

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

|                                     |   |                                     |
|-------------------------------------|---|-------------------------------------|
| Kenneth M. Miller, et al.           | ) | Case No. 2:20-cv-03686              |
| <i>Plaintiffs</i>                   | ) |                                     |
|                                     | ) | Judge Sarah D. Morrison             |
| vs.                                 | ) | Magistrate Judge Chelsey M. Vascara |
|                                     | ) |                                     |
| Jim Canepa, et al.                  | ) |                                     |
| <i>Defendants</i>                   | ) |                                     |
|                                     | ) |                                     |
| Wholesale Beer & Wine Ass'n of Ohio | ) |                                     |
| <i>Intervening defendant</i>        | ) |                                     |

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT and  
MOTION FOR RELIEF FROM ORDER  
Oral argument requested**

**I. Motion for Summary Judgment**

Plaintiffs move for summary judgment pursuant to FED. R. CIV. P. 56 on their complaint that Ohio's laws that prohibit an out-of-state retailer from shipping wine to an Ohio consumer, and restrict the amount of wine a consumer may transport back into Ohio, are unconstitutional. Plaintiffs contend that there are no genuine disputes as to any material fact and they are entitled to judgment as a matter of law that these laws discriminate against interstate commerce in violation of the Commerce Clause and are not saved by the Twenty-first Amendment. A memorandum of law accompanies this motion.

**II. Motion for Relief from Order**

In order that summary judgment may be fully granted on the complaint, Plaintiffs move pursuant to FED. R. CIV. P. 60(b)(2)-(3) for relief from this Court's order dismissing Thomas Stickrath as a defendant, PageID# 271 (Order, ECF No. 33) and dismissing Count I of the complaint that challenged the 4.5 liter limit on personal transportation of wine. Page ID# 356 (Order, ECF No. 36).

This Court ordered dismissal based in substantial part on the defendants' representation that Stickrath was not involved in enforcement of these laws and that the transportation limit was unlikely to be enforced. PageID# 141-42 (Def. Mot. Dismiss, ECF No. 19), 175-77 (Def. Reply Memo., ECF No. 22). However, in discovery taking place after these orders were entered, the defendants have admitted that there are two scenarios under which state officials, including Stickrath, would charge individuals with exceeding the limit. PL Ex. 33 (Def. Answer to Interrog. 16). Relief is therefore warranted under Rule 60(b)(2) for newly discovered evidence and Rule 60(b)(3) for misrepresentation by the defendants.

### **III. Oral argument requested**

This case involves constitutional issues on which precedents are inconsistent.

### **IV. Relief sought**

- a. An order vacating the prior dismissal of Stickrath as a defendant.
- b. An order vacating the dismissal of Count I challenging the transportation limit.
- c. A declaratory judgment that Ohio's ban on direct shipment of wine purchased from out-of-state retailers, and limit on the transportation thereof, are unconstitutional.
- d. An injunction prohibiting the defendants from enforcing those laws.
- e. An award of costs and attorneys' fees pursuant to 42 U.S.C. § 1988.

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**PLAINTIFFS' MEMORANDUM IN SUPPORT OF SUMMARY JUDGEMENT**

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## **I. Introduction**

### **A. The issues**

(1) Ohio prohibits out-of-state retailers from shipping wine to consumers but allows in-state retailers to do so. Plaintiffs contend that this difference in treatment violates the Commerce Clause<sup>1</sup> by discriminating against out-of-state retailers, protecting in-state retailers from competition, and denying consumers access to the markets of other states. The shipping ban is not protected by the Twenty-first Amendment<sup>2</sup> because it is neither even-handed nor necessary to protect public health and safety. Plaintiffs rely chiefly on *Granholm v. Heald*, 544 U.S. 460 (2005); *Tenn. Wine & Spirits Retailers Ass'n. v. Thomas*, 139 S.Ct. 2449 (2019); *Cherry Hill Vineyards v. Lilly*, 553 F.3d 423 (6th Cir. 2008); and *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), *aff'd* 544 U.S. 460 (2005).

(2) Ohio prohibits consumers from transporting more than 4.5 liters of wine back into Ohio that was purchased out of state but allows consumers to transport an unlimited amount of wine purchased from an in-state retailer. Plaintiffs contend that this difference in treatment also violates the Commerce Clause and is not saved by the Twenty-first Amendment.

(3) To reach the transportation issue, the court will have to vacate its Order dismissing that count of the complaint for lack of standing because there was no credible threat of enforcement. ECF No. 36. Plaintiffs contend the court should do so under Fed. R. Civ. P. 60(b) based on newly discovered evidence and misrepresentation by the defendants concerning the likelihood the defendants will enforce that limit.

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<sup>1</sup> U.S. CONST. art I, § 8.

<sup>2</sup> “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.

## **B. The Ohio laws being challenged**

- a. *Direct-shipping ban.* 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),<sup>3</sup> 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©.
- b. *Personal transportation limit.* 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).

These statutes are reprinted in an appendix, *infra* at 19-20.

## **C. Facts**

1. All exhibits cited in this section have been submitted by Plaintiffs as attachments to this motion and authenticated by the attached declaration of James Tanford.

2. 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. Ex. 1, Miller Decl. ¶¶ 1-4. Because of the shipping ban, Miller buys some wine from local retailers he would otherwise have bought from an out-of-state retailer. *Id.* ¶¶ 5-6.

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<sup>3</sup>ORC § 4301(A)(2) says it does not apply to chapter 4303, but that has been superseded by § 4303.01 that expressly adopts § 4301(A)(2) and makes it applicable.

3. 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. Ex. 2, Donovan Decl. ¶¶ 1-6. It would obtain a direct-shipping permit if one were available so it could ship wine to consumers in Ohio 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.

4. The ban on interstate delivery 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. Ex. 3, Wark Expert Report ¶ 10. The state of Ohio currently has authorized only approximately 88,000 wines for sale in the state, Ex. 4, Brand List, which is about 19% of the total number of wines in the United States. *Id.* at 11.

5. 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. Ex. 3, Wark Expert Report ¶¶ 23-24.

6. 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 25 Greek wine, 17 South African wines, and 18 Israeli wines. Exs. 5-6, 8-9. Of these 60 wines, only seven are approved for sale in Ohio. 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. Ex. 7, Tanford Decl. ¶¶ 9-17.

7. 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, e.g., California and New York. Ex. 2, Donovan Decl. ¶ 10; Ex. 3, Wark Expert Report ¶¶ 20, 29-30, 37; Ex. 10, Arger Aff. ¶¶ 5-10; Ex. 11, Gralla Aff. ¶¶ 9, 12; Ex. 12, Messina Aff. ¶ 7.

8. K&L Wine Merchants in California is an important source for boutique and small production California wines not available elsewhere. Ex. 3, Wark Expert Report ¶ 30. It ships to other states but not to Ohio. Ex. 15, K&L Webpage.

9. Retailers outside Ohio will send wine as gifts to celebrate special occasions or from businesses to thank their important clients. Ex. 3, Wark Expert Report ¶ 21; Ex. 2, Donovan Decl. ¶ 11; Ex. 13, Hickory Farms Webpage. Because interstate shipping is banned, only in-state wine retailers may offer this service in Ohio. Ex. 14, Wine Merchant Webpage.

10. Retailers outside Ohio have wine clubs where they send selected bottles of wine to club members every month. Ex. 2 ¶, Donovan Decl. ¶ 12; Ex. 15, K&L Webpage. Because interstate shipping is banned, only in-state wine retailers may offer this service in Ohio. Ex. 14, Wine Merchant Webpage.

11. There is no evidence that direct shipments of wine from out-of-state retailers pose a significant risk to public health and safety. Fourteen states have been allowing consumers to receive wine shipments from out-of-state retailers over the past fifteen years. Ex. 16, Table of State Laws. Forty-four states allow direct shipments to consumers from out-of-state wineries. Ex. 3, Wark Expert Report ¶ 38. No problems have been reported. *Id.* ¶¶ 44-45, 63-64; Ex. 17, Wark Rebuttal Report ¶¶ 2, 3, 6, 9; Ex. 18, State Agency Reports.

12. Ohio allows out-of-state wineries with an “S” permit to ship wine directly to consumers and it has not caused any public health or safety problems. Ex. 33, Def. Answer to Interrog. 4.

13. States that allow direct shipping by out-of-state wine retailers do not have higher rates of wine consumption than states that prohibit shipping. Exhibit 19, NIH Consumption Data.

14. 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, Ex. 20, NHTSA Data; aggravated assaults, Ex. 21, FBI Data; or domestic violence. Ex. 22, Nat'l Coalition Data.

15. The State asserts that the shipping ban is needed to prevent alcohol consumption by minors. Ex. 33, Def. Answer to Interrog. 14. However, direct wine shipping is not a significant method by which minors obtain alcohol. Ex. 23, FTC Report at 26-37; Ex. 24, SAMHSA Nat'l Survey. There have been no studies or reports by any state agency showing that the direct shipment of wine leads to more youth access. Ex. 3, Wark Expert Report ¶ 45. There have been no incidents in Ohio where minors are known to have received wine by direct shipping from wineries licensed to do so. Ex. 33, Def. Answer to Interrog. 1.

16. States that allow direct shipping by out-of-state wine retailers do not experience more problems related to alcohol-influenced sexual behavior by minors, such as STDS, Ex. 25, CDC Data; or teen pregnancies. Ex. 26, CDC Vital Stats.

17. The State asserts that it must ban shipping because on-site inspections are necessary to protect public health and safety. Ex. 33, Def. Answer to Interrog. 14. However, states that allow direct shipping have not experienced any problems associated with the lack of on-site inspections. Ex. 3, Wark Expert Report ¶¶ 41-43; Ex. 18, State Agency Reports. 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. Ex. 3, Wark Expert Report ¶¶ 41-43; Ex. 27, NCSL Model Bill; Ex. 28, NAWR Model Bill.

18. Shipping from wine retailers under a permit is not difficult to monitor. In states that issue direct-shipping permits, fewer than 200 retailers have obtained them. Ex. 29, State Permit Data.

19. States that allow direct shipping by out-of-state wine retailers have not reported any incidents of unsafe, contaminated or tainted wine being shipped. Ex. 3, Wark Expert Report at ¶ 54; Ex. 2, Donovan Decl. ¶ 14. Ohio officials know of no incident in which tainted or unsafe wine was delivered to a consumer by a licensed seller. Ex. 33, Def. Answer to Interrog. 6.

20. The State asserts that it must ban shipping to prevent evasion of its mandatory minimum pricing rules and advertising restrictions. Ex. 33, Def. Answer to Interrog. 14. However, Ohio does not appear to have any actual such policies. Ohio retailers offer wine for sale at discounts of more than 50%, Ex. 34, Jungle Jim's Sale, and freely advertise those sale prices. Ex. 35, Jungle Jim's Ad; Ex. 36, Kroger Ad.

21. The State asserts that the shipping ban is needed to ensure the fair and proper collection of tax revenue. Ex. 33, Def. Answer to Interrog. 14. However, states that require shippers to have permits and remit taxes have not experienced any significant tax evasion or revenue loss. Ex. 3, Wark Expert Report ¶ 44; Ex. 23, FTC Report at 38-39; Ex. 30, Md. Comptroller Report.

22. Ohio retailers ship wine directly to consumers throughout the state. Ex. 14, Wine Merchant Webpage; Ex. 31, Corkscrew Johnny's Webpage; Ex. 32, Western Reserve Wines Webpage.

23. 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. Ex. 33, Def. Answer to Interrog. 13.

24. State officials acknowledge that they would enforce the law prohibiting Ohio residents from transporting more than 4.5 liters of wine into the state. Ex. 33, Def. Answer to Interrog. 16.

## II. The constitutional principles and precedents

### A. Supreme Court cases

The Commerce Clause gives Congress the power to regulate commerce among the States and denies states the authority to discriminate against out-of-state economic interests.

Time and time again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." This rule is essential to the foundations of the Union.... States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses.

*Granholm v. Heald*, 544 U.S. at 472-73 (internal citation omitted). Allowing States to discriminate against out-of-state interests "invite[s] a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Id.* at 473. The nondiscrimination principle applies to all fields of commerce, including the sale of alcoholic beverages. *Tenn. Wine*, 1349 S.Ct. at 2459.

Section 2 of the Twenty-first Amendment gave states broad authority to regulate alcoholic beverages even-handedly but not to discriminate against out-of-state interests. "[S]tate regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Granholm v. Heald*, 544 U.S. at 487. A liquor law's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Healy v. Beer Inst.*, 491 U.S. 324, 344 (1989) (Scalia, J., concurring). The Supreme Court "has repeatedly declined to read § 2 as allowing the States to violate the 'nondiscrimination principle.'" *Tenn. Wine*, 139 S.Ct. at 2470. A state may decide whether to allow or prohibit 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.

Once plaintiffs show that a liquor law discriminates against out-of-state economic interests, the law is unconstitutional unless the State proves 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 associated with alcohol consumption. *Tenn. Wine*, 139 S.Ct. at 2457. The “burden is on the State to show that the discrimination is demonstrably justified.” *Granholm v. Heald*, 544 U.S. at 490, 492 (citations omitted). “Concrete evidence” is required and “mere speculation and unsupported assertions are insufficient to sustain a law that would otherwise violate the Commerce Clause.” *Tenn. Wine*, 139 S.Ct. at 2474. The Supreme Court could not have been clearer.

The *Granholm* case had involved shipping by wineries, and the circuits initially split on whether the nondiscrimination principle also applied to laws regulating wine retailers. Some held that they did. *E.g.*, *Lebamoff Enterpr., Inc. v. Rauner*, 909 F.3d 847, 854 (7th Cir. 2018) (all “state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause”). Others held that they did not. *E.g.*, *Arnold’s Wines, Inc. v. Boyle*, 571 F.3d 185, 191-92 (2d Cir. 2009). The Supreme Court resolved this split in *Tenn. Wine*, ruling that the nondiscrimination principle applied to wine producers in *Granholm* also applied to laws regulating wine retailers because “[t]here is no sound basis for [a] distinction.” 139 S.Ct. at 2471.

#### **B. Sixth Circuit cases**

The Sixth Circuit has decided six cases in which a state liquor law was reviewed to determine if it violated the nondiscrimination rule of the Commerce Clause: *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), *aff’d* 544 U.S. 460 (2005); *Jelovsek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008); *Cherry Hill Vineyards v. Lilly*, 553 F.3d 423 (6th Cir. 2008); *Am. Beverage Ass’n v. Snyder*, 735 F.3d 362 (6th Cir. 2013); *Byrd v. Tenn. Wine & Spirits Retailers Assoc.*, 883 F.3d 608 (6th Cir. 2018), *aff’d* 139 S.Ct. 2449 (2019); *Lebamoff Enterpr., Inc v. Whitmer*, 956 F.3d 863 (6th Cir. 2020).

Not surprisingly, five of these cases echo the Supreme Court's standards.

- a. State's Twenty-first Amendment authority to regulate alcohol "is limited by the nondiscrimination principle of the Commerce Clause." *Byrd v. Tenn. Wine*, 883 F.3d at 623.
- b. The Twenty-first Amendment "does not displace the rule that States may not give a discriminatory preference" to in-state businesses, *Cherry Hill Vineyards v. Lilly*, 553 F.3d at 431, or "discriminate against out-of-state goods. *Jelovsek v. Bredesen*, 545 F.3d at 436.
- c. "If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." *Jelovsek v. Bredesen*, 545 F.3d at 436.
- d. A discriminatory law is unconstitutional "unless the state can demonstrate that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Cherry Hill Vineyards v. Lilly*, 553 F.3d at 432, 433. The same language also appears in *Byrd v. Tenn. Wine*, 883 F.3d at 624; *Am. Beverage Ass'n v. Snyder*, 735 F.3d at 370, and *Jelovsek v. Bredesen*, 545 F.3d at 435, 439.
- e. The burden is on the state. *Byrd v. Tenn. Wine*, 883 F.3d at 626. Concrete "evidence in the record" is required. *Heald v. Engler*, 342 F.3d at 526. "Blanket assertions ... are not enough" *Byrd v. Tenn. Wine*, 883 F.3d at 627 n.10.
- f. The State's purported justification is given "strict scrutiny analysis." *Cherry Hill Vineyards v. Lilly*, 553 F.3d at 432.

Somewhat surprisingly, one Sixth Circuit decision declined to apply the Supreme Court's standards or follow the precedents from this circuit. The lead opinion<sup>4</sup> in *Lebamoff Enterpr., Inc v.*

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<sup>4</sup> Two judges concurred in the result because they thought the State had proved that it could not advance its interests by less discriminatory means and would therefore prevail under the controlling precedents. Had more evidence been presented, it might have "change[d] the result." 956 F.3d at 878-79 (McKeague & Donald, concurring).

*Whitmer* held that the Twenty-first Amendment controlled the outcome, not the Commerce Clause, even though every other case says the opposite. It declined to apply the “skeptical” scrutiny standard used by all the other courts and said that a deferential standard was required. 956 F.3d at 869. It did not review the evidence to see if the State had proved that banning shipping was necessary to advance a local purpose that could not be served by nondiscriminatory alternatives as all other courts have done. It held that requiring an in-state presence was valid, contrary to the clear holding by the Supreme Court 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.<sup>5</sup> The lead opinion criticized all the “activist judges” in other cases who had undertaken any review of state liquor laws because “the Twenty-first Amendment leaves these considerations to the people of Michigan, not federal judges.” *Id.* at 875. Needless to say, the *Whitmer* decision has been widely criticized. *E.g.*, McDermott, Will & Emery, *Examining Lebamoff Enterprises v. Whitmer*, JDSUPRA (May 28, 2020).<sup>6</sup>

This Court should follow the Supreme Court and the five circuit cases which hold that a discriminatory state liquor law is unconstitutional unless the State proves that it advances a Twenty-first Amendment purpose that could not be served by nondiscriminatory alternatives. It should reject the lead opinion in *Lebamoff v. Whitmer* that says otherwise. It should apply the heightened scrutiny standard that is used in all the other cases and not the highly deferential scrutiny standard used in the lead opinion in *Lebamoff*.

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<sup>5</sup>See also *Tenn. Wine*, 139 S.Ct at 2472 (“in-state presence” requirements “can no longer be defended”) (*dictum*).

<sup>6</sup> <https://www.jdsupra.com/legalnews/examining-lebamoff-enterprises-v-whitmer-86470/> (viewed January 21, 2022).

A panel of the court of appeals obviously cannot overrule the Supreme Court. *Tchankpa v. Ascenda Retail Group, Inc.*, 951 F.3d 805, 815-16 (6th Cir. 2020). Nor can one panel of the Sixth Circuit nullify the decisions of previous panels. It may seem counter-intuitive, but older precedents control, not the most recent. *Kepley v. Lanz*, 992 F.Supp.2d 781, 786-87 (W.D. Ky 2014). The “prior decision remains controlling authority,” *Salmi v. Sec’y of HHS*, 774 F.2d 685, 689 (6th Cir. 1985), until overruled by the Sixth Circuit *en banc* or the Supreme Court. *Spencer v. Bouchard*, 449 F.3d 721, 726 (6th Cir. 2006). *Lebamoff* was not an *en banc* opinion, and the Supreme Court has not overruled any of the prior Sixth Circuit cases. It has affirmed them. *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003), *aff’d* 544 U.S. 460 (2005); *Byrd v. Tenn. Wine & Spirits Retailers Assoc.*, 883 F.3d 608 (6th Cir. 2018), *aff’d* 139 S.Ct. 2449 (2019).

If there is any uncertainty about which of two conflicting precedents to follow, the district court must undertake its own review of the opinions and adhere to the ones which engaged in the more thorough and comprehensive analysis. *Kepley v. Lanz*, 992 F.Supp. 2d at 787 n.1. That would be every case other than *Lebamoff v. Whitmer*. Every other case considered both the Commerce Clause and the Twenty-first Amendment. *E.g.*, *Cherry Hill Vineyards v. Lilly*, 553 F.3d at 431. *Lebamoff* considered only the Amendment. The earlier cases critically examined the evidence presented by the State to justify discrimination. *E.g.*, *Granholm v. Heald*, 544 U.S. at 489-93. *Lebamoff* did not. The other cases discussed possible nondiscriminatory alternatives. *E.g.*, *Tenn. Wine*, 139 S.Ct. at 2474-76. *Lebamoff* did not. The lead opinion in *Lebamoff* does none of this analysis, and is simply an outlier.

### III. Argument

#### **A. Ohio's ban on direct shipping by out-of-state wine retailers violates the Commerce Clause's nondiscrimination rule because in-state retailers are allowed to do so**

Ohio prohibits out-of-state retailers from delivering wine to consumers, but allows in-state retailers to do so. See Part II, *supra* at 2. The different treatment of in-state and out-of-state interests violates the Commerce Clause if it benefits the former and burdens the latter, *Granholm v. Heald*, 544 U.S. at 472; *Am. Beverage Ass'n v. Snyder*, 735 F.3d at 370, or “deprives citizens of their right to have access to the markets of other States on equal terms.” *Granholm v. Heald*, 544 U.S. at 473. The different shipping rules meet this standard.

1. The ban benefits in-state wine retailers by shielding them from competition and giving them the exclusive right to make home deliveries, a significant economic advantage, especially during the current pandemic. The evidence shows that consumers want to be able to buy wine online and have it delivered for several reasons. There is a broader selection available online than in any local store. There is more price competition. It is easier and more convenient than going to several local stores. It is a convenient way to send wine as a gift for celebrations or to thank clients. It is an important health safety measure for those vulnerable to Covid. Facts ¶¶ 2, 4-10. When consumers are unable to buy wine, send gifts or join wine clubs from out-of-state sources, they will shift some of those purchases to Ohio retailers. Facts ¶¶ 2, 9, 10.
2. The ban burdens interstate commerce. The state of Ohio has authorized approximately 88,800 wines for sale, which is only about 19% of the wines sold in the United States. Facts ¶ 4. Individual local stores typically carry less than 1% of the available wines. Facts ¶ 5. The wines not available in Ohio include wines recommended by the New York Times and the

leading consumer-oriented wine magazines. Facts ¶ 6. Many of these wines are for sale from retailers in other states that would ship them to Ohio residents if allowed to do so. *Id.* Most rare, collectible, and boutique wines are unavailable to Ohio residents. Facts ¶¶ 7-8. Out-of-state retailers lose business. Facts ¶¶ 2, 9, 10.

3. The ban denies Ohio residents access to more than 80% of the wines that are distributed in the U.S. and sold by retailers in other states, including wine recommended by national publications, desired by collectors, and distributed by wine-of-the-month clubs. Facts ¶¶ 6-10. The closing of the state's borders also prevents consumers from shopping at out-of-state retailers to look for better selection and prices or with the same convenience as they can do at Ohio wine retailers. Facts ¶ 2.

**B. Banning direct shipping by out-of-state wine retailers advances no Twenty-first Amendment purpose that could not be served by nondiscriminatory alternatives**

Once plaintiffs show that a law discriminates against interstate commerce, the law is unconstitutional unless the State shows that it “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory means.” *Cherry Hill Vineyards v. Lilly*, 553 F.3d at 433. The burden is on the state and this is a “strict scrutiny” analysis. *Id.*; *Heald v. Engler*, 342 F.3d at 524, 527.<sup>7</sup>

The list of legitimate purposes is short. It includes the protection of public health and safety, *Tenn. Wine*, 139 S.Ct. at 2457, 2474, but not bureaucratic interests such as facilitating orderly markets, ensuring regulatory accountability, and monitoring financial records and sales, because

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<sup>7</sup> The Supreme Court has never articulated the exact level of scrutiny required, only that it is “exacting,” *Granholm v. Heald*, 544 U.S. at 493, and the state must make the “clearest” showing. *Id.* at 490. Judge Sutton has argued that a deferential level of scrutiny should be used, *e.g.*, *Byrd v. Tenn. Wine*, 883 F.3d at 433, (concurring), but that standard was rejected by the Supreme Court. *Tenn. Wine*, 139 S.Ct. at 2459, 2474 (State must make a “predominant” showing).

“these objectives can also be achieved through the alternative of an evenhanded licensing requirement.” *Granholm v. Heald*, 544 U.S. at 492. The State can only carry this burden “by presenting “concrete evidence,” *Tenn. Wine*, 139 S.Ct. at 2474; *Heald v. Engler*, 342 F.3d at 526. Sweeping assertions and speculation are not enough. *Tenn. Wine*, 139 S.Ct. at 2474; *Byrd v. Tenn. Wine*, 883 F.3d at 627 n.10.

The State cannot meet this burden. The evidence shows that the direct shipment of wine by out-of-state retailers poses no public health and safety problems. Fourteen states have been allowing consumers to receive wine shipments from out-of-state retailers over the past fifteen years and forty-four states allow direct shipments from out-of-state wineries, and none report any public health or safety problems. Facts ¶¶ 11-20. There are no reports that any contaminated or unsafe wine has ever been shipped to a consumer. Facts ¶ 19.<sup>8</sup> There has been no increased youth access. Facts ¶ 15. States that allow direct wine shipping by retailers do not have higher consumption rates or more drunk driving. Facts ¶¶ 13-14. The State has conceded in discovery that it has no concrete evidence showing that minors would be likely to order wine from out-of-state retailers and have it shipped, or that the availability of shipping presents any genuine risk of unsafe or tainted wine. Facts ¶¶ 15, 19. Indeed, Ohio allows out-of-state wineries to ship directly to residents and no problems have occurred. Facts ¶ 12. A ban on direct shipping by out-of-state wine retailers cannot advance a public health and safety purpose when shipping poses no threat in the first place.

Even if the State could show that direct shipping of wine creates some actual public health risk, that would not be enough to justify a total ban. The State must also show that reasonable

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<sup>8</sup> 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.

nondiscriminatory alternatives would be unworkable, which it cannot possibly do. It regulates every other aspect of alcohol distribution in Ohio through a permit system with 66 different kinds of licenses. Ex. 37, Permit List. The Supreme Court and other circuits have held that an even-handed permit system requiring wine shippers to limit quantity, verify age, report sales, remit taxes, consent to jurisdiction, and cooperate in audits, is a reasonable alternative. *Granholm v. Heald*, 544 U.S. at 491; *Tenn. Wine*, 139 S.Ct. at 2475-76; *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). They cite the Model Direct Shipping Bill developed by the National Conference of State Legislatures as an example. See Ex. 27. Ohio already uses this kind of permit system to effectively monitor direct shipments by out-of-state wineries. Facts ¶ 12. Other states use a permit system without problems. Facts ¶ 11. Before it can totally ban direct shipping by out-of-state wine retailers, the State must prove that this alternative would not work in Ohio in this one instance, when it works everywhere else.

### **C. Discriminatory transportation limit**

The same analysis 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 denies Ohio residents access to the markets in other states on equal terms. Retailers often offer discounts on the purchase of a case of wine, and the 6-bottle limit prevents Ohio residents from taking advantage of such sales offered by out of state retailers. PageID# 302-03, Miller Decl. ¶ 4 (ECF 34-5); Page ID# 305, Total Wine Ad (ECF No. 34-6). Therefore, the State must prove that the 4.5 liter limit advances a legitimate state purpose that could not be served by reasonable nondiscriminatory alternatives.

The State cannot justify this limit as anything other than a protectionist measure. It cannot claim that limiting quantity is important, because there is no limit on intra-state transportation, or on direct

shipments from out-of-state wineries, OHIO REV. CODE § 4303.232-233, or on shipments from out-of-state fulfillment houses. *Id.* § 4303.234. Indeed, Ohio explicitly allows every household to purchase 24 cases of wine per year. *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 rational explanation why this restriction must be imposed only on wine brought in from an out-of-state retailer when it is not imposed on wine from any other source.

#### **IV. Relief from orders dismissing defendant Stickrath and Count I of the complaint**

In prior orders, this Court dismissed Thomas Stickrath as a defendant, PageID# 271 (Order, ECF No. 33) and Count I of the complaint challenging the transportation limit, Page ID# 356 (Order, ECF No. 36), because of insufficient evidence to show a likelihood of enforcement. Those orders should be vacated based on the Defendants' Answer to Interrogatory 16 (PL Ex. 33), in which they admitted that Stickrath had a role in enforcing the statute and there were two scenarios in which the plaintiffs could be charged with violating it. The court has plenary power to vacate its own order. *Consol. Coal Co. v. U.S. Dept. of Interior*, 43 F.Supp. 2d 857, 862-63 (S.D. Ohio 1999).

Under FED. R. CIV. P. 60(b)(2), the Court may vacate a prior order based on new evidence that could not have been discovered within the 28 days allowed for a Rule 59 motion. The evidence of the defendants' intent to enforce the transportation limit was exclusively within their own knowledge, so could only come from discovery. The defendant did not file an answer and discovery did not begin until after the Court granted the motions to dismiss. See ECF Nos. 33 (Order of Feb. 17, 2021), 36 (Order of May 12, 2021), 37 (Answer May 26, 2021). The defendants answers to discovery were submitted October 1, 2021. Ex. 33 at 18 (Def. Answers to Interrog.).

Under FED. R. CIV. P. 60(b)(3), the Court may vacate a prior order that was based a misrepresentation by the defendant. In support of their motion to dismiss, the defendants represented that

Stickrath was not involved in enforcement and the transportation limit was unlikely to be enforced. PageID# 141-42 (Def. Mot. Dismiss, ECF No. 19), 175-77 (Def. Reply Memo., ECF No. 22). Those were misrepresentations, as revealed by their answer to Interrogatory 16.

## **V. Remedy**

The appropriate remedy is obvious. The Court should enjoin the defendants from enforcing the ban on direct shipping of wine by out-of-state retailers and the limit on personal transportation of wine purchased at out-of-state retailers. This would provide relief to the plaintiffs, eliminate the discrimination, end the economic protection being given to Ohio retailers, remove a trade barrier, and vindicate the central concern of the Commerce Clause by facilitating more competition and interstate commerce. *Granholm v. Heald*, 544 U.S. at 472. Such an injunction would be consistent with the principle that the usual remedy is to enjoin the unconstitutional aspects of a law but leave the rest intact, so as to nullify as little legislation as possible. *Ayotte v. Planned Parenthood of New Eng.*, 546 U.S. 320, 329 (2006). It would apply only to shipments and transportation of wine, not beer and spirits, and would leave other regulations in place, *i.e.*, the requirement that taxes be paid, OHIO REV. CODE § 4301.43, reports be submitted, *id.* § 4303.22(B)(1); purchases be limited to 24 cases per year, *id.* § 4303.233, and the age of the recipient be verified. *Id.* 403.232(C)(2).

In theory, the discrimination also could be eliminated by “leveling down,” *i.e.*, taking away the shipping rights and preferential privileges given to in-state wine retailers. Some courts have done so. *E.g.*, *Beskind v. Easley*, 325 F.3d 506, 517-20 (4th Cir. 2003). However, this “remedy” is inconsistent with the 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 (1979), not taking them away from innocent parties who are not represented in the litigation. *Nguyen v. I.N.S.*, 533 U.S. 53, 96 (2001) (Scalia, J., concurring). *See also Cherry Hill Vineyards v.*

*Lilly*, 553 F.3d at 435 (extension, rather than nullification is the proper course). Leveling down might eliminate the discrimination, but this is not an Equal Protection case where the plaintiff's only right is to equal treatment. *See Heckler v. Mathews*, 465 U.S. 728, 740 (1984) This is a Commerce Clause case where the plaintiffs' right is to engage in interstate commerce free from state trade barriers. Leveling down would leave that trade barrier in place, reduce rather than increase interstate commerce, and make things worse for plaintiffs rather than better. It is not a viable choice.

## **VI. Conclusion**

Ohio's ban on direct shipping and 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  
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## **Certificate of Service**

I certify that the foregoing document and the declarations and exhibits cited herein, were filed electronically on January 27, 2022, using the court's EF/CMS system. All parties are registered users and will receive notice through the system.

s/ James A. Tanford  
James A Tanford

## APPENDIX OF 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.

© 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.

**4303.25**

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 ....