

Case No. 22-3852

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEREK BLOCK*, KENNETH M. MILLER, and
HOUSE OF GLUNZ, Inc.,
Plaintiffs - Appellants

vs.

JAMES CANEPA, Superintendent of Liquor Control, DAVE YOST,
Attorney-General of Ohio, THOMAS J. STICKRATH, Director,
Ohio Department of Public Safety, DEBORAH PRYCE, Chair of
the Ohio Liquor Control Commission
Defendants - Appellees

WHOLESALE BEER & WINE ASSOCIATION OF OHIO
Intervening Defendant-Appellee

Appeal from a Final Judgment of the United States District Court
for the Southern District of Ohio, Hon. Sarah D. Morrison
District Court No. 2:20-cv-03686

CORRECTED BRIEF OF PLAINTIFFS-APPELLANTS

Robert D. Epstein
James A Tanford, *of counsel*
Epstein Cohen Seif & Porter, LLP
50 S. Meridian St. #505
Indianapolis IN 46204
(317) 639-1326

*Block voluntarily dismissed his claims and is not a party to the appeal.

Corporate disclosure statement

House of Glunz, Inc., has no parent corporation, and no publicly held corporation owns more than 10% of its stock.

Table of contents

Table of authorities v

Statement in support of oral argument 1

Jurisdictional Statement 1

Statement of Issues Presented 2

Statement of the Case 3

 A. The laws at issue 4

 B. Proceedings below 5

 C. Statement of facts 7

Standard of Review 15

Summary of Argument 16

ARGUMENT 20

I. Introduction 20

 A. Issues 20

 B. Standing 22

II. Discriminatory liquor laws are subject to intermediate scrutiny and must be narrowly tailored to advance a Twenty-first Amendment interest 23

III. Ohio’s ban on direct shipping by out-of-state retailers is unconstitutional 27

 A. The direct shipping ban discriminates against out-of-state wine retailers 27

 B. The direct shipping ban is not narrowly tailored to advance Ohio’s interest in public health or safety 29

1. Banning interstate wine shipments does not advance Ohio’s interest in public safety because direct shipping poses no risk in the first place	29
2. A ban on interstate shipping is not justified because nondiscriminatory alternatives are available that Ohio uses in similar circumstances	35
IV. The limit on transporting wine into Ohio is unconstitutional	37
V. The District Court made several errors	39
A. The wrong level of scrutiny was applied	39
B. Inadmissible evidence from the defendants was relied on	41
C. Plaintiffs’ contrary evidence was not considered	42
D. The wrong standard for determining standing was used.	43
VI. Plaintiffs are entitled to relief from the order dismissing Stickrath as a defendant.	44
VII. Remedy	46
Conclusion	48
Certificate of compliance	49
Certificate of service	49
Addendum	50
A. Designation of District Court documents	50
B. Selected Ohio statutes	52

Table of authorities

Cases

<i>Am. Beverage Ass'n v. Snyder</i> , 735 F.3d 362	15, 27 (6th Cir. 2013).
<i>Bacchus Imports Ltd v. Dias</i> , 468 U.S. 263 (1984)	25
<i>Bainbridge v. Turner</i> , 311 F.3d 1104 (11th Cir. 2002).	36
<i>Califano v. Westcott</i> , 443 U.S. 76 (1979)	48
<i>Carr v. Louisville-Jefferson Co.</i> , 37 F.4th 389 (6th Cir. 2022).	16
<i>Cherry Hill Vineyards v. Lilly</i> ,	26 553 F.3d 423 (6th Cir. 2008)
<i>Clark v Jeter</i> , 486 US 456 (1988)	24, 35
<i>Ex Parte Young</i> , 209 U.S. 123 (1908)	46
<i>Family Winemakers of Cal. v. Jenkins</i> , 592 F.3d 1 (1st Cir. 2010) . . .	36
<i>Granholtm v Heald</i> , 544 U.S. 460 (2005)	<i>passim</i>
<i>Graveline v. Benson</i> , 992 F.3d 524 (6th Cir. 2021).	46
<i>Healy v. Beer Inst.</i> , 491 U.S. 324 (1989)	25
<i>Jelousek v. Bredesen</i> , 545 F.3d 431 (6th Cir. 2008).	26
<i>Kassel v. Consol. Freightways</i> , 450 U.S. 662 (1982)	48
<i>Lamb v. Kendrick</i> , 52 F.4th 286 (6th Cir. 2022).	44
<i>Lebamoff Enterpr., Inc. v. Whitmer</i> , 956 F.3d 863	26, 40, 47 (6th Cir. 2020)

Lujan v. Defenders of Wildlife, 504 U.S. 5551 (1992). 22

McKay v. Federspiel, 823 F.3d 862 (6th Cir. 2016) 44

Nguyen v. I.N.S., 533 U.S. 53 (2001) 48

Nolan v. Detroit Edison Co., 991 F.3d 697 (6th Cir. 2021) 16

Ondo v. City of Cleveland, 795 F.3d 597 (6th Cir. 2015). 24

Plunderbund Media, L.L.C. v. DeWine, 753 F. App’x 362. 44
(6th Cir. 2018)

Product Solutions Internat’l, Inc. v. Aldez Containers, LLC, 44
246 F.4th 454 (6th Cir. 2022).

Reform America v. City of Detroit, 37 F.4th 1138 (6th Cir. 2022) 15

Russell v. Lundergan–Grimes, 784 F.3d 1037 (6th Cir.2015) 23

Simpkins v. Boyd Co. Fiscal Court, 48 F.4th 440 (6th Cir. 2022). . . . 15

Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014) 23

T.M. v. DeWine, 49 F.4th 1082 (6th Cir. 2022). 16

Tenn. Wine & Spirits Retailers Assoc. v. Thomas, *passim*
139 S.Ct. 2449 (2019),

Universal Life Church Monastery Storehouse v. Nabors, 15
35 F.4th 1021 (6th Cir. 2021).

West Lynn Creamery v. Healy, 512 U.S. 186 (1994) 28, 36

Wygant v. Jackson Bd. of Ed., 476 U.S. 267 (1986). 24, 35

Statutes, Constitutional Provisions and Rules

U.S. Const., amend. XXI, § 2 *passim*

U.S. Const., art. I, § 8, cl. 3 *passim*

28 U.S.C. § 1291 2

28 U.S.C. § 1331 1

28 U.S.C. § 1343(a)(3) 1

42 U.S.C. § 1983 1, 5

FED.R.EVID. 701 34, 42

FED. R. EVID. 702 34, 42

FED. R. CIV. P. 56 15, 42

Fed.R.Civ.P. 60 44

21 C.F.R. 110.35. 30

27 C.F.R. 24.1 30

Oh. Rev. Code § 4301.01 4, 20

Oh. Rev. Code § 4301.20 4, 21, 37, 48

Oh. Rev. Code § 4301.22 47

Oh. Rev. Code § 4301.43 47

Oh. Rev. Code § 4301.58 4, 20, 47

Oh. Rev. Code § 4301.60 5, 21, 37

Oh. Rev. Code § 4301.611	47
Oh. Rev. Code § 4301.639	47
Oh. Rev. Code § 4301.99	22
Oh. Rev. Code § 4303.01	4
Oh. Rev. Code § 4303.12.....	4, 20, 47
Oh. Rev. Code § 4303.22	47
Oh. Rev. Code § 4303.232	11, 38
Oh. Rev. Code § 4303.233	38, 47, 48
Oh. Rev. Code § 4303.235.	5, 38
Oh. Rev. Code § 4303.25	20
Oh. Rev. Code § 4303.27	4, 20
Ohio Adm. Code 4301:1-1-03(C)	47

Statement in support of oral argument

This case presents a constitutional challenge to Ohio laws that regulate the distribution of wine in ways that discriminate against interstate commerce. A discriminatory liquor law can be sustained only on a showing that it is narrowly tailored to advance a legitimate local purpose protected by the Twenty-first Amendment. This is a fact-sensitive inquiry involving two constitutional provisions, so oral argument is appropriate.

Jurisdictional statement

District court jurisdiction. Plaintiffs brought this action in the Southern District of Ohio under 42 U.S.C. § 1983, alleging that provisions in the Ohio Liquor Control Code violated the Commerce Clause, U.S. CONST. art. I, § 8, and exceeded the state's authority under the Twenty-first Amendment. U.S. CONST., amend. XI, § 2. They sued state officials for declaratory and injunctive relief. The District Court had federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3), which confer original jurisdiction on federal district courts to hear suits alleging the violation of rights and privileges under the Constitution and laws of the United States.

Court of appeals jurisdiction. The District Court entered a final order and opinion on September 12, 2022, denying the plaintiffs' motions

for summary judgment and relief from orders, and granting the defendants' motions for summary judgment. The order disposed of all claims and no part of the litigation remains in the district court. The defendants filed timely notice of appeal on October 4, 2022, and this Court has jurisdiction under 28 U.S.C. § 1291.

Statement of issues presented

1. Ohio discriminates against out-of-state wine retailers. It issues licenses to in-state retailers to sell online and ship to consumers, but will not issue similar licenses to out-of-state retailers or allow them to ship without a license. Is this statute unconstitutional because it is not narrowly tailored to protect public health or safety as required by *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct. 2449 (2019)?

2. Ohio discriminates against interstate commerce in a second way. It has made it a criminal offense for a consumer to transport into the state more than 4.5 liters (6 bottles) of wine bought at an out-of-state retailer, but Ohio has no such restriction on the amount of wine a consumer may transport that was bought from an in-state retailer. Is this statute unconstitutional because it is not narrowly tailored to protect public health or safety?

3. Defendant Thomas Stickrath is the Director of the Ohio Department of Public Safety, which is involved in enforcing the wine laws at issue. Was it error to dismiss him as a defendant on Eleventh Amendment immunity grounds?

Statement of the Case

The plaintiffs are an out-of-state wine retailer and an in-state consumer. They are challenging the constitutionality of two provisions in Ohio that discriminate against interstate commerce. 1) Ohio licenses in-state retailers to sell wine online and ship it to consumers but will not issue similar licenses to out-of-state retailers, nor allow them to ship wine without a license. 2) Ohio allows consumers to bring home up to 24 cases of wine purchased from an in-state retailer, but restricts them to transporting 6 bottles of wine if it was purchased from an out-of-state retailer. The plaintiffs contend that these difference in treatment are unconstitutional under *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, because they discriminate against interstate commerce, protect Ohio retailers from competition, and are not narrowly tailored to advance any legitimate Twenty-first Amendment public health or safety interest.

A. The laws at issue

All relevant Ohio statutes are reprinted in an Appendix to this brief.

(1) Direct-to-consumer shipping. Ohio issues a license called a C-2 permit to in-state retailers. OHIO REV. CODE § 4303.12. It authorizes them to sell and deliver wine to consumers, *id.* § 4303.27, by “any means or devices whatever,” *id.* § 4301.01(A)(2),¹ including through internet sales that are delivered by common carriers like FedEx. Ohio will not issue a C-2 (or any similar license) to out-of-state retailers which would allow them to engage in similar online sales and shipping because they are not physically located in Ohio, Def. Answer ¶ 14, R. 37, PageID 361,² and do not obtain their wine from an Ohio wholesaler. OHIO REV. CODE § 4301.58(c). Without a license, out-of-state retailers are prohibited from shipping wine to Ohio consumers. *Id.* §§ 4303.25, 4301.58(B).

(2) Personal transportation. Ohio prohibits consumers from transporting more than 4.5 liters (6 bottles) of wine into Ohio that was purchased out of state. *Id.* § 4301.20(L). It imposes no such limitation on

¹ ORC § 4301.01(A)(2) says it does not apply to chapter 4303, but that has been superseded by § 4303.01 that expressly adopts chapter 4301.

² The statute is unclear, but Ohio interprets it as requiring physical presence in Ohio. *See* Def. Answer to Interrog. 13, R. 52-34, PageID 4034.

purchases from in-state retailers. *Id.* § 4301.60. Consumers may transport up to 24 cases of wine if they purchased it from an Ohio retailer. *Id.* § 4303.235.

B. Proceedings below

1. Plaintiffs sued Ohio state officials responsible for enforcing the state liquor laws for declaratory and injunctive relief, pursuant to 42 U.S.C. § 1983. Complaint, R. 1, PageID 1-11.

2. The Wholesale Beer & Wine Association of Ohio (WBWAO) intervened as a co-defendant to protect their economic interests which would be threatened by interstate competition. R. 17, PageID 95.

3. The District Court dismissed claims against defendant Thomas Stickrath,³ the Director of the Ohio Department of Public Safety, ruling that his department was not involved in the enforcement of the liquor laws and was therefore immune from suit. R. 33, PageID 265-67. It also dismissed plaintiffs' challenge to the personal transportation restriction for lack of standing, ruling that plaintiff Miller faced no credible threat of prosecution. R. 36, PageID 354-55. It denied the defendants' motion to

³ It also dismissed officials from the Liquor Control Commission (Canepa and Pryce) as defendants. That ruling has not been appealed.

dismiss the challenge to the direct shipping ban, ruling that plaintiffs had met the Rule 12(b)(6) standard for stating a claim, R. 33, PageID 267-71. and that plaintiffs had standing. R. 36, PageID 353.

4. All parties filed cross-motions for summary judgment on the direct shipping ban. Plaintiffs' MSJ, R. 52, PageID 1245; Defendant Yost's MSJ, R. 53, PageID 4057; WBWAO's MSJ, R. 51, PageID 966.

5. In addition, the plaintiffs filed a Rule 60 motion for relief from the prior orders dismissing Stickrath and the challenge to the transportation ban, based on evidence produced during discovery. R. 54, PageID 4546 (Amended Motion). Plaintiffs filed three motions to strike opinion and hearsay evidence submitted by the defendants. R. 55, PageID 4563; R. 56, PageID 4570; R. 57, PageID 4601. WBWAO filed a motion to strike several items of evidence offered by the Plaintiffs. R. 60, PageID 4699.

6. The District Court issued an opinion and order on September 12, 2022, disposing of all pending motions. On the main issue, it granted the defendants' motions for summary judgment and denied the plaintiffs' motion, ruling that the direct shipping ban was constitutional under the Twenty-first Amendment despite violating the nondiscrimination rule of the Commerce Clause. R. 91, PageID 5196-202.

7. On the ancillary issues, the Court denied the plaintiffs' Rule 60 motion, PageID 5183-87, substantially denied the plaintiffs' objections and motions to strike defense evidence, PageID 5188-95, and denied WBWAO's motion to strike the plaintiff's expert as moot. PageID 5192.

8. Plaintiffs filed notice of appeal on October 4, 2022. R. 96, PageID 5271.

C. Statement of Facts

1. Plaintiff Miller is an Ohio consumer who wants to have wine shipped to him from out-of-state retailers. There is a larger selection of wines available at online retailers than at local stores, and home delivery is more convenient and involves less risk of exposure to Covid than in-person shopping. Miller Decl., R. 52-2, PageID 1271-72, ¶¶ 1-4. He would like to be able to take advantage of wine-purchasing opportunities at retail stores outside Ohio and bring the wine home, but does not want to risk criminal penalties. *Id.* ¶¶ 3-5. Because of the shipping ban and transportation restrictions, Miller buys some wine from local retailers he would otherwise have bought from an out-of-state retailer. *Id.* ¶¶ 5-6.

2. Plaintiff House of Glunz is a wine retailer in Illinois that has received requests from Ohio consumers to ship wine to them which it had

to decline because shipping to Ohio is unlawful. Donovan Decl., R. 52-3, PageID 1273-74, ¶¶ 1-6. It would obtain a direct-shipping permit if one were available so it could ship wine to consumers in Ohio, as it does to other states where it is lawful, from its premises in Chicago, and would comply with regulations requiring that it remit taxes, report sales, and verify the age of the recipient on delivery. It is economically unfeasible for it to establish separate premises in Ohio. *Id.* ¶¶ 7-9.

3. The ban on interstate shipping has a significant adverse impact on consumers in Ohio. In the past four years, the federal Tax and Trade Bureau has approved 468,588 wines for sale in the United States. Wark Expert Report, R. 52-4, PageID 1277, ¶ 10. The state of Ohio currently has authorized only approximately 88,000 wines for sale in the state. Approved Brand List, R. 52-5, PageID 1289 et seq. That represents only about 19% of the total number of wines in the United States. Wark Report, ¶ 11.

4. Individual local stores carry only a small subset of these wines. Most wine retailers stock 1000-4000 different wines, which is less than 1% of the total wines in the United States. Having several local stores does little to increase selection because most carry the same mass-market wines. Even the handful of wine super-stores carry only around 10,000 wines, or

around 2% of the wines in the U.S. Wark Expert Report, R. 52-4, PageID 1279, ¶¶ 23-24.

5. It can be difficult for Ohio consumers to get wines recommended by national publications. In 2021, the New York Times, Wine Enthusiast and Wine Spectator reviewed and recommended twenty-five Greek wines, R. 52-6 and 52-7, PageID 3799-807; seventeen South African wines, R. 52-9, PageID 3812-20, and eighteen Israeli wines. R. 52-10, PageID 3821-24. Of these 60 wines, only seven are approved for sale in Ohio, and only one was actually on the shelves of Cincinnati wine retailers or offered online by any Ohio retailer. All sixty were offered for sale from online retailers outside Ohio who ship nationally. Tanford Decl., R. 52-8, PageID 3818-11.

6. Wine consumers who seek rare, collectible, small production and other hard-to-find wines can rarely find them locally. They are sold only by a few specialty retailers in other states, notably California and New York. Wark Expert Report, R. 52-4, PageID 1278-79; Arger Aff., R. 52-11, PageID 3825-26, ¶¶ 5-10; Gralla Aff., R. 52-12, PageID 3827-28.

7. K&L Wine Merchants in California is an important source for boutique and small production California wines not available elsewhere. Wark Expert Report, R. 52-4, PageID 1280 ¶ 30. It ships to other states

but not to Ohio. K&L Webpage, R. 52-16, PageID 3839.

8. Retailers outside Ohio will send wine as gifts to celebrate special occasions or from businesses to thank their important clients. Wark Expert Report, R. 52-4, PageID 1279 ¶ 21; Donovan Decl., R. 52-3, PageID 1275 ¶ 11; Hickory Farms Webpage, R. 52-14, PageID 3831. Because interstate shipping is banned, only in-state wine retailers may offer this service in Ohio. Wine Merchant Webpage, R. 52-15, PageID 3832-33.

9. Retailers outside Ohio have wine clubs where they send selected bottles of wine to club members every month. Donovan Decl., R. 52-3, PageID 1275 ¶ 12; K&L Webpage, R. 52-16, PageID 3837-38. Because interstate shipping is banned, only in-state wine retailers may offer this service in Ohio. Wine Merchant Webpage, R. 52-15, PageID 3832-33.

10. Direct shipments of wine from out-of-state retailers has caused no significant public health or safety risk in the fourteen states that have been allowing consumers to receive wine shipments from out-of-state retailers over the past fifteen years. See Table of State Laws, R. 52-17, PageID 3840-41. Forty-four states allow direct shipments to consumers from out-of-state wineries. Wark Expert Report, R. 52-4, PageID 1281 ¶ 38. No problems have been reported. *Id.* ¶¶ 44-45, 63-64; Wark Rebuttal

Report, R. 52-18, Page ID 3842-43 ¶¶ 2, 3, 6, 9; State Agency Reports, R. 52-19, PageID 3845-62.

11. Ohio allows out-of-state wineries with an “S” permit⁴ to ship wine directly to consumers and it has not caused any public health or safety problems. Def. Answer to Interrog. 4, R. 52-34, PageID 4029.

12. States that allow direct shipping by out-of-state wine retailers do not have higher rates of wine consumption than states that prohibit shipping. NIH Consumption Data, R. 52-20, PageID 3863-68.

13. States that allow direct shipping by out-of-state wine retailers do not have higher rates of problematic behavior associated with alcohol than states that prohibit shipping, such as traffic fatalities, NHTSA Data, R. 52-21, PageID 3869-74; aggravated assaults, FBI Data, R. 52-22, PageID 3878-84; or domestic violence. Nat’l Coalition Data, R. 52-23, PageID 3885.

14. Ohio asserts that the shipping ban is needed to prevent alcohol consumption by minors. Def. Answer to Interrog. 14, R. 52-34, PageID 4034. However, direct wine shipping is not a significant method by which minors obtain alcohol. FTC Report, R. 52-24 at 26-37, Page ID 3915-26; SAMHSA Nat’l Survey, R. 52-25, PageID 3932-33. There have been no

⁴ See OHIO REV. CODE §§ 4302.232 (S-1 permits) and 4303.233 (S-2 permits).

studies or reports by any state agency showing that the direct shipment of wine leads to more youth access. Wark Expert Report ¶ 45, R. 52-4, PageID 1283. There have been no incidents in Ohio where minors are known to have received wine by direct shipping from wineries licensed to do so. Def. Answer to Interrog. 1, R. 52-34, PageID 4026.

15. The State asserts that it must ban shipping because on-site inspections are necessary to protect public health and safety. Def. Answer to Interrog. 14, R. 52-34, PageID 4034. However, states that allow direct shipping have not experienced any problems associated with the lack of on-site inspections. Wark Expert Report ¶¶ 41-43, R. 52-4, PageID 1282; State Agency Reports, R. 52-19, Page ID 3845-62. Those states regulate and monitor wine shipments through a permit system in which out-of-state shippers consent to jurisdiction, limit sales volume, submit reports, and use common carriers that verify age on delivery. Wark Expert Report, *id.*; NCSL Model Bill, R. 52-28, Page ID 3944; NAWR Model Bill, R. 52-29, PageID 3946.

16. Monitoring direct shipping by retailers with permits is not burdensome. In states that issue direct-shipping permits, fewer than 200 retailers have obtained them. State Permits, R. 52-30, PageID 3948-4011.

17. States that allow direct shipping by out-of-state wine retailers have not reported any incidents of unsafe, contaminated or tainted wine being shipped. Wark Expert Report ¶ 54, R. 52-4, PageID 1284; Donovan Decl. ¶ 14, R. 52-3, PageID 1275. Ohio officials know of no incident in which tainted or unsafe wine was delivered to a consumer by a licensed seller. Def. Answer to Interrog. 6, R. 52-34, PageID 4030.

18. The State asserts that it must ban shipping to prevent evasion of its mandatory minimum pricing rules and advertising restrictions. Def. Answer to Interrog. 14, R. 52-34, PageID 4034. However, Ohio does not appear to have any actual such policies. Ohio retailers offer wine for sale at discounts of more than 50%, Jungle Jim's Sale, R. 52-35, PageID 4042-48, and freely advertise those sale prices. Jungle Jim's Ad, R. 52-36, Page ID 4049; Kroger Ad, R. 52-37, PageID 4051.

19. The State asserts that the shipping ban is needed to ensure the collection of tax revenue. Def. Answer to Interrog. 14, R. 52-34, PageID 4034. However, states that require shippers to have permits and remit taxes have not experienced any significant tax evasion or revenue loss. Wark Expert Report ¶ 44, R. 52-4, PageID 1283; FTC Report 38-39, R. 52-34, PageID 3927-28; Md. Comptroller Report, R. 52-31, PageID 4012-20.

20. Ohio retailers ship wine directly to consumers throughout the state. Wine Merchant Webpage, R. 52-15, PageID 3832-36; Corkscrew Johnny's Webpage, R. 52-32, PageID 4021-22; Western Reserve Wines Webpage, R. 52-33, PageID 4023.

21. No permit is available that would allow an out-of-state retailer to ship wine from their out-of-state location directly to consumers in Ohio. Def. Answer to Interrog. 13, R. 52-34, PageID 4034.

22. State officials enforce the ban on direct shipping. See Motion, *Ohio v. Wine.com, Inc.*, R. 34-2, PageID 278.

23. State officials acknowledge that they would enforce the law prohibiting Ohio residents from transporting more than 4.5 liters of wine into the state, have enforced it in the past, and the Department of Public Safety is involved in the enforcement of the state liquor laws. Def. Answer to Interrog. 3, 5, 6, 16, R. 52-34, PageID 4028-35; Snyder Decl. R. 53-7, PageID 4335, 4336, 4481. Thomas Stickrath is the director of that department. Answer ¶ 10, R. 37, PageID 360.

Standard of review

All issues in this case are reviewed *de novo*.

1. Summary Judgment. This Court reviews the grant of summary judgment *de novo*. *Simpkins v. Boyd Co. Fiscal Court*, 48 F.4th 440, 446 (6th Cir. 2022). Summary judgment is proper if, when drawing all inferences in the light most favorable to the non-moving party, the moving party shows that there is no genuine dispute as to any material fact and it is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). The burden is on the non-moving party to produce evidence to show that there is a genuine issue for trial. *American Beverage Ass'n v. Snyder*, 735 F.3d 362, 369 (6th Cir. 2013). When cross-motions are filed, it does not mean that the court must grant one of the motions. Each is separately evaluated to determine whether there is a genuine dispute as to material facts that would require a trial. *Reform America v. City of Detroit*, 37 F.4th 1138, 1147 (6th Cir. 2022).

2. Dismissal on the pleadings. This Court reviews the grant of a motion to dismiss *de novo*, taking as true all well-pleaded material allegations in the pleadings. This includes dismissal based on standing. *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021,

1031 (6th Cir. 2021). Dismissal is appropriate only if the defendant is clearly entitled to judgment as a matter of law; uncertainties must be resolved in favor of the plaintiff. *Carr v. Louisville-Jefferson Co.*, 37 F.4th 389, 393 (6th Cir. 2022). If additional documents were submitted with the complaint, they also may be considered, but will be viewed in the light most favorable to the Plaintiff, *Nolan v. Detroit Edison Co.*, 991 F.3d 697, 707-08 (6th Cir. 2021).

3. Sovereign immunity. This Court reviews *de novo* whether a state official is entitled to sovereign immunity. *T.M. v. DeWine*, 49 F.4th 1082, 1087 (6th Cir. 2022).

Summary of argument

In *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, the Supreme Court held that if a state liquor law discriminates against out-of-state economic actors, “the law can be sustained only on a showing that it is narrowly tailored to ‘advanc[e] a legitimate local purpose’” protected by the Twenty-first Amendment. 139 S.Ct. 2449, 2461 (2019). The narrow-tailoring standard is a form of intermediate scrutiny where the court looks at how well the regulation fits the problem, *i.e.*, whether a law advances a constitutionally permissible state goal with greater precision than other

available alternatives. In the absence of evidence that nondiscriminatory alternatives would be unworkable, a discriminatory law is invalid.

Plaintiffs challenge two Ohio regulations that discriminate against interstate commerce and are therefore subject to the *Tenn. Wine* narrow-tailoring standard.

1. Ohio prohibits out-of-state retailers from selling wine online and ship it to consumers, but allows in-state retailers to do so. Wine distribution requires a license, but Ohio will not issue shipping licenses to out-of-state retailers.
2. Ohio prohibits consumers from transporting more than 4.5 liters (6 bottles) of wine if it was purchased out of state, but allows them to transport up to 24 cases of wine bought from in-state retailers.

In order to justify these discriminatory regulations, the state would have to show that they actually advance the state's Twenty-first Amendment interest in protecting public health or safety and are not predominantly protectionist. *Tenn. Wine*, 139 S.Ct at 2461, 2474. If the law has only an attenuated or speculative relationship to public health, it is not shielded by the Twenty-first Amendment. *Id.*

There are two elements to this equation. *First*, the State must present “concrete evidence” showing that *this particular law* “actually promotes public health or safety[;] speculation and unsupported assertions are insufficient.” *Tenn. Wine*, 139 S.Ct. at 2474. *Second*, the State must show “that nondiscriminatory alternatives would be insufficient to further those interests.” *Id.* If the State chooses a discriminatory alternative over a nondiscriminatory one, it engages in protectionism which the Constitution does not allow. *Id.* at 2475-76.

Ohio’s ban on direct wine shipment cannot survive the narrow-tailoring test. It is discriminatory and protectionist because in-state retailers are given the exclusive privilege to sell wine online and deliver it to consumers’ homes, which gives them a huge advantage over their out-of-state competitors. The State has presented no concrete evidence to show that banning direct-to-consumer wine shipping by out-of-state retailers actually protects public health. Indeed, the record shows exactly the opposite -- no adverse public health effects have occurred in other states that allow interstate wine shipping. Nor has the State shown why the nondiscriminatory alternative of licensing and regulating interstate shipping would be insufficient. Ohio uses this alternative to safely monitor

direct shipping by out-of-state wineries, other states use it to safely monitor retail shipping, and it has been endorsed by the Supreme Court as a nondiscriminatory alternative. This Court should reverse the District Court and enter summary judgment for the plaintiffs.

Ohio's 4.5 liter restriction on the amount of wine a consumer may transport if it was bought out of state is similarly unconstitutional. It is discriminatory because there is no such limit on the amount of wine that may be transported from in-state retailers. Ohio effectively concedes that personal importation does not threaten public health or safety because it does not *prohibit* consumers from doing so; it merely *limits* the amount. Therefore, the law's only plausible purpose is to prevent consumers from stocking up at an out-of-state retailer and force them to buy most of their wine in Ohio. No amount of evidence could conceivably show that the transportation of 7 bottles of out-of-state wine poses some danger to public health or safety not posed by transporting 6 bottles. However, because the District Court dismissed this claim on the pleadings, the record is thin. This Court should reverse the District Court and either enter summary judgment for the plaintiffs or remand the issue to give the State further opportunity – however futile – to try to justify the 6-bottle limit.

ARGUMENT

I. Introduction

A. Issues

Plaintiffs challenge the constitutionality of two Ohio laws that discriminate against interstate commerce in wine: 1) the ban on direct shipping by out-of-state retailers and 2) the limitation on the amount that may be personally transported by consumers.

1. *Direct shipping.* Ohio allows in-state, but not out-of-state, retailers to ship wine to consumers. An in-state wine retailer may obtain a “C-2” permit, OHIO REV. CODE § 4303.12, which allows it to sell and deliver wine to consumers, *id.* § 4303.27, by “any means or devices whatever,” *id.* § 4301.01(A)(2), including internet sales that are delivered by common carriers like FedEx. An out-of-state retailer may not sell online and ship wine to Ohio consumers without a C-2 permit, *id.* §§ 4303.25, 4301.58(B), which Ohio will not issue to retailers that do not have a physical presence in Ohio and/or do not obtain their wine from a wholesaler located in Ohio. *Id.* § 4301.58(c). Plaintiffs contend that this difference in treatment violates the narrow-tailoring test of *Tenn. Wine*. The State has not shown that it is narrowly tailored to advance the protection of public health or

safety. *Tenn. Wine*, 139 S.Ct. at 2461, 2474. Ohio has less protectionist ways to safely monitor interstate wine shipments that it already uses in other contexts.

2. *Personal transportation.* Ohio allows consumers to personally transport up to 24 cases of wine purchased from an in-state retailer, OHIO REV. CODE § 4301.60, but allows them to transport only 4.5 liters (6 bottles) if the wine is purchased from an out-of-state retailer. *Id.* § 4301.20(L). Plaintiffs contend that this difference in treatment also is unconstitutional under *Tenn. Wine*. It discriminates against interstate commerce, shifts purchases to in-state retailers, and restricts consumer access to the markets of other states, which violate the Commerce Clause. It is not narrowly tailored to advance the state's Twenty-first Amendment interest in protecting public health and safety because the State cannot possibly justify why it can safely allow a consumer to transport 6 bottles of wine but not 7, especially when it allow then to transport up to 24 cases bought in-state.⁵

⁵ Plaintiffs contend that this law may be declared unconstitutional on its face. However, the District Court dismissed this claim on the pleadings for lack of standing, so this issue may have to be remanded for further evidentiary submissions.

B. Standing

In order to invoke the judicial power under Article III, plaintiffs must in every case satisfy the three elements of standing: (1) injury, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Where the plaintiff is the object of the regulation, as in this case, “there is ordinarily little question that the [act] has caused him injury, and that a judgment preventing or requiring the action will redress it.” *Id.* at 561-62. House of Glunz is an out-of-state wine retailer that engages in direct shipping, Facts ¶ 2, *supra*, so it the object of Ohio’s prohibition against interstate shipping. Kenneth Miller is an Ohio wine consumer who buys wine and transports it to his home, so he is the object of Ohio’s limitation on the amount he can bring home from other states. Facts ¶ 1, *supra*. In both cases, the plaintiffs have been prevented from engaging in interstate commerce caused by the rule being challenged and would be able to do so if the defendants were enjoined from enforcing it.

Violation of the Liquor Control Code is a criminal offense. OH. REV. CODE § 4301.99. The Supreme Court holds that “it is not necessary that petitioner first expose himself to actual arrest,” as long as the plaintiff alleges “an intention to engage in a course of conduct arguably affected

with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014) (citations omitted). A credible threat is established when a law on its face proscribes the conduct, plaintiff had previously engaged in it, and the fear of prosecution is not “imaginary or wholly speculative,” especially when the government has enforced the law against others. *Id.* at 160-61. *See also Russell v. Lundergan–Grimes*, 784 F.3d 1037, 1049 (6th Cir.2015) (past enforcement against others is sufficient). Plaintiffs established that Ohio has enforced both laws in the past. Facts ¶¶ 22-23, and the State admits it “vigorously” enforces them. Def. Mot. SJ at 18, R. 53, PageID 4084.

II. Discriminatory liquor laws are subject to intermediate scrutiny and must be narrowly tailored to advance a Twenty-first Amendment interest

In its most recent case addressing the interplay between the Twenty-first Amendment⁶ and the Commerce Clause,⁷ the Supreme Court clarified the standard for assessing the constitutionality of a state liquor law that

⁶ “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.

⁷ “The Congress shall have Power ... To regulate Commerce ... among the several States.” U.S. CONST. art I, § 8.

discriminates against out-of-state economic interests. “[I]f a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to ‘advanc[e] a legitimate local purpose’” protected by the Twenty-first Amendment. *Tenn. Wine*, 139 S.Ct. at 2461 (internal citations omitted). The Court defines the narrowly-tailored standard as a form of “intermediate scrutiny.” *Clark v Jeter*, 486 US 456, 461 (1988); *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 n. 7 (1986). Intermediate scrutiny is used in other situations to review discriminatory laws that do not involve suspect classifications or fundamental rights. *Ondo v. City of Cleveland*, 795 F.3d 597, 608 (6th Cir. 2015).

Intermediate scrutiny is a more stringent standard than reasonableness. *Wygant*, 476 U.S. at 279. “To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.” *Clark v Jeter*, 486 US at 461. This requires the court to consider how closely the legislation fits the problem and “whether lawful alternative and less restrictive means could have been used.” *Wygant*, 476 U.S. at 280 n. 6. The law must both advance a legitimate local purpose and “fit a constitutionally permissible state goal

with greater precision than any available alternative.” *Id.* at 280, n 7. One of the chief considerations is whether in other similar circumstances, the State allows the same activity it is now trying to prohibit. *Clark v Jeter*, 486 U.S. at 464. In the absence of evidence that nondiscriminatory alternatives used in similar situations would be unworkable, the legislation is invalid. *See Tenn. Wine*, 139 S.Ct at 1474-76; *Granholm v. Heald*, 544 U.S. 460, 492-93 (2005).

The Twenty-first Amendment did not repeal the Commerce Clause, and the Court “has repeatedly declined to read § 2 as allowing the States to violate the ‘nondiscrimination principle.’” *Tenn. Wine*, 139 S.Ct. at 2470. There has never been any dispute about this. *See Granholm v. Heald*, 544 U.S. at 487 (“state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause”); *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 275 (1984) (the Amendment and the Commerce Clause are both “parts of the same Constitution [and] each must be considered); *Healy v. Beer Inst.*, 491 U.S. 324, 344 (1989) (Scalia, J., concurring) (a liquor law’s “discriminatory character eliminates the immunity afforded by the Twenty-first Amendment”). The Twenty-first Amendment gives the state the authority to decide whether or not to allow shipping, but “[i]f a State

chooses to allow direct shipment of wine, it must do so on evenhanded terms.” *Granholm v. Heald*, 544 U.S. at 493. *Accord*, *Jelousek v. Bredesen*, 545 F.3d 431, 436 (6th Cir. 2008).

Once plaintiffs show that a liquor law discriminates against out-of-state economic interests, the burden shifts to the state to prove that discrimination is necessary to advance a legitimate local purpose that cannot adequately be served by reasonable nondiscriminatory alternatives. *Granholm v. Heald*, 466 U.S. at 492-93. “Legitimate local purposes” protected by the Twenty-first Amendment are those that reduce the public health and safety risks of alcohol consumption. *Tenn. Wine*, 139 S.Ct. at 2457.⁸ “Concrete evidence” is required and “mere speculation and unsupported assertions are insufficient to sustain a law that would otherwise violate the Commerce Clause.” *Id.* at 2474. All state liquor laws are subject to the narrowly-tailored standard and “[t]here is no sound basis for [a] distinction” among types of laws or which aspect of the liquor business is being regulated. *Id.* at 2471.⁹

⁸ The Court suggested in *Granholm v. Heald* that raising tax revenue may also be a legitimate Twenty-first Amendment interest. 544 U.S. at 491-92.

⁹ *But cf.* *Cherry Hill Vineyards v. Lilly*, 553 F.3d 423, 432 (6th Cir. 2008) (“strict scrutiny” should be applied); *Lebamoff Enterpr., Inc. v. Whitmer*, 956 F.3d 863, 869 (6th Cir. 2020) (“deferential” standard should be applied). Neither is consistent with *Tenn. Wine*.

III. Ohio's ban on direct shipping by out-of-state retailers is unconstitutional

A. The direct shipping ban discriminates against out-of-state wine retailers

The first step in analyzing the constitutionality of Ohio's ban on direct shipping by out-of-state wine retailers is to ask whether it violates the nondiscrimination principle of the Commerce Clause. *Am. Beverage Ass'n v. Snyder*, 735 F.3d at 369-70. If the law were even-handed and not discriminatory, no further analysis would be needed, because the Twenty-first Amendment gives states broad power to enact even-handed regulations, even if they burden interstate commerce. If Ohio banned all direct wine shipping, as some states do, a ban on interstate shipping would not discriminate against out-of-state retailers. But “[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.” *Granholm v. Heald*, 544 U.S. at 493.

There is no dispute about this step. Ohio does not regulate direct shipping even-handedly.

1. Ohio issues licenses to in-state retailers that permit them to sell wine online and ship it to consumers' homes, but will not issue similar licenses to out-of-state retailers or allow them to ship to

consumers. Discrimination against out-of-state interests is a fundamental violation of the Commerce Clause. “[D]ifferential treatment between in-state and out-of-state [wine sellers] constitutes explicit discrimination against interstate commerce.” *Granholm v. Heald*, 544 U.S. at 467.

2. Internet commerce and home delivery is an important market. Consumers want to be able to buy wine online from all parts of the country for convenience, because there is a broader selection available online than in any local store, and to take advantage of more price competition. Facts ¶¶ 2-9. Home shopping remains an important health safety measure for those vulnerable to Covid. Facts ¶ 1. By giving access to this market only to in-state retailers, Ohio protects them from competition, and “protecting [local businesses] from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits.” *West Lynn Creamery v. Healy*, 512 U.S. 186, 205 (1994)/

3. The ban denies Ohio residents access to more than 80% of the wines that are distributed in the U.S. but not sold in Ohio, including wine recommended by national publications and desired by collectors.

Facts ¶¶ 3-7. It denies consumers access to wines distributed as gift baskets and by wine-of-the-month clubs. Facts ¶¶ 8-9. “[D]epriv[ing] citizens of their right to have access to the markets of other States on equal terms” violates the Commerce Clause. *Granholm v. Heald*, 544 U.S. at 473.

B. The direct shipping ban is not narrowly tailored to advance Ohio’s interest in public health or safety

1. Banning interstate wine shipments does not advance Ohio’s interest in public safety because direct shipping poses no risk in the first place

The list of legitimate state interests protected by the Twenty-first Amendment is short. It includes the protection of public health and safety, *Tenn. Wine*, 139 S.Ct. at 2457, 2474, and raising tax revenue.¹⁰ *Id.* at 2470. It does not include bureaucratic interests such as facilitating orderly markets, ensuring regulatory accountability, and monitoring financial records and sales, because “these objectives can also be achieved through the alternative of an evenhanded licensing requirement.” *Granholm v. Heald*, 544 U.S. at 492. *See Tenn. Wine*, 139 S.Ct. at 2475-76 (amenability to process can be achieved by designating an agent; background checks can

¹⁰ Tax revenue is not an issue in this case because direct shipments of wine may be taxed. Indeed, bringing shippers into the system who formerly shipped unlawfully will increase revenue. Facts ¶ 19, *supra*.

be done electronically; oversight can be accomplished through licensing and reporting requirements).

The record is overwhelming that banning direct shipping of wine by an out-of-state retailer does not advance the state's interest in protecting public health or safety because direct shipping poses no such threat to begin with. Fourteen states have been allowing direct shipments by out-of-state retailers over the past fifteen years and forty-four states allow direct shipments from out-of-state wineries. None report any public health or safety problems. Facts ¶ 10, *supra*. States that allow direct wine shipping by retailers do not have higher consumption rates or more drunk driving. Facts ¶¶ 12-13. They have not experienced any increase in youth access and the State admits it has no actual evidence that direct wine shipping leads to more youth access. Facts ¶ 14. There are no reports that any contaminated or unsafe wine has ever been shipped and the state admits it has no evidence of any. Facts ¶ 17.¹¹ Indeed, Ohio allows out-of-state wineries to ship directly to residents from premises outside the state, which shipping poses exactly the same potential risks as shipments from

¹¹ This is hardly surprising because wine is among the most heavily regulated products in the country -- regulated, inspected and tested by every state, by the federal Tax and Trade Bureau, see 27 C.F.R. 24.1 et seq. (more than 200 TTB wine regulations), and by the Food and Drug Administration. 21 C.F.R. 110.35.

out-of-state retailers, and no problems have occurred. Facts ¶ 11. Even their own expert has admitted there are no facts to show that direct wine shipping (as distinct from consumption of alcohol bought locally) poses a public safety risk. Kerr Indiana Report, R. 56-2 ¶ 34, PageID 4592. A ban on direct shipping by out-of-state wine retailers cannot advance a public health or safety purpose when direct shipping poses no threat in the first place.

The State has presented only two kinds of evidence in an attempt to establish that direct shipping would pose a threat to public health or safety: 1) Testimony from state officials that they inspect and regulate in-state retailers, and 2) Speculation by various witnesses that public health or safety problems might arise in the future if out-of-state retailers were allowed to ship wine to Ohio because it cannot inspect their premises. This is inadequate to carry the state's burden of proving that a ban on direct shipment actually protects public health or safety.

Ohio presented lots of evidence that state officials conduct inspections and other enforcement activities on the premises of in-state retailers. State officials inspect the building to make sure the premises are safe, clean, dry, ventilated, secure, has operable utilities, and solid shelving. Powers

Decl. ¶¶ 15-22, R. 53-1, PageID 4110-19; Chung Decl. ¶¶12-20, R. 53-2, PageID 4125-33. They make sure the premises are free of narcotics, gambling, weapons and prostitution, Lockhart Decl. ¶14, R. 53-6, PageID 4328. None of this has anything to do with the safety of direct wine shipping. Indeed, noticeably absent is any testimony by state officials that any of their on-site inspection and enforcement activities concern the actual safety of the bottled wine itself.

The State also conducts sting operations on the premises of in-state retailers to make sure alcohol is not being sold to minors. Lockhart Decl. ¶¶13-17, R. 53-6, PageID 4327-29. On-site stings tells us nothing about whether alcohol is being delivered to minors via online ordering and direct shipping, where age verification occurs at the purchaser's home, not on the seller's premises. With respect to direct shipping, the evidence shows that state officials have no problem conducting off-premises stings to see if alcohol is being illegally delivered -- they simply order it online. *See* State's Pleading in *Ohio v. Wine.com* at 5-8, R. 34-2, PageID 282-84 (describing online sting operation to detect illegal direct wine shipping).

These inspections and on-site enforcement activities simply have no connection to whether interstate wine shipping presents a threat to public health or safety that justifies a ban. They do not establish that out-of-state wine is somehow more dangerous nor that other states are somehow less diligent in its on-site inspections. Indeed, the record shows that every state engages in enforcement, inspection and compliance activities to monitor alcohol distribution. Report to Congress, State Enforcement Data, R. 80-2, PageID 5060-64. Wine sold by an out-of-state retailer is every bit as safely regulated as wine sold by an Ohio retailer and not a shred of evidence suggests otherwise.

The defendants try to fill this gap by offering into evidence the personal opinions of several witnesses that direct shipping might pose various public health and safety problems in Ohio that have not occurred anywhere else. They submitted two expert reports speculating that without on-site inspections and the requirement that wine be processed by an in-state wholesaler, a cascade of public health or safety problems might occur. They do not state that any such problems have actually occurred anywhere else. Stevenson/Jones Report 20-33, R. 51-2, PageID 1047-60; Kerr Report 7-14, R. 53-4, PageID 4314-21. Neither report is admissible

under Fed.R.Evid. 702 because neither witness provides any facts or data to support their opinions or explains their methodology.¹²

Defendants also submitted speculative opinions by three lay witnesses that problems might arise in the future if direct shipping were allowed. Powers Decl. ¶ 13, R. 53-1, PageID 4107-08; Chung Decl. ¶¶ 31-33, R. 53-2, PageID 4136-37; Schiffel Decl. ¶ 9, R. 53-5, PageID 4324. None is admissible under Rule 701 because they are not based on the witnesses' personal knowledge and no witness has any personal experience with direct shipping and its effects.¹³

Even if any of these opinions were admissible, they would not be sufficient to sustain the discriminatory shipping ban. None of these problems have actually arisen in any state that allows direct retail shipping, so it is speculative whether they would occur in Ohio. “[S]peculation and unsupported assertions are insufficient to sustain a law that would otherwise violate the Commerce Clause.” *Tenn. Wine*, 139 S.Ct. at 2474.

¹² Plaintiffs have objected to and moved to strike these opinions. See Mot. Strike Stevenson/Jones Report, R. 55, PageID 4563-69; Mot Strike Kerr Report, R.56, PageID 4570-76.

¹³ Plaintiffs have objected to and moved to strike these opinions. Mot. Strike Lay Opinions, R. 57, PageID 4601-03.

2. A ban on interstate wine shipping is not justified because nondiscriminatory alternatives are available that Ohio uses in similar circumstances

Even if the State had shown that interstate wine shipping poses an actual threat to public health and safety, that would not be enough to justify banning it altogether. Under the narrowly-tailored standard the State must also show that the total ban is the best solution because less restrictive means would be ineffective. *Wygant v. Jackson Bd. of Ed.*, 476 U.S. at 280 nn. 6-7. *Accord Tenn. Wine*, 139 S.Ct. at 2474 (state must present evidence “that nondiscriminatory alternatives would be insufficient to further those interests”); *Granholm v. Heald*, 544 U.S. at 489 (purpose “cannot be adequately served by reasonable nondiscriminatory alternatives”). One of the chief considerations is whether in other similar circumstances, the state allows the same activity it is now trying to prohibit. *Clark v Jeter*, 486 U.S. at 464.

Ohio does not use a total ban in similar circumstances. It uses a system requiring wine sellers and shippers to obtain a license, limit quantity, verify age, report sales, remit taxes, consent to jurisdiction, and cooperate in audits. It uses this system to effectively monitor direct shipments by out-of-state wineries even though they are not physically located in Ohio

where officials can conduct on-site inspections and enforcement. Facts ¶ 11, *supra*. It uses the permit system to oversee every other aspect of alcohol distribution in the state. List of Ohio Permits, R. 52-38, PageID 4052-56. The Supreme Court has endorsed the permit system as a reasonable alternative. *Granholm v. Heald*, 544 U.S. at 491; *Tenn. Wine*, 139 S.Ct. at 2475-76. Other Circuits endorse it. *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 17 (1st Cir. 2010); *Bainbridge v. Turner*, 311 F.3d 1104, 1110 (11th Cir. 2002). A task force of the National Conference of State Legislatures has endorsed it. R. 52-28, PageID 3944. Other states use it without problems. Facts ¶¶ 10-14, *supra*. Before Ohio can totally ban direct shipping by out-of-state wine retailers, it must prove that this less restrictive alternative that is successful everywhere else would not work in this one instance. It has not even attempted to do so.

The one thing we know for sure is that prohibiting out-of-state retailers from shipping wine to Ohio consumers protects Ohio retailers from competition. “[P]rotecting [local businesses] from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits.” *West Lynn Creamery v. Healy*, 512 U.S. at 205. The ban is unconstitutional.

IV. The limit on transporting wine into Ohio is unconstitutional

The same intermediate scrutiny standard applies to the statute limiting personal transportation of wine bought out of state to 4.5 liters. OHIO REV. CODE § 4301.20(L). Because no such limitation exists on intra-state transportation of wine, *id.* § 4301.60, the law is facially discriminatory. It discriminates against out-of-state retailers, shifts purchases to local retailers, and denies Ohio residents access to the markets in other states on equal terms. Wines are sold in other states that are not sold in Ohio. Facts ¶¶ 3-4, *supra*. Retailers often offer discounts on the purchase of a full case of wine, so the 6-bottle limit prevents Ohio residents from taking advantage of such sales offered by out of state retailers. Miller Decl. ¶ 4, R. 34-5, PageID 302-05; Total Wine Ad, R. 34-6, PageID 308. Therefore, the law can be saved by the Twenty-first Amendment only if it is narrowly tailored to advance a legitimate state purpose that could not be served by reasonable nondiscriminatory alternatives.

This limit cannot be justified as anything other than a protectionist measure designed to prevent Ohio consumers from stocking up on wine at out-of-state stores and force them to buy most of their wine locally. The

state cannot argue that wine bought out of state is inherently more dangerous than wine bought in Ohio because of the lack of opportunity to conduct on-site inspections (as they do to justify banning interstate shipping) because Ohio allows consumers to bring home 6 bottles purchased from an out-of-state retailer they cannot inspect.

The State cannot argue that it is inherently dangerous for a consumer to buy more than 6 bottles at a time because Ohio imposes no such limit on intra-state transportation or on direct shipments from out-of-state wineries, OHIO REV. CODE § 4303.232-233, and allows them to buy up to 24 cases at a time from those sources. *Id.*, § 4303.235. An Ohio resident could buy all 24 cases at once and transport them home --as long as they buy it from an Ohio retailer. There is no conceivable explanation why the 6-bottle restriction must be imposed only on wine brought in from an out-of-state retailer when it is not imposed on wine purchased from any other source.

Because the 6-bottle transportation limit is facially discriminatory and so obviously protectionist, the plaintiffs contend that it may be declared unconstitutional on the record presented. The issue is the same as for direct shipping --whether the State can show that the law is narrowly

tailored to advance a genuine public health risk because no other alternative is available. It cannot meet this standard. However, the District Court dismissed this claim on the pleadings, so in the alternative, this issue should be remanded for evidentiary submissions.

V. The District Court made several errors

A. The wrong level of scrutiny was applied

The District Court did not apply the correct legal standard when it upheld the constitutionality of the direct shipping ban. It did not ask whether that law was narrowly tailored to advance a public health or safety issue that could not be furthered by nondiscriminatory alternatives, as required by *Tenn. Wine.*, 139 S.Ct. at 2461, 2474. It did not even discuss the alternative of extending C-2 permits to out-of-state retailers. It did not require the State to present concrete evidence that direct shipping actually threatened public health or safety, as required by *Tenn. Wine*, 139 S.Ct at 2474, but uncritically accepted the speculation of defense witnesses that it might cause problems in the future even though it had not done so anywhere else. The court did not even scrutinize the actual law being challenged, but instead ruled on the legitimacy of using a three-tier system for the distribution of wine -- something that was not in dispute.

The District Court erroneously decided that the case was controlled by *Lebamoff Enterpr., Inc. v. Whitmer*, 956 F.3d 863 (6th Cir. 2020). Opinion at 19-23, R. 91, PageID 5196-5200. In *Lebamoff*, this Circuit upheld Michigan's ban on direct wine shipping from out-of-state retailers without engaging in intermediate scrutiny under the narrowly-tailored standard. That's because no such analysis was needed as the *Lebamoff* court characterized the issue:

The parties agree that the Twenty-first Amendment allows Michigan to distribute alcohol within its borders solely through a three-tier system [and] that Michigan may impose all manner of regulations on its wholesalers [and] retailers (*e.g.*, that they be present in the State, sell only within the State, and comply with health-and-safety rules). What separates the parties is whether Michigan may permit its retailers to offer at-home deliveries within the State while denying the same option to an Indiana retailer who does not have a Michigan retail license. Because the Twenty-first Amendment permits Michigan to treat in-state retailers (who operate within the three-tier system) differently from out-of-state retailers (who do not), we uphold the law.

956 F.3d at 867.

Lebamoff does not apply to the present case. The plaintiffs are not challenging Ohio's right to require retailers to have a license in order to ship wine to Ohio consumers, which was the issue decided in *Lebamoff*. Of course it can. The issue here is whether Ohio may refuse to issue licenses

to out-of-state retailers. That rule discriminates against out-of-state interests and is subject to intermediate scrutiny under *Tenn. Wine*.

Also, there is no agreement in this case that Ohio could require a licensee to be physically present¹⁴ in the state, unlike the purported agreement among the parties in *Lebamoff*. Indeed, this is at the heart of the dispute. The Supreme Court has held that an “in-state presence requirement runs contrary to our admonition that States cannot require an out-of-state firm to become a resident in order to compete on equal terms.” *Granholm v. Heald*, 544 U.S. at 474-75. See *Tenn. Wine*, 139 S.Ct. at 2472 (after *Granholm*, “in-state presence” requirements “can no longer be defended”). Because physical-presence laws discriminate against out-of-state interests, they are generally unconstitutional unless narrowly tailored to advance state interests that could not be served by reasonable nondiscriminatory alternatives. The District Court did not undertake this analysis.

B. Inadmissible evidence from the defendants was relied on

The District Court relied on inadmissible evidence submitted by the

¹⁴ In actuality, the plaintiffs in *Lebamoff* may have been trying to dispute whether requiring physical presence was constitutionally valid, but the court saw the case otherwise.

defendants to support their assertion that banning direct wine shipping by out-of-state retailers was justified as a public health or safety measure. Opinion at 11-18, R. 91, PageID 5188-95. Defense witnesses offered inadmissible personal opinions that the ban on direct shipping is a good idea, helps protect public health, and is constitutional under their personal interpretations of the *Tenn. Wine* standard. They speculate that direct wine shipping would lead to increased consumption and cause all sorts of adverse effects, but they cite no facts or data that any of those effects have occurred in states that allow direct shipping. They have not. Facts ¶¶ 10-17, *supra*. Plaintiffs objected and moved to strike those opinions as violating Fed. R. Evid. 701-02. See Mot. Strike Stevenson/Jones Report, R. 55, PageID 4563-69; Mot. Strike Kerr Report, R. 56, PageID 4570-76; Mot. Strike Lay Opinions, R. 57, PageID 4601-03.

C. Plaintiffs' contrary evidence was not considered

Even if some of the defense evidence had been admissible to show that direct wine shipping by out-of-state retailers might pose a risk to public health or safety, it would not justify granting summary judgment. Summary judgment may be granted only when there is no genuine dispute as to any material fact. FED. R. CIV. P. 56(a). Plaintiffs introduced a

mountain of evidence showing that direct shipping posed no public health or safety risk, and that a licensing and reporting system used in other states was effective at preventing harm. Facts, ¶¶ 10-17, *supra*. This evidence refutes the speculation by the defense witnesses that some harms *might* occur in the future in Ohio. It would have justified granting summary judgment to the plaintiffs, but at a minimum, should have prevented granting summary judgment for the defendants because it creates a material factual dispute over whether direct shipping poses a public health or safety risk that could not effectively be ameliorated by a licensing-and-reporting system.

D. The wrong standard for determining standing was used

The District Court dismissed the plaintiffs' claim that the 4.5 liter transportation limit was unconstitutional, R. 36 at 15-18, PageID 353-56, and Thomas Stickrath¹⁵ as a defendant, R. 33 at 15-18, PageID 264-67. It ruled that the plaintiffs lacked standing because they had not adequately shown a likelihood that the Department of Public Safety would enforce the law, *ibid.*, despite the defendant's own evidence that there were various scenarios in which they would enforce it, Def. Answer to Interrog. 16, R.

¹⁵ Director of the Ohio Department of Public Safety, in his official capacity.

52-34, PageID 4035, and had enforced it in the past. Snyder Decl., R. 53-7, PageID 4335, 4336, 4481.

The court applied the wrong legal standard in two regards: 1) At the pleading stage, it did not construe the allegations of standing in the complaint in favor of the plaintiffs. *See Product Solutions Internat'l, Inc. v. Aldez Containers, LLC*, 246 F.4th 454, 458 (6th Cir. 2022). Then, after asking the plaintiffs to supply supporting evidence, it did not draw all reasonable inferences from it in favor of the plaintiffs. *Lamb v. Kendrick*, 52 F.4th 286, 291 (6th Cir. 2022). 2) The court misread *McKay v. Federspiel*, 823 F.3d 862, 867 (6th Cir. 2016), and *Plunderbund Media, L.L.C. v. DeWine*, 753 F. App'x 362, 366 (6th Cir. 2018) as requiring plaintiffs to show *more than one* of the three ways to establish a credible threat of enforcement (history, warnings or public initiation), whereas those cases actually say only one is required. See Section I.B., Standing, *supra*.

VI. Plaintiffs are entitled to relief from the order dismissing Stickrath as a defendant on immunity grounds

One issue deserves particular attention. One of the grounds for granting relief from an order under Fed.R.Civ.P. 60(b)(3) is misrepresentation by the defendant. In support of their motion to dismiss,

the defendants represented that Stickrath, Director of the Department of Public Safety, was entitled to Eleventh Amendment immunity because he was not involved in enforcement of the wine shipping laws at issue. Def. Mot. Dismiss, R. 19, PageID 141-42, Def. Reply Memo, R.22, PageID 175-77. The court granted the motion. Order at 15-18, R. 33, PageID 264-67.

When evidence was produced during discovery that the Ohio Investigative Unit of the Department of Public Safety had indeed been involved in enforcing these laws, the plaintiffs moved for relief from the order dismissing director Stickrath as a defendant on the ground of newly discovered evidence and that the defendants had misrepresented his involvement. Motion, R. 52, PageID 1245-46; Amended Mot., R. 54, PageID 4546. The court was not persuaded and denied the motion. Opinion at 7-10, R. 91, PageID 5184-87.

It is now abundantly clear that the defendant misrepresented the role of the Ohio Investigative Unit of the Department of Public safety when it denied that it engaged in enforcement activity. In its Motion for Summary Judgment, the defense said:

Ohio vigorously enforces its liquor control laws through the Division, the Ohio Investigative Unit, and the Liquor Control Commission. As of January 24, 2022, there are approximately 26,000 active Division-issued liquor permits held by suppliers,

wholesale distributors, or retailers. (Exhibit 2, Chung Decl., ¶ 7.) The Division, the Ohio Investigative Unit, and the Liquor Control Commission are tasked with ensuring that all permit holders comply with the provisions of Ohio Rev. Code Chapters 4301 and 4303, as well as Ohio Adm. Code 4301.

Def. Mot. SJ at 18, R. 53, PageID 4084. Plaintiffs are entitled to the reinstatement of Thomas Stickrath as a defendant. The State's concession that he is involved in enforcement deprives him of Eleventh Amendment immunity under *Ex Parte Young*, 209 U.S. 123 (1908), which the district court had granted based on the state's earlier misrepresentation.

VII. Remedy

The court of appeals generally defers to the district court's choice of remedy, respecting its closer proximity to the evidence. *Graveline v. Benson*, 992 F.3d 524, 546 (6th Cir. 2021). However, because the district court in this case entered judgment for the defendants, it has not yet considered the matter, so the issue of remedy should be remanded for further proceedings.

If this court takes up the issue, the appropriate remedy consists of three parts:

- 1) An injunction prohibiting the defendants from requiring an in-state presence as a precondition to obtaining a C-2 permit. The statute

authorizing C-2 permits does not actually contain any such restriction, so nothing in OHIO REV. CODE § 4303.12 would be affected. That way, an out-of-state retailer would be subject to the same privileges and restrictions as any other Ohio licensee, including having a license, *id.* § 4301.58(B), remitting taxes, *id.* § 4301.43, verifying the age of the recipients, §§ 4301.22, 4301.611, 4301.639, complying with minimum price laws, Ohio Adm. Code 4301:1-1-03(C), and submitting reports. *Id.* § 4303.22(B)(1), and consumers would still be limited to 24 cases per year. *id.* § 4303.233. This avoids the concern this Court expressed in *Lebamoff Enterpr., Inc. v. Whitmer*, that granting relief might allow out-of-state retailers to evade core regulatory provisions that are imposed on in-state retailers. 956 F.3d at 872-73.

2) An injunction requiring the defendants to grant “special consent” to out-of-state C-2 permit holders to sell and ship wine that was not purchased from a wholesaler with an Ohio permit. The granting of such special consent is already authorized under OHIO REV. CODE § 4301.58(C), so nothing in the Ohio Code would be affected. Ohio could attach reporting requirements to that special consent so they know what has been shipped.

3) An injunction prohibiting the defendants from enforcing the 4.5 liter limit on personal transportation in § 4301.20(L). The state already insists it has little interest in enforcing it. Def. Reply at 3, R. 35, PageID 332. It would not affect the general restriction of 24 cases per year per family. *Id.* § 4303.233.

Extending direct shipping rights to out-of-state retailers and interstate transportation rights to Ohio consumers, is also consistent with the general principle that when rights have been unconstitutionally denied, the proper remedy is extension of those rights to the aggrieved individuals. *See Califano v. Westcott*, 443 U.S. 76, 89-90 (1979); *Kassel v. Consol. Freightways*, 450 U.S. 662 (1982). The only other option would be to achieve equality by taking away existing rights to ship and transport wine from in-state retailers, who are not represented in the litigation. That remedy is strongly disfavored for Due Process reasons. *See Nguyen v. I.N.S.*, 533 U.S. 53, 96 (2001) (Scalia, J., concurring).

Conclusion

Ohio's ban on direct shipping and its limit on personal transportation of wine purchased from out-of-state retailers discriminate against interstate commerce. The laws should be declared unconstitutional and the

defendants enjoined from enforcing them.

Respectfully submitted:
Attorneys for plaintiffs-appellants

s/ James A. Tanford
James A. Tanford, *counsel of record*
Robert D. Epstein
Epstein Cohen Seif & Porter, LLP
50 S. Meridian St. #505
Indianapolis IN 46204
(317) 639-1326
tanford@indiana.edu
rdepstein@aol.com

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(I) because it contains no more than 13,000 words in sections identified by Fed. R. App. P. 32(f). It contains 9864 words, as calculated by the word count program in WordPerfect X9. It complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it was prepared in 14-point Century Schoolbook.

s/ James A. Tanford
James A. Tanford

CERTIFICATE OF SERVICE

I certify that on December 13, 2022, the foregoing corrected brief was filed and served on all parties through the court's CM/ECF system.

s/ James A. Tanford
James A. Tanford

ADDENDUM

Designation of District Court Documents

Pursuant to Sixth Cir. R. 30(g), the plaintiffs-appellants designate the following district court documents as relevant to this appeal:

R. 1	Complaint	PageID 1-11
R. 19	Def. Mot. Dismiss,	PageID 141-42
R. 22	Def. Reply Memo	PageID 175-77
R.33	Order	PageID 264-67
R. 34-2	Pleading, <i>Ohio v. Wine.com, Inc.</i>	PageID 278
R. 34-5	Miller Decl.	PageID 302-03
R. 34-6	Total Wine Ad	PageID 308
R. 35	Def. Reply memo	PageID 332
R. 36	Order	PageID 353-56
R. 37	Answer	PageID 360-61
R. 51	WBWAO's MSJ	PageID 966
R. 51-2	Stevenson/Jones Report	PageID 1047-60
R. 52	PL Mot. Sum. Jdmt	PageID 1245-46
R. 52-2	Miller Decl.	PageID 1271-72
R. 52-3	Donovan Decl.	PageID 1273-74
R. 52-4	Wark Expert Report	PageID 1276-86
R. 52-5	Approved Brand List	PageID 1289
R. 52-6	NY Times Greek wine reviews	PageID 3799-801
R. 52-7	Wine Enth. Greek Wine reviews	PageID 3802-07
R. 52-8	Tanford Decl.	PageID 3818-11
R. 52-9	South African wines	PageID 3812-20
R. 52-10	Israeli wines	PageID 3821-24
R. 52-11	Arger Aff.	PageID 3825-26
R. 52-12	Gralla Aff.	PageID 3827-28
R. 52-14	Hickory Farms Webpage	PageID 3831
R. 52-15	Wine Merchant Webpage	PageID 3832-36
R. 52-16	K&L Webpage	PageID 3839
R. 52-17	Table of State Laws	PageID 3840-41
R. 52-18	Wark Rebuttal Report	Page ID 3842-43
R. 52-19	State Agency Reports	PageID 3845-62
R. 52-20	NIH Consumption Data	PageID 3863-68

R. 52-21	NHTSA Data	PageID 3869-74
R. 52-22	FBI Data	PageID 3878-84
R. 52-23	Nat'l Coalition Data	PageID 3885
R. 52-24	FTC Report	Page ID 3915-26
R. 52-25	SAMHSA Nat'l Survey	PageID 3932-33
R. 52-28	NCSL Model Bill	Page ID 3944
R. 52-29	NAWR Model Bill	PageID 3946
R. 52-30	State Permit Data	PageID 3948-4011
R. 52-31	Md. Comptroller Report	PageID 4012-20
R. 52-32	Corkscrew Johnny's Webpage	PageID 4021-22
R. 52-33	Western Reserve Wines Webpage	PageID 4023
R. 52-34	Def. Answer to Interrogs.	PageID 4026-35
R. 52-35	Jungle Jim's Sale	PageID 4042-48
R. 52-36	Jungle Jim's Ad	Page ID 4049
R. 52-37	Kroger Ad	PageID 4051
R. 53	Def. Yost's MSJ	PageID 4057-84
R. 53-1	Powers Decl.	PageID 4107-19
R. 53-2	Chung Decl.	PageID 4125-37
R. 53-4	Kerr Expert Report	PageID 4314-21
R. 53-5	Schiffel Decl.	PageID 4324
R. 53-6	Lockhart Decl.	PageID 4327-29
R. 53-7	Snyder Decl.	PageID 4335-81
R. 54	Amended Mot. for Relief	PageID 4546
R. 55	Mot. Strike Stevenson/Jones Report,	PageID 4563-69
R. 56	Mot Strike Kerr Report	PageID 4570-76
R 56-2	Kerr Report	PageID 4592
R. 57	Mot. Strike Lay Opinions	PageID 4601-03
R. 60	WBWAO Mot. Strike	PageID 4699
R. 80-2	Report to Congress, Enforcement	PageID 5060-64
R. 91	Opinion	PageID 5183-202
R. 96	Notice of Appeal	PageID 5271

SELECTED OHIO STATUTES

4301.01(A)(2)

Except as used in sections 4301.01 to 4301.20, 4301.22 to 4301.52, 4301.56, 4301.70, 4301.72, and 4303.01 to 4303.36 of the Revised Code, “sale” and “sell” include exchange, barter, gift, offer for sale, sale, distribution and delivery of any kind, and the transfer of title or possession of beer and intoxicating liquor either by constructive or actual delivery by any means or devices whatever, including the sale of beer or intoxicating liquor by means of a controlled access alcohol and beverage cabinet pursuant to section 4301.21 of the Revised Code.

4301.20(L)

This chapter and Chapter 4303. of the Revised Code do not prevent the following:...

(L) Any resident of this state or any member of the armed forces of the United States, who has attained the age of twenty-one years, from bringing into this state, for personal use and not for resale, not more than one liter of spirituous liquor, four and one-half liters of wine, or two hundred eighty-eight ounces of beer in any thirty-day period, and the same is free of any tax consent fee when the resident or member of the armed forces physically possesses and accompanies the spirituous liquor, wine, or beer on returning from a foreign country, another state, or an insular possession of the United States.

4301.58

(B) No person, personally or by the person's clerk, agent, or employee, who is not the holder of an A, B, C, D, E, F, G, I, or S permit issued by the division, in force at the time, and authorizing the sale of beer, intoxicating liquor, or alcohol, or who is not an agent or employee of the division or the tax commissioner authorized to sell such beer, intoxicating liquor, or alcohol, shall sell, keep, or possess beer, intoxicating liquor, or alcohol for sale to any persons other than those authorized by Chapters 4301. and 4303. of the Revised Code to purchase any beer or intoxicating liquor, or sell any alcohol at retail. This division does not apply to or affect the sale or possession for sale of any low-alcohol beverage.

(C) No person, personally or by the person's clerk, agent, or employee, who is the holder of a permit issued by the division, shall sell, keep, or

possess for sale any intoxicating liquor not purchased from the division or from the holder of a permit issued by the division authorizing the sale of such intoxicating liquor unless the same has been purchased with the special consent of the division. The division shall revoke the permit of any person convicted of a violation of division © of this section.

4301.60

No person, who is not the holder of an H permit, shall transport beer, intoxicating liquor, or alcohol in this state. This section does not apply to the transportation and delivery of beer, alcohol, or intoxicating liquor purchased or to be purchased from the holder of a permit issued by the division of liquor control, in force at the time, and authorizing the sale and delivery of the beer, alcohol, or intoxicating liquor so transported, or to the transportation and delivery of beer, intoxicating liquor, or alcohol purchased from the division or the tax commissioner, or purchased by the holder of an A or B permit outside this state and transported within this state by them in their own trucks for the purpose of sale under their permits.

4303.12

Permit C-2 may be issued to the owner or operator of a retail store to sell wine in sealed containers only and not for consumption on the premises where sold in original containers. The holder of this permit may also sell and distribute in original packages and not for consumption on the premises where sold or for resale, prepared and bottled highballs, cocktails, cordials, and other mixed beverages manufactured and distributed by holders of A-4 and B-4 permits, and containing not less than four per cent of alcohol by volume, and not more than twenty-one per cent of alcohol by volume. The fee for this permit is three hundred seventy-six dollars for each location.

4303.236

(A) No family household shall purchase more than twenty-four cases of twelve bottles of seven hundred fifty milliliters of wine in one year.

(B)(1) Except as provided in sections 4303.185 and 4303.27 of the Revised Code, no person shall knowingly send or transport a shipment of wine to a personal consumer, as defined in section 4303.233 of the Revised Code, without an S-1 or S-2 permit or registering as a warehouse under

section 4303.234 of the Revised Code. This division does not apply to an H permit holder ...

(C) A person that is not a beer or wine manufacturer, including the holder of any retail permit in this state or outside of this state, shall not obtain or attempt to obtain a B-2a, S-1, or S-2 permit.

4303.25

No person personally or by the person's clerk, agent, or employee shall manufacture, manufacture for sale, offer, keep, or possess for sale, furnish or sell, or solicit the purchase or sale of any beer or intoxicating liquor in this state, or transport, import, or cause to be transported or imported any beer, intoxicating liquor, or alcohol in or into this state for delivery, use, or sale, unless the person has fully complied with this chapter and Chapter 4301. of the Revised Code or is the holder of a permit issued by the division of liquor control and in force at the time.

4303.27

.... This chapter and Chapter 4301. of the Revised Code do not prohibit the holder of an A, B, C, or D permit from making deliveries of beer or intoxicating liquor containing not more than twenty-one per cent of alcohol by volume