

**CASE No. 22-3852  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**DEREK BLOCK, et al.,** : On Appeal from the  
: United States District Court  
**Appellants,** : for the Southern District of Ohio,  
: Eastern Division  
v. :  
: District Court Case No.  
**JIM CANEPA, et al.,** : 2:20-cv-03686  
: :  
**Appellees.** :

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**BRIEF OF APPELLEES DAVE YOST, OHIO ATTORNEY GENERAL,  
AND ANDY WILSON, DIRECTOR OF THE  
OHIO DEPARTMENT OF PUBLIC SAFETY**

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## STATEMENT REGARDING ORAL ARGUMENT

Appellees Dave Yost, Ohio Attorney General, and Andy Wilson, Director of the Ohio Department of Public Safety, believe that oral argument is unnecessary. This is a straightforward case that is readily decided based on precedent in *Lebamoff Enters. v. Whitmer*, 956 F.3d 863 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1049 (2021). The briefs in this case will fully present the facts, issues, and arguments for the Court. If, however, the Court determines that oral argument is necessary in reaching a determination in this matter, the State defendants stand ready to participate.

## STATEMENT OF THE ISSUES

1. Do plaintiffs have standing to bring a pre-enforcement challenge to Ohio's limitation on the amount of wine an individual may personally transport into the State when plaintiffs have not shown that they face a credible threat of prosecution should they violate this restriction?
2. Is the Director of the Ohio Department of Public Safety entitled to sovereign immunity from plaintiffs' claims?
3. Did the District Court abuse its discretion in granting in part and denying in part plaintiffs' motions to strike expert reports filed by the State and intervenor defendant Wholesale Beer and Wine Association of Ohio?
4. Did the District Court abuse its discretion in denying plaintiffs' motion to strike lay testimony in declarations submitted by the State in support of its motion for summary judgment?
5. Does the Constitution require Ohio to allow out-of-state retailers to ship alcohol directly to Ohio consumers, thereby bypassing the State's comprehensive three-tier system of alcohol distribution?
6. Did plaintiffs submit admissible evidence sufficient to create a genuine dispute of material fact as to whether Ohio's challenged restrictions violate the dormant Commerce Clause?

## INTRODUCTION

Alcohol is the only product mentioned in two Constitutional amendments. Infamously banned by the Eighteenth Amendment from manufacture, transportation, or sale during Prohibition, alcoholic beverages were legalized once again by the Twenty-first Amendment fourteen years later. But the Twenty-first Amendment did not merely repeal the Eighteenth and end Prohibition. It also specifically gave each State explicit authority to regulate the importation and transportation of alcohol within its borders. No other object of commerce is textually committed to State regulation.

To protect the health, safety, and welfare of its residents, Ohio established a comprehensive liquor-control law. The law uses a system of permits, regulations, and inspections to promote a safe and orderly market for alcohol in Ohio. As part of this system, Ohio limits direct-to-consumer shipments of beer and wine to retailers physically located in Ohio. Similarly, Ohio limits the quantity of alcohol that an individual may personally transport into the State during a given time period.

Unlike out-of-state retailers, Ohio beer and wine retailers must operate within Ohio's "three-tier system" of alcohol regulation and submit to direct regulation and oversight, including extensive permit requirements, regular physical inspections by the Ohio Division of Liquor Control (the Division), and oversight from the Ohio Department of Public Safety's Ohio Investigative Unit. Ohio vigorously enforces

these requirements and exercises this oversight. Each year, the Division conducts thousands of physical inspections of alcohol manufacturers, wholesalers, and retailers, issuing hundreds of correction notices or citations. Meanwhile, the Ohio Investigative Unit regularly conducts compliance checks to ensure retailers do not sell alcohol to underage customers and investigates other allegations of illegal activity by permit holders. These requirements, inspections, and oversight help limit the abuse or overconsumption of alcohol, prevent underage drinking, ensure alcohol products are safe, and assure that alcohol-related taxes are collected accurately and efficiently.

Plaintiffs would upend all of this. They effectively ask the Court to fracture this longstanding Constitutional scheme by enjoining Ohio's authority to regulate alcohol shipped into its boundaries. In contrast to the myriad alcohol-related social and health concerns that States must consider, plaintiffs have a singular concern—to open the Ohio wine market as broadly as possible. To that end, they challenge Ohio's prohibition on direct-to-consumer shipments of wine by retailers outside of Ohio and Ohio's limitations on the amount of wine an individual may personally transport into the State during a given time. Specifically, they allege that these restrictions violate the dormant Commerce Clause. They ask the Court to invalidate these restrictions and order Ohio to allow shipments by retailers far beyond the reach of its three-tier system and its inspectors and enforcement agents.

Ohio's retailer shipment and transportation restrictions do not run afoul of the Constitution. Indeed, this Court and at least five of its sister circuits have rejected analogous dormant Commerce Clause challenges to substantially similar retail shipping restrictions as those challenged here. *See Lebamoff Enters. v. Whitmer*, 956 F.3d 863 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1049 (2021); *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214 (4th Cir. 2022), *cert. denied*, 2023 U.S. LEXIS 136 (2023); *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 335 (2021); *Wine Country Gift Baskets v. Steen*, 612 F.3d 809 (5th Cir. 2010), *cert. denied*, 562 U.S. 1270; *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000).

The District Court's judgment aligns with circuit and extra-circuit precedent, and should be affirmed.

## STATEMENT OF THE CASE

### A. **Ohio uses a three-tier system to regulate alcohol.**

Ohio has a comprehensive system governing the transportation, distribution, and sale of alcohol within the State. Responsibility and authority for the enforcement of Ohio's liquor control laws are diffused across several state agencies, with principal responsibility divided among the Ohio Division of Liquor Control (the Division), the Ohio Department of Public Safety's Ohio Investigative Unit, and the Liquor Control Commission. *See, e.g.*, Ohio Rev. Code §§ 4301.03, 4301.04,

4301.10, 5502.13. Each of these agencies plays its own unique role in ensuring Ohio has a safe and orderly market for the manufacture, importation, transportation, and distribution of alcohol.

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

Like many states, Ohio controls the sale of wine within its borders through a three-tier system of licensed suppliers (which include manufacturers and importers), wholesale distributors, and retailers. *Tri-County Wholesale Distribs. v. Wine Group, Inc.*, 565 F. App'x 477, 478 (6th Cir. 2012); *see also, e.g.*, Ohio Rev. Code § 4303.03 (permit for certain wine manufacturers and importers); *id.* §§ 4303.07, 4303.10 (permits for wholesale distributors of wine); *id.* § 4303.12 (permit for certain wine retailers). With limited exceptions, consumers in Ohio may purchase only wine that has moved through this three-tier system. *See Tri-County Wholesale Distribs.* at 478; Powers Decl., R. 53-1, PageID 4104, ¶ 7; *see also generally* Ohio Rev. Code § 4301.01(B)(3). (For what it is worth, beer is sold in Ohio through a similar three-tier system, *see* Ohio Rev. Code §§ 4303.02, 4303.06, 4303.11, while the State itself is the exclusive distributor and seller of spiritous liquor, *id.* §§ 4301.10(A)(3), 4301.19).

In this three-tier system, the wine manufacturer or importer (first tier) may sell wine to a wholesale distributor (second tier) who may then sell the wine to a retailer (third tier). *Tri-County Wholesale Distribs.* at 478. Participants at each tier



of the three-tier system must hold a permit issued by the Division. *See, e.g.*, Ohio Rev. Code §§ 4303.03, 4303.031, 4303.07, 4303.071, 4303.08, 4303.10, 4303.12, 4303.14, 4303.18, 4303.181, 4303.184.

Generally, before wine reaches a consumer in Ohio, it must pass through this three tier-system. Wholesalers must obtain the wine that they distribute to retailers from a duly-permitted wine manufacturer or importer. Ohio Rev. Code §§ 4303.07, 4303.10; *see also id.* § 4301.58(C). Likewise, retailers must obtain the wine that they sell to consumers from a duly-permitted wholesaler or from a manufacturer that holds a permit issued by the Division authorizing them to sell wine directly to retailers. Ohio Rev. Code § 4303.35; *see also id.* § 4303.03(B)(1), Ohio Adm. Code 4301:1-1-46(F). Generally, no one person or entity can hold a permit in more than one tier of Ohio's three-tier system. *See, e.g.*, Ohio Rev. Code § 4301.24(B); Ohio Adm. Code 4301:1-1-24(C).

As a limited exception to the three-tier system, Ohio allows residents over twenty-one years old to bring up to four and one-half liters of wine into the State every 30 days, for personal use and not for re-sale, upon returning from a foreign country, another state, or any United States territory or possession. Ohio Rev. Code § 4301.20(L).

## **2. Ohio provides several varieties of wine retail permits.**

To sell wine at retail in Ohio, an entity must secure one of several types of

retail permits. *See, e.g.*, Ohio Rev. Code §§ 4303.12, 4303.14; *see also* Chung Decl., R. 53-2, PageID 4121-23, ¶ 6. A retail permit attaches to a certain location—the licensed premises—that must be located in Ohio. *See* Ohio Rev. Code § 4303.27. But the owner of that premises need not be an Ohio resident. *See* Ohio Rev. Code § 4303.29.

A retailer that holds one of the several types of permits authorizing the sale of wine may also ship or deliver wine to Ohio consumers who are of legal drinking age. *See* Ohio Rev. Code § 4303.27; *see also generally id.* §§ 4301.01(A)(2), 4303.12, 4303.22. Because Ohio retail permit holders are required by law to obtain the wine they sell to consumers from entities that hold permits issued by the Division (*see* Ohio Rev. Code §§ 4301.58(C), 4303.35), wine that is shipped or delivered to Ohio consumers by retail permit holders has necessarily passed through the three-tier system.

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

Ohio does permit out-of-state entities to ship wine directly to Ohio consumers in some limited circumstances, and the law governing those exceptions has recently changed. Before September 30, 2021, certain out-of-state retailers could apply for an S permit from the Division. An S permit was available to a person or entity that met one of the following criteria: (1) was a brand owner or United States importer of beer or wine; (2) was the designated agent of a brand owner or importer for all

beer or wine sold in Ohio by that owner or importer; or (3) was a wine manufacturer that produced less than 250,000 gallons of wine per year and was entitled to a federal tax credit under 27 C.F.R. § 24.278. *See* 2011 Am.Sub.H.B. 114 (129th Ohio Gen. A.). The S permit was available to Ohio entities and out-of-state entities. *Id.* The holder of an S permit was authorized to ship wine to Ohio consumers through a common carrier that holds a permit issued by the Division. *Id.* Thus, under former Ohio Revised Code § 4303.232, a retailer that was a brand owner or importer of a wine or was designated as the agent of that brand owner or importer could obtain an S permit and ship that wine directly to Ohio consumers. Chung Decl., R. 53-2, PageID 4124, ¶ 8.

The Ohio legislature eliminated S permits in 2021. Effective September 30, 2021, the legislature replaced S permits with two new permit options: an S-1 permit and an S-2 permit. The eligibility requirements for S-1 and S-2 permits differ from the S permit in that they are only available to wine or beer *manufacturers*. *See* Ohio Rev. Code §§ 4303.232, 4303.233. Unlike retailers, all wine manufacturers are required to hold a federal license issued by the United States Department of Treasury, Alcohol and Tobacco Tax and Trade Bureau (TTB). Stevenson and Jones Report, R. 53-3, PageID 4222-23, ¶ 110; *see also* Chung Decl., R. 53-2, PageID 4124, ¶ 8. Manufacturers that hold an S-1 or S-2 permit may ship wine directly to Ohio consumers under the terms of the permit. Ohio Rev. Code §§ 4303.232,

4303.233.

Entities that obtained an S permit under former Ohio Revised Code § 4303.232 continue to hold “grandfathered” rights under that permit, which is now characterized by the Division as a grandfathered S-1 permit. *See* Chung Decl., R. 53-2, PageID 4124, ¶ 9. That is, those entities that hold a grandfathered S-1 permit may ship wine directly to Ohio consumers. Otherwise, only out-of-state *manufacturers* that hold an S-1 or S-2 permit, or in-state retail permit holders, may ship wine directly to Ohio consumers. *See* Ohio Rev. Code § 4303.236(C).

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

Wholesalers play a key role in Ohio’s three-tier system of wine distribution. They generally serve as the in-state path through which wine must pass before reaching consumers. This allows the State to control the amount of wine sold through price controls, taxation, and other regulations. For example, Ohio levies taxes on the volume of wine at the wholesale level. *See* Ohio Rev. Code § 4303.33(C)(2); *see also* Kerr Report, R. 53-4, PageID 4316, ¶ 41. Certain permit holders, including wine wholesalers, must file a report with the Ohio Tax Commissioner each month and remit taxes collected under Ohio Revised Code §§ 4301.43 and 4301.432. Ohio Rev. Code 4303.33(C).

Additionally, Ohio imposes minimum prices on the sale of wine, in part through the participation of wholesalers in the three-tier system. Ohio Rev. Code §

4301.13; Ohio Adm. Code 4301:1-1-03(C). As explained in Ohio Adm. Code 4301:1-1-03(C), the State’s minimum markup requirements on the sale of wine “prevent aggressive sales practices that improperly stimulate purchase and consumption, thereby endangering the state’s efforts to promote responsible, and discourage intemperate, consumption of alcoholic beverages[.]” Ohio Adm. Code 4301:1-1-03(C).

For similar reasons, Ohio prohibits wholesalers from offering volume discounts or selling on credit. Ohio Adm. Code 4301:1-1-43(A)(2), (A)(5), (H)(2). Wholesalers are prohibited from giving anything of value to retailers and from having a financial interest in any producer, retailer, or other wholesaler. *See* Ohio Rev. Code § 4301.24(B); Ohio Adm. Code 4301:1-1-24(C); Ohio Adm. Code 4301:1-1-43(A)(1)-(2), (B). To enforce these rules, Ohio requires wholesalers to publicly post and hold their prices for a set period of time (which ensures uniformity across retailers and compliance with the pricing restrictions) and to keep records of all sales ready for inspection. Ohio Rev. Code § 4301.47; Ohio Adm. Code 4301:1-1-03(C).

**5. The Ohio Liquor Control Act and related administrative regulations comprehensively regulate wine distribution and sales.**

Ohio law bestows the Division, the Ohio Investigative Unit, and the Liquor Control Commission with many responsibilities related to the orderly manufacture,

distribution, and sale of wine. The Division is authorized to issue an initial permit to a manufacturer, wholesaler, or retailer only after conducting a physical inspection of the proposed permit premises. Ohio Adm. Code 4301:1-1-12. Additionally, the Division is tasked with conducting renewal inspections of permit holders. Ohio Adm. Code 4301:1-1-19. During these inspections, the Division must verify that permit holders and prospective permit holders meet all requirements imposed by the Ohio Revised Code and the Ohio Administrative Code. *See, e.g.*, Ohio Adm. Code 4301:1-1-03(C) (pricing regulations); Ohio Adm. Code 4301:1-1-17 (sanitation requirements); Ohio Adm. Code 4301:1-1-28 (cleaning and sterilizing requirements); Ohio Adm. Code 4301:1-1-44 (advertising requirements).

In addition to these inspections, retail permit holders are subject to compliance checks by the Division, the Ohio Investigative Unit, and other law enforcement agencies. Ohio Rev. Code § 4301.635. Compliance checks are intended to ensure retail permit holders are not selling alcohol to underage consumers. *Id.* Permit holders are required to admit Division Compliance Agents, Ohio Investigative Unit Enforcement Agents, and other law enforcement officers to the permit premises and shall not allow anyone to interfere with an inspection or investigation of the premises. Ohio Adm. Code 4301:1-1-62. When a Division Compliance Agent or an Enforcement Agent of the Ohio Investigative Unit witnesses a violation of Ohio's liquor control laws or rules, the permit holder is issued a notice or citation. Ohio

Adm. Code 4301:1-1-61. Citations are heard by the Liquor Control Commission and may result in payment of a forfeiture, suspension, or revocation of the permit holder's liquor permit. Ohio Rev. Code § 4301.25; Ohio Adm. Code 4301:1-1-65.

**B. Ohio's liquor control laws are designed to mitigate public health problems and other social ills related to alcohol.**

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

Systemic efforts to combat the ill public health and social effects of alcohol overconsumption in the United States date back to at least the Nineteenth Century, when “tied houses” led to a proliferation of cheap alcohol and overconsumption. Kerr Report, R. 53-4, PageID 4311-12, ¶¶ 13-14. The term “tied house” refers to the vertical integration of large-scale alcohol manufacturers and retailers. *Id.* Manufacturers either owned or controlled a large number of local retail establishments and pressured those retailers to increase alcohol product sales by whatever means necessary. *Id.* at ¶ 14. This pressure triggered price wars between retailers, resulting in lower alcohol prices and excessive alcohol consumption. *Id.* Overconsumption led to increased public drunkenness, theft, gambling, and prostitution. Stevenson and Jones Report, R. 53-3, PageID 4180-81, ¶ 3. The increase in alcohol abuse and related social ills sparked public backlash that resulted in ratification of the Eighteenth Amendment, a near-total ban on the sale of alcoholic beverages in the United States. Kerr Report, R. 53-4, PageID 4311, ¶ 15.

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

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

Ohio exercised its Twenty-first Amendment authority by adopting the above-described liquor control system. Ohio's General Assembly explained the thinking behind this system in the law itself. Its most recent statement about the reasons for the system dates back only to 2021:

- (A) Promote temperance by preventing consumption by underage persons and by discouraging abusive consumption;
- (B) Promote orderly markets by requiring transparent, accountable, and stable distribution of beer and intoxicating liquor and preventing unfair competition;



- (C) Facilitate the collection of taxes related to the sale and consumption of beer and intoxicating liquor.

Ohio Rev. Code § 4301.011; *see also* 2020 Am.Sub.H.B. 674 (133rd Ohio Gen. A.). The three-tier system and its attendant features—including the prohibition on direct-to-consumer deliveries by out-of-state retailers and limitations on personal importation—directly address known societal risks related to alcohol consumption, including traffic accidents, alcohol-related crime, underage drinking, defective products, and alcohol-related deaths and diseases. Kerr Report, R. 53-4, PageID 4314-21, ¶¶ 30-68.

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

One of the primary purposes and effects of Ohio’s three-tier system is to decrease alcohol demand by increasing prices. *Id.* at PageID 4311-12, ¶¶ 18, 21-22. As noted above, Ohio imposes numerous price-control devices through the wholesaler tier, including the prohibition of sales on credit, prohibitions on volume discounts (i.e. charging retailers that purchase a large volume of product a lower per-unit price), and mandatory minimum price markups. By comparison, Illinois, where plaintiff House of Glunz is located, does not impose such discount, credit, and price markup restrictions. Stevenson and Jones Report, R. 53-3, PageID 4224-28, ¶ 116; *see also* 235 Ill. Comp. Stat. § 5/6-5; 235, Ill. Comp. Stat. §§ 5/6-9.10, 5/6-9.15.

Ohio also imposes an excise tax on alcohol at the wholesale level and sales taxes at the retail level. The effect of these price-controls and taxes is to increase the retail price of alcoholic beverages sold in Ohio. Kerr Report, R. 53-4, PageID 4312, ¶ 22. Numerous studies have shown that higher alcohol prices lead to decreased alcohol consumption, along with decreases in behaviors such as binge drinking. *Id.* at Page ID 4312, 4319-20, ¶¶ 22, 57, 59-60. Expenses related to alcohol abuse—including health care costs, lost productivity, and criminal justice expenses—cost Ohio approximately \$8.5 billion annually as of 2010. *Id.* at PageID 4321, ¶ 67.

Decrease in alcohol consumption—related to increased prices—helps reduce the societal consequences of abusive alcohol consumption, including impaired driving, traffic accidents, alcohol-related crimes, alcohol-related mortality, and risky sexual behavior. *Id.* at PageID 4320, ¶ 61. Studies have shown strong associations between reduced alcohol prices and increased rates of traffic fatalities. *Id.* at ¶ 62. From the other direction, studies in multiple states have recorded reductions in alcohol-related mortality associated with tax increases, as well as reductions in domestic violence rates following a State’s imposition of higher alcohol taxes. *Id.* at ¶¶ 64-65. And a nationwide study identified a reduction in injury-mortality rates and violent crime following increase in federal excise taxes on alcoholic beverages. *Id.* at ¶ 63. More focused studies show the same thing. Illinois, for example, saw a 26 percent reduction in fatal alcohol-related traffic accidents after that State

increased excise taxes on beer, wine, and spiritous liquor. *Id.* at ¶ 62. In Ohio, experienced prosecutors recognize connections between excessive alcohol use and criminal activity in Ohio, and support limitations on the availability of alcohol in order to reduce crimes such as vehicular homicide, rape, sexual assault and domestic violence. Schiffel Decl., R. 53-5, PageID 4324, ¶¶ 5-6.

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

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

Although Ohio-based retailers can accept online orders for alcohol delivery, Ohio has mechanisms to strongly disincentivize those retailers from selling to minors and to discipline those that do—mechanisms that cannot be used against out-of-state retailers. Specifically, the Ohio Investigative Unit can conduct compliance checks at Ohio retailers, using undercover agents and participating underage purchasers to verify that a retailer is not selling to minors. Lockhart Decl., R. 53-6, PageID 4327-28, ¶¶ 13, 16. If a retailer does make an illegal sale, the Ohio Investigative Unit can either arrest the individual who makes the illegal sale or issue that individual a criminal summons. *Id.* at PageID 4328-29, ¶ 17. The Ohio Investigative Unit does not have such criminal jurisdiction over employees of out-of-state retailers. *Id.* at PageID 4331, ¶ 29.

Additionally, Ohio has the ability to punish in-state retailers that sell alcohol to minors by cutting off the retailer's product supply. Kerr Report, R. 53-4, PageID 4315, ¶ 35. Because Ohio retailers must purchase alcohol from Ohio-based wholesalers—which, like the retailers, must hold a state-issued permit—Ohio has the ability to discipline any wholesalers that sell to a retailer that has had its permit revoked or suspended for selling to minors. *Id.* Ohio has no parallel ability to stop out-of-state wholesalers from providing products to out-of-state retailers who sell alcohol to minors, because Ohio does not have jurisdiction over those wholesalers' permits. *Id.* Therefore, while an out-of-state retailer who sells alcohol to minors in

Ohio may be disciplined by having its Ohio sales privileges removed, it would not face the more extreme consequence of entirely losing its product supply, which is a consequence that Ohio-based retailers must consider. *Id.*

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

Ohio's restriction of retail permits and its attendant delivery and shipping privileges to in-state retailers also enables Ohio to directly inspect alcohol products for safety and sanitation purposes. Because Ohio retailers must purchase their alcohol products from Ohio wholesalers, Ohio has the ability to inspect the physical premises of both the wholesaler and the retailer to ensure product safety. Such inspections are a routine part of permit-renewal inspections for both wholesalers and retailers, with Division Compliance Agents regularly checking to make sure that wholesalers and retailers store alcoholic beverages in a clean, dry, and secure facility. Powers Decl., R. 53-1, PageID 4110-12, ¶¶ 15.a.ii, 15.b.i, 16.a, 17.a; Chung Decl., R. 53-2, PageID 4125-26, 4130, 4132, ¶¶ 12.a, 14.a, 17.a, 18i. Additionally, if a product is found to be adulterated or unsafe, Ohio can trace the source of the problem back to an Ohio wholesaler or retailer and perform further inspections or initiate a recall as appropriate. Kerr Report, R. 53-4, PageID 4315-16, ¶¶ 39-40.

Ohio has previously issued large-scale recalls of defective alcohol products. In 2012, the State traced and recalled 4,000 cases of spiritous liquor after learning

of a defect that caused parts of a glass stopper to fall into the bottle and contaminate the product. *See Faulty Bottle Stoppers Trigger Tequila Recall*, DAYTON DAILY NEWS, Aug. 2, 2012, <https://www.daytondailynews.com/news/local/faulty-bottle-stoppers-trigger-tequila-recall/OTr2ecGZymmO9bXYP0iMsO/> (last visited Jan. 2, 2023). Due to the State's high degree of control over spirituous liquor, the Division was able to halt shipments and remove bottles from store shelves. By contrast, tracking a defective product sold by an out-of-state retailer would be more challenging to trace back to its source, and Ohio would lack jurisdiction to require a large-scale product recall by out-of-state entities. Kerr Report, R. 53-4, PageID 4315-16, ¶ 40.

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

As noted above, Ohio imposes excise taxes on alcoholic beverages, which are generally assessed and collected at the wholesaler tier. If an out-of-state retailer sells alcohol product that does not pass through an Ohio wholesaler, Ohio cannot collect excise taxes at that wholesale level. *Id.* at PageID 4316, ¶ 44. Additionally, Ohio collects a sales tax at the retail level. Currently, out-of-state retailers that ship to Ohio consumers (often illegally) do not consistently collect or assess sales taxes. *See Donovan Dep.*, R. 50, PageID 889. For example, plaintiff Miller admitted to purchasing wine from out-of-state retailers on which he paid no sales tax. Miller

Dep., R. 48, PageID 440-42. Additionally, Shaun Powers, a Division Compliance Agent Supervisor, ordered wine from multiple out-of-state retailers as part of a sting operation in 2020 and was not assessed sales taxes. Powers Decl., R. 53-1, PageID 4117-18, ¶¶ 26-27.

In addition to helping reduce overconsumption by increasing prices, Ohio's sales and excise taxes offset some of the societal costs of alcohol abuse. In 2018, Ohio raised approximately \$48.1 million in taxes on spiritous liquor, \$42.9 million from taxes on beer, and \$14 million in taxes on wine. Kerr Report, R. 53-4, PageID 4316, ¶ 42. This revenue offsets only a fraction of the approximately \$8.5 billion annual cost to Ohio of alcohol-related health costs, productivity loss, and criminal justice expenses as of 2010. *See id.* at PageID 4321, ¶ 67. Any further reduction of alcohol tax revenue would, in addition to potentially cheapening alcohol, further widen the gap between the public cost of alcohol abuse to Ohioans and the revenue collected to at least partially offset that cost. *Id.* at PageID 4316-17, ¶¶ 44-45.

**C. Ohio enforces its laws through regular inspections, compliance checks, correction notices, and citations.**

Ohio vigorously enforces its liquor-control laws through the Division, the Ohio Investigative Unit, and the Liquor Control Commission. These entities are tasked with ensuring that all permit holders comply with the provisions of Ohio Revised Code Chapters 4301 and 4303, as well as Ohio Administrative Code 4301.

Before issuing a liquor permit to a new applicant, the Division inspects the

proposed permit premises for compliance with Ohio's laws and regulations. Chung Decl., R. 53-2, PageID 4125, ¶ 11; *see also* Ohio Adm. Code 4301:1-1-12. For wine wholesalers, these initial inspections check for things like clean and secure storage areas and whether the permit applicant holds a valid federal permit issued by the TTB. Powers Decl., R. 53-1, PageID 4110-11, ¶ 15; Chung Decl., R. 53-2, PageID 4125-26, ¶¶ 12-13. For retailers, initial inspections verify, among other things, that the building is clean, dry, and secured and meets requirements such as operable coolers and onsite cash registers. Powers Decl., R. 53-1, PageID 4111-14, ¶¶ 16-18; Chung Decl., R. 53-2, PageID 4126-30, ¶¶ 14-16.

After the initial permit inspections, the Division's Compliance Agents conduct renewal inspections of permit holders. Powers Decl., R. 53-1, PageID 4104, ¶ 8; Chung Decl., R. 53-2, PageID 4125, ¶ 11; *see also* Ohio Adm. Code 4301:1-1-19. During a renewal inspection of a wholesale wine distributor, Division Compliance Agents verify that the wholesaler continues to abide by requirements such as holding a valid federal permit issued by TTB and the absence of any "tied house" conflicts (e.g. ensuring that no employee is also employed by a manufacturer or retailer). Powers Decl., R. 53-1, PageID 4114, ¶ 19; Chung Decl., R. 53-2, PageID 4130-31, ¶ 17. During a renewal inspection of a retail permit holder, Compliance Agents verify continued compliance with regulations such as minimum price markup requirements and advertising restrictions. Powers Decl., R. 53-1, PageID



4114-16, ¶¶ 20-22; Chung Decl., R. 53-2, PageID 4131-33, ¶¶ 18-19.

Beyond the initial and renewal inspections, the Division also conducts complaint-based inspections. Powers Decl., R. 53-1, PageID 4117, ¶ 23; Chung Decl., R. 53-2, PageID 4133, ¶ 20. During a complaint-based inspection, Compliance Agents inspect the permit holder's premises for compliance with the subject of the complaint and also complete a full renewal inspection. *Id.*

If a Compliance Agent finds a violation of Ohio law or regulation during an initial, renewal, or complaint-based inspection, the Division can issue a Correction Notice or a Citation. Powers Decl., R. 53-1, PageID 4117, ¶ 24; Chung Decl., R. 53-2, PageID 4134, ¶ 24. A Correction Notice is a letter issued to the permit holder identifying the violations observed and instructing the permit holder to correct the violations within a certain time. *Id.* Failure to correct the violation may result in issuance of a Citation. A Citation is a formal initiation of disciplinary action against the permit holder for a violation of Ohio Revised Code Chapter 4301 or 4303 or Ohio Administrative Code 4301. *Id.* The Ohio Liquor Control Commission hears Citation cases. Such cases may result in fines against the permit holder or suspension or revocation of the permit. *Id.*; *see also* Ohio Rev. Code § 4301.25; Ohio Adm. Code 4301:1-1-65.

During the three-year period between September 1, 2018, and August 31, 2021, the Division conducted approximately 12,312 renewal inspections of permit

holders. Chung Decl., R. 53-2, PageID 4133-34, ¶¶ 21-23. These renewal inspections included both routine, annual renewal inspections as well as renewal inspections conducted as part of a complaint-based inspection. *Id.* During that same period, the Division issued 1,357 Correction Notices and 129 citations to permit holders. *Id.* at PageID 4135, ¶¶ 25-26.

The Division is only one piece of Ohio's enforcement system; another part is the Ohio Investigative Unit, which is a statewide law enforcement agency responsible for enforcing Ohio's alcohol, tobacco, and food stamp fraud laws. Lockhart Decl., R. 53-6, PageID 4325, ¶ 3. Enforcement Agents of the Ohio Investigative Unit conduct a variety of criminal investigations and compliance checks of entities that hold permits from the Division. *Id.* at PageID 4327-30, ¶¶ 10-20. The Ohio Investigative Unit conducts compliance checks to ensure that permit holders are not selling alcohol to minors. *Id.* at PageID 4327-29, ¶¶ 13, 16-17. During compliance checks, Enforcement Agents will work with an underage individual to attempt purchases. *Id.*

The Ohio Investigative Unit's Enforcement Agents also investigate other suspected illegal activity related to liquor sales. *Id.* at PageID 4328-30, ¶¶ 14, 20. These investigations may be complaint-driven or the result of Enforcement Agents' routine field work. *Id.* at PageID 4239, ¶ 19. They relate to a variety of criminal matters, including locations operating without a permit, the illegal manufacture or

sale of alcohol, gambling, prostitution, or drug possession or use. *Id.* at PageID 4328, ¶ 14. Enforcement Agents who uncover violations of Ohio Revised Code Chapter 4301 or 4303 or related administrative regulations are authorized to make arrests, issue criminal summonses, and issue citations, as appropriate depending on the circumstances of the violation. *Id.* at PageID 4330, ¶ 21. For example, if an Enforcement Agent observes a retailer selling alcohol to a minor, the agent will arrest the clerk who made the sale or issue a criminal summons to the clerk. *Id.* at PageID 4328-29, ¶ 17. The agent will also issue an administrative citation to the permit holder. *Id.*

Between September 1, 2018, and August 31, 2021, the Ohio Investigative Unit checked 1,531 locations via alcohol compliance checks throughout the State. *Id.* at PageID 4330-31, ¶¶ 23-25. During that same time period, the Ohio Investigative Unit logged over 9,000 cases. *Id.* at PageID 4331, ¶¶ 26-28; *see also* Snyder Decl., R. 53-7, PageID 4333, ¶ 6.

**D. An Illinois retailer and an Ohio wine consumer sued to enjoin part of Ohio’s three-tier system, but the District Court granted judgment for the State officials.**

Plaintiff House of Glunz, Inc. is an Illinois-based wine retailer that does not hold any permits from the Division and does not want to operate within Ohio’s three-tier system or purchase its wine from a licensed Ohio wholesaler. *See* Donovan Decl., R. 52-3, PageID 1274, ¶ 9. Plaintiff Kenneth Miller is “an active wine

consumer who looks for good wines at good prices wherever [he] can find them.” Miller Decl., R. 52-2, PageID 1271, ¶ 2. Together, they ask the Court to invalidate key features of Ohio’s alcohol control system.

Glunz and Miller sued four Ohio officials in their official capacity: Dave Yost, Ohio Attorney General; James Canepa, Superintendent of the Ohio Division of Liquor Control; Thomas Stickrath, then-Director of the Ohio Department of Public Safety; and Deborah Pryce, then-Chair of the Ohio Liquor Control Commission. Compl., R. 1, PageID 3-4, ¶¶ 7-12. Plaintiffs brought two counts under the dormant Commerce Clause: Count I challenged Ohio’s limitations on the amount of wine an individual may personally transport into the State during a given time, and; Count II challenged Ohio’s restrictions on direct-to-consumer shipments of wine by out-of-state retailers. *Id.* at PageID 7-9, ¶¶ 28-40. The Wholesale Beer & Wine Association of Ohio intervened as a defendant. Order, R. 17, PageID 95.

The District Court dismissed the claims against defendants Canepa, Stickrath, and Pryce, finding that each enjoys Eleventh Amendment sovereign immunity from this lawsuit. Op. & Order, R. 33, PageID 264-67. Plaintiffs appeal only the dismissal of Director Stickrath. Br., at 5, n.3. Since this appeal was filed, Thomas Stickrath has left office. Therefore, his successor, Andy Wilson, “is automatically substituted as a party” for Stickrath in his official capacity. FED. R. APP. P. 43(c)(2).

The District Court also dismissed Count I’s transportation claim, finding that,

despite the opportunity for additional briefing on the issue, plaintiffs failed to meet their burden to prove standing to pursue the claim. *See id.* at PageID 262; Op. & Order, R. 36, PageID 356. Specifically, plaintiffs had not shown that they face a credible threat of prosecution.

Following discovery, all parties filed cross-motions for summary judgment regarding Ohio's prohibition on direct-to-consumer shipments of wine by out-of-state retailers. Plaintiffs also filed a "Motion for Relief from Orders," asking the court to reinstate Count I's transportation claim and the Director of the Ohio Department of Public Safety as a defendant. Pls.' Mot., R. 54, PageID 4546-48. Plaintiffs also filed three motions to strike evidence submitted by defendants in support of their motions for summary judgment, Pls.' Mots., R. 55, 56, 57, and defendants sought to strike the reports and deposition testimony of plaintiffs' proffered expert. Int. Def.'s Mot., R. 60; Def. Yost Memo., R. 69, PageID 4894, n.1.

The court granted in part and denied in part plaintiffs' motions to strike. Op. & Order, R. 91, PageID 5192. The court denied plaintiffs' motion for relief from orders and motion for summary judgment and instead granted summary judgment in favor of defendants. *Id.* at PageID 5203. With respect to defendants' efforts to strike testimony from plaintiffs' expert, the court denied the motion as moot, finding that plaintiffs "fail[ed], even with Mr. Wark, to establish that they are entitled to judgment as a matter of law[.]" *Id.* at PageID 5192. In granting summary judgment

for the defendants, the court found that the Sixth Circuit’s precedent in *Lebamoff* “is good law, and is controlling and dispositive.” *Id.* at PageID 5200. Plaintiffs timely appealed.

### SUMMARY OF THE ARGUMENT

1. This Court lacks jurisdiction to consider plaintiffs’ transportation claim because neither plaintiff has Article III standing to pursue the claim. To establish standing in the pre-enforcement context, plaintiffs must establish that they face a credible threat of prosecution should they violate the challenged law. *Plunderbund Media, LLC v. DeWine*, 753 F. App’x 362, 366 (6th Cir. 2018). Here, the record is devoid of evidence suggesting that Ohio has recently enforced the transportation limit against individuals who have transported more than the allotted amount of wine into the State for personal consumption. Nor has the State sent warning letters to plaintiffs regarding their proposed conduct or does an attribute of the challenged statute make enforcement more likely. Therefore, neither plaintiff has established a threatened injury in fact that is real, immediate, and direct, and they lack standing to pursue the claim.

2. The Director of Ohio Department’s of Public Safety is entitled to sovereign immunity. For the *Young* exception to sovereign immunity to apply, the state official sued must, by virtue of his office, have some connection with the alleged unconstitutional act or conduct of which the plaintiff complains. Moreover, to

overcome the State's sovereign immunity, the *Young* standard requires that the state official threaten or be about to commence proceedings. *See Kelley v. Metro. Cnty. Bd. of Educ.*, 836 F.2d 986, 990 (6th Cir. 1987) To be sure, Director Wilson does play a role in enforcing Ohio's liquor control laws. However, the record does not contain any evidence to suggest that the Director or the Department has taken or threatened legal action to enforce the particular laws challenged here—namely, the prohibitions on shipments of wine by out-of-state retailers or the limitations on the amount of wine an individual may bring into the State for personal consumption. As such, Director Wilson is entitled to Eleventh Amendment sovereign immunity.

3. The District Court did not abuse its discretion in ruling on plaintiffs' motions to strike. District courts have broad discretion in ruling on evidentiary matters, and plaintiffs' cursory complaints about the District Court's rulings on their motions to strike fall short of establishing an abuse of discretion. Rather, the court carefully considered plaintiffs' motions and followed this Circuit's guidance in using a scalpel, not a butcher knife, to strike only the inadmissible portions of the proffered evidence. *See Upshaw v. Ford Motor Co.*, 576 F.3d 576, 593 (6th Cir. 2009).

4. Ohio's ban on direct-to-consumer shipping by out-of-state retailers and limitation on the amount of wine consumers can transport into the State during a given time comport with the dormant Commerce Clause. Pursuant to Supreme Court precedent and *Lebamoff*, state liquor laws do not violate the dormant Commerce

Clause unless they are discriminatory and cannot be justified as a public health or safety measure or on some other legitimate non-protectionist ground. The laws challenged here are similar to the Michigan laws challenged in *Lebamoff* and, like the laws challenged in *Lebamoff*, they promote temperance, combat underage drinking, ensure orderly markets with safe products, and aid in the efficient collection of tax revenue. Ohio has built a robust record regarding the legitimate, non-protectionist grounds for the challenged laws, and plaintiffs failed to proffer admissible evidence to create a genuine dispute of material fact as to whether the laws' predominant effect is economic protectionism rather than public health or safety.

### **STANDARD OF REVIEW**

A district court's determinations regarding Article III standing and Eleventh Amendment immunity are reviewed *de novo*. *Skatmore, Inc. v. Whitmer*, 40 F.4th 727, 731 (6th Cir. 2022); *Binno v. ABA*, 826 F.3d 338, 344 (6th Cir. 2016). Evidentiary decisions made by a district court are reviewed for an abuse of discretion. *Harris v. City of St. Clairsville*, 330 F.App'x 68, 70 (6th Cir. 2008). This Court reviews the grant of summary judgment *de novo*. *Savage v. Gee*, 665 F.3d 732, 737 (6th Cir. 2012).



## ARGUMENT

### **B. Plaintiffs lack standing to pursue their transportation claim.**

As determined by the District Court, neither plaintiff has standing to pursue their Count I challenge to Ohio's limitations on the amount of wine an individual may personally transport into the State. Op. & Order, R. 36, PageID 353-56; Op. & Order, R. 91, PageID 5183-87. At the District Court, only plaintiff Miller submitted declarations regarding the transportation claim, so the Court must analyze standing only as to him. *See* Op. & Order, R. 36, PageID 354.

“To satisfy Article III standing, the plaintiff must demonstrate that (1) he or she suffered an ‘injury in fact’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical’; (2) the injury is ‘fairly traceable to the challenged action of the defendant’; and (3) it is ‘likely that the injury will be redressed by a favorable decision.’” *Mosley v. Kohl’s Dep’t Stores, Inc.*, 942 F.3d 752, 756 (6th Cir. 2019). Because the State has not enforced, or attempted to enforce, the challenged statutes against plaintiffs, their lawsuit is a pre-enforcement challenge to the relevant laws. In the pre-enforcement context, “a plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest but prescribed by a statute, and there exists a credible threat of prosecution thereunder.” *Plunderbund Media, LLC v. DeWine*, 753 F. App’x 362, 366 (6th Cir. 2018). “Standing can derive from an

imminent, rather than actual, injury, but only when ‘the threatened injury is real, immediate, and direct.’” *Crawford v. United States Dep’t of Treasury*, 868 F.3d 438, 454 (6th Cir. 2017) (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)).

Despite the fact that the District Court allowed plaintiffs to submit additional briefing on the issue of whether they face a credible threat of prosecution under the challenged transport laws, they have not, and cannot, establish a credible threat of prosecution. To establish standing in the pre-enforcement context, plaintiffs needed to show some combination of the following factors: (1) a history of past enforcement of the challenged law against plaintiffs or others; (2) enforcement warning letters sent to plaintiffs regarding their specific conduct; and/or (3) an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action. *McKay v. Federspiel*, 823 F.3d 862, 867 (6th Cir. 2016) (holding that a pre-enforcement challenge to a statute requires a pending prosecution or the “substantial risk” of prosecution).

In an attempt to revive their transportation claim, plaintiffs allege that the District Court used the wrong standard for determining standing. Br., at 43. They claim that the court misread *McKay* and *Plunderbund* “as requiring plaintiffs to show more than one of the three ways to establish a credible threat of enforcement (history, warnings or public initiation), whereas those cases actually say only one is required.”

*Id.* at 44. The District Court considered all three methods of showing a credible threat of prosecution; however, plaintiffs presented evidence only on one of the methods—an alleged history of past enforcement. *See Op. & Order*, R. 91, PageID 5187 (quoting *Op. & Order*, R. 36, PageID 356) (“[n]one of the others factors [suggesting a credible threat of prosecution] is present in this case”).

Importantly, plaintiffs’ evidence of an alleged history of past enforcement falls short of suggesting that plaintiff Miller faces of credible threat of prosecution should he transport more than the allotted amount of *wine* into the State for his personal consumption. In support of a credible threat of prosecution, Miller pointed to: (1) an undated Reddit post by someone claiming to have been charged with illegally transporting a bottle of bourbon into Ohio from Kentucky; (2) an Ohio Investigative Unit press release detailing charges brought against five Ohioans for illegal re-sale of beer or intoxicating liquor; (3) law firm webpages offering to defend individuals against charges brought under the transport statutes; (4) a State interrogatory response explaining that the transportation limit could be enforced if an individual was transporting wine into the State to unlawfully sell at retail, if the individual was transporting illegal narcotics in addition to an excess amount of wine, or if the illegal transportation resulted in serious death or injury; and (5) spreadsheets produced during discovery showing eight arrests and one administrative citation for violations of the transportation limit between July 2017 and July 2020. The arrests

and citation reflected on the spreadsheet all involved spiritous liquor, not wine. Lockhart Decl., R. 68-1, PageID 4891-92, ¶¶ 8-10.

However, none of these items establishes that Miller faces a credible threat of prosecution should he transport more than the allotted amount of wine into Ohio for his personal consumption. *See Bronson v. Swensen*, 500 F.3d 1099, 1108 (10th Cir. 2007) (“the credibility of a ‘threat’ is diluted when a factual dissimilarity exists between the plaintiff’s intended future conduct and the conduct that triggered any prior prosecutions under the challenged statute”). Each piece of evidence cited involves either spirituous liquor, the re-sale of spiritous liquor, or the commission of other crimes. In contrast, Miller seeks to transport wine into the State for his own personal consumption. Simply put, Miller’s intended future conduct is factually distinguishable from conduct that triggered prior criminal prosecutions for illegal transportation. *See* Lockhart Decl., R. 68-1, PageID 4892-93, ¶ 11 (Senior Enforcement Commander Erik Lockhart noting he is not aware of a recent case in which the Ohio Investigative Unit has arrested or issued a criminal citation to an individual for violation of Ohio Revised Code § 4301.60 for illegally transporting wine).

Because plaintiffs have not shown they face a credible threat of prosecution, they lack Article III standing to pursue their transportation claim. Moreover, even if the transportation claim is considered on its merits, the claim fails because the

transportation limitation is justified as a public health and safety measure, and its predominant effect is not economic protectionism. *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2474 (2019); *infra*, Section IV.

**C. The Director of Ohio's Department of Public Safety enjoys sovereign immunity from this action.**

Andy Wilson, Director of Ohio's Department of Public Safety, is immune from this lawsuit pursuant to the Eleventh Amendment. Under the Eleventh Amendment, federal courts lack jurisdiction to hear suits by private citizens against a State unless the State unequivocally consents to suit or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate state immunity. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984). Further, a suit against a state official in his or her official capacity is not a suit against the official; rather, it is a suit against the official's office. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (citing *Brandon v. Holt*, 469 U.S. 464, 471 (1985)). It is therefore no different than a suit against the State itself and is also barred by Eleventh Amendment immunity. *See Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 654 n.8 (6th Cir. 2007) (citing *Will*, 491 U.S. at 71).

The Supreme Court has recognized a narrow exception to this immunity where a suit seeks prospective, injunctive relief to prevent enforcement of an allegedly unconstitutional state law. *See generally Ex parte Young*, 209 U.S. 123 (1908). However, the *Young* exception applies only when the officer being sued *has*

*a sufficient connection to enforcement of the challenged act:*

In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have *some connection with the enforcement of the act*, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.

*Id.* at 157 (emphasis added); *see also Floyd v. Cnty. of Kent*, 454 F. App'x. 493, 499 (6th Cir. 2012) (noting that, for the *Young* exception to apply, the state official sued “must have, by virtue of the office, some connection with the alleged unconstitutional act or conduct of which the plaintiff complains”).

Moreover, to overcome the State’s Eleventh Amendment immunity, the *Young* standard “requires that the state official threaten or be about to commence proceedings[.]” *Brown v. Strickland*, No. 2:10-cv-166, 2010 U.S. Dist. LEXIS 63878, at \*9 (S.D. Ohio June 28, 2010); *see also Kelley*, 836 F.2d at 990 (barring suit under Eleventh Amendment where state official defendants did not threaten to enforce any unconstitutional act). It is not sufficient that the state official has the general authority to enforce the law. *Russel v. Lundergan-Grimes*, 784 F.3d 1037, 1048 (6th Cir. 2015). Instead, “[e]njoining a statewide official under *Young* based on his obligation to enforce a law is appropriate when there is a realistic possibility the official will take legal or administrative actions against the plaintiff’s interests.”

*Id.*

Director Wilson is a state official sued in his official capacity. *See Compl., R.*

1, PageID 3, ¶ 7. While plaintiffs claim that the State defendants previously misrepresented the Director's involvement in enforcing the challenged transportation laws (*see Br.*, at 45), that is not the case. In their motion to dismiss, defendants specifically stated that “[t]he Department of Public Safety, under the direction of [former] Director Stickrath, is charged with maintaining an investigative unit to conduct investigations and enforcement activity authorized by the Ohio liquor control laws.” (Mot., R. 19, PageID 127). The distinction plaintiffs are missing is that neither the Director nor the Department has taken any recent action to enforce *the particular laws challenged here*.

That is, neither the Director nor the Department of Public Safety has taken or threatened legal or administrative action to enforce the prohibitions on shipments by out-of-state retailers or the limitations on the amount of wine an individual may bring into the State for personal use. The Department, under the direction of Director Wilson, does, when appropriate, conduct investigations and related law enforcement actions against suspected violators of Ohio liquor laws. However, the Department does not have jurisdiction outside the State of Ohio and therefore lacks authority to take action against out-of-state entities such as House of Glunz. *See Lockhart Decl.*, R. 53-6, PageID 4331, ¶ 29. Moreover, in recent years, neither the Department nor the Director have threatened or filed action against Ohioans who have violated the transportation limit by transporting more than the allotted amount of wine into the

State for personal consumption. Lockhart Decl., R. 68-1, PageID 4892-93, ¶ 11.

Accordingly, Director Wilson is entitled to Eleventh Amendment sovereign immunity.

**D. The District Court did not make evidentiary errors in ruling on the motions for summary judgment.**

While plaintiffs do not identify any evidentiary rulings in their statement of issues, they do make cursory references to alleged evidentiary errors made by the District Court. *See, e.g.,* Br., at 41-43. Because these arguments are not fully developed and argued, they should be considered waived. *Brindley v. McCullen*, 61 F.3d 507, 509 (6th Cir. 1995). Regardless, even when considered on their merits, plaintiffs' arguments must fail.

*First*, the District Court did not abuse its discretion in ruling on the motions to strike the expert reports submitted by defendants. Plaintiffs attempt to characterize the expert reports as containing “inadmissible personal opinions that the ban on direct shipping is a good idea, helps protect public health, and is constitutional under their personal interpretations of the *Tenn. Wine* standard.” Br., at 42. Recall that the District Court carefully sifted the expert evidence and did strike those paragraphs that it found were “conclusive statements phrased in terms of the ‘predominant effect’ test laid out in *Tennessee Wine*.” Op. & Order, R. 91, PageID 5190.

And with respect to the remaining paragraphs of the reports, the court found



that they satisfied Fed. R. Evid. 702 and the standard set forth in *Daubert v. Merrell Dow Pharma., Inc.*, 509 U.S. 579 (1993). Specifically, the court rejected plaintiffs’ arguments that the expert reports were impermissibly based on hearsay, finding that Dr. Kerr relied on facts and data that experts in his field of academic and scientific research would reasonably rely on, yet specifically stated in his report that all opinions expressed therein were his own independent conclusions. *Id.* at 5190-91. Moreover, the court found that defendants’ expert reports were based on adequate data and the product of reliable methodology. *Id.* at 5191-92. The plaintiffs’ chief complaint in that regard—that the expert reports cited no “concrete evidence” showing that any harmful effects have occurred in states that allow direct-to-consumer wine shipments by out-of-state retailers—was specifically rejected by the District Court, which properly found that this argument bears on the weight of the evidence rather than on its admissibility. *Id.* While plaintiffs make cursory references to these determinations, they have not and cannot show that they constitute an abuse of the District Court’s broad discretion to rule on the admissibility of expert opinion evidence. *Brainard v. Am. Skandia Life Assur. Corp.*, 432 F.3d 655, 663 (6th Cir. 2005).

*Second*, the District Court did not abuse its discretion in refusing to strike lay testimony proffered by the State. Specifically, the court declined plaintiffs’ invitation to strike six paragraphs from three declarations submitted by the State in

support of its summary judgment motion. Op. & Order, R. 91, PageID 5192-95. The declarations were submitted by a Division Compliance Agent Supervisor, the Chief of the Division's Investigative Services Unit, and a county prosecutor. *Id.*; Powers Decl., R. 53-1; Chung Decl., R. 53-2; Schiffel Decl., R. 53-5. Under Rule 701 of the Federal Rules of Evidence, a lay witness may testify to an opinion that is rationally based on the witness's perception, helpful to clearly understanding the witness's testimony or determining a fact in issue, and not based on scientific, technical, or other specialized knowledge. The District Court determined that the challenged paragraphs satisfied these requirements and were therefore admissible. With respect to the testimony of the Division employees, the court found that their statements were "rationally based on their perceptions as members of the team charged with enforcing the Ohio liquor control laws, and helpful to determining how those laws are executed and enforced in practice." Op. & Order, R. 91, PageID 5195. Likewise, the court found that the county prosecutor's testimony "is rationally based on her perception as a county prosecutor, and is helpful to determining the impact of the laws' enforcement." *Id.* While plaintiffs vaguely criticize these determinations, Br. at 41-42, they fall woefully short of establishing that the District Court abused its "broad discretion regarding evidentiary rulings." *Ondo v. City of Cleveland*, 795 F.3d 597, 604 (6th Cir. 2015).

- E. Ohio’s retail shipment laws are sanctioned by the Twenty-first Amendment and do not run afoul of the dormant Commerce Clause.**
- i. Pursuant to Supreme Court precedent, State liquor laws do not violate the dormant Commerce Clause unless they are discriminatory and cannot be justified as a public health or safety measure or on some other legitimate non-protectionist ground.**

The Commerce Clause reserves to Congress the power to “regulate Commerce...among the several states.” U.S. Const. art. I, § 8, cl. 3. The dormant Commerce Clause is the “negative inference” of the Commerce Clause and prohibits “regulatory measures designed to benefit in-state interest by burdening out-of-state competitors.” *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994). But review of alcohol regulations under the Commerce Clause must also account for the Twenty-first Amendment. Adopted in response to a widespread collapse in support for Prohibition, the Twenty-first Amendment repealed the Eighteenth Amendment, ending the fourteen-year national Prohibition experiment. U.S. Const. amend. XXI, § 1. Section 2 of the Twenty-first Amendment states, “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. Const. amend. XXI, § 2. As the text shows, the Twenty-First Amendment did not stop at simply repealing the Eighteenth. It also explicitly reserved to the individual States substantial authority to regulate the transportation and sale of alcohol within their respective boundaries, including banning alcohol

altogether if their citizens so chose. U.S. Const. amend. XXI, § 2. “The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.” *Granholm v. Heald*, 544 U.S. 460, 488 (2005) (quoting *California Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980); see also *Tenn. Wine & Spirits* at 2467.

That is, Section 2 constitutionalized “the basic understanding of the extent of the State’s power to regulate alcohol that prevailed before Prohibition.” *Tenn. Wine & Spirits* at 2467. While this power does not permit states to impose purely economic protectionist matters, Section 2 does give “each State leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable.” *Id.* at 2457.

This leeway granted the States means that dormant Commerce Clause challenges to state laws regulating the transportation or sale of alcohol are atypical, *Id.* at 2462–74. In this Court’s words, “When faced with a dormant Commerce Clause challenge to an alcohol regulation...we apply a ‘different test.’” *Lebamoff* at 869. Therefore, courts considering a dormant Commerce Clause challenge to a state alcohol law do not ask whether the challenged law is *narrowly tailored* to advance a legitimate non-protectionist purpose. Rather, courts consider whether the *predominant effect* of the law is protectionist in nature. *Lebamoff* at 869, citing *Tenn.*

*Wine & Spirits* at 2474. “Rather than skeptical review, we ask whether the law ‘can be justified as a public health or safety measure or some other legitimate nonprotectionist ground.’” *Lebamoff* at 869 (quoting *Tenn. Wine & Spirits* at 2474).

As most recently formulated, the Supreme Court applies a two-step analysis for determining whether a state law regulating alcohol violates the Commerce Clause. The first step, as in any other dormant Commerce Clause case, considers whether the challenged regulation discriminates against out-of-state goods or non-resident economic actors. *Tenn. Wine & Spirits* at 2461-62. As explained by the Supreme Court, “any notion of discrimination assumes a comparison of substantially similar entities.” *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). “[N]on-discriminatory regulations that have only incidental effects on interstate commerce are valid unless ‘the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.’” *Or. Waste Sys. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

At the second step, the Court must consider “whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground.” *Tenn. Wine & Spirits* at 2474. Only “[w]here the predominant effect of a law is protectionism, not the protection of public health or safety,” must it be stricken as unconstitutional. *Id.*

**ii. Ohio’s retail shipment restrictions must be upheld because they are a valid exercise of the State’s authority under the Twenty-first Amendment.**

1. The District Court decided this case at step two of the dormant Commerce Clause analysis and granted defendants summary judgment on the basis that the challenged laws “can be justified on legitimate nonprotectionist grounds, and their predominant effect is not protectionism.” Op. & Order, R. 91, PageID 5202. However, as an alternate basis to affirm, this Court could find that the challenged laws do not discriminate against out-of-state entities. *See City Mgmt Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 251 (6th Cir. 1994) (the Court “may affirm on any ground supported by the record”).

The alternate ground here would be a holding that House of Glunz and Ohio wine retailers are not similarly situated. This Court, for example, questioned whether Michigan and Indiana wine retailers were similarly situated before deciding the case on other grounds. *See Lebamoff* at 870. And the Fifth Circuit rejected a dormant Commerce Clause challenge by holding that California and Texas retailers were not similarly situated. *Wine Country Gift Baskets v. Steen*, 612 F.3d 809, 820 (5th Cir. 2010), *cert. denied*, 562 U.S. 1270 (2011).

This Court’s hint and the Fifth Circuit’s holding are a roadmap to resolve this case at step one. Ohio retailers operate in a regulatory environment that is readily distinguishable from that of House of Glunz and other out-of-state retailers. Ohio

retailers must purchase the wine they sell to consumers only from Ohio wholesalers, must submit to inspections and otherwise operate within Ohio's three-tier system, and must comply with all provisions of the Ohio Revised Code and Ohio Administrative Code. House of Glunz and other Illinois retailers must do none of these. Intrastate shipment of wine that has passed through Ohio's three-tier system simply is not the equivalent of importation of wine by out-of-state retailers. Ohio's laws do not discriminate against substantially similar entities; rather, they treat out-of-state retailers differently than in-state retailers because they do not operate within Ohio's three-tier system.

2. If the Court reaches step two, the path is well paved by precedent. While alcohol regulations may be constitutionally unique, this case is not novel. Several circuits, including this one, have upheld state laws that permit in-state retailers to make direct-to-consumer shipments of alcohol while denying such opportunities to out-of-state retailers. This Court rejected a nearly identical challenge to Michigan laws just three years ago. *Lebamoff*, 956 F.3d 863, *cert. denied*, 141 S. Ct. 1049 (2021). The Fourth and Eighth Circuits have reached the same conclusion in cases of recent vintage. *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214 (4th Cir. 2022), *cert. denied*, 2023 U.S. LEXIS 136 (affirming summary judgment in favor of the state and concluding that North Carolina's retailer-shipping laws do not violate the dormant Commerce Clause); *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171,

1180 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 335. Rounding out the scorecard, the Second, Fifth, and Seventh Circuits had earlier reached the same conclusion. *Wine Country Gift Baskets v. Steen*, 612 F.3d 809, 820 (5th Cir. 2010), *cert. denied*, 562 U.S. 1270; *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853–54 (7th Cir. 2000), *cert denied*, 532 U.S. 1002 (2001).

The common thread in these holdings is that restrictions on out-of-state retail shipments are essential elements of the respective States' three-tier alcohol regulatory systems and serve legitimate, non-protectionist health and safety interests such as combating overconsumption, reducing underage drinking, promoting safe and orderly markets, and promoting the efficient collection of taxes.

The challenged Ohio retail shipment laws are no different. Ohio uses a three-tier system, with restrictions on direct-to-consumer shipments by out-of-state retailers, to advance the public interest in combatting alcohol abuse and its related health and safety issues, preventing minors from buying and drinking alcohol, preventing conflicts of interest or corruption from disrupting a safe and orderly alcohol market, ensuring safe and sanitary products, and making sure that taxes are collected fairly and efficiently. These interests are advanced through mechanisms such as minimum markup requirements, bans on discounts and credit, criminal jurisdiction over retail employees, physical inspections of facilities, and excise and



sales taxes. Thus, Ohio’s laws—and the interests they advance—fall squarely within Ohio’s Twenty-first Amendment authority, and any changes to those laws or rebalancing of those interests should come through the legislature, not the courts.

Because *Lebamoff* is binding precedent, and because it parallels the challenge here, it merits a bit more discussion. That case considered a dormant Commerce Clause challenge to a Michigan law that—like the Ohio retail shipment laws challenged here—permitted Michigan-based retailers to directly ship alcoholic beverages to consumers in Michigan, but did not permit out-of-state retailers to do the same. The Court framed the question this way: “If Michigan may have a three-tier system that requires alcohol to run through its in-state wholesalers, and if it may require retailers to locate within the State, may it limit the delivery options...to in-state retailers?” *Lebamoff* at 870. The court determined that the answer was yes. *Id.*

In so deciding, the Court noted that the restriction of direct-to-consumer deliveries to in-state retailers was an essential element of maintaining Michigan’s three-tier system, as the invalidation of the restriction would “necessarily mean[] opening [the State] up to alcohol that passes through out of-of-state wholesalers or for that matter no wholesaler at all.” *Id.* at 872. As the Court noted, this would allow out-of-state products to circumvent the excise taxes collected at the wholesale level and to undercut the local price controls designed to further the legitimate interest in limiting alcohol consumption. *Id.* These controls included minimum prices,

prohibitions of sales on credits, and prohibitions on volume discounts. *Id.* at 868. Ohio’s laws include similar mechanisms to create price floors at the wholesaler and retailer level. Ohio Rev. Code § 4301.13; Ohio Adm. Code 4301:1-1-03(C); Ohio Adm. Code 4301:1-1-43(A)(2), (A)(5), (H)(2).

The Court also noted that Michigan’s laws allowed it to enforce rules governing the physical layout of premises, alcohol storage, recordkeeping requirements, advertisement restrictions, and employee training requirements. *Lebamoff* at 870. The same can be said of Ohio. Like Michigan, Ohio enforces compliance with similar rules and regulations through thousands of random inspections and compliance checks. Powers Decl., R. 53-1, PageID 4110-17, ¶¶ 15-24; Chung Decl., R. 53-2, PageID 4125-35, ¶¶ 11-26; Lockhart Decl., R. 53-6, PageID 4327-31, ¶¶ 11-28.

House of Glunz and Miller recognize that they must get around *Lebamoff*, but their assertion that “*Lebamoff* does not apply to the present case” is puzzling. Br., at 40. While plaintiffs attempt to reframe the issues presented here and in *Lebamoff*, the fact remains that the central issue in both cases is the same: whether a State may permit in-state retailers to ship wine directly to consumers within the state while denying the same option to out-of-state retailers. *Lebamoff* held that “[t]he answer is yes.” *Lebamoff* at 870. That holding is both binding and dispositive. *See, e.g., Cooper v. MRM Inv. Co.*, 367 F.3d 493, 507 (6th Cir. 2004).

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

Just as the Michigan retailers in *Lebamoff* had to purchase their alcohol products from Michigan-licensed wholesalers, the retailers in Ohio must purchase their products from in-state wholesalers and abide by minimum price markup requirements, bans on sale on credit, and bans on volume discounts. And just as the Indiana retailers who challenged the Michigan laws in *Lebamoff* were able to avoid minimum price regulations that Michigan imposed at the wholesaler tier, Illinois-based House of Glunz is not subject to certain minimum price practices that Ohio imposes at the same point. *See Lebamoff* at 872. Specifically, Illinois retailers may receive volume discounts from wholesalers or purchase alcohol from wholesalers on credit—which Ohio retailers may not. Ill. Comp. Stat. § 5/6-5 (allowing

“merchandising credit in the ordinary course of business for a period not to exceed thirty days”); 235 Ill. Comp. Stat. §§ 5/6-9.10, 5/6-9.15 (authorizing quantity discount programs pursuant to “cooperative purchasing agreements”). Consequently, Illinois retailers such as plaintiff House of Glunz, Inc. are able to sell wine products at a lower price than the mandatory minimum price that Ohio retailers must charge. Stevenson and Jones Report, R. 53-3, PageID 4225-26, ¶ 116f-g. Thus, the efforts that Ohio makes to decrease alcohol abuse and its harmful and sometimes deadly effects through price inflation will be undermined if the doors are thrown open to Illinois retailers or other cheaper out-of-state options. In short, what *Lebamoff* said about Michigan retailers can be said of Ohio retailers: They “all live with the bitter and sweet of [the] three-tier system—the bitter of being able to buy only from [Ohio] wholesalers (and the price and volume regulations that go with it) and the sweet of being subject only to intrastate competition.” *Lebamoff* at 873.

The similarities between Ohio’s laws and the Michigan laws upheld in *Lebamoff* do not end here. Like Michigan, Ohio requires retailers to comply with numerous rules governing physical layout, product storage, recordkeeping, and advertisements. *Lebamoff* at 870. Like Michigan, Ohio vigorously enforces its laws and rules, conducting thousands of yearly inspections that regularly uncover violations. *Id.* Like Michigan, Ohio imposes significant taxes on alcohol products at the wholesale level. *Id.* at 872. Finally, like Michigan, Ohio allows very narrow

*exceptions* to its three-tier system *which are equally available to out-of-state and in-state entities*. Specifically, Ohio allows certain wine manufacturers direct access to consumers through the S-1 and S-2 permit system. Such permits are available to in-state and out-of-state wineries on an equal basis, which distinguishes Ohio’s laws from those discriminatory exceptions overturned in *Granholm*.

Ohio retailers must go through the three-tier system, and opening the door to out-of-state retailers “would create a sizeable hole in the three-tier system.” *Lebamoff* at 872. Ohio cannot patch this hole by controlling the prices charged by wholesalers in Illinois or other states—the dormant Commerce Clause itself bans such efforts. *Id.* (citing *Healy v. Beer Institute*, 491 U.S. 324, 337-38 (1989)). Thus, a ruling for House of Glunz and Miller would eviscerate Ohio’s unquestionably legitimate three-tier system, open Ohio to alcohol products at uncontrolled prices, and kneecap Ohio’s authority to regulate alcohol within its borders. Such a holding would contradict *Lebamoff* and hollow out the Twenty-first Amendment’s promise to the States.

In an effort to sidestep *Lebamoff*, plaintiffs claim that the District Court, in following *Lebamoff*, applied the wrong level of scrutiny to the challenged laws. Br. at 39-41. Apparently recognizing that their claims fail under any other level of scrutiny—they contend that the Supreme Court adopted “a form of intermediate scrutiny” in *Tennessee Wine & Spirits* that should apply here. Br. at 16-17. Yet, the

standard that plaintiffs propose is in fact the strict scrutiny standard applied in ordinary dormant Commerce Clause cases. *See id.* Rather than apply the standard set forth by the Supreme Court, *see Tennessee Wine & Spirits* at 2474, plaintiffs cherry-pick language from an earlier portion of the Supreme Court’s opinion explaining the standard of review that applies in most Dormant Commerce Clause cases—not setting forth the standard to be applied in alcohol cases. Br. at 16; *Tenn. Wine & Spirits* at 2461-62. Moreover, plaintiffs’ attempt to circumvent *Lebamoff* is unavailing as a plain reading of *Lebamoff* shows that the Court dutifully applied the *Tennessee Wine & Spirits* standard in upholding Michigan’s laws. *See Lebamoff* at 869.

**C. Plaintiffs failed to create a genuine dispute of material fact that would preclude summary judgment in favor of defendants.**

Finally, plaintiffs’ claim that the District Court ignored “a mountain of evidence [introduced by plaintiffs] showing that direct shipping posed no public health or safety risk” is mistaken. Br., at 42-43. In support, plaintiffs’ point to other States that reportedly allow direct-to-consumer shipping and have allegedly experienced no issues. *See id.* at 10-13. For starters, that framing misses the mark, as the Twenty-First Amendment grants “each State leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable.” *Tenn. Wine & Spirits* at 2457. Whether, or to what extent, another state allows direct-to-consumer shipments from out-of-state retailers need not dictate how Ohio regulates

retailers. Rather, § 2 of the Twenty-First Amendment “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.

As for the District Court’s conclusion that this evidence raised no genuine issue of material fact, what plaintiffs fail to mention is that their proffered evidence suffers from a plethora of evidentiary infirmities and is therefore insufficient to preclude summary judgment.

*First*, plaintiffs’ “facts” about the lack of harm associated with retailer direct shipping are not supported by admissible evidence. To support this alleged “fact,” plaintiffs rely on emails and/or letters between plaintiffs’ counsel and regulators from a fraction of the states that allow retail direct shipping. *See Br.* at 10-11; *Pls.’ Ex. 18, R. 52-19, PageID 3845-62.* Like many of plaintiffs’ proffered exhibits, these documents are neither sworn nor authenticated and therefore are not admissible as evidence. Moreover, even if the Court were to overlook these evidentiary deficiencies and consider the unsworn and unauthenticated documents, they are entitled to little, if any, weight. They represent only a portion of the states that allow the practice of direct-to-consumer shipping by out-of-state retailers. None of the regulators indicated what, if any, investigation or enforcement measures had been undertaken regarding retailers’ non-compliance. Additionally, in the case of Connecticut, the regulator specifically qualified his response that there were no

complaints on file against any out-of-state retail permit holders by noting that the first permit had been issued only five months earlier. *Id.* at PageID 3845. Moreover, some of the state regulators noted occasional issues that have arisen, which directly undermines plaintiffs' supposed "fact." *Id.* at PageID 3847, 3850. And perhaps most importantly, the vast majority of plaintiffs' counsel's communications with state regulators occurred nearly three years ago and predate this lawsuit. *See id.* at PageID 3845-62. As such, they do not account for whether problems have arisen in the recent past.

*Second*, plaintiffs' "facts" about the lack of alcohol-related traffic fatalities and overall wine consumption rates in states that allow direct-to-consumer shipping are plagued with evidentiary issues. Br. at 11, ¶¶ 12-13. In support of the traffic-related-fatalities claim, plaintiffs cite to an exhibit that consists of snippets of publications from the National Highway Traffic Safety Administration intermixed with two summary charts, the origin of which is entirely unclear. Pls.' Ex. 20, R. 52-21, PageID 3869-77. On the issue of alcohol consumption, they use the same approach of combining partial portions of several documents with what is presumably a counsel-prepared summary chart. Pls.' Ex. 19, R. 52-20, PageID 3863-68. Importantly, the summary charts in both exhibits fail to support plaintiffs' contentions that alcohol-related traffic fatalities and alcohol consumption are not higher in states that permit retailer direct shipping from out of state. For example,



the charts in plaintiffs' Exhibit 20 show that some of the states that allow direct shipping do in fact have fatality rates higher than the "National" average listed in the chart. Pls.' Ex. 20, R. 52-21, PageID 3873-74. In short, plaintiffs proffered exhibits do not stand for the propositions that they claim they do. *Id.*; *see also* Pls.' Ex. 19, R. 52-20, PageID 3866.

*Third*, plaintiffs' "facts" about the availability of wine products in Ohio are similarly suspect. Br. at 9, ¶ 6, citing Arger Aff., R. 52-11 & Gralla Aff., R. 52-12. Neither of the cited affiants are Ohio residents or claim to have lived in Ohio at any time. Neither appears to have knowledge of the wine inventory maintained by any Ohio wholesaler or retailer. Perhaps most importantly, both affidavits were executed by the affiants nearly three years ago, before this lawsuit was even filed in July 2020, which calls into question their relevancy. *See id.* Regardless, inability to obtain a certain wine does not amount to a constitutional violation.

*Finally*, plaintiffs' "facts" regarding purported nondiscriminatory alternatives that Ohio could adopt are purely speculative. Br. at 12, ¶ 15. They proclaim that states that allow direct shipping "regulate and monitor wine shipments through a permit system in which out-of-state shippers consent to jurisdiction, limit sales volume, submit reports, and use common carriers that verify age on delivery." *Id.* In support of this claim, plaintiffs cite the report of their proffered expert. *Id.* However, the expert report does not identify a single state that actually follows this formula,

nor does it cite a single statute or administrative rule in support of the claim. Pls.’ Ex. 3, R. 52-4, PageID 1276-86. Without a single example of such a system and in the absence of any details about how such a system might work, plaintiffs’ claim is pure speculation. What House of Glunz and Miller are truly advocating for here is for Ohio to adopt their suggested direct shipping bill. *See* Pls.’ Ex. 27, R. 52-28; Pls.’ Ex. 28, R. 52-29. However, adoption of such a measure must come through legislative action, not through judicial review. As *Lebamoff* observed, “the Twenty-first Amendment leaves these considerations to the people of [the State], not to federal judges.” 956 F.3d at 875.

## CONCLUSION

The Court should affirm.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:
  - a. As calculated by Microsoft Word, this brief contains 13,000 words, excluding the parts of the brief exempted by Fed. R. App P. 32(f) and 6 Cir. R. 32(b)(1), and
2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportional font using Times New Roman at 14 point.

*/s/ Marissa J. Palumbo*

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Senior Assistant Attorney General

## CERTIFICATE OF SERVICE

This will certify that the foregoing *Brief of Appellees Dave Yost, Ohio Attorney General, and Andy Wilson, Director of the Ohio Department of Public Safety* was filed electronically on January 11, 2023. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

*/s/ Marissa J. Palumbo*

MARISSA J. PALUMBO  
Senior Assistant Attorney General

## DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 30(b), Appellees Dave Yost, Ohio Attorney General, and Andy Wilson, Director of the Ohio Department of Public Safety, hereby designate the following filings in the district court's electronic record as relevant to this appeal:

<b>R.</b>	<b>Description</b>	<b>PAGEID#</b>
R. 1	Complaint	3-4
R. 19	State Defendants' Motion to Dismiss	127
R. 33	Opinion & Order dismissing defendants Canepa, Stickrath, and Pryce, holding in abeyance ruling on whether plaintiffs have standing to pursue their claims, and directing plaintiffs to submit credible threat affidavits	264-67
R. 34	Plaintiffs' Credible Threat Declarations	273-74
R. 34-5	Plaintiff Miller's Credible Threat of Prosecution Declaration	302-04
R. 34-7	Exhibit B to Miller's Credible Threat Declaration – Reddit post	306
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## PORTIONS OF RELEVANT OHIO STATUTES AND REGULATIONS

### **Ohio Rev. Code § 4301.011:**

The general assembly hereby finds that the Twenty-first Amendment to the United States Constitution confers upon the state of Ohio sole and exclusive authority to regulate the sale and distribution of beer and intoxicating liquor in this state. That authority, so conferred, has rested with the state of Ohio since the ratification of the Twenty-first Amendment to the United States Constitution.

The general assembly also finds that its authority to so regulate is exercised through Title XLIII of the Revised Code and other relevant provisions of the Revised Code. Title XLIII of the Revised Code and the other relevant provisions of the Revised Code reflect the intent of the general assembly to do all of the following:

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

### **Ohio Rev. Code § 4301.04(A):**

The liquor control commission has the following powers which it may exercise by the vote of a majority of the commissioners:

- (A) To suspend, revoke, and cancel permits. A majority of the commissioners constitutes a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power of the commission. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all powers of the commission. The act of a majority of the commission, when in session, is the act of the commission. A finding, order, or decision of the commission to suspend a permit shall state and fix the effective date of the commencement and the period of duration of such suspension. Such finding, order, or decision of the commission to revoke or cancel a permit shall state and fix the effective date thereof.

....

**Ohio Rev. Code § 4301.13:**

(A) The liquor control commission may adopt, promulgate, repeal, rescind, and amend rules to regulate the manner of dealing in and distributing and selling bottled wine within the state. The commission may require out-of-state producers, shippers, bottlers, and holders of federal importers' permits shipping bottled wine into Ohio and holders of A-2, A-2f, B-5, B-3, and B-2 permits issued by the division of liquor control, engaged in distributing and selling bottled wine in Ohio, to file with the division a schedule of prices in which minimum prices are set forth for the sale of bottled wine at wholesale or retail, or both, in Ohio. Any amendments, additions, alterations, or revisions to the schedule of prices as originally filed with the division shall be filed in the same manner as the original schedule of prices required to be filed with the division.

**(B)**

(1) The commission may determine and fix the minimum mark-ups at wholesale or retail, or both, for bottled wine, and fix the minimum prices at which the various classes of bottled wine shall be distributed and sold in Ohio either at wholesale or retail, or both. With regard to the minimum prices at which various classes of bottled wine are sold in the state at retail, the commission shall allow a retail permit holder to offer to a personal consumer a ten per cent discount off the per-bottle retail sale price on each bottle included in a case of that wine that is offered for sale.

(2) As used in division (B)(1) of this section, "case" means not less than six and not more than twelve bottles of wine, which need not be of the same brand, variety, or volume.

**Ohio Rev. Code § 4301.20(L):**

This chapter and Chapter 4303. of the Revised Code do not prevent the following:

...;

(L) Any resident of this state or any member of the armed forces of the United States, who has attained the age of twenty-one years, from bringing into this state, for personal use and not for resale, not more than one liter of spirituous liquor, four and one-half liters of wine, or two hundred eighty-eight ounces of beer in any thirty-day period, and the same is free of any tax consent fee when the resident or member of the armed forces physically possesses and accompanies the spirituous liquor, wine,

or beer on returning from a foreign country, another state, or an insular possession of the United States[.]

**Ohio Rev. Code § 4301.24(B)–(D):**

**(B)** No manufacturer shall have any financial interest, directly or indirectly, by stock ownership, or through interlocking directors in a corporation, or otherwise, in the establishment, maintenance, or promotion in the business of any wholesale distributor. No retail permit holder shall have any interest, directly or indirectly, in the operation of, or any ownership in, the business of any wholesale distributor or manufacturer.

**(C)**

**(1)** No manufacturer shall, except as authorized by section 4303.021 of the Revised Code, have any financial interest, directly or indirectly, by stock ownership, or through interlocking directors in a corporation, or otherwise, in the establishment, maintenance, or promotion of the business of any retail dealer. No wholesale distributor or employee of a wholesale distributor shall have any financial interest, directly or indirectly, by stock ownership, interlocking directors in a corporation, or otherwise, in the establishment, maintenance, or promotion of the business of any retail dealer. No manufacturer or wholesale distributor or any stockholder of a manufacturer or wholesale distributor shall acquire, by ownership in fee, leasehold, mortgage, or otherwise, directly or indirectly, any interest in the premises on which the business of any other person engaged in the business of trafficking in beer or intoxicating liquor is conducted.

**(2)** All contracts, covenants, conditions, and limitations whereby any person engaged or proposing to engage in the sale of beer or intoxicating liquors promises to confine the person's sales of a particular kind or quality of beer or intoxicating liquor to one or more products, or the products of a specified manufacturer or wholesale distributor, or to give preference to those products, shall to the extent of that promise be void. The making of a promise in any such form shall be cause for the revocation or suspension of any permit issued to any party.

**(D)** No manufacturer shall sell or offer to sell to any wholesale distributor or retail permit holder, no wholesale distributor shall sell or offer to sell to any retail permit holder, and no wholesale distributor or retail permit holder shall purchase or receive

from any manufacturer or wholesale distributor, any beer, brewed beverages, or wine manufactured in the United States except for cash. No right of action shall exist to collect any claims for credit extended contrary to this section.

This section does not prohibit a licensee from crediting to a purchaser the actual prices charged for packages or containers returned by the original purchaser as a credit on any sale or from refunding to any purchaser the amount paid by that purchaser for containers or as a deposit on containers when title is retained by the vendor, if those containers or packages have been returned to the manufacturer or distributor. This section does not prohibit a manufacturer from extending usual and customary credit for beer, brewed beverages, or wine manufactured in the United States and sold to customers who live or maintain places of business outside this state when the beverages so sold are actually transported and delivered to points outside this state.

No wholesale or retail permit shall be issued to an applicant unless the applicant has paid in full all accounts for beer or wine, manufactured in the United States, outstanding as of September 6, 1939. No beer or wine manufactured in the United States shall be imported into the state unless the beer or wine has been paid for in cash, and no supplier registration for any such beer or wine manufactured in the United States shall be issued by the division of liquor control until the A-2, A-2f, B-1, or B-5 permit holder establishes to the satisfaction of the division that the beer or wine has been paid for in cash.

....

**Ohio Rev. Code § 4301.25(A):**

(A) The liquor control commission may suspend or revoke any permit issued under this chapter or Chapter 4303. of the Revised Code for the violation of any of the applicable restrictions of either chapter or of any lawful rule of the commission, for other sufficient cause, and for the following causes:

(1) Conviction of the holder or the holder's agent or employee for violating division (B) of section 2907.39 of the Revised Code or a section of this chapter or Chapter 4303. of the Revised Code or for a felony;

(2) The entry of a judgment pursuant to division (D) or (E) of section 3767.05 of the Revised Code against a permit holder or the holder's agent or employee finding the existence of a nuisance at a liquor permit premises or finding the

existence of a nuisance as a result of the operation of a liquor permit premises;

(3) Making any false material statement in an application for a permit;

(4) Assigning, transferring, or pledging a permit contrary to the rules of the commission;

(5) Selling or promising to sell beer or intoxicating liquor to a wholesale or retail dealer who is not the holder of a proper permit at the time of the sale or promise;

(6) Failure of the holder of a permit to pay an excise tax together with any penalties imposed by the law relating to that failure and for violation of any rule of the department of taxation in pursuance of the tax and penalties.

....

**Ohio Rev. Code § 4301.47:**

Every class A-1, A-1c, A-2, A-2f, and A-4 permit holder and each class B or S permit holder shall maintain and keep for a period of three years a record of the beer, wine, and mixed beverages purchased, distributed, or sold within this state by the permit holder, together with invoices, records, receipts, bills of lading, and other pertinent papers required by the tax commissioner and, upon demand by the tax commissioner, shall produce these records for a three-year period prior to the demand unless upon satisfactory proof it is shown that the nonproduction is due to causes beyond the permit holder's control.

**Ohio Rev. Code § 4301.58:**

(A) As used in this section:

(1) "Charitable organization" is an organization described under section 501(c)(3) of the Internal Revenue Code and exempt from federal income taxation under section 501(a) of the Internal Revenue Code.

(2) "Fundraiser" means a raffle, silent auction, or event where a door prize is awarded.

(3) "Political organization" means a political organization defined

under section 527 of the Internal Revenue Code.

**(4)** “Raffle” means a raffle conducted in accordance with Chapter 2915. of the Revised Code.

**(5)** “Silent auction” means a method of submitting bids in writing by one or more persons and, after a review of all the bids received, personal property is awarded to the highest and most responsive bidder.

**(B)** No person, personally or by the person’s clerk, agent, or employee, who is not the holder of an A permit issued by the division of liquor control, in force at the time, and authorizing the manufacture of beer or intoxicating liquor, or who is not an agent or employee of the division authorized to manufacture such beer or intoxicating liquor, shall manufacture any beer or intoxicating liquor for sale, or shall manufacture spirituous liquor.

**(C)** No person, personally or by the person’s clerk, agent, or employee, who is not the holder of an A, B, C, D, E, F, G, I, or S permit issued by the division, in force at the time, and authorizing the sale of beer, intoxicating liquor, or alcohol, or who is not an agent or employee of the division or the tax commissioner authorized to sell such beer, intoxicating liquor, or alcohol, shall sell, keep, or possess beer, intoxicating liquor, or alcohol for sale to any persons other than those authorized by Chapters 4301. and 4303. of the Revised Code to purchase any beer or intoxicating liquor, or sell any alcohol at retail.

**(D)** No person, personally or by the person’s clerk, agent, or employee, who is the holder of a permit issued by the division, shall sell, keep, or possess for sale any intoxicating liquor not purchased from the division or from the holder of a permit issued by the division authorizing the sale of such intoxicating liquor unless the same has been purchased with the special consent of the division. The division shall revoke the permit of any person convicted of a violation of division (C) of this section.

**(E)** Division (C) of this section does not apply to either of the following:

**(1)** The sale or possession for sale of any low-alcohol beverage;

**(2)** Beer and intoxicating liquor that is given away if all of the following apply:

(a) The beer or intoxicating liquor is given away by a charitable or political organization to a participant in a fundraiser.

(b) Any beer, wine, or mixed beverages given away via the fundraiser is purchased from a person issued a permit under Chapter 4303. of the Revised Code.

(c) Any spirituous liquor given away via the fundraiser is purchased from an agency store located in this state.

(d) Regarding any spirituous liquor donated to the charitable or political organization for purposes of the fundraiser, the donor is not an agency store located in this state and submits to the charitable or political organization receipts showing that the donor purchased the spirituous liquor from an agency store located in this state.

(e) The charitable or political organization submits purchase receipts for the spirituous liquor given away via a fundraiser to the division of liquor control as proof that the spirituous liquor was purchased from an agency store located in this state. The charitable or political organization shall submit the receipts in accordance with procedures that the division shall establish.

**Ohio Rev. Code § 4301.60:**

No person, who is not the holder of an H permit, shall transport beer, intoxicating liquor, or alcohol in this state. This section does not apply to the transportation and delivery of beer, alcohol, or intoxicating liquor purchased or to be purchased from the holder of a permit issued by the division of liquor control, in force at the time, and authorizing the sale and delivery of the beer, alcohol, or intoxicating liquor so transported, or to the transportation and delivery of beer, intoxicating liquor, or alcohol purchased from the division or the tax commissioner, or purchased by the holder of an A or B permit outside this state and transported within this state by them in their own trucks for the purpose of sale under their permits.

**Ohio Rev. Code § 4303.635:**

(A) As used in this section:

(1) “Compliance check” means an attempt on behalf of a law enforcement

agency or the division of liquor control to purchase any beer, wine, mixed beverages, or intoxicating liquor in the enforcement of any section of this chapter or any rule of the liquor control commission in which the age of the purchaser is an element of the offense.

(2) “Confidential informant” means a person who is under twenty-one years of age and who is engaged in conducting compliance checks.

(3) “Law enforcement agency” means an organization or unit made up of law enforcement officers authorized to enforce this chapter and also includes the investigative unit of the department of public safety described in section 5502.13 of the Revised Code.

(B) Within a reasonable period of time after the conduct of a compliance check, the law enforcement agency that conducted the compliance check, or the division of liquor control if the division conducted the compliance check, shall send written notification of it to the permit holder that was its subject. If the confidential informant who participated in the compliance check was able to purchase beer, wine, mixed beverages, or intoxicating liquor, the citation issued for the violation constitutes that notification. If the confidential informant who participated in the compliance check was unable to purchase beer, wine, mixed beverages, or intoxicating liquor, the notification shall indicate the date and time of the compliance check, the law enforcement agency that conducted the compliance check or, when applicable, that the division of liquor control conducted the compliance check, and the permit holder or a general description of the employee of the permit holder who refused to make the sale.

**Ohio Rev. Code § 4303.07:**

Permit B-2 may be issued to a wholesale distributor of wine to purchase from holders of A-2, A-2f, and B-5 permits and distribute or sell that product, in the original container in which it was placed by the B-5 permit holder or manufacturer at the place where manufactured, to retail permit holders and for home use. The fee for this permit is five hundred dollars for each distributing plant or warehouse.

**Ohio Rev. Code § 4303.071:**

(A)

(1) The division of liquor control may issue a B-2a permit to a person that manufactures wine. If the person resides outside this state, the person shall



comply with the requirements governing the issuance of licenses or permits that authorize the sale of intoxicating liquor by the appropriate authority of the state in which the person resides and by the alcohol and tobacco tax and trade bureau in the United States department of the treasury.

(2) The fee for the B-2a permit is twenty-five dollars.

(3) The holder of a B-2a permit may sell wine to a retail permit holder. However, a B-2a permit holder that is a wine manufacturer may sell to a retail permit holder only wine that the B-2a permit holder has manufactured and for which a territory designation has not been filed in this state.

(4) The holder of a B-2a permit shall renew the permit in accordance with section 4303.271 of the Revised Code, except that renewal shall not be subject to the notice and hearing requirements established in division (B) of that section.

(B) The holder of a B-2a permit shall collect and pay the taxes relating to the delivery of wine to a retailer that are levied under sections 4301.421 and 4301.432 and Chapters 5739. and 5741. of the Revised Code.

(C) The holder of a B-2a permit shall comply with this chapter, Chapter 4301. of the Revised Code, and any rules adopted by the liquor control commission under section 4301.03 of the Revised Code.

**Ohio Rev. Code § 4303.09:**

Permit B-4 may be issued to a wholesale distributor to purchase from the holders of A-4 permits and to import, distribute, and sell prepared and bottled highballs, cocktails, cordials, and other mixed beverages containing not less than four per cent of alcohol by volume and not more than twenty-one per cent of alcohol by volume to retail permit holders, and for home use, under rules adopted by the division of liquor control. The formula and samples of all of those beverages to be handled by the permit holder shall be submitted to the division for its analysis and approval before those beverages may be sold and distributed in this state. All labels and advertising matter used by the holders of this permit shall be approved by the division before they may be used in this state. The fee for this permit is five hundred dollars for each distributing plant or warehouse.

**Ohio Rev. Code § 4303.10:**

Permit B-5 may be issued to a wholesale distributor of wine to purchase wine from the holders of A-2 and A-2f permits, to purchase and import wine in bond or otherwise, in bulk or in containers of any size, and to bottle wine for distribution and sale to holders of wholesale or retail permits and for home use in sealed containers. No wine shall be bottled by a B-5 permit holder in containers supplied by any person who intends the wine for home use. The fee for this permit is one thousand five hundred sixty-three dollars.

**Ohio Rev. Code § 4303.12:**

Permit C-2 may be issued to the owner or operator of a retail store to sell wine in sealed containers only and not for consumption on the premises where sold in original containers. The holder of this permit may also sell and distribute in original packages and not for consumption on the premises where sold or for resale, prepared and bottled highballs, cocktails, cordials, and other mixed beverages manufactured and distributed by holders of A-4 and B-4 permits, and containing not less than four per cent of alcohol by volume, and not more than twenty-one per cent of alcohol by volume. The fee for this permit is three hundred seventy-six dollars for each location.

**Ohio Rev. Code § 4303.232:**

(A)

(1) The division of liquor control may issue an S-1 permit to a person that manufactures beer or less than two hundred fifty thousand gallons of wine per year. If the person resides outside this state, the person shall comply with the requirements governing the issuance of licenses or permits that authorize the sale of beer or intoxicating liquor by the appropriate authority of the state in which the person resides and by the alcohol and tobacco tax and trade bureau of the United States department of the treasury.

(2) The fee for the S-1 permit is twenty-five dollars.

(3) An S-1 permit holder may sell beer or wine to a personal consumer by receiving and filling orders that the personal consumer submits to the permit holder. The permit holder shall sell only beer or wine that the permit holder has manufactured to a personal consumer.

(4) An S-1 permit holder shall renew the permit in accordance with section 4303.271 of the Revised Code, except that the renewal shall not be subject to the notice and hearing requirements established in division (B) of that section.

(5) The division may refuse to renew an S-1 permit for any of the reasons specified in section 4303.292 of the Revised Code or if the holder of the permit fails to do any of the following:

(a) Collect and pay all applicable taxes specified in division (B) of this section;

(b) Pay the permit fee;

(c) Comply with this section or any rules adopted by the liquor control commission under section 4301.03 of the Revised Code.

(B)

(1) An S-1 permit holder who sells wine shall collect and pay the taxes relating to the delivery of wine to a personal consumer that are levied under sections 4301.421, 4301.43, and 4301.432 and Chapters 5739. and 5741. of the Revised Code.

(2) An S-1 permit holder who sells beer shall collect and pay the taxes relating to the delivery of beer to a personal consumer that are levied under sections 4301.42 and 4301.421 and Chapters 4305., 4307., 5739., and 5741. of the Revised Code.

(C)

(1) An S-1 permit holder shall send a shipment of beer or wine that has been paid for by a personal consumer to that personal consumer via an H permit holder. Prior to sending a shipment of beer or wine to a personal consumer, an S-1 permit holder, or an employee of the permit holder, shall make a bona fide effort to ensure that the personal consumer is at least twenty-one years of age. The shipment of beer or wine shall be shipped in a package that clearly states that it contains alcohol. No person shall fail to comply with division (C) (1) of this section.

(2) Upon delivering a shipment of beer or wine to a personal consumer, an H permit holder, or an employee of the permit holder, shall verify that the personal consumer is at least twenty-one years of age by checking the personal consumer's driver's or commercial driver's license or identification card issued under sections 4507.50 to 4507.52 of the Revised Code.

(3) An S-1 permit holder shall keep a record of each shipment of beer or wine that the permit holder sends to a personal consumer. The records shall be used for all of the following:

(a) To provide a copy of each beer or wine shipment invoice to the tax commissioner in a manner prescribed by the commissioner. The invoice shall include the name of each personal consumer that purchased beer or wine from the S-1 permit holder in accordance with this section and any other information required by the tax commissioner.

(b) To provide annually in electronic format by electronic means a report to the division. The report shall include the name and address of each personal consumer that purchased beer or wine from the S-1 permit holder in accordance with this section, the quantity of beer or wine purchased by each personal consumer, and any other information requested by the division. The division shall prescribe and provide an electronic form for the report and shall determine the specific electronic means that the S-1 permit holder must use to submit the report.

(c) To notify a personal consumer of any health or welfare recalls of the beer or wine that has been purchased by the personal consumer.

(D) As used in this section, “personal consumer” means an individual who is at least twenty-one years of age, is a resident of this state, does not hold a permit issued under this chapter, and intends to use beer or wine purchased in accordance with this section for personal consumption only and not for resale or other commercial purposes.

(E) An S-1 permit holder shall comply with this chapter, Chapter 4301. of the Revised Code, and any rules adopted by the liquor control commission under section 4301.03 of the Revised Code.

**Ohio Rev. Code § 4303.233:**

(A) As used in this section, “personal consumer” means an individual who is at least twenty-one years of age, is a resident of this state, does not hold a permit issued under this chapter, and intends to use wine purchased in accordance with this section for personal consumption only and not for resale or other commercial purposes.

(B)

(1) The division of liquor control may issue an S-2 permit to a person that manufactures two hundred fifty thousand gallons or more of wine per year. If the person resides outside this state, the person shall comply with the requirements governing the issuance of licenses or permits that authorize the sale of beer or intoxicating liquor by the appropriate authority of the state in which the person resides and by the alcohol and tobacco tax and trade bureau of the United States department of the treasury.

(2) An S-2 permit holder may sell wine to a personal consumer by receiving and filling orders that the personal consumer submits to the permit holder. The permit holder shall sell only wine that the permit holder has manufactured to a personal consumer. An S-2 permit holder may use a fulfillment warehouse registered under section 4303.234 of the Revised Code to send a shipment of wine to a personal consumer. A fulfillment warehouse is an agent of an S-2 permit holder and an S-2 permit holder is liable for violations of this chapter and Chapter 4301. of the Revised Code that are committed by the fulfillment warehouse regarding wine shipped on behalf of the S-2 permit holder.

(C) An S-2 permit holder shall collect and pay the taxes relating to the delivery of wine to a personal consumer that are levied under sections 4301.421, 4301.43, and 4301.432 and Chapters 5739, and 5741, of the Revised Code.

(D)

(1) An S-2 permit holder shall send a shipment of wine that has been paid for by a personal consumer to that personal consumer via an H permit holder. Prior to sending a shipment of wine to a personal consumer, the S-2 permit holder, or an employee of the permit holder, shall make a bona fide effort to ensure that the personal consumer is at least twenty-one years of age. The shipment of wine shall be shipped in a package that clearly states that it contains alcohol. No person shall fail to comply with division (D) (1) of this section.

(2) Upon delivering a shipment of wine to a personal consumer, an H permit holder, or an employee of the permit holder, shall verify that the personal consumer is at least twenty-one years of age by checking the personal consumer's driver's or commercial driver's license or identification card issued under sections 4507.50 to 4507.52 of the Revised Code.

(3) An S-2 permit holder shall keep a record of each shipment of wine that the permit holder sends to a personal consumer. The records shall be used for all of the following:

(a) To provide a copy of each wine shipment invoice to the tax commissioner in a manner prescribed by the commissioner. The invoice shall include the name of each personal consumer that purchased wine from the S-2 permit holder in accordance with this section and any other information required by the tax commissioner.

(b) To provide annually in electronic format by electronic means a report to the division. The report shall include the name and address of each personal consumer that purchased wine from the S-2 permit holder in accordance with this section, the quantity of wine purchased by each personal consumer, and any other information requested by the division. If the S-2 permit holder uses a fulfillment warehouse registered under section 4303.234 of the Revised Code to send a shipment of wine on behalf of the S-2 permit holder, the S-2 permit holder need not include the personal consumer information for that shipment in the report. The division shall prescribe and provide an electronic form for the report and shall determine the specific electronic means that the S-2 permit holder must use to submit the report.

(c) To notify a personal consumer of any health or welfare recalls of the wine that has been purchased by the personal consumer.

(E) An S-2 permit holder shall comply with this chapter. Chapter 4301. of the Revised Code, and any rules adopted by the liquor control commission under section 4301.03 of the Revised Code.

(F)

(1) An S-2 permit holder shall renew the permit in accordance with section 4303.271 of the Revised Code, except that the renewal shall not be subject to the notice and hearing requirements established in division (B) of that section.

(2) The division may refuse to renew an S-2 permit for any of the reasons specified in section 4303.292 of the Revised Code or if the permit holder fails to do any of the following:

(a) Collect and pay all applicable taxes specified in division (C) of this

section:

(b) Pay the permit fee:

(c) Comply with this section or any rules adopted by the liquor control commission under section 4301.03 of the Revised Code.

(G) The initial fee for the S-2 permit is two hundred fifty dollars. The renewal fee for the S-2 permit is one hundred dollars.

**Ohio Rev. Code § 4303.235:**

All B-2a, S-1, and S-2 permit holders and fulfillment warehouses, as defined in section 4303.234 of the Revised Code, are subject to the following:

(A) Audit by the division of liquor control or the department of taxation;

(B) Jurisdiction of the liquor control commission, the division of liquor control, the department of taxation, the department of public safety, and the courts of this state; and

(C) The statutes and rules of this state.

**Ohio Rev. Code § 4303.236:**

(A) No family household shall purchase more than twenty-four cases of twelve bottles of seven hundred fifty milliliters of wine in one year.

(B)

(1) Except as provided in sections 4303.185 and 4303.27 of the Revised Code, no person shall knowingly send or transport a shipment of wine to a personal consumer, as defined in section 4303.233 of the Revised Code, without an S-1 or S-2 permit or registering as a fulfillment warehouse under section 4303.234 of the Revised Code. This division does not apply to an H permit holder.

(2) Except as provided in sections 4303.185 and 4303.27 of the Revised Code, no person shall knowingly send or transport a shipment of beer to a personal consumer, as defined in section 4303.232 of the Revised Code, without an S-1 permit. This division does not apply to an H permit holder.

(C) A person that is not a beer or wine manufacturer, including the holder of any retail permit in this state or outside of this state, shall not obtain or attempt to obtain a B-2a, S-1, or S-2 permit.

**Ohio Rev. Code § 4303.25:**

No person personally or by the person's clerk, agent, or employee shall manufacture, manufacture for sale, offer, keep, or possess for sale, furnish or sell, or solicit the purchase or sale of any beer or intoxicating liquor in this state, or transport, import, or cause to be transported or imported any beer, intoxicating liquor, or alcohol in or into this state for delivery, use, or sale, unless the person has fully complied with this chapter and Chapter 4301. of the Revised Code or is the holder of a permit issued by the division of liquor control and in force at the time.

The superintendent of liquor control may adopt rules requiring a person acting as an agent, solicitor, trade marketing professional, or salesperson for a manufacturer, supplier, broker, trade marketing company, or wholesale distributor, who solicits permit holders authorized to deal in beer and intoxicating liquor, to be registered with the division and may cite the registrant to the liquor control commission for a violation of this chapter, Chapter 4301. of the Revised Code, or the rules adopted by the commission or superintendent.

A trade marketing professional may be registered for more than one trade marketing company.

No manufacturer, supplier, wholesale distributor, broker, or retailer of beer or intoxicating liquor, or other person shall employ, retain, or otherwise utilize any person in this state to act as an employee, agent, solicitor, or salesperson, or act in any other representative capacity to sell, solicit, take orders, or receive offers to purchase or expressions of interest to purchase beer or intoxicating liquor from any person, at any location other than a liquor permit premises, except as specifically authorized by Chapter 4301. or 4303. of the Revised Code or rules adopted thereunder. No function, event, or party shall take place at any location other than a liquor permit premises where any person acts in any manner to sell, solicit, take orders, or receive offers to purchase or expressions of intent to purchase beer or intoxicating liquor to or from any person, except as specifically authorized by Chapter 4301. or 4303. of the Revised Code or rules adopted thereunder.

As used in this section, "trade marketing company" and "trade marketing professional" have the same meanings as in section 4301.171 of the Revised Code.



**Ohio Rev. Code § 4303.27:**

Each permit issued under sections 4303.02 to 4303.232 of the Revised Code shall authorize the person named to carry on the business specified at the place or in the boat, vessel, or classes of dining car equipment described, and shall be issued for one year, or part of one year, commencing on the day after the uniform expiration dates designated by the division of liquor control, or for the unexpired portion of such year, and no longer, subject to suspension, revocation, or cancellation as authorized or required by this chapter or Chapter 4301. of the Revised Code. Upon application by a permit holder, the superintendent of liquor control may expand during specified seasons of the year the premises for which the permit holder's permit was issued to include a premises immediately adjacent to the premises for which the permit was issued, so long as the immediately adjacent premises is under the permit holder's ownership and control and is located in an area where sales under the permit are not prohibited because of a local option election. Whenever the superintendent considers it advisable to cancel the unexpired portion of an outstanding permit in order that the permit may be issued on one of the uniform expiration dates designated by the superintendent, the superintendent shall credit to the holder a proportionate amount representing the unexpired portion of the permit year pursuant to section 4301.41 of the Revised Code. Such permit does not authorize the person named to carry on the business specified at any place or in any vehicle, boat, vessel, or class of dining car equipment other than that named, nor does it authorize any person other than the one named in such permit to carry on that business at the place or in the vehicle, boat, vessel, or class of dining car equipment named, except pursuant to compliance with the rules and orders of the division governing the assignment and transfer of permits, and with the consent of the division. The holder of a G permit may substitute the name of another licensed pharmacist for that entered on the permit, subject to rules of the division.

This chapter and Chapter 4301. of the Revised Code do not prohibit the holder of an A, B, C, or D permit from making deliveries of beer or intoxicating liquor containing not more than twenty-one per cent of alcohol by volume, or prohibit the holder of an A or B permit from selling or distributing beer or intoxicating liquor to a person at a place outside this state, or prohibit the holder of any such a permit, or an H permit, from delivering any beer or intoxicating liquor so sold from a point in this state to a point outside this state.

**Ohio Rev. Code § 4303.29(A):**

(A) No permit, other than an H permit, shall be issued to a firm or partnership unless all the members of the firm or partnership are citizens of the United States. No permit, other than an H permit, shall be issued to an individual who is not a citizen of the United States. No permit, other than an E or H permit, shall be issued to any corporation organized under the laws of any country, territory, or state other than this state until it has furnished the division of liquor control with evidence that it has complied with the laws of this state relating to the transaction of business in this state.

The division may refuse to issue any permit to or refuse to renew any permit of any person convicted of any felony that is reasonably related to the person's fitness to operate a liquor permit business in this state. No holder of a permit shall sell, assign, transfer, or pledge the permit without the written consent of the division.

**Ohio Rev. Code § 4303.292(A):**

(A) The division of liquor control may refuse to issue, transfer the ownership of, or renew, and shall refuse to transfer the location of, any retail permit issued under this chapter if it finds either of the following:

(1) That the applicant, or any partner, member, officer, director, or manager of the applicant, or, if the applicant is a corporation or limited liability company, any shareholder owning five per cent or more of the applicant's capital stock in the corporation or any member owning five per cent or more of either the voting interests or membership interests in the limited liability company:

(a) Has been convicted at any time of a crime that relates to fitness to operate a liquor establishment;

(b) Has operated liquor permit businesses in a manner that demonstrates a disregard for the laws, regulations, or local ordinances of this state or any other state;

(c) Has misrepresented a material fact in applying to the division for a permit; or

(d) Is in the habit of using alcoholic beverages or dangerous drugs to excess, or is addicted to the use of narcotics.

(2) That the place for which the permit is sought:

(a) Does not conform to the building, safety, or health requirements of the governing body of the county or municipal corporation in which the place is located. As used in division (A)(2)(a) of this section, “building, safety, or health requirements” does not include local zoning ordinances. The validity of local zoning regulations shall not be affected by this section.

(b) Is so constructed or arranged that law enforcement officers and duly authorized agents of the division are prevented from reasonable access to rooms within which beer or intoxicating liquor is to be sold or consumed;

(c) Is so located with respect to the neighborhood that substantial interference with public decency, sobriety, peace, or good order would result from the issuance, renewal, transfer of location, or transfer of ownership of the permit and operation under it by the applicant; or

(d) Has been declared a nuisance pursuant to Chapter 3767. of the Revised Code since the time of the most recent issuance, renewal, or transfer of ownership or location of the liquor permit.

**Ohio Admin. Code 4301:1-1-03(C):**

...

(C) Minimum price: This paragraph reflects the policy and intent of the commission to maintain effective control over the sale and distribution of wine, an alcoholic beverage, and to prevent abuses caused by the disorderly and unregulated sale of wine. Mandatory price markups: prevent aggressive sales practices that improperly stimulate purchase and consumption, thereby endangering the state’s efforts to promote responsible, and discourage intemperate, consumption of alcoholic beverages; eliminate discriminatory sales practices that threaten the survival of wholesale distributors and retail permit holders; preserve orderly competition; ensure fair prices over the long term; assure adequate consumer choice; and promote compliance with Ohio law and rule.

(1) This rule shall apply to all sales of wine, not for consumption on the premises where sold and in sealed containers, by manufacturers, suppliers, importers, bottlers, wholesale distributors, and retail permit holders.

(2) Pricing:

(a) Manufacturers, suppliers, and importers shall sell to wholesale distributors at the “wholesale invoice cost.”

(b) Wholesale distributors shall sell to retail permit holders at no less than the “minimum retail invoice cost,” which shall be computed by adding a markup of not less than thirty-three and one-third per cent to the “wholesale invoice cost,” including freight and taxes.

(c) Retail permit holders and A-1-A permit holders shall sell to consumers at no less than the “minimum retail selling price,” which shall be computed by adding a markup of not less than fifty per cent to the “minimum retail invoice cost.”

(d) A-2, B-2, and B-5 permit holders, selling to retail permit holders or A-1-A permit holders, must sell at no less than the “minimum retail invoice cost.”

(e) A-2, B-2, and B-5 permit holders selling to consumers must sell at no less than the “minimum retail selling price.”

(f) B-5 permit holders must sell to B-2 and B-5 permit holders at no less than the “wholesale invoice cost.”

(3) No bottled wine of any kind or description, whether bearing a brand name or private label, shall be imported into or bottled in Ohio and sold or distributed in this state by retail permit holders unless registered for sale in Ohio and a price schedule is in effect. The price schedule shall be in writing and shall contain with respect to each item or brand listed (item or brand means each different type of wine, each different brand, and each different container size) the exact brand or trade name, size or capacity of the container or bottle, kind, and type of wine, the number of bottles or containers contained in each case, and the container and case price to all wholesale and retail permit holders.

(a) The price listed in the price schedule shall be individual for each item or brand and not in any combination with any other item or brand.

(b) A price schedule shall be created and maintained by each manufacturer, supplier, importer, bottler, and wholesale distributor of

bottled wine in this state. The price schedule shall be created quarterly on or before the tenth day of December, the tenth day of March, the tenth day of June, and the tenth day of September of each calendar year. The price schedule, as provided herein, shall be effective on the first day of the calendar month following the date of creation.

(c) In the event that a person required to create and maintain a price schedule, as provided herein, determines to make no change in any items or prices listed in the last schedule, and no change in the price of any listed item as required by this rule, then such prices listed in the schedule previously created and in effect shall remain in effect for each quarterly period thereafter until a revised schedule is created for a subsequent quarterly period.

(d) All price schedules shall be subject to inspection by the division and shall not be considered confidential.

(e) Every manufacturer, supplier, importer, bottler, and wholesale distributor that sells, imports, or distributes bottled wine in Ohio shall create and maintain a price schedule, which shall contain:

(i) The name of every brand of wine to be sold in this state;

(ii) The kind and type of wine, size of container, and the alcoholic content thereof;

(iii) The wholesale invoice cost, minimum retail invoice cost, or minimum retail selling price of the wine, as applicable to that person, and as allowed that person under Ohio law and rule;

(iv) Prices for all such wine for single bottles or containers and in case lot quantities. The minimum retail selling price for single bottles or containers shall be fifty per cent over the minimum retail invoice cost.

(4) Every manufacturer, supplier, importer, bottler, or wholesale distributor shall furnish to each A-1-A, B-2, or B-5 permit holder who purchases any brand of wine for resale to retail permit holders, a copy of its price schedule for the current period for which such price schedule is effective.

(5) No manufacturer, supplier, importer, bottler, or wholesale distributor shall sell or distribute in Ohio, for resale by retail permit holders, wine at a price less than the minimum retail invoice cost for the size of container, type, or kind of wine.

(6) No retail permit holder shall buy wine from a manufacturer, supplier, importer, bottler, or wholesale distributor at a price less than the listed minimum retail invoice cost set forth in the seller's price schedule for the size of container, type, or kind of wine.

(7) No retail permit holder shall sell wine at a price less than the listed minimum retail selling price set forth in that person's price schedule for such wine.

(8) The following sales and purchases at prices below the minimum price prescribed by this rule shall not be deemed a violation of this rule:

(a) Sales of wine made by the owner thereof for the purpose of going out of business or in liquidating the business.

(b) Close-out sales: discontinuance of the sale of an item or brand of wine that has been in the inventory of a B-2, B-5, C-2, D-2 or D-5 permit holder for a period of at least six months from date of the last invoice for the purchase of such item or brand of wine. The permit holder must keep a price schedule and complete documentation of each close-out sale available for inspection upon demand by the division for a minimum of twelve months following the close-out sale. The permit holder may not repurchase the same product, item, or brand of wine for a period of one year from the date of the close-out sale.

(9) Differential pricing practices: manner and frequency of price changes for wine.

(a) Manufacturers, suppliers, importers, bottlers, and wholesale distributors who sell wine to wholesale distributors must give thirty days written notice of any price change to all wholesale distributors to whom they sell their products before initiating the price change. Within five days of receiving said notice, not including Saturday or Sunday, the wholesale distributor must give notice of any resulting price change to its retail accounts.

(b) No manufacturer, supplier, importer, bottler, or wholesale distributor of wine may fix the price to be charged for any package by any other permit holder.

(c) No manufacturer, supplier, importer, bottler, or wholesale distributor of wine may differentiate the price of wine sold to wholesale distributors except when such price differentials are based on reasonable business grounds. A differential price may not be based on a wholesale distributor's refusal to participate in a price promotion. No manufacturer, supplier, importer, bottler, or wholesale distributor of wine may require a wholesale distributor, and no wholesale distributor of wine may require a retail permit holder, to participate in any price promotion.

(10) The commission may suspend or revoke the license or authorization to operate of any manufacturer, supplier, importer, bottler, wholesale distributor, or retail permit holder in Ohio who advertises, offers for sale, ships, sells, or buys bottled wine at a price less than that prescribed by this rule or stipulated in a price schedule, or who violates any provision of this rule.

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

(A) Examinations and inspections. — No class A, B, C, or D permit, except on a renewal, shall be issued by the division until the division has conducted a complete examination, including inspection of the premises, and the division finds that the applicant and the location meet all of the requirements imposed by law and rules.

(B) In determining whether to grant, refuse, or renew a permit, the division shall consider environmental factors affecting the maintenance of public decency, sobriety, and good order, including the number and location of permit premises in the immediate area. If the division finds that no substantial prejudice to public decency, sobriety, and good order will result, it may issue the permit. For purposes of this rule, however, the division shall presume, in the absence of affirmative evidence to the contrary, that the renewal of a permit or transfer of a permit to a successor in interest at the same location will not prejudice the maintenance of public decency, sobriety, and good order.

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

(A) No alcoholic beverages shall be imported into the state of Ohio for resale except upon the written consent of the division. Application for such consent shall be upon forms provided by the division. Consent must be granted by the division prior to said importation. The division shall not grant consent to any party if consent has already been granted to any other party, and is currently in effect. The division shall not grant consent to any supplier to import alcoholic beverages in any calendar year unless the supplier files an affidavit with the division stating that said supplier will comply with all laws of the state of Ohio and rules of the commission concerning alcoholic beverages. Violation of any of the laws or rules may be cause for suspension or revocation of the authorization to import by the commission.

(B) All alcoholic beverages imported into this state for purposes of re-sale to retail permit holders must be consigned and delivered to the warehouse of a wholesale distributor.

**Ohio Admin. Code 4301:1-1-24(C):**

This rule is promulgated pursuant to the provisions of section 4301.13 of the Revised Code to regulate and stabilize the sale and distribution of beer, wine, and mixed beverages in Ohio.

....

(C) No retail permit holder shall have any financial interest, directly or indirectly by stock ownership or through interlocking directors in a corporation, or otherwise, in the establishment, maintenance, or promotion of, a B-1, B-2, B-3, B-4, or B-5 permit holder.

**Ohio Admin. Code 4301:1-1-43(A)(1)-(2), (5), (H)(2):**

(A)

(1) No retail permit holder shall acquire by purchase, either directly or indirectly, or by any means whatsoever, any signs, fixtures, furniture, or other equipment used in connection with the conduct of the retail business from any manufacturer or wholesale distributor of alcoholic beverages at a cost less than the full cost to the manufacturer or wholesale distributor. No manufacturer or wholesale distributor of alcoholic beverages shall sell or furnish, either directly or indirectly, or by any means whatsoever, any signs, fixtures, furniture, or other equipment used in connection with the operation



of a retail permit holder's business at a cost less than the full cost to the manufacturer or wholesale distributor, except as otherwise provided in sections 4301.22 and 4301.24 of the Revised Code, rule 4301:1-1-44 of the Administrative Code, and this rule.

(2) No retail or wholesale permit holder shall accept any premiums, gifts, discounts based on quantity of sales or any other reason, cash discount sales, rebates, or kickbacks, either in money, merchandise, or thing of value, from any manufacturer or wholesale distributor of alcoholic beverages. No manufacturer or wholesale distributor of alcoholic beverages shall offer or give to any retail or wholesale permit holder any premiums, gifts, discounts based on quantity of sales or any other reason, cash discount sales, rebates, or kickbacks, either in money, merchandise, or thing of value.

....

(5) No wholesale distributor or manufacturer of alcoholic beverages shall solicit, for their own benefit, donations of money, merchandise, or thing of value from, or give credit to, any retail permit holder. No wholesale distributor or manufacturer of alcoholic beverages shall sell, for their own benefit, tickets to parties, picnics, entertainment, or similar events to any retail permit holder.

....

(B) No manufacturer or wholesale distributor of alcoholic beverages shall furnish advertising specialties or utilitarian specialties to any retail permit holder at less than their full cost, including glassware or other containers intended for the serving of alcohol beverages, except [in limited circumstances set forth herein].

....

(H)

....

(2) No wholesale distributor shall sell or offer to sell to any retail permit holder, and no retail permit holder shall purchase or receive from any wholesale distributor, any alcoholic beverage except for cash upon receipt of such alcoholic beverage.

**Ohio Admin. Code 4301:1-1-46(C), (F)(1):**

....

(C) No deliveries of beer, or wine and mixed beverages to retail permit holders shall be made by anyone who is not a bona fide employee of the B-1, B-2, B-4, B-5, A-1, A-1c, A-2, or A-4 permit holder making the sale, except such deliveries may be made as provided by section 4301.60 of the Revised Code.

....

(F) Prohibition against sales at wholesale to persons who are not retail permit holders.

(1) No wholesale distributor shall knowingly sell alcoholic beverages at wholesale to a person who is not a retail permit holder.