the

nondiscrimination principle. Not a single opinion by any Justice has called *Bacchus* into question. As Justice Scalia explained, *Bacchus* stands for the established proposition that a state statute's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Healy*, 491 U.S. at 344 (Scalia, J., concurring) (*citing Bacchus*, 468 U.S. at 275-76). In short, the baseline since *Bacchus* is nondiscrimination.

Michigan and its wholesaler allies struggle to distinguish *Bacchus*, arguing that the Hawaiian tax regulation did not involve a regulation of "the transportation or importation into any State" of alcoholic beverages covered by the language of section 2. *See* 03-1116 Br. 29; 03-1120 Br. 30-31. Accordingly, the wholesalers argue, *Bacchus* "did not even hint that rational distinctions ... drawn in the course of regulating physical importation may be subject to heightened scrutiny." 03-1120 Br. at 31. To the contrary, however, the Hawaiian regime expressly imposed a tax on all liquors *imported into Hawaii for use therein* that it did not impose on locally produced liquors. A tax on liquor imports is obviously a regulation of the "importation" of liquor into the State. *See Bacchus*, 468 U.S. at 282 (Stevens, J., dissenting).

Nor can the wholesalers find succor in Judge Easterbrook's assertion that "'[n]o decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause.'" 03-1120 Br. 31 (quoting *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000)). The Twenty-First Amendment certainly confers authority on the State to burden commerce in liquor in a way that it may not burden commerce in other products, *e.g.*, by imposing a licensing fee on imports, *compare Young's Market*, 299 U.S. 59 (1936) (upholding licensing fee), *with Bowman v. Chicago & Northwestern Ry.*, 125 U.S. 465 (1888) (striking down permit requirement). But as Judge Easterbrook recognized in the very next sentence (which the wholesalers ignore): "[w]hat

the Court *has* held, however, is that the greater power to forbid imports does not imply a lesser power to allow imports on discriminatory terms." *Bridenbaugh*, 227 F.3d at 853 (*citing Brown-Forman*, 476 U.S. at 579). "Cases such as *Brown-Forman* and *Bacchus* ... treat § 2 as eliminating economic discrimination against in-state commerce of the sort caused by *Leisy*, *Bowman*, and the original package doctrine, *without authorizing discrimination* against out-of-state sellers." *Id.* (emphasis added); *see also Beskind v. Easley*, 325 F.3d 506, 515 (4th Cir. 2003) (Neimeyer, J., joined by Luttig and Traxler, JJ.) ("Because North Carolina's ABC laws discriminate against out-of-state wine manufacturers and shippers in favor of in-state wine manufacturers and shippers, the scheme violates 'a central tenet of the Commerce Clause.'") (quoting *Bacchus*, 468 U.S. at 276).

Michigan therefore cannot rely on section 2's guarantee of authority to regulate the importation and distribution of liquor. *See, e.g.*, 03-1116 Br. 14. Even if section 2 gives the State broad power "over the importation and sale of liquor and the structure of the liquor distribution system," *North Dakota v. United States*, 495 U.S. 423, 431 (1990) (plurality opinion), this does not support the quite different proposition that section 2 trumps the nondiscrimination principle, *see Bacchus*, 468 U.S. at 275-276. And so it is that Michigan seeks to overrule *Bacchus*, dismissing it as "wrongly decided insofar as the 21st Amendment is concerned," 03-1116 Br. 28, or that the wholesalers are forced to admit that *Bacchus* is "arguably inconsistent" with their painstaking interpretation of this Court's Twenty-First Amendment jurisprudence, 03-1120 Br. 30.

Bacchus is not so easily dismissed. To the contrary, it is embedded in a series of decisions addressing the interplay between the dormant Commerce Clause and the Twenty-First Amendment. In each, the Court has specifically rejected the idea that section 2 repeals any "central tenet" of the

Commerce Clause. In addition to *Bacchus*, the Court applied similar reasoning in two other cases refusing to "save" state legislation under the Twenty-First Amendment. *See Brown-Forman*, 476 U.S. 573; *Healy*, 491 U.S. 324. In both cases, the Court considered the constitutionality of price-affirmation statutes, which essentially set a maximum price for alcohol sold in the State by requiring producers to affirm that they were selling their products at a price no higher than the lowest price elsewhere in the country. *See Brown-Forman*, 476 U.S. at 576; *Healy*, 491 U.S. at 328.

In *Brown-Forman*, the Court held that a "prospective" price-affirmation statute violated the dormant Commerce Clause because "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce." 476 U.S. at 582. The Court reaffirmed the controlling principle: "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Id.* at 579. It reiterated that "the Twenty-first Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause," *id.* at 584 (*citing Bacchus*), and reasoned that the statute could not be "saved" because the Twenty-First Amendment gave States no authority to control sales in other States. *See id.* at 584-85.

In *Healy*, the Court held that a "contemporaneous" price-affirmation statute was invalid under the dormant Commerce Clause, not only because the statute impermissibly affected prices in other States but also because the statute discriminated against alcohol producers and shippers engaged in interstate commerce because it did not apply to in-state shippers. 491 U.S. at 335-41. Following *Brown-Forman*, the Court reasoned that the statute could not be "saved" because the Twenty-First Amendment conferred no authority on States to regulate extraterritorially. *See id.* at

341-42. In an opinion concurring in the judgment, Justice Scalia, citing *Bacchus*, concluded that "[the law's] discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Id.* at 344.

Michigan and the wholesalers seek to dismiss these cases, as they dismissed *Bacchus*, by arguing that these cases were not "covered by the Twenty-First Amendment." 03-1120 Br. 30; *see also* 03-1116 Br. 30. The wholesalers further suggest that "the discrimination at issue was entirely different from that at issue" here, because the State's pricing law applied only to sellers doing business in Connecticut and another State. They argue that the pricing law did not implicate the Twenty-First Amendment as it had "nothing to do with importation" or even interstate commerce. 03-1120 Br. 29-30 n.15. This is plainly incorrect. In each of these cases, the Court discussed the Twenty-First Amendment at length and flatly rejected it as a defense.

Moreover, in those cases, the statutes at issue clearly *did* concern the importation of liquor into the State. As Michigan recognizes, *see* 03-1116 Br. 30, the Court concluded in *Brown-Forman* and *Healy* that each statute controlled sales in other States, and thus lay outside the scope of the State's authority. But both price-affirmation laws also regulated the price of *imported* beer. Regulation of the price of imported alcohol falls squarely within the express language of the Twenty-First Amendment, and in both *Brown-Forman* and *Healy,* the Court explicitly rejected the argument that these liquor regulations were immunized by the Twenty-First Amendment.

III. CONGRESS HAS NOT AFFIRMATIVELY AUTHORIZED DISCRIMINATORY STATE REGULATION OF LIQUOR IMPORTS THROUGH THE WEBB-KENYON ACT.

Michigan and the wholesalers argue that, even if Michigan's wine shipment law is discriminatory, it does not

violate the dormant Commerce Clause because Congress has exercised its affirmative Commerce Clause power in the Webb-Kenyon Act so as to authorize the States to enact discriminatory liquor regulations. *See* 03-1116 Br. 36-38; 03-1120 Br. 16-17. This argument is without merit. While Congress certainly may confer upon the States the power to discriminate against interstate commerce, it has not done so here.

To begin with, the Webb-Kenyon Act does no more than mirror the language of section 2 of the Twenty-First Amendment. Webb-Kenyon was effectively incorporated into the Constitution by the almost identically worded section 2 of the Twenty-First Amendment. *See Craig v. Boren*, 429 U.S. 190, 205-06 (1976); 03-1116 Br. 38 (recognizing same), It thus can no more operate as a delegation of authority to discriminate than can section 2, *see Bainbridge v. Turner*, 311 F.3d 1104, 1110-11 (11th Cir. 2002), and as discussed above, this Court has repeatedly recognized that the Amendment in no way "repealed" the dormant Commerce Clause.

Michigan points to the phrase "any law" (which is also found in section 2), and argues that this must mean that "any" liquor regulation is immune from scrutiny, regardless of whether it discriminates against interstate commerce. But the argument that the statute amounts to an unlimited delegation has no more purchase here than under section 2 of the Twenty-First Amendment. *See* Section II.A., *supra*. This Court has made clear that those words do *not* immunize State liquor regulations from Commerce Clause scrutiny when used in the Twenty-First Amendment. *See Bacchus*, 468 at 275. There is therefore no reason why those same words, which say nothing at all about discrimination, would have more force when encoded in an act of Congress.

Because congressional authorization of state discrimination against interstate commerce runs contrary to the federal interest in a national economic union, Congress's

intent must be clearly and unambiguously expressed. *See Hillside Dairy, Inc. v. Lyons,* 539 U.S. 59, 66 (2003); *New York v. United States*, 505 U.S. 144, 171 (1992); *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992).[11] Webb-Kenyon expresses no such clear intent. To the contrary, the text of the Webb-Kenyon Act, like that of the Twenty-First Amendment, says absolutely nothing about discrimination, and thus cannot be construed as authorizing Michigan to discriminate against out-of-state wine.

In any event, this Court has held that the "only purpose [of the Webb-Kenyon Act] was to give effect to state prohibitions." *James Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U.S. 311, 322 (1917); *see also McCormick & Co. v. Brown*, 286 U.S. 131, 142 (1932) (Webb-Kenyon "referred to the prohibitory laws of the States, the enforcement of which it was intended to aid"). Webb-Kenyon gives States power to prohibit shipments only where there is a state law prohibiting possession, sale, or use of liquor. *See Adams Express Co. v. Kentucky,* 238 U.S. 190, 199 (1915); *Brennen v. Southern Express Co.*, 90 S.E. 402 (S.C. 1916) (Webb-Kenyon does not apply unless there is a state law prohibiting receipt, possession, sale, or use of liquor). It does not give States power to prohibit shipments into counties where possession and use of alcohol is legal. *See Seaboard Air Line Ry. v. North Carolina,* 245 U.S. 298, 303 (1917). Congress thus did not surrender control over interstate commerce so as to permit discrimination against alcohol brought into one State from another. *See Pacific Fruit & Produce Co. v. Martin,* 16 F. Supp. 34, 39-40 (W. D. Wash.

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[11] Petitioners' citation to the McCarran-Ferguson Act, which expressly exempts state insurance laws from scrutiny under the dormant Commerce Clause, is unavailing. *See* 03-1116 Br. 36; 03-1120 Br. 17 & n.2. Far from supporting petitioners, McCarran-Ferguson demonstrates that Congress knows how to create an exception to the nondiscrimination principle when it wants to do so.

1936).

IV. MICHIGAN'S INTERESTS CAN READILY BE MET BY REASONABLE NONDISCRIMINATORY ALTERNATIVES

This Court's dormant Commerce Clause cases "leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988); *see also Hughes v. Oklahoma*, 441 U.S. 332, 336-37 (1979). Under this exception, the "burden is on the state to show that 'the *discrimination* is demonstrably justified,'" *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 (1992) (emphasis in original; citation omitted), and there must be "some reason, apart from origin" to treat out-of-state articles differently, *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978). The "standards for such justification are high," *New Energy Co.*, 486 U.S. at 278, and require "the clearest showing," *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994), not surmise and speculation, *see Hughes*, 441 U.S. at 338. This Court has only rarely found that a State has met its burden of proving the need to discriminate against interstate commerce, and then only upon an extensive factual record clearly demonstrating the absence of workable alternatives. *See Maine v. Taylor*, 477 U.S. 131, 140-43 (1986) (upholding exclusion of imported baitfish that could introduce non-native parasites harmful to Maine fish, where experts testified a total ban was the only way to prevent that).

Michigan has not come close to meeting such a stringent test. The State asserts that the discrimination is necessary to keep wine out of the hands of minors, prevent loss of revenue, and protect public health and safety, but as the Sixth Circuit found, has not supported this assertion with any proof. *See* 03-1116 Pet. App. 15a; 03-1120 Pet. App. 14a-

15a.[12] Michigan's unproven fears that its interests will be compromised by direct shipping are refuted by the finding of the Federal Trade Commission that the twenty-six States that permit direct shipping have encountered no such problems. *See* FTC Report at 38-40. The National Conference of State Legislatures' Model Direct Shipping Bill provides the model of a nondiscriminatory alternative—require that shippers obtain a permit, label packages as containing alcohol, remit taxes, maintain detailed sales records, consent to jurisdiction and inspection, and agree to follow all other state regulations to the same extent as in-state wineries.

Michigan repeats the same argument rejected by the Sixth Circuit, that the three-tier system serves its regulatory interests, so all parts of it are justified. *See* 03-1116 Br. 9-11, 32-33. The argument begs the question why allowing out-of-state wineries to direct ship is a problem, but allowing in-state wineries is not. "[T]he relevant inquiry is not whether Michigan's three-tier system *as a whole* promotes the goals of 'temperance, ensuring an orderly market, and raising

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[12] Recognizing the paucity of the record, the wholesalers urge the Court to apply a new "rational basis test" for discriminatory liquor regulations, asking only whether "there is any reasonably conceivable state of facts that could provide a rational basis for the regulation." 03-1120 Br. 14, 32-33. This test would contradict established authority making clear that discriminatory state liquor regulations are virtually *per se* invalid. *Brown-Forman*, 476 U.S. at 579; *Bacchus*, 468 U.S. at 268-75. The wholesalers would have this Court apply here the deferential review of laws enacted under Congress's affirmative Commerce Clause power. *See* 03-1120 Br. 32 (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981)). These laws, however, as national regulations of interstate commerce, do not raise any prospect of discriminating against (unrepresented) out-of-state entities nor do they have any danger of having an extraterritorial impact in other jurisdictions. Therefore, the only question in such cases is whether Congress's determination that an activity affects interstate commerce is rational. *See Hodel*, 452 U.S. at 276. Here, by contrast, there is every danger that politically powerful insiders have been advantaged at the expense of unrepresented outsiders, and hence a need for judicial solicitude far exceeding mere rationality review.

revenue,' but whether the discriminatory scheme challenged in this case—the direct shipment ban for out-of-state wineries—does so." 03-1116 Pet. App. 15a; 03-1120 Pet. App. 14a; *see also Beskind*, 325 F.3d at 517 ("the question is whether *discriminating* in favor of in-state wineries ... serves a Twenty-first Amendment interest.").

A. Discrimination Is Not Necessary To Prevent Underage Access To Wine.

Michigan's main defense of its anti-shipment rule is that it protects minors. Aided by several amici, Michigan argues that underage drinking is a serious problem, that minors have easy access to credit cards and the Internet, that the anonymity of electronic purchasing allows minors to easily lie about their ages, and that these factors might in the future translate into an epidemic of minors receiving wine shipments from out-of-state wineries over the Internet.

The argument fails. There is simply no evidence that minors are currently buying wine from out-of-state wineries by direct shipment or that direct shipment would be a likely strategy for minors seeking to purchase liquor.[13] Indeed, the Federal Trade Commission found no evidence that States that allowed direct shipment of wine were experiencing any greater problems with access by minors than States that did not. *See* FTC Report at 34; *see also* C.A. App. 242 (Bridenbaugh Aff. ¶ 22). The evidence shows to the contrary that minors consume mostly beer and hard liquor, and relatively little wine. *See* FTC Report at 12. Minors rarely buy any kind of alcohol by direct shipments, which take several days to arrive, because their purchases tend to be

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[13] In a footnote, Michigan claims to have introduced evidence on this issue, 03-1116 Br. 12, n.18, but they point to nothing in the record. No such evidence exists. *Compare* C.A. App. 92-93 (Stewart Interrog. 2) (testifying that there are no documented cases in which minors received shipments from out-of-state wineries).

spontaneous and designed for immediate consumption. *See id.* at 33 & n.137 (quoting past president of the National Conference of State Liquor Administrators that experience shows "kids want instant gratification"). Since they buy small quantities, minors are much more likely to buy cheaper beer and spirits through offline sources than to pay a hefty 33% to 83% premium to have a bottle of wine shipped. *See id.* at 33-34. They are far more likely to have someone over 21 buy it for them or obtain it from a local retail outlet that does not check IDs. *See id.* at 33; C.A. App. 242 (Bridenbaugh Aff. ¶ 21). Minors also can obtain alcohol easily at parties, from friends and family, and by stealing it. *Reducing Underage Drinking: A Collective Responsibility* 166-68, 175-76 (Richard J. Bonnie & Mary E. O'Connell, eds. 2004).[14]

Michigan and the wholesalers rely heavily on a statement in the *Reducing Underage Drinking* study, published by the National Academy of Sciences, that 10% of minors have obtained alcohol "over the Internet or through home delivery." 03-1116 Br. 11 n.17; 03-1120 Br. 39. Their reliance is misplaced; there actually was no such finding. The source of this statistic is Linda A. Fletcher et al., *Alcohol Home Delivery Services*, 61 J. STUDIES ON ALCOHOL 81, 82 (2000), who reported that 10% of minors had received home deliveries *from local retail stores*, not over the Internet or by direct shipment from out-of-state wineries. Those home deliveries were mostly of keg beer, and there was not a shred of evidence that minors ordered any wine by this method. Petitioners also neglect to point out that this same NAS study did not endorse banning direct shipments to help protect minors, but the nondiscriminatory alternative of licensing and regulation. *See* Bonnie & O'Connell, *supra*, at 6-9, 174-75.

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[14] Available at http://www.nap.edu/books/0309089352/html/ (last visited September 20, 2004).

Even if it were likely that some minors would purchase wine over the Internet, this still would not justify Michigan's *discriminatory* law. It is *already* likely that some minors have such access, because Michigan allows 7684 in-state sellers to take orders by mail, telephone and Internet, and to make home deliveries.[15] Michigan retailers even advertise wine on the Internet and tout their ability to direct ship. C.A. App. 243, 245-46 (Bridenbaugh Aff. ¶ 24, Ex. A). It is therefore impossible to credit Michigan's concern that a direct shipment ban is necessary to prevent underage access to wine.

Michigan bans all direct shipping from out of state, including shipments of wine purchased face-to-face at the winery's tasting room where the seller could see the purchaser and check his or her ID. *See, e.g.*, Ariz. Rev. Stat. § 4-203.04(J) (2003) (permitting direct shipping if purchase made in person at out-of-state winery). But out-of-state wineries are every bit as vigilant in verifying the age of their customers as in-state businesses. *See* C.A. App. 69-70 (Stonington Aff. ¶¶ 4-5); *id.* at 72-73 (Eberle Aff. ¶¶ 4-6); *id.* at 75-76 (Cobb Aff. ¶¶ 4-5); *id.* at 84 (Domaine Alfred Aff. ¶¶ 4-6). The risks, after all, are significant: a winery caught selling to minors can lose its state *and* federal licenses. *See* C.A. App. 241 (Bridenbaugh Aff. ¶¶ 19-20).

If Michigan wants to keep wine out of the hands of

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[15] Mich. Comp. L. § 436.1537 allows licensed retailers and wine makers to sell beer, wine, and spirits for home consumption; this includes the right to ship or deliver to a residence. *See* Mich. Comp. L. § 436.1111(7); Mich. Admin. Code R. 436.1011(7)(b). There are 7644 licensed Michigan retailers authorized to make home deliveries of wine, beer and spirits. *See* Mich. Liquor Control Comm'n, Annual Financial Report 2003 at 10, available at http://www.michigan.gov/documents/annual_report_2003_final_86520_7.pdf (last visited Sept. 20, 2004). There are also 40 Michigan wineries that are allowed to make direct shipments. *See* http://www.michiganwines.com/Wineries/wineries.html (last visited Sept. 20, 2004).

minors, there is a reasonable non-discriminatory alternative to a total ban on shipments from out-of-state wineries. The FTC found that other States permit direct shipping without problem by adopting "various procedural safeguards and enforcement mechanisms to prevent sales to minors." FTC Report at 34. Michigan can enact the Model Direct Shipping Bill, which requires the shipper to affix on the outside of each package of wine a notice that states, "CONTAINS ALCOHOLIC BEVERAGES; SIGNATURE OF PERSON AGED 21 YEARS OR OLDER REQUIRED FOR DELIVERY," and also requires that the recipient prove his or her age. *E.g.*, N.C. St. § 18B-1001.1 (2004).[16] The fact that Michigan already relies on this alternative for the 7684 in-state sellers allowed to direct ship, *see* Mich. Comp. L. § 436.1203(2); Mich. Admin. Code R. 436.1011(7)(b), undermines its purported concern that direct shipment will increase underage access.

B. Discrimination Is Not Necessary To Prevent Loss Of Tax Revenue.

Michigan asserts in passing that banning direct wine shipments is necessary to "ensure the collection of taxes." 03-1116 Br. 33. The argument is not developed, probably because, unlike many States that use wholesalers to collect taxes on imported wines, *see* FTC Report at 5, Michigan collects taxes directly from out-of-state wineries on all wine shipped to Michigan wholesalers, *see* Mich. Admin. Code R. 436.1725(2). Michigan does not explain why the State would not be able to collect taxes on wine shipped directly to

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[16] The permit-and-regulation alternative also advances the State's interest in protecting minors more effectively than a total ban, because legal shipments are more easily monitored than illegal ones. *See* FTC Report at 34; *see also* C.A. App. 238 (Bridenbaugh Aff. ¶ 11); *id.* at 94 (Stewart Interrog. 3) (conceding that illegal shipments to minors are difficult to detect).

consumers instead of wholesalers.

Even if Michigan were to fear greater evasion of tax payments from out-of-state shippers than in-state shippers, it can readily protect its tax revenues as other States do—by issuing permits to direct shippers conditioned on their filing regular reports of sales and remitting appropriate taxes. This is the procedure endorsed by the National Conference of State Legislatures as a nondiscriminatory alternative to a ban on direct shipments. *See, e.g.*, S.C. Code Ann. § 61-4-747(C) (2003). As the FTC Report found, States that condition direct shipment on the payment of taxes have experienced no problem with tax evasion. *See* FTC Report at 4, 38-40; *see also* C.A. App. 242 (Bridenbaugh Aff. ¶ 22).[17] Indeed, New Hampshire has used this alternative for several years, *see* N.H. Rev. Stat. § 178:27, and reports that allowing direct shipping has not caused it to lose any tax revenue. To the contrary, New Hampshire's wine tax revenue increased by $121,000 in 2003, soon after it implemented a permit system. *See* Gary Dennis, *Wine Online*, Manchester Union Leader,
Sept. 14, 2003, at F1 (quoting John Byrne, N.H. Liquor Commissioner).

C. Discrimination is Not Necessary to Maintain an Orderly Market and Protect Public Safety.

Michigan asserts that because unregulated alcoholic beverage sales would pose a danger to public health and safety, it is necessary to ban direct shipping from out-of-state

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[17] Some States express the concern that *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), would prevent them from collecting taxes from out-of-state wineries. *See* Amicus Br. of Ohio *et al.* at 25. The fear is misplaced. *Quill* required a nexus between the business and the State, and a permit would satisfy that requirement.

wineries.[18] This is not the first time a State has come before this Court seeking to discriminate against interstate commerce in the name of public safety. States have used this argument to try to exclude other States' harmful waste from their landfills, *see C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353, (1992); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); keep large trucks off their highways, *see Kassell v. Consolidated Freightways Corp.*, 450 U.S. 662, 667 (1981); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); and exclude unwholesome food products, *see Dean Milk Co. v. Madison*, 340 U.S. 349, 353-54 (1951); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935). This Court has consistently rejected the argument. The fact that the State may legitimately protect health and safety cannot justify discriminatory regulation, because "if a State *discriminates* against out-of-state interests ... such facial discrimination will be subject to a high level of judicial scrutiny even if it is directed toward a legitimate health and safety goal." *GMC v. Tracy,* 519 U.S. 278, 307 n.15 (1997) (emphasis added). A State may regulate in the interests of public safety, of course, but must do so evenhandedly. If an out-of-state wine shipment deserves to be restricted, so does a similar in-state shipment. *See Fort Gratiot Sanitary Landfill*, 504 U.S. at 367 ("no valid health and safety reason for limiting the amount of waste ... from outside the State, but not the amount ... from inside the State").

It is not enough for petitioners to cite statistics about the

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[18] Michigan insists that the Sixth Circuit's decision holds the State powerless to regulate shipping at all. 03-1116 Br. 31-33. But the decision only prohibits them from regulating in a *discriminatory* fashion. Likewise, amici raise a slippery slope argument that the decision will open the door to the direct shipment of beer and spirits. The Sixth Circuit's decision only prohibits Michigan from *discriminating* against out-of-state brewers and distillers.

social costs of alcohol as a justification for the need to heavily regulate. The State's power to regulate alcoholic beverages is not in dispute. Rather, Michigan has the burden of proving the need to *discriminate*. It must show that there is something *more dangerous* about wine from out of state than from within the state. It has not done so, and the Model Direct Shipping Bill sets forth a reasonable nondiscriminatory alternative.

As already noted, Michigan uses this alternative for its in-state wineries. *See* 03-1116 Br. 9-10; Mich. Comp. L. § 436.1203. The State offers no evidence that licensing and regulation would not work equally well for out-of-state wineries. Instead, it suggests that the permit-and-regulation system is inadequate because in-state wineries are "subject to" inspections and searches, and out-of-state wineries are not. 03-1116 Br. 10. This is simply not true. Michigan law provides that a licensee shall make its premises available for inspection, regardless of whether those premises are in-state or out-of-state. *See* Mich. Comp. L. § 436.1217. There is therefore no legal bar to inspecting an out-of-state winery.[19] Moreover, each State regulates its own wineries as Michigan does. *See, e.g.*, Cal. Bus. & Prof. Code § 23356 (2004) (license requirement); Cal. Food & Agric. Code § 41164 (2001) (grape testing and inspection); Cal. Bus. & Prof. Code § 25170 (1997) (labeling restrictions); *id.* § 25236 (content restrictions). Thus, every out-of-state winery already is required to obtain various permits, to maintain its records, and to comply with extensive state (not to mention federal) regulations in order to do business in their home States as well as the twenty-six States that allow direct shipment. *See also* C.A. App. 241 (Bridenbaugh Aff. ¶¶ 19-20). Out-of-

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[19] In any event, Michigan's argument is contrived, because the only evidence in the record demonstrates that state officials do not in fact conduct inspections or searches of in-state wineries. *See* C.A. App. 100 (Stewart Interrog. 9).

state wineries are willing to abide by Michigan laws as well. *See, e.g.*, C.A. App. 85 (Domaine Alfred Aff. ¶ 15).

D. Discrimination Is Not Necessary To Assure Enforcement Of The Dram Shop Act.

Michigan asserts that its direct shipment ban is necessary because out-of-state sellers are not subject to suit under its dram shop act, Mich. Comp. L. § 436.1801. The assertion is frivolous. As a threshold matter, Michigan's dram shop act primarily applies to bars selling liquor for immediate consumption. *See Browder v. Int'l Fidelity Ins. Co.*, 321 N.W.2d 668, 673 (Mich. 1982). It would seem to have little application to a delivery that takes place several days after the sale. In any event, even if the dram shop act applies to a retail seller that ships alcohol to a minor, it draws no distinction between in-state sellers and out-of-state sellers. The law on its face applies to any retail licensee, including one with a shipping license.[20] Michigan has long-arm statutes that give its courts jurisdiction over any out-of-state person who commits an act resulting in a tort in Michigan. *See* Mich. Comp. L. §§ 600.705, 600.715. And federal diversity jurisdiction gives injured plaintiffs access to federal court. 28 U.S.C. § 1332 (2004). It is therefore not surprising that petitioners do not cite a single Michigan case in which a victim of an alcohol-related injury had any problem obtaining jurisdiction over an out-of-state alcohol supplier.

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[20] Contrary to Michigan's assertion, *Tennile v. Action Distrib. Co.*, 570 N.W.2d 130 (Mich. Ct. App. 1997), did not hold that the Dram Shop Act "only applies to in-State licensed retailers." 03-1116 Br. 33. The *Tennile* case holds that because the dram shop act places liability upon retailers who deliver alcohol directly to customers, it cannot be used to sue a wholesaler. It contains no discussion of in-state versus out-of-state sellers.

E. The State Will Have No Difficulty Holding Out-Of-State Wineries Accountable.

Most of the nondiscriminatory alternatives discussed above involve licensing out-of-state wineries that want to engage in direct shipping. Petitioners argue that licensing is not a reasonable alternative because the state will not be able to hold out-of-state licensees accountable to the same extent as in-state licensees. This argument appears contrived, because Michigan has already licensed 252 out-of-state businesses as "outstate seller[s] of wine" and allows them to ship to wholesalers. C.A. App. 306-14 (Pride Aff. ¶ 4). Michigan regulates them, tests their wine, restricts their deliveries, requires that they submit regular written reports of sales, and requires them to pay wine taxes on those sales. *See* 03-1116 Br. 9-11. Many of these are exactly the same wineries that would apply for a direct shipment license, and Michigan offers no explanation why it would suddenly lose the ability to hold them accountable merely because some shipments go to individuals instead of wholesalers.

According to the FTC, the twenty-six States that allow direct shipping do not appear to have problems holding out-of-state wineries accountable. *See* FTC Report at 29-31. Background checks can be done electronically. Books, records and financial data can be mailed, faxed, or electronically submitted to Michigan officials. As one court put it, "[i]n this age of ... computer networks, fax machines, and other technological marvels," it is no harder to inspect and regulate out-of-state license holders than in-state ones. *Cooper v. McBeath,* 11 F.3d 547, 554 (5th Cir. 1994). Other investigations can be conducted in exactly the same way Michigan investigates in-state licensees—by sting operations. *See* C.A. App. 99 (Stewart Interrog. 7). State officials could order wine from out-of-state licensees on a random basis or in response to complaints, to verify whether the winery is complying with all state laws regulating

delivery and payment of taxes.

To the extent that Michigan's argument is based on an allegation that it lacks the resources to regulate an increased number of licensed shippers, it is without merit. An inadequate budget might justify limiting the overall number of permits, but cannot justify discrimination by issuing those permits to in-state businesses only. Besides, as this Court has previously pointed out, the State can always raise the additional funds by charging wineries for the reasonable costs of inspections. *See Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354-55 (1951). Michigan already uses this procedure for offsetting the cost of inspecting hospitals, Mich. Comp. L. § 29.2c; rental housing, Mich. Comp. L. § 125.526(12); motor vehicles, Mich. Comp. L. § 257.716(3); and various other items.

Michigan's argument that it lacks the legal ability to enforce its rules against out-of-state wineries therefore is misguided. It can enforce its rules against out-of-state wineries in the same way it enforces against in-state wineries—by requiring out-of-state wineries to obtain a permit as a condition of engaging in direct shipping and then revoking that permit if the wineries break the law. Nor is there any real danger that out-of-state wineries will treat a Michigan permit lightly, *see* 03-1120 Br. 36-37, because the Tax and Trade Bureau may revoke the winery's *federal* permit if that winery violates a State's laws. *See* 27 U.S.C. § 204(e) (2004). Without a federal "basic permit," a winery cannot operate in *any* State. *See* 27 U.S.C. § 203 (2004). The Bureau has assured the States that it will act on their complaints and "take administrative action against a basic permit where a basic permitee ships alcohol beverages products into a State in violation of the laws of that State." BATF Industry Circular 96-3 (1997).

Michigan also can rely upon the Twenty-First Amendment Enforcement Act, which gives the state Attorney General authority to use the federal courts to enforce compliance with

state laws. 27 U.S.C. § 122a(b) (2004). As the National Alcohol Beverage Control Association has observed, the Act "[provides] state governments with an effective tool to use in preventing the illegal interstate flow of alcohol beverages .. into the hands of underage drinkers." FTC Report at 30 & n. 128.

Finally, the wholesalers purport to defend the interests of in-state wineries, arguing that evenhanded direct shipment regulation is unfair because out-of-state wineries can "use direct shipment as a form of regulatory arbitrage," while in-state wineries cannot. 03-1120 Br. at 37. This "unfairness" argument turns the nondiscrimination principle upside down. Even if a State exercises more control over its own wineries, those in-state wineries (along with in-state wholesalers) exert greater political influence in the State than out-of-state wineries. This Court has long recognized that evenhanded regulation of in-state and out-of-state wineries is essential to ensure that local interests are not able to exert their political influence to obtain special favors that are the sure route to "economic Balkanization." *Bacchus*, 468 U.S. at 276; *see also C & A Carbone*, 511 U.S. at 393 ("The Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests."); *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938) ("[W]hen the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."). This is why the national economic union presupposes here, as elsewhere, that the nondiscrimination principle trumps the assertion of the need for local favor.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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