In the United States District Court
For the Southern District of Ohio
Eastern Division

Derek Block, et al. *Plaintiffs*	)	Case No. 2:20-cv-03686
vs.	)	Judge Sarah D. Morrison Magistrate Judge Chelsey M. Vascara
Jim Canepa, et al. *Defendants*	)	
Wholesale Beer & Wine Ass'n of Ohio *Intervening defendant*	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

I. Introduction

Plaintiffs are challenging the constitutionality of provisions in the Ohio Liquor Control Law that ban out-of-state retailers from shipping wine to Ohio consumers, and restrict consumers from personally transporting wine back to Ohio. Because Ohio allows its own retailers to ship wine to consumers and imposes no restrictions on consumers transporting wine purchased within state, the bans on shipping and transportation from out-of-state retailers discriminate against interstate commerce, protect local economic interests, and violate the Commerce Clause. Compl. at 2, Doc. 1, PageID #2.

Ohio's statutory scheme is as follows (all statutes are reprinted in Appendix, pp. 17-20):

a. *Direct shipping*. An in-state 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),[1] including internet sales that are delivered by 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 who are not located in Ohio and/or do not obtain their wine from a wholesaler located in Ohio. *Id.* § 4301.58(C).

b. *Personal transportation.* A consumer may personally transport unlimited quantities of wine purchased from an in-state retailer, *id.* § 4301.60, but is restricted to 4.5 liters (6 bottles) if the wine is purchased from an out-of-state retailer. *Id.* § 4301.20(L).

The plaintiffs seek a declaratory judgment that these laws are unconstitutional and an injunction barring the defendants from enforcing them and requiring the defendants to permit the shipping and transportation of wine from out-of-state retailers to Ohio consumers. Compl. at 9-10, Doc. 1, PageID #9-10. Plaintiffs will abide by the same labeling, shipping, reporting, age verification, licensing and tax rules required for in-state wine sales. Compl. ¶ 38, Doc. 1, PageID #8-92, and will consent to Ohio jurisdiction. Compl. ¶ 39, Doc. 1, PageID #9.

The defendants have moved to dismiss the complaint on three grounds: lack of standing, 11th Amendment immunity, and failure to state a claim for relief under the Commerce Clause because the Twenty-first Amendment immunizes the state's liquor laws from Commerce Clause scrutiny.

II. Standard of review

To survive a motion to dismiss, a claim must be plausible on its face under the "short and plain statement" standard of Fed. R. Civ. P. 8(a). The courts construe the complaint in the light most favorable to the plaintiffs, accept well-pleaded facts as true, and draw all inferences in the

[1] § 4301(A)(2) says it does not apply to chapter 4303, but § 4303.01 expressly adopts § 4301(A)(2) and makes it applicable.

plaintiffs' favor. *Mosley v. Kohl's Dept. Stores, Inc*., 942 F.3d 752, 756 (6th Cir. 2019). General factual allegations suffice in considering a motion to dismiss on the pleadings, because "we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* A motion to dismiss is disfavored, especially when constitutional rights are at stake. *McGlone v. Bell*, 681 F.3d 718, 728 (6th Cir. 2012). Therefore, dismissal is warranted only if the plaintiffs "undoubtedly can prove no set of facts in support of the claims that would entitle [them to] relief." *Theile v. Michigan,* 891 F.3d 240, 243 (6th Cir. 2018).

III. Plaintiffs have standing

The elements of standing are well known: plaintiffs must show an injury-in-fact, causation, and redressability. *Mays v. LaRose*, 951 F.3d 775, 781 (6th Cir. 2020). The plaintiffs have met these requirements. House of Glunz alleges that it has lost profits by being unable to fill orders from Ohio residents. Compl. ¶ 23, Doc. 1, PageID #6. Block and Miller allege that they tried to buy wine from out-of-state retailers and have it shipped but were unable to complete the transactions, Compl. ¶¶ 24-25, Doc. 1, PageID #6-7, and are also unable to personally transport the wine home. Compl. ¶ 31, Doc. 1, PageID #7. The plaintiffs allege that the causes of these injuries are the laws banning shipping and transportation, Compl. ¶¶ 15, 24-25, 37, Doc. 1, PageID #5-8, and there is no suggestion any third party has contributed to the harm. The injury is redressable because the defendants who enforce these laws are before the court, see Compl. ¶¶ 8-11, Doc. 1, PageID #4, and can be enjoined from doing so. House of Glunz alleges it will then take the steps to qualify to do business in Ohio, obtain the necessary permits, and sell and ship wine to Ohio consumers. Compl. ¶ 6, Doc. 1, PageID #3. Block and Miller allege they would then buy wine from out-of-state retailers and have it shipped and/or personally transport it home. Compl. ¶¶ 4-5, Doc. 1, PageID #3.

The defendants have challenged all three elements of standing. They contest injury because House of Glunz never applied for and has never been denied a permit, Mot. Dismiss at 12-13, Doc. 19, PageID #135-36, and Block and Miller did not allege a detailed plan for how, when and where they would purchase wine from out-of-state retailers. *Id.* at 11, Doc. 19, PageID #134. They contest causation because the complaint does not allege that the defendants personally engaged in conduct preventing the plaintiffs from making wine purchases. *Id.* at 13-14, Doc. 19, PageID #136-37. They contest redressability because Ohio Rev. Code § 1.50 contains a severability clause[2] which a court might use to invalidate the law allowing in-state retailers to ship, rather that invalidating the laws they have challenged which ban out-of-state retailers from doing so. *Id.* at 14-16, Doc. 19, PageID #137-39. Their arguments are inconsistent with Sixth Circuit case law and misunderstand the difference between dismissal on the pleadings and dismissal on a motion for summary judgment.

A. Injury to House of Glunz

Defendants assert that House of Glunz has not pleaded an injury-in-fact because it did not allege that it had been denied a permit. Mot. Dismiss. at 12-13; Doc. 19, PageID #135-36. The argument is without merit for two reasons. First, it is irrelevant, because the defendants concede that Derek Block has pleaded an injury-in-fact, *id.* at 11, Doc. 19, PageID #134. and as long as one plaintiff has standing, the court has jurisdiction. *Mays v. LaRose,* 951 F.3d 775, 782 (6th Cir. 2020). Second, the defendants concede that House of Glunz is not eligible for a C-2 retail permit, Mot. Dismiss at 13, Doc. 19, PageID #136, and no application is necessary if doing so would be

[2] "If any provision ... of the Revised Code ... is held invalid, the invalidity does not affect other provisions or ... sections which can be given effect without the invalid provision ... and to this end the provisions are severable."

futile. *Mays v. LaRose,* 951 F.3d *at 782.* The defendants argue that House of Glunz would have been eligible for a different direct shipping permit called an "S" permit, *id*., but they have misread their own statute. Under Ohio Rev. Code § 4303.232(A)(1), an S permit may only be issued to brand owners, importers and wineries, and House of Glunz is none of these – it is an ordinary retailer. Compl. ¶¶ 6, 14, 15, Doc. 1, PageID #3-5. Even with an S permit, the holder "shall sell only wine that the permit holder has manufactured to a personal consumer," § 4303.232(A)(3), and House of Glunz does not manufacture its own wine.

B. Injury to Block and Miller

Defendants concede that Block has adequately alleged an injury caused by the ban on direct shipping, Mot. Dismiss at 11, Doc. 19, PageID #134, but contend that the plaintiffs have failed to allege an injury caused by the ban on personal transportation. *Id.* at 10-11, Doc. 1, PageID #133-34. Given that personal transportation of more than 6 bottles of wine is illegal, Ohio Rev. Code §§ 4301.60; 4301.20(L), and carries potential penalties, *id.* § 4301.99, the plaintiffs are not required to actually attempt to smuggle wine into Ohio to have standing. *Schickel v. Dilger*, 925 F.3d 858, 865 (6th Cir. 2019). We expect citizens to refrain from engaging in illegal conduct. In a pre-enforcement challenge, a plaintiff satisfies the injury-in-fact requirement where he 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, 160 (2014); *McGlone v. Bell*, 681 F.3d 718, 729-30 (6th Cir. 2012). Block and Miller alleged an intent to engage in the cross-border transportation of wine, Compl. ¶ 26, Doc. 1, PageID #7, which is proscribed by law. *Id.* ¶¶ 29, 31. They have explained why they will do so – to obtain wine not found locally. Id. ¶ 30. The defendants assert an interest in enforcing these laws, Mot. Dismiss at 19, Doc. 19, PageID #141, and the State has

already taken aggressively action to enforce the laws regulating interstate transportation of wine in *State v. Wine.com*, 2:20-cv-3430 (S.D. Oh., pending). There exists a sufficiently credible threat of prosecution for plaintiffs to have standing.

The defendants contend that the complaint is not detailed enough because the plaintiffs do not indicate how, when or where they would purchase wine. Mot. Dismiss at 11, Doc. 19, PageID #134. They cite no authority that such details are required at the pleading stage. The only two cases they cite[3] concerned a challenge to standing based on a failure to present evidence on summary judgment. At the pleading stage, general factual allegations of injury suffice because courts presume the party has specific evidence to support the claim. *Mosley v. Kohl's Dept. Stores, Inc.*, 942 F.3d 752, 756 (6th Cir. 2019). The simplified pleading standard of Fed. R. Civ. P. 8(a) applies to allegations of injury, and there is no requirement for the kind of details defendants demand. *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 233-34 (6th Cir. 2003). The plaintiffs could not possibly have detailed plans at this stage anyway, because transporting such purchases is currently illegal, travel is restricted because of the coronavirus, and plaintiffs have no way of knowing the extent to which they may be allowed to transport wine in the future.

C. Causation

At the pleading stage, the plaintiff's burden of alleging that their injury is fairly traceable to the defendant's challenged conduct is "relatively modest." *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 866 (6th Cir. 2020). Plaintiffs have alleged that House of Glunz cannot sell and ship wine to Ohio consumers because Ohio has made it unlawful and for no other reason. Compl. ¶¶ 15, 23 37, Doc. 1, PageID #5-8. Block and Miller allege they could not complete interstate

[3] *Stefanovich v. Univ. of Tenn.*, 1999 U.S. App. LEXIS 5978 (6th Cir. Mar. 30, 1999) and *Tenn. Repub. Party v. SEC,* 863 F.3d 507 (6th Cir. 2017).

purchases because of the ban. Compl. ¶¶ 24-25, 37, Doc. 1, PageID #6-8. There is no obvious alternative cause, and no third parties involved, so nothing more is required.

The defendants contend that the causation element has not been satisfied because the complaint does not allege any conduct, act or omission by any of the defendants personally. Mot. Dismiss at 14, Doc. 19, PageID #137. They cite no authority for the proposition that the constitutionality of a statutory ban on interstate commerce may be challenged only if a state official personally interfered with the transaction. Not surprisingly, the law is to the contrary. Causation is established when the harm is fairly traceable to a statutory provision within the official's jurisdiction to enforce. *Mays v. LaRose,* 951 F.3d at 782. *See also Cutshall v. Sundquist*, 193 F.3d 466, 471-72 (6th Cir. 1999) (in challenge to statute, injury must be traceable to "the state," not the action of a specific official).

D. Redressability

The defendants also contest redressability. They argue that no remedy is possible because Ohio Rev. Code § 1.50 contains a severability clause which would *compel* this court to remedy the discrimination by taking away shipping privileges from in-state retailers rather than extending equal privileges to out-of-state retailers. Mot. Dismiss at 14-16, Doc. 19, PageID #137-39. The argument is nonsense. The severability clause does not say that a court must remedy a discriminatory provision by nullifying other provisions. To the contrary, it explicitly says that if any provision of the Ohio Code is held invalid, the invalid provisions should be severed. Ohio Rev. Code § 1.50. In this case, the invalid provisions are the laws violating the Commerce Clause by banning interstate shipping and transportation. The defendants' proposed interpretation of the severability clause as requiring the nullification of other statutes is foreclosed by Ohio

precedent that statutes are not to be construed to nullify other laws. *Mecca for Fair Govt. v. Mecca Twp. Bd. of Trustees,* 704 N.E.2d 1270, 1274 (Oh. App. 1997).

The state again relies on *Lebamoff Enterpr., Inc. v. Whitmer*, 956 F.3d at 876-77, but that case did not hold that the only option for redressing a discriminatory liquor law is to level down and take away privileges from in-state retailers. It said in *dicta* that leveling down would have been the proper remedy based on the facts and legislative history of the Michigan Liquor Control Code. *Lebamoff* is only one of several liquor cases in which different panels of the Sixth Circuit have reached different results on whether the better remedy for discrimination is to extend privileges to out-of-state entities or take them away from in-state ones. Each case is decided on its own unique facts and law, and most have reached the opposite conclusion. *See Cherry Hill Vineyards v. Lilly*, 553 F.3d at 435 (extending privileges to out-of-state wineries); *Byrd v. Tenn. Wine & Spirits Retailers Ass'n,* 883 F.3d 608, 626-27 (6th Cir. 2018), *aff'd* 139 S.Ct 2449 (2019) (extending privileges to out-of-state retailers). Cf. *Jelovsek v. Bredesen,* 545 F.3d 431, 439-40 (6th Cir. 2008) (either remedy might be appropriate; remanding to district court could to hear more evidence).

Lebamoff did not (and could not) take away the district court's broad discretion to fashion an appropriate remedy. *Howe v. City of Akron*, 801 F.3d 718, 753 (6th Cir. 2015)*; U.S. v. Miami Univ.*, 294 F.3d 797, 806 (6th Cir. 2002). The court has the ability to enjoin the defendants from enforcing the ban on interstate wine shipping and transportation, and when the responsible officials are before the court, "there is ordinarily little question that ... a judgment preventing or requiring ... action [by officials] will redress it." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). A remedy that requires the defendants to extend equal shipping privileges to out-of-state retailers is certainly plausible, because numerous Supreme Court and Sixth Circuit cases

hold that when a state has been unconstitutionally denying benefits to some people, the presumptively correct remedy is to extend those benefits to them rather than take benefits away from parties who are not before the court and have been heard. *E.g., Heckler v. Mathews*, 465 U.S. 728, 733, 738-40 (1984); *Califano v. Westcott*, 443 U.S. 76, 89-90 (1979); *Cherry Hill Vineyards v. Lilly,* 553 F.3d at 435. Plaintiffs have alleged they will in fact engage in interstate commerce in wine if the ban is enjoined, Compl. ¶¶ 4-6, Doc. 1, PageID #3. The possibility that the court might end up leveling down does not make the harm non-redressable.

IV. The defendants may be sued under the *Ex Parte Young* exception to Eleventh Amendment immunity

Under the Eleventh Amendment,[4] a state has sovereign immunity and usually cannot be sued in federal court. There is one well known exception: state officials with responsibility for enforcing an unconstitutional law may be sued in their official capacity for injunctive relief to prevent them from enforcing it. *Ex Parte Young*, 209 U.S. 123, 157 (1908). This exception is thoroughly discussed in *Russell v. Lundergan-Grimes,* 784 F.3d 1037, 1047-49 (6th Cir. 2015), which sets out the following principles: The official must have a concrete connection to the enforcement of the act and an obligation to enforce it. The plaintiff must either have been the subject of an enforcement action or there must be a realistic possibility of an enforcement action. A realistic possibility exists if the state official is "busily engaged in administering" the laws, even if the plaintiffs are unable to prophesy precisely what enforcement actions might be taken against them. The *Ex parte Young* doctrine is designed to permit plaintiffs to challenge the constitutionality of state laws in federal court, not to prevent such suits.

[4] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State ...." U.S. Const., Amend. XI.

There is no question that each of the defendant state officials has a concrete connection to the enforcement of the liquor laws at issue. Dave Yost is the Attorney General of Ohio. Compl. ¶ 9, Doc. 1, PageID #4. He is authorized by Ohio Rev. Code § 4301.10(A)(4) to prosecute persons who violate the Liquor Control Law, and by 27 U.S.C. § 122a to bring suit in federal court to enjoin out-of-state retailers from violating Ohio's wine shipping laws. Thomas J. Stickrath is the Director of the Ohio Department of Public Safety. Compl. ¶ 10, Doc. 1, PageID #4. He is charged by Ohio Rev. Code § 5502.13 with conducting investigations and other enforcement activity authorized by the Liquor Control Law. Jim Canepa is the Superintendent of the Ohio Division of Liquor Control, which is the agency that regulates the distribution and retail sale of alcoholic beverages. Compl. ¶ 8, Doc. 1, PageID #4. He is charged by Ohio Rev. Code §§ 4301.021, 4301.10(A)(4), and 4301.13(A) with enforcing the Liquor Control Law, including provisions related to the sale and transportation of wine. Deborah Pryce is Chairperson of the Ohio Liquor Control Commission, an independent state agency. Compl. ¶ 11, Doc. 1, PageID #4. She is charged by Ohio Rev. Code § 4301.13(A) with adopting, amending and repealing rules to regulate the sale, distribution and shipment of bottled wine within the state, and by Ohio Rev. Code § 4301.25(A) with hearing cases related to violations of state liquor laws.

The plaintiffs have not been the subjects of an enforcement action because they are law-abiding citizens who have not been unlawfully transporting wine. Therefore, the question is whether these defendants are actively engaged in administering the alcohol transportation and control laws. Three out of four certainly are.

a. Attorney General Yost has brought a case in this court against several entities accused of unlawfully shipping wine into Ohio. *Ohio v. Wine.com et al.*, 2:20-cv-03430 (S.D. Ohio, pending).

b. Superintendent Canepa's Division of Liquor Control conducted the stings against out-of-state alcohol shippers upon which Yost's case was based. Doc. 2 at 5-9, PageID # 46-50.

c. Director Stickrath's Department of Public Safety (through its investigative unit) is actively involved in investigating unlawful liquor sales and issuing citations, see *Hobnob, Inc. v. Ohio Liquor Control Com'n,* 2018 WL 4181470 (10th Dist. Ohio Aug. 30, 2018); including investigations of unlawful transportation. *See City of Toledo v. Eischen*, 2008 WL 5197161 (6th Dist. Ohio 2008).

The enforcement role of defendant Pryce is less direct. The Liquor Control Commission is actively involved in approving, denying and/or suspending liquor permits for violating the Liquor Control Law, *e.g.,, Floyd's Legacy, LLC v. Ohio Liquor Control Com'n*, ___ N.E.3d ___, 2020 WL 4718106, 2020-Ohio-4074 (10th Dist. Ohio 2020), *Hobnob, Inc. v. Ohio Liquor Control Com'n, supra*, but House of Glunz does not currently hold an Ohio permit – although it would like to. Compl. ¶ 38, Doc. 1, PageID #8-9.

The defendants concede that Yost can be sued under the *Ex Parte Young* doctrine. Mot. Dismiss at 18, Doc. 19, PageID #141. However, they claim that the other three defendants have Eleventh Amendment immunity because they have not threatened to take any enforcement action concerning unlawful transportation. *Id*. at 18-19, Doc. 19, PageID #141-42. This is not the complete statement of the *Ex Parte Young* standard, however. A realistic likelihood of enforcement exists if the state official is "busily engaged in administering" the laws at issue. *Russell v. Lundergan-Grimes,* 784 F.3d at 1048. *See also McNeil v. Community Probation Serv.*, LLC, 945 F.3d 991, 995 (6th Cir. 2019) ("actively involved with administering" the law). The defendants do not dispute that the remaining three defendants – Canepa, Stickrath, and Pryce – are actively involved in administering these laws. They are subject to suit.

V. The Complaint states valid claims that Ohio laws violate the nondiscrimination principle of the Commerce Clause and are not saved by the Twenty-first Amendment

The defendants have moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a valid claim. The complaint alleges that Ohio's ban on cross-border shipping and transportation discriminates against out-of-state wine retailers in violation of the Commerce Clause.[5] Defendants assert that these claims are foreclosed by the 21st Amendment,[6] which gives states virtually complete control over how to structure their liquor distribution systems.

The shipping and transportation laws being challenged implicate both constitutional provisions. They discriminate against interstate commerce by denying out-of-state retailers the same privileges enjoyed by local retailers, and they regulate aspects of Ohio's liquor distribution system. Resolution of this case will therefore require this court to consider the interplay between these two provisions. They "are parts of the same Constitution [and] each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275 (1984).

The defendants assert that a single case controls how the Commerce Clause and Twnety-first Amendment should be balanced: *Lebamoff Enterp., Inc. v. Whitmer*, 956 F.3d 863 (6th Cir. 2020), which favored the Twenty-first Amendment. Constitutional law is not that simple. There are at least four cases that set the framework for harmonizing these two provisions, and the others strike a quite different balance that prioritizes the Commerce Clause.

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[5] "The Congress shall have the power [to] regulate commerce ...among the several states." U.S. CONST., ART. I, § 8, cl. 3.

[6] "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST., AMEND. XXI, §2. .

1. In *Granholm v. Heald,* 544 U.S. 460, 484-85, 489 (2005), the Supreme Court struck down state laws that prohibited out-of-state wineries from shipping to consumers. It held that if a liquor law discriminates against out-of-state interests, it is presumptively invalid under the Commerce Clause. The Twenty-first Amendment is not an automatic defense. Rather, the state must prove the law advances a legitimate state regulatory interest that cannot adequately be served by reasonable nondiscriminatory alternatives.
2. In *Cherry Hill Vineyards v. Lilly*, 553 F.3d 423, 431-32 (6th Cir. 2008), this Circuit applied *Granholm* and struck down a Kentucky law that prevented out-of-state wineries from shipping to consumers. The court determined that the law violated the nondiscrimination principle of the Commerce Clause and the state had not proved that it advanced a legitimate regulatory interest that could not adequately be served by reasonable nondiscriminatory alternatives. *Accord Siesta Village Mkt. v. Granholm,* 596 F.Supp.2d 1035 (E.D. Mich. 2008).
3. In *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct. 2449, 2470-71, 2474 (2019), the Supreme Court affirmed *Granholm* and reiterated that discriminatory state liquor laws are invalid unless the state proves that reasonable nondiscriminatory alternatives would be insufficient to further its interests. It struck down a state law that prohibited nonresidents from obtaining liquor licenses.
4. In *Lebamoff Enterp., Inc. v. Whitmer*, *supra*, a panel of the Sixth Circuit inexplicably departed from these Supreme Court and Sixth Circuit precedents. It held that the Twenty-first Amendment permits states to discriminate against out-of-state liquor interests, 956 F.3d at 867, as long as the state can justify the law as a public health or

safety measure. *Id.* at 869. It upheld a discriminatory state law that prohibited out-of-state retailers from shipping wine to consumers but allowed in-state retailers to do so.

To the extent that the state is suggesting that *Lebamoff* controls because it is the most recent, they are not correct. A panel of the Sixth Circuit obviously cannot overrule Supreme Court precedents like *Tenn. Wine* and *Granholm,*[7] no matter how recent. *See Tchankpa v. Ascenda Retail Group, Inc.*, 951 F.3d 805, 815 (6th Cir. 2020). Nor can one panel of the Sixth Circuit nullify the prior decisions of another panel, especially when the earlier precedent has been affirmed several times.[8] The "prior decision remains controlling authority" until overturned by the Supreme Court or the Sixth Circuit *en banc*. *Spencer v. Bouchard*, 449 F.3d 721, 726 (6th Cir. 2006); *Salmi v. Sec'y of HHS*, 774 F.2d 685, 689 (6th Cir. 1985).

At this stage, however, this court does not need to reconcile *Lebamoff* with the other three cases, because all four agree on one thing: this is not a pure question of law that can be resolved on a motion to dismiss; a "concrete" factual record is required. *Tennessee Wine*, 139 S.Ct. at 2474; *Granholm,* 544 U.S. at 489-90; *Lebamoff*, 956 F.3d at 874-75; *id.* at 877 (McKeague, concurring)*; Cherry Hill Vineyards*, 553 F.3d at 434. The state cannot merely *assert* that these laws serve legitimate purposes; it must *prove* that the law actually promotes public health or safety because "unsupported assertions are insufficient." *Tenn. Wine & Spirits Retailers Ass'n v.*

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[7] *Tenn. Wine,* 139 S.Ct. at 2470 (Amendment does not allow states to violate the nondiscrimination principle of the Commerce Clause); *Granholm,* 544 U.S. at 489 (discrimination is contrary to the Commerce Clause and is not saved by the 21st Amendment).

[8] The principle that a discriminatory state liquor law presumptively violates the Commerce Clause and exceeds the state's 21st Amendment authority is stated in *Byrd v. Tenn. Wine & Spirits Retailers Assoc.*, 883 F.3d 608, 624 (6th Cir. 2018)*, aff'd* 139 S.Ct, 2449 (2019); *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 370 (6th Cir. 2013); *Jelovsek v. Bredesen*, 545 F.3d 431, 435 (6th Cir. 2008); and *Heald v. Engler,* 342 F.3d 517, 524 (6th Cir. 2003), *aff'd* 544 U.S. 460 (2005), as well as *Cherry Hill Vineyards*.

Thomas, 139 S.Ct 2449, 2474 (2019). It cannot simply rely on conclusions in the *Lebamoff* case, which were based on the legislative history of the particular Michigan statute and a factual record about the enforcement activities of Michigan officials and the particular local public safety issues they were addressing. 956 F.3d at 872-75 (reviewing evidence); *id.* at 877("Michigan has presented enough evidence ... to show its in-state retailer requirement serves the public health") (McKeague, concurring).

Plaintiffs have the burden to show that the Ohio restrictions on interstate commerce have a discriminatory effect. They have alleged facts that satisfy that burden. They allege that there are wines available from out-of-state retailers that consumers cannot find in Ohio, Compl. ¶¶ 18, 34, Doc. 1, PageID #5, 8; that many are sold at retailers in California and other distant states, *id.* ¶ 35, Doc. 1, PageID #8; that the sellers and buyers cannot complete interstate transactions because Ohio forbids sales, shipping and personal transportation, *id*. ¶¶ 14-15, 29-31, 37; Doc. 1, PageID #5-8, that no such restrictions are placed on in-state retail transactions, *id*. ¶¶ 32, 40, Doc. 1, PageID #7-9; and that as a result, consumers shift purchases from out-of-state sources to in-state sources. *Id.* ¶ 27, Doc. 1, PageID #7. The burden then shifts to the state to prove that the law is narrowly tailored to advance one of Ohio's legitimate non-protectionist purposes, *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct. at 2460, and no reasonable nondiscriminatory alternatives are available. *Granholm*, 544 U.S. at 492-93. Plaintiffs have a final opportunity to rebut the state's evidence of a public health problem and demonstrate it is merely pretextual. None of this can be resolved on a motion to dismiss.

VI. Conclusion

For the foregoing reasons, the defendants' motion to dismiss should be denied, and the case allowed to proceed to the evidentiary stage.

Respectfully submitted,
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Certificate of Service

I certify that the foregoing document was filed electronically on October 12, 2020, using the court's CM/ECF system. All parties are registered users and will receive notice through the system.

s/ James A. Tanford
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APPENDIX
Selected provisions of Ohio Revised Code

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.

4301.021
The superintendent of liquor control shall exercise all powers and perform all duties created and enjoined by Chapters 4301. and 4303. of the Revised Code, except for the powers and duties vested in and enjoined upon the liquor control commission by section 4301.022 of the Revised Code and all chapters and sections of the Revised Code referred to in that section, and except for the powers and duties vested in the department of public safety under sections 5502.13 to 5502.19 of the Revised Code and all provisions of the Revised Code referred to in those sections that relate to liquor control enforcement.

4301.10(A)(4)
(A) The division of liquor control shall do all of the following: ...
(4) Enforce the administrative provisions of this chapter and Chapter 4303. of the Revised Code, and the rules and orders of the liquor control commission and the superintendent relating to the manufacture, importation, transportation, distribution, and sale of beer or intoxicating liquor. The attorney general, any prosecuting attorney, and any prosecuting officer of a municipal corporation or a municipal court shall, at the request of the division of liquor control or the department of public safety, prosecute any person charged with the violation of any provision in those chapters or of any section of the Revised Code relating to the manufacture, importation, transportation, distribution, and sale of beer or intoxicating liquor.

4301.13(A)
The liquor control commission may adopt, promulgate, repeal, rescind, and amend rules to regulate the manner of dealing in and distributing and selling bottled wine within the state. The commission may require out-of-state producers, shippers, bottlers, and holders of federal importers' permits shipping bottled wine into Ohio and holders of A-2, A-2f, B-5, B-3, and B-2 permits issued by the division of liquor control, engaged in distributing and selling bottled wine in Ohio, to file with the division a schedule of prices in which minimum prices are set forth for the sale of bottled wine at wholesale or retail, or both, in Ohio. Any amendments, additions, alterations, or revisions to the schedule of prices as originally filed with the division shall be filed in the same manner as the original schedule of prices required to be filed with the division.

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.

4301.25(A)
The liquor control commission may suspend or revoke any permit issued under this chapter or Chapter 4303 of the Revised Code for the violation of any of the applicable restrictions of either chapter or of any lawful rule of the commission, for other sufficient cause, and for the following causes:

(1) Conviction of the holder or the holder's agent or employee for violating division (B) of section 2907.39 of the Revised Code or a section of this chapter or Chapter 4303. of the Revised Code or for a felony;

(2) The entry of a judgment pursuant to division (D) or (E) of section 3767.05 of the Revised Code against a permit holder or the holder's agent or employee finding the existence of a nuisance at a liquor permit premises or finding the existence of a nuisance as a result of the operation of a liquor permit premises;

(3) Making any false material statement in an application for a permit;

(4) Assigning, transferring, or pledging a permit contrary to the rules of the commission;

(5) Selling or promising to sell beer or intoxicating liquor to a wholesale or retail dealer who is not the holder of a proper permit at the time of the sale or promise;

(6) Failure of the holder of a permit to pay an excise tax together with any penalties imposed by the law relating to that failure and for violation of any rule of the department of taxation in pursuance of the tax and penalties.

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 (C) 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.

4301.99(C)
Whoever violates ... section 4301.58 [or] 4301.60 ... of the Revised Code is guilty of a misdemeanor of the first degree.

4303.01.
As used in sections 4303.01 to 4303.37 of the Revised Code, "intoxicating liquor," "liquor," "sale," "sell," "vehicle," "alcohol," "beer," "wine," "mixed beverages," "spirituous liquor," "sealed container," "person," "manufacture," "manufacturer," "wholesale distributor," "distributor," "hotel," "restaurant," "club," "night club," "at retail," "pharmacy," and "enclosed shopping center" have the same meanings as in section 4301.01 of the Revised Code.

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.

4303.232(A)
(1) Permit S may be issued to a person that is the brand owner or United States importer of beer or wine, is the designated agent of a brand owner or importer for all beer or wine sold in this state for that owner or importer, or manufactures wine if the manufacturer is entitled to a tax credit under 27 C.F.R. 24.278 and produces less than two hundred fifty thousand gallons of wine per year. If the person resides outside this state, the person shall comply with the requirements governing the issuance of licenses or permits that authorize the sale of beer or intoxicating liquor by the appropriate authority of the state in which the person resides or by the alcohol and tobacco tax and trade bureau of the United States department of the treasury
* * *
(3) The holder of an S permit may sell beer or wine to a personal consumer by receiving and filling orders that the personal consumer submits to the permit holder. The permit holder shall sell only wine that the permit holder has manufactured to a personal consumer.

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.

5502.13
The department of public safety shall maintain an investigative unit in order to conduct investigations and other enforcement activity authorized by Chapters 4301, 4303 [and other sections] of the Revised Code. The director of public safety shall appoint the employees of the unit who are necessary, designate the activities to be performed by those employees, and prescribe their titles and duties.