

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Derek Block, <i>et al.</i>,	:	
	:	
	:	
Plaintiffs,	:	Case No. 2:20-cv-03686
	:	
v.	:	Judge Sarah D. Morrison
	:	
Jim Canepa, <i>et al.</i>,	:	Magistrate Judge Chelsey M. Vascura
	:	
Defendants.	:	

DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56(a), Defendant Dave Yost, Attorney General of Ohio, respectfully moves the Court to grant summary judgment in favor of the Defendant on Plaintiffs’ sole remaining claim, dismiss Plaintiffs’ Complaint with prejudice, and grant any further relief the Court deems just and proper. A memorandum in support is attached.

Respectfully submitted,

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As the first step in a two-step analysis for determining whether a challenged law violates the Dormant Commerce Clause, a court must determine whether the law discriminates against out-of-state goods or non-resident economic actors. *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2461-62 (2019). Any inquiry into discrimination assumes a comparison of “substantially similar entities.” *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). If the challenged law is not discriminatory, but merely has only “incidental effects” on interstate commerce, the law is valid unless the burden on commerce is “clearly excessive in relation to the putative local benefits.” *Or. Waste Sys. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994).

In this case, the Plaintiff Illinois retailer is not similarly situated to Ohio retailers. Ohio retailers must operate within Ohio’s three-tier system and abide by price restrictions such as bans on volume discounts and bans on sales on credit. Illinois retailers are not required to operate within the Ohio three-tier system and can receive volume discounts or buy on credit. Therefore, the Ohio retail shipment laws are not discriminatory and are subject to the lowest level of Dormant Commerce Clause scrutiny. The laws survive this scrutiny because they produce numerous health and safety benefits that outweigh any incident effects on interstate commerce in alcohol.

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- b. Courts have consistently upheld State alcohol shipment laws that differentiate between in-state retailers, which have to take part in the State’s three tier system, and out-of-state retailers which do not28

Four appellate courts—including the Sixth Circuit—have already considered challenges to State alcohol shipment laws substantially similar to Ohio’s challenged retail shipment laws. *Lebamoff; Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1180 (8th Cir.2021), *cert. denied*, 142 S. Ct. 335 (2021); *Wine Country Gift Baskets v. Steen*, 612 F.3d 809, 820 (5th Cir.2010), *cert. denied*, 562 U.S. 1270; *Arnold’s Wines, Inc. v. Boyle*, 571 F.3d 185 (2d

Cir.2009). The courts differentiated these laws—which ensured that alcohol passed through a three-tier system—from laws previously struck down by the Supreme Court, which either created unequally-applied exceptions to the three-tier system or were unrelated to the three-tier system.

- C. Ohio’s challenged retail shipment laws are analogous to similar laws consistently upheld by the federal courts, and are a valid exercise of Ohio’s Twenty-first Amendment authority31

Ohio’s retail shipment laws are highly similar to laws upheld by the federal appellate courts in *Lebamoff*, *Sarasota Wines*, *Wine Country Gift Baskets*, and *Arnold’s Wines*. Like those laws, Ohio’s retail shipment laws ensure that alcohol products sold to Ohio consumers are routed through Ohio’s three-tier system and further the legitimate goals of limiting alcohol abuse, combatting underage drinking, ensuring product safety, and promoting the efficient collection of tax revenue.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

As the specific subject of two separate amendments to the Constitution, alcohol is unique among products sold in the United States. Infamously banned by the Eighteenth Amendment from manufacture, transportation, or sale within the United States during the Prohibition era, alcoholic beverages were legalized once again by the passage of the Twenty-first Amendment fourteen years later. But the Twenty-first Amendment did not merely repeal the Eighteenth and end Prohibition. It also specifically gave each individual State the explicit authority to regulate the importation and transportation of alcohol within its borders. No other good or service is so specifically and explicitly consigned by the Constitution to the realm of State authority and regulation.

To protect the health, safety, and welfare of its residents, the State of Ohio (“Ohio”), through the duly elected representatives of its General Assembly, established a comprehensive liquor control law. The law utilizes a system of permits, regulations, and inspections to promote a safe and orderly market for the transportation, sale, and consumption of alcohol in Ohio. As part of this system, Ohio restricts the ability for retailers to make direct-to-consumer shipments of beer and wine to retailers physically located in Ohio.

Unlike out-of-state retailers, Ohio beer and wine retailers must operate within Ohio’s “three-tier system” of alcohol regulation and submit to direct regulation and oversight, including extensive permit requirements, regular physical inspections by the Ohio Division of Liquor Control, and oversight from the Ohio State Highway Patrol Ohio Investigative Unit. Ohio vigorously enforces these requirements and exercises this oversight. Each year, the Division of Liquor Control conducts thousands of physical inspections of alcohol wholesalers and retailers, issuing hundreds of correction orders or citations. Meanwhile, the Ohio Investigative Unit regularly conducts sting operations to ensure that retailers do not sell alcohol to underage

customers, and investigates other allegations of illegal activity by permit holders. These requirements, inspections, and oversight help limit the abuse or overconsumption of alcohol, prevent underage drinking, ensure that alcohol products are safe and sanitary, and ensure that alcohol-related taxes are collected accurately and efficiently. In the near century since the end of Prohibition and the passage of the Twenty-first Amendment, the federal courts have consistently recognized that the individual States have a legitimate interest in promoting such interests within their boundaries, and the Twenty-first Amendment affords them expansive authority to do so.

Plaintiffs effectively ask the Court to end this clear and longstanding Constitutional scheme by gutting Ohio's authority to regulate alcohol shipped into and within its boundaries. In contrast to the myriad alcohol-related social and health concerns that States must consider, Plaintiffs have a singular concern—to open the Ohio wine market as broadly as possible. To that end, Plaintiffs challenge Ohio's prohibition on direct-to-consumer shipments of wine by retailers outside of Ohio. Specifically, Plaintiffs allege that Ohio's retailer shipping restrictions violate the Dormant Commerce Clause of the United States Constitution. They ask the Court to invalidate these restrictions and order Ohio to allow shipments by retailers far beyond the reach of its three-tier system and its inspectors and enforcement agents.

Ohio's retailer shipment restrictions do not run afoul of the Constitution—Plaintiffs' request does. Requiring a State to throw open its boundaries to a nationwide alcohol retail market directly contravenes the language and intent of the Twenty-first Amendment, which explicitly contemplates state-level control of alcohol markets. Recognizing this, the courts, while not entirely exempting state alcohol regulations from Dormant Commerce Clause scrutiny, subject state alcohol regulations to a much lower level of scrutiny than any other category of state economic regulations. As long as the *predominant* effect of a state alcohol law is something other than the

economic protection of in-state commercial interests, the law must be upheld.

Ohio's retailer shipping restrictions are an integral part of a broader alcohol control scheme that is vigorously enforced and furthers the non-protectionist public health and welfare goals of temperance, the prevention of underage consumption, product safety, and taxation. Consequently, the retail shipping restrictions are unquestionably a valid exercise of Ohio's Twenty-first amendment authority. Four Circuit Courts of Appeals, including the Sixth Circuit, have rejected similar Dormant Commerce Clause challenges to substantially similar retail shipping restrictions. *See Lebamoff Enters. v. Whitmer*, 956 F.3d 863, 869 (6th Cir.2020), *cert. denied*, 141 S. Ct. 1049 (2021); *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1180 (8th Cir.2021), *cert. denied*, 142 S. Ct. 335 (2021); *Wine Country Gift Baskets v. Steen*, 612 F.3d 809, 820 (5th Cir.2010), *cert. denied*, 562 U.S. 1270; *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir.2009). Accordingly, the Court should uphold Ohio's retail shipping laws, and grant summary judgment to Defendant.

II. STATEMENT OF FACTS

A. The Ohio General Assembly has crafted a comprehensive system governing the transportation, distribution, and sale of alcohol within the State.

Chapters 4301 and 4303 of the Ohio Revised Code, as well as related administrative code provisions, pervasively control the importation, distribution, and sale of alcohol in Ohio. Responsibility and authority for the enforcement of Ohio's liquor control laws are diffused across several state agencies, with principal responsibility divided among the Ohio Division of Liquor Control (the "Division"), the Ohio Department of Public Safety's Ohio Investigative Unit, and the Liquor Control Commission. *See, e.g.*, Ohio Rev. Code §§ 4301.03, 4301.04, 4301.10, 5502.13. Each of these agencies plays its own unique role in ensuring that Ohio has a safe and orderly market for the manufacture, importation, transportation, and distribution of alcohol.

1. Wine is distributed in Ohio through a carefully crafted three-tier system.

Like many states, Ohio controls the sale of wine within its borders through a three-tier system of suppliers (which includes manufacturers and importers), wholesaler distributors, and retailers.¹ *Tri-County Wholesale Distribs. v. Wine Group, Inc.*, 565 F. App'x 477, 478 (6th Cir. 2012); *see also, e.g.*, Ohio Rev. Code § 4303.03 (permit for certain wine manufacturers and importers); Ohio Rev. Code §§ 4303.07, 4303.10 (permits for wholesale distributors of wine); Ohio Rev. Code § 4303.12 (permit for certain wine retailers). With limited exceptions, consumers in Ohio may purchase only wine that has moved through this three-tier system. *See Tri-County Wholesale Distribs.*, 565 F. App'x at 478; Declaration of Shaun Powers, attached hereto as Exhibit 1, at ¶ 7; *see also generally* Ohio Rev. Code § 4301.01(B)(3) (defining “wine” for purposes of Ohio law).

In this three-tier system, the wine manufacturer or importer (first tier) may sell wine to a wholesale distributor (second tier) who may then sell the wine to a retailer (third tier). *Tri-County Wholesale Distribs.*, 565 F. App'x at 478. Participants at each tier of the three-tier system must hold a permit issued by the Division. *See, e.g.*, Ohio Rev. Code §§ 4303.03, 4303.031, 4303.07, 4303.071, 4303.08, 4303.10, 4303.12, 4303.14, 4303.18, 4303.181, 4303.184.

Generally, before wine reaches a consumer in Ohio, it must pass through this three tier-system. Wholesale distributors must obtain the wine that they distribute to retailers from a duly-permitted wine manufacturer or importer. Ohio Rev. Code § 4303.07 (requiring the holder of a B-2 permit authorizing the wholesale distribution of bottled wine to purchase that wine from

¹ Beer is also manufactured, distributed, and sold through the three-tier system. *See* Ohio Rev. Code § 4303.02 (permit for certain manufacturers of beer); Ohio Rev. Code § 4303.06 (permit for wholesale distributors of beer); Ohio Rev. Code § 4303.11 (permit for retailers of beer). The State of Ohio has the exclusive right to distribute and sell spirituous liquor. Ohio Rev. Code § 4301.10(A)(3); Ohio Rev. Code § 4301.19.

manufacturers or importers that hold a permit issued by the Division); Ohio Rev. Code § 4303.10 (similar provision regarding the holder of a B-5 permit authorizing the purchase, importation, bottling, and distribution of wine); *see also* Ohio Rev. Code § 4301.58(C). Likewise, retailers must obtain the wine that they sell to consumers from a duly-permitted wholesale distributor or from a manufacturer that holds a permit issued by the Division that authorizes the manufacturer to sell wine directly to retailers. Ohio Rev. Code § 4303.35 (retail permit holders shall not purchase wine for resale, except from the holders of A or B permits); *see also* Ohio Rev. Code § 4303.03(B)(1) (prohibiting the holder of an A-2 wine-manufacturer permit from selling directly to a retailer, unless the manufacturer also obtains a B-2a permit authorizing sale of wine to a retail permit holder); Ohio Adm. Code 4301:1-1-46(F) (prohibiting wholesale distributors from knowingly selling alcohol at wholesale to a person who is not a retail permit holder).

Generally, no one person or entity can hold a permit in more than one tier of the three-tier system. *See, e.g.*, Ohio Rev. Code § 4301.24(B); Ohio Adm. Code 4301:1-1-24(C) (prohibiting retail permit holders from having any financial interest in a wholesale distributor). For example, a business that holds a wholesale permit cannot also hold a retail permit. *Id.*

2. Ohio provides several varieties of wine retail permits.

In order to sell wine at retail in Ohio, an entity must obtain one of several types of retail permits issued by the Division. *See, e.g.*, Ohio Rev. Code §§ 4303.12 (C-2 permit authorizing sale of wine and mixed beverages in sealed containers for carryout only), 4303.14 (D-2 permit authorizing sale of wine and mixed beverages for on premises consumption or off-premises consumption in original sealed containers until 1:00 a.m.); *see also* Declaration of Frank Chung, attached hereto as Exhibit 2, at ¶ 6. Ohio law generally divides retail permits into two categories: (1) permits that allow the sale of alcoholic beverages for consumption off the licensed premises

only; and (2) permits that allow the sale of alcoholic beverages for on-premises consumption or off-premises consumption in original sealed containers.² (*See* Exhibit 2, Chung Decl. at ¶ 6.)

A retail permit issued by the Division attaches to a certain location—the licensed premises—that must be located in Ohio. *See* Ohio Rev. Code § 4303.27. However, Ohio does not impose a residency requirement for owners of retail establishments. *See* Ohio Rev. Code § 4303.29 (specifying that permit holders shall be United States citizens, but not requiring permit holders to be Ohio residents).

In their Complaint, Plaintiffs focus primarily on the C-2 permit, which is one of several retail permits issued by the Division. (*See* Compl., Doc. 1 at PageID 4, ¶ 13.) A C-2 permit holder may ship or deliver wine to Ohio consumers who are over the age of twenty-one. Ohio Rev. Code § 4303.27; *see also generally* Ohio Rev. Code §§ 4301.01(A)(2), 4303.12, 4303.22. A retailer that holds one of the several other types of permits authorizing the sale of wine may also ship or deliver wine to Ohio consumers who are of legal drinking age. *See* Ohio Rev. Code § 4303.27; *see also generally* Ohio Rev. Code § 4303.22. Because Ohio retail permit holders are required by law to obtain the wine that they sell to consumers from entities that hold permits issued by the Division (*see* Ohio Rev. Code §§ 4301.58(C), 4303.35), wine that is shipped or delivered to Ohio consumers by retail permit holders has necessarily passed through the three-tier system.

3. A Class S permit allows direct-to-consumer shipping by select in-state and out-of-state entities.

Ohio law does permit out-of-state entities to ship wine directly to Ohio consumers in some limited circumstances. Until recently, certain out-of-state retailers could apply for an S permit from

² The following permit types authorize the carryout sale of wine at retail: C-2, D-2, D-5, D-5a, D-5b, D-5c, D-5d, D-5i, D-5j, D-5l, D-5m, D-5n, and D-5o. *See* Ohio Rev. Code §§ 4303.12, 4303.14, 4303.151, 4303.18, 4303.181.

the Division. Specifically, before September 30, 2021, an S permit was available to a person or entity that met one of the following three criteria: (1) was a brand owner or United States importer of beer or wine; (2) was the designated agent of a brand owner or importer for all beer or wine sold in Ohio by that owner or importer; or (3) was a wine manufacturer that produced less than 250,000 gallons of wine per year and was entitled to a federal tax credit under 27 C.F.R. § 24.278. *See* 2011 Am.Sub.H.B. 114 (129th Ohio Gen. A.). The S permit was available to Ohio entities as well as out-of-state entities. *Id.* The holder of an S permit was authorized to ship wine to Ohio consumers through a common carrier that holds an H permit issued by the Division. *Id.* Thus, under former Ohio Rev. Code § 4303.232, a retailer that was a brand owner or importer of a wine or was designated as the agent of that brand owner or importer could obtain an S permit and ship that wine directly to Ohio consumers.

The Ohio General Assembly eliminated S permits with enactment of 2021 Am. Sub. H.B. 110 (134th Ohio Gen. A.).³ Effective September 30, 2021, the legislature replaced S permits with two new permit options: an S-1 permit and an S-2 permit. The eligibility requirements for S-1 and S-2 permits differ from the S permit in that they are only available to wine (or, in the case of the S-1 permit, wine or beer) *manufacturers*. *See* Ohio Rev. Code §§ 4303.232 (an S-1 permit is available to a person that manufactures beer or less than 250,000 gallons of wine per year), 4303.233 (an S-2 permit is available to a person that manufactures 250,000 gallons or more of wine per year). Unlike retailers, all wine manufacturers are required to hold a federal license issued by the United States Department of Treasury, Alcohol and Tobacco Tax and Trade Bureau (TTB). (Expert Report of Bruce D. Stevenson and Gary E. Jones, attached hereto as Exhibit 3, at ¶ 110;

³ The expert report prepared by Dr. William Kerr in this matter discusses Ohio's S permit under former Ohio Rev. Code § 4303.232. Dr. Kerr's expert report was prepared before the Ohio General Assembly enacted 2021 Am. Sub. H.B. 110.

see also Exhibit 2, Chung Decl., ¶ 8.) Manufacturers that hold an S-1 permit may ship wine or beer directly to Ohio consumers under the terms of the permit. Ohio Rev. Code § 4303.232. Similarly, manufacturers that hold an S-2 permit may ship wine directly to Ohio consumers under the terms of the permit. Ohio Rev. Code § 4303.233. Entities that obtained an S permit under former Ohio Rev. Code 4303.232 continue to hold “grandfathered” rights under that permit, which is now characterized by the Division as a grandfathered S-1 permit. (*See* Exhibit 2, Chung Decl. at ¶ 9.) That is, those entities that hold a grandfathered S-1 permit are authorized to ship wine directly to Ohio consumers. Otherwise, only out-of-state *manufacturers* that hold an S-1 or S-2 permit from the Division, or in-state retail permit holders, may ship wine directly to Ohio consumers. *See* Ohio Rev. Code § 4303.236(C).

4. Ohio wholesalers serve a fundamental role in the three-tier system.

Wholesalers play a key role in Ohio’s three-tier system of wine distribution. *See Lebamoff*, 956 F.3d at 868. They serve as the in-state path through which wine must pass before reaching consumers. This allows the State of Ohio to control the amount of wine sold through price controls, taxation, and other regulations. For example, Ohio law levies taxes on the volume of wine at the wholesale level. *See* Ohio Rev. Code § 4303.33(C)(2); *see also* Expert Report of Dr. William Kerr, attached hereto as Exhibit 4, at ¶ 41; Ohio Rev. Code §§ 4301.43 (tax on the sale or distribution of wine), 4301.432 (tax to encourage Ohio grape industries). Certain permit holders, including wholesale distributors of wine, must file a report with the Ohio Tax Commissioner each month and remit the taxes collected under Ohio Rev. Code §§ 4301.43 and 4301.432. Ohio Rev. Code 4303.33(C).⁴

⁴ The Division may not renew the liquor permit of any permit holder that the Tax Commissioner has identified as having a tax delinquency. Ohio Rev. Code § 4303.271(D); *see also* Exhibit 2, Chung Decl., at ¶ 28.

Additionally, Ohio law imposes minimum prices on the sale of wine, in part through the participation of wholesaler distributors in the three-tier system. Ohio Rev. Code § 4301.13; Ohio Adm. Code 4301:1-1-03(C).⁵ Ohio law prohibits wholesalers from offering volume discounts or selling on credit. Ohio Adm. Code 4301:1-1-43(A)(2), (A)(5), (H)(2). Wholesalers are prohibited from giving anything of value to retailers and prohibited from having a financial interest in any producer, retailer, or other wholesaler. *See* Ohio Rev. Code § 4301.24(B); Ohio Adm. Code 4301:1-1-24(C); Ohio Adm. Code 4301:1-1-43(A)(1)-(2), (B). To enforce these rules, Ohio requires wholesalers to post and hold their prices (which ensures uniformity across retailers and compliance with the pricing restrictions) and to keep records of all sales ready for inspection. Ohio Rev. Code § 4301.47 (record keeping requirements); Ohio Adm. Code 4301:1-1-03(C) (price schedule requirements).

5. The Ohio Liquor Control Act and related administrative regulations comprehensively regulate the distribution and sale of wine.

Ohio law bestows the Division, the Ohio Investigative Unit, and the Liquor Control Commission with many responsibilities related to the orderly manufacture, distribution, and sale of wine. The Division is authorized to issue an initial permit to a supplier, wholesale distributor, or retailer only after the Division has conducted a physical inspection of the proposed permit premises. Ohio Adm. Code 4301:1-1-12. Additionally, the Division is tasked with conducting

⁵ As explained in Ohio Adm. Code 4301:1-1-03(C), the State’s minimum markup requirements on the sale of wine reflect “the policy and intent of the [Liquor Control C]ommission to maintain effective control over the sale and distribution of wine, an alcoholic beverage, and to prevent abuses caused by the disorderly and unregulated sale of wine.” Mandatory price markups “prevent aggressive sales practices that improperly stimulate purchase and consumption, thereby endangering the state’s efforts to promote responsible, and discourage intemperate, consumption of alcoholic beverages; eliminate discriminatory sales practices that threaten the survival of wholesale distributors and retail permit holders; preserve orderly competition; ensure fair prices over the long term; assure adequate consumer choice; and promote compliance with Ohio law and rule.” Ohio Adm. Code 4301:1-1-03(C).

renewal inspections of permit holders. Ohio Adm. Code 4301:1-1-19. During these inspections, the Division must verify that permit holders and prospective permit holders meet all requirements imposed by Ohio Rev. Code Chapters 4301 and 4303, and the Ohio Administrative Code. *See, e.g.*, Ohio Adm. Code 4301:1-1-03(C) (pricing regulations); Ohio Adm. Code 4301:1-1-17 (sanitation requirements); Ohio Adm. Code 4301:1-1-28 (cleaning and sterilizing requirements); Ohio Adm. Code 4301:1-1-44 (advertising requirements).

In addition to inspections conducted by the Division, retail permit holders are subject to compliance checks by the Division, the Ohio Investigative Unit, and other law enforcement agencies. Ohio Rev. Code § 4301.635. Compliance checks are intended to ensure that retail permit holders are not selling alcohol to underage individuals. *Id.* Permit holders are required to admit Division Compliance Agents, Ohio Investigative Unit Enforcement Agents, and other law enforcement officers to the permit premises and shall not allow patrons or others to interfere with an inspection or investigation of the permit premises. Ohio Adm. Code 4301:1-1-62. When a Division Compliance Agent or an Enforcement Agent of the Ohio Investigative Unit witnesses a violation of Ohio's liquor control laws or rules, the permit holder is issued a notice or citation. Ohio Adm. Code 4301:1-1-61. Citations are heard by the Liquor Control Commission and may result in the revocation, suspension, or cancelation of the permit holder's liquor permit. Ohio Rev. Code § 4301.25; Ohio Adm. Code 4301:1-1-65.

B. Ohio's wine retailers offer thousands of different wine products to Ohio consumers.

Ohio has issued permits to approximately 16,318 retailers to sell wine for off-premises consumption. (*See Exhibit 2, Chung Decl.*, ¶ 7.) Wholesale distributors obtain the wine products ultimately sold to Ohio consumers from thousands of suppliers. (*See Exhibit 3, Stevenson and Jones Report*, ¶ 118.) In the period between January 1, 2019, and February 21, 2021, the Division

registered over 16,000 wine products alone. While Plaintiffs allege that Ohio consumers have limited access to certain wine products (*see, e.g.*, Compl., Doc. 1 at PageID 8, ¶ 36), often manufacturers choose to allocate rare or hard to find wines to specific retailers or markets. (Depo Tr. of Tom Wark, Doc. 49 at PageID 697-99; *see also* Depo Tr. of Pl. Miller, Doc. 48 at PageID 444-46; Depo. Tr. of Christopher Donovan, Doc. 50 at PageID 873-74). These decisions are not made by the State. (*Id.*)

C. Ohio’s comprehensive liquor control laws are designed to mitigate public health problems and other social ills related to alcohol by promoting temperance, combatting underage drinking, requiring transparent markets, and promoting the collection of excise and sales taxes.

1. Efforts to effectively regulate alcohol use have a long history in the United States.

Systemic efforts to combat the ill public health and social effects of alcohol overconsumption in the United States date back to at least the Nineteenth Century, when “tied houses” led to a proliferation of cheap alcohol and overconsumption. (Exhibit 4, Kerr Report, ¶ 14.) The term “tied house” refers to the vertical integration of large-scale alcohol manufacturers and alcohol retailers. (*Id.* at ¶¶ 13-14.) Manufacturers either owned or controlled a large number of local retail establishments, and pressured those retailers to increase alcohol product sales by whatever means necessary. (*Id.* at ¶ 14.) This pressure triggered price wars between retailers, resulting in lower alcohol prices and higher levels of excessive alcohol consumption. (*Id.*) Alcohol-related activity led to an increase in criminal activity and social ills such as public drunkenness, theft, gambling, and prostitution. (Exhibit 3, Stevenson and Jones Report, ¶ 3.) The increase in alcohol abuse and related social ills eventually led to a widespread public backlash that resulted in the passage of the Eighteenth Amendment, a near-total ban on the sale of alcoholic beverages in the United States. (Exhibit 4, Kerr Report, ¶ 15.)

Prohibition of alcohol backfired, resulting in even higher social and financial cost than the abuses it was designed to combat. (*Id.* at ¶ 16.) Specifically, Prohibition led to widespread bootlegging and racketeering, and authorities throughout the United States spent \$300 million to enforce alcohol bans while losing an estimated \$11 billion in excise tax revenue. (*Id.*) Consequently, the United States adopted the Twenty-first Amendment fourteen years after the adoption of the Eighteenth. (*Id.* at ¶ 17.) The Twenty-first Amendment reversed the Eighteenth Amendment's prohibition on alcohol and gave the individual States, Territories, and Possessions the authority to establish laws governing the importation and transportation of alcohol within their respective borders. U.S. Const. amend. XXI.

2. Ohio's three-tier system and attendant restrictions on retail shipping help promote temperance, combat underage drinking, ensure orderly markets with safe products, and aid in the efficient collection of tax revenue that can offset public expenses associated with alcohol abuse.

Ohio exercised its Twenty-first Amendment authority by adopting the above-described liquor control scheme. The Ohio General Assembly made no mystery about the purpose of the laws, reaffirming as recently as April 2021 its intent to:

- (A) Promote temperance by preventing consumption by underage persons and by discouraging abusive consumption;
- (B) Promote orderly markets by requiring transparent, accountable, and stable distribution of beer and intoxicating liquor and preventing unfair competition;
- (C) Facilitate the collection of taxes related to the sale and consumption of beer and intoxicating liquor.

Ohio Rev. Code § 4301.011; *see also* 2020 Am.Sub.H.B. 674 (133rd Ohio Gen. A.). The three-tier scheme and its attendant features—including the prohibition on direct-to-consumer deliveries by out-of-state retailers—directly address known societal risks related to alcohol consumption, including traffic accidents, alcohol-related crime, underage drinking, defective products, and

alcohol-related deaths and diseases. (Exhibit 4, Kerr Report, ¶¶ 30-68.)

a. Price controls and taxes imposed at the wholesaler level help increase alcohol prices, thereby reducing alcohol consumption and alcohol-related health and safety problems.

One of the primary purposes and effects of Ohio's three-tier system is to decrease alcohol demand by increasing prices. (*Id.* at ¶¶ 18, 21.) As noted above, Ohio imposes numerous price-control devices through the wholesaler tier, including the prohibition of sales on credit, prohibitions on volume discounts (i.e. charging retailers that purchase a large volume of product a lower per-unit price), and mandatory minimum price markups. Notably, Illinois, where Plaintiff House of Glunz, Inc. is located, does not impose such discount, credit, and price markup restrictions. (Exhibit 3, Stevenson and Jones Report, ¶ 116.)

Ohio also imposes an excise tax on alcohol at the wholesaler level and sales taxes at the retailer level. The effect of these price-control devices and taxes is to increase the retail price of alcoholic beverages sold in Ohio. (Exhibit 4, Kerr Report, ¶ 22.) Numerous studies have shown that higher alcohol prices lead to decreased alcohol consumption, along with decreases in behaviors such as binge drinking. (*Id.* at ¶¶ 22, 57, 59-60.) Expenses related to alcohol abuse—including health care costs, lost productivity, and criminal justice expenses, cost Ohio approximately \$8.5 billion annually as of 2010. (*Id.* at ¶ 67.)

Decrease in alcohol consumption—related to increased prices—helps reduce the adverse societal consequences of abusive alcohol consumption, including impaired driving, traffic accidents, alcohol-related crimes, alcohol-related mortality and risky sexual behavior. (*Id.* at ¶ 61.) Studies have shown strong associations between reduced alcohol prices and increased rates of traffic fatalities. (*Id.* at ¶ 62.) Illinois, for example, saw a 26 percent reduction in fatal alcohol-related traffic accidents after that State increased excise taxes on beer, wine, and spiritous liquor.

(*Id.*) Another study identified a nationwide reduction in injury-mortality rates and violent crime following increase in federal excise taxes on alcoholic beverages. (*Id.* at ¶ 63.) Experienced Ohio prosecutors recognize connections between excessive alcohol use and criminal activity in Ohio, and support limitations on the availability of alcohol in order to reduce crimes such as vehicular homicide, rape, sexual assault and domestic violence. (Declaration of Melissa Schiffel, attached hereto as Exhibit 5, ¶¶ 5-6.) Studies in multiple states have recorded reductions in alcohol-related mortality associated with tax increases, as well as reductions in domestic violence rates following a State’s imposition of higher alcohol taxes. (Exhibit 4, Kerr Report, ¶¶ 64-65.) Finally, studies of Illinois and Maryland linked increases in alcohol taxes to reduced rates of sexually transmitted diseases. (*Id.* at ¶ 66.)

b. The restriction of retailer permits and shipping privileges to entities physically located in Ohio helps combat underage drinking by enabling Ohio to utilize disincentives such as criminal prosecution and cutting off a retailer’s product supply.

In addition to price controls and tax measures designed to reduce overconsumption and promote health and safety, Ohio’s liquor control scheme has several features to combat underage drinking. Key among those features is the restriction of retail permits to retailers located in Ohio and operating within Ohio’s three-tier system. Studies and surveys have shown that the ability to order alcohol online for delivery can present an increased opportunity for minors to surreptitiously purchase alcohol. *See e.g.* Rebecca S. Williams & Kurt M. Ribisil, *Internet Alcohol Sales to Minors*, 166 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 808 (2012) (researchers at the University of North Carolina ran a study in which minors attempted to purchase alcohol online—45 percent of attempts were successful); Miranda Hitti, *Teens Buying Alcohol Online*, WEBMD (Aug. 11, 2006), <https://www.webmd.com/parenting/news/20060811/teens-buy-alcohol-online> (reporting the results of surveys showing that more than half a million minors reported personally

buying alcohol online).

Although Ohio-based retailers can accept online orders for alcohol delivery, Ohio has mechanisms to strongly disincentivize those retailers from selling to minors and to discipline those that do—mechanisms that cannot be used against out-of-state retailers. Specifically, the Ohio Investigative Unit, can conduct physical sting operations at Ohio retailers, using undercover agents and participating underage purchasers to verify that a retailer is not selling to minors. (Declaration of Erik Lockhart, attached hereto as Exhibit 6, at ¶¶ 13, 16.) If a retailer does make such an illegal sale, the Ohio Investigative Unit can impose criminal penalties, and will either arrest the individual who makes the illegal sale or issue that individual a criminal summons. (*Id.* at ¶ 17.) The Ohio Investigative Unit does not have such criminal jurisdiction over employees of out-of-state retailers. (*Id.* at ¶ 29.)

Additionally, Ohio has the ability to punish in-state retailers that sell alcohol to minors by cutting off the retailer's supply of product. (Exhibit 4, Kerr Report, ¶ 35.) Because Ohio retailers must purchase alcohol from Ohio-based wholesalers—which, like the retailers, must hold a state-issued permit—Ohio has the ability to discipline any wholesalers that sell to a retailer that has had its permit revoked or suspended for selling to minors. (*Id.* at ¶ 35.) Ohio does not have a similar ability to stop out-of-state wholesalers from providing products to out-of-state retailers who sell alcohol to minors, because Ohio does not have jurisdiction over those wholesalers' permits (if, in fact, the retailer's home state requires it to buy from wholesalers in the first place). (*Id.*) Therefore, while an out-of-state retailer who sells alcohol to minors in Ohio may be disciplined by having its Ohio sales privileges removed, it would not face the more extreme consequence of entirely losing its product supply, which is a consequence that Ohio-based retailers must consider. (*Id.*)

c. The restriction of retailer permits and shipping privileges to entities physically located in Ohio helps ensure that alcohol products are safe and sanitary.

Ohio's restriction of retail permits and its attendant delivery and shipping privileges to in-state retailers also enables Ohio to directly inspect alcohol products for safety and sanitation purposes. Because Ohio retailers must purchase their alcohol products from Ohio wholesalers, Ohio has the ability to inspect the physical premises of both the wholesaler and the retailer to ensure product safety. Such inspections are a routine part of permit renewal inspections for both wholesalers and retailers, with Division of Liquor Control Compliance Agents regularly checking to make sure that wholesalers and retailers store alcoholic beverages in a clean, dry, and secure facility. (Exhibit 1, Powers Decl., at ¶¶ 15.a.ii, 15.b.i, 16.a, 17.a; Exhibit 2, Chung Decl., at ¶¶ 12.a, 14.a, 17.a, 18i.) Additionally, if a product is subsequently found to be adulterated or unsafe, Ohio can trace the source of the problem back to an Ohio wholesaler or retailer and perform further inspections or initiate a recall as appropriate. (Exhibit 4, Kerr Report, ¶¶ 39-40.)

Ohio has issued large-scale recalls of defective alcohol products in the past. In 2012, the State traced and recalled 4,000 cases of spiritous liquor after learning of a defect that caused parts of a glass stopper to fall into the bottle and contaminate the product. *See Faulty Bottle Stoppers Trigger Tequila Recall*, DAYTON DAILY NEWS, Aug. 2, 2012, <https://www.daytondailynews.com/news/local/faulty-bottle-stoppers-trigger-tequila-recall/OTr2ecGZymmO9bXYP0iMsO/> (last visited Jan. 26, 2022). Due to the State's high degree of control over spirituous liquor, the Division was able to halt shipments and remove bottles from store shelves. By contrast, tracking a defective product sold by an out-of-state retailer would be more challenging to trace back to its source, and Ohio would lack jurisdiction to require a large-scale product recall by out-of-state entities. (Exhibit 4, Kerr Report, ¶ 40.)

d. The collection of excise and sales taxes from in-state wholesalers and retailers helps Ohio offset the public cost of alcohol abuse.

As noted above, Ohio imposes excise taxes on alcoholic beverages, which is generally assessed and collected at the wholesaler tier. If out-of-state retailer sells alcohol product that does not pass through an Ohio wholesaler, Ohio cannot collect excise taxes at that wholesale level. (*Id.* at ¶ 44.) Additionally, Ohio collects a sales tax at the retail level. Currently, out-of-state retailers that ship to Ohio consumers (often illegally) do not consistently collect or assess sales taxes. (Depo Tr. of Pl. Miller, Doc. 48 at PageID 440-42; Depo Tr. of Christopher Donovan, Doc. 50 at PageID 889; Exhibit 1, Powers Decl. at ¶¶ 26-27.) For example, Plaintiff Kenneth Miller admitted to purchasing wine from out-of-state retailers on which he paid no sales tax. (Depo Tr. of Pl. Miller, Doc. 48 at PageID 440-42.) Additionally, Shaun Powers, a Compliance Agent Supervisor with the Division, ordered wine from multiple out-of-state retailers as part of a sting operation in 2020 and was not assessed sales taxes. (Exhibit 1, Powers Decl., ¶¶ 26-27.)

In addition to helping reduce overconsumption of alcohol by increasing prices, Ohio's sales and excise taxes serve an additional function—helping to offset the societal costs of alcohol abuse. In 2018, Ohio raised approximately \$48.1 million in taxes on spiritous liquor, \$42.9 million from taxes on beer, and \$14 million in taxes on wine. (Exhibit 4, Kerr Report, ¶ 42.) This revenue only offsets a fraction of the approximately \$8.5 billion annual cost to Ohio of alcohol-related health costs, productivity loss, and criminal justice expenses as of 2010. Any further reduction of alcohol tax revenue would, in addition to potentially cheapening alcohol, further widen the gap between the public cost of alcohol abuse to Ohioans and the revenue collected to at least partially offset that cost. (*Id.* at ¶¶ 44-45.)

D. Ohio enforces its laws through regular inspections, sting operations, correction orders, and citations.

Ohio vigorously enforces its liquor control laws through the Division, the Ohio Investigative Unit, and the Liquor Control Commission. As of January 24, 2022, there are approximately 26,000 active Division-issued liquor permits held by suppliers, wholesale distributors, or retailers. (Exhibit 2, Chung Decl., ¶ 7.) The Division, the Ohio Investigative Unit, and the Liquor Control Commission are tasked with ensuring that all permit holders comply with the provisions of Ohio Rev. Code Chapters 4301 and 4303, as well as Ohio Adm. Code 4301.

Before issuing a liquor permit to a new applicant, the Division inspects the proposed permit premises for compliance with Ohio's laws and regulations. (*Id.* at ¶ 11; *see also* Ohio Adm. Code 4301:1-1-12). The Division employs 28 Compliance Agents, who are tasked with conducting these initial inspections, as well renewal inspections and complaint-based inspections. During an initial inspection of the premises of a wholesale distributor of wine, Division Compliance Agents verify the proposed wholesaler is in compliance with all Ohio laws and regulations, including, but not limited to, the following: the building is of sound construction, clean, well ventilated, and secured solely by the permit applicant; bottling areas are constructed of materials that can be easily cleaned; storage areas are secure and kept clean and dry to ensure sanitation of products; the permit applicant holds a valid federal permit issued by the TTB. (Exhibit 1, Powers Decl., ¶ 15; Exhibit 2, Chung Decl., ¶¶ 12-13.) During the initial inspection of the premises of an applicant for a retail permit, Division Compliance Agents verify compliance with Ohio laws and regulations, including, but not limited to, the following: the business is clean, dry, and occupied and operated solely by the permit applicant; the building has operable utilities, coolers, shelving, and cash registers onsite; nonalcoholic products and general merchandise are on premises; the address of the permit premises is correct and matches the address listed on the permit application. (Exhibit 1, Powers Decl., ¶¶

16-18; Exhibit 2, Chung Decl., ¶¶ 14-16.)

Additionally, the Division's Compliance Agents are responsible for conducting renewal inspections of permit holders. (Exhibit 1, Powers Decl., ¶ 8; Exhibit 2, Chung Decl., ¶ 11; *see also* Ohio Adm. Code 4301:1-1-19.) During a renewal inspection of the premises of a wholesale wine distributor, Division Compliance Agents verify the wholesaler remains in compliance with all Ohio laws and regulations, including, but not limited to, the following: the permit holder maintains a clean, dry building; the permit holder holds a valid federal permit issued by TTB; all products on the premises are properly registered with the Division for sale; no "tied house" conflicts exist (i.e. ensuring that no employee is also employed by a manufacturer or retailer). (Exhibit 1, Powers Decl., ¶ 19; Exhibit 2, Chung Decl., ¶ 17.) During a renewal inspection of the premises of a retail permit holder, Compliance Agents verify that the retailer maintains compliance with all applicable laws and regulations, including, but not limited to, the following: the business is clean, dry, and occupied and operated solely by the permit holder; the products meet minimum price markup requirements; the permit holder is following all advertising restrictions; no alcohol is stored, sold, or consumed outside the permitted premises. (Exhibit 1, Powers Decl., ¶¶ 20-22; Exhibit 2, Chung Decl., ¶¶ 18-19.)

In addition to initial and renewal inspections, the Division also conducts complaint-based inspections. (Exhibit 1, Powers Decl., ¶ 23; Exhibit 2, Chung Decl., ¶ 20.) During a complaint-based inspection, Compliance Agents inspect the permit holder's premises for compliance with the law(s) or regulation(s) implicated by the complaint and complete a full renewal inspection. (*Id.*) If a Compliance Agent finds a violation of Ohio law or regulation during an initial, renewal, or complaint-based inspection, the Division can issue either a Correction Notice or a Citation. (Exhibit 1, Powers Decl., ¶ 24; Exhibit 2, Chung Decl., ¶ 24.) A Correction Notice is a letter issued

to the permit holder identifying the violations observed and instructing the permit holder to correct the violations within a certain time period. (*Id.*) A Citation is a formal initiation of disciplinary action against the permit holder for a violation of Ohio Rev. Code Chapter 4301 or 4303 or Ohio Adm. Code 4301. (*Id.*) The Ohio Liquor Control Commission hears Citation cases and such cases may result in fines against the permit holder or suspension or revocation of the permit. (*Id.*; *see also* Ohio Rev. Code § 4301.25; Ohio Adm. Code 4301:1-1-65.)

During the three-year period between September 1, 2018, and August 31, 2021, the Division conduct approximately 12,312 renewal inspections of permit holders.⁶ (Exhibit 2, Chung Decl., ¶¶ 21-23.) These 12,312 renewal inspections include both routine, annual renewal inspections as well as renewal inspections conducted as part of a complaint-based inspection. (*Id.*) During that same time period, the Division issued 1,357 Correction Notices and 129 citations to permit holders. (*Id.* at ¶¶ 25-26.)

In addition to the Division's role in ensuring permit holders comply with Ohio's statutes and regulations, the Ohio Investigative Unit also plays an important role in ensuring compliance with the law. The Ohio Investigative Unit is a statewide law enforcement agency that is responsible for enforcing Ohio's alcohol, tobacco, and food stamp fraud laws. (Exhibit 6, Lockhart Decl., ¶ 3.) It employs approximately 78 fully-sworn, plainclothes peace officers as Enforcement Agents. (*Id.* at ¶¶ 6-7.) Enforcement Agents conduct a variety of criminal investigations and compliance checks of entities that hold permits from the Division. (*Id.* at ¶¶ 10-20.) The Ohio Investigative Unit conducts compliance checks to ensure that permit holders are not selling alcohol to minors. (*Id.* at

⁶ The number of renewal inspections conducted by the Division during 2020 and 2021 was lower than expected due to the ongoing impacts of the COVID-19 pandemic. (Exhibit 2, Chung Decl., ¶¶ 22-23.) For example, the Division conducted 5,396 renewal inspections between September 1, 2018, and August 31, 2019; however, the Division conducted 3,166 renewal inspections between September 1, 2019, and September 1, 2020. (*Id.*)

¶¶ 13, 16-17.) During compliance checks, Enforcement Agents will work with an underage individual to attempt purchases. (*Id.*) Ohio Investigative Unit compliance checks may be initiated by a complaint or may be scheduled leading up to large scale events. (*Id.* at ¶ 12.)

The Ohio Investigative Unit's Enforcement Agents also investigate other suspected illegal activity related to liquor sales. (*Id.* at ¶¶ 14, 20.) These investigations may be complaint-driven or the result of Enforcement Agents' routine field work. (*Id.* at ¶ 19.) They relate to a variety of criminal matters, including locations operating without a permit, the illegal manufacture or sale of alcohol, gambling, prostitution, or the sale of alcohol to minors. (*Id.* at ¶¶ 14.) Enforcement Agents who uncover violations of Ohio Rev. Code Chapter 4301 or 4303 or related administrative regulations are authorized to make arrests, issue criminal summonses, and issue citations, as appropriate depending on the circumstances of the particular violation. (*Id.* at ¶ 21.) For example, if an Enforcement Agent observes a retailer selling alcohol to a minor, the agent will either arrest the clerk who made the sale or issue a criminal summons to the clerk. (*Id.* at ¶ 17.) The agent will also issue an administrative citation to the permit holder. (*Id.*)

Between September 1, 2018, and August 31, 2021, the Ohio Investigative Unit checked 1,531 locations via alcohol compliance checks throughout the State of Ohio.⁷ (*Id.* at ¶¶ 23-25.) During that same time period, the Ohio Investigative Unit logged over 9,000 cases. (*Id.* at ¶¶ 26-28; *see also* Declaration of Jaclyn Snyder, attached hereto as Exhibit 7, ¶ 6 (authenticating the Ohio Investigative Unit's records pertaining to citations and arrests for certain specified violations between July 22, 2017, and July 22, 2020.))

⁷ The number of compliance checks conducted by the Ohio Investigative Unit during 2020 and 2021 was lower than normal due to the impacts of the COVID-19 pandemic. (Exhibit 6, Lockhart Decl., ¶¶ 24-25).

E. Plaintiffs’ lawsuit will create a hole in Ohio’s three-tier system.

Plaintiffs, an Illinois wine retailer and an Ohio wine consumer, ask the Court to invalidate a key feature of Ohio’s alcohol control scheme under the Dormant Commerce Clause. Specifically, Plaintiffs ask the Court to invalidate Ohio’s prohibition on direct-to-consumer deliveries by wine retailers located outside of Ohio. (Compl., Doc. 1, PageID 9.)⁸ If Plaintiffs prevail, Ohio’s alcohol market will be open to sales by retailers not located in the state. More importantly, it will also be open to retailers who do not purchase alcohol from Ohio-permitted wholesalers and, necessarily, alcohol products that did not pass through Ohio’s three-tier system. (Exhibit 4, Kerr Report, ¶ 28.) Consequently, Ohio will not be able to collect excise taxes on the products sold, nor will it be able to impose minimum markup requirements on the products or ensure that the wholesalers do not sell retailers products on credit or offer volume-based discounts to retailers. As noted above, Illinois—where Plaintiff House of Glunz, Inc. is located and licensed—allows wholesalers to offer volume discounts and to sell to retailers on credit. 235 Ill. Comp. Stat. § 5/6-5 (allowing “merchandising credit in the ordinary course of business for a period not to exceed thirty days”); 235 Ill. Comp. Stat. §§ 5/6-9.10, 5/6-9.15 (authorizing quantity discount programs pursuant to “cooperative purchasing agreements”).

III. LAW AND ARGUMENT

A. Ohio’s retail shipment laws do not discriminate against substantially similar out-of-state entities.

The Constitution’s Commerce Clause reserves to Congress the power to “regulate Commerce...among the several states.” U.S. Const. art. I, § 8, cl. 3. The Dormant Commerce

⁸ Plaintiffs also asked the Court to invalidate Ohio’s restrictions on the amount of wine that an individual may transport into Ohio from outside the State. (Compl., Doc. 1, PageID 9.) The Court previously dismissed this claim. (Order, Doc. 36, PageID 356.)

Clause is the “negative inference” of the Commerce Clause and prohibits “regulatory measures designed to benefit in-state interest by burdening out-of-state competitors.” *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). The Supreme Court has applied a two-step analysis for determining whether a state law regulating alcohol violates the Commerce Clause. The first step, as in any other dormant Commerce Clause case, considers whether the challenged regulation discriminates against out-of-state goods or non-resident economic actors. *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2461-62 (2019). As explained by the Supreme Court, “any notion of discrimination assumes a comparison of substantially similar entities.” *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). “[N]on-discriminatory regulations that have only incidental effects on interstate commerce are valid unless ‘the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.’” *Or. Waste Sys. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994), quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Plaintiffs’ allegations regarding Ohio’s liquor control laws need not proceed beyond this first step of the Dormant Commerce Clause analysis. In asking the Court to grant House of Glunz, Inc. the right to ship wine directly to Ohio consumers, Plaintiffs are asking the Court to find that Illinois retailers like House of Glunz, Inc. are “substantially similar” to Ohio retailers. However, Ohio retailers operate in a regulatory environment that is readily distinguishable from that of House of Glunz, Inc. and other out-of-state retailers. Ohio retailers must purchase the wine that they sell to consumers only from Ohio wholesalers, must operate within Ohio’s three-tier system, and must comply with all provisions of the Ohio Revised Code and Ohio Administrative Code. House of Glunz, Inc. and other Illinois retailers must do none of these. Intrastate shipment of wine that has passed through Ohio’s three-tier system simply is not the equivalent of importation of wine by out-of-state retailers. *See Wine Country Gift Baskets v. Steen*, 612 F.3d 809, 820 (5th

Cir.2010), *cert. denied*, 562 U.S. 1270 (2011) (concluding that a California wine retailer was not similarly situated to Texas wine retailers for purposes of the Dormant Commerce Clause analysis). Ohio's laws do not discriminate against substantially similar entities; rather, they treat out-of-state retailers differently than in-state retailers because they do not operate within Ohio's three-tier system. As detailed below, there are numerous public health safety and benefits that outweigh any incidental effect on interstate commerce of alcohol.

B. Even if found to discriminate against out-of-state businesses, Ohio's retail shipment restrictions must be upheld because they are a valid exercise of Ohio's authority under the Twenty-first Amendment.

Even if found to discriminate against substantially similar out-of-state businesses, Ohio's prohibition on direct-to-consumer shipments of alcoholic beverages by out-of-state retailers should be upheld because it is a constitutional exercise of Ohio's authority under the Twenty-first Amendment. While state laws that differentiate between in-state and out-of-state economic actors are typically subject to strict scrutiny under the Dormant Commerce Clause, state laws that regulate the distribution and sale of alcohol are constitutionally unique. "Intoxicating liquor is the only consumer product identified in the Constitution. Only its regulation by States is given explicit warrant." *Wine Country Gift Baskets*, 612 F.3d at 813. Specifically, the Twenty-first Amendment explicitly permits each State, Territory, or possession of the United States to regulate the transportation and importation of alcohol within its boundaries. Consequently, state alcohol laws are subject to a lower level of scrutiny under the Dormant Commerce Clause. Such laws are constitutionally valid as long as they advance legitimate, non-protectionist state interests.

While alcohol regulations may be constitutionally unique, this case is not novel. Multiple Dormant Commerce Clause challenges to alcohol shipping restrictions similar to the challenged Ohio laws have been brought in the federal courts. Those challenges have failed. Federal appellate

courts, including the Sixth Circuit, have consistently upheld state laws that permit in-state retailers to make direct-to-consumer shipments of alcohol while denying such opportunities to out-of-state retailers. *See Lebamoff Enters. v. Whitmer*, 956 F.3d 863; *Sarasota Wine Mkt.*, 987 F.3d at 1180 (8th Cir.2021); *Wine Country Gift Baskets*; *Arnold's Wines*, 571 F.3d 185. The courts have recognized that such laws are essential elements of the respective States' three-tier alcohol regulatory systems and serve legitimate, non-protectionist health and safety interests such as combating overconsumption, reducing underage drinking, promoting safe and orderly markets, and promoting the efficient collection of taxes.

The challenged Ohio retail shipment laws are no different. Ohio uses a three-tier system, with restrictions on direct-to-consumer shipments by out-of-state retailers, to advance the public interest in combatting alcohol abuse and its related health and safety issues, preventing minors from buying and drinking alcohol, preventing conflicts of interest or corruption from disrupting a safe and orderly alcohol market, ensuring safe and sanitary products, and making sure that taxes are collected fairly and efficiently. These interests are advanced through mechanisms such as minimum markup requirements, bans on discounts and credit, criminal jurisdiction over retail employees, physical inspections of facilities, and excise and sales taxes. Thus, Ohio's laws—and the interests they advance—fall squarely within Ohio's Twenty-first Amendment authority, and any changes to those laws or rebalancing of those interests should come through the legislature, not the courts. Accordingly, the Court should grant summary judgment to Defendant and uphold Ohio's retail wine shipment laws.

- 1. Because Ohio's retail shipping laws concern the transportation and sale of alcohol, they are subject to a lower level of scrutiny under the Dormant Commerce Clause.**

Typically, under existing Dormant Commerce Clause jurisprudence, a state law that

“discriminates against out of state goods or nonresident economic actors...can be sustained only on a showing that it is narrowly tailored to ‘advanc[e] a legitimate local purpose.’” *Tenn. Wine & Spirits Retailers Ass’n. v. Thomas*, 139 S. Ct. 2449, 2461 (2019). However, Dormant Commerce Clause challenges to state laws regulating the transportation or sale of alcohol are atypical, due to the particularities of the Twenty-first Amendment. *Id.* at 2462-2474. *See also Lebamoff* at 869 (“When faced with a dormant Commerce Clause challenge to an alcohol regulation...we apply a ‘different test.’”).

Adopted in response to a widespread collapse in support for Prohibition, the Twenty-first Amendment repealed the Eighteenth Amendment, ending the fourteen-year national Prohibition experiment. U.S. Const. amend. XXI, § 1. However, the Twenty-First Amendment did not stop at simply repealing the Eighteenth. It also explicitly reserved to the individual States substantial authority to regulate the transportation and sale of alcohol within their respective boundaries, including banning alcohol altogether if their citizens so chose. U.S. Const. amend. XXI, § 2. *See also Tennessee Wine & Spirits* at 2467; *Granholm v. Heald*, 544 U.S. 460, 488 (2005) (“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.”), quoting *California Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980).

Section 2 of the Twenty-first Amendment states, “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. Const. amend. XXI, § 2. The Supreme Court has interpreted Section 2 as constitutionalizing “the basic understanding of the extent of the State’s power to regulate alcohol that prevailed before Prohibition.” *Tennessee Wine & Spirits* at 2467. While this power does not permit states to impose purely economic

protectionist matters, Section 2 does give “each State leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable.” *Id.* at 2457.

Given this leeway, state alcohol regulations are subject to a less strict level of Dormant Commerce Clause scrutiny than regulations unrelated to alcohol. *Lebamoff* at 871, citing *Tenn. Wine & Spirits* at 2474. Courts considering a Dormant Commerce Clause challenge to a state alcohol law do not ask whether the challenged law is *narrowly tailored* to advance a legitimate non-protectionist purpose. Rather, courts consider whether the *predominant effect* of the law is protectionist in nature. *Lebamoff* at 871, citing *Tenn. Wine & Spirits* at 2474. The challenged law will survive scrutiny if it can be justified on some legitimate non-protectionist ground such as public health or safety. *Lebamoff* at 871 (“Rather than skeptical review, we ask whether the law ‘can be justified as a public health or safety measure or some other legitimate nonprotectionist ground.’”), quoting *Tenn. Wine & Spirits* at 2474.

Consequently, courts have struck down discriminatory state alcohol regulations designed to promote the economic interests of local industries, businesses, or consumers. *See, e.g. Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984) (invalidating a Hawaii law that created a tax exemption for certain alcohol products produced in-state); *Healy v. Beer Institute*, 491 U.S. 324, 342 (invalidating a Connecticut law that required beer producers and importers to sell beer to Connecticut wholesalers at equal or lower prices than sold to wholesalers in bordering States). By contrast, the courts have long recognized the legitimacy of State interests such as promoting temperance, ensuring orderly market conditions, and raising revenue. *Wine Country Gift Baskets*, 612 F.3d at 814, citing *North Dakota v. United States*, 495 U.S. 423, 432 (1990).

2. State alcohol laws similar to the challenged Ohio laws have consistently withstood Dormant Commerce Clause challenges.

a. Ohio’s use of a three-tier system to control alcohol distribution is “unquestionably legitimate.”

Applying this more deferential standard of Dormant Commerce Clause scrutiny, courts have consistently upheld state alcohol laws similar to the Ohio laws challenged in this case. As an initial matter, the Supreme Court has repeatedly recognized that the three-tier system for alcohol distribution is “unquestionably legitimate.” *Granholm v. Heald*, 544 U.S. 460, 489 (2005), quoting *North Dakota v. United States*, 495 U.S. at 432. Accordingly, “[a] State’s ‘decision to adhere to a three-tier distribution system is immune from direct challenge on Commerce Clause grounds.’” *Lebamoff* at 869-870, quoting *Jelsovek v. Bredesen*, 545 F.3d 431, 436 (6th Cir.2008). “It is only where states create discriminatory exceptions to the three-tier system, allowing in-state, but not out-of-state liquor to bypass the three regulatory tiers, that their laws are subject to invalidation based on the [Dormant] Commerce Clause.” *Arnold’s Wines* at 190, citing *Granholm* at 487. As the Supreme Court has noted, not all three-tier alcohol distribution schemes are identical. *Tenn. Wine & Spirits* at 2742. Amongst the States that have adopted a three-tier scheme, each State has its own variation on the basic model. *Id.* “Because...under §2, States remain free to pursue their legitimate interests in regulating the health and safety risks posed by the alcohol trade...each variation must be judged based on its own features.” *Id.* (Internal quotation omitted.)

b. Courts have consistently upheld State alcohol shipment laws that differentiate between in-state retailers, which have to take part in the State’s three tier system, and out-of-state retailers which do not.

While each State’s alcohol regulations must be considered on their own merits, the Court need not and should not evaluate Ohio’s retailer shipping laws in a vacuum. A number of federal appellate courts—including the Sixth Circuit—have already considered Dormant Commerce Clause challenges to substantially similar retailer shipping restrictions and have upheld those

restrictions as valid exercises of Twenty-First Amendment authority. *See Lebamoff* (upholding a Michigan law allowing direct-to-consumer shipments by in-state alcohol retailers, but not by out-of-state retailers); *Sarasota Wine Market* (upholding a Missouri law allowing direct-to-consumer shipments by in-state alcohol retailers, but not by out-of-state retailers); *Wine Country Gift Baskets* (upholding a Texas law allowing direct-to-consumer shipments by in-state alcohol retailers, but not by out-of-state retailers); *Arnold's Wines* (upholding a New York law allowing in-state retailers to deliver alcohol directly to consumer homes, while preventing out-of-state retailers from making direct-to-consumer deliveries).

The most instructive case is *Lebamoff*. In *Lebamoff*, the Sixth Circuit considered a Dormant Commerce Clause challenge to a Michigan law that—like the Ohio retail shipment laws challenged here—permitted Michigan-based retailers to directly ship alcoholic beverages to consumers in Michigan, but did not permit out-of-state retailers to do the same. In considering the challenge, the *Lebamoff* court recognized the Supreme Court's express condonement of the three-tier system, as well as the recognized right of a State to require licensed retailers to be physically based in the State. *Id.* at 870, citing *Byrd v. Tenn. Wine & Spirits Assn.*, 883 F.3d 608, 622-623 (6th Cir.2018); *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 743 (5th Cir.2016). Upholding the challenged Michigan law, the Sixth Circuit considered the question: "If Michigan may have a three-tier system that requires alcohol to run through its in-state wholesalers, and if it may require retailers to locate within the State, may it limit the delivery options...to in-state retailers?" *Id.* at 870. The court determined that the answer was yes. *Id.*

In so deciding, the *Lebamoff* court noted that the restriction of direct-to-consumer deliveries to in-state retailers was an essential element of maintaining Michigan's three-tier system, as the invalidation of the restriction would necessarily open up the state to retailers who

passed alcohol through out-of-state wholesalers or no wholesalers at all. *Id.* at 872 (“Opening up the State to direct deliveries from out-of-state retailers necessarily means opening it up to alcohol that passes through out of-of-state wholesalers or for that matter no wholesaler at all.”). As the Sixth Circuit noted, this would allow out-of-state products to circumvent the excise taxes collected at the wholesale level and to undercut the local price controls designed to further the legitimate interest in limiting alcohol consumption. *Id.* These controls included minimum prices, prohibitions of sales on credits, and prohibitions on volume discounts. *Id.* at 870. Ohio’s laws include similar mechanisms to create price floors at the wholesaler and retailer level. Ohio Rev. Code § 4301.13; Ohio Adm. Code 4301:1-1-03(C); Ohio Adm. Code 4301:1-1-43(A)(2), (A)(5), (H)(2). The Sixth Circuit also specifically noted that Michigan’s laws allowed it to enforce rules governing the physical layout of premises, storage of alcohol, recordkeeping requirements, advertisement restrictions, and employee training requirements. *Id.* Like Ohio, Michigan enforces compliance with similar rules and regulations through thousands of random inspections and sting operations. *Id.*

The *Lebamoff* court distinguished Michigan’s retailer shipment laws challenged in that case from state alcohol laws invalidated under Dormant Commerce Clause challenges in *Tennessee Wine & Spirits* and *Granholm*. In *Tennessee Wine & Spirits*, the Supreme Court invalidated a Tennessee law that required applicants to live in the state for two years prior to applying for a retail license. *Tenn. Wine & Spirits* at 810-811. While the Court reaffirmed the legitimacy of the three-tier system, it found that the two-year residency requirement was not “an essential feature of a three-tiered scheme.” *Id.* at 2471. Further finding a dearth of evidence that the residency requirement furthered any goals other than protecting economic interests of Tennessee residents, the Court invalidated the requirement as a purely protectionist measure. *Id.* at 2474-2476.

In *Granholm*, the Supreme Court invalidated Michigan and New York laws that allowed in-state wine producers to ship directly to consumers, but did not allow out-of-state producers to do the same. *Granholm* at 473-476. As the *Lebamoff* court noted, the laws challenged in *Granholm* concerned *exceptions* to the “unquestionably legitimate” three-tier system. *Lebamoff* at 874. See also *Arnold’s Wines* at 191 (“In reaching its holding, the *Granholm* Court noted that the challenged regulations were discriminatory exceptions to, rather than integral parts of, the underlying three-tier systems.”). By allowing in-state producers to ship directly consumers, Michigan and New York allowed those producers to sell alcohol without routing the products through in-state wholesalers, while out-of-state producers still had to go through the wholesaler tier. *Lebamoff* at 874.

By contrast, since Michigan law required Michigan retailers to purchase alcohol from Michigan-licensed wholesalers, the Michigan *retailer* shipment restrictions at issue in *Lebamoff* assured that alcohol sold in Michigan went through licensed Michigan wholesalers with their attendant pricing, taxation, and inspection requirements. The Sixth Circuit recognized that the invalidation of those restrictions would allow out-of-state retailers to circumvent Michigan’s wholesale system entirely—“creat[ing] a sizeable hole in the three-tier system” and undermining the legitimate goal of restricting alcohol abuse and the related public health and safety concerns. *Id.* at 872.

C. Ohio’s challenged retail shipment laws are analogous to similar laws consistently upheld by the federal courts, and are a valid exercise of Ohio’s Twenty-first Amendment authority.

The Ohio retail shipment laws challenged in this case are closely analogous to the shipment laws upheld in *Lebamoff*, *Sarasota Wines*, *Wine Country Gift Baskets*, and *Arnold’s Wines* and easily distinguishable from the laws invalidated in *Tennessee Wine & Spirits* and *Granholm*. Like

the laws upheld in *Lebamoff*, *Sarasota Wines*, *Wine Country Gift Baskets*, and *Arnold's Wines*, Ohio's retail shipment laws reserve direct-to-consumer shipment privileges to retailers that operate within the State's three-tier system and withhold them from those that do not. Unlike the durational residency requirements at issue in *Tennessee Wine & Spirits*, which had no impact on whether or not a retailer had to traverse other elements of three-tier system, Ohio's retail shipment laws are directly tied to whether a retailer that sells to Ohio consumers must buy products from Ohio-regulated suppliers and wholesalers.

Just as the Michigan retailers in *Lebamoff* had to purchase their alcohol products from Michigan-licensed wholesalers, the retailers in Ohio must purchase their products from in-state wholesalers and abide by minimum price markup requirements, bans on sale on credit, and bans on volume discounts. *See Lebamoff* at 873 (“These retailers all live with the bitter and sweet of Michigan’s three-tier system—the bitter of being able to buy only from Michigan wholesalers (and the price and volume regulations that go with it) and the sweet of being subject only to intrastate competition.”). *See also Sarasota Wine* at 1179 (Missouri retailers must purchase liquor exclusively from Missouri-licensed wholesalers); *Wine Country Gift Baskets* at 819; *Arnold's Wines* at 192, fn. 3. Relatedly, just as the Indiana retailers who challenged the Michigan laws in *Lebamoff* were able to avoid minimum price regulations that Michigan imposed at the wholesaler tier, the Illinois-based retailer Plaintiff in this case is not subject to certain minimum price practices that Ohio imposes at the same point. Specifically, Illinois retailers may receive volume discounts from wholesalers or purchase alcohol from wholesalers on credit—which Ohio retailers may not. Ill. Comp. Stat. § 5/6-5 (allowing “merchandising credit in the ordinary course of business for a period not to exceed thirty days”); 235 Ill. Comp. Stat. §§ 5/6-9.10, 5/6-9.15 (authorizing quantity discount programs pursuant to “cooperative purchasing agreements”); *Lebamoff* at 872.

Consequently, Illinois retailers such as Plaintiff House of Glunz, Inc. are able to sell wine products at a lower price than the mandatory minimum price that Ohio retailers must charge. (Exhibit 3, Stevenson and Jones Report, ¶ 116f-g.) Thus, the efforts that Ohio makes to decrease alcohol abuse and its harmful and sometimes deadly effects through price inflation will be undermined if the doors are thrown open to Illinois retailers or other cheaper out-of-state options.

The similarities between Ohio's laws and the laws challenged in *Lebamoff* do not end here. Like Michigan, Ohio requires retailers to comply with numerous rules governing physical layout, product storage, recordkeeping, and advertisements. *Lebamoff* at 870. Like Michigan, Ohio vigorously enforces its laws and rules, conducting thousands of yearly inspections that regularly uncover violations. *Id.* Like Michigan, Ohio imposes significant taxes on alcohol products at the wholesale level. *Id.* at 872. Finally, like Michigan, Ohio allows very narrow *exceptions* to its three-tier system *which are equally available to out-of-state and in-state entities*. Specifically, Ohio allows certain wine manufacturers direct access to consumers through the S-1 and S-2 permit system. Such permits are available to in-state and out-of-state wineries on an equal basis, which distinguishes Ohio's laws from those discriminatory exceptions overturned in *Granholm*.

Ohio retailers must go through the three-tier system, and opening the door to out-of-state retailers "would create a sizeable hole in the three-tier system." *Lebamoff* at 872. Ohio cannot patch this hole by controlling the prices charged by wholesalers in Illinois or other states—the Dormant Commerce Clause itself bans such efforts. *Id.*, citing *Healy* at 336. Thus, a ruling for Plaintiffs would eviscerate Ohio's unquestionably legitimate three-tier system, open Ohio to alcohol products at uncontrolled prices, and render Ohio's authority to regulate alcohol within its borders little more than a meaningless specter that can easily be avoided by locating out-of-state. Such a conclusion would kneecap Ohio's efforts to limit alcohol consumption and abuse,

contradict the precedent set by *Lebamoff*, and run afoul of the Twenty-first Amendment.

IV. CONCLUSION

The Twenty-first Amendment compels a grant of summary judgment for the Ohio Attorney General in this case. The Twenty-first Amendment specifically empowers each State to adopt the laws its citizens deem necessary to meet the well-known public health and safety challenges related to alcohol consumption, including alcohol abuse, traffic accidents, crime, underage drinking, and alcohol-related deaths and diseases. Ohio has balanced the need to address these challenges with its citizens' desires to responsibly access and consume alcohol by adopting a three-tier system for alcohol control. This system allows Ohioans to purchase alcohol through thousands of retailers, while using a variety of means—ranging from price controls to physical inspections—to combat evils like overconsumption and underage drinking and to maintain public safety.

The Supreme Court has recognized such systems as an “unquestionably legitimate” exercise of the States' Twenty-first amendment authority, yet Plaintiffs ask the Court to effectively blow a hole in this system by requiring Ohio to open its borders to shipments of alcohol products that never pass through the State prior to purchase. These products avoid Ohio's price controls, taxes, and inspections in favor of those imposed by the retailer's home State—if, indeed, that State chooses to impose any at all. The Dormant Commerce Clause does not compel such a result, and the Twenty-first Amendment forbids it. Such a result would eviscerate the Constitutional scheme for the regulation of alcohol—which, alone among products, is specifically left to the States to regulate. If Plaintiffs seek changes to Ohio's alcohol laws, their path lies in the legislature, not the courts. Accordingly, Plaintiffs' challenge should be rejected, and Ohio's liquor control laws should be upheld in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that the foregoing *Defendant's Motion for Summary Judgment* was filed electronically on January 27, 2022. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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