

Nos. 18-2199, 18-2200

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

LEBAMOFF ENTERPRISES INC.; JOSEPH DOUST; JACK STRIDE; JACK SCHULZ;
RICHARD DONOVAN,

Plaintiffs-Appellees,

v.

RICK SNYDER; WILLIAM SCHUETTE; ANDREW J. DELONEY,

Defendants-Appellants,

and

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,

Intervenor.

Appeal from the United States District Court for the Eastern District of Michigan,
No. 2:17-cv-10191-AJT, Hon. Arthur J. Tarnow

**BRIEF OF AMICUS CURIAE AMERICAN TRUCKING ASSOCIATIONS,
INC. SUPPORTING PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 18-2199

Case Name: Lebamoff Enterprises Inc., et al. v. Rick Snyder, et al.

Name of counsel: Deanne E. Maynard

Pursuant to 6th Cir. R. 26.1, American Trucking Associations, Inc.

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

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I certify that on November 25, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Deanne E. Maynard

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF AMICUS CURIAE

American Trucking Associations, Inc. (“ATA”) is the national association of the trucking industry. Its direct membership includes approximately 1,800 trucking companies, and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. Its membership also includes transportation companies such as FedEx Corporation (“FedEx”) and United Parcel Service, Inc. (“UPS”). The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States, and virtually all of them operate in interstate commerce among the States. ATA regularly represents the common interests of the trucking industry in courts throughout the nation. ATA’s members send drivers into every State in the nation, and most if not all of its local jurisdictions. Thus, ATA and its members have a strong interest in the questions presented in this appeal.¹

¹ Undersigned counsel for ATA certify that no party’s counsel authored this *amicus curiae* brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparation or submission of this *amicus curiae* brief; and no person or entity, other than ATA, its members, or its counsel, contributed money intended to fund the preparation or submission of this *amicus curiae* brief. All parties have consented to the filing of this brief.

ARGUMENT

A core principle of Commerce Clause jurisprudence is that States may not “clearly discriminate against interstate commerce unless that discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.” *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 340-41 (1989) (citations omitted). As the district court correctly held, Michigan’s law prohibiting wine shipments from out-of-state retailers falls squarely within the category of laws the Commerce Clause precludes.

The Michigan law challenged here significantly burdens companies engaged in interstate commerce—not only the retailers that want to ship wine to Michigan consumers, but also the carriers that would transport and deliver that wine. Michigan’s law creates an irrational situation for carriers: they can carry certain cargo if its origin and destination are within the State, but they cannot transport the exact same cargo if it must cross state lines, unless it originates from a particular type of shipper. This patchwork of regulation unreasonably burdens carriers’ ability to transport goods in interstate commerce.

This burden is particularly significant given the importance and rapid growth of direct-to-consumer wine shipping. When the Supreme Court decided *Granholm v. Heald* more than a decade ago, the “direct sale of wine to consumers” was an “emerging and significant business.” 544 U.S. 460, 467 (2005). It is an even more

significant business today, as almost all States now permit shipments of wine to consumers in at least some circumstances. FedEx, *Direct-to-Consumer Wine Shipping State Reference Guide*.²

Michigan and the Wholesalers Association attempt to justify Michigan's facially discriminatory law by asserting that allowing out-of-state retailers to ship wine directly to consumers will lead to rampant sales to minors and unchecked distribution of unsafe alcohol. But both of these asserted interests can "easily be achieved by ready alternatives." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2475 (2019); see *Granholm*, 544 U.S. at 492.

First, Michigan contends that "out-of-state entities are more likely to sell wine to minors than in-state counterparts." State Br. 51. But Michigan has allowed wine to be shipped directly to Michigan consumers from both in-state and out-of-state wineries for more than a decade—and from in-state retailers since January 2017. Pls.' Summ. J. Mot., RE 31, Page ID #209-210. These permitted shipments undermine Michigan's attempts to justify an outright ban on shipments by out-of-state retailers, as a matter of both law and fact.

² https://www.fedex.com/content/dam/fedex/us-united-states/Small-Business-Center/images/2020/Q1/Direct_to_Consumer_Wine_Shipping_State_Reference_Guide_0719_1617352393.pdf (last visited Nov. 25, 2019).

On the law, Michigan’s express allowance of direct shipments from out-of-state wineries (Mich. Comp. Laws § 436.1203(4)) and out-of-state microbreweries (*id.* § 436.1203(12)) belies Michigan’s assertion that it cannot adequately prevent sales to minors from out-of-state entities. A law’s underinclusiveness can “reveal that a law does not actually advance a compelling interest” and “can raise ‘doubts about whether the government is in fact pursuing the interest it invokes.’” *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015); *see, e.g., Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 195 (1999).

On the facts, Michigan and the Wholesalers Association have produced no credible evidence that existing measures are ineffective at preventing minors from obtaining wine shipments from these currently permitted sources. *See* Plaintiffs-Appellees’ Br. 30-40. There is no reason to believe the result would be any different for out-of-state retailers. And carriers’ experience in transporting the currently permitted shipments suggests the parade of horrors hypothesized by Michigan and the Wholesalers Association would not materialize.

In transporting these currently allowed shipments, carriers such as UPS and FedEx apply their own comprehensive nationwide policies and procedures for shipping alcohol directly to consumers—practices they apply regardless of whether a manufacturer or a retailer is the source of the alcohol. For example, UPS accepts alcohol for transportation “only from Shippers who are licensed and authorized

under applicable laws to ship alcoholic beverages.” UPS, *2019 UPS® Tariff/Terms and Conditions of Service—United States* 7 (Sept. 23, 2019).³ It requires wine shippers to enter into a specific agreement with UPS for the transportation of wine. *Id.* Under that agreement (and UPS’s general terms and conditions), wine shippers “must use Delivery Confirmation Adult Signature Required service requesting an adult signature for each Package containing alcoholic beverages.” *Id.* They must also “affix a special UPS alcoholic beverages label to each Package,” in addition to any other labeling required by the origin or destination state. *Id.* UPS may “discontinue service to any Shipper for, among other reasons, tendering a Package containing alcoholic beverages that does not comply with all applicable laws” and UPS’s terms and conditions. *Id.*

Similarly, FedEx permits “[o]nly licensed entities holding a state and federal license or retailers holding a state license” to ship alcohol. FedEx, *FedEx Ground Tariff* 2 (Nov. 1, 2019);⁴ see FedEx, *FedEx Express Terms and Conditions* 2-3 (Oct. 1, 2019).⁵ FedEx forbids individual consumers to ship alcohol of any kind.

³ https://www.ups.com/assets/resources/media/en_US/terms_service_us.pdf.

⁴ https://www.fedex.com/content/dam/fedex/us-united-states/services/SG_GroundTariff_2019.pdf.

⁵ https://www.fedex.com/content/dam/fedex/us-united-states/services/SG_TermsCond_US_2019.pdf.

FedEx, *Alcohol Shipping Center*.⁶ Like UPS, FedEx requires wineries and retailers to enter into a specific agreement before shipping wine with FedEx. *FedEx Ground Tariff, supra*, at 2. FedEx policy “requires an adult signature at the time of delivery for every U.S. package containing alcohol.” *Alcohol Shipping Center, supra*. Further, FedEx mandates that “[e]very alcohol shipment is required to have a label identifying it as such” provided by FedEx. *Id.* And FedEx may reject wine shipments and terminate a shipper’s account if the shipper tenders a package that violates FedEx’s terms and conditions or any “applicable laws and regulations.” *See FedEx Ground Tariff, supra*, at 2, 9; *Alcohol Shipping Center, supra*.

Beyond the contractual obligations that UPS and FedEx impose on wine shippers, they each take additional measures to ensure that wine shipments do not end up in minors’ hands. For example, UPS extensively trains its drivers about age-verification requirements. And both UPS and FedEx allow wine shipments to a UPS or FedEx location for pickup and release only upon verification of the recipient’s age. UPS, *Shipping Wine and Alcoholic Beverages* (last updated July 1, 2019);⁷ *see FedEx Ground Tariff, supra*, at 13.

⁶ <https://www.fedex.com/en-us/shipping/alcohol.html> (last visited Nov. 25, 2019).

⁷ <https://www.ups.com/us/en/help-center/packaging-and-supplies/special-care-shipments/wine.page>.

Second, Michigan and the Wholesalers Association argue that out-of-state retailers need not obtain their wine through Michigan’s three-tier system and that circumvention of that system inhibits Michigan’s ability “to ensure that alcoholic beverages consumed by citizens do not put the public at risk” and “to identify the location of products in case of a recall.” State Br. 47; *see* Wholesalers Br. 23-24. But this argument is “implausible on its face” (*Tennessee Wine*, 139 S. Ct. at 2475) because “fake alcohol is not a large problem in the U.S.” (Summ. J. Op., RE 43, Page ID #862). And direct shipments from *wineries* already flow outside Michigan’s three-tier system (State Br. 18), yet Michigan and the Wholesalers Association point to no evidence that this has caused problems involving counterfeit alcohol.

In sum, Michigan and the Wholesalers Association assert no valid justification for the challenged provision other than protectionism of in-state businesses. Just as in *Tennessee Wine* and *Granholm*, “the record is devoid of any ‘concrete evidence’ showing that” Michigan’s discriminatory law “actually promotes public health or safety.” *Tennessee Wine*, 139 S. Ct. at 2474 (quoting *Granholm*, 544 U.S. at 490). The judgment striking down Michigan’s prohibition on wine shipments by out-of-state retailers should be affirmed.

CONCLUSION

For these reasons and those in the plaintiffs-appellees' brief, the judgment should be affirmed.

Dated: November 25, 2019

Respectfully submitted,

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Amicus curiae American Trucking Associations, Inc., per Sixth Circuit Rule 28(a) and 28(b), hereby designates the following relevant district court documents:

Description of Entry	Date	Record Entry No.	Page ID Range
Plaintiffs' Summary Judgment Motion	2/28/2018	RE 31	209-210
Summary Judgment Opinion and Order	9/28/2018	RE 43	862

CERTIFICATE OF COMPLIANCE

This amicus curiae brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it is 1,447 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f), if applicable. The brief's type size and type face comply with Federal Rule of Appellate Procedure 32(a)(5) and (6).

Dated: November 25, 2019

s/ Deanne E. Maynard

Deanne E. Maynard

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system on November 25, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: November 25, 2019

s/ Deanne E. Maynard

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