IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

JACQUELINE STOWERS 43565 State Route 303 LaGrange, OH 44050 **JOHN STOWERS** 43565 State Route 303 LaGrange, OH 44050 **-and-** **MANNA STOREHOUSE, LLC** 43565 State Route 303 LaGrange, OH 44050 **Plaintiffs,** **-VS-** **DIRECTOR ROBERT BOGGS** **OHIO DEPARTMENT OF AGRICULTURE** 8995 East Main Street Reynoldsburg, Ohio 43068 **-and-** **LORAIN COUNTY GENERAL HEALTH DISTRICT** 9880 South Murray Ridge Road Elyria, Ohio 44035 **Defendants.**	**Case No. 1:09-CV-264** **Hon. Kathleen O'Malley** **PLAINTIFFS' COMBINED MOTION TO AMEND AND MOTION TO REMAND, AND MEMORANDUM IN SUPPORT**

MOTION TO AMEND AND REMAND

Now come Plaintiffs, by and through counsel, pursuant to Federal Rule of Civil Procedure 15(a)(2) and 28 U.S.C.A. Section 1447(c), and respectfully request that this Court (1)

permit Plaintiffs to amend their Complaint to add an additional party; (2) permit Plaintiffs to amend their Complaint to eliminate unnecessary and duplicative federal causes of action; and (3) remand this case to the Court of Common Pleas for Lorain County, Ohio, where it was originally filed. The Plaintiffs' Amended Complaint is filed contemporaneously.[1]

Respectfully submitted,

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[1] Since this the Second Amended Complaint is being filed in federal court, Plaintiffs have utilized the federal court's case caption for their Second Amended Complaint, even though the amendments amend a state court complaint with state court caption..

MEMORANDUM IN SUPPORT

I. FACTS

Plaintiffs John and Jacqueline Stowers maintain a small, private membership-oriented organic food cooperative and/or buying club in Lagrange, Ohio. They have named this club "Manna Storehouse." Plaintiffs brought this action on December 17, 2008, after the Ohio Department of Agriculture and Lorain County Health Department initiated a December 1, 2008 armed raid on their personal home for their purported operation of "a retail food establishment without a license." The Stowers maintain that they are neither running a retail establishment, nor, under applicable law, do they need a license. During the raid, authorities confiscated the family's personal food supply, personal cell phones, and personal records. While the cell phones have since been returned, Defendants are retaining the family's food and records in an undisclosed location, and have not responded to inquiries designed to facilitate return of the food.

The Stowers' Complaint[2] brings eight separate claims for relief, including claims for (1) unlawful search and seizure; (2) violations of equal protection; (3) violations of due process; (4) unlawful exercise of administrative authority; (5) unlawful application of state police power; (6) violation of inalienable and retained rights; (7) taking of private property without compensation; and (8) replevin and mandamus. Of these eight distinct causes of action, only three cite to federal law. The remaining five claims are solely state-based.

The Stowers have not brought a 42 U.S.C. Section 1983 action for monetary relief. Instead, their Complaint only requests declaratory and injunctive relief, and the return of

[2] The Plaintiffs amended their Complaint once in state court. Consequently, this is their Second Amended Complaint. Hereinafter, the term "Complaint" references Plaintiffs' First Amended Complaint, and "Amended Complaint" references Plaintiffs' Second Amended Complaint.

their family's food. Specifically, the Stowers request (1) a declaration that the December 1 search and seizure was unconstitutional; (2) a declaration that the retail food establishment licensing requirement, the putative violation of which precipitated the raid, is unconstitutional as applied to them; (3) a return of property seized during the raid; and (4) injunctive relief prohibiting further raids against them and similarly situated parties, prohibiting such aggressive tactics by administrative agencies, and prohibiting enforcement of the retail food establishment law against them and similarly situated parties.

On February 4, 2009, Defendants, acting in concert, jointly removed the case to the Northern District of Ohio. On that same date, the Lorain County General Health District also filed its Answer, which primarily contains categorical denials of the allegations contained in the Plaintiffs' Complaint. Several days later, the Ohio Department of Agriculture also filed an Answer categorically denying the allegations in Plaintiffs' Complaint.

Proposed plaintiff Cynthia Frantz resides in Lorain County, Ohio. She is a member of Manna Storehouse, having signed a private membership agreement and paid a membership fee. She asserts that her rights, under the Ohio Constitution, have also been violated, insofar as the state of Ohio has denied her the right to enter into agreements for acquiring food, for personal consumption, from the source of her choice.

II. ISSUES

The first issue is whether Plaintiffs may be permitted leave to amend their Complaint to eliminate federal causes of action. The second issue is whether the Stowers may be permitted to amend their Complaint to add Cynthia Frantz as an additional plaintiff. The third issue is whether, if Plaintiffs are permitted to amend their complaint to remove federal causes of

action, this matter should be remanded to the Lorain County Court of Common Pleas. Each of these issues will be considered in sequence.

III. LAW AND ANALYSIS

A. Amendment to Remove Federal Claims

Federal Rule of Civil Procedure 15(a)(2) permits a party to amend its pleading only with the opposing party's written consent or the court's leave. It further specifies that "the court should freely give leave when justice so requires."

In determining whether "justice so requires," a court may balance harm to the moving party if he or she is not permitted to amend against prejudice caused to the other party if leave to amend is granted.[3] For the reasons specified below, Plaintiffs' Motion for Leave should be granted.

i. The Defendants will not be prejudiced.

In determining whether to grant leave for a plaintiff to amend his complaint, "[t]he most important factor in determining whether leave to amend the complaints should be granted is whether the opposing party will be prejudiced if the movant is permitted to alter his pleadings."[4] Here, there will be no prejudice to the Defendants. The Defendants have each engaged in only two activities in response to Plaintiffs' First Amended Complaint: the removal and the filing of a responsive pleading. Neither of these very limited activities warrants a finding that Defendants will be prejudiced.

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[3] *Foman v. Davis,* 371 U .S. 178, 182 (1962).

[4] *State of Tenn. ex rel. Pierotti v. 777 N. White Station Road, 937 F.Supp. 1296 (W.D.Tenn.*1996):

Firstly, Removal to this Court was strictly a tactical venture in forum shopping. This is demonstrated by the fact that the federal claims Defendants use to justify Removal are duplicative, at best, of the asserted state claims, and by no means determinative of the case. Secondly, Defendants' Answers consist almost entirely of categorical denials. Deleting federal claims will not require Defendants to perform additional legal analysis in formulating a response to the Amended Complaint.

Moreover, Defendants are not prejudiced because deletion of the federal causes of action does not substantively alter any claims or defenses. Such amendment only serves to subtract from the claims the Defendants must defend against. Further, because the federal and state constitutional provisions cited are typically interpreted similarly,[5] removal of federal claims would not trigger the need for Defendants' to contemplate further defenses.

Finally, no significant litigation has taken place before this Court: no pre-trials have taken place, no Rule 26 conference has been conducted, and no motions have been filed. Consequently, Defendants could not seriously maintain that they would be prejudiced were this Court to grant leave to Plaintiffs to amend their Complaint so as to remove federal causes of action.

ii. Leave should not be denied even though amendment may defeat federal jurisdiction

The substantive amendment of a Plaintiffs' Complaint may result in a federal court finding itself devoid of jurisdiction. It is nevertheless appropriate to permit such amendment, even "when it is evident, from the timing and surrounding circumstances of the motion's filing, and from plaintiff's own statement regarding its reasons for amendment, that

[5] See infra., p. 10 and footnote 19.

plaintiff seeks to amend the complaint solely in order to defeat federal jurisdiction in this matter."[6]

In *Kimsey v. Snap-On Tools,* the plaintiff brought state and federal claims in state court, and defendants removed based on the federal RICO claims.[7] Three weeks after removal, the plaintiff sought to amend the complaint under Rule 15(a) to eliminate the RICO claims.[8] The defendant argued that the plaintiff should not be permitted to amend his complaint where the effect is to avoid federal jurisdiction.[9] The *Kimsey* court held as follows:

> Plaintiffs state that they no longer wish to pursue federal RICO claims. The Court can envision a host of reasons for such a decision including the expense and complexity of pursuing RICO claims. *While Plaintiffs may be attempting to avoid federal jurisdiction by amending the complaint ... such a reason 'does not diminish the right of these plaintiffs to set the tone of their case by alleging what they choose.'*[10]

Precedent from within the Sixth Circuit overwhelmingly supports and applies the reasoning of *Kimsey*. In *State of Tenn. ex rel. Pierotti v. 777 N. White Station Road,* the Court considered whether to allow the plaintiff to amend its complaints to remove federal claims "when it is evident * * * that plaintiff seeks to amend the complaints solely in order to defeat federal jurisdiction in this matter."[11] Despite lamentations as to whether the "manipulative tactics [were] inappropriate," the district court nonetheless determined that "they have not

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6 *State of Tenn. ex rel. Pierotti v. 777 N. White Station Road, 937 F.Supp. 1296 (W.D.Tenn.*1996)

7 *Kimsey v. Snap-On Tools,* 752 F.Supp. 693 (W.D.N.C.1990).

8 Id.

9 Id.

10 Id., quoting *McGann v. Mungo,* 578 F.Supp. 1413, at 1415 (D.S.C.1982). Emphasis added.

11 *State of Tenn. ex rel. Pierotti v. 777 N. White Station Road, 937 F.Supp. 1296 (W.D.Tenn.*1996)

adversely impacted defendants' case" and granted the plaintiff's motion to amend.[12] The Court then added that "although plaintiff's aim in withdrawing the RICO claim is to return to the state forum for the adjudication of this case, *plaintiff is allowed to determine what claims it brings against defendants and thus, is entitled to make such an amendment*."[13]

Further, in *Green v. Union Planters Bank,* the Court was confronted with a situation similar to that in *Pierotti*, insofar as the defendant removed a state court complaint alleging both state and federal claims, and the plaintiff, upon removal, moved to amend the complaint to withdraw the federal claims and requested remand to state court.[14] In rendering its decision, the *Green* court recognized that "*although plaintiff's aim in withdrawing the [federal] claim is to return to the state forum for the adjudication of this case, [the] plaintiff is allowed to determine what claims it brings against defendants and, thus, is entitled to make such an amendment*."[15] The Court went a step further, emphasizing that these axioms of amendment and remand apply even if a plaintiff is "attempting to avoid federal jurisdiction by amending the complaint," as "such a reason does not diminish the right of [a plaintiff] to set the tone of [his] case by alleging what [he] choose[s]."[16]

Finally, in *Wihite v. City of Richmond,* the plaintiff "essentially ask[ed] the Court to allow him to amend his complaint to reflect only state law claims."[17] The Court noted that

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12 Id., at 1308.

13 Id. Emphasis added.

14 *Green v. Union Planters Bank,* Not Reported in F.Supp.2d, 2006 WL 1699463 (W.D.Tenn.).

15 Id.

16 *Id.* at 1302 (citing *Kimsey v. Snap-On Tools,* 752 F.Supp. 693, 694 (W.D.N.C.1990)).

17 *Wihite v. City of Richmond,* Not Reported in F.Supp.2d, 2007 WL 2020244 (E.D.Ky.)

"the Federal Rules of Civil Procedure provide that a party may amend its pleading by leave of court, leave that shall be freely given when justice so requires," and then concluded that the plaintiff should be permitted to amend his complaint, as amendment directed towards remand was not unjust.[18] *Pierotti*, *Green*, and *Wihite* clearly demonstrate that, within the Sixth Circuit, a plaintiff should be permitted to amend his complaint, even though such amendment may ostensibly divest the federal court of subject matter jurisdiction.

Here, the Plaintiffs are merely trying to establish a state-based tone to their Complaint. Plaintiffs brought their claims in recognition of the independent force and enhanced protectiveness of the Ohio Constitution. This is evidenced by the Complaint itself, which articulates claims, under applicable Ohio law, for (1) unlawful search and seizure; (2) violations of equal protection; (3) violations of due process; (4) unlawful exercise of administrative authority; (5) unlawful application of state police power; (6) violation of inalienable and retained rights; (7) taking of private property without compensation; and (8) Replevin and Mandamus. Of these eight distinct causes of action, only three mention federal law. The remaining five claims are solely state-based.

Of the three claims citing to federal law (search and seizure, equal protection, and due process), each federal constitutional provision runs parallel, and is ancillary, to the relevant provision of the Ohio Constitution. Specifically, the Stowers' claim for unlawful search and seizure cites both Section 14, Article I of the Ohio Constitution, and its federal corollary, the Fourth Amendment to the U.S. Constitution. Their claim for violation of Equal Protection cites both Section 2, Article I of the Ohio Constitution, and its federal corollary, the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Finally, their claim for violation

[18] Id.

of Due Process cites both Section 16, Article I of the Ohio Constitution, and its federal corollary, the Fifth Amendment, as applied through the Fourteenth Amendment, of the U.S. Constitution.

Each of these federal corollaries is dispensable because they offer no protection beyond that afforded by the correlative provisions of the Ohio Constitution. Ohio Supreme Court makes this much clear, having interpreted these provisions of the Ohio Constitution to be coextensive with those of the federal constitution.[19] Meanwhile, the possibility always exists that the Ohio Supreme Court will interpret any of these provisions of the Ohio Constitution as more protective of individual rights. For instance, in 2008, in *Gardner*, *infra*, at least three Ohio Supreme Court justices expressed a willingness to interpret the Ohio Constitution's due process protections as greater than federal counterparts.[20] Thus the federal constitutional claims articulated in Plaintiffs' Complaint are merely duplicative and dispensable.

Finally, notwithstanding the extensive precedent cited above, the Court may have reservations that amendment directed towards remand amounts to a type of gamesmanship or forum-shopping. Any such reservations should not influence this case. A full consideration of the matter demonstrates that it was nothing more than Defendants' gamesmanship and forum-shopping that brought this case to federal court in the first instance. This is illustrated by the facts that (1) nearly all parties relevant to the case, and witnesses, reside in Lorain County; (2)

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[19] See *Eastwood Mall, Inc. v. Slanco* (1994), 68 Ohio St.3d 221, 222, 626 N.E.2d 59 (holding that "Section 11, Article I of the Constitution provides: 'Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right,' and that 'Ohio courts have held that the free speech guarantees accorded by the Ohio Constitution are no broader than the First Amendment. * * * Therefore, the First Amendment is the proper basis for interpretation of Section 11, Article I of the Ohio Constitution.'"); *Bd. of Lucas Cty. Commrs. v. Waterville Twp. Bd. of Trustees* (2007), 171 Ohio App.3d 354, 870 N.E.2d 791 (acknowledging that "[t]he Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and of Section 2, Article I, Ohio Constitution, are functional equivalents,"); and *State v. Gardner* (2008), 118 Ohio St.3d 420, 889 N.E.2d 995 (recognizing "We have held that '[t]he 'due course of law' clause of Section 16, Article I of the Ohio Constitution , has been considered the equivalent of the 'due process of law' clause in the Fourteenth Amendment.'").

[20] See Footnotes 36 and 37 for more exhaustive treatment, and further illustrations.

both Defendants are state-based and/or county-based; and (3) all eight of Plaintiffs' claims are overwhelmingly state-based.

Given these circumstances, Defendants Removals was likely engineered to (1) hinder and delay proceedings that have drawn significant media scrutiny; (2) avoid the hearing of this matter by the duly-elected judiciary of Lorain County; or (3) for some other purely tactical purpose. In short, allowing reservations about gamesmanship and forum-shopping to prohibit Plaintiffs' amendment of their pleadings would have the arbitrary effect of endorsing Defendants' gamesmanship and forum-shopping. Consequently, the Plaintiffs should be permitted leave to amend their Complaint, to remove all federal claims.

B. Amendment to Add an Additional Plaintiff

This court should also grant leave to Plaintiffs to amend their Complaint so as to add Cynthia Frantz as a plaintiff. Mrs. Frantz represents a point of view and a constitutional right that is not represented by any of the current plaintiffs. Specifically, Ms. Frantz is a member of Manna Storehouse, through which she orders food, from local farmers-- food that would not otherwise be available to her as an individual consumer.[21] She maintains that, under the Ohio Constitution, she may not be prohibited from voluntarily cooperating with other citizens of Ohio to purchase food, for personal consumption, from a source of her choice. Put another way, it is her position that the state of Ohio lacks the authority when junxtaposed with her constitutional rights, to dictate what food, if not demonstrably unsafe, she can acquire and consume.

Given the early point in these proceedings, where no dispositive motions have been filed and no discovery has been conducted, adding Ms. Frantz as a plaintiff does not

[21] See Plaintiffs' Second Amended Complaint, at Paragraphs 9 through 14.

prejudice Defendants. Presumably, Defendants, having denied that the Stowers have a right to freely cooperate and contract to distribute organic food, would also deny that Ms. Frantz has the rights articulate above. Consequently, Plaintiffs should be permitted leave to amend their Complaint to add Ms. Frantz as a party-plaintiff.

C. Remand

Assuming that, for the reasons articulated above, this Court permits Plaintiffs to amend their Complaint, this case should be remanded to the Lorain County Court of Common Pleas. Pursuant to 28 U.S.C. 1447(c), a motion to remand is the proper vehicle for challenging a defendant's notice of removal. A motion to remand also appears to be the mechanism by which a plaintiff urges a federal court to decline to continue to exercise supplemental jurisdiction once all federal claims are eliminated.[22]

Pursuant to 28 U.S.C. § 1331, a federal court acquires jurisdiction over any action that "aris[es] under the Constitution, laws, or treatises of the United States," known as federal question jurisdiction. If original jurisdiction is lacking as to an individual claim, then the Court may exercise its supplemental jurisdiction pursuant to 28 U.S.C. § 1367. Section 1367(a) allows a federal court to hear a claim which is part of the same "case or controversy" as the original claim.

In *Gibbs*, The U.S. Supreme Court broadly outlined the criteria to be observed by trial courts in deciding whether to employ the power of pendent or supplemental jurisdiction:

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims

[22] See *infra*.

> should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals.[23]

The courts of the Sixth Circuit Court of Appeals have generally applied this principle, but have ruled even more definitely in favor of state jurisdiction.[24] They indicate that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."[25] Further, elimination of all federal claims gives the district court "a powerful reason to choose not to continue to exercise jurisdiction."[26]

The Sixth Circuit Court of Appeals has specifically ruled that "[w]hen all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state law claims, or remanding them to state court if the action was removed."[27] In cases that have been removed to federal court, however, we have recognized that "when all federal claims have been dismissed before trial, the best course is to remand the state law claims to the state court from which the case was removed."[28]

However, if uncertain how to proceed, the federal court should take into consideration (1) convenience and fairness to the parties, (2) the existence of any underlying

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23 *United Mine Workers of American v. Gibbs*, 383 U.S. 715, at 726, 86 S.Ct. at 1139.

24 *Anderson v. Cader Publishing, Ltd.,* Not Reported in F.Supp.2d, 2006 WL 2404508 (E.D.Mich.), citing *Schwitzgebel v. City of Strongsville,* 898 F.Supp. 1208 (N.D.OH), aff'd, 97 F.3d 1452 (6th Cir.), *cert. denied,* 522 U.S. 827 (1995); *Nash and Assoc., Inc. v. Lum's of Ohio, Inc.,* 484 F.2d 392, 395- 96 (6th Cir. 1973)

25 *Anderson,* supra; *see also Page v. City of Southfield,* 45 F.3d 128, 132 (6th Cir.1995) (holding that if a court determines that it lacks subject matter jurisdiction over a case, it can *sua sponte* remand the case to state court at any time prior to final judgment).

26 *Carnegie-Mellon University v. Cohill,* 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988).

27 *Novak v. MetroHealth Medical Center*, 503 F.3d 572 (6th Cir. 2007); *Musson Theatrical v. Federal Express Corp.,* 89 F.3d 1244, 1254-55 (6th Cir. 1996).

28 *Novak supra*, citing *Thurman v. DaimlerChrysler, Inc.,* 397 F.3d 352, 359 (6th Cir.2004).

issues of federal policy, (3) comity and (4) considerations of judicial economy.[29] "When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice."[30] For the reasons demonstrated below, not just one, but all four of these factors weigh in favor of remand to the Lorain County Court of Common Pleas.

i. Convenience and fairness favor Remand.

As noted above in support of Plaintiffs' Motion for Leave to Amend, the parties, witnesses and evidence related to this case are in Lorain County. This matter is only before the court as a result of Defendants' purely tactical considerations. Thus convenience and fairness concerns weigh in favor of remand.

ii. There is no federal policy at Issue.

The Stowers wish to avail themselves of the additional protections offered by the *Ohio* Constitution. The Stowers intend to argue that provisions of the Ohio Constitution specified in their Complaint should be interpreted so as to protect their rights to a greater extent than do the corresponding provisions of the federal Constitution.

Such an assertion is on firm ground. The United States Supreme Court has repeatedly reminded state courts that they are free to construe their state constitutions so as to provide different, and broader, protections of individual liberties than those offered by the

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[29] *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966); *Shanaghan v. Cahill,* 58 F.3d 106 (4th Cir.1995); *Cohill,* 484 U.S. at 350, 108 S.Ct. at 619; *Timm v. The Mead Corp.,* 32 F.3d 273, 276 (7th Cir.1994).

[30] *Anderson v. Cader Publishing, Ltd.,* Not Reported in F.Supp.2d, 2006 WL 2404508 (E.D.Mich.), citing *Carnegie-Mellon University v. Cohill,* 484 U.S. 343, 350 (1988).

federal Constitution.[31] It has further declared that "state courts' interpretations of state constitutions are to be accepted as final, as long as the state court plainly states that its decision is based on independent and adequate state grounds."[32]

This deference echoes the judicial philosophy of federalism. That is, that "the decisions of the [United States Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of *state* law. Accordingly, Ohio courts are free to interpret the Ohio Constitution without adherence or deference to federal court decisions-- the United States Constitution provides a floor, not a ceiling, for individual rights enjoyed by state citizens."[33] Put another way, "states may not deny individuals or groups the minimum level of protections mandated by the federal Constitution. *However, there is no prohibition against granting individuals or groups greater or broader protections*."[34]

Ohio courts recognize this capacity:

> [W]e believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the

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[31] *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, citing, *e.g., City of Mesquite v. Aladdin's Castle, Inc.* (1982), 455 U.S. 283, 293, 102 S.Ct. 1070, 1077, 71 L.Ed.2d 152, 162 (" * * * [A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."); and *California v. Greenwood* (1988), 486 U.S. 35, 43, 108 S.Ct. 1625, 1630, 100 L.Ed.2d 30, 39 ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."). See, also, *Pruneyard Shopping Ctr. v. Robins* (1980), 447 U.S. 74, 81, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741, 752.

[32] *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, citing *Michigan v. Long* (1983), 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476-3477, 77 L.Ed.2d 1201, 1214-1215.

[33] *PruneYard Shopping Ctr. v. Robbins* (1980), 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741; *State v. Brown* (1992), 63 Ohio St.3d 349, 588 N.E.2d 113.

[34] *Arnold,* supra.

> United States Supreme Court has provided in its interpretation of the federal Bill of Rights, *state courts are unrestricted in according greater civil liberties and protections to individuals and groups*.[35]

The above statement merely reaffirms that Ohio courts have a history of finding that the Ohio Constitution provides protections for individual liberty that stretch beyond those of the U.S. Constitution.[36]

In 2008, the Ohio Supreme Court acknowledged, in *State v. Gardner,* that "[w]e are, of course, free to determine that the Ohio Constitution confers greater rights on its citizens than those provided by the federal Constitution, and we have not hesitated to do so in cases warranting an expansion,"[37] and recognized that "state constitutions are a vital and independent source of law."[38]

The Stowers brought their claims in recognition of the enhanced protections guaranteed by the Ohio Constitution. All eight of their claims are overwhelmingly state based,

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[35] *Arnold,* supra. After making this paradigmatic statement, the Ohio Supreme Court, recognized an obligation "not to disturb the clear protections provided by the drafters of [the Ohio] Constitution." As such, in *Arnold*, it interpreted the Ohio Constitution's protection of the Right to Bear Arms, articulated in Section 4, Article I of the Ohio Constitution, as more protective of that right than the Second Amendment. Emphasis added.

[36] *Preterm Cleveland v. Voinovich* (1993), 89 Ohio App.3d 684, 627 N.E.2d 570, citing *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540, 21 O.O. 422, 38 N.E.2d 70. To the same effect, see, for example, *State v. Smith* (1931), 123 Ohio St. 237, 174 N.E. 768; *State v. Mapp* (1960), 170 Ohio St. 427, 11 O.O.2d 169, 166 N.E.2d 387; *State ex rel. The Repository v. Unger* (1986), 28 Ohio St.3d 418, 28 OBR 472, 504 N.E.2d 37; and *Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 12 O.O.3d 327, 390 N.E.2d 813, all cases where the Ohio Supreme Court found the Ohio Constitution as conferring rights greater than those of the U.S. Constitution. See also *Gardner*, infra, *Arnold*, supra, and *Norwood v. Horney* 110 Ohio St.3d 353, 853 N.E.2d 1115, 36 Envtl. L. Rep. 20,161, 2006 -Ohio- 3799

[37] *State v. Gardner* (2008) 118 Ohio St.3d 420, 889 N.E.2d 995, citing *Norwood v. Horney,* 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (holding that the Ohio Constitution's Takings Clause affords greater protection than the corresponding federal provision).

[38] *Gardner*, supra, citing generally William J. Brennan Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights (1986), 61 N.Y.U.L.Rev. 535. asdf

and only three of the claims specified in the original complaint contain any federal component. Thus there is no federal policy at issue in this case.

To the contrary it is distinctly plausible that this case will present novel issues of state constitutional law. Plaintiffs will request that the trial court recognize the protections of Sections 2, 14, and 16 of Article I of the Ohio Constitution as more protective of the Stowers' rights. Such a legal theory is more appropriate for the courts of the state of Ohio. Thus federal policy considerations weigh in favor of remand.

iii. Comity favors Remand.

At the core of the federal judicial system is the principle that the federal courts are courts of limited jurisdiction.[39] For these reasons, "removal statutes are strictly construed against removal," unless a party clearly demonstrates that the federal court has jurisdiction.[40] Accordingly, courts within the Sixth Circuit have duly noted as follows:

> Regardless of 'judicial resources' or the pleas of the parties before it, a federal court must proceed with caution in deciding that it has subject matter jurisdiction. *The Constitution allows federal courts only a limited and special jurisdiction, and powers not given to the federal courts by Congress are reserved to the primary repositories of American judicial power: state courts.* The constitutional primacy of state court jurisdiction does not change merely because a dispute touches on issues of federal law.[41]

Accordingly, the notion of 'comity' involves the "proper respect for state functions."[42] It reflects "a system in which there is sensitivity to the legitimate interests of both

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[39] *Chicago, Burlington & Quincy Ry. v. Willard* (1911), 220 U.S. 413, 31 S.Ct. 460, 55 L.Ed. 521.

[40] *Shamrock Oil & Gas Corp. v. Sheets* (1941), 313 U.S. 100, 61 S.Ct. 868, 85 L.Ed. 1214; 14 Wright, Miller and Cooper, Federal Practice and Procedure, section 3721, pp. 533-37; *Marler v. Amoco Oil Co., Inc*. (E.D.N.C., 1992), 793 F.Supp. 656.

[41] *Green v. Union Planters Bank,* Not Reported in F.Supp.2d, 2006 WL 1699463 (W.D.Tenn.). Emphasis added.

[42] Id.

State and National Government, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activity of the States."[43]

"[W]hen the state law issues are complicated, or state law is unclear or in the process of evolving, comity considerations may weigh toward remand of the state law claims."[44] Further, federal courts should avoid making decisions of state law when few or no federal issues remain, and no affirmative need for federal jurisdiction exists.[45]

Here, Plaintiffs' Complaints, both original and amended, seek only declaratory and injunctive relief. "It is particularly appropriate that a state court is given the opportunity to interpret the application of its own laws, and to resolve any unsettled questions concerning those laws."[46] Consequently, concerns of comity favor remand.

iv. Judicial economy favors Remand.

The United States Supreme Court has indicated that in cases where "the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed subsequently as well."[47] Even though some later cases have indicated that federal courts should exercise some discretion in deciding whether to proceed with the state claims,[48] in the overwhelming majority of cases where the proceedings in federal court

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43 *Pennzoil Company v. Texaco, Inc.,* 481 U.S. 1, 10, 107 S.Ct. 1519, 1525-26, 95 L.Ed.2d 1 (1987).

44 *Anderson v. Cader Publishing, Ltd.,* Not Reported in F.Supp.2d, 2006 WL 2404508 (E.D.Mich.)

45 Id.

46 Id.

47 *Gibbs*, 383 U.S. at 726, 86 S.Ct. at 1139.

48 *See Rosado v. Wyman,* 397 U.S. 397, 404, 90 S.Ct. 1207, 1213, 25 L.Ed.2d 442 (1970); *Silva v. Vowell,* 621 F.2d 640 (5th Cir.1980); *McGann v. Mungo,* 578 F.Supp. 1413 (D.S.C.1982); *H.J. Inc. v. Northwestern Bell Telephone Company,* 648 F.Supp. 419 (D.Minn.1986).

are still in the early stages, courts have generally dismissed or remanded the state claims after the elimination of all federal claims, on the ground that there has been no substantial commitment of federal judicial resources.[49] Ultimately then, with regard to judicial economy, two considerations exist: (1) whether the federal court has spent a substantial amount of time on the state law claim; and (2) how much time and resources a state court must expend on work already completed by the federal court.[50]

Here, the answers to those inquiries are clear. Federal judicial resources have not been used for consideration of any of the substantive claims in this matter. Deciding this motion is the first action that this Court has had to take in this case. Further, judicial economy "will be served by the narrowing of issues which results from plaintiff's abandonment of a substantial federal claim. In the same way, judicial economy will be served [if] this court will no longer be burdened with a state-law case."[51] Consequently, concerns of judicial economy demonstrate that this case should be remanded.

Based on the foregoing analysis, all relevant factors demonstrate that Plaintiffs should be permitted leave to amend their Complaint, and that this matter should then be remanded to the Lorain County Court of Common Pleas.

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[49] *See, e.g., Briggs v. American Air Filter Co.,* 455 F.Supp. 179 (N.D.Ga.1978); *Houlihan v. Anderson-Stokes, Inc.,* 434 F.Supp. 1324, 1329 (D.D.C.1977); *H.J. Inc.,* 648 F.Supp. at 429; *Mead,* 32 F.3d at 277 (stating, "[e]xactly when before trial the federal claim is eliminated, however, is relevant. For example, dismissal at the pleading stage usually counsels strongly in favor of relinquishing jurisdiction because at that point in a case 'judicial resources' typically have not been heavily tapped").

[50] *Markey v. City of Chicago,* 1995 WL 127791, (N.D.Ill.), quoting *Moses v. County of Kenosha,* 826 F.2d 708, 711 (7th Cir.1987).

[51] *Loutfy v. R.R. Donnelley & Sons, Co.,* 148 F.R.D. 599, 603 (N.D.Ill.1993).

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the following this 3rd day of March, 2009:

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