No. 20-47

In the Supreme Court of the United States

LEBAMOFF ENTERPRISES, INC., *et al.*,
Petitioners,

v.

GRETCHEN WHITMER,
GOVERNOR OF MICHIGAN, *et al.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF WINE RETAILERS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The National Association of Wine Retailers (NAWR) is an association that represents and promotes the unique interests of wine sellers nationwide. Through advocacy, education, and research, NAWR seeks to expand the opportunities for America's wine retailers, whether they serve the wine buying public via small brick-and-mortar establishments, large retail chains, Internet-based businesses, grocery stores, auction houses, or wine clubs. NAWR seeks to unite and serve wine retailing interests by providing essential services, strategic advocacy, and calls to action that will lead to a stable and modernized environment for wine retailing.

Unfortunately, arbitrary and archaic state laws and regulations built for an era that decidedly no longer exists not only hamper wine retailers' abilities to access modern and growing marketplaces locally and nationally, but also hamper consumer choice and customers' ability to access the robust retail market that NAWR's members seek to foster. Too often, these measures serve only to protect local commercial interests from competition while hindering consumers' interests in a diverse and thriving retail market for wine. It is thus a core part of NAWR's mission to work to overcome arbitrary, archaic, and protectionist state-

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have provided written consented to this filing.

based market access and distribution laws and support laws which create a fair and level playing field where wine retailers can legally respond to customer demand that is increasingly turning to online ordering.

NAWR submits this amicus brief in support of Lebamoff's petition for a writ of certiorari. NAWR believes it is necessary for the U.S. Supreme Court to grant the writ in this case, because allowing the *Lebamoff v. Whitmer* decision to stand, will create such chaos and uncertainty in the legal system that wine retailers will be unable to make reasonable business plans.

The COVID-19 crisis has roiled the markets and devastated the economy, while at the same time motivating more people to buy online and receive deliveries of goods so as to reduce their exposure to health risks. Many wine retailers want to invest in the infrastructure to serve wine shipping markets across the country and expand their businesses and enhance their revenue, but because of legal uncertainties surrounding wine retailer shipping, they are not willing to make the necessary investment. NAWR wants these legal uncertainties removed so that wine retailers across the country could grow their businesses during this difficult time.

SUMMARY OF THE ARGUMENT

Justice Samuel Alito, writing for this Court in *Tennessee Wine* clearly stated that "*Granholm* never said that its reading of history or its Commerce Clause analysis was limited to discrimination against products or producers. On the contrary, the Court stated that the Clause prohibits state discrimination against all

"'out-of-state economic interests."[2] This key Supreme Court holding was rejected by the Sixth Circuit panel and replaced by its own theory that discriminatory and protectionist state alcohol laws are immune from any Commerce Clause scrutiny when they regulate retail sales.

The Supreme Court has stated numerous times that the nondiscrimination principle of the Commerce Clause applies in liquor cases. It asserts that the Twenty-first Amendment overrides the Commerce Clause's power in liquor cases.[3] The Sixth Circuit replaces the long-established strict scrutiny standard with a new theory, which does not require a state to present concrete evidence on why discrimination was necessary nor demonstrate the unavailability of any nondiscriminatory alternatives.

Central to the Court's *Tennessee Wine* decision was the question, did the nondiscrimination principles laid out in Granholm apply only to state laws impacting products and producers of alcohol, or did those nondiscrimination principles extend to laws governing alcohol retailers and wholesalers?

The Court answered this question unequivocally: "the [Commerce] Clause prohibits state discrimination against all "'out-of-state economic interests" including retailers. 139 S.Ct. at 2471. If the Supreme Court remains silent on *Lebamoff*, it will create chaos in the

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[2] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2471 (2019)

[3] *Lebamoff Enters. v. Whitmer*, No. 18-2199 at 5 (6th Cir. Apr. 21, 2020).

legal system. As there are eight[4] cases pending in the federal court system with identical facts as in *Lebamoff*, the Supreme Court needs to speak and provide guidance on this issue.

Silence is likely to be viewed by some lower courts as acquiescing to the 6th Circuit's decision and will therefore sow uncertainty about the correct balance between the Commerce Clause and the Twenty-first Amendment.

Moreover, the Court ought to review *Lebamoff* in order to correct the discriminatory and protectionist state laws that currently hinder the important online wine sales and shipping marketplace, and to provide legal certainty to both retailers and consumers, particularly during the current health crisis that has driven more and more consumers to turn online for access to goods.

ARGUMENT

I. The Sixth Circuit's decision in *Lebamoff* rejects and replaces the Supreme Court's Commerce Clause precedents

In Granholm v Heald, this Court held that New York's and Michigan's laws unconstitutionally discriminated against out-of-state wineries by

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[4] *Sarasota Wine Market, LLC v. Schmitt*, No. 19-1948 (8th Cir.); *Lebamoff Enterpr., Inc. v. O'Connell*, No. 1:16-cv-08607 (N.D. Ill.)*; Chicago Wine Co. v. Holcomb*, 1:19-cv-02785 (S.D. Ind.); *Tannins of Indianapolis, LLC v. Taylor*, 3:19-cv-00504 (W.D. Ky.); *B-21 Wines, Inc. v. Guy*, 3:20-cv-00099 (W.D.N.C.); *Bernstein v. Graziano*, 2:19-cv-14716 (D.N.J.); *Anvar v. Tanner*, 1:19-cv-523 (D. R.I.); *Block et al v. Canepa et al 2:2020-cv-03686 (S.D. Ohio).*

forbidding them to ship directly to consumers while allowing in-state wineries to deliver directly violated the Commerce Clause.

> If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms. Without demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage out-of-state wine producers. Under our Commerce Clause jurisprudence, these regulations cannot stand.[5]

In Tennessee Wine, this Court held that the non-discrimination principles outlined in Granholm also apply to discriminatory laws aimed at out-of-state retailers.

> And *Granholm* never said that its reading of history or its Commerce Clause analysis was limited to discrimination against products or producers. On the contrary, the Court stated that the Clause prohibits state discrimination against all " 'out-of-state economic *interests* ,' " *Granholm* , 544 U.S. at 472, 125 S.Ct. 1885 (emphasis added), and noted that the direct-shipment laws in question "contradict[ed]" dormant Commerce Clause principles because they "deprive[d] *citizens* of their right to have access to the markets of other States on equal terms."[6]

The Supreme Court has long recognized in a string of

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[5] *Granholm v. Heald*, 544 U.S. 460, 493 (2005).

[6] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2471 (2019).

cases that the 21st Amendment did not limit Commerce Clause scrutiny of protectionist and discriminatory state alcohol laws[7]. In *Lebamoff,* the Sixth Circuit rejected numerous Supreme Court holdings to conclude that the Commerce Clause has limited authority over interstate commerce where state liquor laws are concerned and upheld a Michigan law that discriminates against out-of-state wine retailers in the same way the Michigan and New York laws discriminated against out-of-state wineries that were overturned in Granholm:

> While the Commerce Clause grants Congress power to eliminate state laws that discriminate against interstate commerce, the Twenty-first Amendment grants the States the power to regulate commerce with respect to alcohol."[8]

Lebamoff's holding that the Twenty-first Amendment abrogates Congress' Commerce Clause powers in liquor matters directly conflicts with this Court's holding in numerous cases. In *Granholm v. Heald* the Court stated that "the Court has held that § 2 does not abrogate Congress' Commerce Clause powers with regard to liquor."[9]

In numerous cases the Supreme Court discussed the interplay between the Twenty-first Amendment and the Commerce Clause. The Court's long held

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[7] *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980); *Granholm v. Heald*, 544 U.S. 460, 487 (2005).

[8] *Lebamoff Enters. v. Whitmer*, No. 18-2199 at 5 (6th Cir. Apr. 21, 2020).

[9] *Granholm v. Heald*, 544 U.S. 460, 487 (2005).

position is that the state regulation of alcohol is limited by the Commerce Clause's nondiscrimination principle. In *Granholm* this Court stated clearly:

> Finally, and most relevant to the issue at hand, the Court has held that state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause.[10]

In *Granholm,* this Court struck down Michigan and New York laws that discriminated in favor of in-state wine producers at the expense of out-of-state wine producers. Michigan and New York banned the shipment of out-of-state wine from coming into the state, while allowing their wineries to ship to consumers in the state.

In addition to striking down New York and Michigan's discriminatory laws, the Court rendered a very clear statement on when state liquor laws under their Twenty-first Amendment powers will be protected. The Court stated that:

> State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. In contrast, the instant cases involve straightforward attempts to discriminate in favor of local producers.[11]

The Court then went on to explain the specific type of analysis that courts must undergo in the case of state liquor laws that, while directly violating the Commerce Clause, nonetheless require an additional layer of analysis to satisfy the power of the states to

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[10] *Id.*

[11] *Granholm v. Heald*, 544 U.S. 460, 463 (2005).

fashion it its own liquor laws:

> Concluding that the States' direct-shipment laws are not authorized by the Twenty-first Amendment does not end the inquiry, for this Court must still consider whether either State's regime "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.[12]

In concluding, the Court stated that:

> We hold that the laws in both States discriminate against interstate commerce in violation of the Commerce Clause, Art. I, § 8, cl. 3, and that the discrimination is neither authorized nor permitted by the Twenty-first Amendment.[13]

In its next Twenty-first Amendment case, *Tennessee Wine*, the Court not only reiterated its analytical framework for Twenty-first Amendment cases laid out in *Granholm*, but also held that the non-discrimination principles from *Granholm* and previous Supreme Court cases that applied to state liquor laws, did indeed apply to wine retailers as well as wine producers.[14]

Prior to Tennessee Wine, certain Federal courts held in favor of state discriminatory liquor laws and determined that *Granholm's* nondiscrimination principle did not apply to retailers, only to producers

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[12] *Id.*

[13] *Id.* at 466.

[14] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2459 (2019).

and products.[15] In other circuits, the courts ruled against state discriminatory liquor laws and determined that *Granholm's* nondiscrimination principle extended beyond producers to retailers.

Justice Alito, writing for the Court in *Tennessee Wine*, settled this question when he held that *Granholm's* nondiscrimination principle extended to retailers.

> The Association and the dissent point out that *Granholm* repeatedly spoke of discrimination against out-of-state products and producers, but there is an obvious explanation: The state laws at issue in *Granholm* discriminated against out-of-state producers. See 883 F.3d at 621. And *Granholm* never said that its reading of history or its Commerce Clause analysis was limited to discrimination against products or producers. On the contrary, the Court stated that the Clause prohibits state discrimination against all " 'out-of-state economic *interests.*[16]

Justice Alito's opinion in *Tennessee Wine* follows the traditional Commerce Clause/Twenty-first Amendment standard. Similar to *Granholm, Tennessee Wine* recognizes that § 2 of the Twenty-first Amendment allows the states great latitude to regulate alcohol, but that § 2 does not allow the states to violate the Commerce Clause's nondiscrimination principle.

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[15] *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009), *Wine Country Giftbaskets.com v. Steen*, 612 F.3d 809 (5th Cir. 2010).

[16] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2471 (2019).

While ruling the Tennessee law violated the Commerce Clause's nondiscrimination principle, Justice Alito went on to reassert Granholm's teaching that because § 2 was involved, an additional analysis was required:

> Having concluded that § 2 does not confer limitless authority to regulate the alcohol trade, we now apply the § 2 analysis dictated by the provision's history and our precedents.[17]

Justice Alito specifically set forth the standard for scrutinizing discriminatory state liquor laws as dictated by § 2's history and Supreme Court precedents. Justice Alito noted:

> Recognizing that § 2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens, we ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground. Section 2 gives the States regulatory authority that they would not otherwise enjoy, but as we pointed out in *Granholm* , "mere speculation" or "unsupported assertions" are insufficient to sustain a law that would otherwise violate the Commerce Clause. 544 U.S. at 490, 492, 125 S.Ct. 1885. Where the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by § 2.

Justice Alito, while acknowledging the special role §2 of the Twenty-first Amendment plays in the

[17] *Id.* at 2474.

constitutional scheme, does not endorse the Sixth Circuit's legal principle that somehow § 2 of the Twenty-first Amendment shields a discriminatory law from Commerce Clause scrutiny. Utilizing the traditional Commerce Clause/Twenty-first Amendment standard, Justice Alito concluded that the discriminatory Tennessee durational residency law, did not meet the strict scrutiny standard.

> The provision at issue here expressly discriminates against nonresidents and has at best a highly attenuated relationship to public health or safety. During the course of this litigation, the Association relied almost entirely on the argument that Tennessee's residency requirements are simply "not subject to Commerce Clause challenge," 259 F.Supp.3d at 796, and the State itself mounted no independent defense. As a result, the record is devoid of any "concrete evidence" showing that the 2-year residency requirement actually promotes public health or safety; nor is there evidence that nondiscriminatory alternatives would be insufficient to further those interests.

Problematically, the Sixth Circuit applied an altogether different standard for evaluating Commerce Clause challenges to state liquor laws:

> When faced with a dormant Commerce Clause challenge to an alcohol regulation, as a result, we apply a "different" test. *Tenn. Wine & Spirits*, 139 S. Ct. at 2474. Rather than skeptical review, we ask whether the law "can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* But if the

> "predominant effect of the law is protectionism," rather than the promotion of legitimate state interests, the Twenty-first Amendment does not "shield[]" it.[18]

The Sixth Circuit indicated that its own and newly minted "Predominant Effect" test applies instead of the traditional strict scrutiny Commerce Clause test because the Twenty-first Amendment permits a "three-tier system" and the Commerce Clause does not prohibit a three-tier system, a theory unrecognized in the Supreme Court's Commerce Clause jurisprudence.

In the Sixth Circuit's view, since the state can mandate a three-tier system under the Twenty-first Amendment, the state has carte blanche power to regulate the importation of alcohol. As Judge Sutton, writing for the Sixth Circuit indicated, a state's "decision to adhere to a three-tier distribution system is immune from direct challenge on Commerce Clause grounds." However, the Sixth Circuit does not contend with *Tennessee Wine's* admonition that, "Although *Granholm* spoke approvingly of that basic model, it did not suggest that § 2 sanctions every discriminatory feature that a State may incorporate into its three-tiered scheme."[19]

Judge Sutton in *Lebamoff* rejects established Supreme Court analysis for Twenty-first Amendment cases, and this would lead to a result, where unsupported assertions and theoretical positions,

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[18] *Lebamoff Enters. v. Whitmer*, No. 18-2199 at 5 (6th Cir. Apr. 21, 2020).

[19] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2471 (2019).

replace concrete evidence as a means to justify discriminatory laws.

The Supreme Court in modern times has never held that § 2 permits state liquor laws to stand that violate the nondiscrimination principle of the Commerce Clause. But what the Court does require is an extra level of analysis, where if the state can justify its law based on legitimate public health and safety concerns and it can demonstrate that nondiscriminatory alternatives were not available, then its law could be upheld. However, as in *Granholm* and *Tennessee Wine*, the Court requires more than "mere speculation" or "unsupported assertions". Rather, it requires a record of concrete evidence to sustain a law that would otherwise violate the Commerce Clause.

In *Tennessee Wine,* the Supreme Court acknowledged Judge Sutton's unsupported reading of § 2 found in his dissent from the Sixth Circuit *Byrd* case and chose not to adopt his reasoning.[20]

> The dissent disagreed, reading § 2 of the Twenty-first Amendment to grant States "'virtually' limitless" authority to regulate the in-state distribution of alcohol, the only exception being for laws that "serve no purpose besides 'economic protectionism.' " *Id.* , at 633 (quoting *Bacchus Imports, Ltd. v. Dias* , 468 U.S. 263, 276, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984)). Applying that highly deferential standard, the dissent would have upheld the 2-year residency requirement, as well as the

[20] *Byrd v. Tennessee Wine and Spirits Retailers Assn.*, 883 F.3d 608 (2018).

> provision applying that requirement to all officers and directors of corporate applicants. The dissent argued that these provisions help to promote the State's interests in "responsible consumption" of alcohol and "orderly liquor markets."[21]

Under Judge Sutton's view, the Tennessee law was constitutionally permissible because it helped to promote orderly markets and responsible consumption.[22]

The Supreme Court was dismissive of Judge Sutton's argument in his *Byrd* dissent, and it should be dismissive of the same legal reasoning he promulgated in *Lebamoff*. Judge Sutton is applying the same reasoning in the *Lebamoff* case that he applied in the *Byrd* dissent, as though *Tennessee Wine* either never happened or isn't controlling.

Judge Sutton's argument if endorsed by this Court, would have the absurd effect of overturning both *Granholm* and *Tennessee Wine*. To illustrate, under *Granholm*, if we applied the Sutton analytical model, Michigan and New York's discriminatory wine shipping laws would have been upheld because the laws' predominant effect is to prevent minor consumption and tax evasion, regardless of whether the problem existed or not. Sutton's legal principle does not require a record of evidence. Under his deferential and rejected analytical framework, all that is needed to uphold the discriminatory state liquor law, is a nice sounding purpose other than economic protectionism.

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[21] *Tennessee Wine and Spirits Retailers Assn. v. Thomas*, 139 S. Ct. 2449, 2459 (2019).

[22] *Id.*

Further, in his opinion, Judge Sutton does not even discuss whether the state's interest could have been adequately served through, reasonable, nondiscriminatory alternatives.

Judge Sutton's opinion in *Lebamoff* poses many problems and challenges that require urgent attention. There are currently eight cases pending in federal court all with nearly identical laws at issue. If the Supreme Court allows *Lebamoff* to stand, it is more likely to send the message to the eight other courts that it endorses the erroneous *Lebamoff* analysis.

II. Allowing the *Lebamoff* decision to stand will leave no clear constitutional standard for lower courts and may lead to rulings contrary to Supreme Court precedents

In *Granholm* the Court ruled against New York and Michigan's discriminatory winery shipping laws. It took fifteen years for the Supreme Court to take a liquor case to answer the question whether *Granholm's* nondiscrimination principle extended to retailers. During that time there were numerous decisions such as *Arnold's Wines and Wine Country Gift Basket*, which held that a discriminatory state liquor law was immune from the Commerce Clause because of § 2.

In *Arnold's Wines* and *Wine Country Gift Basket*, the Second and Fifth Circuits, utilized the notion of the three-tier system being deemed unquestionably legitimate, as a justification to preclude a *Granholm* Commerce Clause analysis of discriminatory state liquor regulations aimed at retailers.[23]

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[23] *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2d Cir. 2009); *Wine Country Giftbaskets.com v. Steen*, 612 F.3d 809, 818-819 (5th Cir. 2010).

The *Tennessee Wine* Court did not endorse the view that the three-tier system being unquestionably legitimate precluded a Commerce Clause challenge to state laws aimed at the retail tier. The *Tennessee Wine* Court, however, reiterated the principle in *Granholm* that § 2 does not shield discriminatory state laws concerning retailers from the Commerce Clause's nondiscrimination principle. Yet, during the fifteen-year interval between *Granholm* and *Tennessee Wine*, lower courts[24] cited the *Arnold*'s *Wines* and *Wine Country Gift Baskets* rulings to justify and uphold state laws that discriminated against out-of-state retailers and wholesaler, thereby thwarting legitimate and constitutional ambitions of companies and consumers to operate and interact in well-regulated and nondiscriminatory marketplaces.

Judge Sutton's principle, if allowed to stand, could create legal reasoning for lower court judges to deviate from traditional Supreme Court precedent.

III. Economic uncertainty and the health threat from the COVID-19 pandemic urges a Supreme Court hearing on *Lebamoff v Whitmer*

Consumers and wine retailers waited fifteen years after the *Granholm* decision for the Supreme Court to take up *Tennessee Wine* and resolve the issue of whether *Granholm's* non-discrimination principles applied beyond alcohol producers to retailers. During

[24] *Sarasota Wine Mkt., LLC v. Parson*, 381 F. Supp. 3d 1094 (E.D. Mo. 2019); *Lebamoff Enters., Inc. v. Rauner*, No. 16 C 8607 (N.D. Ill. June 8, 2017); *Southern Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799 (8th Cir. 2013).

those years and due to continued discriminatory retailer wine shipping laws in numerous states, consumers could not access numerous products, while retailers' access to various state markets was stymied.

With the COVID-19 pandemic motivating consumers to avoid crowded retail environments, they have turned to online sales and shipments in greater numbers. Wine retailers, wanting to serve this growing market, continue to be blocked by protectionist laws such as the Michigan law in question in this case, even after *Tennessee Wine*, which declared the non-discrimination principles in *Granholm* did indeed apply to retailers. Neither consumers nor retailers can afford to wait another fifteen years before the Supreme Court confirms that *Granholm v Heald* and *Tennessee Wine*, together, prohibit discriminatory laws that are preventing the development of the wine retailer shipping channel. For this reason, the Supreme Court ought to grant Certiorari in *Lebamoff v Whitmer*.

The economy has changed and more consumers are demanding direct to consumer shipping.[25] As more people desire the safety and convenience of shopping online, the economy may change forever and may not revert back to its old model.

In 2019 direct to consumer wine shipping dollar sales grew by an estimated seven-point four percent.[26]

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[25] Natalie Gagliordi, Online retail sales surge 49% during pandemic shutdown (May 12, 2020). https://www.zdnet. com/article/online-retail-salessurge-49-during- pandemic-shutdown/ (last visited June 27, 2020).

[26] Sovos ShipCompliant 2020 Direct to Consumer Wine Shipping Report. https://s33694.pcdn.co/shipcompliant/wp-content/uploads/sites/9/2020/02/2020-Direct-to-Consumer-

In June of 2020 direct to consumer wine shipping dollar sales grew by an estimated thirty-one percent compared to June 2019.[27] Clearly, the COVID-19 pandemic has had a major influence on these growth rates.

Wine shipping is the only guaranteed way for consumers to access the increasing diversity of wine "…products. Yet given…" the current protectionist restrictions on wine shipments from out-of-state retailers in a number of states including Michigan, wine retailers seeking to meet the growing demand are barred from doing so.

Local retail stores can deliver wine to customers in most states; however, this solution is not a panacea for many American consumers. In rural areas, it may not be cost effective for a retailer to deliver to customers. A small-town rural retailer also may not have the resources to deliver wine directly to a consumer, or they may simply not want to drive long distances to deliver wine. As an estimated 1 in 5 U.S. residents lives in a rural area,[28] this could account for many residents not having access to wine during a COVID-19 lockdown.

Common carriers, such as Federal Express and United Parcel Service are the only delivery methods available for these rural consumers.

Wine-Shipping-Report-022120.pdf.

[27]Nielsen Beverage Alcohol Practice, Off premise wine sales up 16.6 percent through July 11; DTC grew 31 percent in June (July 22, 2020). https://www.winebusiness.com/news/?go=getArticle& dataId=234201.

[28]https://www.census.gov/library/stories/2017/08/rural-america.html.

Many retailers want to meet consumer demand and ship wine to residents, including residents in other states. To setup online operations, comply with numerous state legal requirements and to setup a shipping system is expensive. Retailers are required to make a substantial investment before entering the interstate shipping marketplace. However, because of the constitutional uncertainty related to wine retailer shipping, many are not willing to make the substantial investment allowing them to enter the marketplace.

Retailers across the country need to know whether they should invest in building their infrastructure for interstate shipping. By taking up and deciding *Lebamoff v. Whitmer,* the Supreme Court can remove the legal uncertainty and allow businesses to know once and for all, whether they can operate in interstate wine retailer shipping markets.

With the *Granholm* decision in 2005, wine retailers believed they, like wineries, could no longer be burdened by discriminatory wine shipping laws. But courts and state legislatures dashed that hope by advancing the argument that discriminatory state laws barring out-of-state retailer shipping were protected by the power granted to the state by the Twenty-first Amendment. Fifteen years later, the Supreme Court directly dispelled that theory when, in *Tennessee Wine,* Justice Alito deemed that theory meritless. Now, states and Courts ignore the clear teachings of Tennessee Wine. Retailers cannot afford to wait another fifteen years to gain certainty on this question and consumers ought also to be given clarity as to whether or not they may, in the wake of the COVID-19 pandemic, choose safer ways to buy wine.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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