No. 03-1120

IN THE

Supreme Court of the United States

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,

v.

ELEANOR HEALD, *et al.*,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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The Michigan plaintiffs (respondents in No. 03-1120) concede that (i) States have unique interests in regulating the distribution of beverage alcohol to their citizens (Br. 10, 22, 43); (ii) States cannot effectively regulate such distribution unless they can control the flow of beverage alcohol across their borders (Br. 22); and (iii) the Twenty-first Amendment and the Webb-Kenyon Act were therefore adopted and worded to carve an exception to the dormant Commerce Clause (Br. 21).

Plaintiffs argue that the constitutionally authorized barrier against unlicensed imports that Michigan (like most other States) has had in place since Prohibition comes tumbling down because the State gives one class of state licensees, who are physically located in the State and subject to its life-or-death regulation, a privilege of shipping directly to customers that is not extended to unlicensed out-of-state entities. Their argument is that the difference in regulation is "discrimination" that eliminates Twenty-first Amendment protection and subjects Michigan's law to "strict scrutiny" to see whether the interests of Michigan and its residents would be just as well protected by a less restrictive approach than the Legislature has chosen.

But there is no constitutional principle that States must treat out-of-state and in-state suppliers of beverage alcohol identically or equally, nor (with respect to this product) is there a national preference for open competition, minimal regulation, maximal availability, and low prices. The Twenty-first Amendment and Webb-Kenyon protect the States' broad discretion over the distribution of alcohol to their residents, by giving the States "virtually plenary" control over physical importation. Nothing in their language or history or in this Court's cases suggests that state control over importation is to be limited by the way a State regulates purely in-state distribution activities. All that the Constitution requires is that state regulation of the importation or transportation of beverage alcohol, including any distinctions the State chooses to draw, be rational (as congressional regulation of other parts of commerce must be) and not violate other provisions of the Constitution that the Twenty-first Amendment was not intended to affect.

Even if it were the responsibility of the courts, rather than the Michigan Legislature, to determine what regulatory system works best in Michigan, plaintiffs have not shown how a State can effectively enforce its restrictions on the distribution of alcoholic beverages and collect its tax revenues if it must permit direct shipment by out-of-state entities. A court-imposed permit system licensing an unbounded number of out-of-state sellers would overwhelm Michigan regulators and leave them without their most effective tool: the ability to put violators out of business. The federal enforcement mechanisms that plaintiffs cite are weak substitutes, and forcing Michigan to rely on them is inconsistent with the basic allocation of responsibility that the Twenty-first Amendment established.

If Michigan cannot draw rational distinctions between out-of-state and in-state suppliers of alcoholic beverages, there is no obvious reason why it would not be required to allow any out-of-state wholesaler to ship wine, beer, and spirits to in-state retailers, and to allow any out-of-state retailer to ship wine, beer, and spirits directly to consumers. That would largely mean the end of the three-tier system of regulation that this Court has called "unquestionably legitimate." *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990) (plurality opinion of Stevens, J.); *see also id.* at 447 (Scalia, J., concurring in judgment). This case is not about "fine and rare wines" but about the viability of the entire system of alcohol regulation that the States have relied upon for 70 years.

I. WEBB-KENYON AND THE TWENTY-FIRST AMENDMENT NEITHER INCORPORATE NOR PERMIT ANY REQUIREMENT THAT STATES TREAT OUT-OF-STATE AND IN-STATE SUPPLIERS IDENTICALLY.

Webb-Kenyon and the Twenty-first Amendment grant the States authority to regulate the "transportation or importation" of beverage alcohol. Neither the texts of these provisions nor their historical background authorize the imposition of a requirement that States either treat out-of-state suppliers identically with in-state licensees or face strict judicial scrutiny.

1. Plaintiffs argue that Webb-Kenyon and, by implication, the Twenty-first Amendment "only prohibit[] shipments into dry areas" (Br. 10), and that they therefore "cannot be read" to displace the dormant Commerce Clause in States (such as Michigan) that regulate, but do not bar, the distribution of alcohol (Br. 10, 34; *see also* Br. 21, 23-25 & n.9). That argument rests on misreading *Seaboard Air Line Railway* v. *North Carolina*, 245 U.S. 298 (1917). The passage plaintiffs cite is the Court's summary of the respondent's position in that case. *See id.* at 303. On the next page, the Court rejects that position, and the actual holding of *Seaboard* is the opposite of what plaintiffs claim: "[I]nstead of interposing an absolute bar against all . . . shipments [of imported alcohol], as it was within the power of the state to do," North Carolina had the authority under Webb-Kenyon to "permit[] them upon conditions . . . . The greater power includes the less." *Id.* at 304.[1]

Representative Webb made this clear at the adoption of Webb-Kenyon in 1913. It "applies to all States, 'wet' and 'dry' alike, because every State in the Union has laws against the unrestricted sale of liquor, and this bill would protect the 'wet' States whose laws are to be violated in the use or sale of liquor as well as it would protect the 'dry' States under the same circumstances. It is a State rights measure." 49 Cong. Rec. 2,812 (1913). The later adoption of nearly identical language in the Twenty-first Amendment in

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[1] Other pre-Twenty-first Amendment cases are consistent. *See Rainier Brewing Co.* v. *Great N. Pac. S.S. Co.*, 259 U.S. 150, 154 (1922) (interpreting Webb-Kenyon to authorize State to limit quantity of alcohol that citizens could import and manner in which it could be shipped); *Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U.S. 311, 324 (1917) (Webb-Kenyon Act "operated . . . irrespective of whether the state law did or did not prohibit the individual use of liquor."); *cf. Vance* v. *W.A. Vandercook Co.*, 170 U.S. 438, 447 (1898) (Wilson Act).

1933, and the re-enactment of Webb-Kenyon in 1935, ratified the Court's interpretation of Webb-Kenyon in *Seaboard*.[2]

2. The texts of the Twenty-first Amendment and Webb Kenyon broadly prohibit exactly what plaintiffs seek to do here, without any suggestion that state laws must treat out-of-state suppliers identically or equally with in-state licensees. *See* MB&WWA Br. 15. Plaintiffs nevertheless argue (Br. 20-25) that these provisions were adopted only to reverse the "*Bowman/Rhodes* line of cases and did not affect the rule against discrimination" plaintiffs say was established in cases such as *Tiernan* v. *Rinker*, 102 U.S. 123 (1880), and *Walling* v. *Michigan*, 116 U.S. 446 (1886), and that there is no legislative history specifically approving state laws treating out-of-state and in-state entities differently.

But, first, there would be no warrant for limiting the protection clearly granted by the Amendment and Webb-Kenyon because of supposed silence in their legislative histories. As the Court demonstrated in interpreting the Amendment itself shortly after adoption (*see infra* pp. 7-9), "where the language is unambiguous, silence in the legislative history cannot be controlling." *Dewsnup* v. *Timm*, 502 U.S. 410, 419-420 (1992); *see also Hibbs* v. *Winn*, 124 S. Ct. 2276, 2300 (2004).

Second, the legislative history is *not* silent. An initial draft of Webb-Kenyon included nondiscrimination language, but Congress, on clear notice that States might discriminate between in-state and out-of-state suppliers, chose not to include that language in either Webb-Kenyon or the Twenty-

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[2] Plaintiffs also cite several statements in the legislative history as establishing that "[t]he core concern of the legislative drafters of . . . the Twenty-First Amendment" was to ensure that dry States could remain dry after Repeal. Br. 25 n.9. But while this was obviously an objective, it was hardly the only one. The statements cited by plaintiffs are perfectly compatible with the many statements showing that Congress intended to protect state rights more broadly. *See* MB&WWA Br. 21-22.

first Amendment. *See* MB&WWA Br. 24.[3] In historical context, this choice must be read as intentional—and it was so read at the time in a judicial decision that MB&WWA cited but that plaintiffs fail to address. *See Dugan* v. *Bridges*, 16 F. Supp. 694, 704 (D.N.H. 1936). As Senator Blaine put it during the deliberations, the Amendment gave States "*absolute control in effect* over interstate commerce affecting intoxicating liquors which enter the confines of the States." 76 Cong. Rec. 4,143 (1933) (emphasis added).[4]

Third, *Bowman* v. *Chicago Northwestern Railway*, 125 U.S. 465 (1888), *Rhodes*, *supra*, *Tiernan*, *supra*, and *Walling*, *supra*, all rested on the *same* principle—that importation of alcohol was interstate commerce with which States could not interfere. *See Walling*, 116 U.S. at 461; *Tiernan*, 102 U.S. at 127. Indeed, the Court stated in *Bowman* that "[t]he present case is concluded, we think, by the judgment of this Court in *Walling*," 125 U.S. at 495, and the Court expressly rejected any attempt to distinguish *Walling* on the grounds that the statute there "made a discrimination" in favor of in-state citizens, *id.* at 496. Rather, the operative principle in both cases was that "[i]nterstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce . . . ." *Id.* (quoting

[3] *Amici* DKT Liberty Project (DKT) and Napa Valley Vintners (NVV) attempt to dismiss the Senate's deletion of the nondiscrimination language as merely a procedural maneuver in order to conform the Senate version of the bill to the House version. *See* DKT Br. 17-18 n.5; NVV Br. 17. At best, that does not answer why the House bill omitted that language in the first place.

[4] *Amicus* NVV misreads (NVV Br. 16-17) the statement by Senator Stone that the Webb-Kenyon Act would "put the shipper outside of [a State] upon a level . . . with the shipper within the State." 49 Cong. Rec. 2,917 (1913). In context, Senator Stone was merely explaining that Webb-Kenyon would remedy a perverse consequence of the Wilson Act, namely that out-of-state manufacturers could ship to in-state customers while in-state shippers could not. *See generally Rhodes* v. *Iowa*, 170 U.S. 412 (1898). Senator Stone later clarified that Webb-Kenyon was designed to "enable the State to enforce its own internal policy" and "[h]ow [the liquor traffic] shall be regulated is a question each State should answer for itself . . . ." 49 Cong. Rec. 2,917 (1913).

Robbins v. *Shelby County Taxing Dist.*, 120 U.S. 489, 497 (1887)). When Webb-Kenyon and the Twenty-first Amendment rejected that principle, they overturned all four cases, destroying the foundation of *Tiernan* and *Walling* as well as that of *Bowman* and *Rhodes*.[5]

Fourth, and most important, the Twenty-first Amendment and Webb-Kenyon are themselves inherently "discriminatory" in the sense plaintiffs mean, because they focus on "importation" to enable States to deal with the inherent difference between out-of-state suppliers and in-state licensees. *See Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000). Out-of-state suppliers are not effectively subject to the full range of state regulation, so Michigan and other States have chosen to require that when they sell for in-state consumption, they do so through another firm that is. This treatment of out-of-state producers as a distinct class follows naturally from the States' constitutional and statutory authority to regulate "importation."

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[5] As the Court noted in *Clark Distilling*, Webb-Kenyon's official title was "An Act divesting intoxicating liquors of their interstate character in certain cases," 242 U.S. at 321, and the statute was enacted to "prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws," *id.* at 324. If imported alcohol is divested of its "interstate character" and stripped of the "immunity characteristic" ordinarily accorded by the Constitution, it must be treated, for constitutional purposes, as *intra*state commerce—*i.e.*, subject to the plenary regulatory power of the State, which is subject to constitutional challenge only to the same very limited extent as other state internal economic regulation.

Amicus DKT asserts that "discriminatory laws are not proper or bona fide police laws in the first place" (DKT Br. 15), but it cites no source for any such free-floating restriction on state legislative power. The cases that DKT does cite are cases in which the police power was limited *by the dormant Commerce Clause*. *See, e.g.*, *Vance*, 170 U.S. at 455; *Scott* v. *Donald*, 165 U.S. 58, 91 (1897) ("We cheerfully concede that the [discriminatory] law in question was passed in the bona fide exercise of the police power," but that statute still may be "repugnant to the constitution of the United States"); *Walling*, 116 U.S. at 455. Since the Amendment rendered that doctrine inapplicable to restrictions on alcohol importation, the States' police power is not subject to any other limitation.

3. Finally, plaintiffs' argument (Br. 19-20) that this Court should read a nondiscrimination clause into the Twenty-first Amendment, because it has previously read exceptions into the Amendment to protect personal constitutional rights and Congress's authority to enact legislation, misses the point. None of the constitutional provisions or federal laws at issue in those cases played any role in the adoption of Webb-Kenyon and the Twenty-first Amendment. The purpose of Webb-Kenyon and the Twenty-first Amendment, as plaintiffs concede (Br. 21), was to exempt States from the dormant Commerce Clause. At least after the Twenty-first Amendment, there is no constitutional right to have beverage alcohol as widely and cheaply available as possible, or to sell into a State on the same terms as an in-state licensee.[6]

II. THIS COURT'S CASES REFUTE PLAINTIFFS' CONTENTION THAT ANY STATE STATUTE THAT DRAWS A DISTINCTION BETWEEN IN-STATE AND OUT-OF-STATE ALCOHOL SUPPLIERS IS SUBJECT TO STRICT SCRUTINY.

This Court's cases have consistently interpreted the Twenty-first Amendment to allow States to draw rational distinctions between in-state and out-of-state suppliers of alcoholic beverages. In adopting the Twenty-first Amendment, the Nation gave each *State* the authority to regulate one small portion of interstate commerce—the "transportation or importation" of alcohol into the State "for delivery or use therein"—and nothing in this Court's case law suggests

[6] The Privileges and Immunities Clause argument raised by *amicus* Virginia Wineries Association is not properly before the Court: it was never raised by the Michigan plaintiffs and was excluded from the grant of certiorari in the New York case. For a similar reason, the argument of *amicus* Cargo Airline Association ("CAA") that § 601 of the Federal Aviation Administration Authorization Act (FAAAA), 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A), preempts Michigan's alcohol regulations should be rejected. *See* CAA Br. 12. This argument—which goes far beyond plaintiffs' discrimination argument and would condemn virtually all state laws governing alcohol importation—has never previously been raised in this case or in any of the direct-shipment litigation nationwide.

that a State's exercise of that authority is subject to greater judicial scrutiny than Congress itself receives when it legislates pursuant to the Commerce Clause.

Plaintiffs misdescribe this Court's first case interpreting the Twenty-first Amendment, *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59 (1936), which established that States may discriminate against out-of-state alcohol. Contrary to plaintiffs' suggestion (Br. 26), the Court's opinion expressly recognized that the California law at issue (which the Court upheld) discriminated against out-of-state alcohol. California imposed a $500 license fee for the privilege of importing alcohol, and the Court noted that the State did not "exact[] an equal fee for the privilege of transporting domestic beer from its place of manufacture to the wholesaler's place of business."[7] Indeed, the California law was essentially the same as the laws struck down in *Tiernan* and *Walling*.[8] *Young's Market* upheld the California statute and thus effectively overruled *Tiernan* and *Walling*, because of the intervening adoption of the Twenty-first Amendment.

The Court's statement in *Young's Market* that the case did "not present a question of discrimination prohibited by the commerce clause," 299 U.S. at 62, read in context, did not mean that there was *no* discrimination, but rather that the statute's problems under the Commerce Clause went well beyond discrimination: the statute directly regulated interstate commerce by taxing importation and, under the *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232 (1872), *that* problem could not be remedied simply by equally burdening in-state beer. *See Young's Market*, 299 U.S. at 62. The Court, however, held that the Twenty-first Amendment eliminated *all* dormant Commerce Clause objections to stat-

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[7] The $750 fee cited by plaintiffs (Br. 26 n.10) applied to *manufacturers* of beer and was not analogous to the $500 fee imposed on *wholesalers* that imported out-of-state beer. *See Young's Market*, 299 U.S. at 64.

[8] *See Walling*, 116 U.S. at 454 (striking down $300 Michigan tax on persons selling alcohol imported from out-of-state); *Tiernan*, 102 U.S. at 127 (striking down $200 Texas tax on persons selling beer and wine manufactured out-of-state).

utes regulating alcohol importation. Indeed, the Court specifically rejected the contention that the Twenty-first Amendment gave States authority over importation yet prohibited discrimination: "To say that, would involve not a construction of the Amendment, but a rewriting of it." *Id.* at 62.

The Court's subsequent cases did not (as plaintiffs claim) merely "characterize *Young's Market* as affirmatively holding that 'discrimination against imported liquor is permissible.'" Br. 26. Both *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401 (1938), and *Indianapolis Brewing Co.* v. *Liquor Control Commission of State of Michigan*, 305 U.S. 391 (1939), expressly *held* that the Twenty-first Amendment permits States to enact "clearly discriminat[ory]" laws. *Mahoney*, 304 U.S. at 403. Plaintiffs studiously avoid discussing the facts of these cases, and with good reason: *Mahoney* upheld a law that limited the importation of liquor stronger than 50 proof without limiting its in-state manufacture, 304 U.S. at 402-403, and *Indianapolis Brewing* upheld a statute that prohibited in-state dealers from selling any beer from Indiana or nine other States, 305 U.S. at 392. And there is absolutely no support for plaintiffs' assertion that the Court "characterized the law at issue [in *Indianapolis Brewing*] as nondiscriminatory." Br. 26 n.10. To the contrary, the Court upheld the law on the principle that "discrimination between domestic and imported intoxicating liquors . . . is not prohibited by the equal protection clause." 305 U.S. at 394.[9]

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[9] Plaintiffs highlight (Br. 13-14) the Court's opinion, written by Justice Jackson, in *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525 (1949), which extolled the virtues of unrestricted interstate commerce, but nothing in that opinion contradicts the Court's contemporaneous view that alcohol was different. As then-Solicitor General Jackson stated in 1939, "[A]n exception was made to the generally exclusive power of Congress, and control of commerce between States in intoxicating liquors was handed back to the States of destination." Robert H. Jackson, *Trade Barriers—A Threat to National Unity*, in *Trade Barriers Among the States: The Proceedings of the National Conference on Interstate Trade Barriers* 75 (1939). Even legislation that discriminated to protect local interests, Jackson said, "is quite properly sustained by the Supreme Court." *Id.* at

Plaintiffs are equally wide of their mark in their interpretation of the Court's more recent decisions. Plaintiffs and *amici* repeatedly cite the Court's statement in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), that the Twenty-first Amendment did not repeal the Commerce Clause. Br. 21, 27. The Court was referring, however, to whether the Twenty-first Amendment repealed Congress's *affirmative* power under the Commerce Clause (something not at issue here). *See Hostetter*, 377 U.S. at 332 ("If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor."). The Court strongly reaffirmed that the Twenty-first Amendment immunized state laws against *dormant* Commerce Clause challenges. *See id.* at 330.

In *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), the Court struck down a discriminatory excise tax in Hawaii, but plaintiffs fail to explain the Court's basis for doing so. Neither Hawaii nor the Court could identify any justification for the difference in Hawaii's treatment of in-state and out-of-state alcohol other than protectionism. The tax, in other words, was "not supported by *any* clear concern of the Twenty-first Amendment," *id.* at 276 (emphasis added), and it thus failed rational-basis review. *Bacchus* never suggested that Hawaii's distinction between in-state and out-of-state alcohol triggered "strict scrutiny." Quite the opposite: the Court's actual holding was that state laws constituting "mere economic protectionism" are "not entitled to *the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor*." *Id.* (emphasis added). A state law that draws a distinction between in-state and out-of-state alcohol that is related to the concerns of the Twenty-first Amendment is entitled to deference.[10]

76; *see also Duckworth* v. *Arkansas*, 314 U.S. 390, 398-402 (1941) (Jackson, J., concurring in result).

[10] Plaintiffs also are wrong that Hawaii's excise tax was "obviously a regulation of the 'importation' of liquor into the State." Br. 29. The tax

Plaintiffs are also wrong to suggest (Br. 27) that *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986), and *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324 (1989), applied plaintiffs' "nondiscrimination" principle to strike down state alcohol regulations. *Brown-Forman* was not based on discrimination at all but on the fact that New York's regulation "directly regulate[d] interstate commerce." *Brown-Forman*, 476 U.S. at 582. In *Healy*, the Court found two Commerce Clause problems with the Connecticut price-affirmation statute: its extraterritorial "effect of controlling commercial activity occurring wholly outside the boundary of the State," *Healy*, 491 U.S. at 337, and its "discriminat[ion] against interstate commerce," *id.* at 340. The "discrimination," however, was not a distinction between in-state and out-of-state suppliers, and the Court did not cite *Bacchus*. It was an (apparently accidental) discrimination *among* entities that sold beer in Connecticut, penalizing those that also sold elsewhere (including in-state entities). *Id.* at 341. The ruling was consistent with the Court's theme that Connecticut could not project its regulatory regime into other States. Moreover, the Court held that the Connecticut statute fell outside the protection of the Twenty-first Amendment not because of the "discrimination" but only because of the extraterritorial effect. *See id.* at 342 ("Here, as in *Brown-Forman*, our finding of unconstitutional extraterritorial effects disposes of the Twenty-first Amendment issue.").[11] *Healy* thus leaves intact the Twenty-first Amendment's protection for a statute like Michigan's, which does *not* regulate liquor sales in other States.

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was imposed at wholesale, *after* liquor was imported, and was not an exercise of the core power to control physical importation.

[11] Justice Scalia, writing only for himself, stated that the statute's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment," 491 U.S. at 344, but as noted, the "discrimination" at issue was against firms that also did business out of state, not in favor of in-state suppliers.

Indeed, just one year after *Healy*, the Court in *North Dakota* upheld a state regulatory scheme that imposed special reporting and labeling requirements on alcohol importers and out-of-state distillers. *See* 495 U.S. at 428-429. Despite the facial distinction between in-state and out-of-state alcohol that North Dakota drew, the Court did not apply strict scrutiny. Instead, the Court upheld the labeling and reporting requirements because, in the words of the plurality opinion, they "f[e]ll within the core of the State's power under the Twenty-first Amendment," *id.* at 432, and they "unquestionably serve valid state interests," *id.* at 433.[12]

III. MICHIGAN'S DISTINCTION BETWEEN IN-STATE AND OUT-OF-STATE DIRECT SHIPMENT IS REASONABLY CALCULATED TO ACHIEVE LEGITIMATE STATE INTERESTS.

Plaintiffs attempt to draw the Court into the minutiae of alcohol regulation, arguing that other regulatory rules could protect Michigan as well as its current system, and that Michigan's regime therefore does not meet strict scrutiny. But strict scrutiny is not the standard. The proper standard of review is rational-basis scrutiny, and Michigan's regime easily passes that test. As explained below, the distinction that Michigan draws between in-state and out-of-state direct shipping is rationally related to the temperance and tax collection goals of the Twenty-first Amendment. Michigan's regime may not be the only way to way to achieve those goals, but under the Twenty-first Amendment, it is a constitutionally protected way.

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[12] Plaintiffs distort the Seventh Circuit's holding in *Bridenbaugh*. The Indiana statute was for present purposes indistinguishable from Michigan's. *See* 227 F.3d at 851 (Indiana permits "local wineries, but not [out-of-state] wineries . . . to ship directly" to consumers). The Seventh Circuit upheld the statute because there was no "functional discrimination," *id.* at 853, since the law simply "ma[d]e alcohol from every source equally amenable to state regulation," which "is precisely what § 2 [of the Twenty-first Amendment] is for," *id.* at 854.

A. Underage Drinking Is A Real Concern Posed By Direct Shipping.

Plaintiffs dismiss the concerns expressed by Michigan, the 33 other States that support Michigan, the National Conference of State Liquor Administrators, and the Michigan Association of Secondary School Principals, among others, about the effect on underage drinking if States should now lose their control over direct shipping.[13] The arguments of a financially interested California winery and a handful of Michigan oenophiles should not obscure the real concerns of those who deal with underage drinking on a daily basis.

The argument of plaintiffs that "[t]here is simply no evidence that . . . direct shipment would be a likely strategy for minors seeking to purchase liquor" (Br. 37) is false. In a Wirthlin survey, 35 percent of college students under 21 said they would be likely to purchase alcohol online if they could get away with it. C.A. App. 358. Indeed, minors are already having alcohol shipped to their homes. As plaintiffs note, one study showed that 10 percent of surveyed high-school seniors said they had used home delivery services to order alcohol. *See* Linda A. Fletcher et al., *Alcohol Home Delivery Services: A Source of Alcohol for Underage Drinkers*, 61 J. Studies on Alcohol 81, 82 (2000). That the participants in the survey ordered from local retail stores, not out-of-state suppliers, hardly helps plaintiffs' argument. It demonstrates that minors can wait for alcohol to be delivered, and in this age of overnight delivery services it hardly takes "several days" (Br. 37) to ship alcohol across the country.

Plaintiffs' argument that minors are unlikely to drink wine (Br. 37) is both wrong and irrelevant. It is wrong because about 13 percent of 12th graders (more than a quarter of the 12th graders who report drinking alcohol) say they

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[13] *See* Ohio and 32 Other States Br. 23-24; Mich. Ass'n of Secondary School Principals Br. 3-23; Nat'l Alcohol Beverage Control Ass'n Br. 11; Ill. Alcoholism and Drug Dependence Ass'n Br. 5-16.

have consumed wine in the past 30 days.[14] It is irrelevant because, as discussed below in Part IV, plaintiffs' position would logically require States to permit direct shipment not only of wine, but of beer and spirits as well.

The Federal Trade Commission ("FTC") staff report on which plaintiffs heavily rely does *not* show the "twenty-six States that permit direct shipping have encountered no . . . problems." Br. 36. That conclusion was based entirely on the responses of 11 states to a questionnaire sent by the FTC. *See* Staff of the FTC, *Possible Anticompetitive Barriers to E-Commerce: Wine* 31-34, App. B (July 2003) ("FTC Staff Report").[15] None of those 11 States, however, had conducted any active investigation, making the FTC staff's "finding" virtually worthless.[16] As explained by *amici*, the only real way to detect illegal sales to minors is through "stings," since neither minors nor retailers report illegal sales, and such sales otherwise come to light only by chance as States investigate crimes or traffic accidents that happen to be related to an illegal purchase. *See* Mich. Ass'n of Secondary School Principals Br. 11-12.

The States that have investigated the problem have found that alcohol can be purchased by minors over the Internet with alarming ease. Michigan, for example, con-

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[14] National Institutes of Health, *Monitoring the Future: National Survey Results on Drug Use, 1975-2003* (Aug. 2004), Vol. I, at 501, 512, *available at* http://www.monitoringthefuture.org/pubs/monographs/vol1_2003.pdf. Five percent of 12th graders reported drinking 5 or more glasses of wine in a row within the past two weeks. *Id.* at 513. Furthermore, the Fletcher study did not find that the illegal deliveries reported in that study "were mostly of keg beer." Br. 38. The study revealed only that retailers that delivered alcohol were more likely than other retailers to sell keg beer; it made no attempt to determine what alcohol those retailers sold to minors. *See* Fletcher, *supra*, at 83.

[15] *Available at* http://www.ftc.gov/os/2003/07/winereport2.pdf.

[16] North Dakota's response, for example, to the question "Have you had problems with out-of-state or in-state shippers shipping wine directly to minors?" was "No information." FTC Staff Report, *supra*, App. B. The State of Washington stated bluntly that out-of-state direct shipping "is a problem of concern" on a nationwide basis. *Id.*

ducted a series of stings, which revealed that one-third of the websites contacted allowed minors to purchase wine "with no more age verification than a 'click' of the mouse."[17] Massachusetts recently conducted a similar sting and discovered that underage college students were able to order beer, wine, and spirits from online retailers without having to verify their age. *See* Ohio and 32 Other States Br. 23.

B. Out-Of-State Alcohol Suppliers Cannot Be Regulated As Effectively As In-State Suppliers.

When they stop trying to deny the dangers posed by direct shipping, plaintiffs fall back to a second argument: that the dangers posed by out-of-state direct shipping are no greater than the dangers of in-state direct shipping and that States therefore do not need to distinguish between in-state and out-of-state entities in order to address these dangers. Plaintiffs propose instead a permit system that would license out-of-state entities to ship directly to consumers. Such a system, however, would overwhelm state regulators and leave them without their most effective tool: the ability to put violators out of business.

Michigan can enforce its alcohol regulations by inspecting licensees, attaching their property, and putting violators out of business by revoking their licenses. Plaintiffs' suggestion that Michigan license out-of-state wineries would not give Michigan anything like the same real power over them. To begin with, Michigan has no way to limit the number of licenses it could be required to grant and no practical way to oversee the thousands of wineries that might ship directly to Michigan consumers. As the Second Circuit noted, "Requiring New York officials to traverse the country to ensure that direct sales to consumers (no matter how small) comply with New York law would render the regulatory scheme useless."

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[17] Irene M. Mead, State of Michigan's Remarks, Federal Trade Commission Workshop, *Possible Anti-Competitive Efforts to Restrict Competition on the Internet* (Oct. 8, 2002) 9-10, *available at* http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/mead.htm; *see also* C.A. App. 322-327.

Swedenburg v. *Kelly*, 358 F.3d 223, 239 (2d Cir. 2004).[18] But even if Michigan could find some way to allocate a finite number of licenses without regard to location (*see* Br. 46), the cost of inspecting wineries as far away as California would be far higher, and plaintiffs cannot be serious in their suggestion (*see* Br. 43) that Michigan should have to depend on California to enforce *Michigan's* regulations against a California winery. Plaintiffs suggest Michigan could defray the higher inspection costs by imposing a higher fee for importation permits, but under plaintiffs' theory of the case, Michigan would have to justify its differential license fees under heightened scrutiny, since out-of-state licensees would inevitably pay more than in-state licensees.[19] Plaintiffs cannot have it both ways. Either Michigan has a right to draw rational distinctions between in-state and out-of-state entities or all such distinctions will end up in litigation.

Moreover, Michigan could threaten a noncompliant out-of-state winery only with the loss of its Michigan license, not with loss of its business. Plaintiffs effectively concede that this would be a less effective sanction and therefore argue that Michigan could instead rely on the federal Tax and Trade Bureau ("TTB") to revoke a noncompliant out-of-state winery's federal license, or could use the Twenty-first Amendment Enforcement Act ("TAEA"), 27 U.S.C. § 122a, to sue the winery in federal court. But neither is an effective substitute for state administrative control over entities

[18] There is no support for plaintiffs' contention (Br. 43 n.19) that Michigan does not conduct inspections or searches of in-state wineries. The interrogatory cited by plaintiffs asked only what steps Michigan has taken "to enforce restrictions on deliveries to consumers" by in-state wineries. C.A. App. 100. Michigan said it had not taken any enforcement action regarding illegal deliveries (because there was no evidence of such deliveries), but Michigan cited other action that it had taken against in-state wineries (*see* D. Ct. Docket No. 54, Ex. 11, Attach. C), and it nowhere suggested that it does not inspect in-state wineries.

[19] None of the examples that plaintiffs cite in which Michigan charges differential fees based on the cost to the State in other regulatory areas (Br. 46) is analogous, since they all pertain to in-state entities; none involves Michigan charging higher fees to out-of-state entities as such.

with an in-state presence. The TTB has hardly "assured the States that will act on their complaints," as plaintiffs claim. Br. 46. In language omitted by plaintiffs, TTB said only that it "*could under appropriate circumstances* take administrative action." ATF Ruling 2000-1, *Direct Shipment Sales of Alcohol Beverages* (emphasis added).[20] Plaintiffs cite no case in which TTB has, in fact, acted on a State's complaint, and TTB denies any authority to take action against an out-of-state *retailer* that ships alcohol directly to a consumer. *See id.* More fundamentally, making enforcement of state laws dependent on federal officers is exactly what the framers of the Twenty-first Amendment did not want. As for the TAEA, there is no reported case in which a State has used it, and the statute hardly matches the deterrence provided by the threat of revoking an in-state entity's license in an administrative proceeding. The TAEA forces a State to litigate in federal courts across the country (to ensure personal jurisdiction), and the only remedy it provides is injunctive relief against further violations of the State's laws. *See* 27 U.S.C. § 122a.[21]

Michigan does, as plaintiffs note, currently license "outstate sellers of wine," Mich. Comp. Laws § 436.1109(9), but that system is not comparable to what plaintiffs propose, and it would not work for regulating direct shipping to consumers. Michigan currently licenses approximately 290 outstate sellers of wine (many of which are distributors that act as agents for numerous brands of wine) making enforcement much more manageable than under a licensing scheme involving thousands of wineries across the Nation. *See* C.A. App. 305-314. Furthermore, the current system allows licensees to ship into Michigan only through a limited number of in-state wholesalers, allowing Michigan regulators to match the records of the out-of-state seller against the re-

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[20] *Available at* http://www.atf.gov/alcohol/info/revrule/rules/2000-1.htm.

[21] *Cf. Swedenburg*, 358 F.3d at 239 n.13 (TAEA "while helpful to states, can only be used after a violation occurs. Under section 2, states have the authority to be proactive as well as reactive.").

cords of the in-state wholesaler to ensure that taxes are being collected and the State's other regulations are being respected. This Court has long recognized the importance of "localizing" alcohol sales in this manner.[22] Direct shipments of alcohol from thousands of wineries nationwide to an unlimited number of Michigan consumers would give the State no similar means of verifying regulatory compliance.

Michigan has also found that requiring a licensee with an in-state presence is important to revenue collection. Plaintiffs object to this but, ironically, 11 of the plaintiffs invoked the Fifth Amendment when asked whether they had paid the applicable Michigan taxes on alcohol they had ordered from unlicensed shippers. *See* C.A. App. 363, 372, 381, 386, 392, 399, 405, 423, 429, 435, 441. And plaintiffs' tax evasion is hardly exceptional. One complaint of the plaintiff wine buyers in *Bridenbaugh* was that Indiana's insistence on a state licensee would force them to pay Indiana taxes that California direct-shippers had not been collecting. 227 F.3d at 849-850. There may or may not be a legal problem in forcing out-of-state entities to collect and remit Michigan taxes, *cf.* Br. 41 n.17, *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992); C.A. App. 325-355, but there is an obviously greater practical problem when a State has no effective capacity to audit an out-of-state shipper, which has no attachable property in the State and cannot be put out of business.

Finally, plaintiffs' argument that because other States permit some limited forms of direct shipping, the Constitution requires Michigan to do exactly the same is fundamen-

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[22] *See Heublein, Inc.* v. *South Carolina Tax Comm'n*, 409 U.S. 275, 282-283 (1972) ("There must be complete records of the quantities, brands, and prices involved at every stage of each liquor sale. By requiring manufacturers to localize their sales, [the State] establishes a check on the accuracy of these records. For example, when a manufacturer can transfer its goods to a wholesaler in the State only after it submits an invoice showing the price and after it receives permission for the transfer, it is easier for the State to enforce its requirement that the wholesale price in [the State] be no higher than that elsewhere in the country. The requirement that sales be localized is, unquestionably, reasonably related to the State's purposes . . . .").

tally inconsistent with the Twenty-first Amendment principle that the choice belongs to each State. The Nation's history of alcohol regulation is that what is desired, or works, in one State may not be suitable for another. And more fundamentally, this case is not about whether all States should adopt some uniform regime of exceptions, but whether States can broadly require all importation to be done by licensed entities with a substantial in-state presence. That is the requirement that the court of appeals struck down.

IV. PLAINTIFFS' READING OF THE CONSTITUTION WOULD DESTROY THE "UNQUESTIONABLY LEGITIMATE" THREE-TIER SYSTEM.

Plaintiffs (wine consumers and one California winery) did not bring this case to eliminate the exception that allows a small number of licensed Michigan wineries to ship directly to their customers. Their objective, in which they succeeded at the Sixth Circuit, was to break down the requirement that all beverage alcohol go through in-state licensees, and their success would undo the three-tier system for regulating beverage alcohol. MB&WWA Br. 39-40. Plaintiffs do not deny this crucial point.

State control over the distribution of beverage alcohol *depends* on the principle that States may require out-of-state entities to sell through licensed in-state entities, even though the requirement is inherently "discriminatory" in the sense in which plaintiffs use that term. The system was conceived as an alternative to establishing state monopolies for the sale of alcoholic beverages in the post-Repeal era. *See* Wine & Spirits Wholesalers of Am. Br. 8-12. States found that they could achieve the benefits of a monopoly system without the burdens if they limited the right to traffic in alcoholic beverages to in-state entities known to, and licensed by, local officials. *Id.* at 10-11. Out-of-state manufacturers were free to introduce their products into the State, but only through the state-monitored three-tier system. *Id.*

Plaintiffs' interpretation of the Twenty-first Amendment would render the three-tier system subject to "strict scrutiny" and almost certainly unconstitutional. The three-tier system permits only in-state wholesalers to sell to in-state retailers. *See North Dakota*, 495 U.S. at 447 (Scalia, J., concurring in judgment). Under plaintiffs' novel and ahistorical "nondiscrimination" principle, this requirement would constitute facial discrimination. States would have to defend it under strict scrutiny, with the predictable result that the States would be required to allow any wholesaler anywhere to sell to in-state retailers.

Plaintiffs' principle would not stop there. Since Michigan allows in-state retailers to ship alcohol directly to in-state consumers, *see* Mich. Comp. Laws § 436.1203, plaintiffs' nondiscrimination principle would require Michigan to allow out-of-state retailers to ship alcohol directly to the State's consumers, or face strict scrutiny for not doing so. Even a State that barred all direct shipping would be open to the charge of discrimination, since only in-state retailers could sell directly to consumers. Such a State would have to defend its decision under heightened scrutiny, and plaintiffs' brief lays the groundwork for such a challenge, arguing that an in-state presence is not necessary for entities selling alcohol directly to consumers. *See, e.g.*, Br. 38 (minors "far more likely" to obtain alcohol illegally from in-state retailers than via direct shipping); Br. 41 (Michigan can protect tax revenues via permit system for direct shippers). Such a challenge would include all forms of alcohol sold by in-state retailers, and thus would open up the States to shipments of beer and spirits as well.

There is no stopping point short of the destruction of the three-tier system. Plaintiffs' principle would usher in an unrestricted national market in mail-order beverage alcohol—something that would shock the legislators who drafted the Amendment, who thought they had ensured that States would never again be powerless, as they were after *Bowman* and *Rhodes*, to regulate the direct shipment of beverage alcohol to their residents.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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