No. 03-1116

In The
Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor; et al.,

Petitioners,

v.

ELEANOR HEALD, et al.,

Respondents.

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

BRIEF FOR THE PETITIONERS

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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?

PARTIES TO THE PROCEEDINGS

Petitioners in Case No. 03-1116, Defendants-Appellees below, are State of Michigan officials including the Governor, the Michigan Attorney General, and the Chair of the Liquor Control Commission. The Petitioners will be referred to collectively as "Michigan." The current holders of those offices have been automatically substituted as parties for the former office holders pursuant to Sup. Ct. R. 35.3.

The Michigan Beer and Wine Wholesalers Association intervened as a Defendant below and therefore is a Respondent in No 03-1116, S. Ct. Rule 12.6, but it has not filed briefs in this Court under that docket number. Its interests are not adverse to the interests of Petitioners in Case No. 03-1116. It is Petitioner in Case No. 03-1120.

Respondents in Case Nos. 03-1116 and 03-1120, Plaintiffs-Appellants below, include Eleanor Heald, Ray Heald, John Arundel, Karen Brown, Richard Brown, Bonnie McMinn, Gregory Stein, Michelle Morlan, William Horwath, Margaret Christina, Robert Christina, Trisha Hopkins, Jim Hopkins and Domaine Alfred, Inc. The thirteen individual Respondents are Michigan residents. Respondent, Domaine Alfred, Inc., is a California winery. The Respondents will be referred to collectively as "the Healds."

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JURISDICTION

The Court of Appeals judgment was entered on August 28, 2003. Pet. App. 19a-20a. That Court denied rehearing en banc on November 4, 2003. Pet. App. 21a-22a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Certiorari was granted on May 24, 2004.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause, U.S. Const. art. 1, § 8, cl. 3, provides, in pertinent part:

> The Congress shall have power . . .
>
> * * *
>
> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

The 21st Amendment, U.S. Const. amend. XXI, provides, in pertinent part:

> Sec. 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of

> intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

27 U.S.C. § 122, the Webb-Kenyon Act, Pet. App. 44a, provides:

> The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the Untied States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

The applicable Michigan statutes, and administrative rules, are Const. 1963, art. 4, § 40, Michigan Compiled Laws (MCL) §§ 436.1109; 436.1111; 436.1113; 436.1203; 436.1537; 436.1603; 436.1605; 436.1607; 436.1701; 436.1801; 436.1903; 436.1909; and Mich. Admin. Code Rules 436.1515; 436.1719. Pet. App. 45a-71a.

STATEMENT OF THE CASE

A. Introduction

Michigan's alcohol regulatory scheme permits licensed, in-State wine producers to ship their product directly to consumers within the State but restricts the ability of unlicensed, out-of-State wineries to do so. The question presented in this case is whether Michigan's scheme violates the dormant Commerce Clause in light of the 21st Amendment.

Michigan answers that the 21st Amendment and the Webb-Kenyon Act, 27 U.S.C. § 122 (1935) gives States the right to control "importation" and "transportation" of intoxicating liquors free of traditional dormant Commerce Clause restraints.[1]

The Healds answer that if a State allows highly regulated in-State licensees to transport alcoholic beverages to in-State consumers, then a State must also allow out-of-State suppliers that same ability or it will be repugnant to the dormant Commerce Clause despite the 21st Amendment.[2]

B. Michigan System

Under the authority provided by the 21st Amendment, the Michigan Legislature created the Michigan Liquor Control Commission ("MLCC" or "Commission") and granted it the sole right, power and duty to control the alcoholic beverage traffic, including the manufacture, importation, possession,

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[1] The Second and Seventh Circuits are in accord with this position. *Swedenburg v. Kelly*, 358 F.3d 223 (2nd Cir. 2004) and *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied*, *sub nom.*, *Bridenbaugh v. Carter*, 532 U.S. 1002 (2001).

[2] The Sixth, Fifth and Fourth Circuits are in accord with this position. *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003), *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003).

transportation, sale and licensing within the State. Mich. Const. 1963, art. 4, § 40; MCL 436.1203.

After prohibition ended in 1933, each State made a choice whether to become a "control" state or a "license" State in terms of the sale and distribution of alcohol. In licensed States, wholesalers and retail sales of alcohol are wholly in the hands of private enterprise. Control States differ in that the State itself is involved in some aspect of the merchandising cycle of one or more types of alcoholic beverage. Both control and license States strictly enforce and license businesses selling alcohol. Michigan is one of eighteen control states.[3] It has a unique blend of public and private enterprise involved in its beverage alcohol distribution system. The Commission is responsible for ordering and buying spirits[4] from suppliers and selling and delivering it to retail licensees. Unlike spirits, beer and wine is purchased from licensed manufacturers and distributed by licensed private wholesalers to licensed retailers.[5]

Persons or entities wishing to manufacture, sell, possess or transport alcohol in the State must apply to the Commission and receive the appropriate license. MCL 436.1203. Specifically, MCL 436.1203(1) and 436.1203(2); Pet. App. 49a-52a provide, in pertinent part:

> (1) Except as provided in this section and section 301, a sale, delivery, or importation of alcoholic liquor, including alcoholic liquor for personal use, shall not be made in this state unless the sale, delivery, or importation is made by the commission, the commission's authorized agent or distributor, an authorized distribution agent approved by order of the

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[3] http://www2.state.id.us/isld/nabcalinks.htm (Last visited 7/20/04).
[4] In Michigan, spirits (i.e. hard liquor) are distributed by the State through special appointed distribution agents. MCL 436.1105(3)(a)-(c).
[5] MCL 436.1113.

> commission, a person licensed by the commission, or by prior written order of the commission. All spirits for sale, use, storage, or distribution in this state, shall originally be purchased by and imported into the state by the commission, or by prior written authority of the commission
>
> (2) For purposes of subsection (1), the sale, delivery, or importation of alcoholic liquor includes, but is not limited to, to the sale, delivery, or importation of alcoholic liquor transacted or caused to be transacted by means of any mail order, internet, telephone, computer, device, or other electronic means. Subject to subsection (3), if a retail sale, delivery, or importation of alcoholic liquor occurs by such means, the retailer must comply with all of the following:
>
> (a) Be appropriately licensed under the laws of this state.
> (b) Pay any applicable taxes to the commission.
> (c) Comply with all prohibitions of the laws of this state including, but not limited to, sales to minors.
> * * *

In order to obtain alcoholic beverages in Michigan, consumers must purchase from licensed retailers within the State.[6] Michigan's retail licensees are divided into two classes: on-premises, where alcohol is consumed at the licensed

[6] MCL 436.1111(5), MCL 436.1203(2). Consumers also may personally transport into Michigan up to one case per day of wine or beer purchased outside the state for their own use and consumption. MCL 436.1203(7)(a) If a consumer wishes to purchase alcohol by Internet, catalog, or telephone, the order may be placed outside the state as long as a licensed, accountable Michigan retailer fills it. MCL 436.1203(7)(b) and MCL 436.1203(1).

premises,[7] and off-premises, where alcohol is purchased for consumption elsewhere.[8] This case deals only with off-premises licensees.

Michigan, like many other States, adopted a three-tier distribution system for wine and beer. Michigan's three-tier distribution system requires that licensed manufacturers, whether located in Michigan or not (the first tier), sell to licensed wholesalers (the second tier), who then sell to licensed in-State retailers (the third tier), who then sell to consumers.[9] Michigan's law does not authorize out-of-State suppliers (*i.e.*, manufacturers, wholesalers or retailers) of alcoholic beverages (such as wine) to sell and transport alcoholic beverages from out-of-State directly to Michigan residents without first passing through an in-State licensee. See Mich. Admin. Code r. 436.1057 ("A person shall not deliver, ship, or transport into this state beer, wine, or spirits without a license authorizing such action, except in accordance with r. 436.1722, or without the prior written approval of the commission.")

In addition to the traditional type of retailer that sells various alcoholic beverage products, Michigan law provides for wine maker and microbrewery licenses that do not fall

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[7] Examples are bars and taverns. Bars generally have class C licenses and can sell at retail beer, wine, mixed spirit drink, and spirits for consumption on the premises. MCL 436.1107(2). Many other license classifications exist under Michigan's Liquor Control Code, and it is not uncommon for an entity to hold more than one classification. For example see MCL 436.1107(2)-(11).

[8] Examples are liquor and grocery stores. These entities must have Specially Designated Merchant (SDM) and/or Distributor (SDD) licenses allowing them to sell beer and wine (SDM), MCL 436.1111(12) or hard liquor (SDD), MCL 436.1111(12), for consumption off the premises.

[9] First tier, manufacturer: MCL 436.1109(1), MCL 436.1607(1), Pet. App 45a, 59a; Second tier, wholesaler: MCL 436.1113(7), Mich. Admin. Code r. 436.1719(5), Pet. App. 49a, 70a; and Third tier, retailer: MCL 436.1111(5), MCL 436.1113(9), Pet. App. 47a, 49a.

precisely within the traditional three-tier structure.[10] A Michigan winery may produce wines for consignment to Michigan wholesalers, thus operating in the manufacturer tier. It also may act as wholesaler for its own wines, providing them to retailers for sale to consumers. Finally, an in-State winery may sell its own product directly to consumers at the winery or direct ship it to their residences. As a licensed retailer of its product it may sell to consumers in the state in accordance with the Commission rules. MCL 436.1111(5). With respect to other wine or alcohol products, Michigan wine makers and microbreweries, like everyone else, operate directly in the three-tier system. See MCL 436.1305(1)(b).

Michigan has chosen to except in-State wineries from some aspects of the three-tier system because regulatory control over these in-State manufacturers is practical for purposes of collecting taxes and because the State can assess meaningful sanctions for violations of State law.[11] See *Bainbridge v. Turner*, 311 F.3d 1104, 1116 (11th Cir. 2002), (Roney, J., dissenting). Michigan in-State wineries selling at retail are subject to a strict regulatory licensing regimen that includes strict liability for sales to minors and intoxicated persons, auditing and tax collection. MCL 436.1801(3). App. 63a-66a.

However, beer and wine may not be imported, shipped or transported into Michigan without first going through a

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[10] MCL 436.1113(9)(Wine maker), Mich. Admin. Code r. 436.1109(2) (Microbrewery). MCL 436.1501-436.1543 and the Mich. Admin. Code r. 436.1104-436.1149 set forth the general qualifications for licensing. Pet App 49a.

[11] In this new era of wireless and Internet communications, the States' task of regulating the out-of-state flow of alcohol shipments has become more complicated and burdensome. Beverage alcohol products are now only a "click away." Over 21,000 wineries are accessible over the Internet, including 3397 in this country. This figure does not include other suppliers and retailers of alcoholic beverages who are reachable over the Internet. In contrast, Michigan has only 40 in-state winemakers to regulate. http://www.wineweb.com/scripts/wineryCount.cfm. (Last visited 6/22/04). http://www.michiganwines.com. (Last visited 6/22/04).

licensed in-state wholesaler unless otherwise authorized by Commission order. MCL 436.1203(1).[12] Out-of-State retailers or wineries may not direct ship to consumer's doorsteps and there is no available licensing classification authorizing them to do so. *Id*.

To the extent that an in-State wine maker is a limited retailer, it may ship its product under strict regulatory conditions, as other off-premise in-State retailers may do.[13] Wine makers are also held to the same statutory requirements for responsible sales that are imposed upon other retailers, and its license is subject to the same penalties. MCL 436.1903(1).

Michigan requires that beverage alcohol pass through the hands of licensees with a substantial in-State physical presence that makes them subject to effective state regulation and enforcement. Michigan licensed retailers are held to strict regulatory requirements, and may have their licenses revoked for serious offenses such as sales to minors. MCL 436.1701; 436.1801(2); 436.1903(1). Pet. App. 60a-69a. Michigan's system ensures that in-State consumers receive alcoholic beverages only through an in-State distribution system consisting of identified licensed parties, located in Michigan and directly accountable to the State.

Michigan does not bar the importation or shipment of alcohol through its distribution system; it channels alcohol through a three-tier licensing system. MCL 436.1203(1). While some wines are expensive, others are very inexpensive--appealing to minors[14] and substance abusers--and are imported both domestically and internationally into Michigan and other

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[12] See District Court Opinion, Fn 3, Pet. App. 26a-27a.

[13] See sale and delivery restrictions, MCL 436.1203; Mich. Admin. Code r. 436.1011; 436.1021; 436.1305; 436.1503; 436.1515; 436.1702-436.1735.

[14] "Minors find wine online" and regulating such out-of-state shipments presents unique and troubling issues. http://www.statenews.com/editions/021700/p1_beer.html. (Last visited 6/22/04).

States in large volume.[15] Ordering alcohol through the Internet and by direct shipment occurs privately, away from commercial in-State licensed retailers, making it less likely to be observed by other customers, outlet management, surveillance cameras or enforcement agents. Michigan deals with these problems by strictly regulating importation and delivery.

All Michigan licensees, including wine makers, are subject to anti-tied-house provisions of Michigan law.[16] For example, a licensed wine maker or retailer may not have a direct or indirect financial ownership or leasehold interest in a licensed wholesaler. MCL 436.1109(1); 1603(1)-(4); 1607(1)-(2). See *Traffic Jam & Snug, Inc. v. Mich. Liquor Control Comm'n*, 194 Mich. App. 640, 648; 487 N.W.2d 768 (1992).

Michigan's licensees (e.g., retailers, wholesalers, and wine makers) are subject to rigorous investigation in order to become licensed. This requires, among other things, extensive disclosure of financial documents and a police background check. MCL 436.1217; 436.1529**,** Mich Admin Code r. 436.1103, 436.1105, 436.1107, 436.1109, 436.1111, 436.1113, 436.1115. Pet. App. 45a-49a. Once licensed, they must comply with a multitude of statutory requirements and Commission rules designed to protect the consuming public**.**

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[15] http://www.wineinstitute.org/communications/statistics/uswinesales.htm (Last visited 6/22/04).

[16] The phrase "tied-houses" was first used in England. It describes a two-tier system consisting of only suppliers and retailers, as where a bar was tied, by ownership links or contractual obligations, to a specific manufacturer. *Bartholomae & Roesing Brewing Malting Co. v. Modzelewski*, 183 Ill. App. 352, 365 (1913). This "tied-house" effect created marketing practices that encouraged corruption and excessive consumption of intoxicating liquors. "Tied-houses" in the U.S. would, for example, offer "free lunch" to promote business and heavily encouraged the consumption of their brand of beer to defray the cost of the give-away meal. Michigan anti tied-house provisions are codified at MCL 436.1109(1)-(4), and MCL 436.1603 through MCL 436.1607, Pet. App. 45a and 55a. See *Actmedia, Inc. v. Stroh*, 830 F. 2d 957, 961 (9th Cir. 1986).

MCL 436.1217, Mich. Admin. Code r. 436.1011. Michigan law requires that retailers maintain adequate liability insurance. MCL 436.1803(1). These stringent requirements protect Michigan consumers from unlawful sales, including sales to minors, by requiring that alcoholic beverages be sold and distributed to consumers only by persons who are responsible and who can be held accountable. By making licensees accountable to and reachable by the State, the statute helps to ensure their compliance with the law, since violations may subject a licensee to fines, suspension or revocation of their licenses, and even criminal prosecution.

Michigan licensed retailers (including licensed wine makers) also bear the burden of ensuring that sales are not made to minors or intoxicated persons; that sales are made only during hours authorized by statute and special permits; that sales are not made in violation of local option laws; that only State-approved products are sold; that spirit sales are made in accordance with State-mandated price controls, and; that appropriate taxes are collected and remitted to the State. MCL 436.1701(1); 436.1801(2); 436.2109; 436.2113; 436.2115; Mich. Admin. Code r. 436.1043.

Mandatory reporting requirements for in-State licensees also assist the State in regulating licensed retailers. For example, information provided by wholesalers allows the State to ensure that the retailers are paying all taxes due. See Mich. Admin. Code r. 436.1621; 436.1631; 436.1641; 436.1719; 436.1720; 436.1725. Michigan's dram-shop law also places liability on in-State retailers for injuries and deaths resulting from sales to minors or intoxicated individuals. MCL 436.1801. In-State retail licensees are subject to investigation, inspections and searches. See MCL 436.1217, 436.1235; Mich. Admin. Code r. 436.1645, 436.1651, 436.1711, 436.1728, 436.1735.

In summary, the principal reasons for the structural purpose of Michigan's alcohol distribution and licensing system is to ensure an orderly importation and distribution system that helps prevent illegal sales to minors[17] and intoxicated persons and secures the effective collection of Michigan taxes. MCL 436.1203(1)-(8); 436.1701; 436.1801(2). Pet. App. 49a-52a, 60a-66a.

C. U.S. District Court Decision

The Healds filed their lawsuit in the United States District Court for the Eastern District of Michigan alleging civil rights violations under 42 U.S.C. § 1983 and seeking injunctive and declaratory relief. The Healds specifically requested that Michigan's importation laws barring the direct shipment of wine into the State be declared unconstitutional. See MCL 436.1203; 436.1909 and Mich. Admin. Code r. 436.1515; 436.1719(4). Pet. App. 49a-71a. The complaint asserted that Michigan's law, as it relates to the importation of alcohol, facially violated the dormant Commerce Clause since it discriminated between out-of-State and in-State direct shipments of wine.

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[17] A National Academy of Sciences (NAS) study notes the problem of Internet initiated alcohol purchases is so serious that an argument can be made that banning Internet initiated purchase and home delivery sales altogether is warranted in light of the likelihood that these methods will be used by underage purchasers. *Reducing Underage Drinking, A Collective Responsibility*, Richard J. Bonnie. & Mary Ellen O'Connell, (eds) at 174 (2003). The NAS report found that underage alcohol use costs the nation an estimated $53 billion annually, including $19 billion from traffic crashes and $29 billion from violent crime. *Id.* at 1. "Limiting youth access to alcohol has been shown to be effective in reducing and preventing underage drinking and drinking-related problems." *Id.* at 6. "Many Internet sites sponsored by alcohol companies are easy for children to access" and do not require age verification. *Id.* at 142. Surveys have shown that 10% of underage purchasers report obtaining alcohol through the Internet or by home delivery. *Id.* at 174.

The District Court decided the case on Cross-Motions.[18] Michigan's motion for summary judgment was granted and the Healds' motion was denied in an unpublished District Court Opinion. *Heald v. Engler*, 00-CV-71438, Slip. Op. (E.D. Mich. Sept. 28, 2001). Pet. App. 25a-35a. The District Court held that Michigan's importation laws were but one part of a comprehensive regulatory system that was a permissible exercise of State power under the 21st Amendment. It declared that Michigan's law is not "mere economic protectionism" because the State's statutory system is designed "to ensure the collection of taxes from out-of-State wine manufacturers and to reduce the risk of alcohol falling into the hands of minors." Pet. App. 34a-35a. The Healds' motion for reconsideration was denied by the District Court on November 5, 2001. In denying that motion, the District Court reiterated that the 21st Amendment authorizes States to regulate the flow of alcohol within their borders and that the three-tier system is a proper exercise of that authority, despite the fact that such a system places a minor burden on interstate commerce. Pet. App. 38a-39a.

[18] Michigan submitted evidence with its motion showing the difficulty of effective enforcement over out-of-state shippers, including preventing out-of-state direct shipments of alcohol to minors, collecting taxes from such sales and obtaining jurisdiction. The evidence included but was not limited to: affidavits averring to prosecutions for illegal out-of-state direct shipments to minors; surveys showing the problem with underage drinking at state colleges and the widespread use of the Internet for ordering alcohol. Additionally, studies were submitted by the *Amicus* Michigan Interfaith Council on Alcohol Problems and the *Amicus* State Universities demonstrating the widespread marketing of alcohol to minors.

D. U.S. Court of Appeals for the Sixth Circuit Decision

The United States Court of Appeals for the Sixth Circuit reversed the District Court and declared MCL 436.1203 (the keystone statute regulating the importation and distribution of *all* alcoholic beverages) unconstitutional on its face, concluding that the challenged statutory system "discriminated" against out-of-State wineries, in violation of the dormant Commerce Clause, and could not be justified as advancing the traditional "core concerns" of the 21st Amendment. *Heald v. Engler*, 342 F.3d 517, 525-528 (6th Cir. 2003). Pet. App. 14a-18a. The Sixth Circuit remanded the case back to the District Court for entry of summary judgment in favor of the Healds. Pet. App. 19a-20a.

On November 4, 2003, the Court of Appeals denied Michigan's Motion for Rehearing En Banc. Pet. App. 21a-22a. On November 21, 2003 the Court of Appeals stayed its mandate pending Michigan's filing of a certiorari petition with this Court. Pet. App. 23a-24a. Certiorari was granted on May 24, 2004.

SUMMARY OF THE ARGUMENT

The explicit terms of Sec. 2 of the 21st Amendment --"The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited" – unambiguously grant to States broad power to regulate the transportation and importation of alcoholic beverages. Michigan's highly regulated alcohol distribution system was enacted in furtherance of its 21st Amendment powers, and its decision to permit licensed in-State wineries to ship directly to consumers while prohibiting unlicensed out-of-State wineries from doing so is authorized by the express terms of Sec. 2 of the 21st Amendment.

Beginning immediately after adoption of the 21st Amendment this Court has consistently reiterated the principle of virtually unfettered State control over the transportation or importation of intoxicating liquor for delivery or use within the State. *Ziffrin Inc. v. Reeves,* 308 U.S. 132, 138 (1939)*; State Bd. of Equalization v. Young's Mkt. Co.,* 299 U.S. 59 (1936) The 21st Amendment did not repeal the Commerce Clause or any other provision of the Constitution, but the text, history, and purpose of the 21st Amendment demonstrate that it carves out an extremely broad area of State authority. This Court has uniformly held that the 21st Amendment gives States "'virtually complete control' 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)

Michigan's regulatory system is also expressly permitted by Congress. The Webb-Kenyon Act, 27 U.S.C. § 122 (1935), provides "The shipment or transportation . . . of any . . . vinous . . . intoxicating liquor . . . into any State . . . to be . . . sold . . . in violation of any law of such State . . . is prohibited." Michigan prominently argued this point below, but the Court of Appeals did not even mention it in its decision.

The Court of Appeals' decision ignored the express mandate of both the 21st Amendment and the Webb-Kenyon Act, 27 U.S.C. § 122. It would permit out-of-State suppliers of alcoholic beverages to do precisely what the Constitution and Congress forbid – import and transport alcoholic beverages into a State in violation of the laws of that State.

ARGUMENT

I. Sec. 2 of the 21st Amendment gives Michigan the right to structure its beverage alcohol importation and distribution system.

A. Regulation of alcohol prior to the adoption of the 21st Amendment.

From colonial times until 1919, when the 18th Amendment ushered in Prohibition, alcohol beverages were sold primarily in a two-tier system consisting of only suppliers and retailers. This "tied-house" effect created marketing practices that encouraged corruption and excessive consumption of intoxicating liquors. *Nat'l Distributing Co. v. United States Treasury Dep't,* 626 F.2d 997, 1008-1010 (D.C. 1980).

In the Nineteenth Century when some States attempted to prohibit importation of out-of-State shipments of liquor, this Court held that such bans violated the dormant Commerce Clause. The Second Circuit in *Swedenburg v. Kelly,* 358 F.3d 223, 231-232 (2nd Cir. 2004) traced this history, as follows:

> Prior to the Eighteenth Amendment and nationwide prohibition of alcohol, many States attempted to ban the production and consumption of alcohol, but found their efforts thwarted by Supreme Court decisions invoking the doctrine now known as the dormant Commerce Clause. See, *e.g.*, *Bowman v. Chicago & N.W. Ry. Co.*, 125 U.S. 465, 481, 493-94; 31 L. Ed. 700; 8 S. Ct. 689 (1888) (invalidating under the dormant Commerce

Clause a State law restricting the importation of liquor to those possessing a permit); *Leisy v. Hardin*, 135 U.S. 100; 34 L. Ed. 128; 10 S. Ct. 681; 12 Ky. L. Rptr. 123; 12 Ky. L. Rptr. 167 (1890) (holding that, even after importation, liquor contained in its original package remained an article of interstate commerce, subject to federal Commerce Clause authority). As a result of the Court's decisions, "dry" States found themselves in the unenviable position of being able to prohibit consumption of domestic liquor but helpless to stop the importation of liquor from outside their borders. See *Bridenbaugh*, 227 F.3d at 852 (recounting pre-Prohibition jurisprudence).

Congress reacted by enacting the Wilson Act, ch. 728, 26 Stat. 313 (1890), which gave States the authority to regulate imported liquor "*to the same extent and in the same manner* as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." *Id.* (emphasis added.) The Wilson Act's language signaled Congress' intent to allow States to regulate imported alcohol in the same manner as domestically produced alcohol.

The Supreme Court, however, narrowly construed the Wilson Act, permitting States to regulate the resale of imported liquor in its original package, but preventing the regulation of direct shipments to in-State consumers by out-of-State distributors. *Rhodes v. Iowa*, 170 U.S. 412, 423-25; 42 L. Ed. 1088; 18 S. Ct. 664 (1898). Congress responded with the Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913), which prohibited "the shipment or transportation, in any manner or by any means whatsoever, of any . . . liquor of any kind, from one State . . . into any other State . . . which . . . is intended, by any person interested therein, to be received,

> possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . ." *Id.* The Act's broad language ensured that dry States had the authority to prevent the importation of alcohol across their borders. By the time the Supreme Court upheld the Webb-Kenyon Act in *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311; 61 L. Ed. 326; 37 S. Ct. 180 (1917), the temperance movement had gained considerable ground throughout the nation. And in 1919, the Eighteenth Amendment set the nation on a course of national prohibition and ended the States' legal struggle to regulate alcohol.

The 18th Amendment was ratified in January of 1920, expressly prohibiting the sale or traffic of beverage alcohol.

B. Section 2 of the 21st Amendment is controlling because its language is plain and unambiguous and its meaning clear.

"America changed course in 1933 and repealed the eighteenth amendment by § 1 of the 21st [Amendment]." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 852 (7th Cir. 2000), *cert. denied, sub nom., Bridenbaugh v. Carter*, 532 U.S. 1002 (2001). However in § 2 of the 21st Amendment the States were expressly given the power to regulate the transportation and importation of intoxicating liquors for delivery or use in that State:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

In 1936, when first asked to interpret the recently adopted 21st Amendment, this Court remarked, "the language of the

Amendment is clear" and "apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes." *State Board of Equalization v Young's Market Co.*, 299 U.S. 59, 63-64, 62 (1936).

It is the plain and unambiguous language of Sec. 2 of the 21st Amendment that is controlling in this case. In *United States v. Wright*, 302 U.S. 583 (1938) this Court was presented with the question whether a bill had become a law within the meaning of art. 1, § 7 of the U.S. Constitution. The Court noted that the first principle of constitutional interpretation is to give due regard to the deliberate choice of words and their normal meaning. *Id*. at 589. In analyzing the language of a Clause in the Constitution the Court reasoned that "[t]he phrasing of the concluding clause is entirely free from ambiguity and there is no occasion for construction." *Id*. See also, *United States v. Sprague*, 282 U.S. 716, 731 (1931) ("The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where intention is clear there is no room for construction and no excuse for interpolation or addition"); *Reid v. Covert*, 354 U.S. 1, 8, fn 7 (1957) ("This Court has constantly reiterated that the language of the Constitution where clear and unambiguous must be given its plain evident meaning.") Additionally *Wright* is instructive in that the Court determined that it should not adopt a construction that would frustrate the fundamental purpose of a Constitutional provision. 302 U.S. at 596.

Nothing in the text of the 21st Amendment limits States in how they may choose to set up their regulatory framework to deal with the transportation, importation, and distribution of alcoholic beverages. Thus, as a textual matter, there can be no justification for ignoring the plain and unambiguous command of the 21st Amendment.

C. Legislative History of the 21st Amendment.

In addition to the plain text, the legislative history of the passage of the 21st Amendment demonstrates its meaning. The purpose of § 1 of the 21st Amendment was to end Prohibition by repealing the 18th Amendment. One reason for the failure of prohibition was that *national* regulation had not taken into account *local* conditions. See, *e.g.*, 76 Cong. Rec. 4146 (1933), statement of Senator Wagner ("The real cause of the failure of the 18th Amendment was that it attempted to impose a single standard of conduct upon all the people of the United States without regard to local sentiment and local habits.").

Section 2 of the 21st Amendment set forth the manner in which the individual States should regulate alcohol. Such a scheme addressed the concern by some States that they would not be able to protect their residents from alcohol crossing the border from other States because they might lack the power to do so (*i.e.*, because of the dormant Commerce Clause.)[19] 76 Cong. Rec. 4141 (1933), statement of Senator Blaine.

Section 2 was equally concerned with the loss of State tax revenue. See, *e.g., Ratification of the Twenty-first Amendment to the Constitution of the United States*, 142 (Everett Somerville Brown ed., 1938) ("It is both foolish and intolerable to go on submitting to a fallacious system under which an illicit, outlaw liquor traffic annually draws hundreds of millions of dollars of profits out of the nation's capital . . . .") (Indiana ratification convention.) See also Senator Blaine's statement that the purpose of § 2 was, "to restore to the States by constitutional amendment absolute control in effect over

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[19] *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 353-357 (1987)(O'Connor, J., dissenting), contains excerpts from Senate debates showing that the intent was to remove Commerce Clause restrictions from any State's alcoholic beverage regulations.

interstate commerce affecting intoxicating liquors which enter the confines of the States," 76 Cong. Rec. 4143 (1933).

Another purpose of the 21st Amendment was to allow States to moderate consumption of alcohol by separating producers from consumers through a mandated distribution structure, typically a three-tier system of manufacturers, wholesalers, and retailers. Before Prohibition, "tied-houses," where alcohol producers controlled retailers, were considered to have contributed to irresponsible sales and increased consumption of alcohol. See, *e.g.*, H.R. Rep. No. 1542, at 12 (1935) (Federal Alcohol Control Act).[20]

Further evidence that the 21st Amendment was meant to confer broad authority on States is found by examining a proposed § 3 of the Amendment that would have given Congress concurrent power to regulate the sale of alcohol for consumption on the premises. That section was voted down by the Senate because it was inconsistent with § 2 and "would take away from every State in the Union the right to determine how it would regulate the liquor traffic within its boundaries," statement of Senator Black, 76 Cong. Rec. 4177 (1933).[21]

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[20] The Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), prefaced its analysis of the 21st Amendment by approving a refusal to examine such history as demonstrating "a wise reluctance to wade into the complex currents beneath the congressional proposal of the Amendment and its ratification in the state conventions." *Midcal*, 445 U.S. at 107, fn. 10. The Court also noted that Senator Blaine, the Senate sponsor of the Amendment resolution, had also described its purpose as "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors . . ." 76 Cong. Rec. 4143 (1933).

[21] The rejection of proposed § 3 was discussed in *Hostetter v. Idlewild*, 377 U.S. 324, 337 (Black, J., dissenting):

> Proposing to leave even this remnant of federal control over liquor traffic gave rise to the only real controversy over the language of the proposed Amendment. Senator

D. This Court's decisions recognize the State's broad 21st Amendment right to regulate the delivery and use of alcohol beverages within the State.

This Court's decisions shortly after adoption of the 21st Amendment broadly recognized that State beverage alcohol importation and distribution laws were "unfettered by the Commerce Clause." *Ziffrin*, 308 U.S. at 138 (upholding against a Commerce Clause challenge, State restrictions on an interstate carrier of alcoholic beverages); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939)(upholding under the 21st Amendment a Michigan statute that prohibited the importation of beer into Michigan from distributors in States that did not allow unrestricted importation of alcohol products manufactured in Michigan);

> Wagner of New York . . . opposed Section 3 because it would defeat the proposed Amendment's purpose "to restore to the States control of their liquor problem." [76 Cong. Rec]., at 4145. Senator Wagner argued that giving the Federal Government even "apparently limited power" would allow that power to be "extended to boundaries now undreamed of and unsuspected" by those supporting the proposed Amendment. *Id*., at 4147. It is clear that the opposition to Section 3 and its elimination from the proposed Amendment rested on the fear, often voiced during the Senate debate, n2 that any grant of power to the Federal Government, even a seemingly narrow one, could be used to whittle away the exclusive control over liquor traffic given the States by Section 2. Having heard those fears expressed, Senator Robinson of Arkansas, the Senate Majority Leader, asked for a vote "to strike out section 3." *Id*., at 4171. It was because of these fears that the Senate then voted to take Section 3 out of the proposed Amendment while retaining Section 2 and its broad grant of power to the States. *Id*., at 4179. n2 *E. g*., 76 Cong. Rec. 4143 (1933) (Senator Blaine); 4144-4148 (Senator Wagner); 4177-4178 (Senator Black).

State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59 (1936).

In *Young's Mkt.*, sellers of imported alcohol refused to apply for an importer's license required by State statute and regulations, claiming that the requirement discriminated against wholesalers of imported beer and that the statute violated the Commerce Clause. This Court held that there was no discrimination against plaintiffs in violation of the Commerce Clause because of the 21st Amendment. The Court explained, 299 U.S. at 62-63:

> The Amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any State 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the State the power to forbid all importations, which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.

Subsequent decisions of this Court have recognized the continuing vitality of the 21st Amendment and the principle of *Young's Mkt.* that States have very broad powers to regulate alcohol.

The limits of a State's authority to regulate alcohol trafficking under the 21st Amendment were discussed in this

Court's plurality opinion in *North Dakota, supra,* 495 U.S. 423, 426-444 (1990), that involved North Dakota's regulations on labeling and reporting alcohol sold to federal military bases within the State. These regulations were upheld despite a challenge based on the Supremacy Clause, where the purchaser of the alcohol was the federal government, whose military bases are not subject to State regulation.

While noting that the Court had invalidated certain State liquor regulations where the area or transaction fell outside a State's jurisdiction, the plurality opinion, *id.* at 430-431, stated:

> At the same time, however, within the area of its jurisdiction, the State has "virtually complete control" over the importation and sale of liquor and the structure of the liquor distribution system. The Court has made clear that the states have the power to control shipments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated intrastate markets. [citation omitted]

The plurality opinion, *id.* at 433, then noted:

> Given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly. [citation omitted]

A State's œore powers under the 21st Amendment include "promoting temperance," "controlling the distribution of liquor," and "raising revenue." *Id.* at 439.

In a concurring opinion Justice Scalia noted, *id.* at 447:

> The Twenty-first Amendment, which prohibits "the transportation or importation into any state . . . for

> delivery or use therein of intoxicating liquors, in violation of the laws thereof," is binding on the Federal Government like everyone else, and empowers North Dakota to require that all liquor sold for use in the state be purchased from a licensed instate wholesaler. Nothing in our Twenty-first Amendment case law forecloses that conclusion. In all but one of the cases in which we have invalidated state restrictions on liquor transactions between the Federal Government and its business partners, the liquor was found not to be for "delivery or use" in the state because its destination was an exclusive federal enclave.

This Court has consistently held that where, as here, a State's law implicates a "core power" under the 21st Amendment, it is immune from challenge and that the primary 21st Amendment "core power" is State control over the importation, sale and distribution process. *North Dakota, supra; Capital Cities Cable, Inc.,* 467 U.S. at 712. The Court of Appeals' invalidation of Michigan's importation, sale and distribution process, conflicts with these decisions because it eviscerates Michigan's most basic "core power" secured by the 21st Amendment, that of structuring its alcohol importation and distribution system.

The Sixth Circuit erroneously dismissed this Court's discussion of the 21st Amendment in *North Dakota* as irrelevant because the case involved the Supremacy Clause. *Heald,* 342 F.3d at 523-524. Pet. App 8a-13a. But this Court's recognition of a State's 21st Amendment powers in *North Dakota* was necessary to its decision. As Justice Scalia wrote, "The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." *North Dakota,* 495 U.S. at 447. In recognizing State powers under the 21st Amendment this Court did not blind itself to Commerce Clause restrictions. (See Justice Brennan's partial dissent, joined by Justices

Marshall, Blackmun and Kennedy where the Commerce Clause is prominently discussed. *Id.* at 449-451.) In fact, the Court indicated that the regulations did not discriminate against the United States because, like any other retailer, it could buy from in-State licensed wholesalers. 495 U.S. at 430-432, 437-439. This presupposes that all other retailers were required to do so. If the State can require all retailers to buy from in-State licensed entities to further "legitimate interests in promoting temperance and controlling the distribution of liquor, in addition to raising revenue," then, a State can also constitutionally require all consumers to buy from in-State licensed entities to further such purposes. *Id.* at 439.

More recently, this Court recognized a State's power to control importation of alcoholic beverages in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), where it noted that Section 2 of the 21st Amendment delegated to the States the power "to prohibit commerce in" alcoholic beverages and further said that State "regulatory power over this segment of commerce is therefore largely 'unfettered by the Commerce Clause.'" *Id.* at 514-515 (citing *Ziffrin, supra*).

E. The Court of Appeals misapplied this Court's decisions.

The Court of Appeals in the present case erroneously concluded that decisions of this Court beginning in the 1960s "signaled a break" from its earlier decisions. Pet. App. 9a. Indeed, the Sixth Circuit found it "disingenuous at best" that Michigan even relied upon the *Young's Mkt*. line of cases. *Ibid.* Instead the Court of Appeals gave insufficient force to the 21st Amendment and undue prominence to the Commerce Clause because of its faulty analysis of *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) and *Healy v. Beer Institute*, 491 U.S. 324 (1989). *Heald*, 342 F.3d at 522-526; Pet. App. 9a-13a.

1. In *Hostetter* this Court recognized that under the 21st Amendment 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.

In *Hostetter*, New York had attempted to close down an airport duty-free shop, whose products were delivered to the ultimate consumer in a foreign country. Under the particular facts of *Hostetter*, the 21st Amendment was irrelevant because the beverages were not being distributed within New York. *Hostetter*, 377 U.S. at 332-333. The Court then said: "To 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, however be an absurd oversimplification" because it would leave Congress without power to regulate interstate or international traffic in alcoholic beverages. *Id.* at 331-332. See also, *Craig v. Boren*, 429 US 190, 206 (1976), *reh'g denied* 429 U.S. 1124 (1977).

Clearly *Hostetter* was not a repudiation of early cases such as *Ziffrin* and *Young's Market*. Indeed, this Court in *Hostetter*, 377 U.S. at 330, cited those cases and recognized that by virtue of the 21st Amendment, the view "has remained unquestioned" 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."

Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964), was decided the same day as *Hostetter*. It held that the Export-Import Clause prohibited State taxation of alcoholic beverages imported from abroad and warehoused within the

State before further shipment. The 21st Amendment did not permit the State to do what the Export-Import Clause prohibited. The Court, however, stated: "We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders. There can surely be no doubt, either, of Kentucky's plenary power to regulate and control, by taxation or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported." *Id.* at 346.

Similarly, in *Craig v. Boren*, 429 U.S. 190, 204-205 (1976) *reh'g denied*, 429 U.S. 1124 (1977), this Court held that the Twenty-first Amendment does not save "invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment," but cited *Young's Mkt.* and *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938) for the proposition that the "importation of intoxicants, [is] a regulatory area where the State's authority under the Twenty-first Amendment is transparently clear." *Craig*, 429 U.S. at 207.

2. In *Bacchus* this Court neither transformed 21st Amendment law nor repudiated its prior holdings interpreting the 21st Amendment.

The Sixth Circuit mistakenly viewed *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274-275 (1984), as transforming 21st Amendment law. *Heald*, 342 F.3d at 523-527. Pet. App. 9a-18a. *Bacchus* involved Hawaii's decision to exempt from taxation two locally produced products: ti root brandy and pineapple wine. *Bacchus*, 468 U.S. at 270-272. The tax exemptions had explicitly been passed and were explicitly defended by the State as exclusively motivated by a desire to aid local industry and had nothing to do with the structure of its

liquor distribution system. *Id.* at pp. 270-276. Hawaii, for the first time cited the 21st Amendment when it submitted its brief to this Court. *Id.* at p. 274, fn. 12. The Court found this "belated" and unelaborated argument unconvincing. *Id.* at 276. Hawaii's eleventh-hour reliance on the 21st Amendment and the fact that the tax was admittedly intended to promote economic protectionism, dissuaded this Court from giving any serious weight to Hawaii's 21st Amendment argument. The Court, *id.* at 276, then stated:

> State laws that constitute *mere* economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor. [emphasis added]

The dissent in *Bacchus* correctly foresaw that the *Bacchus* decision could undermine State regulatory power. The instant case is an example of how a lower court has purported to follow *Bacchus*, but has actually greatly extended that holding from the particular circumstances that shaped the *Bacchus* decision, to effectively extinguish a State's ability to regulate importation and distribution of alcoholic beverages.[22]

Michigan respectfully submits that *Bacchus* was wrongly decided insofar as the 21st Amendment is concerned. It is inconsistent with the text, history, and purposes of the 21st

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[22] Justice Stevens, in a dissent joined by Chief Justice Rehnquist and Justice O'Connor, construed the 21st Amendment and *Young's Mkt.* to permit Hawaii to constitutionally place a tax on out-of-state manufacturers not placed on liquors produced locally. The dissent noted that the *Young's Mkt.* court "explained that the Amendment enables a State to establish a local monopoly and to prevent or discourage competition from imported liquors." *Bacchus*, 468 U.S. at 282. The dissent further observed that *Young's Mkt.'s* reasoning had in no way been limited by the decision in *Hostetter*, at 283-284, and stated that the question is not the appropriate degree of deference to state law nor of the Amendment's core purposes, but whether or not "the provision in this case is an exercise of a power expressly conferred upon the States by the Constitution." *Id.* at 287.

Amendment and fails to give the Amendment its full meaning. In any event, *Bacchus* is not controlling here because of substantial differences from the present case. Unlike the tax scheme at issue in *Bacchus*, the import restrictions in the present case fall squarely within the "transportation or importation" text of the 21st Amendment. Unlike Hawaii's taxation scheme, Michigan's regulatory scheme has ample regulatory purpose and is not "mere economic protectionism."

3. This Court's decision in *Healy* is inapposite since it never examined the relationship of the 21st Amendment to an alleged Commerce Clause violation based on discriminatory treatment of interstate commerce.

The Sixth Circuit also relied on *Healy v. Beer Institute*, 491 U.S. 324, 344 (1989). In *Healy*, this Court invalidated a Connecticut price affirmation statute requiring out-of-State sellers to affirm that the prices charged in Connecticut were no higher than prices contemporaneously charged in nearby States. This Court concluded that the statute's effect was to impair the sellers' ability to competitively price products in bordering States. *Healy*, 491 U.S. at 343. The statute had the effect of controlling commercial activity occurring wholly outside the boundary of the State and thus did not implicate the State's core powers under the 21st Amendment.

Healy began with an analysis of the extra-territorial effects of the statute and then very briefly identified a second violation of the Commerce Clause: the facial discrimination against the brewers and shippers engaged in interstate commerce was not "justified by a valid factor unrelated to economic protectionism." *Id.* at 340-341. The Court found that the statute served to penalize (non-existent) Connecticut brewers from shipping out of State as well. *Id*. Only at this point did the Court turn to the claim "that the Twenty-first Amendment

sanctions Connecticut's affirmation statute regardless of its effect on interstate commerce." *Id.* at 341, *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986), which invalidated a New York price affirmation statute on the basis that it was an attempt by New York to control the sale of alcoholic beverages in another State, was then cited for the proposition that "the Twenty-first Amendment does not immunize state laws from invalidation under the Commerce Clause when those laws have the practical effect of regulating liquor sales in *other* states." (emphasis added) *Healy*, 491 U.S. at 342. That is: the extra-territorial effect of the statute made the 21st Amendment irrelevant. The Court's opinion in *Healy* never examined the relationship of a violation of the Commerce Clause based on discriminatory treatment of interstate commerce to the 21st Amendment. [23]

[23] A separate opinion, 491 U.S. at 326-327, 341 (Scalia, J., concurring in part and concurring in the judgment) did not state that any difference between the treatment of imports and the treatment of in-state products was unconstitutionally protectionist and unprotected by the 21st Amendment. Connecticut did not treat out-of-state suppliers differently from in-state ones. Connecticut required price affirmations from brewers, whether located in or out-of-state, doing business in both Connecticut and at least one of its neighboring states, and not from brewers, whether located in Connecticut or out-of-state, selling only in Connecticut and not in Rhode Island, Massachusetts or New York. The distinction that Justice Scalia rejected was not between imported and local, but between interstate commerce and intrastate commerce. *Id.* at 344. Importation controls like those at issue in the present case are explicitly protected by the 21st Amendment.

II. The Michigan regulatory framework does not violate the Commerce Clause.

A. While the 21st Amendment does not immunize States from other provisions of the Constitution, it carves out a broad exception for State authority over transportation and importation of alcohol.

The text, history, and purposes of the 21st Amendment demonstrate that it cannot mean the State powers it confers are extinguished by the Commerce Clause. However, that is exactly what the Sixth Circuit has done in applying a *per se* rule of invalidity to State beverage alcohol importation systems that are structured to allow in-State direct shipments but ban out-of-State ones. Such a result is inconsistent with the 21st Amendment's plain and unambiguous language and this Court's jurisprudence.

The Court of Appeals applied strict scrutiny in this facial challenge to Michigan's regulatory framework and struck it down, concluding that there were reasonable nondiscriminatory alternatives. Use of that traditional Commerce Clause analysis failed to afford proper weight to Michigan's powers under the 21st Amendment. The effect of its judgment was not to strike down any favoritism for Michigan licensees but instead to permit unlicensed out-of-State wineries free rein to ship directly to Michigan consumers.

Michigan does not contend that the 21st Amendment immunizes it from other provisions of the Constitution. This Court's decisions clearly indicate that it does not. E.g., *Craig, supra* (Oklahoma minimum-drinking age law violated Equal Protection Clause); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (Wisconsin statute forbidding alcohol sales to certain persons violated Due Process Clause); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964)

(Kentucky tax on foreign whiskey violated Export-Import Clause).

It is also clear that a State's 21st Amendment powers are limited by the scope of the text to matters involving the "transportation or importation" of alcohol "for delivery or use" in the State, so there is no extraterritorial reach. E.g., *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 572 (1986), and *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989) (invalidating state statutes that had the impermissible effect of regulating alcohol prices in *other* States).

Michigan does, however, contend that the 21st Amendment "created an exception to the normal operation of the Commerce Clause." *Craig*, 429 U.S. at 206. Within those textual limits, Michigan has "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980) and its three-tier distribution system is "unquestionably legitimate." *North Dakota v. United States*, 495 U.S. 423, 432 (1990). Application of a traditional Commerce Clause balancing analysis, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), involving strict scrutiny necessarily fails to give effect to the State's constitutional powers in this unique area.

Michigan's regulatory framework clearly serves valid regulatory purposes of "promoting temperance," "controlling the distribution of liquor," and "raising revenue." *North Dakota, supra*, 495 U.S. at 439.

Ignoring the significant regulatory requirements and burdens placed on in-State retailers (including in-State licensed wineries acting as their own retailers), the Court of Appeals only focused on the in-State retailers' ability to deliver a product to Michigan consumers. It found this one factor so

negatively affects the ability of out-of-State wineries to compete that it violates the Commerce Clause. However, the Court missed the point of why the Michigan system is needed and why it works.

The point of Michigan's system is that it addresses Michigan's need to protect its citizens by preventing the sale of alcohol to minors while promoting responsible drinking and to ensure the collection of taxes. For example, requiring that sales and direct shipment to consumers be through an in-State licensed entity assures jurisdiction over claims by persons injured as a result of irresponsible sales. Under Michigan's dram-shop law, MCL 436.1801(3), an in-State retailer who unlawfully sells or provides alcohol to an underage purchaser or visibly intoxicated individual may be held liable for resulting injuries and death. Pet. App. 64a-65a. This State law only applies to in-State licensed retailers. *Tennille v. Action Distrib.* Co., 225 Mich. App. 66, 70-73; 570 N.W.2d 130, 132-133 (1997); MCL 436.1113(9). Thus, an in-State retailer (and in-State winery) that sells and delivers alcoholic beverages to a Michigan consumer is not only subject to administrative and criminal sanctions, but also may be held accountable to victims of alcohol-related accidents resulting from irresponsible sales. Conversely, Michigan residents injured by alcohol-related accidents resulting from unlawful sales outside the regulatory system would have no assurance that out-of-State sellers may be held accountable for their actions.[24]

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[24] For example, in *Butler v. Beer Across America*, 83 F. Supp. 2d 1261, 1269 (N.D. Ala. 2000), personal jurisdiction was found lacking against a vendor of beer in an action brought by the parents of a fifteen year old who had used his parents' credit card to order beer over the Internet. See *Hockerson-Halberstadt, Inc. v. Costco Wholesale Corp.,* 93 F. Supp. 2d 738, 741, n1 (Dist Ct. La., 2000), "The effect of the Internet and electronic communication on the traditional law of personal jurisdiction poses challenging questions for the courts. . . . This dynamic area will undoubtedly continue to spawn complex legal issues. See Tu Phan, *Cybersell, Inc. v. Cybersell*, Inc., 14 Berkeley Tech. L.J. 267 (1999) (recognizing that Cyberspace knows no national boundaries and allows

Section 203 of the Michigan Liquor Control Code represents a valid exercise of 21st Amendment powers that this Court has repeatedly recognized. Michigan has a substantial interest in regulating alcoholic beverages and by requiring that alcoholic beverages only be sold to consumers by responsible, accountable, and licensed in-State retailers (including in-State winemakers), Michigan provides for an orderly, controlled market which ensures that this dangerous and frequently abused substance is not delivered into the wrong hands and ensures that all such transactions are taxed and uniformly regulated.

B. The U.S. Constitution vests Congress with the power to regulate commerce.

The Commerce Clause grants to Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art I, § 8, cl. 3. "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys, Inc. v. Dep't of Envt'l Quality*, 511 U.S. 93, 98 (1994). The Commerce Clause is an extraordinary power that Congress does not exercise lightly. See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

In the late 1880's and the early 1890's when statewide prohibition laws were enacted this Court seized upon a

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users to initiate commercial transactions anywhere)." Also see *Lindgregn v. GDT, LLC*, 312 F. Supp. 2d 1125, 1131-1132 (S. Dist. Ct. Iowa 2004) (Internet sales not enough to establish minimum contacts for personal jurisdiction); 74 U. Colo. L. Rev. 319, 320 (2003) "The law of personal jurisdiction based on Internet activity is murky, and courts are wrestling with how to apply principles of personal jurisdiction to cases that deal with the highly impersonal universe of the World Wide Web."

previously rejected dictum[25] and began applying it as a brake on the operation of such laws with respect to interstate commerce in intoxicants, which the Court denominated "legitimate articles of commerce." While this Court held that a State was entitled to prohibit the manufacture and sale of alcohol within its territory[26] it contemporaneously laid down the rule, in *Bowman v. Chicago & Northwestern Railway Co.*, 125 U.S. 465 (1888) that, so long as Congress remained silent in the matter, a State lacked the power, even as part and parcel of a program of statewide prohibition, to prevent the shipment into it of intoxicants from a sister State.

The Holding in *Bowman* was soon followed by *Leisy v. Hardin,* 135 U.S. 100 (1890), to the effect that, so long as Congress remained silent, a State had no power to prevent the sale in the original package of liquors introduced from another State. The effect of the *Leisy* decision was soon overcome by the Wilson Act, 26 Stat. 313 (1890), repealing its alleged silence, but the *Bowman* decision still stood, the act in question being interpreted by the Court not to subject liquors from sister States to local authority until their arrival in the hands of the person to whom consigned. *Rhodes v. Iowa,* 170 U.S. 412 (1898). Not until 1913 was the effect of the decision in the *Bowman* case fully nullified by the Webb-Kenyon Act, 39 Stat. 699, which placed intoxicants entering a State from another State under the control of the former for all purposes whatsoever.

Congress clearly has the power to exempt alcohol from Commerce Clause restrictions. This Court recognized this

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[25] In *Brown v. Maryland,* 25 U.S. 419, 449 (1827), in which the "original package" doctrine originated in the context of state taxing powers exercised on imports from a foreign country, the Court in dictum indicated the same rule would apply to imports from sister States. The Court refused to follow the dictum in *Woodruff v. Parham,* 75 U.S. 123 (1869).

[26] *Mugler v. Kansas,* 123 U.S. 623 (1887); *Kidd v. Pearson,* 128 U.S. 1 (1888).

principle of law well prior to the *Bowman* decision in stating, “It is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce." *Transportation Co. v. Parkersburg,* 107 U.S. 691, 701 (1883). Thus, "[w]hen Congress so chooses, State actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp v. Bd. of Governors of the Federal Reserve System*, 472 U.S. 159, 174 (1985) (interpreting a provision of the Bank Holding Company Act, 12 U.S.C. § 1842(d), permitting regional interstate bank acquisitions expressly approved by the State in which the acquired bank is located, as authorizing State laws that allow only banks within the particular region to acquire an in-State bank, on a reciprocal basis, since what the States could do entirely they can do in part).

The dormant Commerce Clause prohibits State laws that unduly burden interstate commerce, in the absence of express federal authorization. *General Motors Corp. v. Tracy,* 519 U.S. 278, 287 (1997). However, the dormant Commerce Clause is not implicated here because Congress, by federal statute, specifically authorized the type of State law at issue here.

C. Using its Commerce Clause powers Congress enacted the Webb-Kenyon Act, 27 USC § 122, which expressly delegated to the States the right to regulate the transportation and importation of alcoholic beverages within its jurisdiction.

Congress exercised its Commerce Clause power in the Webb-Kenyon Act, 27 U.S.C. § 122, that provides "The shipment or transportation . . . of any . . . vinous . . . intoxicating liquor . . . into any [s]tate . . . to be . . . sold . . . in violation of *any law* of such State . . . is hereby prohibited."

(emphasis added).[27] Thus Congress has unmistakably exercised its power under the Commerce Clause to reinforce and prevent from encroachment those State rights unambiguously provided for in the 21st Amendment.

Any supposed residual dormant effect has been dispelled because Congress has expressly exercised its Commerce Clause power in 27 U.S.C. § 122 (1935). The language "any law" in that statute plainly indicates the States occupy the field. Thus, the enactment of the Webb-Kenyon Act, in which Congress exercised its power to regulate commerce, clearly establishes that the Court of appeals erred when it held that the dormant Commerce Clause was controlling.

Moreover, there can be no doubt over whether the Webb-Kenyon Act would survive a Commerce Clause challenge inasmuch as this Court has already ruled that it does. In *Clark Distilling Co. v. Western Maryland Co.*, 242 U.S. 311, 319 (1917) this Court was confronted with a constitutional challenge of a West Virginia law that provided in pertinent part:

> It shall be unlawful for any person in this state to receive, directly or indirectly, intoxicating liquors from a common, or other carrier. It shall also be unlawful for any person in this state to possess intoxicating liquors, received directly or indirectly from a common, or other carrier in this state. . . .

One question before this Court in *Clark Distilling* was "whether the Webb-Kenyon Law has so regulated interstate commerce as to give the State the power to do what it did in

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[27] Although the Webb-Kenyon Act was originally enacted in 1913 prior to the Advent of Prohibition it was subsequently reenacted without change on August 27, 1935, c. 740, § 202(b), 49 Stat 877, following the repeal of prohibition and the adoption of the 21st Amendment.

enacting the prohibition law and cause its provisions to be applicable to shipments of intoxicants in interstate commerce," thus saving that law from repugnancy to the Commerce Clause. *Id.* at 321-322 . This Court held that the Webb-Kenyon Act was constitutional and it "took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law." *Id* at 325.

Additionally, in *Craig v. Boren, supra*, 429 US at 205-206 this court said: "[*Leisy v. Hardin*, *supra,*135 U.S. 100] led Congress, acting pursuant to its powers under the Commerce Clause, to reinvigorate the State's regulatory role through the passage of the Wilson [27 U.S.C. § 121] and Webb-Kenyon Acts. . . . The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause." (Footnotes omitted.)

The dormant Commerce Clause cannot be used to invalidate § 203 of the Michigan Liquor Control Code because Congress has affirmatively exercised its plenary powers under the Commerce Clause to authorize this, and similar State statutes. In enacting the Webb-Kenyon Act, Congress unequivocally recognized the States' authority to control and confine the distribution of alcoholic beverages to licensed sellers who have themselves been determined to be responsible and accountable.

CONCLUSION

Section 2 of the 21st Amendment, grants Michigan the power to regulate the importation and transportation of intoxicating liquor for delivery or use in Michigan. Congress granted Michigan this same right in the Webb-Kenyon Act.

The decision of the Court of Appeals should be reversed because it has not only abrogated the plain and unambiguous command of Sec. 2 of the 21st Amendment but has frustrated the will of Congress.

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

Respectfully submitted,

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