

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

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| 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. |) | |

**INTERVENOR-DEFENDANT WHOLESALE BEER & WINE
ASSOCIATION OF OHIO’S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56(c), Intervenor-Defendant Wholesale Beer & Wine Association of Ohio (“WBWAO”) moves the Court to enter summary judgment in favor of Defendants and against Plaintiffs on all remaining claims of the Complaint. There are no genuine issues of material fact, and Defendants are entitled to judgment as a matter of law because: (1) the Twenty-First Amendment to the United States Constitution permits the State of Ohio to treat retailers (who conduct business within the State’s three-tier system of alcohol regulation) differently from out-of-state retailers (who operate outside the three-tier system); (2) the Ohio laws at issue in this case do not treat out-of-state retailers in a manner that triggers the Dormant Commerce Clause; and (3) because the predominant effect of the Ohio alcohol control laws is the protection of health and safety, they survive Dormant Commerce Clause scrutiny of alcohol distribution regulations. A memorandum in support follows.



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MEMORANDUM IN SUPPORT

TABLE OF CONTENTS

| | <u>Page</u> |
|--|--------------------|
| TABLE OF AUTHORITIES | vi |
| INTRODUCTION | 1 |
| STATEMENT OF FACTS | 2 |
| I. Historical background of alcohol regulation..... | 3 |
| II. The Ohio three-tier regulatory system includes a wide array of enforcement measures to protect public health and safety | 5 |
| A. The three tiers | 5 |
| B. The exceptions that prove the rule | 6 |
| C. Importation for personal use | 7 |
| D. The statutory provisions that this case concern | 7 |
| E. Public health and safety components of the Ohio three-tier system..... | 8 |
| 1. Separation and disclosure of ownership | 8 |
| 2. Inspection protocols | 8 |
| 3. Physical presence and come-to-rest requirements | 9 |
| 4. Recordkeeping requirements | 9 |
| 5. Retail quota system | 10 |
| 6. Payment requirements..... | 10 |
| 7. Minimum price mark-up | 10 |
| 8. Fees and taxes | 11 |
| 9. The role of the regulated wholesalers | 11 |
| 10. Consequences of circumvention | 13 |
| III. The Plaintiffs’ lawsuit and their claims | 13 |

STANDARD OF REVIEW 14

ARGUMENT 15

I. The Dormant Commerce Clause claim fails as a matter of law 15

A. The Twenty-First Amendment grants Ohio broad authority to regulate the distribution of alcohol within its borders 15

The Twenty-First Amendment gives States near-plenary authority over the transportation, importation, and distribution of alcohol within their borders. *See Granholm v. Heald*, 544 U.S. 460, 488 (2005); *North Dakota v. United States*, 495 U.S. 423, 433 (1990). This authority includes the ability to implement a three-tier regulatory system and “treat in-state retailers (who operate within the three-tier system) differently from out-of-state retailers (who do not).” *See Lebamoff Enters., Inc. v. Whitmer*, 956 F.3d 863, 867 (6th Cir. 2020).

B. Ohio’s ban on sale and delivery of wine directly to Ohio consumers by out-of-state retailers does not violate the Dormant Commerce Clause..... 17

1. In-state retailers and out-of-state retailers are not similarly situated in the context of the three-tier system 18

In-state retailers and out-of-state retailers operate in distinct regulatory environments. They are not similarly situated. A ban on the sale and delivery of wine by out-of-state retailers therefore does not trigger the Dormant Commerce Clause. *See Lebamoff*, 956 F.3d at 870–71; *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 820 (5th Cir. 2010). Further, because regulation of the importation and flow of wine and alcohol into Ohio is inherent in the three-tier system, Ohio laws that differentiate between in-state and out-of-state retailers for purposes of sale and delivery are not unconstitutionally discriminatory. *See Wine Country*, 612 F.3d at 820.

2. Ohio has legitimate, nonprotectionist interests in regulating sale and delivery of alcohol within its borders..... 19

The delineated purposes of Ohio’s liquor control laws are legitimate nonprotectionist state interests. *See Ohio Rev. Code* § 4301.011; *North Dakota*, 495 U.S. at 433, 438–39.

3. Promotion of public health and safety is the predominant effect of the Ohio three-tier system 21

The undisputed evidentiary record establishes that Ohio Rev. Code §§ 4301.58, 4301.60, and 4303.25 operate as public health and safety measures that serve the legitimate nonprotectionist objectives outlined in the statute. *See generally* Stevenson & Jones Rep.; Stevenson & Jones Rebuttal Rep.; *see also* *Lebamoff*, 956 F.3d at 868, 873. Indeed, Plaintiffs do not dispute the fact that Ohio’s regulations promote these interests and that the interests are legitimate. *See* Miller Dep. 38:23–41:6, 54:17–19; 55:5–24.

- a. There is no dispute as to the legitimacy of the State’s interests 23

There is no dispute that the State has a legitimate nonprotectionist interest in regulating alcohol and that Ohio law promotes those interests. *See, e.g.*, Miller Dep. 38:23–41:6, 54:17–19, 55:5–24; *see also* Stevenson & Jones Rebuttal Rep.

- b. There are no reasonable nondiscriminatory alternatives that would serve these interests 23

Absent the laws at issue in this case, Ohio cannot feasibly or practically regulate alcohol within its borders. *See* Stevenson & Jones Rep. ¶¶ 51–58, 62.

- c. The relief sought by Plaintiffs would have an adverse effect on state enforcement efforts 23

If out-of-state retailers were permitted to sell and deliver wine directly to Ohio consumers, Ohio would be unable to inspect the retailers’ physical premises, review their books and records, track the flow of alcohol from these inventories, or enforce any fees or taxes. *See* Stevenson & Jones Rep. ¶¶ 62, 99–102.

- d. Unlicensed direct retail sales from out-of-state retailers would lead to the demise of the three-tier system..... 24

The effectiveness of Ohio’s entire regulatory system depends on the State’s ability to regulate each tier. Ohio would lose the ability to regulate the third tier—retailers—if out-of-state retailers were able to sell and deliver alcohol directly to Ohio consumers.

- e. Unregulated direct sale and delivery by out-of-state retailers would thwart the protections that the wholesaler level provides..... 24

Unlicensed direct sale by out-of-state retailers would take out the necessary and important safety and gatekeeping functions that the middle tier (wholesalers) performs. *Lebamoff*, 956 F.3d at 868.

- f. Out-of-state retail sales would threaten the health of minors 26

The lack of enforcement options that Ohio has over out-of-state retailers would likely increase the risk of minors consuming alcohol. And out-of-state retailers lack the same incentives to prevent the sale of alcohol to minors in another state as they do in their home state. *See Stevenson & Jones Rep.* ¶ 86.

- g. Direct sales by federally-licensed wine producers are different 26

Wineries, as producers, are wholly distinct entities from retailers and operate in a separate tier (first tier vs. third tier) within the Ohio system. *See B-21 Wines, Inc. v. Stein*, No. 3:20-CV-00099-FDW-DCK, 2021 U.S. Dist. LEXIS 127909, at *14 (W.D.N.C. Jul. 9, 2021). Wineries are also subject to a federal permitting and regulatory system that does not apply to retailers. *See Federal Alcohol Administration Act of 1933*, 27 U.S.C. § 201, *et seq*; *see also* Bureau of Alcohol, Tobacco and Firearms (“ATF”), ATF Ruling 2000-1.

- h. Collection of permit and registration fees and alcohol beverage taxes would be impractical 27

The State of Ohio cannot feasibly collect Ohio fees and taxes from out-of-state retailers—a significant amount of revenue that the State uses to fund programs that treat and prevent excessive alcohol consumption, addiction, and the negative effects of those conditions. *See Stevenson & Jones Rep.* ¶¶ 57, 101–109, 119–21.

i. Similar state systems have passed constitutional muster..... 28

Every Circuit that has heard challenges to similar laws in other states prohibiting the direct sale and delivery of alcohol by out-of-state retailers has held that such a ban on out-of-state retailer deliveries is a valid exercise of the authority conferred by the Twenty-First Amendment and is compatible with the Dormant Commerce Clause. *See, e.g., Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1175 (8th Cir. 2021); *Lebamoff*, 956 F.3d at 873; *Wine Country*, 612 F.3d at 812; *Arnold’s Wines, Inc. v. Boyle*, 571 F.3d 185, 187, 191 (2d Cir. 2009); *Jelovsek v. Bredesen*, 545 F.3d 431, 436 (6th Cir. 2008); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853–54 (7th Cir. 2000); *Tannins of Indianapolis, LLC v. Cameron*, No. 3:19-cv-504-DJH-CHL, 2021 U.S. Dist. LEXIS 246548, at *2 (W.D. Ky. Dec. 28, 2021); *B-21 Wines*, 2021 U.S. Dist. LEXIS 127909, at *16.

C. The Sixth Circuit’s decision in *Lebamoff* determines Plaintiffs’ Dormant Commerce Clause challenge..... 29

The Sixth Circuit recently upheld a similar Michigan law, which banned sale and delivery of wine to Michigan consumers by out-of-state retailers. *Lebamoff*, 956 F.3d at 870. Like the Michigan provision, the Ohio laws at issue in this case serve legitimate nonprotectionist state interests and promote public health and safety. The Ohio laws likewise pass Dormant Commerce Clause scrutiny for the same reasons that the Michigan law is constitutional.

II. Ohio does not disfavor out-of-state wines and alcohol..... 34

The Ohio three-tier system does not unconstitutionally discriminate against out-of-state retailers or out-of-state wines. Plaintiff Miller’s alleged concern over inability to obtain certain specialty wines lacks a factual basis. *See* Exhibits 5–8. And, more importantly, Plaintiffs’ desire to obtain certain rare and vintage wines does not warrant judicial override of Ohio’s regulatory system. *See Lebamoff*, 956 F.3d at 875.

CONCLUSION..... 36

CERTIFICATE OF SERVICE 37

INDEX OF EXHIBITS..... 38

TABLE OF AUTHORITIES

| | <u>Page</u> |
|--|----------------|
| Cases | |
| <i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986) | 15 |
| <i>Arnold's Wines, Inc. v. Boyle</i> , 571 F.3d 185 (2d Cir. 2009)..... | 26, 28, 29, 31 |
| <i>Aronson v. City of Akron</i> , 116 F.3d 804 (6th Cir. 1997)..... | 15 |
| <i>B-21 Wines, Inc. v. Stein</i> , No. 3:20-CV-00099-FDW-DCK, 2021 U.S. Dist. LEXIS 127909 (W.D.N.C. Jul. 9, 2021)..... | 26, 29 |
| <i>Bridenbaugh v. Freeman-Wilson</i> , 227 F.3d 848 (7th Cir. 2000)..... | 16, 28 |
| <i>Byrd v. Tenn. Wine & Spirits Retailers Ass'n</i> , 883 F.3d 608 (6th Cir. 2018)..... | 16 |
| <i>Capital Cities Cable, Inc. v. Crisp</i> , 467 U.S. 691 (1984) | 5 |
| <i>Cincom Sys., Inc. v. Novelis Corp.</i> , 581 F.3d 431 (6th Cir. 2009)..... | 15 |
| <i>Cooper v. Tex. Alcoholic Beverage Comm'n</i> , 820 F.3d 730 (5th Cir. 2016)..... | 16 |
| <i>Crowley v. Christensen</i> , 137 U.S. 86 (1890) | 3 |
| <i>Doe v. BlueCross Blueshield of Tenn., Inc.</i> , 926 F.3d 235 (6th Cir. 2019) | 18 |
| <i>Fisher Foods, Inc. v. Ohio Dep't of Liquor Control</i> , 555 F. Supp. 641 (N.D. Ohio 1982)..... | 20 |
| <i>Gen. Motors Corp. v. Tracy</i> , 519 U.S. 278 (1997) | 18 |
| <i>Granholt v. Heald</i> , 544 U.S. 460 (2005)..... | passim |
| <i>Healy v. Beer Inst.</i> , 491 U.S. 324 (1989)..... | 33 |
| <i>Jelovsek v. Bredesen</i> , 545 F.3d 431 (6th Cir. 2008) | 16, 28 |
| <i>Lebamoff Enters., Inc. v. Whitmer</i> , 956 F.3d 863 (6th Cir. 2020) | passim |
| <i>New Energy Co. of Ind. v. Limbach</i> , 486 U.S. 269 (1988) | 17, 23 |
| <i>North Dakota v. United States</i> , 495 U.S. 423 (1990) | passim |
| <i>Pearce v. Chrysler Grp. LLC Pension Plan</i> , 893 F.3d 339 (6th Cir. 2018) | 14 |
| <i>Pittman v. Experian Info. Sols., Inc.</i> , 901 F.3d 619 (6th Cir. 2018) | 15 |

Pompei Winery v. Board of Liquor Control, 167 Ohio St. 61, 146 N.E.2d 430 (1957) 20

Rucker v. City of Kettering, 84 F. Supp. 2d 917 (S.D. Ohio 2000) 15

S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control, 731 F.3d 799 (8th Cir. 2013) 16

Salem v. Liquor Control Comm’n, 34 Ohio St. 2d 244, 298 N.E.2d 138 (1973)..... 20

Sarasota Wine Mkt., LLC v. Schmitt, 987 F.3d 1171 (8th Cir. 2021)..... 28

Solomon v. Liquor Control Comm’n, 4 Ohio St. 2d 31, 212 N.E.2d 595 (1965) 20

Tannins of Indianapolis, LLC v. Cameron, No. 3:19-cv-504-DJH-CHL, 2021 U.S. Dist. LEXIS 246548 (W.D. Ky. Dec. 28, 2021)..... 29

Tenn. Wine & Spirits Retailers Ass’n v. Thomas, 139 S. Ct. 2449 (2019) 4, 17

Tri-County Wholesale Distribs. v. Wine Group, Inc., 565 F. App’x 477 (6th Cir. 2012) 6

Wine Country Gift Baskets.com v. Steen, 612 F.3d 809 (5th Cir. 2010)..... 19, 28

Statutes

235 Illinois Compiled Statute 5/6-5 32

235 Illinois Compiled Statute 5/6-6 32

27 U.S.C. § 201 27

42 U.S.C. § 1983 13

Ill. Adm. Code tit. 11 § 100.500 32

Ohio Admin. Code 4301:1-1-03 22, 31

Ohio Admin. Code 4301:1-1-03(C)..... 11, 22

Ohio Admin. Code 4301:1-1-12 8

Ohio Admin. Code 4301:1-1-22 6

Ohio Admin. Code 4301:1-1-22(B)..... 7, 9

Ohio Admin. Code 4301:1-1-24(C)..... 8, 21

Ohio Admin. Code 4301:1-1-43(A)(2) 32

Ohio Admin. Code 4301:1-1-43(H)(2) 32

| | |
|--------------------------------------|---------------|
| Ohio Admin. Code 4301:1-1-46(C)..... | 7 |
| Ohio Admin. Code 4301:1-1-72 | 22 |
| Ohio Rev. Code § 1333.82(G) | 32 |
| Ohio Rev. Code § 1333.84(B) | 32 |
| Ohio Rev. Code § 4301..... | 5 |
| Ohio Rev. Code § 4301.011..... | 5, 20, 31 |
| Ohio Rev. Code § 4301.10(A)(1) | 9 |
| Ohio Rev. Code § 4301.10(A)(6) | 9 |
| Ohio Rev. Code § 4301.12..... | 6 |
| Ohio Rev. Code § 4301.13..... | 6 |
| Ohio Rev. Code § 4301.20..... | 13 |
| Ohio Rev. Code § 4301.20(L)..... | 7 |
| Ohio Rev. Code § 4301.22..... | 6 |
| Ohio Rev. Code § 4301.24..... | 6, 8, 21, 32 |
| Ohio Rev. Code § 4301.58..... | passim |
| Ohio Rev. Code § 4301.58(B) | 7, 13 |
| Ohio Rev. Code § 4301.60..... | 7, 13, 14, 21 |
| Ohio Rev. Code § 4303..... | 5, 6 |
| Ohio Rev. Code § 4303.06..... | 6 |
| Ohio Rev. Code § 4303.07..... | 6 |
| Ohio Rev. Code § 4303.071..... | 6 |
| Ohio Rev. Code § 4303.071(B) | 7 |
| Ohio Rev. Code § 4303.09..... | 6 |
| Ohio Rev. Code § 4303.10..... | 6 |
| Ohio Rev. Code § 4303.232..... | 6, 35 |

| | |
|---|--------|
| Ohio Rev. Code § 4303.232(A)(1) | 6 |
| Ohio Rev. Code § 4303.232(B) | 7 |
| Ohio Rev. Code § 4303.233..... | 6, 35 |
| Ohio Rev. Code § 4303.233(B)(2)..... | 6 |
| Ohio Rev. Code § 4303.233(C) | 7 |
| Ohio Rev. Code § 4303.234..... | 35 |
| Ohio Rev. Code § 4303.235..... | 7 |
| Ohio Rev. Code § 4303.25..... | passim |
| Ohio Rev. Code § 4303.29..... | 6 |
| Ohio Rev. Code § 4303.29(B)(2)(a) | 31 |
| Ohio Rev. Code § 4303.292(A) | 9 |

Other Authorities

| | |
|--|----|
| Application for New Alcoholic Beverage Permit, accessed at https://com.ohio.gov/static/documents/liqr_4113.pdf (last accessed Jan. 23, 2022)..... | 8 |
| <i>The Federalist Papers</i> No. 12 (Alexander Hamilton) | 28 |

Rules

| | |
|-----------------------------|----|
| Fed. R. Civ. P. 56(a) | 14 |
|-----------------------------|----|

Constitutional Provisions

| | |
|------------------------------------|----|
| U.S. Const. amend. XVIII..... | 3 |
| U.S. Const. amend. XXI, § 2 | 16 |
| U.S. Const. art. I § 8, cl. 3..... | 17 |

INTRODUCTION

As authorized by the Twenty-First Amendment, the Ohio General Assembly has enacted comprehensive regulatory laws that protect Ohioans from the dangers that alcohol presents. A three-tier distribution structure for alcohol beverages, including wine, is the basis of the State's regulatory system. The three tiers are comprised of licensed suppliers, wholesalers, and retailers. Almost every state has implemented some version of a three-tier regulatory system, and at least sixteen other states have adopted systems that are similar to the Ohio model. These regulatory systems have consistently passed judicial muster in adjudication of challenges similar to the one that Plaintiffs raise. *See, e.g., Lebamoff Enters., Inc. v. Whitmer*, 956 F.3d 863, 867 (6th Cir. 2020) (collecting cases).

The issue in this case is whether the Ohio three-tier system of liquor control is compatible with the Dormant Commerce Clause. Citing *Lebamoff*, this Court has noted with approval the fact that the record in that parallel case “enabled the court of appeals to consider the legislative history of Michigan’s liquor laws, Michigan’s enforcement of the laws, and local issues Michigan officials were addressing via their liquor laws.” Op. & Order (Feb. 17, 2021) at 21 (ECF No. 33, PageID # 270). “[T]he question,” the Court noted, “is whether the predominant *effect* of the [Ohio liquor control laws] is protectionism or promotion of . . . legitimate [State] interests.” *Id.* at PageID # 271 (emphasis in original).

The record establishes that promotion of public health and safety is the predominant objective and effect of the Ohio liquor control system. As relevant to this case, Ohio’s regulatory system requires in-state retailers to buy wine from licensed in-state wholesalers or licensed in-state wineries and, like the wholesalers and the wineries, comply with extensive regulations. Such retailers who comply with Ohio’s regulatory scheme are allowed to sell and deliver wine directly

to Ohio consumers. Out-of-state retailers may sell and deliver wine to Ohio consumers if they likewise maintain a physical location in the State, obtain their inventory from licensed wholesalers, and hold the required permit. Absent satisfaction of those requirements, out-of-state retailers are prohibited from selling and delivering wine directly to Ohio consumers.

The attached affidavit and expert report of Bruce D. Stevenson and Gary E. Jones, veteran Ohio regulators, document the ways in which State control of retail sales serves, as its main purpose, the principal statutory objective of safeguarding public health and safety. Mr. Stevenson and Mr. Jones provide key information as to the historical context, enforcement tools, and regulatory concerns of the Ohio liquor control laws. *See* Expert Report of Bruce D. Stevenson and Gary E. Jones and Rebuttal Expert Report of Bruce D. Stevenson and Gary E. Jones, incorporated into their Joint Affidavit, attached as **Exhibit 1**. The WBWAO is aware of no genuine dispute as to any of the material facts that they set forth.

The undisputed material facts entitle the WBWAO and co-defendant Dave Yost, Ohio Attorney General, to judgment as a matter of law. Plaintiffs maintain that three provisions of the Ohio Revised Code violate the Dormant Commerce Clause. In effect, they argue that, because in-state retailers are allowed to sell and deliver wine directly to Ohioans, out-of-state retailers must also be permitted to do so. Plaintiffs' Dormant Commerce Clause claim has no merit.

STATEMENT OF FACTS

The material facts of this case establish the constitutionality of the Ohio Liquor Control Law's ban on the sale, shipment, and delivery of wine by out-of-state retailers directly to Ohio consumers.

I. Historical background of alcohol regulation

The pre-Prohibition era was marked by excessive alcohol consumption and the associated costs, including addiction, crime, violence, family troubles, and preventable deaths. Alcohol was produced *and* sold during that era on a widespread basis by single entities. “[A]lcohol producers typically sold their beer and liquor through ‘tied house’ saloons. They set up saloonkeepers with a building and equipment in exchange for promises to sell only their drinks and to meet minimum sales goals.” *Lebamoff*, 956 F.3d at 867; *Stevenson & Jones Rep.* ¶ 28. These saloons were often “located near factories, mines and other heavily industrialized and populated areas” and “lured customers by offering free food, cheap beer and adult-themed entertainment.” *Stevenson & Jones Rep.* ¶ 29.

Such vertical integration created a focus on profits, at the expense of the public welfare. *Id.* Indeed, these saloons were very effective at bringing alcohol to the market and keeping supply and demand high with costs low. However, as the Sixth Circuit recently stated about the pre-Prohibition business model, “not all efficient markets are useful markets. You can have too much of a good thing.” *Lebamoff*, 956 F.3d at 867.

The “tied-house” system created a vicious cycle of alcohol abuse and poverty. *Stevenson & Jones Rep.* ¶ 30. In the midst of that era, the Supreme Court observed that “statistics of every state show[ed] a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source.” *Crowley v. Christensen*, 137 U.S. 86 (1890). In response, the Eighteenth Amendment outlawed the manufacture, sale, or transport of intoxicating liquors. U.S. Const. amend. XVIII, *repealed by* U.S. Const. amend. XXI.

Prohibition addressed some issues, but raised others. John D. Rockefeller, Jr., commissioned a study on the regulation of alcohol and published the findings in a publication,

titled “Toward Liquor Control,” that is still used today.¹ Stevenson & Jones Rep. ¶ 27. The study strongly cautioned against allowing retail establishments to operate under exclusive control of producers and manufacturers, finding that the former “tied-house” saloons fostered a multiplicity of outlets and shielded non-resident owners from the negative consequences of their business operations on the community. *Id.* The study recommended a state-based three-tier system (suppliers – wholesalers – retailers) to promote safer distribution and use of alcohol—the system in widespread use today. *Id.*

The Prohibition era ended with ratification of the Twenty-First Amendment. Section 2 provides: “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.” States thus gained the authority to determine whether and how they would permit alcohol sale and consumption within their borders. *See Lebamoff*, 956 F.3d at 868.

Following ratification, “[s]ome States initially kept a ban on alcohol in place,” while “[o]thers permitted it through highly regulated markets to prevent the problems associated with tied-house saloons from resurfacing.” *Id.* Over the years, every State has lifted the complete ban on alcohol and implemented a three-tier system to regulate the market. Stevenson & Jones Rep. ¶¶ 33, 36.

The Supreme Court has consistently recognized and reaffirmed that the Twenty-First Amendment confers broad authority upon the States to regulate the distribution and use of alcohol. *See, e.g., Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2470 (2019) (Section 2 of the Twenty-First Amendment “grants States latitude with respect to the regulation of

¹ The WBWAO will separately deliver a print copy of “Toward Liquor Control” to the Court and counsel of record in tandem with the electronic filing of this motion.

alcohol”); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984) (confirming that state control of the liquor distribution system is “the central power reserved by § 2 of the Twenty-first Amendment”); *North Dakota v. United States*, 495 U.S. 423, 431–33 (1990) (“within the area of its jurisdiction, the State has ‘*virtually complete control*’ of the importation and sale of liquor and the structure of the liquor distribution system” and state liquor control policies adopted under the auspices of the Twenty-First Amendment “are supported by a strong presumption of validity and should not be set aside lightly.” (emphasis added)). The Supreme Court has made clear that these three-tier systems are “unquestionably legitimate.” *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (quoting *North Dakota*, 495 U.S. at 432).

II. The Ohio three-tier regulatory system includes a wide array of enforcement measures to protect public health and safety.

Like most States, Ohio employs a three-tier system to regulate alcohol distribution and consumption within its borders. Stevenson & Jones Rep. ¶ 33. The Ohio General Assembly has enacted a comprehensive statutory system to regulate the distribution of alcohol within the State—the Ohio Liquor Control Law, now codified in Chapters 4301 and 4303 of the Ohio Revised Code. The intent of the law is to: (1) “Promote temperance by preventing consumption by underage persons and by discouraging abusive consumption”; (2) “Promote orderly markets by requiring transparent, accountable, and stable distribution of beer and intoxicating liquor and preventing unfair competition”; and (3) “Facilitate the collection of taxes related to the sale and consumption of beer and intoxicating liquor.” Ohio Rev. Code § 4301.011.

A. The three tiers

Producers and suppliers (including breweries, wineries, and distilleries), which comprise the first tier, must obtain state licenses and may sell only to wholesalers licensed by the State. Licensed wholesalers (including members of the WBWAO), constituting the second tier, likewise

must obtain a license and may sell only to licensed retailers, other licensed wholesalers, or, in limited instances, to consumers for home use. *See* Stevenson & Jones Rep. ¶ 72; *see also* Ohio Rev. Code §§ 4303.06 (B-1 permit for beer), 4303.07 (B-2 permit for wine), 4303.10 (B-5 permit for wine), 4303.09 (B-4 permit for mixed beverages). Retailers, who operate as the third tier, similarly must hold a state license and comply with various regulations and restrictions in order to sell to consumers. *See* Ohio Rev. Code §§ 4301.13, 4301.24, 4301.58; *see generally id.* at Ch. 4303; *see also Tri-County Wholesale Distribs. v. Wine Group, Inc.*, 565 F. App'x 477, 478 (6th Cir. 2012)

Participants in each tier thus must obtain a state permit. Ohio Rev. Code § 4301.58. At the retail level, a retailer must maintain a physical presence in Ohio in order to obtain a permit. Ohio Rev. Code §§ 4303.12; 4303.29.

B. The exceptions that prove the rule

The S-class permit exception underscores the focus of the Ohio three-tier system on public health and safety. In certain circumstances, out-of-state *producers* may ship wine directly to Ohio consumers after obtaining an S-1 or S-2 permit that involves compliance measures. *See id.* at §§ 4303.232(A)(1), 4303.233(B)(2); Stevenson & Jones Rep. ¶¶ 110–13, 120. In addition, wineries that obtain a B-2a permit may sell directly to in-state retailers. Ohio Rev. Code §§ 4301.13, 4301.22, 4301.58, 4303.233, 4303.071, 4303.232; Ohio Admin. Code 4301:1-1-22.

The Ohio General Assembly has made clear that retailers otherwise may not import alcohol directly into the State and that all wine purchased from retailers must first go through the wholesaler level, except wine from producers who hold an S-1 or S-2 permit. *See* Ohio Rev. Code §§ 4301.13, 4301.22, 4301.58, 4303.232, 4303.233; *see also* Ohio Admin. Code 4301:1-1-22 (“No alcoholic beverages shall be imported into the state of Ohio for resale except upon the written

consent of the division All alcoholic beverages imported into this state for purposes of re-sale to retail permit holders must be consigned and delivered to the warehouse of a wholesale distributor.”); Ohio Admin. Code 4301:1-1-22(B) (“All alcoholic beverages imported into this state for purposes of re-sale to retail permit holders must be consigned and delivered to the warehouse of a wholesale distributor.”); Ohio Admin. Code 4301:1-1-46(C) (“No deliveries of beer, or wine and mixed beverages to retail permit holders shall be made by anyone who is not a bona fide employee of the B-1, B-2, B-4, B-5, A-1, A-2, or A-4 permit holder making the sale” with limited exception.).

Moreover, out-of-state producers who obtain S and B-2a permits and deliver wine directly to Ohio consumers are statutorily liable, both on an entity basis and on a personal basis, for the sales tax associated with those sales. *See* Ohio Rev. Code §§ 4303.071(B), 4303.232(B), 4303.233(C), 4303.235.

C. Importation for personal use

The only other exception is the allowance of personal transportation of limited quantities of alcohol—for wine, the limit is 4.5 liters or six regular-sized (750 ml) bottles—by Ohio residents into the State for personal use. Ohio Rev. Code § 4301.20(L). Count I of the Complaint sought declaratory and injunctive relief against that provision. The Court has dismissed Count I for lack of subject matter jurisdiction, as the Plaintiffs lack standing to raise the claim. *Op. & Order* (May 12, 2021) at 15–18 (ECF No. 36, PageID ## 353–56).

D. The statutory provisions that this case concern

The three provisions of Ohio’s Liquor Control Law that remain subject to challenge in this action are §§ 4301.58, 4301.60, and 4303.25. Section 4301.58(B) prohibits the unauthorized sale, retention, or possession of alcohol. Section 4301.60 prohibits the unauthorized transportation of

alcohol into the State. Section 4303.25 prohibits the sale or delivery of wine in Ohio without a permit. Together, these provisions bar out-of-state retailers who choose not to maintain a physical presence in Ohio from selling or delivering wine directly to Ohio consumers.

E. Public health and safety components of the Ohio three-tier system

1. Separation and disclosure of ownership

At each level of the three-tier system, the State of Ohio strives to protect public health and safety through a panoply of regulatory measures. No person or entity may hold a permit in more than one tier—a prohibition that thwarts vertical integration among the three tiers and prohibits distribution or sale of alcohol by modern-day “tied houses.” *See, e.g.*, Ohio Rev. Code § 4301.24; Ohio Admin. Code 4301:1-1-24(C) (prohibiting retail permit holders from having any financial interest in a wholesale distributor). Additionally, the permitting process requires disclosure of the applicant’s financial information, ownership interests, officers, criminal history, and other information. *See, e.g.*, Ohio Admin. Code 4301:1-1-12; Application for New Alcoholic Beverage Permit, accessed at https://com.ohio.gov/static/documents/liqr_4113.pdf (last accessed Jan. 23, 2022).

2. Inspection protocols

Inspections of applicants and licensed retailers conducted by the Ohio Division of Liquor Control allow the State of Ohio to protect consumer safety by ensuring compliance with rules and regulations. Stevenson & Jones Rep. ¶¶ 59–63. These include inspections related to the initial license application—namely, a preliminary inspection, one or more status inspections, and a final inspection—as well as license renewal inspections, inspections initiated by a complaint, routine field inspections (“RFIs”), and other site visits. *Id.* at ¶ 60. Along with the state inspections, the requirement that nearly all alcohol be distributed through the middle tier—the wholesalers—adds

another layer of inspection and auditing for alcohol products. *Id.* at ¶¶ 64–81. Specifically, the State of Ohio can ensure that nearly all alcohol that passes into the State has been recorded and inspected by having to only inspect and audit the 100 licensed wholesalers rather than the thousands of retailers and producers. *See id.* at ¶¶ 64–66, 75, 77.

3. Physical presence and come-to-rest requirements

Physical presence and come-to-rest requirements ensure that these inspections are practical and meaningful. *Id.* at ¶ 62a. Under Ohio Revised Code § 4301.10(A)(1), 4301.10(A)(6) and 4303.292(A), licensed wholesalers and retailers must maintain a physical presence in the State. The come-to-rest requirement generally mandates that alcohol is physically received at a wholesaler’s place of business and placed into the inventory before it may be distributed. Ohio Admin. Code 4301:1-1-22(B). Together, these requirements create the start of the product trail in the State and allow ready access for product inspections, auditing, and collection of taxes. *See* Stevenson & Jones Rep. ¶ 62a.

4. Recordkeeping requirements

The record keeping requirements ensure that alcohol sales may be properly tracked (to negate “bootlegging” and counterfeit products) and that any taxes are properly assessed and collected. *Id.* at ¶ 62a–c. “Licensed businesses at each level of the three-tier system are required to maintain and make available for inspection and review all books and records of the previous three years of operation.” *Id.* at ¶ 62b. This record keeping is crucial for the track-and-trace system, which provides the mechanism for Ohio to ensure product safety, to effectively remove unauthorized or unsafe products from the market, and to allow the State to conduct trace-back investigations involving suspected criminal activity or alcohol-related accidents. *Id.* at ¶¶ 62b, 62c.

5. Retail quota system

The retail quota system maintains the safe and orderly sale and use of alcohol by restricting the number of retailers in a given territory of the State. *Id.* at ¶¶ 82–89. In 2016, Ohio had 8,625 wine retail carryout outlets. *Id.* at ¶ 84. The retail quota system restricts the number of retail outlets available in each taxing district based on the population of each area. *Id.* at ¶ 83. This restriction not only helps to limit consumption, but also is calculated to instill in each retailer “a responsibility to adhere to the laws and rules to protect his or her investment in that business” by limiting the number of licenses available. *Id.* at ¶ 86. The restrictions on hours of sale for retailers “further promote temperance and orderly markets.” *Id.* at ¶ 89.

6. Payment requirements

Ohio retail price control regulations seek to moderate alcohol consumption and the negative effects of excessive consumption. *Id.* ¶¶ 90–98. The cash law requires payment upon receipt, as opposed to credit, consignment, or other form of delayed or non-monetary payment. *Id.* at ¶ 62e. The cash law promotes temperance and orderly markets “by lessening the possibility of favorable financial arrangements or related forms of commercial inducement by an industry member that are intended to promote aggressive sales practices, recklessly stimulate purchase and consumption, or induce the wholesale distributor or the retailer to purchase certain alcohol beverages of a supplier to the exclusion of other products of a competitor.” *Id.*

7. Minimum price mark-up

Another price control regulation is the minimum mark-up, which results in statewide minimum prices that level the playing field for all retailers. *Id.* at ¶ 62g. Mandatory price mark-ups “prevent aggressive sales practices that improperly stimulate purchase and consumption, thereby endangering the state’s efforts to promote responsible, and discourage intemperate,

consumption of alcohol 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 rules.” Ohio Admin. Code 4301:1-1-03(C).

8. Fees and taxes

The State system of fees and taxes fosters and funds programs to promote public health and safety. Stevenson & Jones Rep. ¶¶ 99–109. These fees include license issuance and renewal fees, a biennial registration fee, a product registration fee, an annual supplier registration fee. *Id.* at ¶ 99. The various permitting fees (which totaled \$39,458,111.46 in 2019) go to the local community, the Ohio Department of Mental Health and Addiction Services, and the State Liquor Regulatory Fund to implement and fund, in part, educational, enforcement, and rehabilitative programs. *Id.* at ¶¶ 50–58, 101.

9. The role of the regulated wholesalers

The wholesale distributors, who comprise the middle tier, are particularly important as they act as “an indispensable buffer between manufacturers and retailers” to “prevent harmful practices, such as price manipulation, exclusive sales, ownership interest, credit on purchases and financial loans, while delivering consumer choice, variety and safety.” *Id.* at ¶ 41; *see also id.* at ¶¶ 64–81. The wholesaler level is essentially a clearinghouse for State inspection and auditing of alcohol that enters its borders, allowing the State to effectively monitor and enforce the above-outlined regulations and restrictions. *Id.* at ¶ 75.

“Typically few in number and often state-owned, [wholesalers] are the in-state path through which all alcohol passes before reaching consumers,” which “allows States, if they wish, to control the amount of alcohol sold through price controls, taxation, and other regulations.”

Lebamoff, 956 F.3d at 868. This is true in Ohio, where there are only 100 wholesalers compared to the thousands of producers and retailers. *Stevenson & Jones Rep.* ¶¶ 64–66, 75, 77. As such, “the most efficient and economical way to sell [alcohol] products in a regulated environment is through the use of wholesale distributors.” *Id.* at ¶ 64.

Moreover, wholesalers provide the necessary level between producers and retailers to prevent vertical integration between the other tiers and limit the ability of a large conglomerate to monopolize the alcohol industry. *Id.* at ¶ 73. As the in-between tier, wholesalers ensure that the market contains a diversified assortment of products, including more niche or rare products. *Id.* at ¶ 74. The wholesalers further add a layer to the enforcement of the retailers by ensuring all retailers are properly licensed before selling to them. *Id.* at ¶ 72.

In addition, as Messrs. Stevenson and Jones report, “wholesale distributors also make it easier for the government to collect taxes and enforce laws that pertain to the sale of alcohol beverages.” *Id.* at ¶ 76. Rather than “dealing with thousands of individual retail stores, the government can simply tax the wholesale distributors, allowing an efficient way of auditing tax collections.” *Id.* This is not only efficient, but also “makes the sale and taxation of alcohol beverages more transparent.” *Id.*

Finally, because the wholesalers are responsible for certain territories within the state, they understand and respect the social responsibilities that they have in the various communities. Wholesalers therefore sponsor public health and safety programs, such as “Arrive Safe” and “Safe Rides” programs that offer free rides to individuals who are too intoxicated to safely and legally operate a vehicle and “We Card” programs that educates on the dangers of underage drinking. *Id.* at ¶ 78.

10. Consequences of circumvention

There are more than 640,000 alcohol retailers in the United States, including House of Glunz. *Id.* at ¶ 87. To allow them to flood the Ohio market with alcohol that does not go through the three tiers of the regulatory system would undermine Ohio’s comprehensive efforts to combat the negative consequences of alcohol consumption and severely impact Ohio’s ability to promote the general safety and welfare of its citizens. *Id.* at ¶¶ 6, 87. As Messrs. Stevenson and Jones have opined, based on their extensive regulatory experience and enforcement backgrounds, the unregulated sale and delivery of wine by out-of-state retailers to Ohio consumers would “(i) materially impede enforcement of Ohio liquor laws regarding safety of alcohol products and sales to under-age consumers; (ii) allow out-of-state retailers to undercut Ohio price regulation; (iii) undermine the Ohio three-tier system of alcohol beverage distribution; and (iv) provide an incentive for tax avoidance.” *Id.* at ¶ 6a.

III. The Plaintiffs’ lawsuit and their claims

The remaining Plaintiffs in this case are Kenneth M. Miller (an Ohio resident who is a wine enthusiast) and House of Glunz (an Illinois wine retailer). Compl. ¶¶ 4–6 (ECF No. 1, PageID ## 2–3). The other original Plaintiff, Derek Block, dismissed his claims with prejudice after discovery requests were served upon him. *See* Stip. of Dismissal (ECF No. 30, PageID # 241).

Pursuant to 42 U.S.C. § 1983, Plaintiffs have alleged two Dormant Commerce Clause violations. Count I of their Complaint claimed that the ban on personal transportation of wine into the State in excess of 4.5 liters, *see* Ohio Rev. Code § 4301.20, violates the Dormant Commerce Clause. Compl. ¶¶ 28–40 (ECF No. 1, PageID ## 7–9). In Count II, Plaintiffs allege that the ban on sale and delivery of wine directly to Ohio consumers by unlicensed out-of-state retailers, *see* Ohio Rev. Code §§ 4301.58(B), 4301.60, 4303.25, likewise violates the Dormant Commerce

Clause. *Id.* Plaintiffs seek a declaratory judgment that the Ohio statutes are unconstitutional, along with injunctive relief prohibiting Defendant Attorney General Dave Yost from enforcing the statutes and requiring the State to allow House of Glunz and other out-of-state retailers to sell and ship wine directly to Ohio consumers. *Id.* at Req. for Relief ¶¶ A–C, PageID ## 9–10.

The relief sought by Plaintiffs would open Ohio’s borders for direct delivery of alcohol by any out-of-state retailer without having to pass through the three-tier regulatory system. Given the substantial potential impact that this lawsuit may have on the entire three-tier system, WBWAO moved to intervene in order to ensure that the interests of the Ohio wholesalers—the middle tier of the three-tier system—were adequately represented. *See* Mot. to Intervene (ECF No. 15). The Court granted WBWAO’s motion. Order Granting Mot. to Intervene (ECF No. 17).

The State Defendants moved to dismiss for lack of subject matter jurisdiction on the ground that Plaintiffs lack standing to raise their claims. *See* Mot. to Dismiss (ECF No. 19). Following the initial decision and supplemental briefing, the Court granted in part and denied in part the motion to dismiss, finding that Plaintiffs lack standing to raise Count I (the personal transportation claim) but not Count II (the out-of-state retailers claim). Op. & Order (May 12, 2021) (ECF No. 36). Accordingly, this case proceeds only as to Count II—the constitutionality of Ohio Rev. Code §§ 4301.58, 4301.60, 4303.25—Ohio’s ban on direct sale and shipment of wine to Ohio consumers by unlicensed, out-of-state retailers. *Id.*

STANDARD OF REVIEW

Summary judgment is proper if, after drawing all inferences in the light most favorable to the non-moving party, “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Pearce v. Chrysler Grp. LLC Pension Plan*, 893 F.3d 339, 345 (6th Cir. 2018). To overcome the motion,

“[t]he nonmoving party ‘must set forth specific facts showing that there is a genuine issue for trial.’” *Pittman v. Experian Info. Sols., Inc.*, 901 F.3d 619, 628 (6th Cir. 2018) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). Where only issues of law remain, the court may resolve the case on summary judgment. *See Cincom Sys., Inc. v. Novelis Corp.*, 581 F.3d 431, 435 (6th Cir. 2009).

ARGUMENT

Plaintiffs bear the heavy burden of overcoming the strong presumption that Ohio’s three-tier regulatory structure is constitutional. *See North Dakota*, 495 U.S. at 431–33; *see also Rucker v. City of Kettering*, 84 F. Supp. 2d 917, 929–30 (S.D. Ohio 2000) (“Legislative enactments [and the Ohio Administrative Code] carry a strong presumption of constitutionality. . . . Rebutting the presumption is seldom easy, and it is far from easy here.” (quoting *Aronson v. City of Akron*, 116 F.3d 804, 809 (6th Cir. 1997))). Indeed, “given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly.” *North Dakota*, 495 U.S. at 433. As set forth below, Plaintiffs have failed to meet their burden. The Court should grant summary judgment against their remaining claim.

I. The Dormant Commerce Clause claim fails as a matter of law.

A. The Twenty-First Amendment grants Ohio broad authority to regulate the distribution of alcohol within its borders.

The recognized intent of the Twenty-First Amendment is to protect the legitimate state interests in “promoting temperance, ensuring orderly market conditions, and raising revenue.” *Id.* at 433. To accomplish this goal, Section 2 gives the States near-plenary authority over alcohol distribution within their borders, by providing that “[t]he 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; *see also North Dakota*, 495 U.S. at 433.

The Supreme Court has consistently recognized that the Twenty-First Amendment permits three-tier regulatory systems like the Ohio system. *See, e.g., Granholm*, 544 U.S. at 489 (finding that “funnel[ing] sales through the three-tier system” is “unquestionably legitimate”). The Sixth Circuit has expressly held that a State’s “three-tier distribution system is immune from direct challenge on Commerce Clause grounds.” *Jelovsek v. Bredesen*, 545 F.3d 431, 436 (6th Cir. 2008).

Courts have permitted States to strictly regulate the second tier—wholesalers. *See North Dakota*, 495 U.S. at 432–33; *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 810–13 (8th Cir. 2013); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853–54 (7th Cir. 2000). And courts have likewise permitted States to strictly regulate the third tier—retailers—through measures including a requirement that the retailers maintain a physical premise in the State. *See Lebamoff*, 956 F.3d at 867, *Byrd v. Tenn. Wine & Spirits Retailers Ass’n*, 883 F.3d 608, 623 (6th Cir. 2018) (observing that distinctions between in-state and out-of-state retailers that “are an inherent aspect of the three-tier system” do not violate the Dormant Commerce Clause (quoting *Cooper v. Tex. Alcoholic Beverage Comm’n*, 820 F.3d 730, 743 (5th Cir. 2016))).

As discussed below, the Sixth Circuit has found in favor of the State of Michigan in an action that challenged a similar statutory ban on direct sale and delivery of wine from unlicensed out-of-state retailers. *See Lebamoff*, 956 F.3d at 870–73. In upholding that State law, the Sixth Circuit explained that the Twenty-First Amendment permits a State “to treat in-state retailers (who operate within the three-tier system) differently from out-of-state retailers (who do not).” *Id.* at 867. Plaintiffs’ challenge to Ohio’s regulation of the third tier falls squarely within the scope of that dispositive ruling.

B. Ohio’s ban on sale and delivery of wine directly to Ohio consumers by out-of-state retailers does not violate the Dormant Commerce Clause.

The Commerce Clause provides that Congress has the power to “regulate Commerce . . . among the several States.” U.S. Const. art. I § 8, cl. 3. Under the “dormant” Commerce Clause, States may not pass laws that discriminate against out-of-state economic interests unless those laws “advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988); *see also Granholm*, 544 U.S. at 492–93 (“The Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State’s nondiscriminatory alternatives will prove unworkable.”).

This case turns on the relationship between the Dormant Commerce Clause and the Twenty-First Amendment. The Constitution treats alcohol differently than other commodities. Indeed, “[w]hile the Commerce Clause grants Congress power to eliminate state laws that discriminate against interstate commerce, the Twenty-first Amendment grants the States the power to regulate commerce with respect to alcohol.” *Lebamoff*, 956 F.3d at 869. The Twenty-First Amendment thus shapes the Dormant Commerce Clause analysis as it relates to alcohol distribution.

The Supreme Court has laid out a “different” test under the Dormant Commerce Clause for state statutes that involve alcohol regulation. Under this more lenient test, courts “ask whether the law ‘can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground.’” *Id.* (quoting *Tenn. Wine & Spirits*, 139 S. Ct. at 2474). In conducting this inquiry, courts must look for “concrete evidence” that the statute “actually promotes public health or safety,” or evidence that “nondiscriminatory alternatives would be insufficient to further those interests.” *Tenn. Wine & Spirits*, 139 S. Ct. at 2474. If the “predominant effect” of the law

is protectionism and not “the protection of public health or safety,” the law is not shielded by the Twenty-First Amendment. *Id.* The Ohio laws that allow in-state retailers to sell and deliver wine directly to Ohio consumers and prohibit unlicensed out-of-state retailers from doing so have the predominant effect of protecting public health and safety and readily pass this test.

1. In-state retailers and out-of-state retailers are not similarly situated in the context of the three-tier system.

As an initial matter, Plaintiffs must show that similarly situated entities are given preferential treatment in order to raise a discrimination claim under the Dormant Commerce Clause. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997) (“[A]ny notion of discrimination assumes a comparison of substantially similar entities.”); *Doe v. BlueCross Blueshield of Tenn., Inc.*, 926 F.3d 235, 237 (6th Cir. 2019) (“Treating similarly situated people differently goes to the heart of invidious discrimination. But treating differently situated people differently usually counts as equal justice under law.”).

Plaintiffs suggest that unlicensed out-of-state retailers are similarly situated to licensed in-state retailers. There is no legal or factual basis for that proposition. Although in-state and out-of-state retailers sell the same types of products, the similarities end there. The most notable difference is that in-state retailers and out-of-state retailers, like House of Glunz, operate in wholly distinct regulatory environments. *See Lebamoff*, 956 F.3d at 870–71. In-state retailers must operate within Ohio’s three-tier system and comply with all the regulations associated with it, while out-of-state retailers need not do so. *Intrastate* delivery of wine from licensed retailers thus is distinct from delivery of wine by unlicensed out-of-state retailers.

Moreover, in the context of the Twenty-First Amendment as the Supreme Court has interpreted it, the Dormant Commerce Clause is operative only when a state law discriminates in a manner that “is not inherent in the three-tier system itself.” *Wine Country Gift Baskets.com v.*

Steen, 612 F.3d 809, 818 (5th Cir. 2010). In *Wine Country*, the Fifth Circuit reviewed a challenge to a Texas law, similar to Ohio’s, that allowed in-state retailers within its three-tier system to deliver alcohol directly to Texas consumers while prohibiting out-of-state retailers from doing so. *Id.* at 819. The Fifth Circuit held that the Texas law did not run afoul of the Dormant Commerce Clause because the plaintiff out-of-state retailer was not situated similarly to the in-state retailers. *Id.* at 820.

Specifically, because the requirement that wholesalers and retailers maintain a physical presence in the state is inherent in the three-tier system, a law that distinguishes between in-state and out-of-state retailers for purposes of delivery is not thereby unconstitutionally discriminatory. *See id.* (citing *Granholm*, 544 U.S. at 469). Indeed, the court emphasized that the remedy sought in *Wine Country* (which is identical to that sought in this case)—allowing out-of-state retailers to ship wine into the State because local retailers can make in-state deliveries—“would grant out-of-state retailers dramatically greater rights than [in-state] ones.” *Id.* The same is true here.

The Ohio laws at issue in this case regulate the importation and flow of wine and other alcohol into and within the State—an inherent aspect of the three-tier system. Plaintiffs’ Dormant Commerce Clause challenge fails as a matter of law for the threshold reason that no unlawful discrimination results from the Ohio laws that trigger the Clause.

2. Ohio has legitimate nonprotectionist interests in regulating sale and delivery of alcohol within its borders.

Even if in-state retailers and out-of-state retailers were similarly situated for purposes of the Dormant Commerce Clause and physical presence were not an inherent imperative of the three-tier system, it would not change the dispositive fact that the Ohio laws at issue in this case advance significant legitimate state interests. The legislatively-recognized purposes of Ohio liquor control laws are to: (1) “Promote temperance by preventing consumption by underage persons and by

discouraging abusive consumption;” (2) “Promote orderly markets by requiring transparent, accountable, and stable distribution of beer and intoxicating liquor and preventing unfair competition;” and (3) “Facilitate the collection of taxes related to the sale and consumption of beer and intoxicating liquor.” Ohio Rev. Code § 4301.011.

Ohio courts have long vouched for these vital public health and safety interests. *See, e.g., Fisher Foods, Inc. v. Ohio Dep’t of Liquor Control*, 555 F. Supp. 641, 647 (N.D. Ohio 1982) (upholding Ohio’s minimum mark-up requirements, stating that “the fundamental purpose of the Liquor Control Act is to absolutely control the liquor industry in the State of Ohio as a matter of social and public policy and that its purpose is not merely to provide fair competition between liquor distributors or retailers” (citing *Pompei Winery v. Board of Liquor Control*, 167 Ohio St. 61, 146 N.E.2d 430 (1957))); *Salem v. Liquor Control Comm’n*, 34 Ohio St. 2d 244, 245, 298 N.E.2d 138, 140 (1973) (“The obvious ‘harmful potentialities’ when the sale of intoxicating beverages occurs in retail outlets necessitates that the liquor industry be strictly regulated, and that regulation includes not only the sale of liquor but also the conditions and circumstances surrounding the liquor premises.”); *Solomon v. Liquor Control Comm’n*, 4 Ohio St. 2d 31, 34, 212 N.E.2d 595, 598 (1965) (“Because of the harmful potentialities incident to the conduct of such business, those engaging therein must obtain a permit from the state and are thereafter subject to strict regulation by statute and by rules and regulations adopted and promulgated pursuant to statutory authority by the Department of Liquor Control, the regulating and supervising agency created by the state to oversee and police, as it were, the liquor business.”).

The Supreme Court has recognized the legitimacy of these nonprotectionist interests. *See North Dakota*, 495 U.S. at 433, 438–39 (stating that States have legitimate, nonprotectionist interests in “promoting temperance and controlling the distribution of [alcohol]”). To promote

these interests, States have been afforded “virtually complete control over whether to permit importation or sale of liquor and how to structure the[ir] liquor distribution system[s].” *Granholm*, 544 U.S. at 488; *see also North Dakota*, 495 U.S. at 424.

3. Promotion of public health and safety is the predominant effect of the Ohio three-tier system.

The record shows that Ohio Rev. Code §§ 4301.58, 4301.60, and 4303.25 serve the legitimate nonprotectionist objectives of public health and safety. The predominant effect of the entire regulatory system, including these provisions, is the promotion of public health and safety:

- Ohio’s licensing system ensures that alcohol will not be distributed by pseudo-“tied-houses” to combat the pre-Prohibition problems associated with vertical integration. *See, e.g.*, Ohio Rev. Code § 4301.24; Ohio Admin. Code 4301:1-1-24(C) (prohibiting retail permit holders from having any financial interest in a wholesale distributor).
- Planned and unplanned inspections allow the State of Ohio to protect consumer safety by ensuring compliance with rules and regulations. *Stevenson & Jones Rep.* ¶¶ 59–63. This effort includes monitoring and enforcement of compliance with Ohio’s sanitation and record keeping requirements to ensure that alcohol sales may be properly tracked (to negate “bootlegging” and counterfeit products) and that any taxes are properly assessed and collected. *Id.* at ¶¶ 62b–d.
- “The physical presence and come-to-rest requirements provide safeguards for the health and safety of Ohio residents by establishing a starting point for the transparent and accountable tracking of beer and intoxicating liquor commerce in Ohio.” *Id.* at ¶ 62a. These requirements allow for the proper inspection and audit of alcohol and create the start of the product trail in the state. *Id.*
- The licensed entities within each tier are required to maintain and make available to the State all books and records kept. *Id.* at ¶ 62b. This requirement allows the State to track and trace alcohol sales from the producer level to the retailer level to allow the State to locate and destroy unsafe products and to facilitate investigations involving suspected alcohol-related criminal activity or accidents. *Id.* at ¶ 62c.
- The retail quota system and hours of sale restrictions control the amount of alcohol available and limit consumption in order to combat the negative effects of excessive drinking. *Id.* at ¶¶ 82–98.

- The State’s cash law requires payment upon receipt of all alcohol products at all levels. *Id.* at ¶ 62e. “These requirements promote temperance and orderly markets by lessening the possibility of favorable financial arrangements or related forms of commercial inducement by an industry member that are intended to promote aggressive sales practices, recklessly stimulate purchase and consumption, or induce the wholesale distributor or the retailer to purchase certain alcohol beverages of a supplier to the exclusion of other products of a competitor.” *Id.*
- Beer and wine are required to be sold at a minimum mark-up price. *See* Ohio Admin. Code 4301:1-1-03 (wine mark-ups); Ohio Admin. Code 4301:1-1-72 (beer mark-ups). The minimum price mark-up “prevent[s] aggressive sales practices that improperly stimulate purchase and consumption, thereby endangering the state’s efforts to promote responsible, and discourage[s] intemperate, consumption of alcohol beverages; eliminate[s] discriminatory sales practices that threaten the survival of wholesale distributors and retail permit holders; preserve[s] orderly competition; ensure[s] fair prices over the long term; assure[s] adequate consumer choice; and promote[s] compliance with Ohio law and rules.” *Id.* at 4301:1-1-03(C).
- The State system of fees and taxes fosters and funds programs to promote public health and safety, such as educational and rehabilitative programs. Stevenson & Jones Rep. ¶¶ 50–58, 99–109.
- The wholesale distributors are “an indispensable buffer between manufacturers and retailers” to “prevent harmful practices, such as price manipulation, exclusive sales, ownership interest, credit on purchases and financial loans, while delivering consumer choice, variety and safety.” *Id.* at ¶¶ 41, 64–81.

To allow an out-of-state retailer to import wine directly into Ohio, without moving that wine through the three-tier system, would significantly undermine—if not fatally compromise—Ohio’s regulatory system and impede the State’s ability to effectively regulate alcohol within its borders, and thus remove safeguards that protect public health and safety.

a. There is no dispute as to the legitimacy of the State’s interests.

Plaintiffs do not dispute the legitimacy of the State’s interests or the fact that the State’s laws and regulations promote those interests. *See, e.g.*, Miller Dep. 38:23–41:6, 54:17–19, 55:5–24 (ECF No. 48, PageID ## 442–45, 458–59).²

b. There are no reasonable nondiscriminatory alternatives that would serve these interests.

The record further establishes the absence of reasonable nondiscriminatory alternatives that would serve these interests. *See New Energy Co.*, 486 U.S. at 278. Indeed, the State of Ohio cannot feasibly or practically regulate a nationwide market of retailers. Out-of-state retailers operate outside the jurisdiction of the State of Ohio. It would be impractical, if not impossible, to inspect and monitor them or to enforce Ohio laws that an extraterritorial retailer fails to heed. To even attempt such regulation, the State of Ohio would be required to increase its enforcement efforts exponentially, which would in turn strain and overwhelm the limited regulatory, staffing, and fiscal resources available—and have a material impact upon Ohio taxpayers. *See Stevenson & Jones Rep.* ¶¶ 51–58, 62.

c. The relief sought by Plaintiffs would have an adverse effect on state enforcement efforts.

Inability to adequately monitor and regulate out-of-state retailers would impede the State of Ohio from being able to effectively protect the health and safety of its citizens. The State would

² Plaintiffs may proffer a purported expert, Tom Wark, who opines generally about a perceived lack of preferred wine variety available in states, like Ohio, that prohibit out-of-state retailers from delivering directly into the State. Although he provides a single, unsubstantiated opinion that Ohio law does not promote any safeguards against minors’ consumption of alcohol, Mr. Wark offers no admissible testimony to contradict the evidence that the law protects public health and safety, fosters orderly markets, limits excessive drinking, and promotes the collection of taxes. *See generally* Stevenson & Jones Rebuttal Rep. Notably, Mr. Wark was also proffered as an expert in the *Lebamoff* case. *See* Wark Dep. 7:3–18, 8:21–24 (ECF No. 48, PageID ## 612–13).

be unable to inspect the retailers’ physical premises, review their books and records, or track the flow of alcohol from these inventories. *See id.* at ¶ 62. State regulators in Ohio would have no authority to compel out-of-state retailers to comply with the requisite pricing mark-ups and cash laws. *See id.* at ¶¶ 62, 90–98. And Ohio enforcement personnel would face an uphill battle attempting to sanction out-of-state retailers or collect fines for noncompliance. *See id.* at ¶¶ 62, 99–102. Indeed, by operating out-of-state, these retailers would be akin to absentee owners like those that owned saloons pre-Prohibition—focused on profit with no ties to Ohio and heedless of community health and safety—with virtual impunity. *Id.* at ¶ 62m.

d. Unlicensed direct retail sales from out-of-state retailers would lead to the demise of the three-tier system.

The effectiveness of Ohio’s entire regulatory structure depends on the State’s ability to regulate each tier. Ohio would lose the legal and practical ability to regulate the third tier—retailers—if out-of-state retailers were able to sell and deliver alcohol directly to Ohio consumers. That in turn would allow entry into the State of alcohol that did not pass through any entity over which the State government has authority and control, and thereby rendering the entire three-tier system obsolete and effectively stripping the State of Ohio of the ability to regulate any tier.

e. Unregulated direct sale and delivery by out-of-state retailers would thwart the protections that the wholesaler level provides.

Allowing out-of-state retailers to deliver wine directly to Ohio consumers would eclipse the necessary and important safety and gatekeeping functions that the middle tier (wholesalers) performs. *See id.* at ¶¶ 64–81. The wholesale distributors, who comprise the middle tier, are particularly important, as they act as “an indispensable buffer between manufacturers and retailers” to “prevent harmful practices, such as price manipulation, exclusive sales, ownership interest, credit on purchases and financial loans, while delivering consumer choice, variety and safety.” *Id.*

at ¶¶ 41, 64–81. As the Sixth Circuit emphasized: “Wholesalers play a key role in three-tier systems. Typically few in number and often state-owned, they are the in-state path through which all alcohol passes before reaching consumers. That allows States, if they wish, to control the amount of alcohol sold through price controls, taxation, and other regulations.” *Lebamoff*, 956 F.3d at 868.

Ohio’s system works efficiently because retailers are required to obtain alcohol for resale through the wholesaler level. As such, nearly all alcohol flows through the licensed wholesalers, which offer “a clearinghouse for inspection and auditing” of the products by state regulators. *See Stevenson & Jones Rep.* ¶ 75. Instead of having to monitor the alcohol via thousands of licensed retailers, Ohio may instead regulate it via the 100 wholesalers. *Id.* at ¶¶ 65, 75.

The integral role of wholesaler regulation protects public health and safety by (1) preventing the sale of unsafe and counterfeit alcohol through the record-keeping and come-to-rest requirements, (2) ensuring retailer compliance with the licensing scheme through the restriction that wholesalers may only sell to retailers they themselves have verified are properly licensed, (3) preventing vertical integration or pseudo-“tied houses” from overtaking the market, (4) ensuring consumer safety through the track-and-trace restrictions, (5) promoting proper consumption levels through the cash laws and minimum mark-ups, and (6) ensuring the efficient collection of taxes through the smaller number of entities needing to be assessed and audited. Additionally, wholesalers handle exclusive regions within the state, which promotes a fair and orderly marketplace and eliminates price competition at that tier (which in turn keeps prices higher and lessens the risk of alcohol abuse). *See id.* at ¶¶ 64–81; *Lebamoff*, 956 F.3d at 872 (“state control of the wholesalers . . . promote[s] ‘core’ Twenty-first Amendment interests by ‘promoting

temperance [and] ensuring orderly market conditions.” (quoting *Arnold’s Wines, Inc. v. Boyle*, 571 F.3d 185, 188, 191 (2d Cir. 2009)).

f. Out-of-state retail sales would threaten the health of minors.

The lack of enforcement options would likely increase the risk of minors consuming alcohol. As Plaintiff Miller admits, he often has arranged for direct shipment of wine to his office, yet he never signs for it and does not know who does or if anyone was required to show identification upon receipt of the contraband products. Miller Dep. 27:13–28:7 (ECF No. 48, PageID ## 231–32). As presented above, the State of Ohio lacks the ability and authority to inspect and enforce compliance with its regulations by out-of-state retailers. That impediment raises the very real risk that retailers could become lax in their diligence to ensure that minors are not purchasing alcohol from them. Indeed, out-of-state retailers do not have the same civic incentives to prevent the sale of alcohol to minors in another state as they do in their home state. *See, e.g., Stevenson & Jones Rep.* ¶ 86.

g. Direct sales by federally-licensed wine producers are different.

Plaintiffs suggest that there have been no severely detrimental consequences from allowing out-of-state wine producers (the first tier of the system) to sell and deliver wine directly to Ohio consumers and the same therefore would be true if the Court requires the State of Ohio to allow all out-of-state retailers to do the same. That is a false comparison between two highly dissimilar sectors of the alcohol economy. Wineries and retailers are wholly distinct entities that operate in separate tiers (first tier vs. third tier) within the Ohio system. *See B-21 Wines, Inc. v. Stein*, No. 3:20-CV-00099-FDW-DCK, 2021 U.S. Dist. LEXIS 127909, at *14 (W.D.N.C. Jul. 9, 2021) (“Allowing producers to circumvent the three-tier system does not undermine the system in the same way allowing retailers to circumvent the system would.”).

Moreover, wineries are required to obtain a federal permit and comply with various federal and state laws. *See* Federal Alcohol Administration Act of 1933, 27 U.S.C. § 201, *et seq*; *see also* Bureau of Alcohol, Tobacco and Firearms (“ATF”), ATF Ruling 2000-1. This federal permitting and regulatory system provides an added layer of accountability not present with retailers. Indeed, the State of Ohio would have little recourse where an out-of-state retailer violates its comprehensive regulatory system. *See* Stevenson & Jones Rep. ¶¶ 110–13, 120.

h. Collection of permit and registration fees and alcohol beverage taxes would be impractical.

Additionally, Ohio cannot feasibly collect from out-of-state retailers the same fees and taxes that in-state retailers pay. For reference, for the fiscal year 2019, Ohio collected about \$57.5 million in alcohol taxes and \$39.5 million in permit fees. *Id.* at ¶¶ 101, 106. As noted above, the potential pool of 640,000 out-of-state retailers dwarfs the current number of in-state retailers. It would be impractical for Ohio to attempt to inspect these out-of-state retailers and levy and collect the various permitting fees. *See id.* at ¶¶ 119–21.

A significant amount of tax revenue is at stake. The excise tax on wine is paid exclusively by the producers and wholesalers. *Id.* at ¶ 104. Out-of-state retailers would be able to completely evade this impost as they would not be operating within the three-tier system. That would significantly limit the amount of taxes that Ohio could collect on alcohol—funds that, in part, go towards important alcohol abuse education and rehabilitation measures. *Id.* at ¶¶ 6b, 103–109. Fees and taxes help to fund statewide programs that treat and prevent excessive alcohol consumption, addiction, and the negative effects of those issues. *See id.* at ¶ 57 (“Twenty per cent of the State of Ohio’s Undivided Liquor Permit Fund (Fund 7066), which is derived from collection of permit fees[,], is paid into the Statewide Treatment and Prevention Fund (Fund 4750).”).

Moreover, the State of Ohio cannot practically and efficiently regulate and collect sales taxes from up to 640,000 out-of-state retailers. Indeed, Plaintiff Miller admits that he has ordered wine from out-of-state entities that he had shipped to his home or office, on which he paid zero taxes. *See* Miller Dep. 36:6–38:20 (ECF No. 48, PageID ## 440–42).

Inability to impose and collect fees and taxes on wine from out-of-state entities also would diminish the ability of the State of Ohio to regulate consumption by that means. As Alexander Hamilton noted in *The Federalist Papers*, writing about the ability of the proposed federal government to levy duties on imported “ardent spirits,” “if it should tend to diminish the consumption of [them], such an effect would be equally favorable to the agriculture, to the economy, to the morals, and to the health of the society.” *The Federalist* No. 12 (Alexander Hamilton). Plaintiffs seek a remedy in this case that would deprive the State of Ohio of that venerable tool for moderating consumption.

i. Similar state systems have passed constitutional muster.

Every Circuit that has heard challenges to similar laws in other states has held that such bans on out-of-state retailer sale and deliveries is a valid exercise of the authority conferred by the Twenty-First Amendment that is compatible with the Dormant Commerce Clause. *See, e.g., Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1175 (8th Cir. 2021) (upholding Missouri law); *Lebamoff*, 956 F.3d at 873 (upholding Michigan law); *Wine Country*, 612 F.3d at 812 (upholding Texas law); *Arnold’s Wines, Inc.*, 571 F.3d at 187, 191 (upholding New York law); *Jelovsek v. Bredesen*, 545 F.3d 431, 433 (6th Cir. 2008) (upholding Tennessee law that prohibited direct alcohol deliveries from out-of-state retailers and wholesalers but allowed in-state entities to do so); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853–54 (7th Cir. 2000) (upholding Indiana law); *Tannins of Indianapolis, LLC v. Cameron*, No. 3:19-cv-504-DJH-CHL, 2021 U.S. Dist.

LEXIS 246548, at *2 (W.D. Ky. Dec. 28, 2021) (upholding Kentucky law); *B-21 Wines*, 2021 U.S. Dist. LEXIS 127909, at *16 (upholding North Carolina law).

As the Sixth Circuit aptly pointed out, drastic inequalities would arise if this Court were to hold otherwise—*i.e.*, it would mean that retailers in Indiana or Michigan (or any other state with a similar law) “could make direct deliveries within [Ohio], but [Ohio] retailers would not do the same in [those other states].” *Lebamoff*, 956 F.3d at 871.

Simply put, the Ohio laws that remain at issue in this case are an integral part of the broader three-tier system that serves the State’s legitimate interests and promote the public’s health and safety. The State of Ohio could not maintain an effective three-tier system, and serve the public health and safety interests that the system promotes, while allowing unregulated direct sale and deliveries from beyond its borders. “No amount of additional money through spending appropriations or raised license fees could change that reality.” *Lebamoff*, 956 F.3d at 873 (quotation, alterations, and citation omitted).

C. The Sixth Circuit’s decision in *Lebamoff* determines Plaintiffs’ Dormant Commerce Clause challenge.

The Sixth Circuit has dispositively addressed the relationship between the Twenty-First Amendment and the Dormant Commerce Clause as it pertains to the retailer tier of the regulatory system. The court upheld Michigan’s regulatory structure that bans out-of-state retailer sale and shipment of wine directly to Michigan consumers—regulations that are strikingly similar to Ohio’s regulations. *Lebamoff*, 956 F.3d at 867.³

³ This Court earlier declined to find that *Lebamoff* foreclosed Plaintiffs’ action, at the motion to dismiss stage, stating that the evidentiary record needed to be developed. Op. & Order (Feb. 17, 2021) at 21–22 (ECF No. 33, PageID ## 271–71). With the benefit of the evidentiary record that this motion presents, the similarities between this case and *Lebamoff* are clear and dispositive.

In *Lebamoff*, Michigan wine consumers and an Indiana wine retailer, which had no presence in Michigan, challenged a Michigan law that allowed in-state retailers to sell and deliver wine directly to Michigan consumers. *Id.* at 868. Similar to Ohio’s regulatory system, Michigan law requires retailers to obtain a permit, a prerequisite of which is that the retailer maintain a physical presence in the state, and to purchase nearly all inventory from the State’s wholesaler tier. *Id.* at 868, 870. Like the Ohio system, licensed in-state retailers could sell and deliver wine directly to Michigan residents while unregulated out-of-state retailers could not. *Id.* at 867. The plaintiffs brought a Dormant Commerce Clause challenge under § 1983.⁴ *Id.* The district court granted summary judgment in their favor and extended delivery rights to all out-of-state retailers. *Id.* at 869.

The Sixth Circuit reversed. *Id.* at 867. After detailing the history and nexus of the Twenty-First Amendment and Dormant Commerce Clause, the court held that (1) because States may adopt a three-tier system, as Michigan (and Ohio) have, they may require nearly all alcohol to run through in-state wholesalers, and (2) because States may require retailers to maintain an in-state location, they may also limit direct delivery rights to in-state retailers alone. *Id.* at 870.

The court debunked the notion that in-state retailers (who operate within the three-tier system) and out-of-state retailers (who do not) are situated in a sufficiently similar position to invoke the Dormant Commerce Clause. *Id.* at 870–71. The court then held that, even if those entities were similarly situated, “Michigan’s law promotes plenty of legitimate state interests” that cannot be characterized as state protectionism. *Id.* at 871. As such, the Sixth Circuit concluded that, because the Twenty-First Amendment permits States “to treat in-state retailers (who operate

⁴ Plaintiffs also raised a Privileges and Immunities Clause challenge to the Michigan statute, which the Sixth Circuit also found to be unavailing. *Lebamoff*, 956 F.3d at 875–76.

within the three-tier system) differently from out-of-state retailers (who do not),” Michigan’s law allowing in-state retailers to sell and deliver wine directly to Michigan consumers, while prohibiting out-of-state retailers the same, was not unconstitutional under the Dormant Commerce Clause. *Id.* at 867.

Ohio, like Michigan, allows licensed in-state retailers (which must maintain a physical presence in the State) to sell and deliver wine directly to in-state consumers while prohibiting unlicensed and unregulated out-of-state retailers from doing so. Ohio Rev. Code § 4301.58. Like Michigan, Ohio has legitimate and nonprotectionist interests in “promoting temperance and controlling the distribution of [alcohol].” *See id.* at § 4301.011; *see also Lebamoff*, 956 F.3d at 871 (quoting *North Dakota*, 495 U.S. at 433, 438–39). And like Michigan, Ohio’s laws prohibiting out-of-state retailers from delivering wine directly to Ohio consumers foster and promote those interests. *See Stevenson & Jones Rep.* ¶ 6.

As the Sixth Circuit explained, “[o]pening up the State to direct deliveries from out-of-state retailers necessarily means opening it up to alcohol that passes through out-of-state wholesalers or for that matter no wholesaler at all.” *Lebamoff*, 956 F.3d at 872 (citing *Arnold’s Wines*, 571 F.3d at 185 n.3). As such, if successful, Plaintiffs’ challenge would “effectively eliminate[] the role of [Ohio’s] wholesalers . . . [and] create a sizeable hole in the three-tier system.” *Id.*

As is the case in Michigan, Ohio imposes excise taxes on all alcohol products almost exclusively at the producer and wholesaler levels. *Stevenson & Jones Rep.* ¶ 104. And Ohio imposes certain quota and price restrictions that foster higher prices than an unregulated market may bear. *See Ohio Rev. Code* § 4303.29(B)(2)(a); *Ohio Admin. Code* 4301:1-1-03 (wine price mark-ups). To allow out-of-state retailers to bypass Ohio’s wholesaler tier “leaves too much room

for out-of-state retailers to undercut local prices and to escape the State’s interests in limiting consumption.” *Lebamoff*, 956 F.3d at 872. Accordingly, for the same reasons that Michigan’s ban on direct delivery of wine by out-of-state retailers is constitutional on this ground, Ohio’s similar ban is likewise constitutional.

Moreover, just as there was ample reason for Michigan’s concern that Indiana retailers like the plaintiff in *Lebamoff* would undercut its entire regulatory scheme, so too is there reason to believe that retailers from Illinois (or any other state for that matter), like House of Glunz, could do the same in Ohio. *See id.* at 872–73. Although Ohio and Illinois both have three-tier systems, they regulate them differently. *See Stevenson & Jones Rep.* ¶¶ 115, 116i–l.

For example, unlike Ohio, Illinois permits retailers and wholesalers to purchase wine products on credit, which weakens the independence of the three tiers and the anti-“tied-house” laws. *Compare* 235 Ill. Comp. Stat. 5/6-5 (retailer); 235 Ill. Comp. Stat. 5/6-6 (distributor) *with* Ohio Rev. Code Ann. § 4301.24(D); Ohio Admin. Code 4301:1-1-43(H)(2) . Unlike Ohio, Illinois permits wholesalers to sell to retailers below cost, with volume discounts, and with no minimum prices. *Compare* Ill. Adm. Code tit. 11 § 100.500 *with* Ohio Admin. Code 4301:1-1-43(A)(2) ; Ohio Admin. Code 4301:1-1-03(C).

Unlike Ohio, Illinois does not place any control on the number of importers that may supply a specific brand of wine. Ohio Rev. Code §§ 1333.82(G), 1333.84(B); Ohio Admin. Code 4301:1-1-43(D)(4). “Allowing Illinois retailers to ship alcohol beverages directly to Ohio consumers would remove the barrier to lower prices and thus encourage increased consumption, leading to potentially devastating health and safety results.” *Stevenson & Jones Rep.* ¶¶ 116b–g.

The Sixth Circuit delineated further concerns: “Once out-of-state delivery opens, the least regulated (and thus the cheapest) alcohol will win.” *Lebamoff*, 956 F.3d at 872. As such, without

delivery restrictions like those imposed by Ohio, “there is a ‘substantial’ risk that out-of-state alcohol will get ‘diver[t]ed’ into the retail market[,] . . . disrupti[ng] the [alcohol] distribution system’ and increasing alcohol consumption.” *Id.* (quoting *North Dakota*, 495 U.S. at 433). This result would leave no recourse for the State of Ohio, as it has no authority or power to place controls on the prices set by out-of-state wholesalers and producers. *See id.* at 873; *see also Healy v. Beer Inst.*, 491 U.S. 324, 336–38 (1989).

In-state retailers must “live with the bitter and sweet of [Ohio’s] three-tier system—the bitter of being able to buy only from [Ohio] wholesalers (and the price and volume regulations that go with it) and the sweet of being subject only to intrastate competition.” *See Lebamoff*, 956 F.3d at 873. Plaintiff House of Glunz, by contrast, seeks to help itself to the “sweet” of Ohio’s three-tier system but pass on the “bitter” of it. *Id.*

As the Sixth Circuit explained, allowing in-state retailers to deliver directly to in-state consumers is “nothing new,” and “[a]nyone who wishes to join them can get [an Ohio] license and face the regulations that come with it.” *Id.* Ohio in no way forbids House of Glunz to follow the required procedures and requirements to obtain a license. Rather, it is House of Glunz that refuses to take those steps and be subject to Ohio’s regulatory system, instead opting to attempt to enjoy the ability to sell and deliver wine to Ohioans without the corresponding restrictions.

The only reason that House of Glunz gives for not doing so is that “[i]t is not part of our business model.” *See* House of Glunz Answers to WBWAO Interrogs. ¶ 19, attached as **Exhibit 2**. The Court should not allow House of Glunz to circumvent Ohio’s system in this manner purely for the sake of its own business convenience and strategy.

II. Ohio does not disfavor out-of-state wines and alcohol.

Ohio law does not discriminate among types or brands of wine that may be sold in the State, or on the basis of the source of the wine itself. Plaintiffs claim that some brands or vintages are not available for purchase from any in-state retailers. If so, that is not because Ohio law precludes those wines or suppliers. Instead, if limited release wines are not available, it would be due in part to the fact that there are so few bottles available worldwide and the wine producers and suppliers have discretion as to where to send them. *See Lebamoff*, 956 F.3d at 875. Indeed, that is part of what makes rare and vintage wines so desirable and valuable—they are not readily available.

Additionally, there is no factual basis for Plaintiffs' concerns about not being able to obtain certain rare or vintage wines. Plaintiff Miller has identified several rare wine varieties that he collects, including Araujo Cabernet Sauvignon, Spottswoode Cabernet Sauvignon, and a Blackbird red blend. Miller Answers to WBWAO Interrogs. ¶ 9, attached as **Exhibit 3**; Miller Dep. 29:1–11, 45:5–20 (ECF No. 48, PageID ## 433, 449). He claimed that these varieties are not available from any Ohio wine retailers. Miller Answers to Interrogs. ¶ 9. To the contrary, each of these three varieties is available in Ohio—the Araujo Cabernet is available in at least four locations in Cleveland and Columbus and the Spottswoode Cabernet and the Blackbird blend are available at Jungle Jim's International Market outside Cincinnati. *See Exhibits 4, 5, & 6*. Indeed, Mr. Miller admits that he makes minimal efforts to find wine from Ohio retailers. Miller Dep. 29:12–33:3, 59:14–60:3 (ECF No. 48, PageID ## 433–37, 463–64). In fact, Mr. Miller admits that he normally does not check to see if any Ohio retailers have a specific wine before purchasing it from outside the State. *Id.* at 27:9–12.

As the record demonstrates, a significant amount of wine varieties, including rare and vintage ones, is available in Ohio—which makes sense. As the Sixth Circuit aptly pointed out, the “wholesalers have their own profit incentives to carry enough brands to meet consumer demand and answer requests for more.” *Lebamoff*, 956 F.3d at 875; *see also* Stevenson & Jones Rebuttal Rep. ¶ 6 (“Ohio retailers that do not carry a particular product have the ability, and ordinarily are willing, to order any such wine through a wholesaler, upon a consumer’s request.”).


Moreover, Mr. Miller may now also purchase wine and have it directly delivered from out-of-state wineries—the first tier of the system. *See* Ohio Rev. Code §§ 4303.232. This certainly provides additional opportunities to obtain at least some more varieties than were previously available. Yet, regardless of whether Mr. Miller is unable to obtain certain rare and vintage wines, that fact would not validly affect the analysis under the Dormant Commerce Clause. “[S]ome reduction in consumer choice . . . flows ineluctably from a three-tier system,” the purpose of which “is to make it harder to sell alcohol by requiring it to pass through regulated in-state wholesalers.” *Lebamoff*, 956 F.3d at 875.

Still, the State of Ohio has taken several steps to safely increase Ohio consumers’ choices when it comes to purchasing wine—for one, it has opened up direct deliveries from federally-regulated out-of-state wineries, regardless of size. *See, e.g.*, Ohio Rev. Code §§ 4303.232, 4303.233. But with each such expansion of options, the State cautiously embeds safeguards to protect against pre-Prohibition evils. *See, e.g.*, Ohio Rev. Code § 4303.233 (implementing new regulatory requirements to accommodate the amendment to the liquor control laws to allow direct deliveries from wineries, both in-state and out-of-state, producing 250,000 gallons or more of wine per year); *id.* at § 4303.234 (establishing “fulfillment warehouses” to facilitate the delivery of wine from large-scale, out-of-state wineries who hold the requisite permit).

CONCLUSION

Plaintiffs' impatient desire to obtain certain "specialty" wines without inconvenience does not warrant judicial destruction of the State of Ohio's three-tier system. The Dormant Commerce Clause challenge to the Ohio regulatory prohibition of out-of-state retailer sale and delivery of wine directly to Ohio consumers fails as a matter of law. The Court should enter summary judgment in favor of Defendants and dismiss Plaintiffs' complaint with prejudice.

Respectfully submitted,



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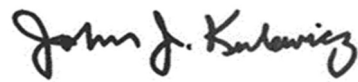
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served electronically through this Court's electronic service system upon all parties and/or counsel of record on this the 27th day of January 2022. Notice of this filing is sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

A handwritten signature in black ink, reading "John J. Kulewicz". The signature is written in a cursive style with a horizontal line underneath it.

John J. Kulewicz (0008376)

*Counsel for Intervenor-Defendant
Wholesale Beer & Wine Association of Ohio*

INDEX OF EXHIBITS

Exhibit 1 – Joint Affidavit of Bruce D. Stevenson and Gary E. Jones with their Expert Report and Rebuttal Expert Report attached

Exhibit 2 – House of Glunz’s Answers to WBWAO’s Interrogatories

Exhibit 3 – Kenneth M. Miller’s Answers to WBWAO’s Interrogatories

Exhibit 4 – Email from Solo Vino Imports, an Ohio wholesaler, stating availability of Araujo Cabernet in Ohio

Exhibit 5 – Website showing availability of Spottswoode Cabernet in Ohio

Exhibit 6 – Website showing availability of Blackbird blend in Ohio