Case No. 25-3305

United States Court of Appeals
for the Sixth Circuit

DEREK BLOCK
Plaintiff

KENNETH M. MILLER; HOUSE OF GLUNZ, INC.
Plaintiffs - Appellants

v.

JAMES V. CANEPA, Superintendent of Liquor Control,
Ohio Division of Liquor Control
Defendant

DAVE YOST, Attorney-General of Ohio
Defendant-Appellee

WHOLESALE BEER & WINE ASSOCIATION OF OHIO
Intervenor 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

BRIEF OF PLAINTIFFS-APPELLANTS

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Corporate disclosure statement

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

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Statement in support of oral argument

At issue is the constitutionality of two features of Ohio's alcohol laws that discriminate against out-of-state wine retailers and protect local retailers from interstate competition. Plaintiffs contend these laws violate the dormant Commerce Clause. The State contends they are valid under the Twenty-first Amendment. The parties dispute the extent to which the State must justify this discrimination. These are complex issues, so oral argument is appropriate.

Statement of jurisdiction

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. On March 20, 2025, the District Court issued a final order and opinion, R. 133, PageID 6805-28, and entered judgment denying the plaintiffs' motion for summary judgment and granting the State defendant's and intervenor-defendant's motions for summary judgment. R.134, PageID 6829. The order disposed of all claims and no part of the litigation remains in the district court. The plaintiffs filed timely notice of appeal on April 17, 2025, R. 135, PageID 6830. This Court has jurisdiction under 28 U.S.C. § 1291.

Statement of issues

Plaintiffs challenge the constitutionality of two features of Ohio's alcohol laws that discriminate against out-of-state wine retailers and protect local retailers from interstate competition.

1) *Transportation restriction*. Consumers may buy and transport home 24 cases of wine (288 bottles) if they purchase it from an in-state retailer but only 4.5 liters (six bottles) if they purchase it from an out-of-state retailer.
2) *Interstate shipping prohibition*. In-state retailers are allowed to sell wine over the internet and ship it to consumers; out-of-state retailers may not.

Plaintiffs contend these provisions violate the Commerce Clause.[1] The State contends they are permissible under the Twenty-first Amendment.[2] The Supreme Court has reconciled these two provisions in two recent cases in which it held that discriminatory state liquor laws are unconstitutional unless the State proves that they are reasonably necessary to address alcohol-related health or safety problems. *Tenn. Wine & Spirits Retailers' Ass'n v. Thomas*, 588 U.S. 504 (2019); *Granholm v. Heald*, 544 U.S. 460 (2005). The discriminatory nature of these laws is not disputed, so the issue is:

Is Ohio's purported justification for discriminating against out-of-state wine retailers supported by concrete evidence that the law actually advances a legitimate health or safety purpose and that non-discriminatory alternatives would be insufficient?[3]

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[1] "Congress shall have Power ... To regulate Commerce ... among the several States." U.S. CONST. art I, § 8. Courts have long held that "this Clause also prohibits state laws that unduly restrict interstate commerce." *Tenn. Wine*, 588 U.S. at 514.

[2] "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.

[3] The District Court did not apply part two of this standard, whether there were readily available nondiscriminatory alternatives. R. 133, PageID 6819 n.4.

Statement of the Case

A. The laws being challenged

The plaintiffs are challenging the constitutionality of two features of Ohio's alcoholic beverage laws that restrict consumers' ability to buy wine from out-of-state retailers:

(1) *Transportation restriction.* Ohio prohibits consumers from transporting more than 4.5 liters (6 bottles) of wine into Ohio that was purchased out of state. OHIO REV. CODE [ORC] § 4301.20(L). It imposes no such limitation on purchases from in-state retailers. *Id.* § 4301.60. Consumers may transport up to 24 cases of wine (288 bottles) if they purchased it from an Ohio retailer. *Id.* § 4303.236.

(2) *Interstate shipping prohibition.* Ohio issues a license called a C-2 permit to in-state retailers. ORC § 4303.12. It authorizes them to sell and deliver wine to consumers, *id.* § 4303.27, using "any means or devices whatever," *id.* § 4301.01(A)(2), including by internet sales that are delivered by common carriers like FedEx.[4] Ohio will not issue a C-2 permit (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

[4] 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.

located in Ohio, Def. Answer ¶ 14, R. 37, PageID 361,[5] and do not obtain their wine from Ohio sources. ORC § 4301.58(C). Ohio has no other license that would permit out-of-state retailers to ship wine. Def. Interrog. 13 (ECF 52-34, Page ID 4034). Without a license, out-of-state retailers are prohibited from shipping wine to Ohio consumers. *Id.* §§ 4303.25, 4301.58(B). Relevant Ohio statutes are reprinted in the addendum.

B. Statement of facts

The record was substantially created in 2021, prior to the first appeal and remand. The parties added some supplemental evidence on remand, but relied mainly on the original record.

1. Plaintiff Miller is an Ohio wine consumer who wants to be able to shop for wine online, purchase wines that are new, interesting, or he cannot find locally, and have that wine shipped to him from out-of-state retailers. His local wine stores have limited selection and more wine at a greater variety of price points is available online from out-of-state retailers. Miller Rev'd Decl. ¶¶ 1-4, 11, R. 119-1, PageID 6579-81. He has tried to order wine from out-of-state retailers and have it shipped but he

[5] The statutes are unclear, but Ohio interprets the law as requiring physical presence in Ohio. *See* Def. Answer to Interrog. 13, R. 52-34, PageID 4034.

has been unable to do so. *Id.* ¶ 6. If it becomes lawful to have wine shipped from out-of-state retailers. he intends to do so. *Id.* ¶ 14.

2. Plaintiff Miller has previously transported wine into Ohio for personal use that he purchased out of state, but not since he found out that it is illegal. He would like to be able to do so in the future but does not want to risk committing a crime or having the wine confiscated. Miller Rev'd Decl. ¶¶ 7-9, PageID 6580. In his experience, wine is often sold by the case (12 bottles) and stores often offer a discount if you buy a case, so Ohio's 6-bottle limit prevents him from taking advantage of wine-purchasing opportunities outside Ohio. *Id.* ¶ 10. If it becomes lawful to personally transport more than 6 bottles into Ohio, he intends to do so. *Id.* ¶ 14, PageID 6581.

3. Rare, high-priced, unusual and collectible wines are generally available only from a small number of specialty wine retailers and auctions outside Ohio. Miller Rev'd Decl. ¶¶ 11-12, PageID 6581; Wark Expert Report ¶¶ 20, 29-30, 37, R. 52-4, PageID 1278-79; Arger Aff., ¶¶ 5-10, R. 52-11, PageID 3825-26; Gralla Aff., ¶¶ 9, 12, R. 52-12, PageID 3827-28.

4. At auction, wine is often listed in lots larger than 6 bottles. Miller Rev'd Decl. ¶ 12, PageID 6581. Ohio's 6-bottle limit prevents Miller from transporting them home and the interstate shipping ban prevents him from having them delivered, so he is foreclosed from buying them. *Id.*

5. Because of the bans on interstate shipping and transportation, Miller has bought more wine from in-state retailers. He has not consumed less wine because of these laws, but sometimes has had to buy less desirable wine that is locally available. *Id.* ¶ 13.

6. Plaintiff House of Glunz is a wine retailer in Chicago, 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. ¶¶ 1-6, R. 52-3, PageID 1273-74. It would obtain a direct-shipping permit if one were available so it could ship wine from its premises in Chicago to consumers in Ohio, as it does to other states where it is lawful, 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.

7. The ban on interstate shipping has a significant adverse impact on consumers in Ohio. For the 48 months ending July 1, 2019, the federal Tax

and Trade Bureau approved 468,588 wines for sale in the U.S., but only about 88,000 (19%) were authorized for sale in Ohio. Wark Expert Report ¶¶ 10-11 (ECF 52-4, PageID 1277); Brand List (ECF 52-5, Page ID 1289 et seq).

8. 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 United States. Wark Expert Report ¶¶ 23-24, R. 52-4, PageID 1279.

9. 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 had been 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 3808-11.

10. K&L Wine Merchants in California is an important source for small production California wines not available elsewhere. Wark Expert Report ¶30, R. 52-4, PageID 1280. It ships to other states but not to Ohio. K&L Webpage, R. 52-16, PageID 3839.

11. Retailers outside Ohio will send wine as gifts to celebrate special occasions or as thank-you presents from businesses to their important clients. Wark Expert Report ¶21, R. 52-4, PageID 1279; Donovan Decl. ¶11, R. 52-3, PageID 1275; 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.

12. Retailers outside Ohio have wine clubs where they send selected bottles of wine to club members every month. Donovan Decl.¶12, R. 52-3, PageID 1275; 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.

13. The only evidence in the record concerning potential public health or safety risks associated with sales and shipping of wine from out-of-state retailers shows that it has caused no significant problems in the fourteen states that have been allowing consumers to receive wine shipments from out-of-state retailers over the past twenty years. See Table of State Laws, R. 52-17, PageID 3840-41; Wark Expert Report ¶¶ 63-64, R. 52-4, PageID 1284; Wark Rebuttal Report, R. 52-18, Page ID 3842-43 ¶¶ 2, 3, 6, 9; State Agency Reports, R. 52-19, PageID 3845-62. The defendants offered no contrary evidence and their expert admits he knows of none. Kerr Report (Ind) ¶ 34, R. 56-2, PageID 4592.

14. Ohio allows out-of-state wineries with an "S" permit[6] to ship wine directly to consumers and admit that it has not caused any public health or safety problems. Def. Answer to Interrog. 4, R. 52-34, PageID 4029.

15. States that allow shipping by out-of-state wine retailers do not have higher rates of wine consumption than states that prohibit shipping. Some are higher; some are lower. NIH Consumption Data, R. 52-20, PageID 3863-66. In the five years following the enactment of direct-shipping laws, states that opened their markets to interstate shipping saw a median

[6] *See* ORC §§ 4303.232 (S-1 permits) and 4303.233 (S-2 permits).

increase in wine consumption of only 0.02 gallons/person, which was lower that the nation-wide rate of increase for the same time periods, which was 0.04 gallons/person. *Id.*, PageID 3867-68.

16. States that allow out-of-state retailers to sell and ship wine 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.

17. 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, it does not offer any evidence to support this concern. The evidence shows that 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 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.

18. The State asserts that it must ban interstate shipping because on-site inspections are necessary to protect public health and safety. Def.

Answer to Interrog. 14, R. 52-34, PageID 4034. However, it offers no evidence that the inspection of retail stores, as opposed to producers and bars, has ever uncovered a public health problem. Indeed, the only evidence in the record shows that states that allow interstate 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 interstate 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.

19. Every state regulates wine retailers and engages in enforcement, inspection and compliance activities. Report to Congress, State Enforcement Data, R. 80-2, PageID 5060-64.

20. The only evidence in the record shows that monitoring shipping by out-of-state 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.

21. Interstate shipping is not a source of unsafe or tainted wine. The only evidence in the record is that there have been no incidents of unsafe wine being shipped. Donovan Decl. ¶ 14, R. 52-3, PageID 1275. Ohio officials admit they 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.

22. The State has asserted that it must ban interstate shipping to prevent evasion of its mandatory minimum pricing rules and advertising restrictions. Def. Ans. to Interrog. 14, R. 52-34, PageID 4034. It asserts that discounts and advertising may increase consumption. However, Ohio already allows in-state retailers to discount price, sell wine cheaply, and advertise those low prices. Jungle Jim's Sale, R. 52-35, PageID 4042-48 (discounts more than 50%); Jungle Jim's Ad, R. 52-36, Page ID 4049; Kroger Ad, R. 52-37, PageID 4051.

23. The State asserts that banning out-of-state retailers is needed to ensure tax revenue. Def. Ans. to Interrog. 14, R. 52-34, PageID 4034. It offers no evidence of any such revenue loss in states that allow shipping under a permit system. The only evidence in the record is that no such revenue loss occurs. FTC Report 38-39, R. 52-34, PageID 3927-28; Md.

Comptroller Report, R. 52-31, PageID 4012-20.

24. 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.

25. 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.

26. State officials enforce the ban on direct shipping. See Motion, *Ohio v. Wine.com, Inc.*, R. 80-3, Page ID 5069-71.

27. State officials acknowledge that they would enforce the law prohibiting Ohio residents from transporting more than 4.5 liters of wine into the state and have enforced it in the past. Def. Answer to Interrogs. 3, 5, 6, 16, R. 52-34, PageID 4028-35; Snyder Decl. R. 53-7, PageID 4335, 4336, 4481.

28. The State has offered no evidence to explain the reason for the six-bottle limit on personal transportation of wine purchased out of state, nor why it is safe for a consumer to bring home six bottles but not more. See State Reply Memo, R. 122, PageID 6660-62. The state's witness

declarations do not address the transportation limit at all. Chung Decl., R. 116-2, PageID 6118-22; Callahan Decl., R. 116-3, PageID 6152-58; Powers Decl., R. 116-4, PageID 6159-62; Lockhart Decl., R. 116-5, PageID 6163-66; Snyder Decl., R 116-6, PageID 6167-72; Boldin Decl., R. 116-7, PageID 6470-72.

29. William Kerr is an economist who provided an expert report for the State predicting that wine sold and shipped by out-of-state retailers would be cheaper than wine in Ohio and would increase alcohol consumption and adverse alcohol-related social consequences. R. 116-1, ¶¶ 46-68, PageID 6025-29. He does not include any data on actual prices of wine sold in Ohio compared to wine sold by out-of-state retailers, nor does he include shipping charges in his price estimates. *Id.*

30. Dr. Kerr concedes that his opinions about the possible harmful effects of interstate retailer wine shipping are not based on actual data or research because he does not think any empirical research exists. Kerr Report (Ind.) ¶ 34, R. 56-2, PageID 4592.

31. In 2020, in the course of an investigation into unlawful shipping by out-of-state retailers, an employee of the Division of Liquor Control purchased wine online from several out-of-state retailers and had it

shipped to the Division's headquarters in Ohio. Stmt. of Facts, Ohio v. Wine.com, R. 80-3, Page ID 5069-71.

C. Procedural history

1. This is the second appeal in this case. This Court previously reversed a decision by the District Court that upheld the constitutionality of these laws. *Block v. Canepa,* 74 F.4th 400 (6th Cir. 2023).

2. Plaintiffs sued Ohio 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. The Wholesale Beer & Wine Association of Ohio (WBWAO) intervened as a co-defendant and filed an Answer. R. 18, PageID 96-11.

3. In the first set of proceedings, the District Court dismissed defendants Stickrath, Canepa and Pryce after ruling that they were not involved in enforcing the liquor laws, R. 33, PageID 265-67, dismissed Count I (transportation restriction) for lack of standing, R. 36, but denied the State's motion to dismiss Count II (shipping prohibition). *Id.* Defendant Yost then filed an answer. R. 37.

4. On cross-motions for summary judgment as to the shipping prohibition, the district court granted the defendants' motions and upheld

the prohibition under the Twenty-first Amendment. R. 91, PageID 5196-202.

5. This Court reversed. It reinstated the transportation restriction (Count I), holding that Plaintiffs had adequately pled standing, 74 F.4th at 410-11. It remanded both issues for further consideration of the factual record to assess whether the State had met the Supreme Court's standards for justifying a discriminatory liquor law. *Id.* at 414. It denied the State's petition for rehearing *en banc.* Case No. 22-3853, Dkt. No. 53.

6. On remand, the District Court held: a) that plaintiffs had standing and that both laws were discriminatory, Opinion, R. 133, PageID 6817-18 n. 3, but b) ruled in favor of the defendants on renewed cross-motions for summary judgment. It ruled that the laws were justified under the Twenty-first Amendment by the State's general interest in oversight and regulatory control. *Id.* at PageID 6820-27. It declined to consider whether there were nondiscriminatory alternatives. *Id.* at PageID 6819 n.4. [7]

7. Plaintiffs filed a timely notice of appeal on April 17, 2025. R.135.

[7] The court also made several evidentiary rulings that are not at issue on appeal. R. 133, PageID 6810-16.

Standard of review

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. *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 369 (6th Cir. 2013). However, opinions and conclusions without supporting facts are insufficient to establish a factual dispute. *Viet v. Le*, 951 F.3d 818, 823 (6th Cir. 2020). When cross-motions are filed, it does not mean that the court must grant one of the motions. Each is separately evaluated. *Reform America v. City of Detroit*, 37 F.4th 1138, 1147 (6th Cir. 2022).

Summary of argument

Plaintiffs challenge the constitutionality of two features of Ohio's Liquor Control Code that discriminate against interstate commerce -- a six-bottle limit on the amount of wine that a consumer may purchase out of state and transport back to Ohio, and a total prohibition against out-of-

state retailers shipping wine to Ohio. Because Ohio wine retailers are not subject to these same restrictions, these laws discriminate against interstate commerce in violation of the Commerce Clause. They are not protected by the Twenty-first Amendment, which the Supreme Court holds is limited by the nondiscrimination principle.

Under Supreme Court precedents, a discriminatory liquor law may be upheld only if the State proves that the law advances alcohol-related public health or safety purposes and is reasonably necessary because non-discriminatory alternatives would be unworkable. The burden is on the state and concrete, non-speculative evidence is required. The State has not met its burden.

The State presented no evidence whatsoever concerning the transportation restriction or why a consumer may safely transport six bottles of wine purchased outside the state but not seven. It did not address why a husband and wife together could visit an out-of-state wine shop and bring home a total of 12 bottles, but if one spouse cannot make the trip, the couple is limited to six.

The State presented no concrete evidence than a ban on interstate wine shipping advanced health and safety in any concrete way. Ohio already

allows interstate wine shipping from out-of-state wineries and had no evidence that shipping the same wine from out-of-state retailers poses any different threat. Plaintiffs' evidence showed that states that allow interstate shipping do not have higher rates of consumption or alcohol-related adverse health and safety problems than states that prohibit it. The State's only evidence comprised speculation that direct shipping *might* produce problems in Ohio that had not occurred anywhere else. The Supreme Court has been clear that speculation is not sufficient.

Even if there were some health and safety risk associated with out-of-state wine, that would not be enough to justify banning it. The Supreme Court holds that the state must also explain why non-discriminatory alternatives would not work. The State argued, and the district court held, that -- contrary to the Supreme Court -- no such showing was required. This was error. The Court in *Tennessee Wine* said that when the record is devoid of evidence that non-discriminatory alternatives would be insufficient, the State has fallen far short of justifying the law, and it is unconstitutional.

One thing is not at issue. Plaintiffs do not seek the right to engage in unregulated and unlicensed transactions that evade Ohio's licensing

system. To the contrary, they ask that out-of-state retailers be allowed to obtain licenses and sell and deliver wine to consumers under the regulation and supervision of the Ohio Division of Liquor Control

ARGUMENT

I. The framework for assessing the constitutionality of discriminatory state liquor laws

A. The Supreme Court's standards

Plaintiffs challenge the constitutionality of two features of Ohio's liquor control laws that discriminate against out-of-state wine retailers and protect local retailers from competition. 1) Ohio allows consumers to buy and transport home 24 cases (288 bottles) of wine if it was purchased from an in-state retailer but only 4.5 liters (6 bottles) if it was purchased from an out-of-state retailer. 2) Ohio allows in-state retailers to sell wine online and ship it to consumers but prohibits out-of-state retailers from doing so. Plaintiffs contend that both features are unconstitutional under the analytical framework set by *Tenn. Wine & Spirits Retailers Ass'n. v. Thomas,* 588 U.S. 504 (2019) and *Granholm v. Heald*, 544 U.S. 460 (2005).

Resolution of the case requires consideration of both the Commerce Clause, which prohibits states from discriminating against out-of-state interests, and the Twenty-first Amendment, which gives states broad

power to regulate alcohol. The Supreme Court has set the framework for balancing those competing interests in *Granholm* and *Tenn. Wine*. They establish the following evidence-weighing standards for assessing the constitutionality of a discriminatory state liquor law.

1. "[S]tate regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Granholm*, 544 U.S. at 487. "[T]he Court has repeatedly declined to read § 2 [of the Twenty-first Amendment] as allowing the States to violate the 'nondiscrimination principle.'" *Tenn. Wine,* 588 U.S. at 533.

2. However, the Commerce Clause and the Twenty-first Amendment are both "parts of the same Constitution [and] each must be considered." *Bacchus Imports Ltd. v. Dias,* 468 U.S. 263, 275 (1984). Therefore, a discriminatory law is not per se unconstitutional. The State has the opportunity to justify discrimination by showing that it is "reasonably necessary" in order to "regulat[e] the health and safety risks posed by the alcohol trade," *Tenn. Wine,* 588 U.S. at 533, 535, and to "address alcohol-related public health and safety issues." *Id*. at 539.

3. Although the Court says that there may be additional legitimate nonprotectionist grounds that could justify discrimination, *Tenn. Wine,* 588

U.S. at 539, *Granholm,* 544 U.S. at 489, the only interest actually identified by the Court is protecting public health and safety. *Id.* at 518-33 (extensive historical analysis of Twenty-first Amendment). It has ruled out most other state interests as not being sufficiently important to justify discrimination, including maintaining oversight over liquor store operators, *id.* at 541, ensuring responsible sales practices and familiarity with local law, *id* at 542, facilitating orderly market conditions, *Granholm*, 544 U.S. at 492, ensuring regulatory accountability, *id.*, and monitoring sales and taxes. *Id.* at 491-92. These objectives are legitimate state interests, but they do not justify discrimination because they "can also be achieved through the alternative of an evenhanded licensing requirement," *id* at 492, and requiring an out-of-state licensee to consent to jurisdiction, appoint an in-state agent, submit to electronic audits, file reports of sales, and undergo training. *Tenn. Wine,* 588 U.S. at 540-43.[8]

4. The "burden is on the State to show that 'the discrimination is demonstrably justified,'" *Granholm*, 544 U.S. at 492. In order to meet that burden, the State must prove that a discriminatory law "actually promotes

[8] The District Court upheld the laws in large part because they "served the legislative purposes of ... promoting orderly markets" and "ensuring ... accountab[ility]." R. 133, PageID 6822. This contradicts the plain language in *Granholm* and *Tenn. Wine.*

public health or safety [and] that nondiscriminatory alternatives would be insufficient to further those interests." *Tenn. Wine*, 588 U.S. at 540. A finding that a discriminatory law serves a legitimate state interest "does not end the inquiry. We still must consider whether [the purpose] cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Granholm*, 544 U.S. at 489. When "the record is devoid of any 'concrete evidence' showing ... that nondiscriminatory alternatives would be insufficient to further those interests," the State "has fallen far short of showing that the [law] is valid." *Tenn. Wine,* 588 U.S. at 540, 543.[9]

5. The State must produce "concrete evidence" of actual effects, i.e. proof that a restriction actually reduces a threat to health or safety. "[S]peculation [and] unsupported assertions are insufficient to sustain a law that would otherwise violate the Commerce Clause." *Tenn. Wine* 588 U.S. at 539-40; *Granholm*, 544 U.S. at 490, 492.

6. Courts must give careful scrutiny to assertions that discriminatory laws advance health and safety because "[i]t does not at all follow that every statute enacted ostensibly for the promotion" of 'the public health,

[9] The District Court declined to consider the availability of nondiscriminatory alternatives, citing *dictum* from a First Circuit case. Opinion, R. 133, PageID 6819, n.4. This contradicts the plain language of *Tenn. Wine* and *Granholm.*

the public morals, or the public safety' is 'to be accepted as a legitimate exertion" of state authority. *Tenn. Wine*, 588 U.S. at 538 *(quoting Mugler v. Kansas*, 123 U.S. 623, 661 (1887). In *Granholm*, the Court called this an "exacting standard." 544 U.S. at 493. In *Tenn. Wine,* the Court said this was a different inquiry than strict scrutiny, which applies to pure Commerce Clause cases, 588 U.S. at 539, but it also rejected deferential scrutiny. *Id.* at 513. Without labeling it as such, the Court engaged in an intermediate level of scrutiny. It devoted seven paragraphs to an assessment of the purported justification to see if the evidence proved that the law actually advanced a legitimate government interest and was narrowly tailored to address the health or safety concern. *Id.* at 540-43. The Court previously has used intermediate or "careful" scrutiny in other alcohol contexts. See *44 Liquormart v. R.I.*, 517 U.S. 484, 507-08 (1996) (1st Amendment); *Cal. Retail Liquor Dealers Ass'n v. Midcal Alum., Inc.*, 445 U.S. 97, 110 (1980) (federal commerce power). Intermediate scrutiny is defined in *Clark v Jeter,* 486 US 456, 461 (1988) and *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 nn. 6-7 (1986).

7. The burden is on the State to justify these two *specific* restrictions, not just the State's overall interest in regulatory oversight or using a

three-tier system. *Tenn. Wine*, 588 U.S. at 534-35; *Granholm,* 544 U.S. at 492. Although there is *dictum* in *Granholm* that "the three-tier system [is] 'unquestionably legitimate,'" 544 U.S. at 489, the Court has clarified that this "did not suggest that [individual] discriminatory feature[s]" are valid just because they are part of a state's three-tiered scheme." *Tenn. Wine*, 588 U.S. at 535. "[E]ach variation must be judged based on its own features," *id.*, and courts must "analyze [each] provision on its own." *Id.* at 539. If elements of the three-tier system were exempt from scrutiny, it would mean "that a state law prohibiting the importation of alcohol for sale to persons of a particular race, religion, or sex would be immunized from challenge." *Id.* at 519.[10]

8. Physical presence and residency requirements are presumptively unconstitutional. Requiring businesses to be present in the state so local agencies can easily monitor and inspect them is not a sufficient non-protectionist justification. "[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,* 544

[10] The District Court ruled that the restrictions were *per se* constitutional because they are parts of Ohio's three-tier system and assessed only whether the overall system advanced health and safety. R. 133, Page ID 6820-24. This contradicts the plain language of *Tenn. Wine.*

U.S. at 474. Residency requirements "can no longer be defended." *Tenn. Wine,* 588 U.S. at 535-36. They must be justified with concrete evidence that they are reasonably necessary to protect public health or safety.

B. Sixth Circuit precedent is conflicting

The Sixth Circuit has decided six previous 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* 588 U.S.504 (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. The 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; *Byrd v. Tenn. Wine,* 883 F.3d at 624; *Am. Beverage Ass'n v. Snyder*, 735 F.3d at 370; *Jelovsek v. Bredesen,* 545 F.3d at 435, 439.

e. The burden is on the state. *Byrd v. Tenn. Wine*, 883 F at 626. Concrete "evidence in the record" is required. *Heald v. Engler*, 342 at 526. "Blanket assertions ... are not enough" *Byrd v. Tenn. Wine*, 883 F.3d at 627 n.10.

Somewhat surprisingly, one panel declined to apply the Supreme Court's standards or follow the earlier precedents from this circuit which the Supreme Court had affirmed. The lead opinion[11] in *Lebamoff Enterpr.,*

[11] 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).

Inc v. 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. It held that requiring an in-state presence was valid, contrary to the 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,* 544 U.S. at 474.[12] 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. It upheld Michigan's law prohibiting out-of-state retailers from shipping wine to consumers.

The panel in the first appeal of this case expressed concern about over-reliance on *Lebamoff*. *Block v. Canepa,* 74 F.4th at 412-14. There are

[12] *See also Tenn. Wine, 139* S.Ct at 2472 ("in-state presence" requirements "can no longer be defended") (*dictum*).

several reasons. First, the opinion and guidance of the Supreme Court controls over any conflicting language in *Lebamoff*. 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). Second, *Lebamoff* did not overrule prior Sixth Circuit cases. They remain controlling authority until overruled by the Sixth Circuit *en banc* or the Supreme Court. *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). Indeed, if there were an unresolvable conflict between *Lebamoff* and earlier precedent, the court would have to follow the earlier precedent, *U.S. v. Dorsey,* 91 F.4th 453, 457-58 (6th Cir. 2024), especially in this case where those earlier precedents (*Byrd* and *Heald*) had been affirmed by the Supreme Court..

However, courts try to avoid unresolvable conflicts and will rationalize seemingly inconsistent decisions whenever possible. See *Cooper v. MRM Invest. Co.*, 367 F.3d 493, 507 (6th Cir. 2004). That is what the earlier panel did. It held that *Lebamoff* was not dispositive because precedent establishes that the validity of a discriminatory state liquor law depends on the unique facts of each case. It remanded so the district court could "consider[] how that evidence stacks up against the *Tennessee Wine* test,"

not the *Lebamoff* lenient standard. 74 F.4th at 414.

Not surprisingly, the State relies heavily on *Lebamoff*. They argue that the Supreme Court's decision in *Tennessee Wine* was a game changer that *sub silentio* overruled *Granholm* and nullified all Sixth Circuit cases that were decided before 2019, including *Byrd* which the Court affirmed. Even if the argument made any sense, that by affirming *Byrd*, the Supreme Court may actually have weakened it, it would be unavailing. In situations like this, "where an advocate insists a new Supreme Court decision undermines a previous decision, the earlier decision stands until the Court says otherwise." *U.S. v. Bradley*, 969 US 585, 591 (6th Cir. 2020). The standards for assessing the constitutionality of the transportation and interstate shipping restrictions are those set by the Supreme Court in *Tenn. Wine* and *Granholm*.

II. The District Court did not properly apply the Supreme Court's standards

The District Court initially upheld these laws as *per se* constitutional under the Twenty-first Amendment's broad grant of regulatory authority. Opinion, R. 91. This Court reversed. Although "States have broad power to regulate liquor under § 2 of the Twenty-first Amendment," *Granholm*, 544 U.S. at 493, the Supreme Court has "repeatedly declined to read § 2

as allowing the States to violate the 'nondiscrimination principle'" of the Commerce Clause. *Tenn. Wine,* 588 U.S. at 533. The Twenty-first Amendment "does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment" by in-state sellers. *Granholm*, 544 U.S. at 493. "If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms," *id.*, unless it can justify the discrimination as a public health or safety measure or on some other legitimate nonprotectionist ground,[13] and show with concrete evidence that its predominant effect is the protection of health or safety and not protectionism. *Tenn. Wine*, 588 U.S. at 539-40.

On remand, the District Court again upheld these laws on the same overly broad basis that the Twenty-first Amendment gives states broad authority to regulate alcohol. It acknowledged that the laws were discriminatory, Opinion, R.133, R. 6818-19 n.3, so the question was whether their predominant effects were the protection of public health and safety, but the court did not apply the Supreme Court's standards for how to make that determination. Opinion, R. 133, PageID 6820-24. It did not

[13] The only other legitimate ground identified by the Court that might justify discrimination is raising tax revenue. The Court has rejected the state's interest in orderly markets, oversight and regulatory accountability as justifying discrimination. See discussion *supra* at 22-23.

assess whether the State had produced "concrete evidence" to show that these specific laws have an "actual effect" on health or safety, although *Tenn. Wine* says that is required. 588 U.S. at 539-40. It declined to consider whether there were reasonable nondiscriminatory alternatives, *id.*, PageID 6819 n.4, despite the clear language in *Tenn. Wine* that the State must also present "evidence that nondiscriminatory alternatives would be insufficient to further those interests." 588 U.S. at 540. It relied on the State's assertions that allowing interstate sales *might* increase consumption and health or safety problems, *id.*, Page ID 6823-24, 6827, although *Tenn. Wine* says that "'speculation' or 'unsupported assertions' are insufficient to sustain a law that would otherwise violate the Commerce Clause." 588 U.S. at 539.[14]

The District Court is not alone in struggling to properly apply the Supreme Court's standards. The results reached by other circuits have been inconsistent. Some have fully applied the Supreme Court's standards and generally struck down discriminatory state liquor laws because of their obvious protectionist effect. *E.g., Family Winemakers of Cal. v.*

[14] The District Court ruled on the papers without hearing oral argument, which may have contributed to the court's misunderstanding of *Granholm* and *Tenn. Wine*.

Jenkins, 592 F.3d 1, 17 (1st Cir. 2010); *Freeman v. Corzine,* 629 F.3d 146, 161 (3d Cir. 2010); *Cherry Hill Vineyards v. Lilly*, 553 F.3d 423 (6th Cir. 2008); *Bainbridge v. Turner,* 311 F.3d 1104 (11th Cir. 2002). Some have departed from the Supreme Court's guidelines and have given the state's purported justification only minimal scrutiny and/or declined to require the State to address non-discriminatory alternatives. *E.g.*, *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214 (4th Cir. 2022); *Sarasota Wine Mkt., LLC v. Schmitt,* 987 F.3d 1171 (8th Cir. 2021). Some have taken a middle road. *E.g., Anvar v. Dwyer,* 82 F.4th 1 (1st Cir. 2023); *Lebamoff Enterpr., Inc. v. Rauner*, 909 F.3d 847 (7th Cir. 2018). The District Court relied mostly on the cases that had not applied the complete framework in *Granholm* and *Tenn. Wine,* and reached an ultimate decision inconsistent with the Supreme Court's standards.

III. Ohio's interstate transportation and shipping restrictions are unconstitutional under the Supreme Court's standards

A. Both restrictions are discriminatory

The *Tenn. Wine* public-safety inquiry is required only if a state law discriminates against interstate commerce. The State has conceded that Ohio's restrictions on interstate transportation and shipping of wine are discriminatory and the District Court agreed. Dist. Ct. Opinion, R. 133,

PageID 6817 n.3. There is no dispute about this.

For Commerce Clause purposes, discrimination simply means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter," *Granholm ,* 544 U.S. at 472, results in a "commercial advantage" to in-state businesses over their out-of-state competitors, *New Energy Co. of Ind v. Limbach,* 486 U.S. 269, 275 (1988), and deprives citizens of their right to have access to the markets of other states on equal terms. *Tenn. Wine* at 534; *Granholm*, 544 U.S. at 473. Protecting local industry "from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 205 (1994). Discriminatory legislation is discriminatory even if "motivated by public health" concerns. *Chem. Waste Mgmt., Inc. v. Hunt,* 504 U.S. 334, 344 n.6 (1992).

The record establishes that the laws burden out-of-state retailers, benefit in-state retailers and protect them from competition, and deny Ohio citizens access to the markets of other states. Statement of Facts, *supra*, ¶¶ 1-12 (hereafter "Facts"). These are textbook violations of the Commerce Clause's nondiscrimination principle. *Granholm,* 544 U.S. at

472-73. Therefore, this case turns on whether the State has met its burden to justify discrimination and show why it must ban interstate shipping and transportation of wine rather than license and regulate it like it does for every other aspect of the liquor industry.

B. The State has no evidence that can justify either law as a genuine health or safety measure

1. The State has not tried to justify the transportation restriction

Ohio allows consumers to buy and transport up to 24 cases of wine if they purchase it from in-state retailers. ORC §§ 4301.60; 4303.236. By contrast, Ohio restricts consumers to transporting 4.5 liters (6 bottles/half case) if it is purchased outside the state. ORC § 4301.20(L). This difference in treatment prevents Plaintiff Miller and other Ohio residents from buying wine in other states which is commonly sold by the case. Facts ¶2. It prevents them from buying collectible wine at auction which is often sold in lots of more than 6 bottles. Facts ¶ 4. It prevents them from buying wine for a party or reception from retailers in other states. It forces them to shift some of their purchases to in-state retailers. Facts ¶ 5.

Determining that the personal transportation limit is unconstitutional is straightforward. It is obviously discriminatory, so the only question is

whether the State can provide an evidence-based public-safety justification for limiting transportation to 4.5 liters of wine per month. They have not even attempted to do so. In the District Court, neither the State nor the intervenor WBWAO identified any evidence in the record addressing this issue, or why transporting six bottles was safe but transporting seven or more was suddenly dangerous. Their only evidence addressed why they needed to prohibit consumers from acquiring *any* wine from other states in any manner because it is *all* potentially dangerous because state officials cannot conduct inspections. State MSJ at 19-20 ®. 116, PageID 5991-92); WBWAO MSJ at 11 ®. 114, PageID 5405.

That evidence is irrelevant because Ohio does not prohibit consumers from buying wine in other states and transporting it. It allows consumers to transport six bottles from an out-of-state retailer. If there were a health or safety risk because those retailers' premises were not inspected by Ohio agents, it would be present in the first six bottles and would not arise only when a consumer buys seven.

There is no credible argument that transporting six bottles is safe but transporting more than six bottles is a serious public safety threat. Transportation itself is not the problem. Ohio allows consumers to

transport up to 24 cases of wine purchased from in-state retailers. ORC §§ 4301.60; 4303.236. The fact that it comes from an "uninspected" out-of-state source is not the problem. Ohio allows residents to buy up to 24 cases of wine from out-of-state wineries, ORC §§ 4303.232, 4303.233, and out-of-state fulfillment warehouses. ORC § 4303.234.[15] Plaintiffs' evidence shows that allowing consumers to acquire wine from out-of-state retailers does not cause any increase in consumption or any other public health or safety risk, Facts ¶¶ 13, 15-22, and the State has presented no contrary evidence. Establishing a genuine health or safety risk is the State's burden of proof, and when the record is "devoid of evidence," the State "has fallen far short of showing that the [law] is valid." *Tenn. Wine,* 588 U.S. at 540, 543.

2. Interstate retail wine shipping presents no unique health or safety risk

Under the *Tennessee Wine* test, the State must prove with concrete evidence that the direct shipping ban "actually" promotes public health or safety;" speculation (even by experts) is not enough. 588 U.S. at 539-40. It has not done so. There is plenty of concrete evidence available, because fourteen states have been allowing out-of-state retailers to ship wine to

[15] A fulfillment warehouse is a logistics company that handles the packaging and shipping of wine on behalf of other wineries.

consumers over the past twenty years, Facts ¶ 13, and federal agencies track rates of consumption and alcohol-related problematic behavior for those states. Facts ¶ 16. Indeed, Ohio does not even have to look to other states. It allows out-of-state wineries and fulfillment houses with no physical presence in the state to ship 24 cases of wine to consumers. ORC §§ 4303.232, 4303.233, 4303.234. The defendants have not presented even a single piece of evidence that any of this interstate shipping has caused any actual public health or safety problem anywhere. All they present is speculation that the lack of on-site inspections and the possibility that some out-of-state wine might be cheaper, *might* cause problems in Ohio that have not occurred anywhere else. "'[S]peculation' or 'unsupported assertions' are insufficient to sustain a law that would otherwise violate the Commerce Clause." *Tenn. Wine*, 588 U.S. at 539.

The only concrete evidence in the record concerning the actual effects of interstate direct shipping show that it poses no threat to public health or safety. Data from the National Institutes of Health show that states that allow shipping by out-of-state retailers do not have higher rates of consumption. Facts ¶ 15. They do not have higher rates of problematic behavior associated with alcohol such as traffic fatalities, aggravated

assaults, or domestic violence, Facts ¶ 16, nor higher rates of youth access. Facts ¶ 17. There is no evidence of any incident where tainted or unsafe wine has been shipped from an out-of-state retailer. Facts ¶ 21. Banning interstate wine shipping cannot advance public safety when it poses no threat in the first place.

The State speculates that problems *might* occur if out-of-state retailers were allowed to sell wine directly to Ohio consumers. It asserts that strict adherence to the three-tier system is the bulwark preventing a cascade of potential social ills. State MSJ at 22-25, 28-30; R. 116, PageID 5994-6002. This is a strawman argument. This case does not concern bootleggers selling bathtub gin from a warehouse in Cleveland. It concerns whether there would be a significant health or safety risk if Ohio licensed out-of-state retailers to sell bottled wine (approved by the federal Tax and Trade Bureau) at prices posted on its website and ship it to consumers via an Ohio-licensed carrier who verifies age on delivery, and whether any such risk is so great that shipping must be banned completely rather than regulated. The State has no evidence to support its fears and speculation.

a. The State presented some hearsay evidence that minors have occasionally been able to buy wine online and that delivery services have

not always verified age. State MSJ at 29, R. 116, PageID 6001. If so, it does not justify discrimination. The Supreme Court has rejected youth access as an argument for banning only interstate shipping because "minors are just as likely to order wine from in-state [sources] as from out-of-state ones." *Granholm*, 544 U.S. at 491. If the risk is low enough that Ohio can allow its own retailers to ship to consumers, it is low enough to allow out-of-state retailers to also do so.

b. The State argues it can only inspect retailers, conduct stings to see if they are selling to minors, and recall adulterated products if the retailer is physically located in the state. State MSJ at 25-26, 29-30; R. 116, PageID 5997-6002. The argument is contrived because Ohio allows out-of-state wineries and fulfillment houses to ship wine even though it cannot inspect their premises, conduct on-site stings or compel them to recall adulterated products. ORC §§ 4303.232, 4303.233, 4303.234. If one is safe enough, so is the other. The defendants do not explain the difference.

Nor is the evidence relevant, for four reasons: 1) Every state conducts inspections and enforcement activities, Facts ¶ 19, and there is no evidence that Ohio does anything unique. 2) On-site inspections and ID checks have little to do with wine sold online and shipped to consumers

miles away from the store's premises. 3) There is no evidence that there has ever been even a single incident of adulterated wine shipped to a consumer. Facts ¶ 21. This is not surprising because disease-causing pathogens cannot survive in its acid and alcohol content.[16] 4) Besides, Ohio officials can easily monitor direct shipping by out-of-state retailers any time they want, simply by ordering wine from them, having it delivered, seeing if age is verified, and inspecting the wine at their leisure. They have done this before. *State v. Wine.com*, 2:20-cv-3430 (S.D. Oh). R. 80-3, R. 80-3, Page ID 5069-71. See Facts ¶ 31.

c. The Defendants rely heavily on the opinion of an economist (Kerr) that direct shipping from out-of-state retailers *might* produce a flood of cheap wine that *might* increase consumption and cause alcohol-related problems. State MSJ at 31-35, R. 116, Page ID 6003-07.[17] Kerr's evidence is irrelevant at best. He assumes that Ohio would not collect taxes or impose minimum pricing laws, but the State already requires anyone who

[16] *See* Sara Azavado et al., *Microbiologically, wine is a low food-safety risk consumer product*, BIO Web Conf. 7, 04003 (2016), https://doi.org/10.1051/bioconf/20160704003; Heidi Santoro et al, *Antimicrobial Activity of Selected Red and White Wines against Escherichia coli*: NIH, Nat. Library of Medicine, https://pmc.ncbi.nlm.nih.gov/articles/PMC7404564/ (viewed 7/7/2025).

[17] The full Kerr Report is at R. 116-1.

ships wine to Ohio to pay taxes, ORC § 4301.43(B), and to comply with other Ohio laws and regulations including minimum pricing rules. *See* ORC §§ 4303.232(E), 4303.233(E). He does not include shipping costs or real-world data on wine prices. Facts ¶ 29. He has no supporting data that wine is *actually* cheaper from an out-of-state retailer than in Ohio when shipping charges are included, and the evidence shows that any Ohio consumers motivated to drink more by low prices can already purchase wine at any Kroger in the state for $3.49 a bottle. R. 52-37, PageID 4051. The direct shipping ban causes consumers to switch to in-state retailers, not to drink less wine. Facts ¶ 5. Indeed. Dr. Kerr admits there is no concrete evidence, data or study that shows that interstate retail wine shipping produces any harmful effects. Facts ¶ 30.

d. Finally, the Defendants rely on the personal opinions of several witnesses that interstate shipping might cause problems in Ohio that have not occurred anywhere else. See Stevenson/Jones Report 20-33 ®. 53-3, PageID 1047-60); Powers Decl. ¶ 13 ®. 53-1, PageID 4107-08); Chung Decl. ¶¶ 31-33 ®. 53-2, PageID 4136-37); Schiffel Decl. ¶ 9 ®. 53-5, PageID 4324). None of the witnesses has any experience with interstate retailer shipping or its effects or personal knowledge to support their opinions.

None identifies any other state where their predictions have actually occurred. None accounts for (or even acknowledges) the actual data showing that direct shipping has not caused any problems anywhere else. Facts ¶¶ 13-23. None explains why shipping by out-of-state wineries has caused no problems in Ohio but shipping the same wine from a retailer would. Opinions unsupported by facts and data are inadmissible under FED.R.EVID. 701-702, inadequate to create a material fact dispute, *Viet v. Le*, 951 F.3d at 818, 823, and "insufficient to sustain a law that would otherwise violate the Commerce Clause." *Tenn. Wine,* 139 S.Ct. at 2474.

In any event, the Supreme Court notes that actions speak louder than words. If a state allows others to engage in the same activity it is trying to prevent plaintiffs from doing, it is a "tacit concession" that there would be no substantial problem extending similar privileges to the plaintiffs. *Clark v Jeter,* 486 U.S. at 464-65. This principle alone forecloses the State's arguments because Ohio allows out-of-state wineries and fulfillment houses to ship to consumers. ORC §§ 4303.232, 4303.233, 4303.234.

C. The State's failure to offer any evidence on the effectiveness of nondiscriminatory alternatives is dispositive

Under the *Tennessee Wine* test, the State must prove not only that a discriminatory law "actually promotes public health or safety," but also

that "nondiscriminatory alternatives would be insufficient to further those interests." 588 U.S. at 540-43. *Accord Granholm,* 544 U.S. at 489 (State must show that purpose "cannot be adequately served by reasonable nondiscriminatory alternatives"). The State has not presented any evidence that nondiscriminatory alternatives would be ineffective. It merely contends, contrary to *Tenn. Wine* and *Granholm*, that it does not need to make this showing. State MSJ at 35, R.116, PageID 6007. The Wholesalers do not discuss it at all. WBWAO MSJ, R. 114.

Nondiscriminatory alternatives abound. The most obvious one is a permit system that regulates interstate wine transportation and shipping.. Ohio already uses a permit for shipping from out-of-state wineries that it cannot inspect. ORC §§ 4303.232, 4303.233. A permit system can address every one of the State's concerns about direct shipping. It can require the retailer to submit an inspection report from its local health department. Other states do.[18]

It can require that the shipper be licensed and inspected in its home state,

[18] E.g., Mo. Div. Alcohol Control, Form 829-A0007, Checklist of Requirements for Primary Retail Liquor License, item #13, atc.dps.mo.gov/documents/; Fla. Div. of Alc. Bev & Tobacco form ABT-6001, App. for New Alc. Bev. License, p.5, https://www2.myfloridalicense.com/alcoholic-beverages-and-tobacco/forms-and-publications/#1507126373746-3209ceeb.

ensure that the buyer is over 21, label boxes as containing alcohol, use an Ohio-licensed delivery service that verifies age on delivery, collect and remit taxes, keep records of sales and report names and addresses to the state, notify the purchaser of any recalls of wine, and comply with state laws and regulations (including minimum pricing rules). Under ORC § 4303.235, shippers are subject to audit by the state and to the jurisdiction of the liquor control commission, the division of liquor control, the department of taxation, the department of public safety, and the courts of this state. The State has conceded that this permit system appears to have worked for direct shipping from out-of-state wineries because they have caused no health and safety problems. Facts ¶ 14.

Ohio regulates every other aspect of alcohol distribution through permits. See List of 66 Permits, R.52-38, PageID 4052-56. It touts the permit system as safe. State MSJ at 1, R. 116, PageID 5973. The Supreme Court has endorsed the permit system as a reasonable alternative to a total ban. *Granholm,* 544 U.S. at 491; *Tenn. Wine*, 588 U.S. at 542. The National Conference of State Legislatures has endorsed it. R. 52-28, PageID 3944. Other states use it to safely regulate retailer shipping. Facts ¶¶ 13-23. Before Ohio can totally ban interstate transportation and

shipping of wine, it would have to produce concrete evidence to show that the permit system which works everywhere else would not work in this one instance. It has not done so, and when the record is "devoid of any 'concrete evidence' showing that ... nondiscriminatory alternatives would be insufficient" the law is unconstitutional. *Tenn. Wine,* 588 U.S. at 540.

The State makes three weak arguments against a permit system. First it says it could not put an offending out-of-state retailer totally out of business. State MSJ at 30, R.116, PageID 6002. This is not technically correct. Many states, including Illinois where House of Glunz is located, revoke the license of a retailer who has violated the laws of a sister state. 235 ILL. COMP. STAT. 5/6-2(12). It is also contrived, because Ohio already licenses national companies to sell liquor, including 172 Kroger Stores and 87 Walmart Stores[19] and it cannot even put a dent in their business for a liquor law violation, let alone put them out of business altogether. In any event, the Supreme Court has already rejected this argument as a justification for discrimination, saying the loss of a local permit is a sufficiently strong incentive. *Granholm*, 544 U.S. at 490.

[19] Ohio Liquor Control Permit lookup, https://apps2.com.ohio.gov/liqr/Permit Lookup/PermitHolder. The search of the website was for C-2 permits issued to Kroger and Walmart, conducted June 27, 2025..

Second, the Defendants fear that 400,000 out-of-state retailers might begin shipping into Ohio and might overwhelm regulators. State MSJ at 33-34, PageID 6005-06. Speculation is insufficient to sustain a discriminatory law, *Tenn. Wine*, 588 U.S. at 430, especially in this situation where the actual evidence shows to the contrary. In states that issue retail shipping licenses, fewer than 200 retailers actually get them. Facts ¶ 20. In any event, if such a flood did occur, Ohio has the non-discriminatory alternative of a quota system. It already uses quotas to limit some brick-and-mortar retail stores. ORC § 4303.29(B)(2).

Third, the Defendants argue that allowing out-of-state retailers to ship would undermine rural communities' local control of retail outlets, which it asserts may be related to temperance because "[a] rural community with a small population may have different concerns of temperance regulation than a large city." State MSJ, R. 116, PageID 6006. The Supreme Court has rejected this argument as entirely speculative. *Tenn. Wine*, 588 U.S. at 542 (actual owners could live elsewhere). In this case, it is contrived, because Ohio already allows residents of those communities to order wine from Ohio retailers at the other end of the State who are not subject to local control. Facts ¶ 24.

Like the defendants in *Tenn. Wine,* the State mounted no evidentiary defense but relied almost entirely on the argument that it did not need to show that nondiscriminatory alternatives would be insufficient. "As a result, the record is devoid of any 'concrete evidence' showing ... that nondiscriminatory alternatives would be insufficient to further those interests," 588 U.S. at 540, and the State "has fallen far short of showing that the [law] is valid." *Id.* at 543.

D. The three-tier-system is not an end in itself that exempts its discriminatory features from the Supreme Court's requirement of evidentiary weighing

The State argued in the lower court that the transportation and shipping restrictions were valid simply because they were part of Ohio's purported three-tier system. Allowing out-of-state retailers to sell wine to consumers would eliminate the role of wholesalers and create a "sizeable hole in the three-tier system" through which a "limitless" flood of "unregulated" wine might pour that had not passed through an Ohio wholesaler, increasing consumption and putting Ohio retailers at a competitive disadvantage. State MSJ, R. 116, PageID 5991-93.

The argument is untenable. First, it misstates the actual constitutional standards by relying on scattered lower court cases instead of *Tenn. Wine.*

The Supreme Court held to the contrary, that the *general* legitimacy of a three-tier system does not protect *specific* discriminatory laws. The Court "examined whether the challenged laws were reasonably necessary to protect the State's asserted interests," 588 U.S. at 533, not whether the overall system advanced the State's interests. "Although *Granholm* spoke approvingly of [the three-tier system], it did not suggest that § 2 sanctions every discriminatory feature that a State may incorporate into its three-tiered scheme." *Id.* at 535. "[E]ach variation must be judged based on its own features," *id.*, and courts must "analyze [each] provision on its own," *id.* at 539, to see if it "actually promotes public health or safety [and] that nondiscriminatory alternatives would be insufficient to further those interests." *id.* at 540. The three-tier system is a means to promote the public welfare, not an end in itself. The inquiry remains whether, based on "concrete evidence" rather than "speculation," a particular regulation promotes health or safety in a way that a nondiscriminatory regulation could not. *See Day v. Henry,* 129 F.4th 1197, 1212 (9th Cir. 2025) (Forrest, concurring & dissenting). The fact that a particular provision may be important to a three-tier system is relevant, but not a bypass around the evidentiary weighing required by the Supreme Court. *Id.*

Second, the argument mischaracterizes Ohio law. Ohio has no three-tier system that *requires* out-of-state wine to pass through a wholesaler. Out-of-state wineries and fulfillment houses may sell and ship wine directly to consumers, ORC §§ 4303.232, 4303.233, 4303.234, or consumers may buy alcohol from out-of-state retailers and personally bring it home. *Id.* § 4301.20(L). Nor does Ohio have a mandatory three-tier system for in-state alcohol. Producers may sell directly to consumers. ORC § 4303.022 (beer); 4303.041 (distillers); 4303.233 (wineries). Retailers do not have to buy all their alcohol from wholesalers, but may buy it directly from the producers. ORC §§ 4303.071(B)(3) (wine); 4303.022 (beer). The Supreme Court says a state cannot impose a three-tier system on out-of-state entities while exempting local ones. *Granholm*, 544 U.S. at 466-67, 474.

Third, even if Ohio had a three-tier system, it would be irrelevant. A three-tier system regulates business practices in the supply chain, not consumer purchases and consumption. After Prohibition, states sought ways to minimize the kind of aggressive business practices that occurred under tied houses where producers controlled the saloons. Some states took over distribution themselves; others adopted a privatized system that "separate[s] producers, wholesalers and retailers," into different tiers,

Tenn. Wine, 588 U.S. at 535, in order to "limit vertical integration" among them. *Granholm*, 588 U.S. at 466. The three-tier system relates to how alcohol gets on retail shelves, not how much of it consumers buy or how they get it home. The Supreme Court's health and safety standards relate to the purchase and consumption after it is on those shelves, *e.g.*, responsible sales by store owners, alcohol awareness training for store employees, and cutting off sales to known abusers, *Tenn. Wine*, 588 U.S. at 540-42; or preventing sales to and consumption by minors. *Granholm*, 544 U.S. at 489-90. Nothing in a three-tier system (or a 4-tier, or state-controlled system) has anything inherently to do with sales and consumption. States have many different systems, and "there is no reason to think that the Twenty-first Amendment accords privileged status" only to the three-tier system or gives it "outsized deference"). *Lebamoff Enterpr. Inc. v. Rauner*, 909 F.3d at 855.

Nor is there anything inherent in a three-tier system that requires premises to be physically located in the state. Separation of tiers is accomplished regardless of location, and indeed, the producers of alcohol are located all over the world. What Ohio is asking for is constitutional authority to limit participation in Ohio's distribution chain to in-state

businesses only. This runs afoul of the Supreme Court's central holdings 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*, 544 U.S. at 474, and that residency requirements "can no longer be defended." *Tenn. Wine,* 588 U.S. at 535-36.

The State concedes that one of its concerns is protecting local businesses from being put at a competitive disadvantage. State MSJ, R. 116, PageID 5992. See also ORC § 4301.011 ("intent of the general assembly [includes] preventing unfair competition"). When a law has a protectionist effect, the State must show that discrimination is reasonable necessary to protect health and safety, and that its importance as a health and safety measure must outweigh that protectionist effect. Simply calling these restrictions part of the three-tier system is not an end run around the Supreme Court's requirement of evidentiary weighing.

IV. Plaintiffs have standing to challenge the restrictions

In the district court, WBWAO (but not the State) argued that plaintiffs lacked standing. The District Court ruled to the contrary, found that plaintiffs have standing, and WBWAO did not appeal. R. 133, Page ID

6817-18, n.4. But standing is always a potential issue because this Court has an independent obligation to examine its own jurisdiction. *Ward v. Nat'l Patient Account Serv. Solutions, Inc*, 9 4th 357, 360 (6th Cir. 2021). We therefore address it briefly.

To establish standing, the plaintiffs must show (1) injury, (2) causation, and (3) redressability. *FDA v. Alliance for Hippocratic Med.,* 602 U.S. 367, 379-82 (2024); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). Only one plaintiff needs standing. *Mass. v. EPA*, 549 U.S. 497, 518 (2007).

a. *Injury*. A party suffers an injury-in-fact when its constitutional rights have been violated by the defendant. *Rieves v. Town of Smyrna, Tenn.*, 67 F.4th 856, 861 (6th Cir. 2023). Plaintiffs have demonstrated that they have been denied the right to engage in interstate commerce, Facts ¶¶ 1-12, which is a personal right. *Dennis v. Higgins,* 498 U.S. 439, 449-50 (1991). This falls squarely within *Lujan* that "[w]hen the suit is one challenging the legality of government action or inaction [and] the plaintiff is himself an object of the action (or forgone action) at issue... there is ordinarily little question that the action or inaction has caused him injury." 504 U.S. at 561-62. *Accord Consumers' Research v. FCC*, 67 F.4th 773, 783-84 (6th Cir. 2023).

b. *Causation and redressability*. Causation and redressability are flip sides of the same coin. "If a defendant's action causes an injury, enjoining the action ... will typically redress it." *FDA v. Alliance,* 602 U.S. at 380-81. "Government regulations that require or forbid some action by the plaintiff almost invariably satisfy ... causation requirements. So in those cases, standing is usually easy to establish." *Id.* at 382. When government officials are defendants and the suit challenges the legality of government action, redressability is a "low bar to clear," *R.K. v. Lee*, 53 F.4th 995, 1001 (6th Cir. 2022), and there is "little question ... that a judgment preventing ... the action will redress it." *Lujan*, 504 U.S. at 561-62; *Consumers' Research*, 67 F.4th at 783-84. An injury is potentially nonredressable only when the injury could continue to be caused by "independent actors not before the courts ... whose [behavior] the courts cannot presume either to control or to predict." *Lujan,* 504 U.S. at 562; *Changizi v. Dept. of HHS*, 82 F.4th 492, 496-97 (6th Cir. 2023). No independent third party is involved in this case; the statute and its threat of enforcement by the defendant is the cause. Facts ¶¶ 1-6, 26-27. The State has not suggested there is any other cause, so the court can enjoin the defendant from enforcing the interstate transportation and shipping restrictions.

V. Remedy

Because it upheld the laws at issue, the District Court did not consider remedy. The court of appeals generally defers to the district court's choice of remedy, respecting its closer proximity to the evidence, so it may remand the case for that purpose. *Graveline v. Benson,* 992 F.3d 524, 546 (6th Cir. 2021). If this Court takes up the remedy issue, the appropriate remedy is to declare the transportation restriction and interstate shipping prohibitions unconstitutional and enjoin the defendants from enforcing them. When a trade barrier has been restricting interstate commerce, the presumptive remedy is to remove the barrier so that commerce may increase. *See Kassel v. Consol. Freightways*, 450 U.S. 662 (1982). This would leave intact the State's prerogative to decide how best to implement the order -- by creating a new shipping license, issuing existing C-2 retail permits to out-of-state retailers, allowing unlicensed shipping, and/or adding new regulations on minimum pricing. It also leaves intact the shipper's obligation to remit taxes, ORC §§ 4301.43(B), 4301.433 (shipper responsible for unpaid taxes), and comply with other Ohio laws including minimum pricing rules. *See* ORC §§ 4303.232(E), 4303.233(E).

Conclusion

Ohio's restrictions on interstate transportation and shipping of wine discriminate against interstate commerce and have not been justified by the State. This Court should reverse the judgment of the District Court, declare the interstate transportation and shipping restrictions unconstitutional, and enjoin the defendant from enforcing them.

July 7, 2025

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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 11,739 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

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:

A. Procedural

R. 1	Complaint	PageID 1-11
R. 18	WBWAO Answer	PageID 96-111
R. 37	Def. Answer	PageID 357-72
R. 91	1st Dist. Ct. Opinion	PageID 5178-203
R. 114	WBWAO Mot. Sum. Judgment	PageID 5386-423
R. 115	Pl. Mot. Sum. Judgment	PageID 5933-59
R. 116	Def. Mot. Sum. Judgment	PageID 5964-6010
R. 133	Opinion and Order	PageID 6805-28
R. 134	Judgment	PageID 6829
R. 135	Notice of Appeal	PageID 68308

B. Evidentiary and other

R. 52-3	Donovan Decl.	PageID 1273-74
R. 52-4	Wark Expert Report	PageID 1276-88
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. 52-38	List of permits	PageID 4052-56
R. 53	Def. Yost's 1st MSJ	PageID 4057-84
R. 53-3	Stevenson/Jones Report (also filed as R. 51-2 and 114-1)	PageID 4172-4304
R. 53-7	Snyder Decl.	PageID 4335-81
R. 56-2	Kerr Expert Report (Ind.)	PageID 4582-600
R. 80-2	Report to Congress, Enforcement	PageID 5060-64
R. 80-3	Motion, Ohio v. Wine.com	PageID 5065-71
R. 116-1	Kerr Report (also filed as R. 53-4, 66-1 and 114-4)	PageID 6011-115
R. 116-2	Chung Decl.	PageID 6118-22
R. 116-3	Callahan Decl.	PageID 6152-58
R. 116-4	Powers Decl.	PageID 6159-62
R. 116-5	Lockhart Decl.	PageID 6163-66
R. 116-6	Snyder Decl.	PageID 6167-72
R. 116-7	Boldin Decl.	PageID 6470-72
R. 119-1	Miller Revised Decl.	PageID 6579-81
R. 122	State Reply memo	PageID 6660-62

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.

4301.43(B)

For the purposes of providing revenues for the support of the state and encouraging the grape industries in the state, a tax is hereby levied on the sale or distribution of wine in Ohio, except for known sacramental purposes, at the rate of thirty cents per wine gallon for wine containing not less than four per cent of alcohol by volume and not more than fourteen per cent of alcohol by volume, ninety-eight cents per wine gallon for wine containing more than fourteen per cent but not more than twenty-one per cent of alcohol by volume, one dollar and eight cents per wine gallon for vermouth, and one dollar and forty-eight cents per wine gallon for sparkling and carbonated wine and champagne, the tax to be paid by the holders of A-2, A-2f, B-5, S-1, and S-2 permits or by any other person selling or distributing wine upon which no tax has been paid. From the tax paid under this section on wine, vermouth, and sparkling and carbonated

wine and champagne, the treasurer of state shall credit to the Ohio grape industries fund created under section 924.54 of the Revised Code a sum equal to one cent per gallon for each gallon upon which the tax is paid.

4301.433

In order to assist with the collection of the tax levied under section 4301.43 of the Revised Code, a supplier of wine that is bottled outside this state and that is shipped into and intended for sale within this state shall furnish to the tax commissioner two copies of the invoice for each shipment of that wine into this state. The supplier may furnish the invoice information electronically in a format prescribed by the tax commissioner. All such invoices and invoice information shall be open to public inspection during regular business hours.

4301.58

© 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.

(D) 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.

4303.022

Permit A-1c may be issued to a manufacturer to manufacture beer and sell beer products in bottles or containers for home use and to retail and wholesale permit holders under rules adopted by the division of liquor control if the manufacturer's total production of beer, wherever produced, will not exceed thirty-one million gallons in a calendar year. In addition, an A-1c permit holder may sell beer manufactured on premises at retail, by individual drink in a glass or from a container, for consumption on the premises where sold.

4303.071.

(A)(1) The division of liquor control may issue a B-2a permit to a person that manufactures wine. 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 intoxicating liquor by the appropriate authority of the state in which the person resides....

(3) The holder of a B-2a permit may sell wine to a retail permit holder....

(B) The holder of a B-2a permit shall collect and pay the taxes relating to the delivery of wine to a retailer that are levied under sections 4301.421 and 4301.432 and Chapters 5739. and 5741. of the Revised Code....

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 ....

4303.29 (B)(1)

... upon application by properly qualified persons, one C-1 and C-2 permit shall be issued for each one thousand population or part of that population, and one D-1 and D-2 permit shall be issued for each two thousand population or part of that population, in each municipal corporation and in the unincorporated area of each township.

4303.232

(A)(1) The division of liquor control may issue an S-1 permit to a person that manufactures beer or 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 and by the alcohol and tobacco tax and trade bureau of the United States department of the treasury....

* * *

(3) An S-1 permit holder 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 beer or wine that the permit holder has manufactured to a personal consumer.

(B)(1) An S-1 permit holder who sells wine shall collect and pay the taxes relating to the delivery of wine to a personal consumer that are levied under sections 4301.421, 4301.43, and 4301.432 and Chapters 5739. and 5741. of the Revised Code.

* * *

(C)(1) An S-1 permit holder shall send a shipment of beer or wine that has been paid for by a personal consumer to that personal consumer via an H permit holder. Prior to sending a shipment of beer or wine to a personal consumer, an S-1 permit holder, or an employee of the permit holder, shall make a bona fide effort to ensure that the personal consumer is at least twenty-one years of age. The shipment of beer or wine shall be

shipped in a package that clearly states that it contains alcohol. No person shall fail to comply with division (C)(1) of this section.

(2) Upon delivering a shipment of beer or wine to a personal consumer, an H permit holder, or an employee of the permit holder, shall verify that the personal consumer is at least twenty-one years of age by checking the personal consumer's driver's or commercial driver's license or identification card issued under sections 4507.50 to 4507.52 of the Revised Code.

(3) An S-1 permit holder shall keep a record of each shipment of beer or wine that the permit holder sends to a personal consumer. The records shall be used for all of the following:

(a) To provide a copy of each beer or wine shipment invoice to the tax commissioner in a manner prescribed by the commissioner. The invoice shall include the name of each personal consumer that purchased beer or wine from the S-1 permit holder in accordance with this section and any other information required by the tax commissioner.

(b) To provide annually in electronic format by electronic means a report to the division. The report shall include the name and address of each personal consumer that purchased beer or wine from the S-1 permit holder in accordance with this section, the quantity of beer or wine purchased by each personal consumer, and any other information requested by the division. The division shall prescribe and provide an electronic form for the report and shall determine the specific electronic means that the S-1 permit holder must use to submit the report.

© To notify a personal consumer of any health or welfare recalls of the beer or wine that has been purchased by the personal consumer.

(E) An S-1 permit holder shall comply with this chapter, Chapter 4301. of the Revised Code, and any rules adopted by the liquor control commission under section 4301.03 of the Revised Code.

4303.233

(A) As used in this section, “personal consumer” means an individual who is at least twenty-one years of age, is a resident of this state, does not hold a permit issued under this chapter, and intends to use wine purchased in accordance with this section for personal consumption only and not for resale or other commercial purposes.

(B)(1) The division of liquor control may issue an S-2 permit to a person that manufactures two hundred fifty thousand gallons or more 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 and by the alcohol and tobacco tax and trade bureau of the United States department of the treasury.

(2) An S-2 permit holder may sell 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. An S-2 permit holder may use a fulfillment warehouse registered under section 4303.234 of the Revised Code to send a shipment of wine to a personal consumer. A fulfillment warehouse is an agent of an S-2 permit holder and an S-2 permit holder is liable for violations of this chapter and Chapter 4301. of the Revised Code that are committed by the fulfillment warehouse regarding wine shipped on behalf of the S-2 permit holder.

(C) An S-2 permit holder shall collect and pay the taxes relating to the delivery of wine to a personal consumer that are levied under sections 4301.421, 4301.43, and 4301.432 and Chapters 5739. and 5741. of the Revised Code.

(D)(1) An S-2 permit holder shall send a shipment of wine that has been paid for by a personal consumer to that personal consumer via an H permit holder. Prior to sending a shipment of wine to a personal consumer, the S-2 permit holder, or an employee of the permit holder, shall make a bona fide effort to ensure that the personal consumer is at least twenty-one years of age. The shipment of wine shall be shipped in a package that clearly states that it contains alcohol. No person shall fail to comply with division (D)(1) of this section.

(2) Upon delivering a shipment of wine to a personal consumer, an H permit holder, or an employee of the permit holder, shall verify that the personal consumer is at least twenty-one years of age by checking the personal consumer's driver's or commercial driver's license or identification card issued under sections 4507.50 to 4507.52 of the Revised Code. (3) An S-2 permit holder shall keep a record of each shipment of wine that the permit holder sends to a personal consumer. The records shall be used for all of the following:

(a) To provide a copy of each wine shipment invoice to the tax commissioner in a manner prescribed by the commissioner. The invoice

shall include the name of each personal consumer that purchased wine from the S-2 permit holder in accordance with this section and any other information required by the tax commissioner.

(b) To provide annually in electronic format by electronic means a report to the division. The report shall include the name and address of each personal consumer that purchased wine from the S-2 permit holder in accordance with this section, the quantity of wine purchased by each personal consumer, and any other information requested by the division. If the S-2 permit holder uses a fulfillment warehouse registered under section 4303.234 of the Revised Code to send a shipment of wine on behalf of the S-2 permit holder, the S-2 permit holder need not include the personal consumer information for that shipment in the report. The division shall prescribe and provide an electronic form for the report and shall determine the specific electronic means that the S-2 permit holder must use to submit the report.

(c) To notify a personal consumer of any health or welfare recalls of the wine that has been purchased by the personal consumer.

(E) An S-2 permit holder shall comply with this chapter, Chapter 4301. of the Revised Code, and any rules adopted by the liquor control commission under section 4301.03 of the Revised Code.

* * *

4303.234

(A) As used in this section:

(1) "Fulfillment warehouse" means a person that operates a warehouse that is located outside this state and has entered into a written agreement with an S-2 permit holder to fulfill orders of the S-2 permit holder's wine to personal consumers via delivery by an H permit holder.

(2) "Personal consumer" has the same meaning as in section 4303.233 of the Revised Code.

(B) A fulfillment warehouse may send a shipment of wine sold by an S-2 permit holder to a personal consumer via an H permit holder. A fulfillment warehouse shall provide annually in electronic format by electronic means a report to the division not later than March first. The annual report shall include all of the following:

(1) The name and address of the fulfillment warehouse. The fulfillment warehouse shall include the address of each location owned or operated by the fulfillment warehouse that is used to ship wine to

personal consumers in this state.

(2) The name and address of each S-2 liquor permit holder with which the fulfillment warehouse has entered into an agreement;

(3) The name and address of each personal consumer that the fulfillment warehouse sends wine to and the quantity of wine purchased by the personal consumer;

(4) The shipping tracking number provided by the H permit holder for each shipment of wine delivered to a personal consumer. The division shall prescribe and provide an electronic form for the report and shall determine the specific electronic means that the fulfillment warehouse must use to submit the report.

* * *

4303.235 (formerly § 4303.234)

All B-2a, S-1, and S-2 permit holders and fulfillment warehouses, as defined in section 4303.234 of the Revised Code, are subject to the following:

(A) Audit by the division of liquor control or the department of taxation;

(B) Jurisdiction of the liquor control commission, the division of liquor control, the department of taxation, the department of public safety, and the courts of this state; and (C) The statutes and rules of this state.

4303.236 (formerly § 4303.233)

Household wine purchase limitation; prohibitions

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

(2) Except as provided in sections 4303.185 and 4303.27 of the Revised Code, no person shall knowingly send or transport a shipment of beer to a personal consumer, as defined in section 4303.232 of the Revised Code, without an S-1 permit. 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.