UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

KAMBIS ANVAR and MICHELLE DRUM, ***Plaintiffs***	:	
v.	:	**C.A. NO.: 1:19-cv-00523**
ELIZABETH M. TANNER, Director of Department of Business Regulation, and PETER F. NERONHA, Attorney General of Rhode Island, ***Defendants***	:	
v.	:	
RHODE ISLAND RESPONSIBLE BEVERAGE ALCOHOL COALITION, INC., ***Intervenor Defendant***	:	

DEFENDANTS ELIZABETH M. TANNER AND PETER F. NERONHA'S MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Plaintiffs Kambis Anvar and Michelle Drum—two Rhode Island consumers—seek to disrupt the long-standing and "unquestionably legitimate" three-tier system of alcohol regulation in Rhode Island. *See Granholm v. Heald*, 544 U.S. 460, 489 (2005) (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)). They ask this Court to allow out-of-state retailers to bypass the three-tier system and instead sell and ship alcohol directly to Rhode Island consumers, a privilege that in-state retailers are not even afforded.[1] Permitting the direct shipment of alcohol from out-

[1] Though Plaintiffs maintain that "[t]his case only involves shipping of wine, not beer or spirits," the laws and regulations that they challenge do not make such a distinction. If Plaintiffs are awarded the declaratory relief they seek, it would

of-state retailers to Rhode Island consumers would eviscerate the three-tier system in this state.

Plaintiffs argue that such a dismantling is necessary because Rhode Island's laws and regulations discriminate against out of state retailers and give in-state retailers an unfair advantage. But this is simply not true—in-state retailers are not permitted to bypass the three-tier system and ship via a common carrier directly to a consumer. The scheme in place and the laws that comprise the complex three-tier scheme in Rhode Island do not permit *any* retailer—regardless of in-state or out-of-state—to direct ship alcohol in such a manner.

Further, Rhode Island's laws that restrict the direct shipment of wine and other alcoholic beverages from out-of-state retailers are necessary to promote the health and safety of Rhode Islanders. Indeed, Rhode Island enacted this statutory scheme in approximately 1933 following the 21st Amendment's passage, with the declared purpose of "the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." R.I. Gen. Laws § 3-1-5; P.L. 1933, ch. 2013. Any changes to Rhode Island's regulation of alcohol should be made by the people of Rhode Island and their duly elected representatives.

For these reasons, and those set forth in the below Memorandum, Defendants Elizabeth M. Tanner in her official capacity as Director of the Rhode Island Department of Business Regulation ("DBR") and Peter F. Neronha in his official capacity as Rhode Island Attorney General (collectively "State Defendants" or "the

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invalidate laws and regulations that apply to all alcoholic beverages, including beer and spirits.

State"), ask that this Honorable Court grant the State's Motion for Summary Judgment, enter judgment in favor of the State, and deny Plaintiffs' Motion for Summary Judgment.

I. BACKGROUND

1. History of Alcohol Regulation, the 21st Amendment, and the Three Tier System

Pre-Prohibition-era America was rife with problematic alcohol consumption. *See* State's Statement of Undisputed Facts ("SOF") at ¶¶ 1-2. (quoting historian W.J. Rorabaugh, "For generations, Americans had been heavy drinkers, and by 1900 saloons were identified with political corruption, prostitution, gambling, crime, poverty and family destruction."). One reason for the excessive and irresponsible alcohol consumption was the "tied-house" system, wherein "an alcohol producer, usually a brewer, would set up saloonkeepers, providing them with premises and equipment, and the saloonkeepers, in exchange, agreed to sell only that producer's products and to meet set sales requirements." *See Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2463 (2019); *see also* SOF at ¶ 3. This model incentivized saloonkeepers to encourage high alcohol consumption. SOF at ¶ 4; s*ee also Tennessee Wine*, 139 S. Ct. at 2463 n.7; *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1176 (8th Cir.), cert. denied, 142 S. Ct. 335, 211 L. Ed. 2d 178 (2021) (noting the tied-house model is "widely perceived as causing or at least

contributing to the social ills of excess alcohol consumption and consumption by minors").

The proliferation of alcohol-related issues gave rise to temperance movements and many states, including Rhode Island, passed laws restricting or prohibiting the sale of alcohol before the Eighteenth Amendment's ratification in 1919 that prohibited the manufacture, sale, and transportation of liquor. SOF at ¶¶ 5, 6, 7; *see also Granholm v. Heald,* 544 U.S. 460, 476 (2005). Prohibition was unpopular, its enforcement was weak, and it led to increased organized crime. SOF at ¶¶ 9, 10.

In 1933, the Twenty-First Amendment was ratified; Section 1 repealed prohibition and Section 2 empowered the states to regulate the transportation and sale of alcohol as each saw fit.[2] SOF at ¶¶ 11, 12, 13. Section 2 of the Twenty-First Amendment "grant[ed] the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Granholm v. Heald*, 544 U.S. 460, 488 (2005) (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)).

Since the Twenty-First Amendment's ratification, nearly all states have adopted some version of a three-tier system for the regulation of alcohol. SOF at ¶ 14. Under the three-tier system:

[2] Section 2 of the Twenty-First Amendment reads, "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."

> "[T]he producer sells to a licensed in-state wholesaler, who pays excise taxes and delivers the alcohol to a licensed in-state retailer. The retailer, in turn, sells the alcohol to consumers, collecting sales taxes where applicable."

Sarasota Wine Mkt., LLC v. Schmitt, 987 F.3d 1171, 1176 (8th Cir.), cert. denied, 142 S. Ct. 335, 211 L. Ed. 2d 178 (2021) (quoting *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 187 (2d Cir. 2009)). The three-tier model is "a closed system of product sale whereby a licensed supplier can only sell alcohol to a licensed wholesaler who can only sell to a licensed retailer." SOF at ¶ 15.

The three-tier system is designed to prevent the "tied-house" system that contributed to the excessive consumption during the pre-Prohibition era. SOF at ¶¶ 16, 17. *See e.g.*, *Sarasota Wine Mkt.*, 987 F.3d at 1176 (noting the "primary purpose" of the three-tier system "is to prevent a return to 'the English 'tied-house' system'"); *Lebamoff Enterprises Inc. v. Whitmer*, 956 F.3d 863, 868 (6th Cir. 2020), cert. denied, 141 S. Ct. 1049, 208 L. Ed. 2d 520 (2021) ("To avoid the tied-house system's 'absentee owner' problem, businesses at each tier must be independently owned, and no one may operate more than one tier"); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 187 (2d Cir. 2009) ("The main purpose of the three-tier system was to preclude the existence of a 'tied' system between producers and retailers, a system generally believed to enable organized crime to dominate the industry").

The Supreme Court has upheld the three-tier system, deeming it an "unquestionably legitimate" exercise of state's authority under the Twenty-First

Amendment. *Granholm*, 544 U.S. at 466, 489 (quoting *North Dakota*, 495 U.S. at 432).

2. Rhode Island's Regulation of Alcohol

Rhode Island's statutory regulation of alcohol was legislatively enacted in approximately 1933 with the declared purpose of "the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." R.I. Gen. Laws § 3-1-5; P.L. 1933, ch. 2013; SOF ¶ 19. Under Rhode Island's three-tier system, like those in other states, alcoholic beverages pass from the manufacturer or importer of the alcohol to a licensed Rhode Island wholesaler, and then to a licensed Rhode Island alcohol retailer. SOF at ¶ 18. A Rhode Island wholesaler can only purchase alcoholic products from the manufacturer and a Rhode Island retailer can only purchase alcoholic beverages from a licensed wholesaler. *See* R.I. Gen. Laws § 3-6-16; R.I. Gen. Laws § 3-7-18.

Rhode Island requires a license for the manufacture, sale, or importation of beverages. *See* R.I. Gen. Laws § 3-5-1. The Rhode Island DBR is the licensing authority for in-state manufacturers and wholesalers.[3] *See* R.I. Gen. Laws § 3-5-14.1. Local cities and towns are the licensing authorities responsible for Class A retailer's licenses, the licenses needed to operate what is commonly known as a liquor store or liquor retailer. *See* R.I. Gen. Laws §§ 3-7-1, 3-7-3.

[3] DBR also issues limited retail licenses, such as Class P caterer licenses and Class G and GD license for the sale of alcohol on railroad, air, and marine transportation.

A wholesaler's license authorizes the holder to keep for sale and to sell alcoholic beverages at wholesale to license holders, such as to sell to Class A retailers.[4] *See* R.I. Gen. Laws § 3-6-9, 3-6-10. Wholesalers are subject to a number of requirements. For one, they are required to purchase alcoholic beverages solely from the manufacturer of said product (or from a contracted importer if a foreign supplier). *See* R.I. Gen. Laws § 3-6-16 (requiring licensed wholesalers to purchase only "from the distillery, rectifier, winery or brewery manufacturing the beverages or from the importer holding the basic contract with a foreign supplier whereby that foreign supplier exports distilled spirits, wines or malt beverages into the United States"). Wholesalers are also prohibited from having any interest—either direct or indirect—in any retailer's license or its business. R.I. Gen. Laws Ann. § 3-7-22(a). If the prohibited interest is not disposed of within 30 days, the violator forfeits their license. *Id.*

Retailer licenses in Rhode Island are issued at the municipal level, as noted above. *See* R.I. Gen. Laws §§ 3-7-1, 3-7-3, 3-5-15 (granting "town councils or license boards of the several towns" and "the mayors and city councils in the several cities" the "right, power, and jurisdiction to issue all other licenses authorized by this title"). Under the existing statutory and regulatory scheme for obtaining a Class A

[4] There are 3 different wholesaler's licenses in Rhode Island: Class A, Class B, and Class C. A Class A license authorized the licensee to sell at wholesale "malt beverages and wines," whereas a Class B license holder is authorized to sell "malt and vinous beverages and distilled spirits" *Compare* R.I. Gen. Laws § 3-6-9 *with* § 3-6-10. A Class C wholesaler licensee can manufacture, transport, import, export, deliver, and sell alcohol for any use *other than* beverage purposes (including for mechanical, manufacturing, medicinal, or chemical purposes).

license, licenses are issued to corporations incorporated in another state but authorized to transact business in Rhode Island or to citizens who are Rhode Island residents. *See* R.I. Gen. Laws § 3-5-10.

Additional statutes and regulations effectively require a Class A retailer to have in-state premises in Rhode Island. For example, DBR's regulations require all retail licenses issued to identify a premise from which the alcoholic beverages will be sold, served, or stored. *See* 230 R.I. Code R. 30-10-1.4.27(A). Other laws and regulations require a Class A license applicant to submit a drawing of the licensed premises to the local licensing board, and mandate that prior to issuing a license, the city or town provide notice to the public of the location of the applicant's premises. *See* R.I. Gen. Laws § 3-5-17; 230 R.I. Code R. 30-10-1.4.3 (notice must include, among other things, address of proposed licensed premise); 230 R.I. Code R. 30-10-1.4.27 (B)-(C) (requiring applicants to submit to local licensing board drawing of the licensed premises). The law further prohibits the sale, service or storage of alcoholic beverages outside the licensed premises. 230 R.I. Code R. 30-10-1.4.27 (B). These laws contemplate that a Class A retailer have premises in Rhode Island.

Additional laws limit the issuance of Class A retailer licenses. *See* R.I. Gen. Laws § 3-5-11, 3-5-11.1. Rhode Island law prohibits issuing licenses to any "chain store organization," including chain retail and wholesale businesses, grocery stores, markets, department stores, and convenience stores. *See* R.I. Gen Laws § 3-5-11. The chain store prohibition includes chains in which one or more stores are located outside of the state. R.I. Gen Laws § 3-5-11(a). The franchising of Class A liquor

licenses is similarly prohibited.[5] *See* R.I. Gen Laws §§ 3-5-11.1. The legislative purpose is clear: "To promote the effective and reasonable control and regulation of the Rhode Island alcoholic beverage industry and to help the consumer by protecting their choices and ensuring equitable pricing." R.I. Gen. Laws § 3-5-11.1(a).

In addition to the prohibition on franchising and chain-store arrangements, Class A retailers are also subject to myriad laws and regulations governing the sale of alcohol. To name just a few, Rhode Island law: restricts the hours and days that a Class A retailer is legally permitted to sell alcohol, R.I. Gen. Laws §§ 3-7-23, 3-8-1; requires Class A retailers to carry liquor liability insurance in addition to commercial, general liability and property damage insurance, R.I. Gen. Laws § 3-7-29; prohibits Class A retailers from holding distilled spirits in a container larger than 3 liters, 230-RICR-30-10-1.4.32; and requires Class A retailers to retain records of all wholesale purchases for one year and to make these records available to DBR on demand, R.I. Gen. Laws § 3-7-28, 230-RICR-30-10-1.4.30. Rhode Island law also requires a Class A retail retailer seeking license renewal to submit a certificate from the tax administrator verifying that the licensee has paid all taxes owed to the State. *See* R.I. Gen. Laws § 3-7-24.

There are also many laws in place related to the sale of alcohol to underage persons. *See* R.I. Gen Laws § 3-8-4(a) (prohibiting sale of alcoholic beverages to an

[5] The First Circuit upheld Rhode Island's statutory prohibition on the franchising of Class A retail licenses and issuance of licenses to chain stores. *See Wine and Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 4 (1st Cir. 2007).

individual under 21 years of age); R.I. Gen Laws § 3-8-4(b) (setting 18 as minimum age of Class A retailer's employee authorized to sell alcoholic beverages); R.I. Gen. Laws § 3-8-5 (setting penalties up to $750 for sale of alcohol to a person under 21 years of age). Rhode Island also allows the use of "compliance checks," colloquially known as "sting operations," wherein underage individuals acting as agents for the State or municipal police departments, are sent into Class A retailers to see if they sell alcohol to the minor. *See* R.I. Gen. Laws § 3-8-5.1.

Once issued, a Class A retailer's license permits the holder to "keep for sale and to sell at the place described beverages at retail." *See* R.I. Gen. Laws § 3-7-1; § 3-7-3. A Class A retailer is also authorized "to deliver the beverages in a sealed package or container, which package or container shall not be opened nor its contents consumed on the premises where sold." *See id.*; 230-RICR-30-10-1.4.10 ("A Class A alcoholic beverage licensee may deliver alcoholic beverages to the residence of a customer"). The delivery of alcoholic beverages by a Class A retailer to a Rhode Island consumer is heavily regulated. For one, only the owner of the Class A retail establishment or one of their employees can make the delivery. 230-RICR-30-10-1.4.10(B). When making a delivery, a Class A licensee must ensure that the alcoholic beverage is not delivered to an individual under the age of twenty-one and must check a valid form of identification with a photograph. 230-RICR-30-10-1.4.10(A). A Class A licensee can only make a sale and delivery of alcohol during its legal business hours. *See* 230-RICR-30-10-1.4.10(B). Further, for each delivery, a Class A retailer is required to have an invoice that sets forth the name of the

licensed establishment or person making the delivery, the purchaser's name and address, the delivery date, a list of the products being delivered, and the signature of the person to whom the alcohol was delivered. *See* 230-RICR-30-10-1.4.10(C).

3. Direct Shipment of Alcohol to Rhode Island Consumers

Under Rhode Island's three-tier model, alcoholic beverages cannot be shipped directly to a Rhode Island consumer from an out-of-state retailer (or an in-state retailer for that matter). This derives from a few statutes. First, Rhode Island law deems it "unlawful for any person in the business of selling intoxicating beverages in another state or country to ship or cause to be shipped any intoxicating beverage directly to any Rhode Island resident who does not hold a valid wholesaler license issued by the State of Rhode Island." R.I. Gen. Laws § 3-4-8. *See also* 230-RICR-30-10-1.4.19 (B)(1) (requiring all alcoholic beverages that come into Rhode Island for resale to be consigned and delivered to a licensed wholesaler). Under R.I. Gen Laws § 3-4-6, it is illegal for an "express carrier, common carrier, or other person who, for the purpose of carrying to any other person, receives any beverage which has been sold or is intended for sale in violation of this title." R.I. Gen. Laws § 3-4-6. Direct shipment of alcohol via a common carrier is prohibited.

The only delivery of alcohol to Rhode Island consumers that is permitted is delivery by a Class A owner or employee (230-RICR-30-10-1.4.10(B)) or when a Rhode Island resident personally places an order for "intoxicating beverages" at the premises of the alcohol manufacturer, such as a winery. *See* R.I. Gen. Laws § 3-4-

8(a). Shipment of alcohol under this provision must contain the language: "Contains Alcohol, Adult Signature (over 21) Required for Delivery." *Id.* Aside from this exception, it is otherwise illegal for "any person in the business of selling intoxicating beverages in another state or country" to ship alcohol directly to a Rhode Island resident.[6] *Id.*

4. Plaintiffs' Case

Plaintiffs Anvar and Drum filed suit on October 3, 2019, against State Defendants challenging the constitutionality of certain Rhode Island's laws and regulations related to the sale and shipment of wine from out-of-state retailers directly to Rhode Island residents.[7] SOF at ¶¶ 18-21, 23. Plaintiffs' Complaint specifically challenges R.I. Gen. Laws §§ 3-4-8(a), 3-5-10, 3-5-11, 3-5-15, 3-5-17, 3-7-18 and 230 R.I. Admin Code 30-10-1.4.19(B)(1), 30-10-1.4-10(B), and 30-10-1.4.27, and argues that these statutes and regulations violate the Commerce Clause because they permit an in-state Class A retailer to deliver wine directly to a Rhode Island consumer but prohibit an out-of-state retailer from obtaining a Class A license that would allow it to do the same. SOF at ¶ 22, 23. They seek (1) a

[6] Any person who violates R.I. Gen. Laws § 3-8-4 (a), will receive a certified letter from DBR ordering the person or retailer to cease and desist any shipment of intoxicating beverages to Rhode Island residents, for the first offense. For each subsequent offense, violators will be fined $1,500. R.I. Gen. Laws § 3-4-8 (b).

[7] Though Plaintiffs' Complaint focuses specifically on the sale and direct shipment of wine, the statutes and regulations they challenge are not limited to solely wine but rather all intoxicating beverages.

declaration that the challenged laws are unconstitutional;[8] (2) an injunction that bars State Defendants from enforcing these laws and requires State Defendants to permit out-of-state retailers to ship wine directly to Rhode Island consumers; and (3) an award of costs and expenses. SOF at ¶ 26.

Plaintiffs are Rhode Island residents and wine consumers who claim these laws prohibit them from having wine directly shipped to them from out-of-state wine retailers and they would otherwise buy wine from out-of-state retailers if it were legal. SOF at ¶¶ 20,21, 24. They allege that they have been unable to purchase "many rare, unusual, and heavily allocated wines that are distributed in other states[,] are not stocked or sold by Rhode Island retailers, but are readily available from retailers located in Connecticut, New York and California who will ship and deliver to states where it is lawful to do so." SOF at ¶ 25.

5. Procedural History

After Plaintiffs filed suit, State Defendants answered Plaintiffs' Complaint. SOF at ¶ 27. The Rhode Island Responsible Beverage Alcohol Coalition, Inc. ("RIRBAC"), a non-profit association of Rhode Island's alcohol wholesalers, successfully intervened in the action. SOF at ¶ 29, 30.

[8] Plaintiffs specifically seek a declaration that R.I. Gen. Laws § 3-4-8(a) and 230 R.I. Admin Code 30-10-1.4.19(B)(1) are unconstitutional violations of the Commerce Clause and § 3-5-10, 3-5-11, 3-5-15, 3-5-17, 3-7-18 and 230 R.I. Admin Code 30-10-1.4.19(B)(1), 30-10-1.4-10(B), and 30-10-1.4.27 are unconstitutional as applied. *See* p. 6 of Plaintiff's Complaint at ECF 1.

The parties engaged in discovery and on January 20, 2021, Defendants deposed Plaintiffs Anvar and Drum. SOF ¶¶ 31, 34. Ahead of the close of fact discovery on January 22, 2021, Defendants also deposed three of Plaintiffs' identified witnesses: Vincent Messina, Lawrence Gralla, and Kosta Arger. SOF ¶¶ 32, 33,36. After fact discovery closed, Defendants jointly moved on February 24, 2021, to stay expert discovery and the remaining deadlines to allow Defendants to file a dispositive motion on the issue of Plaintiffs' standing. SOF ¶ 37. This Court stayed the scheduling order and Defendants filed their motion to dismiss. SOF ¶¶ 38,

The crux of Defendants' joint motion to dismiss was that Plaintiffs failed to meet their burden of establishing standing because neither demonstrated that they suffered an injury-in-fact. SOF at ¶¶ 39,40. The joint motion argued that Plaintiffs' allegations of consumer standing—namely that they attempted to purchase "rare, unusual, and heavily allocated wines" from out-of-state retailers but were refused—conflicted greatly with their deposition testimony. SOF ¶ 40,41. The parties were heard, and this Court denied the motion on July 16, 2021, finding that Plaintiffs sufficiently plead injury. SOF ¶¶ 42, 43.

Thereafter, the parties proceeded with expert discovery. SOF ¶¶ 43, 44. On January 14, 2022, Plaintiffs moved for summary judgment. SOF ¶ 45.

II. STANDARD OF REVIEW

Summary judgment is proper when "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). When reviewing a motion for summary judgment, this Court must draw all reasonable inferences in the nonmovant's favor, but it "will not 'draw unreasonable inferences or credit bald assertions, empty conclusions, rank conjecture, or vitriolic invective.'" *Garmon v. National Railroad Passenger Corp.*, 844 F.3d 307, 312 (1st Cir. 2016).

Where, like here, both parties have moved for summary judgment, the standard remains the same. *See Mandel v. Boston Phoenix, Inc.*, 456 F.3d 198, 205 (1st Cir. 2006) ("[t]he presence of cross-motions for summary judgment neither dilutes nor distorts this standard of review"). In evaluating cross-motions, "[t]he court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." *Bienkowski v. Northeastern Univ.*, 285 F.3d 138, 140 (1st Cir. 2002) (internal quotation marks and citation omitted).

III. ARGUMENT

Plaintiffs seek to disassemble the "unquestionably legitimate" three-tier system for alcohol regulation in Rhode Island. *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)). Plaintiffs ask that out-of-state retailers be permitted to ship directly to a Rhode

Island consumer via common carrier without the alcoholic beverages ever passing through a Rhode Island wholesaler, something even in-state Rhode Island retailers lack the authority to do.

Plaintiffs' arguments are unavailing. For one, Rhode Island has presented legitimate reasons for restricting out-of-state retailers from shipping directly to Rhode Island consumers; the present scheme is critical to ensuring public health and safety and necessary for proper regulation and enforcement measures. Further, restrictions akin to those in Rhode Island have consistently been upheld by Circuit courts and federal district courts across the country. Plaintiffs' argument that Rhode Island's laws restrict consumer access to the wine market of other states is similarly unsupported in law and overstated; there are numerous factors' unrelated to Rhode Island's direct-shipping restriction that affect the availability of wine. Lastly, Plaintiffs' newfound challenge to Rhode Island's limit on the transportation of alcoholic beverages was not raised in their Complaint. For these reasons, and all others raised herein, Plaintiffs cannot carry their burden of proof and summary judgment should enter for the State Defendants on all claims.

A. Rhode Island's Laws that Restrict Out-of-State Retailers' Direct Shipment of Wine to In-State Consumers Do Not Violate the Commerce Clause

a. The Relationship Between the Commerce Clause and the Twenty First Amendment

Because Plaintiffs raise Commerce Clause challenges to Rhode Island's laws regulating alcohol, which authority was bestowed in Section 2 of the Twenty-First Amendment, it is critical to discuss the interplay between the Commerce Clause and the Twenty-First Amendment. The Commerce Clause grants Congress the power to "regulate Commerce … among the several States…" U.S. Const. art. I, § 8, cl. 3. It has long been held that "state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm v. Heald*, 544 U.S. 460, 472, 125 S. Ct. 1885, 1895, 161 L. Ed. 2d 796 (2005) (*Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994)). Generally, a law that "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," is struck down. *Granholm v. Heald*, 544 U.S. 460, 487, 125 S. Ct. 1885, 1904, 161 L. Ed. 2d 796 (2005).

The analysis is not as unambiguous, though, when the challenged law involves state regulation of alcohol. Because Section 2 of the Twenty-First Amendment granted states "virtually complete control" over regulation of alcohol within its borders, "a different inquiry" is appropriate when the challenged law falls within the state's authority under the Twenty-First Amendment. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2474 (2019); *Granholm v. Heald*, 544 U.S. 460, 488 (2005). Under this "different inquiry," courts ask, "whether the challenged requirement can be justified as a public health or safety measure or on

some other legitimate nonprotectionist ground." *Tennessee* Wine, 139 S. Ct. at 2474. Where, however, "the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by § 2." *Id.*

Plaintiffs' memorandum is replete with references to the "searching scrutiny" that should be applied to Rhode Island justification for the challenged law and the "heavy burden" Rhode Island bears in establishing that its law further a legitimate non-protectionist interest. *See* Plaintiffs' Memorandum in Support of their Motion for Summary Judgment, ECF 58-1 at 2, 6, 9, 10, 11, 12, 14, 15, 17. This is inconsistent with the Supreme Court and Circuit Court precedent. Rather than examining with "searching scrutiny" Rhode Island's justification for the challenged laws, this Court should inquire "whether the challenged requirement[s] can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Tennessee* Wine, 139 S. Ct. at 2474. Supreme Court jurisprudence requires the State to present "concrete evidence"—not "mere speculation" or "unsupported assertions" —showing that its challenged laws advance public health or safety. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2474 (2019) (quoting *Granholm v. Heald*, 544 U.S. 460, 490, 492 (2005)).

Rhode Island has legitimate public health and safety justifications for its restrictions on the direct shipment of alcohol to consumers. When the State first enacted its laws regulating alcohol, it was to further "the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." R.I. Gen. Laws

§ 3-1-5; P.L. 1933, ch. 2013. And DBR has been bestowed with supervisory authority to effectuate this purpose. SOF ¶ 56. Rhode Island prohibits the direct shipment of alcohol from out-of-state retailers because of health and safety and regulatory concerns that out-of-state retailers pose. SOF ¶ 69, 70. In furtherance of these legitimate public health and safety justifications, DBR conducts enforcement activities against out-of-state retail sellers who take online alcoholic beverage orders for shipment directly to Rhode Island residents. SOF ¶ 62, 63, 64, 65, 66, 67.

From a health-and-safety standpoint, Rhode Island's requirement that all alcohol that comes into this state pass through a licensed in-state wholesaler to a licensed in-state retailer ensures that alcoholic beverages are untainted and safe for consumption. SOF ¶ 70, 78, 80, 81. Rhode Island's requirement that wholesalers only purchase alcoholic beverages from licensed manufacturers and importers—inherent to the three-tier system—makes it less likely for tainted or unsafe products to reach the market. SOF ¶ 78, 80, 81. The three-tiered system prevents these problems by a variety of checks and balances. SOF ¶ 79. If one tier in the system violates the State's law, members of another tier notice and usually report the violation to authorities (which conserves valuable enforcement resources). SOF ¶ 79. However, when alcoholic beverages are shipped directly from an out-of-state retailer, neither DBR nor local law enforcement are able to verify that the product offered for sale is what the seller purports it to be, that the product is being sold to someone at least twenty-one years old, or even that the product is fit for human consumption. SOF ¶ 70, 78, 80, 81.

From a regulatory perspective, out-of-state retailers pose significant challenges. SOF ¶ 69. For one, out-of-state retailers do not have physical premises in Rhode Island. This is problematic because Rhode Island's requirement that licensees have premises in state is critical to ensuring that licensed wholesalers and retailers comply with the applicable laws. SOF ¶¶ 68, 69, 72. In-state presence makes it possible for DBR's enforcement to inspect retailers and wholesalers to ensure their compliance with the license requirements and other state laws and regulations. SOF ¶¶ 68, 69, 72. The in-state-premises requirement also gives local law enforcement the ability to conduct "compliance checks," and see whether in-state retailers are complying with the laws and regulations related to the sale of alcohol to minors. SOF ¶¶ 57, 59, 70. *See also* R.I. Gen. Laws § 3-8-5.1. Also, Rhode Island's system also ensures proper collection of taxes. SOF ¶¶ 69, 77, 79.

Though Plaintiffs maintain that states that allow direct shipping have not experienced any problems with increased consumption, underage individuals accessing alcohol, and loss of tax revenue, that is disputable. According to the National Liquor Law Enforcement Association, states have reported having issues with unlicensed retailers direct shipping, failure to pay alcohol excise tax and sales tax, violation of state limits on the amount of alcohol that can be shipped, and failure to verify age of the consumer upon delivery, just to name a few. SOF ¶ 76. In fact, Plaintiff Drum's own testimony illustrates one issue when alcohol is shipped using a common carrier. Drum Dep. at 32:25-34:18. Plaintiff Drum testified about her experience when an out-of-state retailer based in New York mailed Plaintiff

wine she ordered via common carrier. SOF at ¶ 41. Plaintiff acknowledged that when the wine was delivered, the individual making the delivery did not ask to see a form of identification to verify her age. SOF at ¶ 42. Unfortunately, this violation of the law—and the failure to properly verify the consumer's age and to obtain the consumer's signature—are just a few of the many issues states have reported. SOF ¶ 76.

Section 2 of the Commerce Clause granted Rhode Island and other states "the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens." *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2474, 204 L. Ed. 2d 801 (2019). Rhode Island enacted a statutory and regulatory scheme designed to ensure temperance, safe and untainted products, that minimizes underage access, and ensures compliance with legal requirements.

b. Rhode Island's Laws and Regulations Do Not Violate the Commerce Clause

Plaintiffs challenge Rhode Island's laws and regulations that relate to the importation, sale and delivery of alcoholic beverages from out of-state retailers directly to Rhode Island consumers. In particular, Plaintiffs attack Rhode Island's lodge four attacks at Rhode Island's laws: (1) allowing in-state retailers to deliver but prohibiting out-of-state retailers from doing so, is facially discriminatory; (2) restricting direct shipment of wine from out-of-state retailers deprives Rhode Islanders of access to markets in other states; (3) prohibiting the shipment of

alcohol by common carrier indirectly discriminates against out-of-state retailers; and (4) limiting the transportation of alcohol to three-gallons transportation facially discriminates because it does not apply to in-state retailers. *See* ECF 58-1 at 12, 14, 15, 17. Plaintiffs maintain that Rhode Island's restrictions do not further legitimate Twenty-First Amendment purposes and could be accomplished "by nondiscriminatory alternatives." *Id.* at 17. *See* Plaintiffs' Memorandum in Support of their Motion for Summary Judgment, ECF 58-1 at 1-2. All arguments fail.

c. Rhode Island's Laws that Allow Licensed In-State Retailers to Deliver Alcohol to In-State Consumers and Prohibit Direct Shipment from Out-of-State Retailers Are Constitutional

Plaintiffs argue that the prohibition on out-of-state retailers from delivering wine directly to Rhode Island consumers is a facial violation of the Commerce Clause because in-state retailers are permitted to deliver wine to in-state consumers. *See* ECF 58-1 at 12. Plaintiffs argue that such a prohibition is borne from the combination of R.I. Gen. Laws § 3-5-1 and the "the fact that Rhode Island has no license that would allow an out-of-state retailer to make home deliveries." *See* ECF 58-1 at 1.

Rhode Island's three-tier system, as discussed above, requires a license for the manufacture, sale, or importation of beverages. The challenged Rhode Island law, R.I. Gen. Laws § 3-5-1, requires a license to sell alcohol in this State, and a Class A retailers license authorizes the holder of the license to sell the beverages at

retail and deliver said beverages directly to a Rhode Island customer, R.I. Gen. Laws §§ 3-7-1 and 3-7-3. From these laws, Plaintiffs argue that "the state will not issue licenses to out-of-state retailers that would permit home deliveries." Plaintiffs' overly simplistic characterization, however, is not wholly accurate. To start, R.I. Gen. Laws § 3-5-1 is not discriminatory on its face; it treats unlicensed out-of-state retailers the same as unlicensed in-state retailers. It is not limited to out-of-state actors, R.I. Gen. Laws § 3-5-1 also prohibits a Rhode Island retailer from selling alcohol if not licensed as a Class A retailer. Though Plaintiffs are correct that "[a] license is required to distribute alcohol in Rhode Island," they overlook the fact that R.I. Gen. Laws § 3-5-1 applies equally to Rhode Island retailers in their argument that it is facially discriminatory. See ECF 58-1.

Next, it is important to note that Class A retail licenses—which authorize the holder to make in-state deliveries of alcohol—*can* be issued to out-of-state corporations authorized to transact business in Rhode Island. *See* R.I. Gen. Laws § 3-5-10. Of course, the applicant would need to comply with the other statutes and regulations, such as having a physical premises in Rhode Island and not being a chain store.[9] *See* 230 R.I. Code R. 30-10-1.4.27 (requiring that "[a]ll licenses granted or issued must identify a premise for operation under the license").

Once the mischaracterization of Rhode Island's scheme is clarified, it becomes apparent that it does not violate the Commerce Clause. The provisions that

[9] Of note, neither Plaintiff is an out-of-state retailer who applied for a Class A retail license in Rhode Island and whose application has been denied.

Plaintiffs challenge—such as requiring a license and requiring premises in Rhode Island—are inherent aspect of a three-tier system, a system that the Supreme Court has blessed as "unquestionably legitimate." And circuit courts around the country have upheld the constitutionality of regulatory model just like Rhode Island's, which that require a license to sell alcohol, require a licensee to have a premises in the licensing state, and permit such licensees to deliver alcohol in-state.

Most recently, the Eighth Circuit in *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1176 (8th Cir.), cert. denied, 142 S. Ct. 335, 211 L. Ed. 2d 178 (2021) examined a challenge to a Missouri law that allows in-state retailers to deliver alcohol directly to consumers through a common carrier or a state-licensed "third party facilitator." The plaintiffs (a Florida wine retailer, its owner, and several Missouri residents)[10] argued that Missouri's laws restricting the direct shipping from out-of-state retailers—including its requirements that licensed liquor retailers be Missouri residents and have a physical presence in Missouri—violated the Commerce Clause. 987 F.3d at 1177.

In affirming the dismissal of the plaintiffs' commerce clause claims, the Eighth Circuit held that "[t]he Missouri laws at issue in this case are an essential feature of its three-tiered scheme…" *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1184 (8th Cir.), cert. denied, 142 S. Ct. 335, 211 L. Ed. 2d 178 (2021). The court noted that the challenged licensing requirements, including requiring a

[10] Plaintiffs were represented by the same pro hac vice counsel of record as the instant case. The Florida retailer and its owner never applied for a Missouri retailer license and were unwilling to maintain premises in Missouri and purchase alcohol from Missouri-licensed wholesalers. *See* 987 F.3d at 1177.

retailer to have a physical presence in state, "have been consistently upheld…as essential to a three-tiered system…" *Id.* at 1182. The Eighth Circuit also observed that the licensing requirements were the same for both in-state and out-of-state retailers, much like Rhode Island's laws discussed above. *See id.* at 1184.

Similarly, in *Lebamoff Enterprises Inc. v. Whitmer*, 956 F.3d 863, 866 (6th Cir. 2020), cert. denied, 141 S. Ct. 1049, 208 L. Ed. 2d 520 (2021), the Sixth Circuit reviewed a Michigan law that allowed licensed in-state retailers to deliver alcohol directly to consumers via common carrier or by a state-licensed, third-party facilitator. Michigan—like Rhode Island—requires retailers to have a physical presence in the state. *See id.* at 870. An Indiana liquor retailer and Michigan residents[11] argued that the direct shipping law violated the commerce clause.

The Sixth Circuit asked and answered:

> "If Michigan may have a three-tier system that requires all alcohol sales to run through its in-state wholesalers, and if it may require retailers to locate within the State, may it limit the delivery options created by the new law to in-state retailers? The answer is yes."

Id. at 870. The court arrived at this conclusion applying the "different" test applicable to Commerce Clause challenges when alcohol regulations are at issue and the Twenty First Amendment is implicated. *Id.* at 871. Under the "different" test, the Sixth Circuit asked, "whether the law 'can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground" and concluded

[11] Plaintiffs were represented by the same pro hac vice counsel in the instant case.

that it "promotes plenty of legitimate state interests." *Id.* (quoting *Tennessee Wine & Spirits*, 139 S. Ct. at 2747). It held,

> "[t]here is nothing unusual about the three-tier system, about prohibiting direct deliveries from out of state to avoid it, or about allowing in-state retailers to deliver alcohol within the State. 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. … That effectively eliminates the role of Michigan's wholesalers. If successful, Lebamoff's challenge would create a sizeable hole in the three-tier system."

Lebamoff Enterprises Inc. v. Whitmer, 956 F.3d 863, 872 (6th Cir. 2020), cert. denied, 141 S. Ct. 1049, 208 L. Ed. 2d 520 (2021) (internal citations omitted). The Sixth Circuit continued on, noting that in-state retailers take the good (permitted deliveries) and bad (stringent regulations and requirements) of the state's three-tier system, yet Plaintiffs want all the benefits of an in-state retailer with none of the burdens: "Anyone who wishes to join them can get a Michigan license and face the regulations that come with it. Lebamoff seizes the sweet and wants to take a pass on the bitter." *Lebamoff Enterprises Inc. v. Whitmer*, 956 F.3d 863, 873 (6th Cir. 2020), cert. denied, 141 S. Ct. 1049, 208 L. Ed. 2d 520 (2021).

State alcohol regulatory systems that require alcohol retailers to maintain premises in-state in order to be licensed and only permit licensed retailers to deliver alcohol have been upheld by myriad courts. *See also Byrd v. Tennessee Wine & Spirits Retailers Ass'n*, 883 F.3d 608, 623 (6th Cir. 2018), aff'd sub nom. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 204 L. Ed. 2d 801 (2019)

(requiring wholesaler or retailer businesses to be physically located within Tennessee may be an inherent aspect of a three-tier system"); *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 821 (5th Cir. 2010) ("Texas can require its authorized retailers to sell from locations physically located in Texas" and "the dormant Commerce Clause does not support ordering Texas to issue retail permits for use at out-of-state locations"); *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 743 (5th Cir. 2016); *Tannins of Indianapolis, LLC v. Cameron*, No. 3:19-CV-504-DJH-CHL, 2021 WL 6126063 (W.D. Ky. Dec. 28, 2021) (dismissing challenge to Kentucky law that permitted alcohol delivery from in-state retailers with premises in state); *B-21 Wines, Inc. v. Stein*, 548 F. Supp. 3d 555 (W.D.N.C. 2021) (finding North Carolina laws restricting out-of-state direct shipping do no offend Commerce Clause).

Notably, some of the laws that have been upheld as constitutional allowed in-state retailers to *ship* using a common carrier. *See, e.g.*, *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1184 (8th Cir.), cert. denied, 142 S. Ct. 335, 211 L. Ed. 2d 178 (2021); *Lebamoff Enterprises Inc. v. Whitmer*, 956 F.3d 863, 872 (6th Cir. 2020). This is a much broader authority than the heavily-regulated deliveries that Rhode Island law permits Class A retailers. The Seventh Circuit made a point to distinguish between laws that allow in-state *shipment* via common carrier laws (like Illinois' challenged law) versus laws that only allow in-state *delivery* (like Rhode Island):

> "[L]ocal deliveries are different in kind from state-wide deliveries through a carrier. The former delivery scheme is logically tied to an in-state presence (how else would the deliveries be accomplished locally?), while the latter form of delivery makes an in-state presence unnecessary. … By contrast, this case involves state-wide deliveries…"

Lebamoff Enterprises, Inc. v. Rauner, 909 F.3d 847, 857 (7th Cir. 2018). The Seventh Circuit recognized that local deliveries by in-state retailers are "constitutionally benign." *Id.* (quoting *Wine Country Gift Baskets.com*, 612 F.3d at 850).

As the plethora of jurisprudence shows, Rhode Island's requirement that a retailer must have a physical premises in Rhode Island to be licensed and allowing licensed in-state retailers to deliver alcohol locally, either by the licensee or their employees, is well-within the State's authority under the Twenty First Amendment. Plaintiffs' Commerce Clause challenge to these laws therefore fails as a matter of law.

B. Rhode Island's Laws Do Not Unconstitutionally Restrict Access to Market

Plaintiffs maintain that Rhode Island's laws deny them access to the wine markets in other states, in violation of the Commerce Clause. *See* ECF 58-1 at 13-14. Plaintiffs claim that they are unable to access 95% of the wines available for sale nationwide, including wines produced by Tom Seaver and Drew Bledsoe and ones recommended by the Wine Spectator. *Id.* at 14.

Similar arguments have failed. In *Lebamoff v. Whitmer*, the Sixth Circuit concluded that the consumer-plaintiffs' complaints about their limited access to wine was "exaggerated" as in-state wholesalers have a financial incentive to carry enough wine brands to satisfy demand. Lebamoff Enterprises Inc. v. Whitmer, 956 F.3d at 875. Regardless of the wines' availability, the Court found the plaintiffs' argument unavailing:

> "To be sure, some brands are not available. But 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. R. 34-3 at 3–5. As Lebamoff's expert admits, fewer than 50,000 of the roughly 200,000 wines sold in the country are available nationwide. That's not Michigan's fault."

Id. at 875.

So too here, the alleged concern for greater access to rare, highly allocated, wines is overstated. SOF ¶ 82. The majority of Americans either never drink alcohol or rarely do. SOF ¶ 83. For those that do drink, the evidence shows that they are pleased with the selection available to them. SOF ¶ 85. In a nationwide survey of Americans revealed that 88% are satisfied with the alcohol selection available in their community. SOF ¶ 85.

Indeed, even Plaintiffs' claims about wine availability in Rhode Island are exaggerated. Though Plaintiffs alleged in their Complaint that they seek to purchase rare, unusual, and highly allocated wines, the evidence in the record told a much different story. Plaintiff Anvar has described himself as "a casual kind of

[wine] drinker." SOF ¶ 35. On the one occasion he sought to purchase a wine unavailable at his local retailer, the retailer special ordered it for him. SOF ¶ 36. Plaintiff Anvar was unable to identify a single one of the alleged "rare, unusual, and heavily allocated wines" that Plaintiffs claim are unavailable in Rhode Island. SOF ¶ 37. Plaintiff Drum similarly described her wine consumption as that of a "novice." SOF ¶ 38. Drum also could not identify a single wine that she sought to purchase but that was unavailable in Rhode Island. SOF ¶ 39.

As noted in *Lebamoff*, there are other reasons, aside from restricting direct shipment, why certain wines may be unavailable in a certain market. SOF ¶ 86. The vast majority of wineries in the United States are considered small and have limited production. SOF ¶ 87. There are barriers unrelated to direct-shipping restrictions, that prevent smaller wineries from getting their products distributed. SOF ¶ 88. Many sell exclusively to one retailer or allocate their product to a small number of retailers. SOF ¶89. None of these factors that affect wine availability are "[Rhode Island's] fault." *Lebamoff*, 956 F.3d at 875.

C. Rhode Island's Law that Prohibits Delivery By Common Carrier Is Essential to the Three-Tier System and Constitutional

Plaintiffs also challenge Rhode Island's laws that prohibit the direct shipment of alcohol by common carrier in Rhode Island. *See* ECF 58-1 at 15. Though they acknowledge that this restriction applies to in-state and out-of-state retailers alike, Plaintiffs nevertheless maintain that this is "indirect

discrimination." *See* id; *see also* R.I. Gen Laws §§ 3-4-6, 3-4-8. Plaintiffs argue that the ban on shipment via a common carrier discriminates against out-of-state retailers who cannot deliver the wine using their own employees in accord with Rhode Island regulations. *Id.*

This argument fails for several reasons. First, it is uncontested that this provision does not discriminate against out-of-state retailers in favor of in-state retailers. In-state and out-of-state retailers alike are not permitted to ship wine via a common carrier. In-state Rhode Island retailers are only permitted to deliver alcohol in accord with strict State regulations; a scheme which has been consistently upheld by Circuit courts and district courts.

To the extent Plaintiffs argue that the Commerce Clause requires Rhode Island to allow all direct shipping via common carrier and completely bypass the three-tier system, such an argument is unsupported by Supreme Court and Circuit court jurisprudence. Rhode Island is empowered to "funnel sales through the three-tier system," *Granholm v. Heald*, 544 U.S. 460, 488–89, (2005), and mandating that alcoholic beverages pass directly from producers to licensed Rhode Island wholesalers to licensed Rhode Island retailers, "is an essential feature of a three-tiered scheme." *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2471–72, 204 L. Ed. 2d 801 (2019). As explained by the Sixth Circuit, "[t]here is nothing unusual about the three-tier system, about prohibiting direct deliveries from out of state to avoid it, or about allowing in-state retailers to deliver alcohol within the State." *Lebamoff Enterprises Inc. v. Whitmer,* 956 F.3d 863, 872

(6th Cir. 2020). As such, Plaintiffs' challenge to the nondiscriminatory prohibition on direct shipment via common carrier fails.

D. Plaintiffs' Challenge to Transportation Limit Was Not Raised and Should Not be Considered

For the first time, Plaintiffs challenge Rhode Island's limitation on the amount of wine that can be transported. *See* ECF 58-1 at 19. Specifically, Plaintiff challenge R.I. Gen. Laws § 3-4-1(a) which states "[e]xcept as otherwise provided, it is unlawful to import beverages into this state." Elsewhere, import is defined to mean "at one time, or in one transaction, to take, or cause to be taken, into this state from outside the state … any vinous beverage or any beverage consisting in whole, or in part, of alcohol produced by distillation in excess of three (3) gallons." R.I. Gen. Laws Ann. § 3-1-1(9).

Notably, Plaintiffs did not allege in their Complaint that the limitation on the importation of wine into Rhode Island was an unconstitutional violation of the Commerce Clause. Nor do Plaintiffs allege that they have been injured by the transportation limit set forth therein. They do not even seek any declaratory or injunctive relief as to this law. Because of this, State Defendants were not put on notice that such a claim would be made and did not have the opportunity to ask Plaintiffs in discovery or depositions questions related to this newfound claim. This Court should not consider this new claim Plaintiffs raise at this late stage; doing otherwise would unfairly prejudice the State.

E. CONCLUSION

For the reasons set forth above, State Defendants are entitled to summary judgment on all of Plaintiff's claims. State Defendants, therefore, ask that this Honorable Court grant the State's Motion for Summary Judgment, enter judgment in favor of the State, and deny Plaintiffs' Motion for Summary Judgment.

ELIZABETH M. TANNER, Director of the Department of Business Regulation and PETER F. NERONHA, Attorney General of the State of Rhode Island

/s/ Andrea M. Shea
Andrea M. Shea, # 9702
Lauren E. Hill, #9830
Special Assistant Attorneys General
150 South Main Street
Providence, RI 02903
Tel (401) 274-4400
Fax (401) 222-2995

CERTIFICATION

I hereby certify that I e-filed the within document through the ECF filing system on this 4th day of March 2022, and that it is available for viewing and downloading by counsel for Plaintiff.

/s/ Andrea M. Shea