Case No. 22-3852

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

vs.

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

WHOLESALE BEER & WINE ASSOCIATION OF OHIO
Intervening Defendant-Appellee

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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

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Argument in Reply

The State and intervening defendants have filed separate briefs but make similar arguments, so we are submitting one brief in reply to both.

I. Introduction

Plaintiffs are challenging the constitutionality of two Ohio liquor laws that restrict the shipping and transportation of wine purchased from an out-of-state retailer. Because those restrictions do not equally apply to in-state retailers, plaintiffs contend that they discriminate against interstate commerce in violation of the Commerce Clause. The defendants respond by asserting that the restrictions are public health or safety measures protected by the Twenty-first Amendment. Two constitutional provisions are therefore involved and much of this case boils down to how the court should balance them.

The defendants contend that the Twenty-first Amendment alone controls the analysis, so only minimal (if any) scrutiny should be applied. To support their position, they exaggerate the scope of *Lebamoff Enterpr., Inc. v. Whitmer*, 956 F.3d 863 (6th Cir. 2020) and ask the court not to look closely at *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct 2449, 2459 (2019) and *Granholm v. Heald*, 544 U.S. 460 (2005). In those two

cases, the Supreme Court rejected the use of a "highly deferential" standard based only on the Twenty-first Amendment because the Court has "repeatedly declined to read § 2 as allowing the States to violate the "nondiscrimination principle." *Tenn. Wine,* 139 S.Ct at 2459, 2470. The Court holds that "state regulation of alcohol is limited by the nondiscrimination principle." *Granholm v. Heald,* 544 U.S. at 487. *Accord Healy v. Beer Inst.*, 491 U.S. 324, 344 (1989) (Scalia, J., concurring) (a liquor law's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment").

The fact that the Twenty-first Amendment is "limited" by the nondiscrimination principle does not mean the Commerce Clause alone controls the outcome. If it did, a discriminatory state law would be given strict scrutiny and usually struck down without further inquiry. *Granholm v. Heald*, 544 U.S. at 487. However, when a liquor law is at issue, "because of § 2, we engage in a different inquiry." 139 S.Ct at 2474.

That "different inquiry" is a compromise between these two extremes because when two constitutional provisions apply, neither one prevails. They are "parts of the same Constitution [and] each must be considered in light of the other and in the context of the issues and interests at stake."

Bacchus Imports Ltd. v. Dias, 468 U.S. 263, 275 (1984). When a discriminatory state liquor law is being reviewed, both the Commerce Clause and Twenty-first Amendment apply, so courts should use an intermediate level of scrutiny that falls between minimal and strict scrutiny. *See Tenn. Wine*, 139 S.Ct. at 2461 ("narrowly tailored" standard); *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 507-08 (1996) ("less than strict standard" requiring a "reasonable fit" between a restriction and its goal).

In their briefs, the defendants disagree and stubbornly cling to the use of a minimal scrutiny standard that gives no weight to the Commerce Clause. They deny that intermediate scrutiny or the narrowly-tailored standard is appropriate. *E.g.*, Yost Br. at 41. This is inconsistent with *Tenn. Wine*, in which the Court said the opposite and then spent nine paragraphs applying intermediate scrutiny and analyzing whether a residency law was narrowly tailored to serve legitimate interests.[1]

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[1] The State asserts that the narrowly tailored standard is a form of strict scrutiny. Br. at 50-51. Its misunderstanding may be because the Court has been inconsistent -- sometimes using it to refer to strict scrutiny, *e.g.*, narrowly tailored to serve a "compelling" interest, *William-Yulee v. Florida Bar*, 525 U.S. 423,444 (2015), and sometimes using it to refer to intermediate scrutiny. *e.g.,* narrowly tailored to serve a "legitimate" state interest. *McCullen v. Coakley*. 573 U.S. at 486. In *Tenn. Wine*, the Court continually refers to the state's "legitimate" public health or safety interests, *e.g.*, 139 S.Ct at 2469, 2474, so is not employing strict scrutiny.

1. Under intermediate scrutiny, "a statutory classification must be substantially related to an important governmental objective." *Clark v Jeter,* 486 U.S. 456, 461 (1988). In *Tenn. Wine*, the Court engaged in this exact analysis. It found that the residence rule "has little relationship to public health and safety," 139 S.Ct at 2457; *id.* at 2474 (relationship "highly attenuated" at best).

2. To withstand intermediate scrutiny, the State must "establish a 'reasonable fit' between [a restriction] and its temperance goal." *44 Liquor-mart v. R.I.*, 517 U.S. at 507-08. An important measure of "fit" is "whether lawful alternative and less restrictive means could have been used." *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 nn. 6-7 (1986). In *Tenn. Wine*, the Court engaged in this analysis. It found that "there are obvious alternatives that better serve that goal without discriminating," 139 S.Ct at 2476, and "the record is devoid of any 'concrete evidence' showing that ... nondiscriminatory alternatives would be insufficient." *Id.* at 2474.

3. A second important measure of "fit" is whether, in other similar circumstances, a state allows the same activity it is now trying to prohibit. *Clark v Jeter,* 486 U.S. at 464. In *Tenn. Wine*, the Court applied this analysis to Tennessee's claim that its residency requirement would assure

that retailers who are familiar with the communities they serve would be more likely to promote responsible sales practices. The Court found that the state did not have a similar residency requirement "for owners of bars and other establishments that sell alcohol for on-premises consumption," and did not require other other permit applicants to live in the community where the store was located. 139 S.Ct at 2475-76.

4. Perhaps the most important element of intermediate scrutiny is that concrete evidence is required to show that the law is addressing a genuine problem. *See U.S. v. Virginia*, 518 U.S. 515, 539 (1996) ("persuasive evidence in this record" is required to justify discrimination); *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003) (state met this standard when it presented "voluminous evidence" that discriminatory college admissions advanced educational goals); *Sylvester v. Becerra*, 138 S.Ct. 945, 945 (2018) (Thomas, J. dissenting from denial of cert.) (under intermediate scrutiny, court cannot rely on "common sense;" State must "submit relevant evidence"). In *Tenn. Wine*, the Court clearly applied this analysis, striking down a residency law because "the record is devoid of any 'concrete evidence' showing that the [law] actually promotes public health or safety; nor is there evidence that nondiscriminatory alternatives would be

insufficient to further those interests." 130 S.Ct. 2474. "'[U]nsupported assertions' are insufficient." *Id.*

II. Reply to Defendants' arguments

A. The issue is the validity of two specific laws, not the entire regulatory system

Throughout their briefs, the defendants constantly mischaracterize the nature of the plaintiffs' claims as a broad attack on Ohio's basic authority to regulate the distribution of alcohol. *E.g.*, Yost Br. at 3 (plaintiffs seek to "enjoin Ohio's authority to regulate alcohol shipped into its boundaries"); Intervenor's Br. at 33-34 (plaintiffs seek wide-open "unlicensed" and unregulated shipping). Such hyperbole is not helpful. Plaintiffs are challenging two specific discriminatory laws -- Ohio's refusal to license out-of-state retailers to sell and ship wine to consumers, and its restriction on the amount of wine that may be purchased out of state and transported home. Plaintiffs do not challenge Ohio's right to subject such shipments to Ohio regulations that pertain to shipping,[2] such as obtaining a license, verifying the age of the recipient, remitting taxes, reporting sales,

[2] Plaintiffs are indirectly challenging two regulations that have nothing to do with shipping -- that every retailer must be physically located in Ohio and purchase their wine from an Ohio wholesaler. Both provisions would independently violate both the nondiscrimination and extraterritoriality principles of the Commerce Clause if applied to a retailer located in another state.

submitting to audits, complying with minimum pricing laws, and using the same package delivery services that in-state retailers use. See Facts ¶ 2 (Opening Br. at 7-8); R.1, Complaint ¶¶ 6, 13-16, 38, 40 (PageID 3-4, 8-9).

Plaintiffs are not challenging Ohio's authority to regulate the distribution of alcoholic beverages through what it calls a three-tier system. Of course Ohio may do so. A state can have any kind of system it wants: a four-tier system, a three-tier system, a two-tier system, a one-tier system, a zero-tier system or --as Ohio does -- a combination of these.[3] What it cannot do is embed discriminatory laws into its system, and when it does, Plaintiffs may challenge those specific discriminatory laws.

The argument that we are challenging the entire three-tier system and demanding unlicensed, unregulated and untaxed shipping is a strawman. *See, e.g.*, Intervenor's Br. at 33 *et seq*.[4] By exaggerating the scope of the case, the defendants are trying to divert the inquiry away from the validity

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[3] Foreign wine is distributed through 4 tiers (producer, importer, wholesaler and retailer). Some domestic wine is distributed through a 3 tiers (producer, wholesaler and retailer). Other domestic wine is sold through a single tier (a winery that sells directly). Other wine is acquired through zero Ohio tiers (personally made or transported by a consumer).

[4] Intervenor's brief is almost totally devoted to arguing that the State has a general right to license and regulate retail sales in even-handed ways. The brief is largely irrelevant because this general right "is limited by the nondiscrimination principle," *Granholm v. Heald*, 544 U.S. at 487, and this case concerns specific discriminatory laws.

of two specific laws to the validity of the whole three-tier system. They can then argue that the laws should be upheld, despite their discriminatory character, because *dictum* in *Granholm v. Heald* said that "[w]e have previously recognized that the three-tier system itself is 'unquestionably legitimate.'" 544 U.S. at 489.

The effort is unavailing for two reasons. First, by taking one phrase out of context, the defendants are misstating *Granholm*. In that opinion, the Court itself limited this *dictum* to nondiscriminatory aspects of the three-tier system because "[d]iscrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment" *Id* at 488. Second, the Supreme Court in *Tenn. Wine* clarified that this *dictum* did not mean that individual laws are immune from challenge.

> This argument ... reads far too much into *Granholm's* discussion of the three-tiered model. Although *Granholm* spoke approvingly of that basic model, it did not suggest that § 2 sanctions every discriminatory feature that a State may incorporate into its three-tiered scheme.

139 S.Ct at 2471. The Court will "analyze [each] provision on its own." *Id*. at 2474. This circuit has said the same thing.

> [A] state's alcoholic-beverages law is not immune simply because it is part of a three-tier system. In *Granholm*, New York and Michigan "argue[d] that any decision invalidating their direct-shipment laws would call into question the

> constitutionality of the three-tier system." But the Supreme Court disagreed, noting that, although three-tier systems are "unquestionably legitimate," those systems are not valid when they "involve straightforward attempts to discriminate.. Based on this language, a state's alcoholic-beverages law is not automatically valid simply because it addresses a portion of a three-tier system.

Byrd v. Tenn. Wine & Spirits Retailers Ass'n, 883 F.3d 608, 620 (6th Cir. 2018),*aff'd* 139 S.Ct 2449 (2019).

B. *Tenn. Wine's* intermediate scrutiny standard applies

The State and Intervenors offer a number of arguments why this court should not apply intermediate scrutiny and should not ask whether the restrictions fit the problem. They are without merit.

1. The ban is discriminatory because it applies only to out-of-state retailers selling the same product

The defendants' first argument is that intermediate scrutiny is not required because there is no discrimination. They argue that in-state and out-of-state wine retailers operate in different regulatory environments and therefore are not similarly situated. If there were no discrimination, a ban on direct shipping could easily be upheld because only minimal scrutiny under the Twenty-first Amendment would be required.

The Supreme Court holds to the contrary. In-state and out-of-state companies are similarly situated if they sell the same product. *Gen. Motors*

v. Tracy, 519 U.S. 278, 298-99 (1997); *Best & Co. v. Maxwell,* 311 U.S. 454, 456 (1940). Indeed, the successful winery plaintiffs in *Granholm v. Heald,* were from different regulatory environments but the Court found that treating them differently "constitutes explicit discrimination against interstate commerce." 544 U.S. at 467. This circuit concurs, and has also found that in-state and out-of-state wineries are similarly situated. *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 431-34 (6th Cir. 2008); *Jelovsek v. Bredesen,* 545 F.3d 431, 436-40 (6th Cir.2008); *Heald v. Engler,* 342 F.3d 517, 525 (6th Cir. 2003), *aff'd* 544 U.S. 460 (2005). It is irrelevant that they operate in different regulatory environments because that is true of every out-of-state business that complains of discrimination. If being located in a different state, having a different wholesaler, and being subject to different local laws meant that businesses were not similarly situated, no dormant Commerce Clause case could ever succeed.

The State cites *Wine Country Gift Baskets.com v. Steen* to support its argument. Yost Br. at 43-44. However, that case does not stand for the proposition that in-state and out-of-state retailers are not similarly situated because they operate in different regulatory system. The Fifth Circuit held that the out-of-state retailer in that case was not similarly

situated to a Texas retailer because it was seeking the right to engage in state-wide direct shipping -- something in-state retailers were not allowed to do. 612 F.3d 809, 812 (5th Cir. 2010). The ban on state-wide shipping was even-handed. The decision had nothing to do out-of-state and in-state retailers operating in different state regulatory systems.

2. The constitutional analysis is controlled by the Supreme Court' decision in *Tenn. Wine,* not by *Lebamoff v. Whitmer*

The State and Intervenor argue that the outcome of this case is so completely controlled by *Lebamoff Enterpr., Inc. v. Whitmer,* 956 863 (6th Cir. 2020) , that no evidence, analysis or scrutiny is even required. Yost Br. at 47-49; Intervenor Br. at 25-30. The argument cannot be taken literally, of course because *Lebamoff* upheld a different law from a different state on a different factual record. The outcome in one case does not determine the outcome in another case. In each, the parties present evidence, the court applies the appropriate level of scrutiny, and then the court makes a decision.

a. Each case is decided on its own record

The defendants desperately want this case to be controlled by *Lebamoff* and the record established in that case, rather than the evidentiary record in this case. That is probably because the records in the two cases are

substantially different and the record is important. One of the key factors in *Lebamoff* was that the State had "presented enough evidence, *which the plaintiffs have not sufficiently refuted*, to show its in-state retailer requirement serves the public health." 956 F.3d at 877 (McKeague, J. concurring). By contrast, the plaintiffs in this case have thoroughly refuted Ohio's claim that direct wine shipping would harm its specific public health interests. They presented extensive evidence showing that direct shipping in states where it is lawful has caused none of the public health or safety problems the State is worried about. See summary of 20 exhibits and an expert report in Opening Br. at 10-13 (¶¶ 10-19).

Why was the plaintiffs' record in *Lebamoff* insufficient? Because the Supreme Court changed the rules of the game after the record had been made. The record was made more than a year before the *Tenn. Wine* decision was announced in 2019. See Doc. No. 31, 2:17-cv-10191 (E.D. Mich. 2018). At that time, this circuit applied strict scrutiny to discriminatory state liquor laws. *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d at 433-34. The plaintiffs were not required to produce evidence refuting the state's public health concerns because the burden of proof was entirely on the State. *Heald v. Engler*, 342 F.3d at 526.

The issue of protecting public health and safety was not even important at that time. The Supreme Court had said in *Granholm* that protecting public health and safety did not justify banning interstate shipping because "[t]hese objectives can also be achieved through the alternative of an evenhanded licensing requirement." 544 U.S. at 492. So of course the record in *Lebamoff* contained little evidence to refute the state's claim that banning direct wine shipping protects public health. It would be fundamentally unfair to ignore the record in this case and hold the plaintiffs to the insufficient record in *Lebamoff* established before *Tenn. Wine*.

b. All discriminatory liquor laws receive intermediate scrutiny

The defendants want this court to employ the "highly deferential standard" used in *Lebamoff*, under which states have virtually limitless authority to regulate the in-state distribution of alcohol as long as they assert a plausible purpose. The Supreme Court rejected such minimal scrutiny in *Tenn. Wine*, 139 S.Ct. at 2459,[5] because it fails to take the Commerce Clause into account. It also rejected strict scrutiny because that

[5] *See Tenn. Wine,* 139 S.Ct. at 2459, characterizing the dissent in the underlying case, *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*. The *Byrd* dissent and the *Lebamoff* majority are virtually identical and both were authored by Judge Sutton.

would not take the Twenty-first Amendment into account. The Court said that a "different inquiry" is required.

That "different inquiry" is intermediate scrutiny, not the abandonment of the Commerce Clause's nondiscrimination rule. The Court has long been concerned that what appear to be valid exercises of the police power may be protectionism in disguise, so it has repeatedly held that laws with discriminatory effect "[sh]ould not escape scrutiny." *Id.* at 2467 (citations omitted). When intermediate scrutiny is applied, courts do not simply defer to the state's assertion of a plausible purpose, but demand "concrete evidence" showing "that the [law] *actually* promotes public health or safety [and that] evidence that nondiscriminatory alternatives would be insufficient to further those interests." *Id.* at 2474 (emphasis added).

Lebamoff' and *Tenn. Wine* appear to conflict over the level of scrutiny. When precedents are potentially conflicting, courts should first try to reconcile them. That is fairly straightforward here. First, *Lebamoff* rejected "skeptical" review, which sounds like a reference to strict scrutiny. 956 F.3d at 869. Intermediate scrutiny is not skeptical review, it is neutral as between the two parties --neither skeptical nor deferential. Second, to invoke intermediate scrutiny, a retailer-plaintiff bears the initial burden

of establish discrimination. See *American Beverage Ass'n v. Snyder*, 735 F.3d 362, 369-70 (6th Cir. 2013). The plaintiff in *Tenn. Wine* met this threshold. 139 S.Ct at 2457 (residency requirements for retail licenses are discriminatory because they "blatantly favor[] the State's residents"). The plaintiff in *Lebamoff* apparently did not. The *Lebamoff* panel felt that the plaintiff was asking to be treated differently from (and more favorably than) in-state retailers and to be exempted from state licensing laws. Therefore, they were not similarly situated to licensed in-state retailers. 956 F.3d at 867. The *Lebamoff* court did not consider whether Michigan's physical-presence requirement was discriminatory because it thought the plaintiffs had stipulated the issue away.

> The parties agree that the Twenty-first Amendment allows Michigan to ... impose all manner of regulations on its ... retailers [including] that they be present in the State."

Id.[6]

The minimal scrutiny used in *Lebamoff* would be appropriate when a law is evenhanded, but is not appropriate in this case because the law is

[6] The panel was probably wrong on this point. Plaintiffs did not actually agree that a state could require physical presence and they argued it was unconstitutional under *Granholm*. *See* Appellants' Brief in 18-2199, at 36-37. What is important, however, is that the panel thought there was agreement and may have based its decision on that misunderstanding.

discriminatory. Ohio wine retailers can get a license allowing online sales and direct shipping; out-of-state retailers cannot. Ohio has a physical-presence requirement as a condition for license eligibility, which the Supreme Court holds is itself a form of discrimination. *Granholm v. Heald*, 544 U.S. at 475 (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").

The two cases are not completely reconcilable. There is some sweeping language in *Lebamoff* suggesting that even discriminatory liquor laws are immune from scrutiny because of the Twenty-first Amendment. However, this broad proposition was explicitly rejected in *Tenn. Wine*.

> According to the [appellant] § 2 was intended to broadly exempt all in-state distribution laws from dormant Commerce Clause scrutiny. The dissent relies heavily on this same argument. The argument fails for several reasons.

139 S.Ct. at 2472. To the extent that there is conflict between *Tenn. Wine* and *Lebamoff*, the Supreme Court case trumps circuit precedent, even if the conflicting opinion was decided after the Supreme Court decision. *Tchankpa v. Ascena Retail Group, Inc.*, 951 F.3d 805, 815-16 (6th Cir. 2020).

3. To justify a discriminatory law requires evidence that it actually protects public health or safety and nondiscriminatory alternatives would not work

The parties agree that *Tenn. Wine* sets the basic standard for justifying a discriminatory state liquor law, but they disagree on exactly what that standard is. The defendants argue that the entire standard is contained in the phrase "because of § 2, we engage in a different inquiry [and] ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." 139 S.Ct. at 2474. They ignore the rest of the opinion as if it did not exist.[7] The parts they omit explain in unambiguous terms how the courts are to engage in this inquiry, and what is required for a state to justify the law.

a. Justification requires evidence.

The defendants argue that no evidence is needed to justify these laws, either because there is a "strong presumption" of validity, Intervenor's Br. at 22-23,[8] or because an earlier panel upheld a non-identical Michigan law.

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[7] The State quotes *Tenn. Wine* only once. Yost Br. at 42. In every other situation where it claims to be paraphrasing *Tenn. Wine*, it actually cites *Lebamoff v. Whitmer,* which can be misleading. *See e.g.,* Br. at 41, quoting *Lebamoff's* rejection of "skeptical review" and erroneously claiming it is "quoting *Tenn. Wine*." No such language appears in *Tenn. Wine.*

[8] The Intervenor cites only cases that did not involve discrimination or the Commerce Clause.

Yost Br. at 45-55. The Supreme Court says to the contrary that "[c]oncrete evidence" is required in every case. *Tenn. Wine,* 139 S.Ct at 2474. "[A[s we pointed out in *Granholm*, 'mere speculation' or 'unsupported assertions' are insufficient to sustain a law that would otherwise violate the Commerce Clause." *Id.* There is nothing ambiguous about this evidentiary standard. The defendants do not even mention it.

b. The evidence must address the actual effect of the law, not just its purpose

The defendants argue that the shipping ban is constitutional because its *purpose* is to advance the state's interests in protecting public heath and safety. *E.g.*, Intervenor Br. at 35-36; Yost Br. at 11, 13-14, 18. The Supreme Court says to the contrary that concrete evidence is required to show the actual *effect* of the law, not just its purpose. "Where the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by § 2." *Id.* Therefore, the State must present concrete evidence "that the ... requirement *actually* promotes public health or safety. *Id.* (emphasis added). For example, it is not sufficient for the State to say that a ban on direct shipping is justified because out-of-state wine might be cheaper and therefore might cause an increase in consumption. Yost Br. at 14-16. Concrete evidence is required

to show that wine received by consumers from out-of-state is *actually* cheaper, and that higher prices for wine *actually* reduce consumption rather than just causing consumers to switch to cheaper brands. See Gehrsitz et al., *The effect of changes in alcohol tax differentials on alcpohol consumption*, J. PUB. ECONOMICS 204 (2021) (when prices increase, consumers switch to cheaper products if available).

c. The evidence must address nondiscriminatory alternatives

The defendants contend that the inquiry stops at the question whether the law promotes the State's public health or safety interests. The Intervenor denies that any inquiry into the feasibility of nondiscriminatory alternatives is required. Br. at 45-46. The State does not even discuss it. See Yost Br. Table of Contents at iii. The Supreme Court says otherwise. One of the central questions is whether the state has produced "evidence that nondiscriminatory alternatives would be insufficient to further those interests." *Id.* Indeed, the Court in *Tenn. Wine* spent a substantial portion of its analysis considering viable nondiscriminatory alternatives.

> [Ensuring] that retailers are "amenable to the direct process of state courts,"... could easily be achieved by ready alternatives, such as requiring a nonresident to designate an agent... "If [the State] desires to scrutinize its applicants thoroughly ... it can

> devise nondiscriminatory means short of saddling applicants with the 'burden' of residing" in the State. [Nor is the law] needed to enable the State to maintain oversight over liquor store operators.... "In this age of split-second communications by means of computer networks ... there is no shortage of less burdensome, yet still suitable, options." ... Not only is the [law] ill suited to promote responsible sales and consumption practices, ... but there are obvious alternatives that better serve that goal without discriminating against nonresidents.

139 S.Ct. at 2475-76 (internal citations and parentheses omitted).

d. All discriminatory liquor laws are subject to this scrutiny

The Intervenor argues that laws regulating retailers are subject to lesser scrutiny than laws regulating producers. It concedes that *Granholm* held that if a state allows direct shipping by wineries it must do so evenhandedly, but asserts that "the Court did not broaden this statement to apply it with equal force to wine retailers." Br. at 24. In fact, the Court said exactly the opposite.

> Although it concedes (as it must under *Granholm*) that § 2 does not give the States the power to discriminate against out-of-state alcohol *products and producers*, the Association presses the argument, echoed by the dissent, that a different rule applies to state laws that regulate in-state alcohol distribution. There is no sound basis for this distinction.

Id. at 2470-71. The Intervenor's argument is disingenuous. The same level of inquiry applies to all discriminatory state liquor laws.

C. Cases from other circuits are of little value

The defendants try to bolster their argument by citing cases from other circuits which have upheld other state laws similar to Ohio's on various grounds. Yost Br. at 44-45; Intervenor Br. at 32. Not surprisingly, they omit from the list of cases those that favor plaintiffs. *E.g., Lebamoff Enterpr., Inc. v. Rauner,* 909 F.3d 847 (7th Cir. 2018); *Siesta Village Mkt. v. Perry*, 530 F.Supp. 2d 848 (N.D. Tex. 2008) (mooted by change in Tex. law); *Freeman v. Corzine,* 629 F.3d 146, 161-61 (3d Cir. 2010) (personal importation limit struck down). Cases from other circuit are obviously not precedent in this one. *U.S. v. Cinemark USA, Inc.*, 348 F.3d 569, 579 (6th Cir. 2003). This case involves Ohio's unique laws and regulatory policies and is not the kind of issue on which national uniformity of result is important.

In eny event, only one of the cases cited by the defendants is actually germane -- *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214 (4th Cir. 2022) -- and it was a split decision with a vigorous dissent. The other cases are based on different laws, facts and precedents. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) was decided before *Granholm,* on the since-rejected basis that the Commerce Clause did not apply at all. It is no

longer good law in the Seventh Circuit. *See Lebamoff Enterpr., Inc. v. Rauner*, *supra*. *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809 (5th Cir. 2010) and *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009) upheld *nondiscriminatory* bans on direct shipping that applied equally to both in-state and out-of-state retailers.[9] *Sarasota Wine Mkt. v. Schmitt*, 987 F.3d 1171 (8th Cir. 2021) was decided on a unique 8th Circuit precedent.

III. Ohio's ban on direct shipping by out-of-state retailers is unconstitutional under the *Tenn. Wine* standard

1. The ban on direct shipping is discriminatory. It applies only to retailers located outside Ohio. The state will issue licenses that authorize direct wine shipping only to retailers physically located within the state. Residency rules and physical-presence requirements are "blatantly" discriminatory. *Tenn. Wine*, 139 S.Ct. at 2456. *Accord Granholm v. Heald*, 544 U.S. at 475. Home delivery of products is an important retail market, and Ohio prevents out-of-state retailers from participating in it, which protects local retailers from competition. "[P]rotecting [local businesses] from the rigors of interstate competition is the hallmark of the economic

[9] They also assumed that *Granholm* applied only to producers and not retailers, which was rejected in *Tenn. Wine,* 139 S.Ct. at 2470-71.

protectionism that the Commerce Clause prohibits." *West Lynn Creamery v. Healy*, 512 U.S. 186, 205 (1994).

2. Discrimination triggers intermediate scrutiny under *Tenn. Wine,* which requires the state to produce concrete evidence that the law actually reduces public health or safety problems. Witness speculation and unsupported assertions are not sufficient, and that is all the defendants present. The only concrete evidence they present is that state officials inspect the physical premises of in-state retailers. Nowhere is there a shred of evidence connecting those inspections to any issue about wine that is ordered online, shipped to consumers' homes and delivered miles away from the store. See Intervenor's Br. at 7-14. Nowhere is there any evidence that adverse effects have actually arisen in states that allow cross-border wine shipping, or in Ohio itself that allows cross-border shipping from wineries. Some defense witnesses speculated that public health or safety problems *might* arise in Ohio in the future, even though they have not arisen anywhere else, but speculation is neither admissible under Fed. R. Evid. 701-02,[10] nor sufficient under *Tenn. Wine.*

[10] The district court ruled that the speculative predictions of defense experts about possible future harm from direct shipping were admissible and the total absence of a factual basis or reliable methodology went only

3. The concrete evidence shows the exact opposite. Fourteen states have been allowing direct shipments by out-of-state retailers over the past fifteen years and forty-four states allow direct shipments from out-of-state wineries. None reports any public health or safety problems -- no increase in consumption, no increased youth access, and no contaminated wine. The State admits it has no evidence to the contrary. R. 56-2 ¶ 34, PageID 4592. It has allowed out-of-state wineries to ship directly to consumers for years with no evidence of any harmful consequence. Because the ban on direct shipping produces no actual beneficial effect on public health or safety, "the predominant effect of [the] law is protectionism, not the protection of public health or safety, [so] it is not shielded by § 2." *Tenn. Wine*, 139 S.Ct. at 2474. Arguments by the defendants that regulation in general helps reduce alcohol-related social problems are irrelevant. They lead to the conclusion that direct shipping should be regulated, not banned entirely. If regulation works in other contexts, it will work here. *See Granholm v. Heald*, 544 U.S. at 492 ("protecting public health and safety, and ensuring

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to weight. The court did not follow Rule 702 requiring that expert opinions be based on sufficient facts and the product of reliable methods. Failure to apply the right legal standard is an abuse of discretion. Thiscourt should independently review the admissibility of this evidence. *Lyngaas v. Ag*, 992 F.3d 412, 430-31 (6th Cir. 2021).

regulatory accountability [can] be achieved through the alternative of an evenhanded licensing requirement").

4. Even if the State had shown that direct shipping posed some actual risk to public health and safety, that would not be enough to justify banning it altogether. The state must present evidence "that nondiscriminatory alternatives would be insufficient to further those interests." *Tenn. Wine,* 139 S.Ct. at 2474; *Granholm v. Heald,* 544 U.S. at 489. The State has no such evidence, makes no claim that it has, and does not even discuss the issue. Yost Br. at i-iii (Table of Contents). The record is entirely to the contrary. Other states successfully minimize risk and monitor shipping through a licensing-and-reporting system. Ohio already uses licensing to effectively monitor every other aspect of alcohol distribution in the state, including direct shipments by out-of-state wineries. The Supreme Court has endorsed the permit system as a reasonable alternative. *Granholm v. Heald*, 544 U.S. at 491; *Tenn. Wine*, 139 S.Ct. at 2475-76. A task force of the National Conference of State Legislatures has endorsed it. R. 52-28, PageID 3944.

Intervenor makes one attempt to argue that nondiscriminatory alternatives would be unworkable by disingenuously claiming there are

640,000 potential out-of-state retailer poised to flood the Ohio market with alcohol and overwhelm regulatory efforts. Br. at 14-15. 45, 48. As they well know, the evidence in the record shows that fewer than 200 out-of-state retailers actually get direct-shipping permits in states that issue them. R. 52-30, PageID 3948-4011. Those states have had no trouble monitoring those shippers safely. *Id*.

5. Assuming *arguendo* that the defendants had any admissible evidence to show that interstate direct wine shipping caused public health or safety problems and that licensing would not work, granting summary judgment would still be inappropriate. The plaintiffs' evidence from federal agencies and an expert witness contradicts what little evidence the state presented. That would create a genuine dispute on a material issue, precluding summary judgment for the defendants. FED. R. CIV. P. 56(a). The State nitpicks the persuasiveness of some of plaintiffs' evidence, Br. at 51-53,[11] but this was summary judgment for defendants, so the evidence is to be construed most favorably to the plaintiffs. *Render v. FCA US, LLC*, 53 F.4th 905, 913-14 (6th Cir. 2022).

[11] The State insinuates that some of it is inadmissible but cites no rule or specific grounds, so if this is an objection, it is waived. FED. R. EVID. 103(a).

The Intervenor seeks to avoid this issue by claiming that some of plaintiffs' evidence is not admissible -- statements from state regulators that direct shipping has caused no problems, R. 52-19, PageID 3845-62, and data from federal agencies showing that direct-shipping states do not have more consumption or alcohol-related problems. NIH Consumption Data, R. 52-20, PageID 3863-68; NHTSA Traffic Data, R. 52-21, PageID 3869-74; FBI Assault Data, R. 52-22, PageID 3878-84; Domestic Violence Data, R. 52-23, PageID 3885. See Interv. Br. at 40-42. The objections are without merit. The statements of public officials and data compilations by public agencies are admissible under Fed. R. Evid. 803(8). The data tables are governmental publications, which are self-authenticating. Fed. R. Evid. 902(5). The statements by state regulators were authenticated by the declaration of James Tanford, R. 52-1 ¶ 18, PageID 1268, and under the reply-letter doctrine. Fed. R. Evid. 901(b)(4).[12] The charts that summarize these data provide citation to the full relevant databases, so they are admissible summaries under FED.R.EVID. 1006.

IV. The limit on transporting wine into Ohio is unconstitutional

The same intermediate scrutiny standard applies to the statute limiting personal transportation of wine bought out of state to 4.5 liters.

[12] See MUELLER & LAIRD, 5 FEDERAL EVIDENCE § 9:7 (4th ed.2022).

OHIO REV. CODE § 4301.20(L). Because no such limitation exists on intra-state transportation of wine, *id.* § 4301.60, the law is facially discriminatory. The State makes no attempt to justify this restriction as anything other than a protectionist measure designed to prevent consumers from stocking up on wine purchased out of state.

The State's only defense is that plaintiffs lack standing to challenge the personal transportation limit because they have not shown a likelihood that state officials would enforce the law. The argument is disingenuous because state officials concede that there are various scenarios in which they would enforce it, Def. Answer to Interrog. 16, R. 52-34, PageID 4035, and had enforced it in the past. Snyder Decl., R. 53-7, PageID 4335, 4336, 4481. The State offered no evidence from a state official testifying under oath that they would not enforce the law. It basically just argues that the plaintiffs' evidence is weak, not that it is nonexistent. This is summary judgment, however, and plaintiffs are entitled to all reasonable inferences from the evidence. *Render v. FCA US, LLC*, 53 F.4th at 913-14, especially when the State offers no contrary evidence.

When a plaintiff is the object of a regulation, there is ordinarily little question that he has standing. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). Plaintiff Miller is an Ohio wine consumer who buys

wine and transports it to his home, so he is the object of Ohio's limitation on the amount he can transport. He has standing unless the threat of prosecution is "imaginary or wholly speculative." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160-61 (2014). Past enforcement against others is sufficient. *Id.; Russell v. Lundergan–Grimes*, 784 F.3d 1037, 1049 (6th Cir.2015) Plaintiffs established that Ohio has enforced both laws in the past. Opening Br at 14 (Facts ¶¶ 22-23), and the State admits it "vigorously" enforces them. Def. Mot. SJ at 18, R. 53, PageID 4084. We have established standing.

V. The Director of the Dept. of Public Safety is a proper defendant

The State argues that the Director of the Department of Public Safety, was properly dismissed from the case on the grounds of Eleventh Amendment immunity because he is not involved in enforcing the wine shipping laws. The argument is without merit. In its Motion for Summary Judgment, the defense asserted:

> Ohio vigorously enforces its liquor control laws through the Division, the Ohio Investigative Unit,[13] and the Liquor Control Commission.... The Division, the Ohio Investigative Unit, and the Liquor Control Commission are tasked with ensuring that

[13] The Ohio Investigative Unit is part of the Department of Public Safety. See https://publicsafety.ohio.gov/what-we-do/our-programs/ohio-investigative-unit (viewed January 31, 2023).

> all permit holders comply with the provisions of Ohio Rev. Code Chapters 4301 and 4303, as well as Ohio Adm. Code 4301.

Def. Mot. SJ at 18, R. 53, PageID 4084. Plaintiffs are entitled to the reinstatement of the Director as a defendant. The State's concession that he is involved in enforcement deprives him of Eleventh Amendment immunity under *Ex Parte Young,* 209 U.S. 123 (1908).

Conclusion

Ohio's restrictions on direct shipping and personal transportation of wine purchased from out-of-state retailers discriminate against interstate commerce and have not been justified with concrete evidence. They should be declared unconstitutional and the defendants enjoined from enforcing them.

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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 6500 words in sections identified by Fed. R. App. P. 32(f). It contains 6470 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.

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CERTIFICATE OF SERVICE

I certify that on February 17, 2023, the foregoing Reply Brief was filed and served on all parties through the court's CM/ECF system.

s/ James A. Tanford
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