

FILED ELECTRONICALLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
NO. 3:05-cv-00289-CRS

HUBER WINERY, et al

PLAINTIFFS

v.

LaJUANA S. WILCHER, et al

DEFENDANTS

and

WINE AND SPIRITS WHOLESALERS
OF KENTUCKY, INC.

INTERVENOR DEFENDANT

**STATE DEFENDANTS' RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION
FOR JUDGMENT ON THE PLEADINGS**

Come Defendants, LaJuana S. Wilcher and Lavoyed Hudgins, in their official capacities as Secretary of the Environmental and Public Protection Cabinet, and Executive Director of the Kentucky Office of Alcoholic Beverage Control, respectively (hereafter collectively referred to as "State Defendants"), by counsel, and for their Response to Plaintiffs' Motion for Judgment on the Pleadings, state as follows:

ORAL ARGUMENT

Pursuant to LR 7.1(f), Defendants request an oral argument to better elucidate the reasons why the Court should dismiss Plaintiffs' Complaint.

INTRODUCTION

Plaintiffs' declaratory action contends that KRS 243.032, KRS 244.155, KRS 244.156, and KRS 244.165 are unconstitutional and seeks a permanent injunction preventing State Defendants from enforcing these statutes. The crux of Plaintiffs' case rests upon the Commerce Clause of the United States Constitution (Art. I, § 8, cl. 3) and *Granholm v. Heald*, ___ U.S. ___,

125 S.Ct. 1885 (2005). Plaintiffs' Complaint breaks into two distinct parts. In Count One, Huber Winery (Huber) and the two individual Plaintiffs challenge their alleged inability to ship directly to Kentucky consumers. In Count Two, Huber alone challenges its alleged inability to sell directly to Kentucky retailers. For both Counts, KRS 244.165 allegedly prohibits the desired sales because it supposedly criminalizes the shipment of wine directly into Kentucky except to wholesalers. Plaintiffs' allegations and beliefs, however, as to the nature of Kentucky's statutory scheme are incorrect. No discrimination occurs under the law. Additionally, Plaintiffs' Complaint fails for reasons of standing and ripeness (subject matter jurisdiction doctrines) and abstention.

STATEMENT OF THE CASE

Huber operates a winery in Indiana. The individual Plaintiffs are residents of Jefferson County who wish to import wine from out-of-state wineries. Plaintiffs believe that Kentucky's statutory scheme regulating the sale of wine discriminates against them. This lawsuit, however, was carefully planned and orchestrated, a fact which the Court should take note of, as the Court is sitting in equity. The Supreme Court decided *Granholm* on May 16, 2005. On that very same day, at 3:16 pm, the Plaintiffs filed their Complaint. The proverbial ink on the decision remained wet when Plaintiffs filed their Complaint: its filing must have been calculated in advance. In Plaintiffs' rush to file their Complaint, however, they failed to properly assess justiciability issues. There exists no Article III "Case or Controversy" regarding this action.

Under the broad authority given to the states under the Twenty-First Amendment to the United States Constitution, the General Assembly has granted the Kentucky Office of Alcoholic Beverage Control (ABC) broad discretionary powers of regulation. *See* KRS 241.080 (granting the ABC the discretionary power to issue or refuse a license under KRS 243.020 to KRS

243.670); KRS 241.060 (granting the ABC the power to issue administrative regulations governing licensure and the use, sale, and transportation of alcoholic beverages); *Alcoholic Beverage Control Board v. Woosley*, 367 S.W.2d 127, 128 (Ky. 1963)(recognizing that the liquor industry stands apart and is “subject to strict regulation and broader discretionary administrative control”)(emphasis added); *Brey v. Alcoholic Beverage Control Board*, 451 S.W.2d 647, 650 (Ky. 1970)(holding that the ABC Board has wide discretion in regulating the alcohol industry).

Pursuant to its regulatory power, the ABC has issued 804 KAR 4:330, titled “Direct sales from out-of-state companies.” The regulation’s purpose is to provide procedural due process for violators of KRS 244.165. Section one (§1) requires the ABC, when it “finds probable cause that a first violation of KRS 244.165 has occurred,” to issue an administrative citation to the violator giving notice of a hearing on the charge. If, at the hearing, the ABC finds a violation has occurred, it then issues a cease and desist letter. Under Section three (§3), the ABC must find that a second violation occurred, after a hearing, before referring the case to the Commonwealth Attorney in the appropriate venue for criminal prosecution.

Section four (§4) of 804 KAR 4:330 allows a Kentucky resident, while visiting another state or country, to ship wine to his home, business or mailing address. This provision is substantially similar to the rights given by the General Assembly to “small” and “farm” wineries licensed in Kentucky. KRS 243.155(1)(f) and 243.156(1)(h) allow “small” and “farm” wineries, respectively, to ship directly to a customer if (1) “the wine is purchased by the customer in person at the winery”; (2) the “wine is shipped by licensed common carrier”; and (3) the “amount of wine shipped is limited to two (2) cases per customer.” Under 804 KAR 4:330 §4,

Kentucky residents are allowed to purchase wine at out-of-state wineries and to cause same to be shipped to themselves for personal use in unlimited quantity.

The ABC has never interpreted its regulations so as to treat out-of-state wineries more harshly than in-state wineries. If anything, out-of-state wineries, under this regulation, receive more favorable treatment than in-state wineries inasmuch as Kentuckians can cause *unlimited* quantities of wine to be shipped home for their personal use from out-of-state wineries, no matter what amount of wine such wineries produce. But, Kentuckians may only cause two (2) cases of wine to be shipped from purchases at in-state wineries and then only from “small” in-state wineries (*i.e.*, wineries producing less than 50,000 gallons per year). *Compare* KRS 243.155(1)(f) & .156(1)(h) *with* 804 KAR 4:330 §4.

Indeed, in the year 2003, the ABC took no enforcement action against any out-of-state wineries through the issuance of a cease and desist letter pursuant to KRS 244.165. Likewise, in 2004, the ABC issued only two (2) cease and desists, and neither of these were to out-of-state wineries. So far this year, no administrative citations that could lead to a cease and desist letter have been issued to any out-of-state wineries. Furthermore, unless a winery has received a cease and desist letter, it cannot be criminally prosecuted for an offense under KRS 244.165(2).

In any event, the State Defendants acknowledge their responsibility to enforce Kentucky’s laws in compliance with applicable decisions of the United States Supreme Court, such as *Granholm*, and not to take enforcement action pursuant to any statute or regulation clearly similar to another state’s laws that have been held unconstitutional. This acknowledgement may be played out in the enforcement posture of the ABC and/or its licensing process, or both. To date, however, neither Huber Orchards, Inc., nor any of its subsidiaries, including Huber Winery have tested how the State Defendants may carry out their responsibility

of enforcing Kentucky's laws in a constitutional fashion pursuant to applicable Supreme Court precedent. Huber has never applied for a license of any kind from the ABC and has never sought any guidance or direction, formal or informal, from the ABC post-*Granholm*.

In light of the ABC's actual track record of not having taken enforcement action pursuant to KRS 244.165 against any out-of-state "small" wineries in the past, after the *Granholm* decision, Plaintiffs cannot complain that an actual or imminent threat of injury exists such that the ABC will issue any administrative citations to an out-of-state "small" winery (such as Huber)¹ so long as such winery has complied with the same requirements applicable to "small" or "farm" wineries located in Kentucky.

Of course, the ABC expects that any sale or shipment of wine from any out-of-state "small" winery into Kentucky ("small" being defined as producing less than 50,000 gallons of wine per year sans reference to Kentucky fruit or honey) must be legal under the out-of-state winery's state/local law. Of course, the ABC will continue to enforce KRS 244.165 as it applies to any out-of-state winery producing *more* than 50,000 gallons of wine per year. All wineries, in-state or out, producing *more* than 50,000 gallons of wine are not considered "small" or "farm" wineries under Kentucky's current statutory definition, and thus have no legal authority to sell, ship or distribute wine in Kentucky except through a licensed wholesaler in this Commonwealth.

This enforcement posture of the ABC toward "small" out-of-state wineries mirrors exactly the provisions of the "small" and "farm" winery licensing provisions of KRS 243.155(1)(f) and 243.156(1)(h), and in no way lessens the right of a Kentucky resident under 804 KAR 4:330 § 4 to cause to be shipped to her/himself as many cases of wine as s/he desires to purchase "for personal use" while present at an out-of-state winery. The ABC's enforcement

¹"Small" winery being defined as producing less than 50,000 gallons of wine per year sans any reference to "fruit or honey produced in Kentucky." Pursuant to KRS 241.010(46) such reference can already be waived as "exempt" and in the exercise of appropriate discretion by ABC authorities, after *Granholm*, no doubt would be waived.

posture, as articulated herein, will no doubt change after the 2006 Legislative Session of the General Assembly and amendatory legislation is enacted, or alternatively, if regulations are formally promulgated through the administrative rulemaking process and adopted, in response to *Granholm*, whichever event may first occur. Until these legislative or regulatory changes are effected, however, Plaintiffs do not have a justiciable controversy as there is no chance they will be prosecuted after the *Granholm* decision.² Wine from “small” wineries, as defined herein, whether in or out-of-state, may be shipped to Kentucky purchasers so long as the conditions of KRS 243.155(1)(f) & 243.156(1)(h) are complied with.

Plaintiffs’ allegations in their Complaint.

Huber alleges, in paragraph 3 of the Complaint, that it:

holds all necessary Indiana and federal licenses and permits to manufacture and sell wine in interstate commerce. It has received numerous requests from residents of Jefferson County, Kentucky to deliver wine to them. It would sell and deliver wine directly to Schneider and Reilly, and other consumers at their residences, and to licensed retail wine sellers at their place of business, in the Commonwealth of Kentucky, if state law permitted it to do so.

Huber does not, however, allege that it has ever shipped wine to a Kentucky resident or retailer, in contravention of KRS 244.165; it does not allege that a cease and desist letter has ever been sent to it; it does not even allege that the ABC has issued a citation to it for violating KRS 244.165; neither does it allege that it has applied for a “small winery” license in Kentucky. Indeed, given its rush to file this lawsuit, it would be impossible for Huber to allege or prove any

² Indeed, the fact that Plaintiffs rushed to file this lawsuit knowing that it would take time for the legislative and/or regulatory processes to respond to *Granholm* is perhaps the most puzzling facet of this lawsuit. The Wine Institute of America and the National Association of American Wineries, organizations of which Huber is no doubt a member, states on its website: “Even though we won [in *Granholm*], Wine Institute, Wine America and Family Winemakers of California are urging their winery members to continue shipping in strict compliance with all existing state laws.” And later, in response to “Frequently Asked Questions,” it is stated, “Despite this clear legal victory [in *Granholm*] for wineries and consumers, ***affected states will need to take legislative or regulatory action to address the discrimination issue, and put the mechanics in place that allow for limited, regulated direct shipping.***” See www.wineamerica.org (May 2005 Newsletter).

of these things. Huber ran to the Courthouse before it ever could have suffered injury-in-fact in the wake of *Granholm*.

The individual Plaintiffs, Schneider and Reilly, allege, in paragraph 4 of the Complaint, that they:

are regular purchasers and consumers of wine, and would purchase bottled wine from out-of-state wineries and have those wines shipped to them in Jefferson County if Kentucky law permitted them to do so.

These individuals, however, do not allege that they ever actually attempted to purchase or ship wine from Huber, or any other out-of-state winery, and were in fact refused the privilege to do so because of Kentucky law.

Indiana Law.

Even though Huber alleges that it is licensed under Indiana law to sell wine in interstate commerce, Indiana law does not allow such shipments. According to a May 20, 2005 letter from the Indiana and Alcohol and Tobacco Commission, Indiana law forbids shipment of wine.

It has come to our attention that wineries in Indiana may be engaged in selling wine by taking orders via internet, mail, and/or telephone and directly shipping to the consumers address. This method of sale is contrary to Indiana law. Indiana Code § 7.1-3-12-5 dictates that your winery is *only* “entitled to sell the winery’s wine on the licensed premises to consumers either by the glass, or by the bottle, or both.” (Emphasis in original.)

Letter from David Heath, Chairman, Indiana Alcohol & Tobacco Commission, Exhibit “1.”

The web page to the Indiana Alcohol & Tobacco Commission also has a statement from Chairman David Heath dated May 17, 2005. “This ruling [*Granholm*] will not allow out-of-state wineries to ship wine to Indiana residents, because Indiana law does not permit Indiana wineries to ship directly to consumers.” See www.in.gov/atc/scwinery, August 16, 2005, attached hereto as Exhibit “2.” Huber is an Indiana farm winery. See Indiana Alcohol & Tobacco Commission

web page, Exhibit “3.”³ Though Huber alleges Indiana law allows it to sell wine out-of-state, this is simply not the case.

Plaintiffs’ counsel is well aware of these laws, having filed suit against the state of Indiana under *Granholm* on May 18, 2005, in a suit styled *Baude et al v. Heath*, Civil Action Number 05-cv-735, pending in the Southern District of Indiana.

ARGUMENT

Given the wide enforcement discretion and rulemaking authority of the ABC on the issuance and denial of licenses and the interpretation of statutes, and the past enforcement track record of the ABC (as described above), there exists no threat or imminent threat that the ABC will enforce KRS 244.165 against out-of-state wineries manufacturing less than 50,000 gallons of wine a year (such as Huber) before the Kentucky General Assembly meets to address Kentucky’s laws in light of the *Granholm* decision. Accordingly, this Court should dismiss Plaintiffs’ suit because they lack standing under Article III of the United States Constitution; moreover, the case is not ripe for judicial review. Based upon the standing and ripeness doctrines, the Court lacks subject matter jurisdiction. The party opposing dismissal based upon subject matter jurisdiction bears the burden of proving that such exists. *GTE North, Inc. v. Strand*, 209 F.3d 909, 915 (6th Cir. 2000). Furthermore, even if the Court did have subject matter jurisdiction, the doctrine of *Pullman* abstention requires dismissal or abeyance of Plaintiffs’

³ Indiana licenses two types of wineries: a vintner and a farm winery. See IC 7.1-3-12-2 and 7.1-3-12-4. A farm winery must produce less than 500,000 gallons of wine annually. IC 7.1-3-12-4(a)(2). By contrast, and by negative inference, a vintner must produce greater than 500,000 gallons of wine annually. Under IC 7.1-3-12-2, a vintner permit allows the winery “to transport wine and either sell it, or deliver it, or both, in shipments to points outside this state, and to a wine wholesaler, and to another vintner.” An Indiana “farm winery” by contrast is not granted the authority to ship wine to points outside of the state, including a non-Indiana retailer. IC 7.1-3-12-5. When read in conjunction with the vintner’s power to ship outside of the state of Indiana, which is not granted to an Indiana farm winery, an Indiana farm winery is only allowed to sell wine to an Indiana retailer or wholesaler. IC 7.1-3-14-3 and 7.1-3-4-2(a)(5)(requiring that the Indiana wine retailer be a resident on Indiana). See Indiana laws, attached here as composite Exhibit “4.”

action. And, in any event, Kentucky's laws, as they apply to the individual Plaintiffs in this case, are perfectly constitutional.

I. STANDING

Standing is “an essential and unchanging part of the case-or-controversy requirement of Article III.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To prove the Plaintiffs have standing, they must demonstrate three distinct elements: (1) “injury in fact,” which is “an invasion of a legally protected interest that is (a) ‘concrete and particularized and (b) actual or imminent, not conjectural or hypothetical’; (2) a causal relationship between the injury and the challenged conduct . . . and (3) a likelihood that the injury will be redressed by a favorable decision.” *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663 (1993)(citations omitted). A court must determine standing on the facts as they existed at the time the plaintiff filed the complaint. *NAACP v. City of Parma*, 263 F.3d 513 524 (6th Cir. 2001). Moreover, “[t]he party invoking federal jurisdiction bears the burden of establishing [standing].” *Lujan*, 504 U.S. at 561. Because of this burden, the “Court must accept as true all material allegations contained in the complaint and liberally construe them in favor of the complaining party.” *American Canoe Ass’n, Inc. v. City of Louisa Water and Sewer Comm’n*, 389 F.3d 536, 540 (6th Cir. 2004).

A. Standing for Huber.

Huber fails to meet all three prongs of standing. It has no injury-in-fact because it has never been cited, much less prosecuted, for shipping wine into Kentucky. Additionally, Indiana law, not Kentucky, prohibits the shipment of wine outside of Indiana. Huber's claims, therefore, founder on the causation and redressability prongs of standing. Because Huber's home-state's law prohibits it from shipping wine outside of Indiana, Kentucky's laws cannot be the legal

cause of Huber's purported harm. Furthermore, this Court cannot redress Huber's purported injury because Indiana law would block any efficacy to this Court ruling upon the constitutionality of Kentucky's laws. Simply put, Huber lacks standing.

The Supreme Court defines injury-in-fact as occurring when the plaintiff has "sustained or is in immediate danger of sustaining some direct injury." *Massachusetts v. Mellon*, 262 U.S. 447, 448 (1923). As the Sixth Circuit has noted, "[w]ithout evidence that the [plaintiffs'] predicted result is 'actual or imminent' such an injury can only be 'conjectural or hypothetical.'" *Michigan Gas Co. v. FERC*, 115 F.3d 1266, 1271 (6th Cir. 1997)(emphasis added). "In order to establish standing to bring an action for declaratory or injunctive relief, 'a plaintiff must show actual present harm or a significant possibility of future harm in order to demonstrate the need for pre-enforcement review.'" *Goleta National Bank v. O'Donnell*, 23 F.Supp.2d 745, 752 (S.D. Ohio)(quoting *National Rifle Ass'n of America v. McGaw*, 132 F.3d 272, 279 (6th cir. 1997)).

Huber has no threat of immediate injury under either Count I or Count II of the Complaint. KRS 244.165 criminalizes the shipment of wine into Kentucky to anyone other than a Kentucky wholesaler. Huber, therefore, lacks an imminent danger of harm because its lawsuit is based upon speculation that a citation, and a cease and desist letter, and a second citation and cease and desist letter will all be issued against it, under 804 KAR 4:330 and KRS 244.165(1). *See Lujan*, 504 U.S. at 560; *see also Lee v. Oregon*, 107 F.3d 1382, 1388-1390 (9th Cir. 1997)(holding that terminally ill plaintiff lacked standing to challenge assisted-suicide law because her injury—attempting to commit suicide while depressed—depended upon a chain of speculative circumstances). However, Huber has made no allegations that it is under imminent threat of enforcement; no citation has been issued; no hearing under KRS Chapter 13B has been scheduled or held; no cease and desist letter has ever been issued against Huber. None of these

things could have occurred because Huber filed its lawsuit on the **same day** that *Granholm* was decided.

Likewise, Huber has never applied or been denied a “small winery” license in Kentucky prior to filing its Complaint; indeed, it does not allege it even inquired about applying for same. How can Huber claim to be harmed by a licensing scheme in Kentucky when it has not even applied or inquired about its eligibility to apply for a license? Kentucky’s ABC may very well interpret its licensing scheme after *Granholm* in a way that would allow out-of-state wineries to obtain a “small winery” license, pursuant to a doctrine of Kentucky law that deems null and void *ab initio* any unconstitutional provisions of a statute. See *Spanish Cove Sanitation, Inc. v. Louisville-Jefferson County Metropolitan Sewer District*, 72 S.W.3d 918, 921 (Ky. 2002). Given the ABC’s broad discretion over licensing of alcoholic beverage sales and the *Spanish Cove* “null and void” doctrine, the ABC might very well have deemed an out-of-state winery capable of becoming a licensee under Kentucky’s small winery licensing statute. Of course, Huber’s complete failure to test the ABC’s response to *Granholm* in its licensing process bars it from having appropriate standing in this lawsuit.

In *Poe v. Ullman*, 367 U.S. 497 (1961), the Supreme Court, per Justice Frankfurter, dismissed a lawsuit seeking a declaratory judgment that various Connecticut statutes were unconstitutional because it forbade the importation of certain contraceptive devices. The present case is identical to *Poe*. “Plaintiffs, however, have been unable to obtain this information for the sole reason that its delivery and use may or will be claimed by the defendant State’s Attorney . . . to constitute offenses against Connecticut law.” *Id.* at 499. The Court even warned against the use of a declaratory judgment action to escape the standing requirement. *Id.* at 506-507. The Supreme Court analyzed the Complaint for allegations that the state was prosecuting or

threatening to prosecute the plaintiffs for importing contraceptive devices. *Id.* at 501. No such threats of prosecution had been made in Connecticut.

Equally important to the decision in *Poe*, the Supreme Court noted that the Connecticut law had been enforced only once in the more than three-quarter centuries since its enactment. The immediacy of plaintiff's lawsuit was completely lacking based upon this "nullifying" fact of previous non-prosecution. "'Deeply embedded traditional ways of carrying out state policy . . .'-or not carrying it out-'are often tougher and truer law than the dead words of the written text.'" *Id.* at 502. Because of this, plaintiffs in *Poe* lacked standing. "The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication." *Id.* at 508. *See also Adult Video Ass'n v. United State Department of Justice*, 71 F.3d 563, 566-67 (6th Cir. 1995)(holding that adult video store's challenge to anti-obscenity law lacked standing because there had been no allegations or evidence that the Department of Justice was threatening to prosecute the video store based upon the challenged law: "A generalized grievance against governmental conduct is insufficient to confer standing upon a party who wishes to enter federal court").⁴

The above law controls Huber's lack of standing. The winery has not alleged any threatened enforcement against it based on KRS 244.165, the statute that allegedly prohibits Huber from shipping wine directly into Kentucky. Huber could not have alleged any threatened enforcement action taken against it after *Granholm* because it filed suit on the same day the decision came down. Any argument by Huber that it is losing money is purely speculative, especially since Indiana's laws make it illegal for Huber to ship to a Kentucky resident or retailer. Finally, similar to *Poe*, the ABC has taken an enforcement posture herein, in light of

⁴ In the First Amendment context, Federal Courts allow pre-enforcement challenges because of the possible "chill" on free speech. A pre-enforcement, facial challenge is inapplicable here under Huber's Commerce Clause arguments. *See Adult Video Ass'n*, 71 F.3d at 567.

Granholtm, clearly revealing that Huber has suffered no injury-in-fact and will not suffer any injury for the foreseeable future.

Huber also fails to meet standing's causation and redressability prongs. Indiana's laws, not Kentucky's, prohibit the shipment of wine into Kentucky. Therefore, there is no causation between Kentucky's laws and Huber's purported legal inability to ship wine into Kentucky. Additionally, the Court cannot redress any alleged harm to Huber in this action because no enforcement action has ever been taken against Huber; the Court cannot, therefore, correct any alleged inequity. Moreover, Indiana's laws are not before this Court for consideration, *i.e.*, this Court has not been asked, nor could if it were (due to personal jurisdiction concerns over Indiana's alcohol control authorities) rule on the constitutionality of Indiana's statutes which on their face, appear to unequivocally prohibit Huber to ship wine to anyone out of the state of Indiana. Lacking legal authority to ship out of Indiana, it would be a classic problem of non-redressability for this Court to issue a ruling that will have no affect on Huber's local-law inability to ship out of Indiana. For all of the above reasons, Huber lacks standing to bring the present lawsuit.

B. The Individual Plaintiffs.

The individual Plaintiffs' allegations only concern Count I of the Complaint: the alleged inability of an out-of-state winery to ship directly to Kentucky residents. They too lack injury-in-fact, causation and redressability. The individual Plaintiffs allege that they want to receive shipments of wine from out-of-state wineries, but that Kentucky law prohibits such transactions. However, the individual Plaintiffs have not alleged, for standing purposes, that they have attempted to purchase wine from a winery and been denied because of Kentucky's statutory/regulatory scheme. Instead, the individual Plaintiffs have only made allegations that

they “would” purchase wine from out-of-state wineries “if Kentucky law permitted them to do so.” The individual Plaintiffs do not claim they have actually attempted and been denied the ability to purchase wine from any out-of-state winery, nor do they allege they were denied the ability to purchase out-of-state wines post-*Granholm*, due to Kentucky’s laws. Without these allegations, there is no injury in fact.

Of course, they could not make such a claim because they filed this lawsuit the same day *Granholm* came down. Furthermore, to the extent Huber is the only out-of-state winery named in the Complaint from which they allege they would like to receive wines, the individual Plaintiffs lack standing because Indiana law prohibits Huber from shipping wine directly to consumers. Causation is lacking for the individual Plaintiffs. Indeed, so is redressability. If individual Plaintiffs have suffered no injury-in-fact then the Court has nothing to correct. Similarly, because Indiana law prohibits the shipment of wine from Indiana to the individual Plaintiffs, and because the Court cannot rule upon Indiana law, it cannot redress the individual Plaintiffs’ alleged harm. “A generalized grievance against governmental conduct is insufficient to confer standing upon a party who wishes to enter federal court.” *Adult Video Ass’n*, 71 F.3d at 566. The individual Plaintiffs have alleged nothing more, failing to provide the immediate harm sufficient to confer standing upon this Court.

II. RIPENESS

Similar to the requirement of standing, ripeness also addresses the subject matter jurisdiction of a federal court to decide a case. “The standing question bears close affinity to the questions of ripeness—whether the harm asserted has matured sufficiently to warrant judicial intervention.” *Warth v. Seldin*, 422 U.S. 499 n.10 (1975). “In the context of a declaratory judgment action, the constitutional requirements for standing and ripeness intersect.” *Goleta*

National Bank, 239 F.Supp.2d at 751). This doctrine “is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.” *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993).

Ripeness concerns are particularly relevant when, as here, a plaintiff seeks declaratory and injunctive relief.

The injunctive and declarative judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in a controversy “ripe” for judicial resolution. . . . [i]ts basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Labs v. Gardner, 387 U.S. 136, 148-149 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

To determine whether a controversy is ripe for review, courts “evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Id.* at 149. The First Circuit has defined these two prongs: “fitness typically involves subsidiary queries concerning finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed, whereas hardship typically turns upon whether the challenged action creates a direct and immediate dilemma for the parties. *Gun Owners’ Action League, Inc. v. Swift*, 284 F.3d 198, 206 (1st Cir. 2002).

Before considering these separate aspects, the effect of Indiana law and its bar on direct shipments to out-of-state residents and retailers makes the current lawsuit merely an “abstract disagreement[] over administrative policies.” *Abbott Labs*, 387 U.S. at 149. Regardless of the constitutionality of Kentucky’s statutory and regulatory scheme, the controversy is abstract

because the actions sought by Plaintiffs are illegal under Indiana's current law. This Court cannot alter that fact.

For ripeness, an important part of the fitness prong requires a final administrative action. The Supreme Court has cautioned that a determination of finality must be viewed pragmatically. *Id.* at 149. According to *Franklin Federal Savings Bank v. Director, Office of Thrift Supervision*, 927 F.2d 1332 (6th Cir. 1991), a final administrative decision “includes ‘interpretive decisions that crystallize or modify private legal rights.’” *Id.* at 1337 (quoting *Federal Trade Commission v. Standard Oil of California*, 449 U.S. 232, 247 (1980)).

While an agency may generally express tentative views without judicial review, ‘[o]nce the agency publicly articulates an unequivocal position, however, and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of proposed judicial review.’

Id. (quoting *Ciba-Geigy Corp. v. United States Environmental Protection Agency*, 801 F.2d 43, 436 (D.C. Cir. 1986)). In other words, the agency's actions become final and subject to judicial review. “Mere contemplation of a course of action does not constitute a final agency action.” *First Federal Sav. Bank & Trust v. Ryan*, 927 F.2d 1345, 1354 (6th Cir. 1991). See also *United Public Workers v. Mitchell*, 330 U.S. 75, 90 (1947)(holding that plaintiffs' allegations that they were deterred from engaging in various political activities were unripe for review because the plaintiffs, except one, had not actually engaged in the political activity).

In *Gun Owners' Action League*, the First Circuit ruled that a challenge to a gun licensing scheme remained unripe because of the failure of the plaintiff to obtain a license and because of the administrative body's power to interpret the statutes at issue. 284 F.3d at 207-209. In the present dispute, the recent Supreme Court decision of *Granholm* altered the landscape of selling and shipping wine throughout the United States. So fundamental was this shift that local alcohol

control agencies and state legislatures must be allowed time to digest the opinion and consider new statutes and regulations in response. The Court should take judicial notice that the General Assembly meets annually for a limited period of time; the next session is scheduled for January 2006.

For Huber, there has been no final, or any, administrative action to make its claims ripe. No enforcement action has been taken against it. No license has been requested by it. The same holds true for the individual Plaintiffs. They do not allege that they have been refused shipment of wine to their residences in Kentucky after having appeared in person at any out-of-state winery to purchase wine. Short of such allegations, their claim lacks standing and ripeness.

Furthermore, the failure of the Plaintiffs to abide by the notice provisions of KRS 418.075 renders Plaintiffs' claims unfit and unripe for judicial review. From all of the pleadings filed to date, it is apparent that Plaintiffs have not notified the Kentucky Attorney General of this lawsuit which questions the constitutionality of certain wine related statutes. KRS 418.075(1) states:

In any proceeding which involves the validity of a statute, the Attorney General of the state shall, before judgment is entered, be served with a copy of the petition, and shall be entitled to be heard

CR 24.03 states: "when the constitutionality of any act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading motion or other paper first raising the challenge upon the Attorney General." While this state rule of civil procedure is not binding on this federal court, it is nonetheless the appropriate procedure to follow in this case as a matter of comity to the Commonwealth of Kentucky since its procedure merely implements KRS 418.075. The Supreme Court of Kentucky has ruled that "KRS 418.075 is mandatory and that strict enforcement of the statute will eliminate the

procedural uncertainty.” *Maney v. Mary Chiles Hospital*, 785 S.W.2d 480, 482 (Ky. 1990); *see also Homestead Nursing Home v. Parker*, 86 S.W.3d 424, 425 (Ky.App. 1999); *Brashars v. Commonwealth*, 25 S.W.3d 58, 65-66 (Ky. 2000); *see also Berrier v. Bizer*, 57 S.W.3d 271, 279 (Ky. 2001); *Sutherland v. Davis*, 286 Ky. 743, 151 S.W.2d 1021, 1025 (1941)(holding, along with *Berrier*, that judicial admissions cannot be disputed, *i.e.*, Plaintiffs cannot dispute that this lawsuit concerns the constitutionality of certain statutes). Failure to make the proper notification before entry of judgment renders void any judgment deciding the constitutionality of a statute. *Mary Chiles Hospital*, 785 S.W.2d at 482. Until such time as the Kentucky Attorney General has been notified and allowed the chance to intervene in this lawsuit, the present dispute is unripe and no judgment, such as on Plaintiffs’ Motion for Judgment on the Pleadings, could properly be entered on the merits of Plaintiffs’ claims.

As to the hardship prong of ripeness, for the reasons stated in the standing argument, Plaintiffs’ alleged injuries lack an immediate dilemma. No enforcement action is pending against Huber, and it has not applied for a “small” winery license. The individual Plaintiffs lack hardship because they have not alleged they have been refused the privilege of purchasing wine from an out-of-state winery that is legally capable of shipping into Kentucky.

III. PULLMAN ABSTENTION

In *Railroad Comm’n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), the Supreme Court issued its seminal opinion that Federal Courts should not interfere when a state action may obviate the federal question.

Pullman abstention is warranted only when a state law is challenged and resolution by the state of certain questions of state law may obviate the federal claims, or when the challenged law is susceptible of a construction by state courts that would eliminate the need to reach the federal question.

GTE North v. Strand, 209 F.3d 909, 921 (6th Cir. 2000)(citing *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 306 (1979)). Pullman abstention requires dismissal in this case because of the equitable relief sought by Plaintiffs. *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 731 (1996).

This lawsuit challenges Kentucky’s alcohol laws. However, as has been shown herein, the challenged laws are susceptible to a construction by state courts and the ABC that would obviate the need for federal intervention. For instance, the current enforcement posture of the ABC as it relates to shipments of wine by common carrier for both in-state and out-of-state wineries that manufacture less than 50,000 gallons of wine a year obviates the need for federal intervention. Similarly, the enforcement posture taken by the ABC as to shipments to Kentucky retailers by out-of-state wineries who manufacture less than 50,000 gallons of wine obviates the need for federal intervention.

Finally, the General Assembly needs to be given an opportunity to address the effect of *Granholm* on the state’s alcohol laws. Plaintiffs have never given the General Assembly the chance, rushing pell mell to the Courthouse. The General Assembly cannot convene at a moments notice due to the rendering of a new, groundbreaking Supreme Court decision. The Court should abstain from ruling on this suit until the legislative body of Kentucky has had a chance to consider *Granholm* and pass legislation in response. Before that happens, the Court should exercise its prudence and allow state government to work.⁵ For these reasons, the Court should dismiss this lawsuit or at the very least, hold it in abeyance, under *Pullman* abstention

⁵ See footnote 2, *supra*, for a discussion as to the puzzling facet of Plaintiffs’ bringing this lawsuit before the ink of *Granholm* even dried, and the position of Wine Institute of America and National Association of American Wineries, of which Huber is no doubt a member, which advises wineries that they should comply with applicable state laws recognizing that “affected states will need [time] to take legislative or regulatory action to address” *Granholm* and to “put the mechanics in place that allow for limited, regulated direct shipping.” See www.wineamerica.org (May 2005 Newsletter).

until the Commonwealth of Kentucky's authorities have had a chance to react to *Granholm*. Doing so will in no way adversely affect Plaintiffs as they are being treated, under the ABC's current enforcement posture, wholly evenhandedly as between in-state and out-of-state wineries.

IV. NO COMMERCE CLAUSE DISCRIMINATION

The State Defendants do not believe the issues of standing and ripeness as to Huber could ever give rise to Huber's being a proper party to prosecute this lawsuit. Accordingly, this Court should dismiss Huber's claims contained in Counts I and II of the Complaint as being wholly unfit for judicial review. If the Court were to decide, however, that the individual Plaintiffs' claims (contained only in Count I of the Complaint) do present a "live" controversy, then these Defendants will herein address the merits of why their claims are incorrect as a matter of law. It should go without saying that these Defendants believe strongly the individual Plaintiffs' claims are likewise barred by the standing and ripeness doctrines, but if the Court disagrees, the individual Plaintiffs' claims should be defeated on the merits as they cannot show actionable discriminatory burdens under the Commerce Clause and *Granholm*.

The Commerce Clause of the United States Constitution is offended when state laws "mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm*, 125 S.Ct. at 1895 (quoting *Oregon Waste Systems, Inc. v. Departmental Quality of Ore.*, 511 U.S. 93, 99 (1994)). Such an evenhanded rule prevents the "economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Id.* (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-326 (1979)). The Commerce Clause forbids "one state in its dealings with another [from] plac[ing] itself in a position of economic isolation." *City of Philadelphia v. New Jersey*,

437 U.S. 617, 623 (1978)(quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525-537-538 (1949)).

After *Granholm*, states are still free to place any restrictions on the sale of wine in their state, so long as those restrictions do not discriminatorily burden out-of-state wineries while benefiting in-state wineries. “The Twenty-First Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. . . . State policies are protected under the Twenty-First Amendment when they treat liquor produced out of state the same as its domestic equivalent.” *Granholm*, 125 S.Ct. at 1905.

KRS 244.165 does not burden out-of-state wineries to the benefit of in-state wineries. No winery, in-state or out, can sell directly to a Kentucky resident without personal appearance of the purchaser at the winery. In other words, a Kentucky resident must be present in person at the winery to make a purchase; direct mail, internet or other remote purchasing methods are not permitted for any winery, in-state or out-of-state. See 804 KAR 4:330, §4, KRS 243.155(1)(f), and 243.156(1)(h). The ABC’s enforcement posture as articulated herein allows both in-state and out-of-state “small” wineries (*i.e.*, wineries that produce less than 50,000 gallons of wine per year) to ship two cases of wine to a Kentucky resident, via a common carrier, when that Kentucky resident is present in person at the winery to purchase same. For example, a Kentucky resident visiting an out-of-state winery can have the winery ship two cases back to his residence; likewise, that same Kentucky resident, while visiting a Kentucky winery, can have the winery ship two cases back to his residence.

Additionally, a Kentucky resident under 804 KAR 4:330 §4 can purchase, in person, at an out-of-state winery an unlimited quantity of wine and ship that wine to her/himself in

Kentucky for personal use. This right to ship unlimited quantities of wine to oneself only exists for Kentucky residents at out-of-state wineries. This statutory scheme does not and could not violate the Commerce Clause or *Granholm*. The playing field is perfectly level between in-state and out-of-state wineries. If anything, the Kentucky resident visiting a winery out-of-state has the ability to ship unlimited quantities of wine into Kentucky for her/his personal use, a right not expressly granted for in-state winery purchases. No winery, in-state or out, is permitted to ship to Kentucky residents without the Kentucky resident appearing in person at the winery to make the purchase. This is not discriminatory in violation of the Commerce Clause.

Kentucky is not a completely “wet” state. To ensure the integrity of Kentucky’s “wet” and “dry” territories, it is Kentucky’s right, under the Twenty-First Amendment, to impose an in-person purchasing requirement for wines bought at in-state and out-of-state wineries. Indeed, there is no direct shipment anywhere in the state, except for the rights granted to in-state and out-of-state wineries. KRS 243.240 bars a retail package licensee from shipping its goods to a customer, even when the customer is present at the store. Retail package licensees may “make deliveries [of alcohol sold] only at the premises designated in the license.”

Granholm only requires that Kentucky law be non-discriminatory, and it is: Kentuckians who want to purchase wines at a winery, no matter where that winery is situated, may only purchase and cause that wine to be shipped to Kentucky if they appear in person at the winery. This aspect of Kentucky law is perfectly legal and in accord with the way in which the Commerce Clause and Twenty-First Amendment have been interpreted by the Supreme Court in *Granholm*.

Accordingly, if the Court deems the individual Plaintiffs in this action to have standing, which for the reasons set out above the Court should not do, the Court must declare that

Kentucky's laws governing the direct shipment of wines into the Commonwealth to individual purchasers of same are constitutional.

CONCLUSION

For the foregoing reasons, Defendants request that Plaintiffs allegations against KRS 243.032, 243.155(1)(d), 243.156(1)(d) and 243.165 be dismissed for lack of standing, ripeness, and violation of the *Pullman* abstention doctrine as well as KRS 418.075. If the Court were to find the individual Plaintiffs have standing, which it should not, the Court should declare that Kentucky's laws are constitutional in that the individual Plaintiffs have no right to receive direct shipments of wine from any place (whether in-state or out-of-state) without personally appearing to purchase same and that Kentucky's laws in this respect are non-discriminatory (and thus constitutional) in their treatment of in-state and out-of-state purchases of wine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2005, I electronically filed the foregoing with the clerk of the court using the CM/ECF system, which will send a notice of electronic filing to the following:

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I further certify that I mailed the foregoing document and the notice of electronic filing by first class mail to the following non-CM/ECF participants:

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