No. 03-1120

IN THE

Supreme Court of the United States

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,

v.

ELEANOR HEALD, *et al.*,
Respondents.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

By Order filed May 24, 2004, this Court granted certiorari in respect of the following question:

> 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 PROCEEDING

Petitioner, intervening defendant-appellee below, is the Michigan Beer & Wine Wholesalers Association ("MB&WWA"), a trade association of Michigan beer and wine wholesalers that intervened as a defendant in the district court.

Respondents, 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. (hereafter collectively referred to as "plaintiffs"). The thirteen individual parties are Michigan residents who describe themselves as consumers of "fine and rare wines" or wine journalists. Respondent Domaine Alfred, Inc. is a California winery.

The Governor, the Attorney General, and the Chair of the Liquor Control Commission of the State of Michigan (hereafter collectively referred to as "Michigan" or the "State") were defendants-appellees below and are petitioners in No. 03-1116.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner MB&WWA has no parent corporation, and there is no publicly held company that owns 10 percent or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 342 F.3d 517. The order denying rehearing en banc (Pet. App. 21a-22a) is not reported. The opinion of the district court granting summary judgment for the defendants (Pet. App. 25a-35a) is not reported. The order of the district court denying reconsideration (Pet. App. 39a-40a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 2003 (Pet. App. 19a-20a), and rehearing en banc was denied on November 4, 2003 (Pet. App. 21a-22a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves the Twenty-first Amendment, U.S. Const. amend. XXI (Pet. App. 45a); the Commerce Clause, U.S. Const. art. I, § 8, cl. 3 (Pet. App. 45a); the Webb-Kenyon Act, 27 U.S.C. § 122 (Pet. App. 46a); Mich. Comp. Laws §§ 436.1111, 436.1113, 436.1203, 436.1537, 436.1701, 436.1801, 436.1903, and 436.1909 (Pet. App. 47a-66a); and Mich. Admin. Code r. 436.1515, 436.1705, and 436.1719 (Pet. App. 67a-69a).

STATEMENT

The Sixth Circuit authorized the plaintiffs to do precisely what the Twenty-first Amendment and the Webb-Kenyon Act, 27 U.S.C. § 122, expressly forbid: import alcoholic beverages into Michigan, for use within the State, without a license, in violation of state laws. The decision is inconsistent with the constitutional and statutory texts and with this Court's decisions repeatedly interpreting the Amendment to give the States "virtually complete control" over the physical importation of beverage alcohol. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). State laws limiting importation are essential foundations for state laws regulating alcohol sales to residents and imposing excise taxes, which otherwise would be circumvented by direct shipments from out of state. Michigan's decision to allow direct shipping by licensed in-state entities, including wineries—which Michigan can effectively license, supervise, inspect, punish, and put out of business if they violate its laws—is an entirely rational statutory classification and does not make Michigan's ban on imports by unlicensed consumers any less constitutional.

The Commerce Clause establishes a national market for every product but one: the Twenty-first Amendment gives the States primary responsibility for regulating physical traffic in beverage alcohol destined for use by their citizens. As Justice Jackson said, the American people in 1933 "knew that liquor is a lawlessness unto itself" and therefore "did

not leave it to the courts to devise special distortions of the general rules as to interstate commerce to curb liquor's 'tendency to get out of legal bounds.'" *Duckworth* v. *Arkansas*, 314 U.S. 390, 398-399 (1941) (Jackson, J., concurring in result). Instead, the Twenty-first Amendment and Webb-Kenyon carve an exception to the dormant Commerce Clause, giving States approximately the same power over interstate physical traffic in alcohol (subject to the same limitations in other provisions of the Constitution) as Congress has to regulate physical traffic in any other product.

This case is not about "fine and rare wines." Under the Twenty-first Amendment, the States have provided the great bulk of the whole body of laws regulating the distribution of beverage alcohol in this country, and that system is challenged in this case. Plaintiffs sought a declaration and injunction striking down the Michigan statutory provision barring unlicensed Michigan residents from importing alcoholic beverages of all kinds, and the Sixth Circuit ordered that plaintiffs be given "judgment." But even if the complaint and the ruling below were more fine-tuned, this case would challenge the entire three-tier system, in force in most States since Prohibition, under which only licensed firms with a substantial in-state presence may sell beverage alcohol at wholesale or retail. If plaintiffs have a constitutional right to import "fine and rare wines," there is no obvious reason why they should not have a right to import cheap wines, or any other beverage that competes with local wineries for their beverage-alcohol dollars. And if Michigan cannot take into account a firm's substantial in-state physical presence in determining what regulatory burdens to impose, it is not clear why Michigan is not required to allow out-of-state firms to sell any beverage, at wholesale or retail, to its residents.

A. Federal Law Governing State Control Over Alcohol Importation

Both the Constitution and a federal statute bar, in very broad terms, any importation of beverage alcohol in violation of state law, including importation by a resident not licensed

to do so. In 1913, Congress exercised its power under the Commerce Clause to enact the Webb-Kenyon Act, which forbids the "shipment or transportation . . . of any . . . intoxicating liquor of any kind from one State . . . into any other State . . . which said . . . liquor is intended . . . to be received, possessed, sold, or in any manner used . . . in violation of any law of such State." Act of Mar. 1, 1913, ch. 90, 37 Stat. 699 (codified at 27 U.S.C. § 122). In 1933, at the end of Prohibition, Section 2 of the Twenty-first Amendment made this federal protection of state power permanent by placing it into the Constitution. Section 2 prohibits "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof." U.S. Const. amend. XXI, § 2. In 1935, to vanquish any doubt, Congress re-enacted Webb-Kenyon. Act of Aug. 27, 1935, ch. 740, § 202(b), 49 Stat. 877.

This Court has repeatedly affirmed that the Amendment gives States very broad power over the physical importation of beverage alcohol. Prior to Webb-Kenyon and the Twenty-first Amendment, the Court had struck down, on Commerce Clause grounds, a Texas statute insofar as it taxed sellers of out-of-state, but not in-state, beer and wine, *Tiernan* v. *Rinker*, 102 U.S. 123 (1880), and a South Carolina statute authorizing licensed in-state sales but barring direct interstate shipments to consumers, *Scott* v. *Donald*, 165 U.S. 58 (1897). But shortly after the Twenty-first Amendment was adopted, the Court ruled unanimously that a State need not treat in-state and out-of-state suppliers identically or equally. It held that California could impose a license fee on the right to import beer, adding that a State could "permit[] . . . manufacture [within the State] and sale" without any obligation to "let imported liquors compete with the domestic on equal terms." *State Bd. of Equalization* v. *Young's Market Co.*, 299 U.S. 59, 62 (1936). The Court reiterated in 1964 that States' power over physical importation of beverage alcohol for use by their citizens is virtually plenary. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964) ("[A] State is totally unconfined by traditional Commerce Clause limitations when it restricts the im-

portation of intoxicants destined for use, distribution, or consumption within its borders. . . . This view of the scope of the Twenty-first Amendment . . . has remained unquestioned."). More recently, the Court has reiterated that a state regulatory system that requires out-of-state manufacturers to sell only to licensed wholesalers "fall[s] within the core of the State's power under the Twenty-first Amendment" and is "unquestionably legitimate." *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990) (plurality opinion of Stevens, J.); *see also id.* at 448 (Scalia, J., concurring in judgment) ("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."). "No decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause." *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000) (Easterbrook, J.).

B. Michigan's Regulatory Scheme

After the adoption of the Twenty-first Amendment in 1933, Michigan, like most other States, legalized the sale of beverage alcohol under strict controls. The Michigan Constitution was amended to permit the creation of a commission that would "exercise complete control of the alcoholic beverage traffic within this state." Mich. Const. art. 4, § 40; *see also Terre Haute Brewing Co.* v. *Liquor Control Comm'n*, 288 N.W. 339, 341 (Mich. 1939). The Michigan legislature then created the Liquor Control Commission and established a state distribution law whose core provision, § 203 of Michigan's Liquor Control Code, states that only the Commission itself, or a licensed or otherwise Commission-authorized person, may import beverage alcohol. Section 203, which is the provision the Sixth Circuit invalidated in this case, provides that "a sale, delivery, or importation of alcoholic liquor . . . 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 commission, a

person licensed by the commission, or by prior written order of the commission." Mich. Comp. Laws § 436.1203(1); *see also id.* §§ 436.1201(2), 436.1901.

Like most other States, Michigan adopted a license system involving three tiers, manufacturers, wholesalers, and retailers. The Federal Alcohol Administration Act, 27 U.S.C. §§ 201-219a ("FAAA"), enacted in 1935, fosters such three-tier systems by requiring separate federal licenses for manufacturers and wholesalers, *id.* § 203(b), (c), and limiting the financial ties and commercial arrangements that these permitholders may have with retailers, *id.* § 205. Such three-tier systems have been widespread in the United States since the end of Prohibition.

Under Michigan's three-tier system, manufacturers (whether in-state or out-of-state) generally are licensed to sell only to licensed in-state wholesalers. *See* Mich. Comp. Laws §§ 436.1109(1), 436.1305, 436.1403, 436.1607(1); Mich. Admin. Code r. 436.1705, 436.1719. Licensed wholesalers may sell only to licensed retailers. *See* Mich. Comp. Laws §§ 436.1113(7), 436.1607(1). And licensed retailers may sell alcohol directly to consumers, including by direct shipment, subject to strict limitations described below and supervision by the Commission. *See* Mich. Comp. Laws §§ 436.1111(5), 436.1203(2)-(4); Mich. Admin. Code r. 436.1515. In 1985, Michigan adopted the modification of this scheme that led the Sixth Circuit to invalidate the entire scheme in this case. It amended its statutory definition of "wine maker" to permit in-state wine manufacturers to sell their own wine at retail. *See* Mich. Comp. Laws § 436.1113(9); *see also id.* § 436.1537(2), (3).

Michigan permits beverage alcohol to be sold in Michigan regardless of the place of manufacture, but Michigan insists that every drop sold (whether manufactured within the state or elsewhere) pass through a Michigan licensee that has a substantial in-state presence. It does so because such licensees are subject to initial approval, inspection, attachment of their assets, and punishment for violation of state laws, by measures up to and including loss of the state

licenses on which their business depends. Michigan licensees must comply with financial responsibility requirements and are subject to a police background check prior to licensing. *See, e.g.*, Mich. Admin. Code r. 436.1105(1)(b), (2)(g), 436.1113, 436.1115. Once licensed, they must comply with statutory requirements and Commission rules designed to achieve various important state objectives with respect to the distribution of alcohol. *See, e.g.*, Mich. Comp. Laws § 436.1203; Mich. Admin. Code r. 436.1401-.1529, 436.1601-.1651, 436.1702-.1735. To assure compliance, licensees are subject to investigations, inspections of both premises and sales records, and searches. *See* Mich. Comp. Laws §§ 436.1217, 436.1235; Mich. Admin. Code r. 436.1651, 436.1728, 436.1735. Violations subject a licensee to financial penalties, criminal punishment, and suspension or revocation of its liquor license. *See* Mich. Comp. Laws §§ 436.1903, 436.1907, 436.1909, 436.1911, 436.1917.

Michigan requires all beverage alcohol to pass through the hands of in-state licensees for three sets of reasons. First, this enables Michigan to regulate the use of alcohol. Michigan, for example, prohibits underage drinking. *See* Mich. Comp. Laws §§ 436.1701, 436.1703, 436.1801(2). Michigan gives communities the local option to bar the retail sale of alcohol in whole or in part, which numerous communities still do today. *See* Mich. Const. art. 4, § 40; Mich. Comp. Laws §§ 436.2101-.2113. Michigan imposes labeling and content restrictions on alcohol. *See, e.g.*, Mich. Comp. Laws §§ 436.1113(8), 436.2005; Mich. Admin. Code r. 436.1611, 436.1719. Licensees are responsible for knowing the age and sobriety of their customers and enforcing and observing these rules. *See, e.g.*, Mich. Comp. Laws §§ 436.1203, 436.1701, 436.1801(2), 436.1903.

Second, Michigan's regulatory scheme enables it to collect tax revenues from the sale of beverage alcohol. These taxes promote temperance (by raising the price of alcohol), and they provide a significant source of revenue for the State. Michigan imposes a 13.5¢ or 20¢ per liter excise tax on wine, depending on its strength. *See* Mich. Comp. Laws

§ 436.1301. In 2003, Michigan collected $168.3 million from specific taxes on liquor, license fees, fines and penalties, and beer and wine excise taxes. *See* Mich. Liquor Control Comm'n, *Annual Financial Report 2003*, at 2, *available at* http://www.michigan.gov/documents/annual_report_2003_final_86520_7.pdf (last visited July 29, 2004).

Finally, Michigan's scheme prevents the vertical integration of manufacturing, wholesaling, and retailing (sometimes referred to as "tied house" arrangements). *See* Mich. Comp. Laws §§ 436.1305, 436.1403, 436.1603, 436.1607, 436.1609. The three-tiered system is used by many States to prevent such integration, which has been associated with abusive sales practices and excessive consumption. *See generally Borman's, Inc.* v. *Michigan Liquor Control Comm'n*, 195 N.W.2d 316, 319-320 (Mich. Ct. App. 1972).

C. Proceedings Below

In March 2000, the plaintiffs—individual Michigan residents who describe themselves as "collectors of fine and rare wines" (Am. Compl. ¶ 10)—filed suit against Michigan state officials in the United States District Court for the Eastern District of Michigan. They sought a judgment declaring § 203 of the Liquor Control Code (the provision that bars unlicensed importation of all beverage alcohol into the State) "unconstitutional in violation of the Commerce Clause of the United States Constitution." Am. Compl. at 10. Plaintiffs alleged that they "want to and intend to purchase bottled wines from suppliers outside the State of Michigan and have those wines shipped directly to their residences in Michigan." Am. Compl. ¶ 19. Although stating that their personal interest was in "fine and rare wines" (Am. Compl. ¶ 10), plaintiffs sought a sweeping injunction to prevent enforcement of any statutory provision "prohibiting or punishing the delivery of *alcoholic beverages* from an out-of-state supplier to an adult Michigan resident." Am. Compl. at 10 (emphasis added).

Two non-Michigan wineries (one of which was later dismissed from the case) were later added as plaintiffs. Pe-

titioner MB&WWA, a trade association of licensed Michigan beer and wine wholesalers, intervened as a defendant.

On cross-motions for summary judgment, the district court rejected plaintiffs' challenge and granted summary judgment for Michigan and MB&WWA. Citing this Court's decision in *North Dakota*, the district court held that a State has "virtually complete control" over the importation of beverage alcohol, including wines, under the Twenty-first Amendment. Pet. App. 33a (quoting *North Dakota*, 495 U.S. at 431). State control is not total, the district court stated, because a state regulation "must further 'core' concerns of [the Twenty-first] Amendment—namely, 'the interest of promoting temperance, ensuring orderly market conditions, and raising revenues.'" Pet. App. 34a (quoting *North Dakota*, 495 U.S. at 432). But, the court held, Michigan's direct shipment law is "one provision of a comprehensive system that regulates the flow of all alcohol beverages into and within the State of Michigan" (Pet. App. 34a), and Michigan's requirement that all wine flow through in-state licensees furthers the concerns of the Twenty-first Amendment because it "ensure[s] the collection of taxes from out-of-state wine manufacturers and . . . reduce[s] the risk of alcohol falling into the hands of minors" (Pet. App. 34a-35a). The district court distinguished *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), in which this Court struck down Hawaii's tax exemption for a certain pineapple beverage as "mere economic protectionism," *id.* at 276, on the ground that the Hawaii provision, which did not purport to regulate imports, had no asserted purpose related to the Twenty-first Amendment. *See* Pet. App. 34a.

On appeal, the Sixth Circuit reversed and remanded with instructions to grant "judgment" for the plaintiffs. Pet. App. 17a. The court ruled that the provision allowing licensed in-state wineries to ship their own wine directly to consumers rendered Michigan's entire regulatory scheme "facially discriminatory" (Pet. App. 14a) and subject to "strict scrutiny" under the dormant Commerce Clause (Pet. App. 17a). The court held that Michigan's scheme failed

strict scrutiny because the "discrimination between in-state and out-of-state wineries" did not "further[] any of the [Twenty-first Amendment's] concerns" and, further, Michigan had not shown "that no reasonable non-discriminatory means exists to satisfy these concerns." Pet. App. 14a. The court did not respond to the argument of MB&WWA and Michigan that the Commerce Clause is not "dormant" here because Congress has used its Commerce Clause power to enact the Webb-Kenyon Act and thereby give the States federal statutory authority, in addition to their constitutional authority, to restrict imports of alcoholic beverages.

The Sixth Circuit disagreed explicitly with the Seventh Circuit's ruling in *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) (Easterbrook, J.), which upheld an indistinguishable Indiana statutory scheme against the same challenge. Whereas *Bridenbaugh* viewed these cases as "pit[ting] the twenty-first amendment, which appears in the Constitution, against the 'dormant commerce clause,' which does not," *id.* at 849, the Sixth Circuit ruled that the "traditional dormant Commerce Clause analysis" governed, and that Michigan had to meet a "strict scrutiny" test and justify as "needed" and "least restrictive" its decision to bar its residents from receiving direct shipments from out-of-state firms while allowing them to receive direct shipments from licensed in-state wineries. Pet. App. 12a, 17a. The Sixth Circuit gave the Twenty-first Amendment no significance except to *limit* the state governmental interests that an importation regulation might permissibly serve. It otherwise applied the same Commerce Clause analysis that it would apply to importation of any other product.

The Sixth Circuit rejected a long series of decisions of this Court (dating from *Young's Market* in 1936 through *North Dakota* in 1990) holding that States have near plenary power under the Twenty-first Amendment to regulate the physical importation of alcohol. The Sixth Circuit considered this line of decisions as tacitly jettisoned by this Court's decisions in *Hostetter*—which dealt with alcoholic beverages traveling through (but not destined for use in) New York—

and *Bacchus*—which dealt not with an importation regulation but with a discriminatory tax scheme that the State (Hawaii) made no serious effort to defend under the Twenty-first Amendment.

By ordering "judgment" for the plaintiffs, the court appeared to strike down the State's entire scheme of limiting imports of beverage alcohol (as plaintiffs had requested). The remedy was not limited either to "fine and rare wines" or to the offending treatment of licensed in-state wineries. MB&WWA and Michigan both filed petitions for rehearing en banc, seeking modification of both the constitutional ruling and the remedial ruling. The Sixth Circuit rejected those petitions without comment.

MB&WWA timely filed a petition for writ of certiorari on February 2, 2004. On May 24, 2004, this Court granted and consolidated MB&WWA's petition (No. 03-1120), Michigan's petition for certiorari (No. 03-1116), and a petition (No. 03-1274) to review the Second Circuit's decision in *Swedenburg* v. *Kelly*, 358 F.3d 223 (2d Cir. 2004). The petitions were granted limited to the single Question Presented.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is not about "fine and rare wines." The Sixth Circuit struck down the Michigan statute, § 203, that bars unlicensed Michigan residents from importing all alcoholic beverages and thus provides a necessary foundation for all Michigan regulation of alcohol. The thousands of cheap wines available today from around the Nation, with greater appeal to most teenagers and alcohol abusers, are constitutionally indistinguishable from rare vintages. Moreover, if the decision below stands, there is no obvious reason why it does not extend to other out-of-state alcoholic beverages that compete with wine for the consumer's dollars, or to the fundamental requirement that wholesalers and retailers must be located in the State if they wish to sell to Michigan purchasers.

The Twenty-first Amendment gives the States broad power to adopt any reasonable (and otherwise constitu-

tional) regulation of the physical importation of alcoholic beverages for use by their residents, notwithstanding the dormant Commerce Clause. It gives the States essentially the same power over such physical traffic as the Commerce Clause gives Congress with respect to physical traffic in all other products: regulations must have some conceivable rational relationship to a proper purpose, and they may not violate other provisions of the Constitution such as the First Amendment, but the dormant Commerce Clause does not limit state regulation of physical imports.

The text and history of the Amendment make clear that its purpose was to carve an exception to the dormant Commerce Clause for physical importation of alcohol so that States could effectively regulate domestic use. Congress exercised *its* power under the Commerce Clause by enacting and re-enacting the Webb-Kenyon Act, confirming this state power. This Court then held unanimously, at a time when Prohibition and Repeal were recent memories, that the Twenty-first Amendment created a broad and unqualified exception to the dormant Commerce Clause for physical importation of alcohol for domestic use. In particular, the Court confronted and expressly rejected the contention that a State must treat out-of-state sellers of this one product identically or equally with in-state sellers:

> The plaintiffs . . . 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 domestic on equal terms. To say that would involve not a construction of the Amendment, but a rewriting of it.

State Bd. of Equalization v. *Young's Market Co.*, 299 U.S. 59, 62 (1936).

The Sixth Circuit expressly rejected this case, and even chided petitioners for citing it, but the Court has never since questioned the statement just quoted. On the contrary, although the Court has limited state power in cases involving

alcohol *not* intended for domestic use, or involving other provisions of the Constitution such as the First and Fourteenth Amendments, the Court has often reiterated that States have "virtually complete control" over physical traffic in alcohol destined for their citizens.

Bacchus Imports Ltd. v. *Dias*, 468 U.S. 263 (1984), which struck down a Hawaii taxing scheme that exempted a locally produced pineapple beverage, distinguished *Young's Market* on the ground that the tax exemption, whose only purpose (the State conceded in oral argument) was promotional, did not serve *any* purpose related to the Twenty-first Amendment. *See id.* at 274-276. Whether or not that distinction was successful, it was the premise of the decision, and *Bacchus* is not relevant here. It did not involve direct state regulation of "transportation or importation," and it did not involve any attempt by a State to promote any Twenty-first Amendment interest. We suggest that the best reading of *Bacchus* is that the tax exemption was unconstitutional because it did not involve the regulation of the physical importation of beverage alcohol and was admittedly "mere economic protectionism," *id.* at 276, that did not rationally serve any Twenty-first Amendment purpose.

The Michigan statute easily meets any test of rationality. In order to regulate sales of alcohol to its residents and, for example, prevent sales to minors and irresponsible consumers, Michigan requires that all beverage alcohol pass through licensed sellers with a substantial in-state physical presence. These are firms that Michigan can and does examine extensively before licenses are issued; that Michigan can inspect (both their premises and their records) after licensing; whose property Michigan can attach; and which Michigan can penalize for violations, not only with fines and other criminal penalties but by revoking licenses. Michigan's forty licensed in-state wineries are subject to these controls, in particular the threat of being put out of business if they, for example, fail to take elaborate care not to sell to underage persons. It was entirely rational for Michigan to decide that it does not need to require these wineries to sell through a

separate licensee, while insisting that the more than 2,000 wineries in the rest of the Nation, which Michigan cannot as a practical matter license or inspect and cannot put out of business, must sell to Michigan residents only through Michigan licensees.

ARGUMENT

I. THE TWENTY-FIRST AMENDMENT AND THE WEBB-KENYON ACT AUTHORIZE THE STATES TO ADOPT ANY RATIONAL REGULATION OF THE PHYSICAL IMPORTATION OF BEVERAGE ALCOHOL, WITHOUT REGARD TO THE RESTRICTIONS THAT THE DORMANT COMMERCE CLAUSE WOULD IMPOSE WITH RESPECT TO OTHER PRODUCTS.

The Twenty-first Amendment and the Webb-Kenyon Act create a single-product exception to the dormant Commerce Clause, giving the States the power to regulate the physical importation of alcohol. With respect to interstate shipments of this one product into their territory for use by their residents, States have a power similar to the power of Congress over interstate shipment of all other products. Like Congress, they may not exercise that power in a way that has no rational connection with their regulatory objectives, and they may not violate other provisions of the Constitution, but within these limits their power is virtually plenary. The text and legislative history of the Amendment and Webb-Kenyon are in accord on this point, and no decision of this Court has suggested that the dormant Commerce Clause can trump a State's attempt to regulate the physical importation of alcohol for use by its residents. On the contrary, the Court has repeatedly held that States have "virtually complete control" over the physical importation of alcohol. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). States therefore may impose any regulation of physical importation without offending the Commerce Clause if there is any reasonably conceivable state of facts that could provide a rational basis for the regulation.

A. The Plain Words of the Twenty-first Amendment Prohibit What the Plaintiffs Seek To Do Here.

The text of the Amendment is broad and unequivocally prohibits what the plaintiffs seek to do and what the Sixth Circuit authorized them to do. The Twenty-first Amendment provides:

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

U.S. Const. amend. XXI, § 2.

The constitutional text resolves the present question. "[W]hen the . . . language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation omitted); *see also Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) ("We have stated time and again that courts must presume that a legislature says . . . what it means and means . . . what it says . . . .").

The Twenty-first Amendment is a detailed provision, whose broad language was obviously chosen with some care. There is no ambiguity that would require this Court to construct an extratextual standard in this case. On the contrary, as the Court said in 1936, when first asked to interpret the then-very-recent Amendment, "the language of the amendment is clear," *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59, 63-64 (1936), and "confer[s] upon the State the power to forbid all importations which do not comply with the conditions which it prescribes," *id.* at 62. And as a textual matter, there is no justification for ignoring the plain words of one Constitutional provision to honor an inference drawn from another. As Justice Jackson wrote in another case where a party invoked the dormant Commerce Clause as protection against liability for violating the Twenty-first Amendment, the plaintiffs ask the Court "to hold that one provision of the Constitution guarantees

[them] an opportunity to violate another. The law is not that tricky." *Duckworth* v. *Arkansas*, 314 U.S. 390, 397 (1941) (Jackson, J., concurring in result).

B. The Plain Words of the Webb-Kenyon Act Also Prohibit What the Plaintiffs Seek To Do Here, and the Commerce Clause Therefore Is Not "Dormant" in This Case.

The Commerce Clause is not "dormant" in this case. The text of the Webb-Kenyon Act (on which the Twenty-first Amendment was based) is similarly broad and also unequivocally prohibits what the Sixth Circuit authorized the plaintiffs to do. The Webb-Kenyon Act, first enacted in 1913 and then again in 1935, provides:

> The shipment or transportation ... of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State ... into any other State ... 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 ... is prohibited.

27 U.S.C. § 122 (2004).

In re-enacting Webb-Kenyon in 1935,[1] Congress exercised its own Commerce Clause authority to affirm state au-

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[1] Congress's stated purpose in re-enacting Webb-Kenyon was to eliminate any inference that certain legislative actions associated with Repeal had implicitly repudiated Webb-Kenyon. In 1933, prior to ratification of the Twenty-first Amendment, Congress enacted the Cullen Beer Act to permit the sale of low-alcohol beer. Act of Mar. 22, 1933, ch. 4, 48 Stat. 16. Section 6 of that statute had repeated the language of the Webb-Kenyon Act with respect to such low-alcohol beverages. When Congress repealed the Cullen Beer Act in 1935, it was concerned that "there is room for argument that the Cullen Act effected a partial amendment of the Webb-Kenyon Act, and the repeal of that amendment leaves a gap in the Webb-Kenyon Act as to liquors containing 3.2 percent or less of alcohol by weight." S. Rep. No. 74-1330, at 5 (1935); H.R. Rep. No. 74-1601, at 6 (1935). Congress therefore dispelled any possible confusion by formally

thority over physical importation of beverage alcohol and to take such regulations outside the dormant Commerce Clause. This statute, too, bars dormant Commerce Clause scrutiny of state regulation of such importation. "If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge." *Western & S. Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648, 652-653 (1981).[2] "Once Congress acts, courts are not free to review state ... regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state ... regulation under the Commerce Clause in the absence of congressional action." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982). Congress's re-enactment of Webb-Kenyon makes explicit the intention of Congress (as well as the Nation in the Twenty-first Amendment) that state regulation of the physical importation of alcohol be unconstrained by the dormant Commerce Clause.

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re-enacting Webb-Kenyon. *See also* Br. for the United States as Amicus Curiae, *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, No. 79-97, at 43 (Jan. 7, 1980) ("U.S. *Midcal* Amicus Br.").

[2] In *Western & Southern*, this Court followed its prior holding in *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946), and held that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, removed all dormant Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance. 451 U.S. at 652-655. Western & Southern had argued that the statute did not permit "anti-competitive state taxation that discriminates against out-of-state insurers." *Id.* at 653 (internal quotation omitted). The Court rejected the argument, stating that "[t]he unequivocal language of the Act suggests no exceptions." *Id.*

C. The Purpose of Both the Twenty-First Amendment and Webb-Kenyon Was To Create an Exception to the Dormant Commerce Clause With Respect to a Single Product—Beverage Alcohol—That the Nation Believed the States Should Have Broad Power To Regulate.

The broad plain meaning of the texts of the Twenty-first Amendment and Webb-Kenyon is supported by their history. They were explicitly intended to create an exception to the dormant Commerce Clause, allowing States not only to bar importation of beverage alcohol but also to permit importation and channel it through licensed entities.

Since the founding of the Nation, the States have played an especially large role in regulating the use of beverage alcohol by their residents. In the *License Cases*, 46 U.S. (5 How.) 504 (1847), this Court "recognized a broad authority in state governments to regulate the trade of alcoholic beverages within their borders free from implied restrictions under the Commerce Clause." *Craig* v. *Boren*, 429 U.S. 190, 205 (1976). In 1873, the Court said, "It has never been seriously contended" that "the right of the States to regulate traffic in intoxicating liquors" "raise[s] any question growing out of the Constitution of the United States." *Bartemeyer* v. *Iowa*, 85 U.S. (18 Wall.) 129, 132 (1873). Rather, regulation of such traffic "fall[s] within the police regulations of the States, left to their judgment, and subject to no other limitations than such as [a]re imposed by the State constitution, or by the general principles supposed to limit all legislative power." *Id.*

Later in the century, however, the Court undercut state control by invalidating state restrictions on physical importation under the dormant Commerce Clause. The consequence was to expose state limits on the use of alcohol by their citizens to circumvention via direct shipment from out of state. As this Court explained in *Craig*, "This led Congress, acting pursuant to its powers under the Commerce Clause, to reinvigorate the State's regulatory role through

the passage of the Wilson and Webb-Kenyon Acts." *Craig*, 429 U.S. at 205 (footnotes omitted).

In 1890, the Court held in *Leisy* v. *Hardin*, 135 U.S. 100 (1890), that the dormant Commerce Clause immunized imported liquor from state regulation as long as it remained in its "original package." This decision crippled a State's ability to prohibit or regulate its citizens' use, possession, or sale of alcoholic beverages, because merchants could import beverages and resell them in the "original package."[3] Clearly disapproving of this result, Congress responded just months later with legislation designed to withdraw federal authority over the local effects of interstate alcohol traffic. The Wilson Act[4] empowered States to regulate alcohol "upon arrival," whether or not in an original package. The Court upheld that statute, *In re Rahrer*, 140 U.S. 545 (1891), but then construed it narrowly, holding that alcohol did not "arrive" in a State until received by the consignee, *Rhodes* v. *Iowa*, 170 U.S. 412 (1898). Direct interstate shipments to consumers (the conduct at issue in the present case) thus remained outside the control of the States.

In 1913, Congress enacted the Webb-Kenyon Act in order to deal with this interference with state control.[5] Webb-Kenyon prohibited any "shipment or transportation" of alcohol intended "to be received, possessed, sold, or in any man-

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[3] *See* Boris I. Bittker & Brandon P. Denning, *Bittker on the Regulation of Interstate and Foreign Commerce* § 9.02 (1999) ("[*Leisy*] opened the door to so-called original package saloons, which sold liquor while still in the original package to their patrons, thus frustrating the temperance movement unless police were stationed on every street corner.").

[4] Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (codified at 27 U.S.C. § 121).

[5] 49 Cong. Rec. 707 (1913) (Sen. Kenyon explaining that legislation was needed to "permit the States to exercise their reserved police power without interference by the Federal Government"); *see also id.* at 2,812 (Rep. Webb explaining that the Webb-Kenyon Act "would remove the shackles of interstate-commerce law from the action of the States, and discontinue the handicap under which they now labor in enforcing their police regulations").

ner used" in violation of the terminating State's laws. 27 U.S.C. § 122. The statute's intent to create a blanket exception to the dormant Commerce Clause was made clear by its title: "An Act divesting intoxicating liquors of their interstate character in certain cases."

In 1917, a divided Court upheld the constitutionality of Webb-Kenyon and affirmed that it created an exception to the dormant Commerce Clause for the importation of alcohol. *Clark Distilling Co.* v. *Western Md. Ry.*, 242 U.S. 311 (1917). The Court stated that the purpose of Webb-Kenyon was to do what the Wilson Act had failed to do: "prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught." *Id.* at 324; *see also id.* at 325 (Webb-Kenyon "took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law.").

With the "Great Experiment" of Prohibition in 1919, "the uneasy tension between the Commerce Clause and state police power temporarily subsided." *Craig*, 429 U.S. at 205. The ratification of the Eighteenth Amendment and the enactment of the Volstead Act[6] to implement the Eighteenth Amendment created a federal bar on the manufacture, sale, and transportation of all beverage alcohol within the United States.

In 1933, however, Prohibition ended with the adoption of the Twenty-first Amendment, and the States were given permanent constitutional control over interstate physical traffic in beverage alcohol. Section 1 of the Amendment repealed the Eighteenth Amendment.[7] Section 2, in language clearly modeled on Webb-Kenyon, prohibited the "importa-

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[6] Act of Oct. 28, 1919, 41 Stat. 305.

[7] U.S. Const. amend XXI, § 1 ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed.").

tion into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof."

The Amendment was explicitly intended to incorporate Webb-Kenyon into the Constitution and ensure that Webb-Kenyon's guarantee of state authority to regulate alcohol could never be overturned by a future Court (or Congress). The floor manager of the bill, Senator John Blaine,[8] described the Judiciary Committee's view that because Webb-Kenyon was sustained in *Clark* by a "divided opinion," Congress should "write permanently into the Constitution a prohibition along that line," namely Section 2. 76 Cong. Rec. 4,141 (1933). Similarly, Senator Borah, another leading proponent of Section 2, concluded that "justice and fairness to the States" required "incorporating it permanently in the Constitution of the United States." *Id.* at 4,172.

The path to adoption of the Twenty-first Amendment confirms that Congress specifically intended the States to have the power to control imports, as a foundation for all state control over beverage alcohol. The version of the Amendment reported out of the Senate Judiciary Committee contained a Section 3 giving "Congress . . . concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. at 4,138.[9] But after strong criticism from legislators who pointed out that "concurrent" federal power would effectively negate state regulatory power over alcohol,[10] Con-

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[8] This was Senator Blaine of Wisconsin, not the notorious Senator James G. Blaine of Maine. *See Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion of Thomas, J.).

[9] *See generally 324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 353-356 (1987) (O'Connor, J., dissenting).

[10] *See* 76 Cong. Rec. 4,177 (1933) (Sen. Hugo Black arguing that Section 3 "would take away from every State in the Union the right to determine how it would regulate the liquor traffic within its boundaries . . . . I am opposed to that."); *id.* at 4,143 (Sen. Blaine explaining that "under section 3 the proposal is to take away from the States the powers that the States would have in the absence of the eighteenth amendment. My view therefore is that section 3 is inconsistent with section 2 . . . .").

gress eliminated Section 3. Congress thus preserved the primary role of Section 2, which was, as Senator Blaine put it, "to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States." *Id.* at 4,143. An array of Senators and Representatives offered similar interpretations.[11]

The path to adoption also makes it clear that the Twenty-first Amendment was intended not merely to allow "dry" States to exclude beverage alcohol, but also to provide a foundation for "wet" States to regulate its distribution and use within their borders. The Amendment was intended, as noted, to constitutionalize Webb-Kenyon. Prior to 1933, this Court had interpreted Webb-Kenyon to authorize a State to regulate imports, not merely to bar them: the Court had upheld state authority under Webb-Kenyon to require publication of the names of persons importing liquor, *Seaboard*

[11] *See, e.g., id.* at 4,172 (Sen. Borah stating that the Amendment "promise[s] . . . local self-government, State rights, the right of the people of the respective States to adopt and enjoy their own policies"); *id.* at 4,219 (Sen. Walsh stating that "[t]he purpose of [Section 2] [i]s to make the intoxicating liquor subject to the laws of the State once it passe[s] the State line and before it gets into the hands of the consignee as well as thereafter"); 76 Cong. Rec. 2,776 (Rep. Lea, speaking against section 2, characterizing it as "the extreme of State rights" because it would require the federal government to enforce the "many varied, and perhaps unwise, provisions that might be written by the various States of the country"); *id.* at 4,225 (Sen. Swanson asking, and Sen. Robinson confirming, that "it is left *entirely to the States* to determine in what manner intoxicating liquors shall be sold or used and to what places such liquors may be transported") (emphasis added); *id.* (Sen. Robinson stating that section 2 "leaves to the States the power of regulation"); *id.* at 4,514 (Rep. Celler stating that "[e]ach State must determine for itself the type of supervision it wishes over the distribution of liquor"); *see also* U.S. *Midcal* Amicus Br. at 45 ("The debates on the Twenty-First Amendment [show that] the states' power to regulate liquor, whether moving in intrastate or interstate commerce, was to be relieved of the limitations imposed by the Commerce Clause *simpliciter*.").

Air Line Ry. v. *North Carolina*, 245 U.S. 298 (1917),[12] and to restrict the amount of alcohol an individual could import and impose detailed labeling requirements on imports, *Ranier Brewing Co.* v. *Great N. Pac. S.S. Co.*, 259 U.S. 150, 153-154 (1922).[13] Congress's subsequent use of language parallel to Webb-Kenyon in the Twenty-first Amendment must be interpreted to incorporate this interpretation of that language. *See*, *e.g.*, *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."); *Holder* v. *Hall*, 512 U.S. 874, 961 (1994) (separate opinion of Stevens, J.) ("[W]hen Congress reenacts a statute with knowledge of its prior interpretation, that interpretation is binding on the Court."); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).

The path to adoption also makes clear that the Amendment was understood not to require States to treat in-state and out-of-state firms identically or equally. When it enacted Webb-Kenyon, Congress was presumably aware of extensive litigation about whether States were required to afford in-state and out-of-state firms identical treatment, and it edited Webb-Kenyon to remove any such require-

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[12] *See Seaboard*, 245 U.S. at 304 ("The challenged act instead of interposing an absolute bar against all shipments, as it was within the power of the State to do, in effect permitted them upon conditions intended to secure publicity, to the end that public policy might not be set at naught by subterfuge and indirection. The greater power includes the less.").

[13] In 1913, Representative Webb emphasized that Webb-Kenyon "applies to all States, 'wet' and 'dry' alike, because every State in the Union has laws against the unrestricted sale of liquor, and this bill would protect the 'wet' States whose laws are to be violated in the use or sale of liquor as well as it would protect the 'dry' States under the same circumstances. It is a State rights measure. . . . This bill might well be styled a local option act to give the various States power to control the liquor traffic as to them might seem best." 49 Cong. Rec. 2,812 (1913).

ment. The cases included *Tiernan* v. *Rinker*, 102 U.S. 123, 127 (1880) (declaring Texas statute "inoperative, so far as it makes a discrimination against wines and beer imported from other States"), and *Scott* v. *Donald*, 165 U.S. 58, 101 (1897) (invalidating South Carolina statute as "an unjust preference of the products of the enacting State as against similar products of the other States"). The initial draft of the Webb-Kenyon Act would have granted States only the right to regulate imported products on a nondiscriminatory basis, but the bill was amended to cover all imports and eliminate any reference to discrimination. *See* 49 Cong. Rec. 2,687, 2,919-2,920, 2,924 (1913); *Dugan* v. *Bridges*, 16 F. Supp. 694 (D.N.H. 1936). The Twenty-first Amendment constitutionalized Webb-Kenyon, and (as we show below) the understanding of those who lived through its adoption was that States were not required to treat out-of-state and in-state firms alike.

Finally, any doubt about Congress's own intent with respect to state power over physical importation was eliminated when Congress re-enacted the Webb-Kenyon Act in 1935. By re-enacting the language it had enacted in 1913, Congress ratified this Court's intervening interpretation of Webb-Kenyon as creating a general exception to the dormant Commerce Clause for both wet and dry States.

D. This Court's Cases Interpreting the Twenty-first Amendment Make Clear That States May Adopt Any Rational Scheme of Regulation of Physical Importation of Beverage Alcohol—Much as Congress May Adopt Any Rational Scheme of Regulating Interstate Traffic in Other Products.

This Court has ruled over and over that the Twenty-first Amendment gave the States a power to regulate the physical importation of alcohol that is not limited by the Commerce Clause. From the earliest cases to its most recent pronouncements, this Court has consistently held that "the States' regulatory power over this segment of commerce is . . . largely 'unfettered by the Commerce Clause.'" *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 514-515

(1996) (quoting *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132, 138 (1939)). Under this Court's cases, a state law regulating the physical importation of alcohol might, of course, be subject to "rational basis" scrutiny under the Due Process Clause or the Equal Protection Clause, just as similar scrutiny might be applied to congressional regulation of other parts of interstate commerce. And state regulation of beverage alcohol is of course subject (like congressional regulation of commerce) to the First Amendment and other provisions of the Constitution. But rational state regulation of physical importation is not limited by the dormant Commerce Clause. On the contrary, this Court's cases make clear that state regulation of this one product is at least as free from economic second-guessing by the courts as is congressional regulation of other parts of commerce. The heightened judicial scrutiny endorsed by the Sixth Circuit would impermissibly push the courts into an area expressly reserved to the States by both the Constitution and Congress.

This Court's early cases, decided unanimously in the immediate wake of the Twenty-first Amendment (and by Justices who had lived through Prohibition and Repeal) and never explicitly or implicitly overruled, make it clear that state power over importation is far broader than needed here to uphold Michigan's statute—and, in particular, that States may impose rational conditions on imports that are not imposed on domestic products. Immediately after Repeal, the States used their constitutional authority to enact distribution systems that drew various distinctions between in-state and out-of-state alcohol, and the Court was immediately confronted with claims that States had unconstitutionally "discriminated" against out-of-state alcohol. In *Young's Market*—the first Twenty-first Amendment case to come before the Court—the Court upheld a California statute that imposed a $500 license fee for wholesalers to import beer. California imposed no analogous fee for locally produced beer, but the Court, speaking through Justice Brandeis, ruled that the Amendment "confer[s] upon the State the power to forbid all importations which do not comply with the conditions which it prescribes." 299 U.S. at 62. The

Court flatly rejected the argument that if a State permits the manufacture and sale of alcohol "it must let imported liquors compete with the domestic on equal terms." *Id.* Indeed, the Court said, it cannot "be doubted" that a State could permit the sale of local brews and prohibit all competing imports. *Id.* at 63.

One term later, in *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401 (1938), the Court unanimously reaffirmed *Young's Market* and upheld a Minnesota statute that prohibited the importation of strong alcohol beverages (*i.e.*, greater than 25 percent alcohol) but permitted their sale if produced in-state. The statute "clearly discriminate[d] in favor of liquor processed within the State," *id.* at 403, but Justice Brandeis, again speaking for the Court, refused to "rewrit[e]" the Twenty-first Amendment to limit state power and noted that *Young's Market* had "settled" that "discrimination against imported liquor is permissible," *id.* at 403-404. The next term, in *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U.S. 391 (1939), the Court addressed a Michigan statute that discriminated against out-of-state alcohol by prohibiting Michigan dealers from selling any beer from Indiana and nine other States. The Court unanimously affirmed the statute's constitutionality, broadly holding that "the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." *Id.* at 394. In the 1941 *Duckworth* case, Justice Jackson explained why the Court treated state alcohol regulations with such deference:

> The people of the United States knew that liquor is a lawlessness unto itself. They determined that it should be governed by a specific and particular constitutional provision. They did not leave it to the courts to devise special distortions of the general rules as to interstate commerce to curb liquor's 'tendency to get out of legal bounds.' It was their unsatisfactory experience with that method that resulted in giving liquor an exclusive place in constitutional law . . . .

314 U.S. at 398-399 (Jackson, J., concurring in result).

The Court did not in its early cases identify what power *Congress* retained under the Commerce Clause to regulate beverage alcohol, but the Court has never deviated from its holding that, in the absence of contrary congressional regulation, state power over importation was unconstrained by the dormant Commerce Clause. In 1944, for example, Justice Black—who had served in the Senate that enacted the Twenty-first Amendment—wrote that although "the precise amount of power [the Amendment] has left in Congress to regulate liquor under the Commerce Clause has not been marked out by decisions," he doubted "that state statutes regulating intoxicating liquor should *ever* be invalidated by this Court under the Commerce Clause except where they conflict with valid federal statutes." *Carter* v. *Virginia*, 321 U.S. 131, 138 (1944) (Black, J., concurring) (emphasis added); *see also id.* at 140 (Frankfurter, J., concurring) ("[T]he range of State control over liquor has been extended by the Twenty-first Amendment beyond the permissive bounds of the Commerce Clause.").

The Court later did address what power Congress retained, but these cases—sometimes portrayed as cutting back on the Court's earlier broad interpretations of state power—*reiterate* that the dormant Commerce Clause does not curb state authority over alcohol importation. In *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), *Midcal*, *supra*, and *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984), the Court was forced to balance state alcohol regulations against affirmative exercises of Congress's power under the Commerce Clause. In each case, the federal power won.[14] (No such issue is presented

[14] *See Hostetter*, 377 U.S. at 334 (State cannot "prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations."); *Midcal*, 445 U.S. at 114 ("The unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act."); *Capital Cities*, 467 U.S. at 716 ("As in *Midcal Aluminum* . . . we hold that when, as here, a state regulation squarely

here because Congress has, in the Webb-Kenyon Act, exercised its authority in a manner entirely consistent with and supportive of state importation restrictions.) *Hostetter*, *Midcal*, and *Capital Cities* themselves stated emphatically, however, that in the absence of an exercise of Congress's power, the dormant Commerce Clause is inapplicable against state alcohol regulations:

> This Court made clear in the early years following adoption of the Twenty-first Amendment 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. . . . This view of the scope of the Twenty-first Amendment . . . has remained unquestioned.

Hostetter, 377 U.S. at 330; *see also Midcal*, 445 U.S. at 110 ("The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."); *Capital Cities*, 467 U.S. at 712 ("§ 2 reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause.").

The Court has, of course, repeatedly held that the Twenty-first Amendment does not allow the States to "ignore their obligations under *other* provisions of the Constitution," *Capital Cities*, 467 U.S. at 712 (emphasis added), any more than Congress itself, when legislating under the Commerce Clause, can ignore other constitutional limitations. *See*, *e.g.*, *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982)

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conflicts with the accomplishment and execution of the full purposes of federal law, and the State's central power under the Twenty-first Amendment of regulating the times, places, and manner under which liquor may be imported and sold is not directly implicated, the balance between state and federal power tips decisively in favor of the federal law, and enforcement of the state statute is barred by the Supremacy Clause.").

(Massachusetts statute regulating location of liquor licensees violated Establishment Clause); *Craig*, *supra* (Oklahoma gender-biased 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). But these cases do not suggest that the dormant Commerce Clause imposes any limitation on state authority. To the contrary, they strongly reiterate plenary state power. *See*, *e.g.*, *Craig*, 429 U.S. at 206 ("This Court's decisions . . . have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause."); *James B. Beam Distilling*, 377 U.S. at 346 ("We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit . . . importation . . . . There can surely be no doubt, either, of Kentucky's plenary power to regulate and control . . . the distribution, use, or consumption of intoxicants within her territory after they have been imported.").

The Twenty-first Amendment and Webb-Kenyon empower a State to regulate interstate shipments for "delivery and use" within the State, and the Court has been careful not to allow States to project their power beyond their borders. In *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986), and *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324 (1989), for example, the Court invalidated state statutes that "directly control[led] commerce occurring wholly outside the boundaries of a State," *Healy*, 491 U.S. at 336, by effectively dictating alcohol prices in other States. *See Brown-Forman*, 476 U.S. at 585 (Twenty-first Amendment "confers no authority to control sales in other States"); *Healy*, 491 U.S. at 342.[15] Similarly, *Hostetter*

[15] The *Healy* Court also condemned the Connecticut statute on the secondary ground that it discriminated against interstate commerce, and Justice Scalia concurred only in this second ground. But the discrimina-

invalidated a New York statute that regulated alcohol for which "ultimate delivery and use [was] not in New York, but in a foreign country." 377 U.S. at 333.[16] None of these cases, however, imposes or suggests any constriction of state power with respect to circumstances that *are* covered by the Twenty-first Amendment, such as when a State exercises its core power to regulate the importation of alcohol for use in the State.

Bacchus Imports, Ltd. v. *Dias*, 468 U.S. 263 (1984)—the case on which the Sixth Circuit relied most heavily—is arguably inconsistent with the long line of earlier cases,[17] but nothing in *Bacchus* suggests that the dormant Commerce Clause limits rational state regulation of physical importation for purposes of assuring responsible use of beverage alcohol and raising related revenues. The statute at issue in *Bacchus* did not purport to regulate "the transportation or importation into any State" of alcoholic beverages. More-

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tion at issue was entirely different from the present case. As between two firms, both engaged in selling beer in Connecticut, but only one of which also sold beer elsewhere, the State's pricing law would apply only to the latter, effectively penalizing firms doing business in Connecticut for engaging in business anywhere else. The distinction had nothing to do with importation (or with the State's price control objectives). Regulation of imports, the exact thing the Twenty-first Amendment allows, is inherently concerned with interstate and not domestic commerce. As Judge Easterbrook said in *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), "*Every* use of § 2 could be called 'discriminatory' in the sense that plaintiffs [challenging a statute indistinguishable from Michigan's] use that term, because every statute limiting importation leaves intrastate commerce unaffected." *Id.* at 853. Under the Twenty-first Amendment, the issue is whether the necessarily distinct and separate regulation of domestic commerce in beverage alcohol is so irrational as to invalidate the importation regulation.

[16] *See also Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518 (1938) (Twenty-first Amendment did not confer on California authority to collect taxes on alcohol delivered to, and used in, park under federal sovereignty).

[17] *See Bacchus*, 468 U.S. at 278-287 (Stevens, J., dissenting); *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 553-556 (1991) (O'Connor, J., dissenting).

over, the challenged provision did not regulate the use of alcohol or help raise taxes. On the contrary, it was a special tax exemption for a locally produced pineapple liquor, designed to promote that particular local product. As Hawaii conceded, the *sole* purpose of the tax exemption was "to promote a local industry." *Id.* at 276 (quoting brief of Hawaii). Indeed, the State made no attempt in the lower courts to defend the exemption on Twenty-first Amendment or Webb-Kenyon grounds, *id.* at 274 n.12, nor did it claim that the promotion of a local beverage served any purpose underlying those provisions, *id.* at 276. This Court struck down the statute, stating that the Twenty-first Amendment does not shelter "mere economic protectionism," *id.*, but it did not even hint that rational distinctions (as in the Michigan law, *see infra* Part II) drawn in the course of regulating physical importation may be subject to heightened scrutiny.

On the contrary, as Judge Easterbrook stated in *Bridenbaugh*, "No decision of the Supreme Court holds or implies that laws limited to the importation of liquor are problematic under the dormant commerce clause." *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000); *see also Milton S. Kronheim & Co.* v. *District of Columbia*, 91 F.3d 193, 203 (D.C. Cir. 1996) ("Nothing in *Bacchus* or the other later cases overrules the principles iterated in [earlier Supreme Court cases]," including the "authority of the state under the [Twenty-first] Amendment over importation of intoxicants.").

Indeed, six years after *Bacchus*, this Court reaffirmed state power over importation in *North Dakota* v. *United States*, 495 U.S. 423 (1990). Justice Stevens, writing for a four-Justice plurality (which included Justice White, the author of *Bacchus*), noted that "[u]nder the State's regulatory system, ... out-of-state ... suppliers may sell to only licensed wholesalers or federal enclaves." *Id.* at 428. The creation of such a system, he said, "fall[s] within the core of the State's power under the Twenty-first Amendment" and is "unquestionably legitimate." *Id.* at 432. Justice Scalia, concurring in the result, said, without qualification, "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." *Id.* at 447. No Justice disagreed on this point.

The Sixth Circuit attempted to distinguish *North Dakota* on the ground that it "did not implicate the Commerce Clause" (Pet. App. 15a), but that is entirely wrong. The essential premise of *North Dakota* was that the State had the power, unfettered by the Commerce Clause, to require that all imported beverage alcohol pass through licensed in-state firms. It was only on that premise that the disputed question in the case—what steps the State could take to prevent diversion of federal-enclave alcohol—arose. The four dissenters did not question the premise, although they disagreed on the federal enclave issue. The Court obviously did not unanimously overlook a Commerce Clause problem that would have required a different result if the case had involved any other product.

Finally, this Court has never suggested (as the Sixth Circuit held) that state regulation of importation of beverage alcohol must be narrowly tailored or is otherwise subject to "strict scrutiny." On the contrary, this Court's cases are consistent with the evident and stated intention of the Twenty-first Amendment and Webb-Kenyon to give the States broad discretionary power over importation of beverage alcohol that is comparable to Congress's power over interstate traffic in other products. When Congress adopts a law regulating interstate commerce, courts ask only whether the means selected by Congress are "reasonably adapted to the end permitted by the Constitution." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981) (internal quotation omitted). Congress may not, of course, adopt a classification that violates the freedom of speech guaranteed by the First Amendment or improperly discriminates on the basis of race or religion. But if the law imposes an economic classification "that neither proceeds along suspect lines nor infringes fundamental constitutional rights," courts ask only whether "there is any *reasonably*

conceivable state of facts that could provide a rational basis for the classification." *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added). "On rational-basis review, . . . those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it. Moreover, because [courts] never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* at 314-315 (citations and internal quotation omitted). As the Court has often explained in this context, "Where . . . there are plausible reasons for [a legislature's] action, our inquiry is at an end. . . . This is particularly true where the legislature must necessarily engage in a process of line-drawing . . . [because] the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980).

Applying this "most relaxed and tolerant form of judicial scrutiny," *Dallas* v. *Stanglin*, 490 U.S. 19, 26 (1989), the Court has declined over and over again to second-guess Congress's use of its Commerce Clause power to draw economic distinctions that have a "conceivable" rational justification. *See, e.g.*, *Beach Communications*, 508 U.S. at 316-320 (affirming Congress's authority to impose different regulatory burdens on cable television operators); *Fritz*, 449 U.S. at 174-179 (affirming Congress's authority to assign different retirement benefits to railroad workers).[18] The Court also extends this same deference to state legislatures' use of their police powers. *See, e.g.*, *Nordlinger* v. *Hahn*, 505 U.S.

[18] *See also Preseault* v. *ICC*, 494 U.S. 1, 17, 19 (1990) (If "a regulated activity affects interstate commerce . . . we must ensure only that the means selected by Congress are reasonably adapted to the end permitted by the Constitution. . . . The process of legislating often involves trade-offs, compromises, and imperfect solutions, and our ability to imagine ways of redesigning the statute to advance one of [the legislature's] ends does not render it irrational." (citations and internal quotation omitted)).

1, 11 (1992) (upholding California law imposing different tax assessments on new and existing homeowners); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961) (upholding Maryland law exempting some but not all businesses from generally applicable "Blue Law" forbidding commercial activity on Sunday).

At the least, such deference is appropriate for States acting under the authority conferred by the Twenty-first Amendment. The Amendment was intended to restore state power over alcohol traffic and to protect against federal encroachment. It would be ironic, in the face of the Amendment and Congress's own allocation of power to the States in Webb-Kenyon, for this Court nonetheless to subject state regulation to heightened review—scrutiny that Congress itself does not face. State regulation of this one product, if rationally designed to serve a Twenty-first Amendment purpose, should be as free from economic second-guessing by the courts as is congressional regulation of other parts of commerce. The tax scheme in *Bacchus*, which Hawaii expressly denied had any regulatory purpose related to the Amendment, failed this rational basis test. As discussed below, Michigan's distinction between out-of-state wineries and state licensees with a substantial in-state presence easily passes it.

II. MICHIGAN'S BAR AGAINST DIRECT SALES OF IMPORTED ALCOHOLIC BEVERAGES IS NOT RENDERED INVALID BY ITS ENTIRELY RATIONAL DECISION TO ALLOW LICENSED IN-STATE WINERIES TO SHIP THEIR PRODUCTS DIRECTLY TO CONSUMERS.

The Sixth Circuit treated Section 2 of the Twenty-first Amendment as having no force in this case, and ignored Webb-Kenyon entirely, because Michigan permits licensed in-state manufacturers to ship wine directly to consumers. But Michigan's treatment of both foreign and domestic wineries reflects an entirely rational legislative judgment.

As the Sixth Circuit recognized, Michigan does not bar the importation of out-of-state wine or otherwise prevent any out-of-state manufacturer from distributing its products

in the State. *See* Pet. App. 13a. All wines, no matter where produced, can be sent to a Michigan resident's home by an appropriate in-state licensee, subject to Michigan regulations and effective sanctions should the in-state licensee fail to comply with Michigan law. The "discrimination" the Sixth Circuit found is that Michigan requires non-Michigan manufacturers to ship wine to licensed in-state wholesalers, but permits licensed in-state wineries to sell their products directly to consumers. But in both cases, Michigan is simply demanding that beverage alcohol pass through the hands of licensees with a substantial in-state physical presence that makes them subject to effective state regulation. Michigan has judged that a firm that manufactures wine in the State, and can be put out of business if it behaves improperly, is sufficiently within the reach of Michigan regulation that it does not need to sell through another licensee. Nothing in the Twenty-first Amendment, Webb-Kenyon, or the Commerce Clause requires Michigan to impose unnecessary burdens on in-state entities that are effectively regulated in other ways. This Court should not open the door for courts to use the dormant Commerce Clause to substitute their judgments for the States' in this sensitive area.[19]

State power to regulate alcohol imports is the foundation for achieving all other state regulatory objectives. The Nation learned in the Nineteenth Century, *see Leisy*, *supra*; *Vance* v. *W.A. Vandercook Co. (No. 1)*, 170 U.S. 438 (1898), and this Court reiterated as recently as *North Dakota*, that States must be able to regulate the terms and conditions of importation if they are to be able to control alcohol use and collect alcohol taxes. That is why Michigan adopted a regulatory scheme that channels all beverage alcohol through licensed firms that have a substantial permanent physical

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[19] *Cf. Tyler Pipe Indus., Inc.* v. *Washington State Dep't of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part) ("It is astonishing that we should be expanding our beachhead in this impoverished territory, rather than being satisfied with what we have already acquired by a sort of intellectual adverse possession.").

presence in the State and thus can be effectively disciplined for noncompliance in this process. They are subject to inspections of their books and records and physical premises by the State. *See* Mich. Comp. Laws §§ 436.1217, 436.1235. They have important in-state property subject to attachment by the State. *See id.* § 436.1911. And the State can put them entirely out of business for serious violations. *See id.* §§ 436.1903, 436.1905, 436.1907, 436.1909, 436.1917.

Out-of-state winemakers are in an entirely different situation. To begin with, no State has unlimited enforcement resources, and Michigan simply cannot, as a practical matter, check the backgrounds, inspect the records, or monitor the regulatory compliance of an unlimited number of wineries all over the Nation. (The number has been estimated at over 2,100, but the even more important point is that Michigan has no way of controlling that number, or limiting the number of websites to which its children have access.) In upholding New York's similar regulatory scheme, the Second Circuit explained well the difficulties faced by state alcohol regulators in regulating out-of-state entities:

> In 2000, there were over 2,100 wineries in the country, a 275% increase since 1975. Requiring New York officials to traverse the country to ensure that direct sales to consumers (no matter how small) comply with New York law would render the regulatory scheme useless. Section 2 does not require that New York bear the burden in attempting to ensure proper compliance with its tax and regulatory system regarding imported wine.

Swedenburg v. *Kelly*, 358 F.3d 223, 238-239 (2d Cir. 2004) (footnote omitted).

But the even more fundamental point is that Michigan has concluded it cannot effectively police sales by manufacturers located entirely outside the State. It has no effective ability to inspect their premises or attach their property administratively for violating Michigan law. And even if it could require out-of-state wineries to obtain Michigan licenses, it could not force an out-of-state firm to treat the li-

censing process nearly as seriously, because denial or revocation of a license is a far less effective sanction against an out-of-state manufacturer (which risks losing only its sales to Michigan) than against an in-state winery, for whom license revocation means the loss of the business itself. *See Bainbridge* v. *Turner*, 311 F.3d 1104, 1116 (11th Cir. 2002) (Roney, J., dissenting) (court should not "treat[] as equal the prospective loss of a beverage license to an in-state firm and the loss of a Florida beverage license of an out-of-state firm, if one is required at all. One would put the firm out of business, the other would simply restrict the market by a state.").

Furthermore, allowing out-of state wineries to sell directly to consumers would, in fact, allow those wineries to compete unfairly with in-state firms precisely because of Michigan's inability, at a practical level, to regulate such sales. For example, taxes on sales originating out-of-state are notoriously easy to evade. Indeed, one of the injuries asserted by the plaintiffs in *Bridenbaugh* was that buying out-of-state wines from in-state dealers required them to pay the "difference in price" produced by the fact that in-state "dealers collect state excise taxes on wines that pass through their hands, while the [out-of-state] shippers with which plaintiffs used to deal do not." 227 F.3d at 849-850.[20] In-state wineries are also obviously under much greater compulsion to honor other regulatory requirements and cooperate with the Michigan Commission. Michigan's requirement that out-of-state wine go through the three-tier system ensures that out-of-state wineries cannot use direct shipment as a form of regulatory arbitrage.

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[20] *See also Bridenbaugh*, 227 F.3d at 850 ("[S]tates have insuperable problems collecting their use taxes when people buy from out-of-state vendors that do not collect sales taxes. Noncompliance is almost impossible to detect, and rampant civil disobedience ensures that a handful of prosecutions would not be effective. Private gains from violating the laws vastly exceed the anticipated legal penalties.").

Michigan rationally decided that in-state wineries could ship directly to consumers because they are subject to effective oversight and regulation. Michigan decided, as New York did, that "[p]resence ensures accountability." *Swedenburg*, 358 F.3d at 237. Michigan had no obligation to impose unneeded restrictions on in-state manufacturers merely because it required imports to go through state licensees. "Defining the class of persons subject to a regulatory requirement—much like classifying governmental beneficiaries—inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Beach Communications*, 508 U.S. at 315-316 (internal quotation omitted).

States particularly need regulatory flexibility today because of the potential easy availability of alcohol over the Internet. Whereas direct shipment might have posed a limited problem ten years ago, today the Internet threatens to make it a major breach of state regulatory regimes. Electronic commerce makes it conceivable that large amounts of alcohol could be sold via direct shipment, and the States are understandably concerned about the prospect of being flooded with shipments of alcohol, directly to consumers, from thousands of unaccountable out-of-state sources. *See* No. 03-1116 (petition stage), Br. of Amici Ohio and 35 Other States 1 ("The possibility that federal courts may eviscerate the States' ability to maintain their liquor control systems, as some Circuit Courts have already done, is of paramount concern to all States."). "In these credit card days of easy purchase by telephone and internet," *Bainbridge*, 311 F.3d at 1116 (Roney, J., dissenting), States need greater assistance from the courts, not new legal obstacles to enforcement.

Underage drinking is a particular concern posed by direct shipping. According to a study by the National Academy of Sciences released since the proceedings in the dis-

trict court, more young people drink alcohol than smoke tobacco or use marijuana, and underage drinking costs the nation an estimated $53 billion annually in losses stemming from traffic fatalities, violent crime, and other behaviors. *See* Richard J. Bonnie & Mary Ellen O'Connell, *Reducing Underage Drinking: A Collective Responsibility* 13, 35 (2004).[21] The study further reported that 10 percent of minors surveyed said they had obtained alcohol over the Internet or through home delivery and that "increasing use of the Internet may increase the percentage." *Id.* at 174. Expanding the availability of alcohol through direct shipments therefore poses very real dangers, and the judicial system is the last place where these types of policy decisions should be made, particularly as electronic commerce is rapidly evolving. It is the States that are on the frontline dealing with these issues, and they, not the courts, should decide when and how alcohol may enter their territory.

Finally, the potential impact of the Sixth Circuit's decision is very large. Plaintiffs have implied throughout this case that it concerns only oenophiles' access to high-end wines, but they have (thus far successfully) challenged the basic provision that bars unlicensed importation of all alcoholic beverages. Moreover, the principle they espouse is not limited to "fine and rare wines." The Constitution does not provide any basis for saying that only makers of fine and rare wines (and not all other alcoholic beverages) must be given the same direct shipment privilege given to licensed in-state wineries. And if plaintiffs were right, there would be no reason why Michigan, which allows licensed in-state retail package stores to deliver beer, wine, and distilled spirits to their customers, *see* Mich. Comp. Laws § 436.1203(2), would not be required to allow out-of-state retailers to do the same thing. Similarly, there would be no reason why Michigan, which requires wholesalers to have an in-state presence, would not be required to allow out-of-state whole-

[21] *Available at* http://www.nap.edu/books/0309089352/html/.

salers to ship wine, beer, and distilled spirits to Michigan retailers.

In short, the path opened up by the Sixth Circuit leads far beyond giving the self-described wine connoisseurs in this case the ability to buy fine and rare wines on the telephone; it threatens to undo the "unquestionably legitimate," *North Dakota*, 495 U.S. at 432, three-tier system, imposed severally by the States, that has been the foundation of beverage alcohol regulation since the end of Prohibition.

CONCLUSION

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

Respectfully submitted,

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