UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

KAMBIS ANVAR, VINCENT COLAPIETRO, and MICHELLE DRUM,

Plaintiffs,

v.

ELIZABETH TANNER, Director of Dept. of Business Regulation, and PETER NERONHA, Attorney General of Rhode Island,

Defendants,

RHODE ISLAND RESPONSIBLE BEVERAGE ALCOHOL COALITION, INC.,

Intervenor-Defendant.

C.A. No. 19-cv-00523-JJM-LDA

MEMORANDUM OF LAW OF INTERVENOR-DEFENDANT RHODE ISLAND RESPONSIBLE BEVERAGE ALCOHOL COALITION, INC. IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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Intervenor-Defendant Rhode Island Responsible Beverage Alcohol Coalition, Inc. ("RIRBAC") respectfully submits this Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment (ECF No. 58) and in support of its Cross-Motion for Summary Judgment.

I. <u>Introduction</u>

The Twenty-first Amendment of the United States Constitution empowers States to pass laws concerning the sale and distribution of alcohol within their borders. *See* U.S. Const. Amend. 21, Sec. 2.[1] "[U]nder § 2, States 'remai[n] free to pursue' their legitimate interests in regulating the health and safety risks posed by the alcohol trade . . . ." *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. __, 139 S. Ct. 2449, 2471-72 (2019) ("*Tennessee Wine*"). Indeed, "§ 2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens." *Id.* at 2474. In this case, however, Plaintiffs seek to substitute their judgment for that of Rhode Island and its citizens as reflected by State law in the guise of a dormant Commerce Clause claim challenging critical provisions of Rhode Island's alcohol beverage code.[2] Their effort is unsupported by the Constitution and contrary to precedent. The Court should reject it.

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[1] 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.

[2] Worse still, most of the Plaintiffs' alleged evidence is nothing more than overbroad pronouncements from a self-proclaimed expert in everything from "writing" and "marketing communications" to "wine industry marketing," "wine industry politics," and "alcohol industry regulation," who owns a public relations company that sometimes represents alcohol retailers. *See* Declaration of Ryan M. Gainor ("Gainor Decl."), Exhibit 1, Excerpts of Deposition Transcript of Tom Wark ("T. Wark Dep. Tr.") at 8:17 -25:15; Gainor Decl., Exhibit 2, Curriculum Vitae of Tom Wark. This purported evidence has no bearing on the question of whether Rhode Island's laws have the predominant effect of benefiting the health and safety of its citizens. It is more akin to generalized legal argument from an industry spokesperson than supported factual findings.

To regulate alcohol, Rhode Island – like many of her sister states – has adopted a three-tier system for its distribution and sale. The United States Supreme Court has blessed the three-tier system as "'unquestionably legitimate.'" *Granholm v. Heald*, 544 U.S. 460, 488-489 (2005) (quoting *North Dakota v. U.S.*, 495 U.S. 423, 432 (1990)) ("States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment" under which system the wholesalers must be in-state; that three-tier system is an "'unquestionably legitimate'" exercise of state authority).

Under Rhode Island's three-tier system, Rhode Island licensed retailers must purchase wine from Rhode Island licensed wholesalers, who in turn must purchase from Rhode Island licensed suppliers. R.I. Gen. Law § 3-7-18. Licensed in-state retailers may sell and deliver to Rhode Island consumers the alcohol products purchased from the licensed in-state wholesalers. R.I. Gen. Law §§ 3-7-1, 3-7-3. While retailers may deliver wine to customers in Rhode Island, those deliveries must be completed by an employee and/or owner of the licensed Rhode Island retailer – *not* by a common carrier.[3] 230 R.I. Admin. Code R. 30-10-1.4.10.[4]

By seeking to permit retailers nationwide to ship alcohol to Rhode Island without maintaining licensed premises in the State[5] and without purchasing those alcohol products from a

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[3] Plaintiffs seek favored treatment for out-of-state retailers, arguing that, even if it struck down the "basic ban on home deliveries," this Court would also have to allow out-of-state retailers to deliver via common carrier, because it is the "only feasible delivery method available to them." ECF No. 58-1 at 2. They offer no compelling explanation as to their belief that the dormant Commerce Clause requires preferential treatment to out-of-state entities. As set forth below in Section IV.C, there is none.

[4] Rhode Island law also permits the delivery of wine under only one other circumstance – a Rhode Island resident who buys wine in-person at the premises of an out-of-state winery may ship it back home. Unlike many other states, Rhode Island does not allow for out-of-state wineries otherwise to directly ship their products into the State.

[5] Plaintiffs' claim that there is no Rhode Island "license that would allow an out-of-state retailer to make home deliveries" (ECF No. 58-1 at 1) is misleading in its oversimplification. An out-of-state retailer could obtain a Rhode Island retailer license, but it would need a store in the State.

licensed in-state Rhode Island wholesaler, Plaintiffs effectively challenge a core component of the State's three-tier system (as Plaintiffs' expert concedes (Gainor Decl., Ex. 1, Wark Dep. Tr. at 102:19-24-104:12-16)) – thereby challenging Rhode Island's three-tier system itself. Under well-established Supreme Court precedent, such a challenge must fail. *Granholm v. Heald*, 544 U.S. at 488-89.

Plaintiffs, novice wine consumers living in Rhode Island, seek to take up the mantle on behalf of out-of-state retailers (who are glaringly absent from this case). They cannot identify even one specific wine that they have sought to purchase but have been unable to buy in Rhode Island. Nonetheless, their Motion for Summary Judgment effectively argues that a constitutional violation exists unless a consumer can purchase every vintage of every wine (domestic or foreign) and have it shipped directly to their door. The flaw in Plaintiffs' argument is that, while their assertion of a purported constitutional right suffices for *standing*, it falls woefully short of establishing the requisite discrimination under the dormant Commerce Clause to prevail on the merits.[6]

Plaintiffs' Commerce Clause challenge to Rhode Island's requirement that a licensed retailer have a physical presence in the State is also legally untenable because the requisite discrimination is lacking where out-of-state retailers and licensed Rhode Island retailers are not similarly situated. Licensed Rhode Island retailers operating within and bound by the regulatory

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230 R.I. Adm. R. 30-10-1.4.27. But significantly, that out-of-state retailer would not need to be a resident of the State (as long as the corporate licensee is qualified to do business in the State).

[6] Indeed, this Court was prescient in its prior decision on this point. *See* Memorandum and Order on Motion to Dismiss, ECF No. 46 at 8 n.4 ("The Court foresees that the issue of availability may carry more relevance in assessing Commerce Clause implications amid an analysis of the merits."). Likewise, the case on which Plaintiffs rely, *Bridenbaugh v. Freeman-Wilson*, 227 F.2d 848, 850, 854 (7th Cir. 2000), makes the same distinction, finding the wine consumer plaintiffs had standing, but rejecting their dormant Commerce Claim.

burdens of Rhode Island's three-tier system are not similarly situated to out-of-state retailers seeking to sell and deliver wine to Rhode Island consumers without being bound by Rhode Island's comprehensive regulatory system. Because most states have a wholesaler purchase requirement like Rhode Island's, the out-of-state retailers cannot, under their home-state licenses, purchase wine from a licensed Rhode Island wholesaler. The regulatory systems in which the in-state and out-of-state retailers do business are not the same. *See Lebamoff Enterprises Inc. v. Whitmer*, 956 F.3d 863, 870 (6th Cir. 2020), *cert. denied*, 2021 WL 78088 (U.S. Jan. 11, 2021) (No. 20-47)[7] (in-state Michigan retailers and out-of-state retailers "operate in distinct regulatory environments, the most notable distinction being that Michigan-based retailers may purchase only from Michigan wholesalers and must operate within its three-tier system and comply with its other regulations.").

But even if this Court does not decide this case on the grounds that Plaintiffs' challenge is to Rhode Island's three-tier system itself; *or* on the basis that these consumer Plaintiffs failed to show the requisite discriminatory effect in light of the wines available to them; *or* on the basis that there is no unconstitutional discrimination where the in-state and out-of-state retailers are not similarly situated, Plaintiffs' Commerce Clause claim must nevertheless fail because the Rhode Island licensed retailer presence requirement satisfies the test set forth in *Tennessee Wine*. The Supreme Court expressly held that, because of the Twenty-first Amendment, "a different inquiry" than the standard strict scrutiny analysis must be applied in assessing a dormant Commerce Clause challenge to a state alcohol beverage statute. 139 S. Ct. at 2474. Under this "different inquiry," the State must show that "the predominant effect" of an alcohol beverage law is the protection of "public health and safety" or "some other legitimate" ground – but not protectionism. *Id.* And the

[7] Plaintiffs' Memorandum of Law (ECF No. 58-1 at 11) claims a commentator (another lawyer) has disagreed with *Lebamoff*. The U.S. Supreme Court did not – it declined to grant certiorari.

State's showing must consist of "'concrete evidence'" that the challenged statute "actually promotes public health or safety," *or* of evidence that "nondiscriminatory alternatives would be insufficient to further those interests." *Id.*

As demonstrated below, to meet the Supreme Court's clarified standard, RIRBAC (along with the State Defendants) have set forth non-speculative, supporting evidence to establish that Rhode Island's laws requiring licensed alcohol beverage retailers to be present (*not* resident) in the State and to purchase from licensed Rhode Island wholesalers (who must also be present – not resident – in the State) are necessary to effectuate the State's protection of public health and safety in connection with the sale and consumption of alcohol beverage products. And the evidence in support of the cross-motions reflects the Supreme Court's guidance regarding the presumptive validity of a presence requirement to enable the State to "monitor the [retail] stores' operations through on-site inspections, audits, and the like" and to revoke a retailer's operating license in the event of a violation threatening public health or safety. *Tennessee Wine*, 139 S. Ct. at 2475. That is, the State Defendants and RIRBAC have provided actual, factual evidence that the "predominant effect" of Rhode Island's law is *not* protectionism.

Plaintiffs' motion for summary judgment should therefore be denied, and the cross-motion for summary judgment of RIRBAC (as well as the cross-motion of the State Defendants) should be granted.

II. Factual and Procedural Background

Complaint. In the Complaint (ECF No. 1), Plaintiffs challenge several Rhode Island statutes and regulatory provisions (collectively, the "RI ABC Law") concerning the distribution and sale of alcohol beverage products as unconstitutional in relation to the dormant Commerce Clause:

a. R.I. Gen. Law § 3-4-8(a), which makes it unlawful for anyone in the business of selling intoxicating beverages in another state or country to ship any intoxicating beverage directly to a Rhode Island resident other than a licensed Rhode Island wholesaler. An exception is made for an order placed personally by the purchaser at the manufacturer's premises to be shipped to a Rhode Island address for non-business purposes; that is, a Rhode Island consumer may purchase wine while on the premises of an out-of-state winery and have it delivered by common carrier to that consumer in Rhode Island.

b. R.I. Gen. Law § 3-5-10 under which a retailer license may be issued to residents of Rhode Island and corporations incorporated in another state and authorized to do business in Rhode Island.

c. R.I. Gen. Law § 3-7-18, which requires that licensed Rhode Island retailers purchase from licensed Rhode Island wholesalers (the "in-state wholesale purchase requirement").

d. 230 R.I. Admin. Code 30-10-1.4.19(B)(1) ("Rule 19"), which is the "at rest" law under which all alcoholic beverages brought into Rhode Island for resale must be consigned and delivered to a licensed Rhode Island wholesaler.

e. 230 R.I. Admin. Code 30-10-1.4.27 ("Rule 27"), which requires that the retailer license must identify a premises for operation under the license (the "retailer presence requirement").

f. 230 R.I. Admin. Code 30-10-1.4.10 ("Rule 10"), which provides that the owner or employee of a Class A retailer license holder may deliver alcoholic beverages to the residence of a customer. The licensed Rhode Island retailer may not use a common carrier for delivery.

g. R.I. Gen. Law § 3-5-11, which prohibits the issuance of certain alcohol-related licenses to "chain store organizations."

h. R.I. Gen. Law § 3-5-15, which vests with licensing boards and/or town councils the authority to grant retailer licenses up to the maximum number fixed by DBR.

i. R.I. Gen. Law § 3-5-17, which requires notice and a hearing before certain retailer licenses can be granted. This statute also requires notice as to the location for which a license has been sought and as to the opportunity to be heard for those objecting to the license application.

While there is no out-of-state retailer plaintiff in this action, the consumer Plaintiffs seek a declaratory judgment and injunction essentially on behalf of out-of-state retailers to allow those

retailers to sell and deliver wine by common carrier directly to Rhode Island consumers. *Id.* The relief Plaintiffs seek in the Complaint would allow out-of-state retailers to sell and deliver wine by common carrier directly to Rhode Island consumers, despite the failure of those out-of-state retailers to maintain a premises for operation in Rhode Island and the failure of those out-of-state retailers to purchase wine for resale to a Rhode Island consumer from a Rhode Island licensed wholesaler. Such relief would therefore allow the out-of-state retailers not to comply with the State's three-tier system of distribution and sale of alcohol products under which retailers must purchase alcohol products from in-state licensed wholesalers, and in-state licensed wholesalers must purchase alcohol products from licensed suppliers who have registered their products with the State.

Summary of Evidence. Because the primary legal question in this case is whether the predominant effect of the retailer presence and in-state wholesaler purchase requirements of the RI ABC Law is the protection of the health and safety of Rhode Island's citizens, the factual evidence on that question is important and is summarized as follows:

Under the RI ABC Law, retail licensees are required to maintain and have available for inspection on their licensed premises all purchase and sale records. Affidavit of John Mancone in support of DBR's motion for summary judgment ("Mancone Aff.") ¶ 18. The various municipalities are responsible for issuing Class A retail licenses and undertake their own enforcement measures. *Id.* at 20; *see also* Expert Witness Report of Pamela S. Erickson ("Erickson Report") (Gainor Decl., Ex. 6) at ¶¶ 4-5, 7 (noting the benefits of the three-tier system, the rationale for state and local control over retailing alcohol products within a three-tier system, and the credible research confirming the efficacy of local measures). The RI ABC Law "deputizes" the Division of Sheriffs, the Rhode Island State Police, and local law enforcement to enforce the

State's statutes and regulations concerning alcoholic beverages within their respective jurisdictions. *Id.* at ¶ 21; *see also* R.I. Gen. Laws 3-12-1.

The RI ABC Law also authorizes the use of "compliance checks" in which underage individuals working with DBR or a municipal police department are sent into a Class A retailers' licensed premises to see if the minor is able to purchase alcohol. *Id.* at ¶ 22.

The licensed Rhode Island wholesaler is subject to various inspections of its licensed premises – on-site, physical inspections. Declaration of Kenneth Mancini ("Mancini Decl.") ¶ 9; Declaration of Michael J. Epstein ("Epstein Decl.") ¶ 3. And if a Rhode Island wholesaler refuses to provide DBR or other enforcement officials with access to its licensed premises, that refusal is grounds for suspension or revocation of the wholesaler's license. *Id.*

Because licensed Rhode Island wholesalers may purchase only those alcoholic beverage products from the designated brand owner that are registered with DBR, and because those purchased products must be stored in the wholesaler's licensed warehouse prior to resale to a licensed Rhode Island retailer, if a product is determined to be defective, the supplier-manufacturer can be tracked through a particular wholesaler, and the defective product recalled. Mancini Decl. ¶ 10; Epstein Decl. ¶4. This allows the licensed Rhode Island wholesaler, upon receipt of notice concerning a defective product, to act expeditiously (i) to locate all quantities in its possession of the defective product and remove it from distribution until it is either approved for sale or required to be returned to the supplier, and (ii) if necessary, to recover the defective product from the retailers to whom it was sold. *Id.* RIRBAC's wholesaler members are able to effectuate a product recall quickly because of the detailed records that they must maintain regarding sales to each of the finite number of licensed Rhode Island retailers as well as the ongoing business relationship they have with each of those Rhode Island retailers. More importantly, because the licensed Rhode

Island wholesalers have boots on the ground and feet on the street, they are able to mobilize effectively and then seamlessly retrieve defective product from each retailer in the State before a consumer is injured by or falls ill from that recalled product. Mancini Decl. ¶ 12; Epstein Decl. ¶ 6. Should the magnitude of the recall problem trigger the involvement of the federal Alcohol and Tobacco Tax and Trade Bureau or DBR, these licensed Rhode Island wholesalers would fully comply with any necessary on-site measures (including product seizure) consistent with the obligations under their federal basic permit. They would also cooperate with DBR to ensure that all recalled product that was already shipped to retailers was identified, located and, if necessary, removed from the retailers' shelves – again, consistent with their obligations under their Rhode Island license. Mancini Decl. ¶ 13; Epstein Decl. ¶ 7.

As noted above, the enforcement activities of DBR are assisted by Rhode Island law enforcement officers. Mancone Aff. ¶ 21. This assistance in enforcement duties would not be available from officers in another state. Further, since local Rhode Island law enforcement officers would have no jurisdiction to act in another state, this critical means of enforcement would be lost if retailers (and wholesalers) are not required to be physically present in the state.

Out-of-state online retailers pose additional regulatory challenges because DBR, municipalities, and local law enforcement cannot conduct in-person, on-site inspections or confirm that the products for sale have passed through a licensed wholesaler or that the sellers have complied with State tax laws. *Id.* at 30; *see also* Expert Witness Report of Patrick Maroney ("Maroney Report") (Gainor Decl., Ex. 7) at pp. 20-22. These out-of-state online retailers also pose additional safety concerns because neither DBR nor law enforcement can verify that the product offered for sale is what it purports to be, that the product is being sold to someone at least

21 years old, or even that the product is fit for human consumption. *Id.* at 31. *See also* Gainor Decl., Ex. 6, Erickson Report at ¶¶ 7-9; Gainor Decl., Ex. 7, Maroney Report at pp. 10-15.

While the threat of suspension or revocation of a Rhode Island retailer's license is a significant deterrent, that is because the Rhode Island licensed retailer knows that if it loses its license, it will effectively be out of business. To the extent an out-of-state retailer held a direct shipment permit, the threat of suspension or revocation of that permit would be a much less significant incentive to a licensee whose business does not depend on selling to Rhode Island consumers where DBR had no authority to revoke the out-of-state retailers' home state license. Gainor Decl., Ex. 6, Erickson Report at ¶ 8; Gainor Decl., Ex. 7, Maroney Report at pp. 16-18. Nor would DBR have any authority to stop the out-of-state wholesalers from selling product to the non-compliant out-of-state retailer – but DBR is able to do so with respect to its in-state wholesalers and retailers, again because of the presence requirement. *Id.*

Rhode Island's three-tier system also advances public health and safety by promoting responsible sales and consumption and orderly markets. Rhode Island law prohibits wholesalers from discriminating in price among retailers (the same product must be sold at the same price to all retailers). Mancini Decl. ¶ 8. Rhode Island imposes further restrictions on its licensed wholesalers and retailers (such as mandating that the price a retailer may charge for a bottle of wine is based on the wholesaler's invoice), and, of course, heavily taxes wholesalers (*id.* at ¶¶ 6-8). But, once again, since the out-of-state retailers would not be purchasing from the licensed Rhode Island wholesaler, they would be able to sell alcohol products that the State has not approved and at prices and under terms of sale that would be illegal in Rhode Island.

While the Complaint includes general allegations concerning the supposed unavailability of wines in Rhode Island and the purported discriminatory effect of that unavailability, the

testimony of Plaintiffs does not bear that out. Plaintiff Drum testified that there has been no specific wine that she was looking for that she could not find at a local Rhode Island liquor store (Gainor Decl., Ex. 5, M. Drum Dep. Tr. 19:24-20:3). Plaintiff Anvar testified similarly (Gainor Decl., Ex. 9, K. Anvar Dep. Tr. 15:4-7). Plaintiffs' expert, Tom Wark, concluded that he could not identify any Rhode Island retailer that had been unable to get a Rhode Island wholesaler to stock a wine product that the Rhode Island retailer or its customer was looking for (Gainor Decl., Ex. 1, T. Wark Dep. Tr. 95:17-21).

That is consistent with the testimony of RIRBAC's licensed wholesaler members that, given the well-established business relationships that the Rhode Island wholesalers have with the Rhode Island retailers and the competitive nature of the market, it is in the wholesaler's interest to attempt to source specific products (including wine) that a retailer is interested in purchasing. Mancini Decl. at ¶ 14; Epstein Decl. at ¶ 8. RIRBAC's wholesaler members have generally been successful in fulfilling the requests of Rhode Island retailers for a wine that Rhode Island wholesalers did not carry at the time of the request, and on many occasions, placed orders with suppliers relative to a request from one of their retail customers specific to a SKU (stock-keeping unit) that they do not carry. *Id.* *See also* Gainor Decl. Ex. 6, Erickson Report at ¶¶10-11.

Procedural History. Following the completion of fact discovery, Defendants moved to dismiss the Complaint for lack of standing. While denying the motion, in its Memorandum and Order on Motion to Dismiss dated July 16, 2021 (ECF No. 46), this Court noted: "The Court foresees that the issue of availability [of wine in the Rhode Island market] may carry more relevance in assessing Commerce Clause implications amid an analysis of the merits." *Id.* at 8 n.4.

III. Standard of Review

Under Rule 56(a), summary judgment should be granted where "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). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be `no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

"In the summary judgment context, 'genuine' has been construed to mean that the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party." *Mota v. Okonite Co., Inc.*, No. CV 19-562-JJM-PAS, 2022 WL 35808, at *2 (D.R.I. Jan. 4, 2022) (McConnell, D.J.) (internal quotations omitted). "Similarly, a fact is 'material' if it is one that might affect the outcome of the suit under the governing law." *Id.*

"Where . . . a district court rules simultaneously on cross-motions for summary judgment, it must view each motion, separately, through this prism." *Grossman v. Martin*, No. 120CV00048JJMLDA, 2021 WL 4775903, at *3 (D.R.I. Oct. 13, 2021) (McConnell, D.J.). "That is, each motion and the record it provides will be viewed in the light most favorable to the nonmovant." *Id.* Thus, the summary judgment "standard does not change when the parties cross-move for summary judgment." *Id.*

To avoid summary judgment, "[t]he nonmovant cannot rely on 'conclusory allegations, improbable inferences, and unsupported speculation." *Johnson v. Johnson*, 23 F.4th 136, 141 (1st Cir. 2022); *see also Doe v. Brown Univ.*, 505 F. Supp. 3d 65, 81 (D.R.I. 2020) ("Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable

inferences, and unsupported speculation."). The First Circuit has "repeatedly held" that affidavits which "merely reiterate allegations made in the complaint, without providing specific factual information made on the basis of personal knowledge" are insufficient to defeat summary judgment. *Garmon v. Nat'l R.R. Passenger Corp.*, 844 F.3d 307, 315 (1st Cir. 2016). "Neither wishful thinking . . . nor conclusory responses unsupported by evidence will serve to defeat a properly focused Rule 56 motion." *Velazquez-Garcia v. Horizon Lines Of Puerto Rico, Inc.*, 473 F.3d 11, 15 (1st Cir. 2007); *see also Lopez-Carrasquillo v. Rubianes*, 230 F.3d 409, 414 (1st Cir. 2000) (affidavit which contained legal arguments and "quasi-factual" allegations insufficient to create dispute of fact even where plaintiff purported that affidavit was made to best of her knowledge).

IV. Argument

A. Because Plaintiffs Attack Core Provisions That Are Essential To Rhode Island's "'Unquestionably Legitimate'" Three-Tier System, Their Commerce Clause Claim Fails

Rhode Island requires that licensed retailers and wholesalers have a physical presence in the State and mandates that retailers purchase only from in-state wholesalers. It does not impose a residency requirement on retailers or wholesalers. Plaintiffs contend that the presence requirement and in-state wholesaler purchase mandate are discriminatory under the dormant Commerce Clause.

In *Granholm*, the Supreme Court held that "[t]he Twenty-first Amendment empowers [states] to require that all liquor sold for use in the State be purchased from *a licensed in-state wholesaler*," 544 U.S. at 489 (emphasis added), and reaffirmed that the three-tier system is "'unquestionably legitimate,'" *id.* at 489 (quoting *North Dakota v. U.S.*, 495 U.S. at 432); *see also Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 30-31 (1st Cir. 2007) (Selya J.) ("This three-tiered system has been justified on multiple grounds: as an efficient means of controlling the

distribution of alcoholic beverages, as an effective means of promoting temperance, and as a facilitating means of collecting excise taxes. Its legitimacy has been vouchsafed by no less an authority than the Supreme Court.") (internal citations omitted).

Based on this view of the three-tier system, the Supreme Court has distinguished between a regulatory provision that is an "essential feature" of a three-tier system and one that is not. *See, e.g., Tennessee Wine,* 139 S. Ct. at 2471-72 (durational residency requirement is "not an essential feature of a three-tiered scheme").[8] Following *Tennessee Wine*, the courts that have addressed the "essential feature" question have *uniformly* held that the regulatory requirements at issue here are essential to the state's three-tier system. *See, e.g., Sarasota Wine Market, LLC v. Schmitt*, 987 F.3d 1171, 1183 (8th Cir. 2021), *cert. denied*, 2021 U.S. LEXIS (U.S. Oct. 21, 2021) (No. 20-1767) (plaintiff "without question attacks core provisions of Missouri's three-tiered system that the [Supreme] Court . . . described as 'unquestionably legitimate'"; Missouri's retailer and

[8] In contrast to a challenge to the three-tier system itself, the Supreme Court in *Granholm* struck down *exceptions* to Michigan's and New York's three-tier systems that allowed in-state wineries to sell and ship wine they produced directly to in-state consumers (thereby allowing in-state wineries to operate in two tiers—supplier and retailer—and to completely bypass the wholesaler tier), while prohibiting out-of-state wineries from doing the same. The Court said the Twenty-first Amendment's aim was "to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation and use," but "[t]he amendment did not give states the authority to pass nonuniform laws in order to discriminate against out-of-state goods. . . ." *Id.* at 484-485. Because the direct shipment laws created exceptions to the states' three-tier systems favoring in-state wine producers while out-of-state producers remained subject to the three-tier system, the Court found the laws "involve[d] straightforward attempts to discriminate in favor of local producers," served no purpose other than economic protectionism, and thus violated the dormant Commerce Clause. At the same time, the Court reaffirmed that a state's law requiring all alcohol sold within its border to pass through a three-tier system is an '"unquestionably legitimate"' exercise of a state's authority under the Twenty-first Amendment. *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432). No such exception is involved in Plaintiffs' Commerce Clause claim here. To the contrary, the State and Intervenor Defendants do not seek to selectively apply the three-tier system to discriminate against out-of-state retailers; instead, they seek to evenhandedly apply the physical presence requirement to in-state and out-of-state retailers.

wholesaler physical presence requirements and its mandate to purchase only from in-state wholesalers "are an essential feature of its three-tiered scheme"; dismissal of plaintiffs' Commerce Clause complaint affirmed); *Lebamoff Enterprises v. Whitmer*, 956 F.3d at 872 (upholding Michigan's requirement that retailer be in-state to make deliveries because "opening 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" (emphasis added)); *Tannins of Indianapolis v. Cameron*, No. 3:19-CV-504-DJH-CHL, 2021 WL 6126063, at *4 (W.D. Ky. Dec. 28, 2021) ("In short, *Lebamoff* confirmed that states with a three-tier system can prohibit direct-to-consumer alcohol deliveries by out-of-state retailers without violating the Commerce Clause. And Kentucky is no different. Like Michigan in *Lebamoff*, Kentucky regulates alcohol distribution within its borders via a three-tier system. Like Michigan, Kentucky has a legitimate interest in preserving the integrity of its three-tier system. Like Michigan, 'there is no other way' Kentucky 'could preserve the regulatory control provided by the three-tier system' other than by prohibiting direct-to-consumer alcohol deliveries by out-of-state retailers. And thus, like Michigan's, Kentucky's ban on such deliveries is constitutionally permissible under both the Commerce Clause and the Twenty-first Amendment.") (internal citations and quotations omitted); *B-21 Wines, Inc. v. Stein*, __ F. Supp. 3d __, 2021 WL 2899812 at *5, *6 (W.D.N.C. July 9, 2021) ("the only question the court need evaluate" is whether North Carolina's differential treatment of out-of-state wine retailers "is essential to North Carolina's three-tier system"; North Carolina's retailer presence requirement upheld; plaintiffs' summary judgment motion denied; state defendants' motion granted). *See also Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) ("[A]rgument challenging the three-tier system itself . . . is foreclosed by the Twenty-First Amendment and . . . *Granholm*."); *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 743

(5th Cir. 2016) ("Distinctions between in-state and out-of-state retailers and wholesalers are permissible only if they are an inherent aspect of the three-tier system.") (citation omitted), *cert. denied sub nom., Tex. Package Stores Ass'n v. Fine Wine & Spirits of N. Tex.*, ___ U.S. ___, 137 S. Ct. 494 (2016); *Jelovsek v. Bredesen*, 545 F.3d 431, 436 (6th Cir. 2008) (a state's "decision to adhere to a three-tier distribution system is immune from direct challenge on Commerce Clause grounds").

As in the recent cases of *Sarasota Wine, Lebamoff*, *Tannins of Indianapolis,* and *B-21 Wines*, Plaintiffs here seek the elimination of the retailer presence requirement and the state mandate to purchase from an in-state wholesaler.[9] Plaintiffs' proffered expert agrees that the in-state wholesaler purchase mandate is a core component of the three-tier system in its "strictest form" that most states have, and that it "would be beneficial to producers of all sorts, and to retailers, for them to be able to buy and sell among themselves *without a wholesaler being involved*" (Gainor Decl., Ex. 1, Wark Dep. Tr. 43:5-24 (emphasis added); 102:19-24; 104:12-16).

As in *Lebamoff*, if Plaintiffs are successful, that will "effectively eliminate the role" of Rhode Island's wholesalers and "create a sizeable hole in the three-tier system." *Lebamoff*, 956 F.3d at 872; *accord B-21 Wines*, 2021 WL 2899812 *5-6 ("allowing out-of-state retailers to circumvent the three-tier system – while still requiring in-state retailers to participate in the system – would render the three-tier system meaningless"; "[g]iven a choice between virtually eliminating North Carolina's three-tier system, which the Supreme Court and multiple Courts of Appeals have determined is unquestionably legitimate, and maintaining the status quo, the Court chooses the latter.").

[9] This is not surprising because the same attorneys represent the plaintiffs in those four retailer direct shipping cases, others in Arizona, Illinois, Indiana, New Jersey, and Ohio, and, of course, in this case.

Plaintiffs' attack on essential features of Rhode Island's three-tier system therefore cannot stand.

B. Any Commerce Clause Claim Based On Discrimination Arising From Wines "Unavailable" In Rhode Island Must Fail

To the extent Plaintiffs base their claim of discrimination on the supposed wines that out-of-state retailers have for sale in "the markets of other states" that are allegedly "unavailable" in Rhode Island, Plaintiffs have not established that a Rhode Island retailer has not been able to source a wine requested by a Rhode Island consumer. To try to support its claims, the Motion refers to wines from purported local sports "icons" Tom Seaver and Drew Bledsoe[10], wines recommended by Wine Spectator, rare wines and old vintages (ECF No. 58-1 at 14). But the Motion does not support the claims with non-speculative evidence. Plaintiff Drum waffles, saying that it is "impossible to name specific wines [she] would buy from out-of-state retailers because [she] do[es] not know what wines [she] might be looking for." Pl. Ex. 2 (ECF No. 58-4) at ¶ 12. Plaintiff Anvar's waffling is almost verbatim: "It is impossible to name specific wines I would buy from out-of-state retailers because I do not know exactly what wines I may want." Pl. Ex. 1 (ECF No 58-3) at ¶ 10. Similarly speculative and unsupported is the testimony of Plaintiffs' purported expert, whose pronouncements as to "local stores," the wine retailers in "a city," the wines available "locally," and the location of "specialty wine retailers" were made without speaking with any Rhode Island retailer *or* Rhode Island wholesaler *or* Rhode Island consumer. Gainor Decl., Exhibit 1, Wark Dep. Tr. at 97:5-12; 98:9-23; 96:11-97:4. Nor was Mr. Wark able to identify any

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[10] Seaver, best known for his 11 seasons with the New York Mets, pitched one season for the Boston Red Sox at the end of his career. Locals likely know Bledsoe best for suffering an injury during the 2001 NFL season that led to the beginning of the Tom Brady-era for the New England Patriots. Whether wine by Seaver or Bledsoe has any demand in Rhode Island is speculative at best.

Rhode Island retailer that had been unable to get a Rhode Island wholesaler to supply or source a wine product that the Rhode Island retailer or its customer was looking for. *Id.* at 95:17-21.

Even more speculative and unsupported are the third-party affidavits of Kosta Arger and Larry Gralla upon which Plaintiffs base certain other supposedly undisputed facts as to the availability of wines in Rhode Island (Pl. Exhibits 10 and 11 (ECF Nos. 58-13 and 58-14); neither of them is a Rhode Island resident or has lived in Rhode Island; neither has asked a Rhode Island wholesaler or retailer to source a particular wine; and neither has knowledge of what wine inventory any Rhode Island wholesaler or retailer carries. *See* Gainor Decl., Exhibit 3, Excerpts of Deposition Transcript of Kosta Arger ("Arger Dep. Tr.") Tr. at 13:5-14:7; 21:3-11;22:12-17; 23:6-11; 24:7-14; 26:8-27:1; Gainor Decl., Exhibit 4, Excerpts of Deposition Transcript of Lawrence Gralla ("Gralla Dep. Tr.") at 13:4-21; 15:13-17; 18:19-20:7; 21:20-25; 24:22-28:12.

In contrast, the record shows that Rhode Island wholesalers are able to fulfill the requests of their Rhode Island retailer customers for wines – including those that are not currently on the retailer's or wholesaler's shelves. *See* Mancini Decl. at ¶ 14; Epstein Decl. at ¶ 8.

Ultimately, Plaintiffs cannot identify a single, specific wine that they tried to obtain in Rhode Island but have been unable to source.[11] *See* Gainor Decl., Exhibit 5, Excerpts of Drum Deposition Transcript of Michelle Drum ("Drum Dep. Tr.") 19:24-20:3 (there was no specific wine that Drum was looking for that she could not find at a local liquor store); Gainor Decl., Exhibit 9, Excerpts of Transcript of Deposition of Kambis Anvar ("Anvar Dep. Tr.") 15:4-7 (same). Failing to do so, they assume that any hypothetical inability to obtain a particular label in Rhode Island would be the result of a prohibition on direct- to-consumer shipping. But other explanations abound. For example, the lack of availability may be the result of a business decision

[11] It cannot be disputed that Rhode Islanders have access to thousands of labels of wine.

by a winery not to register its products for sale in Rhode Island. Mancini Decl. ¶ 15; Epstein Decl. ¶ 9. *See also Lebamoff*, 956 F.3d at 875.

Regardless, other courts that have grappled with this issue have held that no Commerce Clause violation exists under comparable circumstances. *See Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d at 1178-84 (holding consumers who alleged that direct shipment prohibition prevented them from purchasing wines not available in Missouri had standing, but ultimately rejecting Commerce Clause challenge); *Lebamoff Enterprises Inc. v. Whitmer*, 956 F.3d at 874-75 ("What of the consumer plaintiffs, the Michigan wine purchasers who cannot buy the types of wine they want without inconvenience? The record for one suggests these concerns may be exaggerated. Wine wholesalers have their own profit incentive to carry enough brands to meet consumer demand and answer requests for more.").

In *Lebamoff,* the Sixth Circuit Court of Appeals acknowledged that some brands of wine may be unavailable to consumers in Michigan. *Lebamoff*, 956 F.3d at 875. But it explained that "the extent of the State's responsibility for that gap is not clear. Some winemakers may seek higher margins by selling exclusively at 'high-end' restaurants or at their own vineyards, and others may lack the capacity to produce enough wine for wide distribution. . . As Lebamoff's expert admits[12], fewer than 50,000 of the roughly 200,000 wines sold in the country are available nationwide. That's not Michigan's fault." *Id.*

The Sixth Circuit further held that

> [I]t's likely the case that some wine producers do not sell to Michigan wholesalers due to these regulatory costs. Some rare wines, for example, apparently are available only through specialty retailers located primarily in California, New York, New Jersey, and Chicago. But some reduction in consumer choice, it seems to us, flows ineluctably from a three-tier system. The purpose of the system, for better or worse, is to make it harder to sell

[12] Lebamoff's expert was Mr. Wark. *See* Gainor Decl., Exhibit 1, Wark Dep. Tr. 7:7-13.

> alcohol by requiring it to pass through regulated in-state wholesalers. Those middlemen unsurprisingly impose added costs, sometimes choice-limiting costs. Still, it's worth noting that Michigan has loosened some regulations to increase choice. That was the point of allowing limited direct deliveries by out-of-state wine producers. Perhaps more amendments are in order. Broadening product options seems far afield from the tied-saloon system that the three-tier system was designed to replace. The internet has widened that gap. Today '[w]e live in a global economy and we shop in virtual marketplaces for everything from luxuries to necessities.' But the Twenty-first Amendment leaves these considerations to the people of Michigan, not to federal judges.

Id. at 875. The Twenty-first Amendment certainly does not leave the considerations discussed in *Lebamoff* to Plaintiffs.

Neither of the two cases relied on by Plaintiffs compels a different result. Only one, *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000), concerned the direct shipment of alcohol. There, as Plaintiffs note, the Seventh Circuit held that "Indiana oenophiles" possessed standing to bring a claim. *Id.* at 850. But Plaintiffs overlook the Court's ultimate holding – that Indiana law did not violate the dormant Commerce Clause. *Id.* at 853-54. Thus, if anything, *Bridenbaugh* supports the State and Intervenor Defendants, not Plaintiffs. The other case cited by Plaintiffs involves milk. In *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949), the plaintiff, a Massachusetts company, sought to abide by New York's laws to build a new facility in New York. *Id.* at 526-527. Here, no out-of-state retailer has attempted to follow Rhode Island's statutory licensing scheme. Therefore, the case is distinguishable on its face.

C. Because the Out-of-State and Licensed In-State Retailers Are Not Similarly Situated, There Is No Discrimination Arising from the Physical Presence Requirement

Plaintiffs complain that licensed retailers located in Rhode Island may make *intrastate* sales and deliveries of wine purchased from Rhode Island wholesalers to their Rhode Island customers, but unlicensed retailers outside of Rhode Island cannot import into the State wine which was not purchased from licensed Rhode Island wholesalers (and which therefore has not passed

through Rhode Island's three-tier system) and cannot sell and deliver that wine directly to Rhode Island consumers. But Plaintiffs' grievance fails to consider the well-established principle that "any notion of discrimination [in a dormant Commerce Clause analysis] assumes a comparison of substantially similar entities." *Gen. Motors v. Tracy*, 519 U.S. 278, 298 (1997).

The Fifth Circuit recently affirmed this principle in a case involving a Texas alcohol beverage retailer licensing statute, holding: "'[A] statute impermissibly discriminates only when it discriminates between similarly situated in-state and out-of-state interests.'" *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm.*, 935 F.3d 362, 376 (5th Cir. 2019), quoting *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 163 (5th Cir. 2007), and citing *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978)[13]; *see also Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 820 (5th Cir. 2010) (unlicensed out-of-state retailers were not similarly situated to licensed in-state retailers and therefore "cannot make a logical argument of discrimination").

Licensed Rhode Island retailers operating within the State's three-tier system are not similarly situated to out-of-state retailers who seek to sell and deliver wine to Rhode Island consumers without being bound by Rhode Island's comprehensive regulatory system. Rhode Island law extends the right to deliver wine *intrastate* to any person or entity who becomes a Rhode Island licensed retailer, regardless of the licensee's residence (as long as the corporate licensee is qualified to do business in Rhode Island). While a retail license may be issued for premises in

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[13] In another case rejecting a Commerce Clause challenge to Rhode Island's alcohol regulations (including the prohibition on chain stores holding Class A retail licenses that Plaintiffs challenge in their Complaint but not in their summary judgment motion), Judge Selya quoted *Exxon* and explained: "Thus, the fact that the mosaic of state laws enacted by the General Assembly may have had a negative impact on W & S's business model is, in itself, insufficient to show discriminatory effect." *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 15 (1st Cir. 2007) (quoting *Exxon*, 437 U.S. at 126) (internal citations omitted), *cert. denied*, 552 U.S. 889 (2007).

Rhode Island to entities that are headquartered or incorporated in other states, that license mandates that the retailer purchase wine from a Rhode Island licensed wholesaler (not an out-of-state wholesaler) and otherwise comply with all other regulatory requirements and prohibitions under the RI ABC Law. Here, out-of-state retailers are not similarly situated because they will not purchase wine from a licensed Rhode Island wholesaler. Because, as Plaintiffs' expert agrees, most states have an in-state wholesaler purchase requirement, out-of-state retailers are generally prohibited from doing so under their home-state license.

Rhode Island evenhandedly imposes delivery and shipment restrictions on *all* licensed retailers[14] as part of "an effective and uniform system for controlling liquor." *Granholm*, 544 U.S. at 484. A law is not discriminatory merely because it might not provide an out-of-state retailer with the same economic opportunities as licensed in-state retailers. *See Exxon, supra.* Nor is it discriminatory simply because the out-of-state retailer's preferred business model (direct shipping) is not allowed. *Id.*; *Wine & Spirits Retailers, Inc. v. Rhode Island,* 481 F.3d at 15; *see also Breard v. Alexandria*, 341 U.S. 622, 638 (1951) (it was constitutionally "immaterial" under a Commerce Clause analysis that alternative methods of doing business did not produce as much business as the method subject to regulation).

The Commerce Clause forbids the states from imposing economic burdens on out-of-state economic interests to create an advantage for in-state economic interests. *Granholm*, 544 U.S. at 472 ("States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses"). But states are not obligated to ensure equally efficient access to out-of-state business interests. *Exxon, supra.* That is particularly so here where

[14] Pursuant to Rule 10 of the RI ABC Law, an in-state retailer may deliver product to a Rhode Island consumer through its owner or an employee and cannot use a common carrier to deliver product. 230 R.I. Admin. Code 30-10-1.4.10.

the statute that is preventing an out-of-state retailer from being able to sell and deliver to Rhode Island consumers is its own home state licensing requirement that it purchase from its home state licensed wholesalers – it is not the Rhode Island statute regulating the sale and delivery of wine purchased from a Rhode Island licensed wholesaler.

Significantly, the markets in which the in-state and out-of-state retailers compete are not the same. Just as the Rhode Island licensed in-state retailers must do business with Rhode Island licensed wholesalers, an out-of-state retailer must do business with licensed wholesalers of its home state. Neither an in-state nor an out-of-state retailer can engage in a cross-border/interstate market transaction because of the equivalent prohibition on importing wine that exists in their respective alcohol beverage codes.

Nor can Plaintiffs demonstrate that out-of-state retailers are similarly situated to licensed Rhode Island retailers simply by arguing that the out-of-state retailers are bound by their home state's regulatory system. That argument wrongly assumes that Rhode Island does not have a legitimate interest in regulating the distribution of alcohol and must accede to whatever is acceptable to any other state from which retailers may wish to import wine into and deliver it to consumers. But Plaintiffs' rationale contravenes the very cornerstone of § 2 of the Twenty-first Amendment, recognized most recently in *Tennessee Wine*, that "each State [has] the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens." 139 S. Ct. at 2474. And that argument wrongly assumes that the various States' regulatory systems are indistinguishable. *See Tennessee Wine*, 139 S. Ct. at 2472 ("under § 2, States 'remain free to pursue' their legitimate interests in regulating the health and safety risks posed by the alcohol trade"; the States' "three-tiered schemes differ").

Rhode Island's "three-tiered scheme" is a strict one. Wholesalers may sell only those alcohol products that the suppliers have registered with the State. R.I. Gen. Law § 3-6-14. All alcohol products the wholesalers purchase must come to rest at the wholesalers' licensed warehouse before those products can be sold to a retailer. 230 R.I. Admin. Code R. 30-10-1.4.19(B)(1). Several states, including New York from which Plaintiff Michelle Drum had wine shipped to her in Rhode Island illegally (Gainor Decl., Exhibit 5, Drum Dep. Tr. 32:11-33:21), do *not* have an "at rest" law. Requiring alcohol products to be "at rest" at a licensed Rhode Island wholesaler's premises prevents alcohol products from circumventing the licensed wholesaler, preventing grey goods or bootlegged alcohol products that are not authorized for sale by the supplier, and allows the products to be tracked and inspected prior to resale to the retailers. Mancini Decl. ¶¶ 5-6. But, once again, since the out-of-state retailers would not be purchasing from the licensed Rhode Island wholesaler, they would be able to sell alcohol products that the State has not approved and on terms that would be illegal in Rhode Island.

The Sixth Circuit in *Lebamoff* noted these same types of restrictions imposed on Michigan's wholesalers and retailers in analyzing whether Michigan's retailers and Indiana's retailers were "substantially similar entities.'" *Lebamoff*, 956 F.3d at 870.

> "[A]ny notion of discrimination assumes a comparison of substantially similar entities." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298, 117 S. Ct. 811, 136 L.Ed.2d 761 (1997). That is not clear when it comes to a comparison between Michigan retailers and Indiana retailers like Lebamoff. True, they both sell the same product to consumers. True also, retailers in Northern Indiana and Southern Michigan presumably compete with each other for those consumers. But they operate in distinct regulatory environments, the most notable distinction being that Michigan-based retailers may purchase only from Michigan wholesalers and must operate within its three-tier system and comply with its other regulations. That may affect whether the kind of discrimination targeted by the dormant Commerce Clause is afoot. *See Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 820 (5th Cir. 2010) (upholding a similar statute on this ground).

Id. at 870-871.

Here, Plaintiffs have not shown "the kind of discrimination targeted by the dormant Commerce Clause." Indeed, this case is devoid of an out-of-state retailer plaintiff, and the two consumer Plaintiffs have failed to establish the requisite discrimination on behalf of out-of-state retailers because the prerequisite of "substantially similar entities" is lacking.

Plaintiffs therefore cannot sustain a claim of discrimination under the dormant Commerce Clause.[15]

[15] In their summary judgment brief, Plaintiffs try to concoct two new discriminatory grievances based on purported undisputed facts – (i) unable to buy a wine from an out-of-state retailer, a Rhode Island consumer will "substitute" a wine from an in-state retailer (ECF No. 58-1 at 13; Stmt. of Undisputed Facts 31), and (ii) a Rhode Island consumer would be able to buy wines at better prices from an out-of-state retailer than from a local retailer (ECF No. 58-1 at 13; Stmt. of Undisputed Facts 6). Neither of these purported discriminatory effects is set forth in the Complaint (such that this Court should reject these last-minute add-ons); and, in any event, both are "supported" solely by the Drum Declaration (Pl. Ex. 2 (ECF No. 58-4) at 2, 15-18). But Plaintiff Drum's Declaration (prepared specifically for the summary judgment motion) is contrary to her deposition testimony and therefore improper. *See, e.g.,* Gainor Decl., Ex. 5, Drum Dep. Tr. at 19:24-20:3 (there has been no specific wine that she was looking for that she couldn't find at a local Rhode Island liquor store); 20:4-19 (Vickers, a local liquor store with a "wide selection of wines," "responded by bringing in a few more [Barolo] options," and she "was just pleasantly surprised"); 17:7-18:7 (Drum found a "remarkably cheap" Barolo, "a nondenominational," at a local liquor store and purchased it – "Indeed, I did" want to purchase it.); 29:15-30:3 ("there's really no price differential on the wine you can get here and that you can get online" from an out-of-state retailer). Drum's assertions of having to substitute a lesser wine locally or having to pay higher prices locally contradict her deposition testimony and appear to be the work of Plaintiffs' counsel trying to manufacture undisputed facts in an attempt to win summary judgment – an improper use of a plaintiff's declaration. *Escribano-Reyes v. Prof'l Hepa Certificate Corp*., 817 F.3d 380, 386 (1st Cir. 2016) ("[W]here a party has given 'clear answers to unambiguous questions' in discovery, that party cannot 'create a conflict and resist summary judgment with an affidavit that is clearly contradictory,' unless there is a 'satisfactory explanation of why the testimony [has] changed.'") (alterations in original); *Pena v. Honeywell Int'l Inc.*, No. CV 15-179 WES, 2018 WL 582579, at *2 (D.R.I. Jan. 29, 2018), *aff'd* 923 F.3d 18 (1st Cir. 2019) ("a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity.").

D. Because the Concrete Evidence That the Defendants Are Submitting Establishes That the Predominate Effect of Rhode Island's Retailer Presence Requirement Is the Advancement of Public Health and Safety and Not Protectionism, Plaintiffs' Commerce Clause Claim Fails

Even if this Court finds that (i) Plaintiffs are not challenging essential features of Rhode Island's three-tier system, (ii) Plaintiffs' evidence of "unavailability" of wine in Rhode Island was admissible and established the requisite discrimination to sustain a Commerce Clause claim on the merits (not just standing), and (iii) Plaintiffs have demonstrated the requisite discrimination between similarly situated entities, Plaintiffs' Commerce Clause claim must nevertheless fail because Rhode Island's retailer presence requirement meets the *Tennessee Wine* test – i.e., the predominant effect of that law is to promote the health and safety of Rhode Island's citizens.

1. The "Different Inquiry" Standard of *Tennessee Wine* Applies.

In evaluating Tennessee's alcohol beverage retailer durational residency law, the Supreme Court in *Tennessee Wine* acknowledged that under the normal dormant Commerce Clause test – if the state had chosen to regulate any other retail business in the same way – the regulation "could not be sustained." *Tennessee Wine*, 139 S. Ct. at 2474. "But because of § 2, we engage in a *different inquiry*." *Id.* (emphasis added). The Court recognized that "§ 2 was adopted to give each State the authority to address alcohol-related public health and safety issues," and other legitimate interests, "in accordance with the preferences of its citizens." *Id.* And therefore "Section 2 gives the States regulatory authority that they would not otherwise enjoy," namely regulatory authority not permitted under the dormant Commerce Clause. *Id.*

The "different inquiry" articulated in *Tennessee Wine* requires states to show that "the *predominant effect* of a law" is the protection of public health and safety (or other legitimate state interests) – not protectionism. *Id.* at 2474 (emphasis added). "In conducting the inquiry, courts must look for 'concrete evidence' that the statute 'actually promotes [the state's legitimate

interests, including] public health or safety,' or evidence that 'nondiscriminatory alternatives would be insufficient to further those interests.'" *Wal-Mart Stores v. Texas Alcoholic Beverage Comm'n*, 935 F.3d at 369-70, quoting *Tennessee Wine*, 139 S. Ct. at 2472.

This test is distinct from normal dormant Commerce Clause strict scrutiny, which requires that laws be "*narrowly tailored*." *Id.* at 2461 (quoting *Dep't of Revenue*, 553 U.S. at 338) (emphasis added). The Supreme Court recognized that the states' non-protectionist interests in, for example, "address[ing] alcohol-related public health and safety issues" are undeniably legitimate. *Id.* at 2474. And under this "different inquiry" test, the states do not have to demonstrate that their chosen regulations are "narrowly tailored" to serve their interests by considering every non-discriminatory alternative means of regulation. *Tennessee Wine* requires only that the states demonstrate they are not ignoring "*obvious alternatives that better serve*" their interests. *Id.* at 2476 (emphasis added).

The courts that have addressed cases in which the retailer presence requirement has been challenged under the dormant Commerce Clause have found that the "different inquiry" test articulated in *Tennessee Wine* applied. *See Lebamoff*, 956 F.3d at 869 ("When faced with a dormant Commerce Clause challenge to an alcohol regulation, as a result [of § 2], we apply a 'different' test. Rather than skeptical review, we ask whether the law 'can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." (internal citations omitted)); *B-21 Wines*, 2021 WL 2899812, at *4 ("dormant Commerce Clause analysis changes somewhat when the article of commerce being regulated is alcohol"; "if the challenged regulation or law is found to violate the dormant Commerce Clause, courts 'ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground,'" citing *Tennessee Wine*); *Chicago Wine Co. v. Holcomb*, 532 F. Supp.

3d 702, 713 (S.D. Ind. 2021)(citing *Tennessee Wine*'s different inquiry test and denying plaintiffs' summary judgment motion and granting defendants' summary judgment motion regarding retailer presence requirement and wholesaler purchase requirement); *Tannins of Indianapolis v. Cameron*, No. 3:19-CV-504-DJH-CHL, 2021 WL 6126063, at *3-4 (W.D. Ky. Dec. 28, 2021) (following *Lebamoff* and dismissing complaint).[16]

Notably, it is *Tennessee Wine*'s adoption of *Granholm's* governing principles that provides express guidance for this Court's assessment of Rhode Island's retailer presence requirement. Under the "different inquiry," the State must show that "the predominant effect" of an alcohol beverage law is the protection of "public health and safety" or "some other legitimate" ground – but not protectionism. *Tennessee Wine*, 139 S. Ct. at 2474. And the State's showing must consist of "'concrete evidence'" that the challenged statute "actually promotes public health or safety," or of evidence that "nondiscriminatory alternatives would be insufficient to further those interests." *Id.* (quoting *Granholm v. Heald*, 544 U.S. at 492).

Indeed, in its thorough description in *Tennessee Wine* of the history of the interplay between the dormant Commerce Clause and the Twenty-first Amendment, the Supreme Court underscored that the distinction between the requisite "'concrete evidence'" showing that the challenged statute promoted public health or safety or some other legitimate interest and "'mere

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[16] Nor does the First Circuit's decision in *Family Winemakers of California v. Jenkins*, 592 F.3d 1 (1st Cir. 2010), alter the analysis under *Tennessee Wine. Family Winemakers* – like *Granholm* – involved an *exception* to the three-tier system of Massachusetts (*id*. at 14) under which every Massachusetts winery, but none of the wineries that produced 98% of all wine in the United States, could simultaneously use the traditional wholesaler method under the three-tier system as well as direct distribution to retailers and direct shipping to consumers. The First Circuit found that the challenged statute was discriminatory in effect and purpose, noting that the legislative history was evidence of economic protectionism in favor of the in-state wineries (*id*. at 14, 17). Here, the physical presence requirement is not an exception to Rhode Island's three-tier system. *Tennessee Wine*'s "different inquiry" analysis thus applies.

speculation'" or "'unsupported assertions'" that are insufficient to sustain the law was one the Court "pointed out in *Granholm*." *Tennessee Wine*, 139 S. Ct. at 2474.

2. The Challenged Retailer Presence Requirement Meets the Supreme Court's *Tennessee Wine* "Predominate Effect" Test Because That Requirement Enables Rhode Island To Protect Public Health and Safety Concerning Alcohol Products.

After setting out its "predominant effect" test ("whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground"), the Supreme Court in *Tennessee Wine* acknowledged that retailers are presumptively present in the state. In discussing reasonable alternatives to a durational residency requirement, the Supreme Court distinguished between presence and residence, emphasizing that Tennessee retailers were already physically located in the state, which was sufficient for the state to maintain oversight such that residency was unnecessary:

> In this case, the argument [in support of residency] is even less persuasive since the stores at issue are physically located within the State. For that reason, the State can monitor the stores' operations through on-site inspections, audits, and the like . . . Should the State conclude that a retailer has 'fail[ed] to comply with the state law,' it may revoke its operating license. *Granholm*, 544 U.S. at 490, 125 S. Ct. 1885. This 'provides strong incentives not to sell alcohol' in a way that threatens public health or safety. *Ibid.*

139 S. Ct. at 2475.

Rhode Island's retailer presence requirement functions to enable the State to "monitor the [retailer] stores' operations through on-site inspections, audits, and the like" and thereby protect Rhode Island's citizens from the retailers' sale of alcohol products "in a way that threatens public health or safety." *Tennessee Wine*, 139 S. Ct. at 2475. The evidence in the record demonstrates the attributes of the challenged statute within Rhode Island's three-tier system.[17]

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[17] This case stands in stark contrast to the statute at issue in *Fam. Winemakers of California v. Jenkins*, 592 F.3d 1, 17–18 (1st Cir. 2010). When passing the statutes at issue in *Jenkins*, the

a. Monitoring retailers' operations through on-site inspections and audits

Under the RI ABC Law, Retail licensees are required to maintain and have available for inspection on their licensed premises all purchase and sale records. Affidavit of John Mancone in support of DBR's motion for summary judgment ("Mancone Aff.") ¶ 18. The various municipalities are responsible for issuing Class A retail licenses and undertake their own enforcement measures. *Id.* at 20; *see also* Erickson Report (Gainor Decl., Ex. 6) at ¶¶ 4-5, 7 (noting the benefits of the three-tier system, the rationale for state and local control over retailing alcohol products within a three-tier system, and the credible research confirming the efficacy of local measures).

The RI ABC Law also "deputizes" the Division of Sheriffs, the Rhode Island State Police, and local law enforcement to enforce the State's statutes and regulations concerning alcoholic beverages within their respective jurisdictions. *Id.* at ¶ 21; *see also* R.I. Gen. Laws 3-12-1.

The RI ABC Law also authorizes the use of "compliance checks" in which underage individuals working with DBR or a municipal police department are sent into a Class A retailers' licensed premises to see if the minor is able to purchase alcohol. *Id.* at ¶ 22.

The licensed Rhode Island wholesaler is subject to various inspections of its licensed premises – on-site, physical inspections. Mancini Decl. ¶ 9; Horizon Decl. ¶ 3. Initially, before a wholesaler license is issued, the premises to be licensed must undergo and pass an inspection by DBR. *Id.* The local fire safety agency also conducts an on-site inspection of the licensed premises. *Id.* As a condition of its license, the Rhode Island wholesaler must make its premises (including its books and records) available for inspection by DBR. *Id.* RIRBAC's wholesaler members

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members of the Massachusetts legislature were clear that their intention was to discriminate against wineries outside of the commonwealth to benefit those within it. *Id.* at 5.

undergo an annual on-site inspection and audit of their total state tax filings, including alcohol beverage-related excise tax and container tax filings. *Id.* And if a Rhode Island wholesaler refuses to provide DBR or other enforcement officials with access to its licensed premises, that refusal is grounds for suspension or revocation of the wholesaler's license. *Id.*

Because licensed Rhode Island wholesalers may purchase only those alcoholic beverage products from the designated brand owner that are registered with DBR, and because those purchased products must be stored in the wholesaler's licensed warehouse prior to resale to a licensed Rhode Island retailer, if a product is determined to be defective, the supplier-manufacturer can be tracked through a particular wholesaler, and the defective product recalled. Mancini Decl. ¶ 10; Epstein Decl. ¶4. This allows the licensed Rhode Island wholesaler, upon receipt of notice concerning a defective product, to act expeditiously (i) to locate all quantities in its possession of the defective product and remove it from distribution until it is either approved for sale or required to be returned to the supplier, and (ii) if necessary, to recover the defective product from the retailers to whom it was sold. *Id.*

For example, Rhode Island Distributing addressed the following recall problems: (i) in November 2021, Rhode Island Distributing was notified by the supplier of Sonoma Crest Flowers Chardonnay 2018 that there was a problem with the quality of the liquid; because at the time of the notification the product had already been sold to retail, within 24 hours Rhode Island Distributing identified the 15 retailers to whom the defective product was sold, went to each retailer's premises, picked up the defective product, returned that defective product to its warehouse, and arranged for the destruction of the product; (ii) in March 2021, a lot of Balvenie 12 year scotch was recalled nationally; Rhode Island Distributing had received and sold into the retail market 12 cases; again, Rhode Island Distributing was able to quickly identify the retailers

to whom the defective product had been sold, notify the retailers, and pick up all of the defective bottles from the 13 retailers affected; and (iii) in March 2021, Rhode Island Distributing discovered that cans of one of the flavors of Loyal Nine Cocktails, a vodka-based canned cocktail, were exploding because of a secondary fermentation process in the can; Rhode Island Distributing pulled the defective product from its warehouse shelf and, with respect to the cased already sold to retailers, identified those retailers and picked up the defective product from them. Mancini Decl. ¶ 11.

Horizon addressed the following recall problems: (i) in 2008, glass residue was found in a certain bottle type used by Boston Beer (i.e., Sam Adams) for some, but not all, of their beer SKUs; it was estimated to affect 25% of the product in the market; Horizon undertook a complete market sweep of all retailers to whom any Boston Beer product had been sold, and within 48 hours, Horizon had all the product back in its warehouse and properly sorted and categorized; (ii) in 2016, Horizon addressed a similar glass residue issue concerning Corona beer; during the height of the summer beer season, Horizon inspected all Corona beer that had been sold through to the retail market (as well as the 100,000 cases in its warehouse) to separate cases with a certain code on the packaging – all of this was done in 72 hours; (iii) currently, Horizon is in the midst of a recall involving On The Rocks pre-packaged cocktails, which is undergoing a liquid reformulation; Horizon is inspecting the product that was sold through to the retail market and the product in its warehouse to determine what bottles, cases, and lots should be collected, segregated, and destroyed. In every recall incident, Horizon is able to leverage its large local sales force, solid retailer relationships, and robust trucking fleet to mobilize quickly to identify, locate, and inspect/remove product on a large scale from every retailer in Rhode Island to whom Horizon sold the defective product in question. Its software system allows Horizon to review sales history data

to quickly figure out "who got what and when." This sales history knowledge coupled with Horizon's people and trucks being in close proximity to the retailers are crucial to managing a recall efficiently and effectively. Epstein Decl. ¶¶ 4-5.

RIRBAC's wholesaler members are able to effectuate a product recall quickly because of the detailed records that they must maintain regarding sales to each of the finite number of licensed Rhode Island retailers as well as the ongoing business relationship they have with each of those Rhode Island retailers. More importantly, because the licensed Rhode Island wholesalers have boots on the ground and feet on the street, they are able to mobilize effectively and then seamlessly retrieve defective product from each retailer in the State before a consumer is injured by or falls ill from that recalled product. Mancini Decl. ¶ 12; Epstein Decl. ¶ 6. Should the magnitude of the recall problem trigger the involvement of the federal Alcohol and Tobacco Tax and Trade Bureau or DBR, these licensed Rhode Island wholesalers would fully comply with any necessary on-site measures (including product seizure) consistent with the obligations under their federal basic permit. They would also cooperate with DBR to ensure that all recalled product that was already shipped to retailers was identified, located and, if necessary, removed from the retailers' shelves – again, consistent with their obligations under their Rhode Island license. Mancini Decl. ¶ 13; Epstein Decl. ¶ 7.

b. Necessary role of local law enforcement

As noted above, the enforcement activities of DBR are assisted by Rhode Island law enforcement officers. Mancone Aff. ¶ 21. That is a common means by which DBR fulfills its public health and safety functions. This assistance in enforcement duties would not be available from officers in another state. Further, since local Rhode Island law enforcement officers would have no jurisdiction to act in another state, this critical means of enforcement would be lost if retailers (and wholesalers) are not required to be physically present in the state.

Out-of-state online retailers pose additional regulatory challenges because DBR, municipalities, and local law enforcement cannot conduct in-person, on-site inspections or confirm that the products for sale have passed through a licensed wholesaler or that the sellers have complied with State tax laws. *Id.* at 30; *see also* Maroney Report (Gainor Decl., Ex. 7) at pp. 20-22. These out-of-state online retailers also pose additional safety concerns because neither DBR nor law enforcement can verify that the product offered for sale is what it purports to be, that the product is being sold to someone at least 21 years old, or even that the product is fit for human consumption. *Id.* at 31. *See also* Erickson Report at ¶¶ 7-9; Maroney Report at pp. 10-15.

c. License revocation: jurisdictional limits

While the threat of suspension or revocation of a Rhode Island retailer's license *is* a significant deterrent, that is because the Rhode Island licensed retailer knows that if it loses its license it will effectively be out of business. The Supreme Court in *Tennessee Wine* recognized this deterrent effect regarding in-state retailers:

> Should the State conclude that a retailer has "fail[ed] to comply with state law," it may revoke its operating license. *Granholm*, 544 U. S., at 490. This "provides strong incentives not to sell alcohol" in a way that threatens public health or safety. *Ibid.*

139 S. Ct. at 2475. To the extent an out-of-state retailer held a direct shipment permit, the threat of suspension or revocation of that permit would be a much less significant incentive to a licensee whose business does not depend on selling to Rhode Island consumers where DBR had no authority to revoke the out-of-state retailers' *home state license*. Gainor Decl., Exhibit 6, Erickson Report at ¶ 8; Gainor Decl., Exhibit 7, Maroney Report, at pp. 16-18. Nor would DBR have any authority to stop the out-of-state wholesalers from selling product to the non-compliant out-of-state retailer – but DBR is able to do so with respect to its in-state wholesalers and retailers, again because of the presence requirement. *Id.*

d. Orderly local markets promote health and safety

Rhode Island's three-tier system also advances public health and safety by promoting responsible sales and consumption and orderly markets. Retailers are prohibited from warehousing alcohol products on unlicensed premises. Wholesalers must maintain alcohol products purchased and imported into Rhode Island "at rest" for 24 hours in the licensed warehouse before resale to avoid alcohol products from circumventing the proper distribution channels (e.g., bootlegged product or grey goods). *See* 230 R.I. Admin. Code R. 30-10-14.19(B)(1); Mancini Decl. ¶¶ 5-6.

Rhode Island law prohibits wholesalers from discriminating in price among retailers (the same product must be sold at the same price to all retailers). Mancini Decl. ¶ 8. Rhode Island imposes further restrictions on its licensed wholesalers and retailers (such as mandating that the price a retailer may charge for a bottle of wine is based on the wholesaler's invoice), and, of course, heavily taxes wholesalers (*id.* at ¶¶ 6-8). But, once again, since the out-of-state retailers would not be purchasing from the licensed Rhode Island wholesaler, they would be able to sell alcohol products that the State has not approved and at prices and under terms of sale that would be illegal in Rhode Island.

e. No federal regulation of retailers

It is especially important that states are able to require licensed retailers to be present because retailers (unlike suppliers, importers, and wholesalers) are not required to hold any federal permit in order to operate. Rather alcohol beverage retailers are regulated by the states only.[18]

[18] There is no *federal* permit available to, or required of, beverage alcohol retailers. Retailers are licensed and regulated by the individual states, under each state's own laws which reflect local needs, local history, and local views on how beer, wine and spirits should be distributed and sold. There is no federal retailer permit that can be revoked or suspended if a retailer fails to comply with New Jersey law. In contrast, wineries and wine wholesalers are required to have a federal permit and to comply with federal and state laws. *See* Federal Alcohol Administration Act of

Thus, this "concrete," non-speculative supporting evidence concerning on-site inspections, local code enforcement, disciplinary measures, and other attributes of Rhode Island's regulatory scheme establishes that Rhode Island's retailer presence requirement (and its in-state wholesaler purchase mandate) are necessary to effectuate the State's protection of its citizens' health and safety in connection with the sale and consumption of alcohol products in the State. Because the evidence in the record thus satisfies the *Tennessee Wine* standard, Plaintiffs' summary judgment motion should be denied and RIRBAC's cross-motion should be granted.

E. Plaintiffs' So-Called "Reasonable Alternative" – Duplicating A Permitting System For Out-of-State Wineries That Does *Not* Exist – Should Be Rejected

Based on their contention that out-of-state winery direct shipping and out-of-state retail direct shipping "pose no threat" to public health and safety "in the first place" (ECF No. 58-1 at 18), Plaintiffs argue that the "reasonable alternative" to the retailer presence and in-state wholesaler purchase requirements is to allow out-of-state retail direct shipping under the same "permit system Rhode Island already uses" for out-of-state wineries (ECF No. 58-1 at 19). Plaintiffs' evidentiary support for their "pose no threat" predicate is woefully insufficient; and the "reasonable alternative" is far from reasonable given that Rhode Island has no existing system for out-of-state wineries and in light of the many significant differences between winery and retailer direct shipping.

1935, 27 U.S.C. §§ 201, *et seq.* ("FAA"). *See also* Bureau of Alcohol, Tobacco and Firearms ("ATF"), ATF Ruling 2000-1 (available at https://www.ttb.gov/rulings/2000-1.htm) which explains that "[r]etailers are not required to obtain basic permits under the FAA Act," and "while ATF is vested with authority to regulate interstate commerce in alcoholic beverages pursuant to the FAA Act, the extent of this authority does not extend to situations where an out-of-State retailer is making the shipment into the State of the consumer."). The Alcohol and Tobacco Tax and Trade Bureau ("TTB"), the successor agency to ATF, confirms that ATF Ruling 2000-1 "remains in effect and reflects the policy of TTB today." *See* http://www.ttb.gov/publications/direct_shipping.shtml.

a. Unsupported "pose no threat" predicate.

The evidence upon which Plaintiffs rely in claiming that neither winery nor retail direct shipping poses any threat to public health and safety is (i) inadmissible or entitled to little, if any, weight, (ii) fails to support the point in question, and/or (iii) not relevant.

For example, Plaintiffs rely heavily on what they call "federal data" as purported evidence that States allowing direct shipping report "no problem" with youth access or shipment to minors. In this regard, Plaintiffs' expert, Tom Wark, cites to the 2015 Substance Abuse and Mental Health Services Administration ("SAMHSA") National Survey on Drug Use and Health in his report. Wark Report ¶ 43 (ECF No. 58-7). But as the State Defendants' expert, Pamela Erickson, noted at page 7 of the Rebuttal Report for the New Jersey State defendants in that retailer direct shipping case (which Rebuttal Report was disclosed in Ms. Erickson's Expert Witness Report in this case and a copy of which is annexed as Exhibit 8 to the Gainor Declaration) –

> In contrast to the outdated Substance Abuse and Mental Health Services Administration (SAMHSA) survey upon which Mr. Wark relies, SAMHSA's 2020 State Performance & Best Practices for the Prevention and Reduction of Underage Drinking Report states:
>
> "Retailer interstate shipments may be an important source of alcohol for underage people who drink. In a North Carolina study (Williams & Ribisl, 2012), a group of eight 18- to 20-year-old research assistants placed 100 orders for alcoholic beverages using Internet sites hosted by out-of-state retailers. Forty-five percent of the orders were successfully completed, whereas 39 percent were rejected as a result of age verification. The remaining 16 percent of orders failed for reasons believed to be unrelated to age verification (e.g., technical and communication problems with vendors). Most vendors (59 percent) used weak, if any, age verification at the point of order, and, of the 45 successful orders, 23 (51 percent) had no age verification at all. Age verification at delivery was also inconsistently applied.
>
> The North Carolina study reported that there are more than 5,000 Internet alcohol retailers, and that the retailers make conflicting claims regarding the legality of shipping alcohol across state lines to consumers. There were also conflicting claims regarding the role of common carriers. The North Carolina study reported that all deliveries were made by such companies,

> and many Internet alcohol retailers list well-known common carriers on their websites. Yet carriers contacted by the study researchers stated they do not deliver packages of alcohol except with direct shipping permits. This suggests confusion regarding state laws addressing interstate retail shipments. North Carolina prohibits such shipments, which means that at least 43 percent of the retailers in the study appeared to have violated the state law." *See* https://www.stopalcoholabuse.gov/media/ReportToCongress/2018/report_main/State_Performance_Best_Practices.pdf.[19]

Other "federal data" proffered by Plaintiffs is combined with a "Summary" chart created by Plaintiffs' counsel. Initially, because these materials were produced as part of purported "Amended Disclosures" well after the close of fact discovery, it should not be allowed as part of the record on Plaintiffs' summary judgment motion. Additionally, these exhibits should be given little, if any, weight because of the evidentiary issues plaguing them. For example, Plaintiffs' Exhibit 16 (ECF No. 58-19) consists of five different documents, including part of the National Highway Traffic Safety ("NHTS") Facts 2019 Data and part of the NHTS Facts 2016 Data, which is combined with two "Summary" charts (apparently prepared by counsel) in a misguided attempt to show that alcohol-impaired traffic fatalities are not higher in states allowing retailer direct shipping. (ECF No. 58-1 at 18). But the "Summary" is factually incorrect in designating Idaho and Nevada as allowing retailer direct shipping and, in any event, makes no sense because some of the designated direct shipping states have fatality rates *higher* than the "U.S. Average" and the others have rates lower than the "U.S. Average" – which is the same for the states that do *not* allow

[19] The Williams and Ribisl study to which the SAMHSA 2020 Report refers is also referenced in the Erickson Report at page 7 and the Maroney Report at page 13. Rebecca S. Williams and Kurt M. Ribisl, *Internet Alcohol Sales to Minors*, Arch Pediatric Adolescent Medicine 2012; 166(9): 808-813. While Plaintiffs and their expert, Tom Wark, may have overlooked this study in erroneously claiming the lack of any study regarding retailer direct shipping to minors, the Defendants' experts did not.

retail direct shipping. This "Summary" (Plaintiffs' Exhibit 16 (ECF No. 58-19)) is therefore entitled to no weight.[20]

The "Summary" charts, the Wark Report (¶ 18), Plaintiffs' Exhibit 32 (ECF No. 58-35), and Plaintiffs' Statement of Undisputed Facts (¶¶ 39-40) are all based on the erroneous assertion as to the number of states that allow retail direct shipping. Specifically, Nevada and Idaho do not allow it. The Nevada legislature's passage of Senate Bill 507 was effective July 1, 2021 – Nevada thereby prohibited retailer direct shipment (https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/7922/Text). And the Idaho Alcohol Control Bureau's advisory clarifies that the amended reciprocity law (Idaho 23-1309A(7)) does *not* permit out-of-state retailers to direct ship to Idaho consumers (https://www.avalara.com/blog/en/north-america/2021/09/is-idaho-a-reciprocal-state-for-dtc-wine-shipping.html). Plaintiffs' loosey-goosey approach to this issue compounds their error and further undermines their position that because no problems exist in those states allowing retail direct shipping, Rhode Island should follow suit.

Plaintiffs also rely heavily on emails between Plaintiffs' counsel and regulators from some of the states that allow retail direct shipping (Plaintiffs' Exhibit 12 (ECF No. 58-15)) to support the supposed fact that none of the states allowing direct shipping has reported any problems (ECF No. 58-1 at 5, 18). Like the "federal data" and "Summary" charts, because much of that correspondence was produced as part of purported "Amended Disclosures" well after the close of fact discovery, it should not be allowed as part of the record on Plaintiffs' summary judgment

[20] Plaintiffs use the same approach ("federal data" combined with what presumably is a counsel-prepared "Summary" chart) on the issue of alcohol consumption (Plaintiffs' Exhibit 33 (ECF No. 58-36)). This "Summary" chart is likewise entitled to no weight because it also is factually wrong as to the states allowing retail direct shipping and also proves nothing because of the states allowing direct shipping, some are above the "U.S. Average," while others are below – i.e., no different than those states *not* allowing direct shipping.

motion. These emails should likewise be given little, if any, weight because none of the regulators indicated what, *if any*, investigation or enforcement measures had been undertaken regarding retail direct shippers' non-compliance. Further, (i) in the case of Connecticut, the regulator specifically caveated his response by noting that the first permit had been issued only five months earlier; and (ii) Nebraska's regulator noted that "licenses do not report shipments to us" (thus undermining Plaintiffs' supposed "fact").

Finally, Plaintiffs rely on a 2003 FTC report, *Possible Anticompetitive Barriers to E-Commerce: Wine* (Plaintiffs' Ex. 15 (ECF No. 58-18)), and a 2012 report by the Maryland Comptroller, *Study on the Impact of Direct Wine Shipment* (Plaintiffs' Ex. 13 (ECF No. 58-16)), for the proposition that those states allowing direct shipping reported no related public health or safety problems and no problems with shipments to minors (ECF No. 58-1 at 5, 18). Both reports have evidentiary infirmities. The FTC report (almost 20 years old) was based on a study of the winery direct shipping market in McLean, Virginia – not retailer direct shipping. Additionally, Plaintiffs fail to note that the appendices to the FTC report undermine their purported undisputed fact: Appendix A makes clear that the study was limited to McLean, Virginia, and Appendix B contains the letters from state regulators (including the Hawaiian regulator who noted his concern about "recourse against out-of-state shippers of wine shipping wine illegally into my state or shipping wine to minors in my state" which "has the potential to become a major problem). The Maryland Report was limited to Maryland consumers, licensed Maryland wholesalers, and out-of-state wineries holding a Maryland winery direct shippers permit – not out-of-state retailers; and Rhode Island does not provide for an out-of-state winery direct shippers permit.

b. No "reasonable alternative."

Even if Defendants did not put forth sufficient concrete evidence that the predominate effect of the State's retailer presence requirement is the protection of public health and safety

(Defendants did), and even if Plaintiffs did proffer admissible, reliable, and factually correct evidence that retail direct shipping "poses no threat" to public health and safety (Plaintiffs did not), Plaintiffs' position that the "reasonable alternative" to maintaining the State's retailer presence and in-state wholesaler purchase requirements is simply using the supposed permit system already in place for out-of-state winery direct shipments for out-of-state retailers should be rejected.

Initially, Plaintiffs incorrectly claim that Rhode Island has a permitting system for out-of-state wineries that ship products into the State. It does not. Rhode Island has a limited exception to its prohibition on the shipment of wine that allows a Rhode Islander who purchases wine in person at a winery to ship the wine home. The in-person sale is made in the out-of-state winery's home state, is not subject to the jurisdiction of DBR, and is not pursuant to any permit issued by Rhode Island.[21]

Nor can the requirement that the purchase transaction be in-person at the winery's premises be challenged. The First Circuit upheld such a requirement in *Cherry Hill Vineyard, LLC v. Balducci*, 505 F.3d at 36 (evenhanded requirement that all wine purchases – whether by an in-state or out-of-state winery – be made face-to-face was not discriminatory under the dormant Commerce Clause). The in-person purchase requirement also ensures that the winery is selling to an adult Rhode Islander.

[21] Nor does this limited exception to Rhode Island's three-tier system negate the existence of that three-tier system. *See Granholm*, 544 U.S. at 474 ("subjecting out-of-state wineries, but not local ones, to the three tier-system" violated the dormant Commerce Clause); *Family Winemakers of California v. Jenkins,* 592 F.3d at 14 (challenged licensing law "grants exceptions to the three-tier system for the predominant purpose of benefitting local industry"); *accord Lebamoff*, 956 F.2d at 863 (noting that a two-tier system exists in Utah for wine because the state is the sole importer and main retailer and then underscoring that *Granholm* concerned a discriminatory exception to a three-tier system" regarding wine – not an elimination of the three-tier system for wine).

Additionally, Rhode Island has a litany of reasons for treating such in-person, out-of-state *winery* transactions differently than they would online, out-of-state *retailer* transactions, including the following:

- The essential business of a winery is the production and sale of its own wine; therefore, it has the strongest incentive to ensure that it maintains its reputation by not selling defective or tainted products and by not violating state law.
- Unlike retailers, wineries are required to obtain a federal permit that could fall into jeopardy if they violate state law.
- Because wineries sell only wine, there is no threat that they will also attempt to sell spirits and have them delivered with the wine.
- Out-of-state retailers are required to follow the alcohol beverage regulations of the state where they are located. Thus, in many instances, they are required to buy product from an in-state wholesaler – a regulatory requirement that has no relevance or application to wineries.

Plaintiffs' argument that allowing out-of-state retailer direct shipping will not adversely impact the ability of the State to enforce compliance with its regulatory scheme is factually and legally unsupported. The idea that there will be no more than 500-800 retailers who will seek to deliver to Rhode Island consumers, as suggested by Plaintiffs' proffered expert, is speculative at best, and simply sketchy statistics at worst, since it is based on the number of retailers that took orders on a single web site, Winesearcher.com, and makes no effort to assess the number of out-of-state retailers who would engage in direct shipping if more states allow retail direct shipping such that the retailers will be shipping legally – other than to say there was "no question in [his] mind that [if] more states will allow out-of-state retailers to ship into their state," that "will result in *far more wine being shipped across borders*." Gainor Decl., Ex. 1, Wark Dep. Tr. 115:2-116:6 (emphasis added).

As noted above, Plaintiffs' reliance on their counsel's correspondence with certain ABC agencies in states allowing out-of-state retail direct shipping should also be rejected. In contrast,

the evidence submitted by the Defendants reveals the risks to public health and safety arising from out-of-state sellers' illegal or non-compliant conduct. *See* Gainor Decl., Ex. 6, Erickson Report at ¶¶ 4-7; Gainor Decl., Exhibit 7, Maroney Report at pp. 7-15.

Equally faulty is Plaintiffs' argument that Rhode Island must allow out-of-state retail direct shipping because certain states purportedly allow it.[22] The Supreme Court has consistently underscored that §2 of the Twenty-first Amendment is predicated on the concept, recognized most recently in *Tennessee Wine*, that "each State [has] the authority to address alcohol-related public health and safety issues in accordance with the preferences of *its citizens*." 139 S. Ct. at 2474 (emphasis added). The Rhode Island Legislature's determination that a retailer presence requirement and in-state wholesaler purchase mandate fulfill the public policy of the State and the legislative purpose of the RI ABC Law – foremost of which is "the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages" (R.I. Gen. Law § 3-1-5)[23] – is not to be second-guessed by how loosely some other state chooses to regulate the alcohol products in its state. *See also Lebamoff*, 956 F.3d at 875 ("The purpose of the [three-tier] system, for better or worse, is to make it harder to sell alcohol by requiring it to pass through regulated in-state wholesalers."; "the Twenty-first Amendment leaves these considerations [regarding loosening some regulations] to the people of Michigan, not to federal judges."); *accord Tennessee Wine*, 139 S. Ct. at 2484 (Gorsuch, J., dissenting "Under the terms of the compromise [those who adopted the Twenty-first Amendment] hammered out, the regulation of alcohol wasn't left to the

[22] As noted above, Plaintiffs' proffered expert, Tom Wark, claims that 16 jurisdictions allow retail direct shipping and further claims 14 of those (including Nevada and Idaho) "explicitly" allow it. Pls. Exhibit 5, Wark Report ¶ 18. Mr. Wark appears to have overlooked that Nevada and Idaho no longer allow retail direct shipping.

[23] *See also* R.I. Gen. Law § 3-1-6 (RI ABC Law is to be construed "to limit rather than expand commerce in alcoholic beverages and to enhance strict regulatory control over . . . distribution and sale of alcoholic beverages through the three-tier regulatory system").

imagination of a committee of nine sitting in Washington, D.C., but to the judgment of the people themselves and their local elected representatives.").

F. Plaintiffs Did Not Challenge A So-Called "Transportation Limit"

Plaintiffs claim for the first time in their summary judgment brief (ECF No. 58-1 at 19-20) that "the statute limiting personal transportation of wine [into the State] to three gallons" (15 bottles) is discriminatory. Their Complaint is devoid of any allegations or request for relief regarding the so-called "transportation limit" or the statutes supposedly constituting it. For that reason alone, Plaintiffs' argument should be rejected.

Even assuming this Court considers the day-late-and-a-dollar-short "transportation limit" argument (it should not do so), the claim must nevertheless be rejected. From a factual standpoint, Plaintiffs have never expressed a desire to import more than 15 bottles into the State. Indeed, both Plaintiffs indicate they do not buy nearly that much wine in one trip (Gainor Decl., Exhibit 5, Drum Dep. Tr. at 18:20-19:1; Gainor Decl., Ex. 6, Anvar Dep. Tr. at 11:19:23), and Plaintiff Drum stated she did not want to buy a full case (ECF No. 58-4, Page ID 1679, ¶ 20). They can identify neither discrimination nor harm.

Legally, Plaintiffs' argument, to the extent it is at all intelligible, is wrong. The "importation orders" provision (R.I. Gen. Laws § 3-4-1) has nothing to do with a Rhode Island consumer's "personal transportation of wine" across state lines (ECF No. 58-1 at 19). It is a provision that applies to the State's Division of Taxation processing an order by a wholesaler for a product that is not currently carried by licensed Rhode Island wholesalers or retailers.

Plaintiffs' "transportation limit" argument is procedurally improper, substantively defective, and should be rejected.

V. Conclusion

Because Plaintiffs' requested relief would result in the elimination of not only the retail license presence requirement but the State mandate that alcohol products be purchased from an in-State wholesaler – an essential feature of the State's three-tier system – their Commerce Clause claim fails. A separate and independent reason why Plaintiffs' Commerce Claim fails is because they fail to show unconstitutional discrimination against them with respect to the wines available to them. Alternatively, because the Rhode Island retailers and out-of-state retailers are not similarly situated, there can be no discrimination concerning the licensing presence requirement. And, in any event, even if the licensing presence requirement were found to discriminate, the record is replete with evidence establishing that the licensing presence requirement promotes the public health and safety of Rhode Island's citizens and therefore satisfies *Tennessee Wine*'s test.

Plaintiffs' motion for summary judgment should therefore be denied, the cross-motion for summary judgment of RIRBAC should be granted, and the cross-motion of the State Defendants should likewise be granted.

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Respectfully submitted,

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