

## **Nida Samona's Statement to Congress**

Distinguished members of Congress, I am the Chairperson of the Michigan Liquor Control Commission. Thank you for the invitation to discuss Michigan's system for regulating alcoholic beverages and the need to amend the Webb-Kenyon Act to preserve state regulatory authority over the distribution of alcohol beverages.

Experience has taught us that government regulation can be in the public interest. Whether it is financial markets, food safety, or mortgages, government has a role in protecting the public. This is especially true with alcohol

In 1941 Supreme Court Justice Jackson stated that liquor is "a lawlessness unto itself". That was true then and is true today. Because of their potential for abuse, and their importance as a source of tax revenue, alcoholic beverages must be highly regulated. History has taught us that regulation is most effective and accepted, when done at the State level.

The detrimental impacts on individuals, families, and society as a whole that result from intemperate or underage consumption of alcoholic beverages are dramatically different from those related to the use of other products, whether measured by scale, severity, nature, or remedy. As a consequence, states attempt to mitigate these problems through regulation. Indeed, alcoholic beverages have always been, and remain, one of the most heavily regulated products in the country. Localities and states have enacted a variety of restrictions on the manufacture, distribution, and sale of alcoholic beverages.

Alcohol is the only product that has been the subject of two Constitutional Amendments: the first was the Eighteenth Amendment, which established National Prohibition, and the second was the Twenty-first Amendment, which returned primary responsibility for alcohol regulation to the states. Community norms and standards across the country differ widely regarding

alcohol. This fact underscores the soundness of the Constitutional and Congressional decisions to rest regulatory authority primarily at the state and local level. Under the authority provided by the Twenty-First Amendment, the Michigan Legislature created the Michigan Liquor Control Commission and granted it plenary powers to control alcoholic beverage traffic in Michigan, including the manufacture, importation, possession, transportation and sale of alcoholic beverages within the State. Among the goals of the Commission, are controlling the traffic in alcoholic beverages within the state, collecting tax revenue, and protecting both the consumer and general public from unlawful consumption and use of alcohol.

The overriding policy of Michigan's Liquor Control Code is to provide strict regulation and control over the alcoholic beverage industry as opposed to fostering the significant degree of free enterprise afforded other business endeavors, dealing with other products. This regulation is achieved through a transparent system that requires that all alcoholic beverages be distributed through the Commission or its licensees—who are subject to extensive oversight and regulation.

That system has worked remarkably well for over seventy – five (75) years. Through the delicately balanced and historically tested regulatory scheme used by Michigan, Michigan has been able to address fundamental state interests, such as: preventing illegal sales to minors, inhibiting overly aggressive marketing and consumption, collecting taxes, creating orderly distribution and importation systems, and preventing a recurrence of the problems that led to the enactment of National Prohibition. These are all recognized as core interests of Twenty-First Amendment.

Michigan's regulatory system is the product of Michigan's experience and history. Prior to Prohibition large suppliers dominated saloons and retailers leading to overconsumption of alcoholic beverages. These arrangements were blamed for producing monopolies and exclusive

dealing arrangements, for causing a vast growth in the number of saloons and bars, for fostering commercial bribery, and for generating other "serious social and political evils," including political corruption, irresponsible ownership of retail outlets, and intemperance. Today state regulators are not only faced with large producers trying to promote their products and business, but also with large retailers who because of their market dominance can exert extreme influence over manufacturers and others in the distribution chain, if left free from state regulation.

No responsible person believes that unfettered competition, the lowest price, and ubiquitous availability of alcohol are in the public interest. Therefore, in regulating the distribution system, Michigan has significantly restricted the use of aggressive marketing techniques and drastic price-cutting of alcoholic beverages thereby promoting responsible usage and temperance.

In 2004 the Supreme Court's 5-4 decision in *Heald v Granholm* struck down Michigan and New York laws that banned wineries located out of state from shipping wine directly to the doorsteps of Michigan and New York customers. While the *Granholm* decision did not invalidate Michigan's three-tier distribution system for alcoholic beverages, and, indeed, referred to that three tier system as "unquestionably legitimate", State regulatory systems remain under siege. Michigan and other states continue to be challenged with lawsuits whose goal is to eviscerate effective state regulation of alcoholic beverages, by opening the floodgates and allowing entities over whom state regulators have little or no control to distribute alcoholic beverages free of the oversight and rules that govern in-state licensees.

For example, Michigan was sued on the theory that out-of -state retailers should be able to ship wine to Michigan residents. The District Court ruled against Michigan's position and rather than face the additional costs of litigating the Michigan Legislature restricted the ability of all retailers to ship to consumers. Michigan reached this resolution even though it believed its

legal position was correct. The same arguments that were put forth by Michigan and rejected by our District Court were subsequently accepted by the 2<sup>nd</sup> and 5<sup>th</sup> Circuit Courts of Appeals who upheld regulatory systems similar to Michigan's against the same type of legal challenge.

Because of this type of expensive and uncertain litigation -- where a state may be forced to expend great manpower and incur great defense costs and where the state is forced to litigate under the threat of severe economic sanctions (attorney fees totaling over millions of dollars) if it doesn't prevail-- a federal statute is needed to confirm the primacy of State regulation over dormant commerce clause and antitrust challenges that might apply to other products.

Finally, I would like to address why as a practical matter it is important that States like Michigan have the ability to establish their own regulatory structure.

Michigan uses its limited resources, Commission staff and local law enforcement officers, to ensure that in-state retailers and wholesalers are physically inspected and checked to make sure that Michigan's regulatory system is being followed, that only approved alcoholic beverages are being sold, that alcoholic beverages are not being sold to underaged persons and that taxes are being paid. Michigan simply does not have the ability or financial resources to effectively regulate hundreds of thousands of out-of- state retailers to ensure they are not selling to minors and to ensure that they are paying taxes and only selling products approved by the Commission. In 2008, the Michigan Liquor Commission had almost a billion dollars in taxable spirit sales. It is unknown how much revenue is generated from illegal and untaxed out-of-state sales.

The proposed legislation before you (Comprehensive Alcohol Regulatory Effectiveness Act of 2010 (CARE)) would amend the Webb-Kenyon Act to support State based alcohol regulation, establish higher evidentiary standards for legal actions challenging the authority of

states or territories to regulate alcoholic beverages and help ensure the collection of all alcohol taxes.

This legislative action is necessary to help Michigan and other states regulate alcoholic beverages free from certain dormant commerce clause and federal antitrust law restrictions that would otherwise apply. It is also needed to help states defend against attacks that are motivated by economics not for public health reasons. When confronted with commerce clause litigation dealing with attacks on state alcohol regulatory systems the Twenty-first Amendment should mean what it says. Congress has the power to regulate commerce and the opportunity here to preserve state control over alcohol regulation. This power is being eroded by Court decisions based upon the dormant commerce clause that invalidate state alcohol regulatory systems.

Additionally, Section 1988 of Title 42 of the United States Code provides for reimbursement of attorneys' fees to plaintiffs who prevail over states under Section 1983 dormant commerce clause litigation. Dormant commerce clause litigation is typically brought by very well funded corporations or individuals in the alcohol businesses. This type of litigation has proliferated and attorney fee awards are often enhanced at unimaginable lodestar rates that drain essential state resources. Michigan alone, has incurred well over several million dollars in fees and costs in defending these lawsuits. States are being punished for making legislative choices that others may not agree with but are nevertheless based on public policy and welfare concerns that address the unlawful distribution and abuse of alcoholic beverages.

Thank you for your time and consideration of this important matter.