No. _____

In the Supreme Court of the United States

DAVE YOST, ATTORNEY GENERAL OF OHIO,

Petitioner,

v.

KENNETH M. MILLER; HOUSE OF GLUNZ, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 26a0132p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 25-3305

DEREK BLOCK,

Plaintiff,

KENNETH M. MILLER; HOUSE OF GLUNZ, INC.,

Plaintiffs-Appellants,

v.

JAMES V. CANEPA, Superintendent of Liquor Control, Ohio Division of Liquor Control,

Defendant,

DAVE YOST, Attorney General of Ohio,

Defendant-Appellee,

WHOLESALE BEER & WINE ASSOCIATION OF OHIO,

Intervenor Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Ohio at Columbus.
No. 2:20-cv-03686—
Sarah Daggett Morrison, Chief Judge.

Argued: February 24, 2026

Decided and Filed: May 6, 2026

Before: MOORE, CLAY, and MATHIS, Circuit Judges.

COUNSEL

ARGUED: James A. Tanford, EPSTEIN SEIF PORTER & BEUTEL, LLP, Indianapolis, Indiana, for Appellants. Michael J. Hendershot, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee Dave Yost. **ON BRIEF:** James A. Tanford, EPSTEIN SEIF PORTER & BEUTEL, LLP, Indianapolis, Indiana, for Appellants. Michael J. Hendershot, Mathura J. Sridharan, Kaitlyn M. Kachmarik, Samantha V. Rupp, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. Martha Brewer Motley, Emily J. Taft, Maxwell H. King, VORYS, SATER, SEYMOUR AND PEASE LLP, Columbus, Ohio, for Intervenor Appellee. Sean O'Leary, O'LEARY LAW AND POLICY GROUP, LLC, Chicago, Illinois, John C. Neiman, Jr., MAYNARD NEXSEN PC, Birmingham, Alabama, Frederick R. Yarger, William P. Sowers, Jr., WHEELER TRIGG O'DONNELL LLP, Denver, Colorado, for Amici Curiae.

OPINION

CLAY, Circuit Judge. Plaintiffs Kenneth M. Miller and House of Glunz, Inc. challenge the constitutionality of Ohio liquor laws preventing out-of-state wine retailers from shipping wine directly to Ohio consumers, Ohio Rev. Code §§ 4301.01(A)(2), 4301.58(C), 4303.12, 4303.25, 4303.236(B)(1), 4303.27 (the “Direct Ship Restriction”), and prohibiting individuals from transporting more than six bottles of wine into Ohio during any 30-day period, *id.* § 4301.20(L) (the “Transportation Restriction”). On appeal, Plaintiffs challenge the district court’s holding that the Restrictions are constitutional. For the reasons set forth below, we **REVERSE** the district court and **REMAND** for further proceedings consistent with this opinion.

BACKGROUND

Plaintiff Kenneth Miller is an Ohio resident who wants to be able to order wine directly from out-of-state retailers and to personally transport wine he buys outside of Ohio back into the state. Plaintiff House of Glunz is an Illinois retailer that wants to be able to ship wine directly to Ohio consumers. Ohio law, however, prohibits out-of-state retailers from shipping wine directly to Ohio consumers (the “Direct Ship Restriction”) and prohibits Ohio residents from personally transporting more than six bottles of wine into the state during any thirty-day period (the “Transportation Restriction”). Miller and House of Glunz thus filed suit alleging that the Direct Ship and Transportation Restrictions impermissibly discriminate against out-of-state businesses in violation of the Commerce Clause.

The procedural and factual background relevant to this appeal is set forth below.

1. Ohio’s Liquor Laws

Ohio, like many states, has a three-tier system for regulating the sale and distribution of alcohol. In a three-tier system, the state separates the entities involved in the distribution of alcohol into three distinct tiers: alcohol manufacturers (tier one); wholesale distributors (tier two); and retailers (tier three). *THREE TIERS AND A TIED HOUSE*, OHIO DEP'T OF COM., https://com.ohio.gov/divisions-and-programs/liquor-control/new-permit-info/guides-and-resources/three-tiers-and-a-tied-house [https://perma.cc/RV6N-ACK7] (last visited March 30, 2026). Generally, "the [first] tier makes the [alcohol]" and "sells it to a distributor, who then sells it to a retail location for sale to Ohio consumers." *Id.* The Ohio Division of Liquor Control issues "A" class permits to entities it allows to operate as manufacturers, "B" permits to wholesalers, and "C" permits to retailers. *See* Ohio Rev. Code § 4303.01 *et seq*. Generally, entities may not operate across more than one tier—i.e., a manufacturer may not receive a B permit to also act as a wholesaler—and alcohol products must pass through each tier prior to reaching the consumer. *See id.* § 4301.24.

Ohio has also, however, carved out several exceptions that allow wine to reach end consumers without going through the three-tier system. Pursuant to Ohio Revised Code §§ 4303.232, 4303.233, and 4303.236, both in- and out-of-state wineries may acquire an S-1 or S-2 permit, which allows them to directly ship up to twenty-four cases, or 288 bottles, of wine a year to each Ohio household without routing those sales through Ohio retailers or wholesalers. Pursuant to Ohio Revised Code § 4303.071, in- and out-of-state wineries may also acquire a B-2a permit to sell wine directly to Ohio retailers without going through an Ohio wholesaler—Ohio does not appear to limit the amount of wine a winery may sell to Ohio retailers. *See id.* §§ 4303.071(A)(3), 4301.24(E)(4) (a B-

2a permit holder may operate as a wholesaler). Because wineries can elect to rely on out-of-state "fulfillment warehouse[s]," wine may flow from out-of-state wineries to Ohio consumers without ever coming to rest in Ohio wholesalers' warehouses or on Ohio retailers' shelves. *Id.* § 4303.234(A)(1). Additionally, before 2021, Ohio allowed some out-of-state retailers who were also "brand owner[s]" or "importer[s] of . . . wine" to ship wine directly to Ohio consumers. *Id.* § 4303.232(A)(1), (3) (2011) (repealed 2021) Although Ohio has repealed that portion of the provision and no longer issues new retail permits to brand owners or importers, out-of-state entities who received permits under the pre-2021 statute are allowed to continue direct-to-consumer shipping.

In this case, Plaintiffs challenge two Ohio restrictions relating to the importation of out-of-state wine into Ohio. The first is the Direct Ship Restriction, which is comprised of several different laws that work together to ban out-of-state retailers from shipping wine to Ohio consumers. Ohio issues a C-2 permit to in-state retailers. Ohio Rev. Code § 4303.12. C-2 permittees may sell and ship wine directly to Ohio consumers, *id.* § 4303.27, using "any means or devices" including common carrier delivery of products consumers purchase on the internet, *id.* § 4301.01(A)(2). And David Yost, Ohio's Attorney General (and the state official responsible for enforcing Ohio's liquor laws) has averred that "retailers located solely outside Ohio cannot obtain a C-2 permit from" Liquor Control, Answer, R. 37, PageID #362, and that without this permit they are prohibited from shipping wine to Ohio consumers, Ohio Rev. Code §§ 4301.58(C), 4301.60, 4303.25, 4303.236(B)(1). Accordingly, in-state retailers may ship wine directly to Ohio consumers, but out-of-state retailers like House of Glunz may not.

Plaintiffs also challenge the Transportation Restriction contained in Ohio Revised Code § 4301.20(L). Section 4301.20(L) prohibits Ohio consumers from transporting more than 4.5 liters, or six bottles, of wine acquired outside of Ohio into the state during any thirty-day period. *Id.* § 4301.20(L). By contrast, Ohio consumers may transport up to twenty-four cases, or 288 bottles, of wine within Ohio so long as they purchased it from an Ohio seller. *Id.* § 4303.236(A).

A. First District Court Proceeding and Appeal

In 2020, Plaintiffs filed suit under 42 U.S.C. § 1983 against Ohio Attorney General David Yost and other officials who enforce Ohio's liquor code.[1] The Wholesale Beer & Wine Association of Ohio ("WBWAO") intervened as a Defendant. Plaintiffs' suit asserts that the Direct Ship and Transportation Restrictions "discriminate[] against interstate commerce, protect[] local economic interests, and violate[] the Commerce Clause." Compl., R. 1, PageID #2. Plaintiffs seek "a declaratory judgment that the

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[1] Plaintiffs originally sued, in addition to Yost, Superintendent of Liquor Control Jim Canepa, Director of the Ohio Department of Public Safety Thomas Stickrath, and Chairperson of the Ohio Liquor Control Commission Deborah Pryce. The district court found that all of these individuals were immune from suit under the Eleventh Amendment and dismissed the claims against them. Plaintiffs challenged the dismissal of only the Director of the Ohio Department of Public Safety Stickrath on appeal, and we affirmed. *Block v. Canepa*, 74 F.4th 400, 411–12 (6th Cir. 2023). Accordingly, the only remaining Ohio defendant is Attorney General Yost.

[laws are] unconstitutional and an injunction barring the defendants from enforcing" both laws. *Id.*

In 2022, the district court granted summary judgment to Defendants after holding that the Direct Ship Restriction constituted a valid exercise of Ohio's Twenty-first Amendment power to regulate the sale of alcohol within its borders. The district court also found that Plaintiffs lacked standing to challenge the Transportation Restriction. Plaintiffs appealed, and we reversed the district court's determination that the Direct Ship Restriction was constitutional, holding that the district court had erred in treating this Court's decision in *Lebamoff Enterprises Inc. v. Whitmer*, 956 F.3d 863 (6th Cir. 2020), as creating a per se rule that state restrictions on direct-to-consumer wine shipments by out-of-state retailers were constitutional. *Block v. Canepa*, 74 F.4th 400, 412-14 (6th Cir. 2023). We also reversed the district court's determination that Plaintiffs lacked standing to challenge the Transportation Restriction. *Id.* at 410-11.

We clarified that, to determine if a discriminatory alcohol law is constitutional, courts must apply a test developed by the Supreme Court in *Tennessee Wine & Spirits Retailers Association v. Thomas*, 588 U.S. 504 (2019). Under that test, a discriminatory law will survive a Commerce Clause challenge if (1) it "can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground," and if (2) its "predominant effect" is "the protection of public health or safety," rather than "protectionism." *See id.* at 539-40. We thus remanded, instructing the district court to weigh the evidence submitted by both parties and then determine how the Restrictions fared under the *Tennessee Wine* test. *Block*, 74 F.4th at 414.

B. Remand and Second Appeal

On remand, the parties engaged in additional discovery and then again filed cross motions for summary judgment on the questions of whether the Direct Ship and Transportation Restrictions were constitutional. Before applying the *Tennessee Wine* test, the district court determined that, because the Restrictions were "trusses supporting . . . the three-tier system," they could not "be excised for review outside that context." *Block v. Canepa*, 771 F. Supp. 3d 1010, 1020 (S.D. Ohio 2025). The district court thus focused its *Tennessee Wine* analysis on the three-tier system as a whole, not on the specifically challenged provisions. *See id.* at 1021-24.

The district court determined that Defendants had presented evidence showing that the three-tier system could be justified as a public health and safety measure because it allows Ohio "to keep close watch over the movement and sale of wine throughout the state" and to "control alcohol prices, including by efficient collection of an excise tax at the wholesaler lever [*sic*]." *Id.* at 1021-22. It also determined that the evidence submitted by Plaintiffs was insufficient to impeach or significantly undermine the health and safety justifications offered by Defendants, and thus concluded that the predominant effect of both Restrictions was not protectionism, but the protection of the public health and safety. *Id.* at 1023-24. Accordingly, the court held both Restrictions constitutional and again granted summary judgment to Defendants. *Id.* at 1024. Plaintiffs appealed.

DISCUSSION

Standing

Before reaching the merits of Plaintiffs' challenge, we address standing. *See Kitchen v. Whitmer*, 106 F.4th 525, 533 (6th Cir. 2024) (We "must resolve a threshold jurisdictional issue like standing before reaching the 'merits' of a case."). Defendants advance several different arguments as to why Plaintiffs lack standing to challenge both the Direct Ship and Transportation Restrictions. Although Defendants raise some of these arguments for the first time in this appeal, "standing is jurisdictional," so "we may address it at any point in the proceedings." *Kroll v. White Lake Ambulance Auth.*, 691 F.3d 809, 813 (6th Cir. 2012). We review questions of standing *de novo. In re Cannon*, 277 F.3d 838, 852 (6th Cir. 2002).

To establish standing, a plaintiff must show that it (1) suffered an "injury" that is (2) "fairly traceable to the challenged action" and that is (3) "redressable by a favorable ruling." *Murthy v. Missouri*, 603 U.S. 43, 57 (2024) (citation omitted). All of Defendants' standing arguments relate to the last element and contend that Plaintiffs' injuries cannot be redressed by a judicial ruling. We disagree and hold that Plaintiffs have standing to challenge both Restrictions.

1. Direct Ship Restriction

Defendants first argue that Plaintiffs lack standing to challenge the Direct Ship Restriction. Before addressing the specifics of their arguments, a few words about the methods for redressing a Commerce Clause violation are in order. A federal court may cure a discriminatory injury that violates the dormant Commerce Clause "by either 'leveling up' or 'leveling down'" the restriction. *See Comptroller of Treasury of Md v. Wynne*, 575 U.S. 542, 569 (2015). Leveling up entails extending the withheld benefit to out-of-state interests—in this case that would mean allowing out-of-state retailers to ship wine to Ohio consumers. *See Sessions v. Morales-Santana*, 582 U.S. 47, 72 (2017). Leveling down entails withholding the benefit from both in- and out-of-state interests—in this case that would mean leaving the Direct Ship Restriction intact, but also forbidding in-state retailers from direct-shipping to consumers. *See id.* Either of these alternatives would redress the discriminatory injury inflicted on Plaintiffs by ensuring that there is no disparate treatment between in- and out-of-state retailers. *See Wynne*, 575 U.S. at 569. Although Plaintiffs seek an injunction that would allow out-of-state retailers to ship wine to Ohio consumers (leveling up), "federal courts possess broad discretion to fashion equitable remedies," and it would also be appropriate for the district court to cure their injury by enjoining direct-to-consumer shipping by Ohio retailers (leveling down). *Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 460 (6th Cir. 2004). This "partial redress" sufficiently "satisf[ies] the standing requirement." *Parsons v. U.S. Dep't of Just.*, 801 F.3d 701, 716 (6th Cir. 2015).

We now turn to Defendants' standing arguments, beginning with Yost's. As described above in section I.A, Plaintiffs challenge several statutes that, together, form the Direct Ship Restriction. However, they do not explicitly challenge Ohio Revised Code § 4303.35, which requires "holders of [Ohio] retail permits" to purchase the wine they sell to Ohio consumers only from "holders of A or B permits."

According to Yost, even if the district court enjoined the enforcement of the Direct Ship Restriction, § 4303.35 would still require out-of-state retailers to obtain all of the wine they ship to Ohio consumers exclusively from sellers located in Ohio because Ohio issues A and B permits to only Ohio entities.[2] Yost contends that this would make it practically impossible for out-of-state retailers to direct-ship wine to Ohio consumers because it would be economically infeasible for them to buy wine from Ohio only to ship it back to Ohio. Under Yost's theory, this would leave the direct shipping ban de facto in effect, rendering Plaintiffs' injury unredressed.

Yost's argument is unconvincing for several reasons. First, by its own terms, § 4303.35 does not cover out-of-state retailers with no physical presence in Ohio. Section 4303.35 applies to "holder[s] of retail permits," which for wine retailers is a C-2 permit. *See* Ohio Rev. Code § 4303.12. "[R]etailers located solely outside of Ohio cannot obtain a C-2 permit;" thus, if an out-of-state retailer wants to sell wine in Ohio, it must "establish[] a physical facility in Ohio." Answer, R.37, PageID #361-62. Accordingly, § 4303.35 does not regulate retailers like House of Glunz who cannot obtain a C-2 permit because they maintain no physical presence in Ohio. Yost is thus incorrect that, in the absence of the Direct Ship Restriction, § 4303.35 would necessarily apply to out-of-state retailers so as to effectively keep the direct shipping ban in place. Indeed, under the version of Ohio Revised Code §

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[2] Note that this contention is not correct because Ohio issues B-2a permits to out-of-state wineries. *See* Ohio Rev. Code § 4303.071(A)(1).

4303.232 that was repealed in 2021 that did allow some out-of-state retailers to directly ship wine to Ohio consumers, Ohio granted them an S permit to do so, not a C-2 retail permit. *See* Ohio Rev. Code § 4303.232(A)(1), (3) (2011) (repealed 2021).

Moreover, even if Yost is correct that § 4303.35 would apply to out-of-state retailers if the Direct Ship Restriction were enjoined, Plaintiffs' injury would still be redressable. First, the district court could take the leveling down approach and enjoin direct-to-consumer wine shipments by in-state retailers, which would cure the discriminatory injury. Second, the court might also be able to level up and extend shipping benefits to out-of-state retailers by enjoining § 4303.35's in-state purchase requirement. "The power of the federal courts to remedy constitutional violations is flexible . . . [and] [w]here such a violation has been found, the court should tailor the remedy to fit the nature and extent of the violation." *Doe v. DeWine*, 910 F.3d 842, 850-51 (6th Cir. 2018) (alterations in original) (quoting *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1235 (2d Cir. 1987)). So even though Plaintiffs did not specifically challenge § 4303.35, it may be within a federal court's equitable powers to enjoin its purchase requirements to the extent it frustrates efforts to cure the constitutional violation. Because there is at least some remedy the district court could issue no matter how one interprets § 4303.35 and its relationship to the Direct Ship Restriction, Yost's standing arguments fail.

Defendant WBWAO argues that Plaintiffs' injuries are not redressable because we lack authority to grant the type of relief that Plaintiffs seek. It claims that because there is no one specific discriminatory statute that we could strike down to cure Plaintiffs' injury, the only way to provide relief would be for us to effectively "order, design, and implement a makeshift exception for out-of-state wine retailers onto the Ohio Revised Code." Appellee WBWAO's Brief at 52. This, according to WBWAO, would constitute "impermissible legislative drafting" that is "beyond the power of an Article III court." *Id.* (quoting *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020).

WBWAO is incorrect. The district court here could certainly level down by removing in-state retailers' ability to ship wine directly to consumers. This sort of straightforward revocation of a benefit is well within an Article III court's powers. *See Lebamoff*, 956 F.3d at 876 (acknowledging that any discriminatory injury inflicted by Michigan's wine-shipping restrictions could have been redressed by leveling down the statute). The court may also be able to level up and enjoin the Direct Ship Restriction without overstepping its constitutional bounds so long as it does so in a way that is "faithful to legislative intent." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 331 (2006); *see also Day v. Henry*, 152 F.4th 961, 968 (9th Cir. 2025) (holding that the district court could "[enjoin] the enforcement of the statutory scheme as applied to all liquor retailers and wholesalers inside *and* outside of [the state]."). However, the fact that the district court could level down the statute is enough on its own to satisfy the redressability element. *See Cooper v. USPS*, 577 F.3d 479, 496 (2d Cir. 2009) ("Appellate tribunals have accorded district courts broad discretion to frame equitable remedies for constitutional violations so long as the relief granted is commensurate with the scope of the constitutional infraction." (citation modified)).

Lastly, WBWAO says that Plaintiffs' injuries are not redressable because none of the provisions that Plaintiffs challenge facially discriminate between in- and out-of-state retailers. Their argument appears to be that the lack of facial discrimination makes it impossible for us to redress a facial challenge to the statute. They claim that "because the statutes do not discriminate between in-state and out-of-state retailers in the first place, . . . declaring the challenged statutes unconstitutional and enjoining their enforcement would not redress any discrimination between in-state and out-of-state retailers." Appellee WBWAO's Br. at 50.

WBWAO is correct that the language of the provisions that comprise the Direct Ship Restriction does not explicitly differentiate between in- and out-of-state retailers. But Ohio clearly understands these statutes to authorize direct-to-consumer shipping from only retailers with a physical presence. *See* Answer, R.37, PageID #361-62 (admitting that out-of-state retailers may not ship wine directly to Ohio consumers under the relevant statutes). Indeed, Ohio's liquor permitting laws impose an in-state presence requirement. *See* Ohio Rev. Code §§ 4301.10(A)(6) (Liquor Control must "[c]onduct inspections of liquor permit premises"); 4303.27 (authorizing permit holders "to carry on the business specified at the place . . . described" in the permit); 4303.29(B)(2)(a) (capping the number of retail store permits Ohio issues in each of the state's taxing districts based on that district's population); 4303.292(A)(2)(a)-(d) (Liquor Control may refuse to grant a permit for issues relating to the physical location of a business). Given that Ohio presumes that its laws do not have extraterritorial effect, these location-based regulations contemplate a C-2 permit holder's in-state presence. *See State ex rel. Haavind v. Crabbe*, 151 N.E. 755, 757 (Ohio 1926) ("[T]he laws of a state, generally speaking, have no force beyond the state's territorial limits."). Indeed, in the instances where Ohio's liquor code allows out-of-state entities to sell wine in Ohio without going through Ohio wholesalers, it says so explicitly. *See, e.g.*, Ohio Rev. Code §§ 4303.232(A)(1), (C)(1) (stating that "[i]f the person resides outside this state" and is a wine manufacturer, he may acquire a permit to ship wine directly to Ohio consumers); 4303.233(B)(1), (D)(1) (same); 4303.234(A)(1) (allowing a "person that operates a warehouse that is located outside this state" to fulfill a permitted winery's orders by shipping "wine to personal consumers). Against this backdrop, it is clear that the statutes challenged by Plaintiffs allow direct shipping by only in-state entities. WBWAO's contention that the lack of facial discrimination robs Plaintiffs of standing thus fails.

Accordingly, we hold that Plaintiffs have standing to challenge the Direct Ship Restriction.

2. Transportation Restriction

Defendant Yost also argues that Plaintiffs' challenge to the Transportation Restriction is not redressable because the statute containing the Restriction, Ohio Rev. Code § 4301.20(L), is an exception to Ohio's blanket ban on transporting any wine into the state. This total prohibition is contained in a separate and unchallenged provision, § 4303.25. According to Yost, if we enjoin § 4301.20(L), which allows a consumer to bring six bottles of wine into Ohio, § 4303.25's total ban would remain intact and forbid consumers from bringing *any* out-of-state wine into the state. Under Yost's version of events, Plaintiffs' injury would thus be left unredressed.

Yost's argument is misplaced. He is correct that the redressability element is not satisfied where, "notwithstanding any action [a court] might take" in response to a plaintiff's suit, an unchallenged, overlapping law regulating the same conduct "would remain in place" and inflict the same alleged injury on the plaintiff. *White v. United States*, 601 F.3d 545, 552 (6th Cir. 2010). But this principle does not apply to the instant case because enjoining § 4301.20(L)'s six bottle limit would cure Plaintiffs' injury, even with § 4303.25 remaining in place.

Section 4303.25 reads, in relevant part:

> No person . . . shall . . . transport, import, or cause to be transported or imported any . . . 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 . . .

Ohio Rev. Code § 4303.25 (emphasis added). The italicized language instructs that, the general transportation ban notwithstanding, the importation of alcohol is permissible in certain circumstances. Section 4301.20(L) then clarifies that one of the circumstances in which importing wine is permissible is where a 21-or-above Ohio resident brings wine into Ohio for "personal use and not for resale," and if he brings "not more than . . . four and one-half liters of wine . . . in any thirty-day period." If we struck down the 4.5-liter limit, § 4301.20(L) would instead clarify that wine importation is permissible under § 4303.25

so long as the importing consumer is of-age and the wine is "for personal use and not for resale." This would leave consumers free to bring up to 288 bottles of out-of-state wine into Ohio per year, remedying the discrepancies between the amount of out-of-state versus in-state wine a consumer may purchase and transport, thus curing Plaintiff Miller's injury. *See* Ohio Rev. Code § 4303.236(A).

Yost's argument works only if we accept his contention that Plaintiffs' suit necessarily seeks to strike down § 4301.20(L) in its entirety, and not simply the parts of that provision that discriminate against out-of-state retailers. But that framing mischaracterizes Plaintiffs' argument. Throughout this suit, Plaintiffs have clearly limited their challenge specifically to "the provisions in Ohio Rev. Code § 4301.20 *that prohibit[] Ohio residents from personally transporting more than 4.5 liters of wine*," not the non-discriminatory components of the statute. Compl., R.1, PageID #7 (emphasis added). And in any event, federal courts may exercise their equitable power to fashion remedies narrowly if they see fit. *See Coal. for Gov't Procurement*, 365 F.3d at 460 ("[F]ederal courts possess broad discretion to fashion equitable remedies."). In this case, an appropriate and narrow remedy to cure Plaintiffs' injury would be to enjoin only the six bottle limit.

Accordingly, the injury to Plaintiffs inflicted by the Transportation Restriction is redressable, and Plaintiffs thus have standing to challenge the Restriction.

Constitutionality

Because Plaintiffs have standing to challenge both the Direct Ship and Transportation Restrictions, we turn to the question of constitutionality. We review the district court's grant of summary judgment to the Defendants *de novo*. *Levine v. DeJoy*, 64 F.4th 789, 796 (6th Cir. 2023). A party is entitled to summary judgment if, based on the record as a whole, there are no genuine disputes of material fact that could lead a factfinder to find for the moving party's opponent. Fed. R. Civ. P. 56(a); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "The mere existence of a scintilla of evidence in support of the [non-moving party's] position" is "insufficient" to defeat the moving party's motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

To determine whether the Direct Ship and Transportation Restrictions are constitutional, we need to understand the relationship between the Constitution's Twenty-first Amendment and the Commerce Clause. Section 2 of the Twenty-first Amendment states that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. It "delegates to each State the choice whether to permit sales of alcohol within its borders and, if so, on what terms and in what way." *Lebamoff*, 956 F.3d at 868. According to the dormant Commerce Clause, however, a state law that discriminates "against out-of-state goods or nonresident economic actors" is unconstitutional unless "it is narrowly tailored to advance a legitimate local purpose." *Tenn. Wine*, 588 U.S. at 518 (cleaned up). In short, the Twenty-first Amendment "grants States latitude with respect to the regulation of alcohol" but does not "allow[] the States to violate the nondiscrimination principle" of the dormant Commerce Clause. *Id.* at 533 (cleaned up).

In *Tennessee Wine*, the Supreme Court developed a constitutionality test that balances the latitude of the Twenty-first Amendment with the limits of the dormant Commerce Clause. "A discriminatory state liquor law will survive a dormant Commerce Clause challenge if (1) it 'can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground,' and (2) its 'predominant effect' is 'the protection of public health or safety,' rather than 'protectionism.'" *Block*, 74 F.4th at 413 (quoting *Tenn. Wine*, 588 U.S. at 539-40). The district court applied the *Tennessee Wine* test and concluded the Direct Ship and Transportation Restrictions were valid exercises of Ohio's Twenty-first Amendment authority to regulate alcohol sales within its borders. *Block*, 771 F. Supp. 3d at 1020-24.

We disagree with this conclusion. Based on the record as a whole, and analyzing the constitutionality of the Restrictions under the correct legal framework, we conclude that neither Restriction can be justified as a legitimate health and safety measure. Because the connection between both Restrictions and Ohio's purported health and safety objectives is tenuous or nonexistent, the predominant effect of both Restrictions is protectionism. We thus hold the Direct Ship and Transportation Restrictions unconstitutional under the dormant Commerce Clause.

1. Legal Framework

We first address the appropriate legal framework for analyzing the Restrictions. The district court determined that the Direct Ship and the

Transportation Restrictions were "essential components of Ohio's three-tier system" of alcohol regulation and could not be "excised for review outside that context." *Block*, 771 F. Supp. 3d at 1021, 1024. It thus applied the *Tennessee Wine* test not to each individual Restriction, but to Ohio's three-tier system as a whole. It then concluded that the Restrictions were constitutional by virtue of the fact that they were supposedly essential to Ohio's "unquestionably legitimate" three-tier system. *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (citation omitted); *see Block*, 771 F. Supp. 3d at 1020-1024.

The district court erred in applying this "essential feature" framework. We have clearly held that "a state's alcoholic-beverages law is not automatically valid simply because it addresses a portion of a three-tier system." *Byrd v. Tennessee Wine & Spirits Retailers Association*, 883 F.3d 608, 620 (6th Cir. 2018). This is because The Twenty-first Amendment does not "sanction[] every discriminatory feature that a State may incorporate into its three-tiered scheme." *Tenn. Wine*, 588 U.S. at 535. The Twenty-first Amendment protects features "essential" to "the basic three-tiered model of separating producers, wholesalers, and retailers," but beyond that, "each variation must be judged based on its own features." *Id.*

At the outset, we have little difficulty concluding that the Restrictions are neither basic nor essential components of three-tier systems. Many states with three-tier systems allow both in- and out-of-state wine retailers to ship wine directly to their residents, *see B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 235 (4th Cir. 2022) (Wilkinson, J., dissenting) (identifying eleven states that eschew direct-ship restrictions), so direct-ship restrictions are hardly instrumental to the existence of three-tier schemes, *Tenn. Wine*, 588 U.S. at 535 (concluding that residency requirements are "not . . . essential feature[s] of . . . three-tiered scheme[s]" because "[m]any . . . schemes do not impose . . . any residency requirements"). A state can easily maintain three distinct tiers *and* treat in-state and out-of-state retailers evenhandedly with respect to direct-shipping—the three-tier system remains intact whether the state permits or proscribes direct shipping for both in-state and out-of-state retailers. Transportation limits are likewise not essential to three-tier systems because they do nothing to help "separat[e] producers, wholesalers, and retailers." *Tenn. Wine*, 588 U.S. at 535.

Thus, contrary to the district court's determination, there is no rule telling courts to use an "essential feature" approach to analyze the Restrictions at issue here. *Lebamoff* merely suggests that it may be appropriate to apply the essential feature framework in some circumstances, depending on the specifics of the challenged law, how vital the law is to the state's three-tier system, and the evidence presented by the parties. *See Lebamoff*, 956 F.3d at 877 (McKeague, J. concurring, joined by Donald, J.) ("Michigan has presented enough evidence, which the plaintiffs have not sufficiently refuted, to show its in-state retailer requirement serves the public health."); *see also Anvar v. Dwyer*, 82 F.4th 1, 10-11 (1st Cir. 2023) ("[T]here is nothing inherent in the three-tier system . . . that necessarily demands an in-state-presence requirement for retailers."). This is precisely why we previously explained that "*Lebamoff* did *not* hold that direct ship restrictions are always constitutional" and directed the district court to "consider Plaintiffs' evidence *in this case* concerning *Ohio's* Direct Ship Restriction." *Block*, 74 F.4th at 413-14.

In this case, it is clear that neither Restriction is an essential feature of Ohio's three-tier system because Ohio does not actually have a three-tier system with respect to wine.[3] As discussed above in section I.A., Ohio broadly uses a three-tier system to regulate alcohol sold in the state, but has also carved out extensive wine-specific exceptions to the three-tier system. Out-of-state wineries may already directly ship up to 288 bottles to wine to each Ohio household every year and sell an unlimited amount of wine to Ohio retailers without going through a wholesaler. *See* Ohio Rev. Code §§ 4303.071(A)(3), 4303.232(C)(1), 4303.233(D)(1). Fulfillment warehouses located outside Ohio can ship wine, on behalf of a licensed winery, straight to Ohio households. *Id.* § 4303.234(A)(1). And some out-of-state retailers grandfathered into Ohio's retail permit scheme under the pre-2021 version of § 4303.232 continue to make direct wine shipments in the state. These exceptions create numerous pathways for out-of-state wine to enter Ohio's market without going through the three tiers—including via direct-consumer shipping. We thus conclude that Ohio does not actually maintain a three-tier system through which "all [wine] passes

[3] We do not suggest that it is always appropriate to use the essential feature approach if a regulation is an essential component of a state's three-tier system. We focus our analysis on the role the Restrictions at issue in this case play in the three-tier system simply because they are non-essential, meaning the essential feature framework is inapplicable.

before reaching consumers." *Lebamoff*, 956 F.3d at 868. The Direct Ship and Transportation Restrictions cannot be essential features of a system that does not exist for wine.

The Transportation Restriction, § 4301.20(L), is also not essential for the additional reason alluded to above: there is no clear relationship between § 4301.20(L) and the regulatory aims of the three-tier system. Ohio's three-tier system regulates how alcohol is "brought . . . to market" and sold in the state. *Lebamoff*, 956 F.3d at 867. Section 4301.20(L), however, does not regulate an activity with a direct relationship to the marketing or distribution-for-sale of alcohol, but rather the transport of alcohol into Ohio "for personal use and *not* for resale." Ohio Rev. Code § 4301.20(L) (emphasis added). Defendants vaguely aver that allowing consumers to bring an unlimited amount of out-of-state wine into Ohio would undermine the state's ability to control the price of wine in Ohio's market. But they provide no concrete evidence demonstrating that wine imported by consumers for personal use actually has this, or any other, effect on wine for sale in Ohio.

Because neither Restriction is essential to Ohio's three-tier system, the district court should have applied this Circuit's normal framework for analyzing the constitutionality of state alcohol laws and considered how each individual Restriction "stacks up against the *Tennessee Wine* test." *Block*, 74 F.4th at 414. Accordingly, we proceed to analyze each Restriction under *Tennessee Wine* on its own terms, not in the context of the three-tier system.

2. Direct Ship Restriction

We begin with the Direct Ship Restriction. The parties agree that this Restriction discriminates between in- and out-of-state interests because it allows direct-to-consumer wine shipping by the former but not the latter. *See supra* section I.A. Applying the *Tennessee Wine* test to the Restriction, we ask whether it can be justified on legitimate "health and safety grounds" or whether its "predominant effect" is protectionism. 588 U.S. at 539-40. As we evaluate the evidence in the record, we are guided by the Supreme Court's caution that "'mere speculation' or 'unsupported assertions' are insufficient to sustain a law that would otherwise violate the Commerce Clause." *Id.* at 539 (quoting *Granholm*, 544 U.S. at 490, 492).

Defendants offer three primary health and safety justifications for the Direct Ship Restriction. They claim that the Restriction ensures that Ohio is able to: (1) physically access wine retailers to perform on-site safety inspections; (2) impose price controls and taxes on wine sold in the state, which in turn promotes temperance; and (3) monitor and curb underage drinking. However, the record as a whole demonstrates that the connection between the Direct Ship Restriction and these purported objectives is tenuous and unsubstantiated, leading us to conclude that the Restriction's predominant effect is protectionism, in violation of the Commerce Clause.

To explain how we reach this conclusion, we walk through each of Defendants' purported health and safety justifications for the Restriction.

i. Physical Presence Requirement

Defendants contend that the ban on direct-to-consumer shipping from out-of-state retailers is designed to require retailers to maintain a physical presence in Ohio, thus ensuring that Ohio liquor enforcement agents can physically inspect wine sellers for product safety violations. Yost submitted evidence showing that enforcement agents routinely inspect the premises of state-issued alcohol permit holders. Between September 1, 2021, and January 31, 2024, for example, Ohio conducted several thousand inspections and issued 935 notices and 46 citations to alcohol permit holders.

Yost offers one wine-specific instance where the physical presence requirement helped the state enforce its product safety objectives. In 2021, a consumer reported falling ill after drinking "Saint Sadler" wine, and the Division of Liquor Control traced the tainted wine from its Ohio retailer back to an individual in Cleveland who used unsanitary production methods. The Division then confiscated hundreds of bottles of contaminated wine from the manufacturer and retailers across Ohio. According to Yost, "Ohio could not have removed similarly unsafe wine from out-of-state retail shelves as it lacks the power and authority to inspect out-of-state retailers and to seize unsafe product from their inventory, even if the contaminated wine was intended for sale or shipment to Ohioans." Appellee Yost Br. at 34-35.

The connection this evidence demonstrates between the physical presence requirement and Ohio's purported safety aims is weak. First, Defendants are able to offer only one example, the Saint Sadler incident, where the physical presence requirement helped Ohio root out unsafe *wine*—all of their other examples relate to alcohol in general. The Saint Sadler example is also of limited value: there, an unlicensed in-state producer sold wine he brewed using a home winemaking kit, in direct contravention of Ohio law. This isolated example of an amateur vintner illegally smuggling homemade wine into the stream of commerce sheds little light on health and safety risks stemming from wine sold by professional retailers. Indeed, Defendants are unable to point to a single piece of concrete evidence demonstrating tangible risks stemming from the interstate shipping of wine from professional, licensed retailers—and the fact that Ohio already allows interstate direct-to-consumer shipping from licensed sellers (wineries) suggests that it is safe, "weaken[ing] the public health justifications" for the Direct Shipping Restriction. *Lebamoff*, 956 F.3d at 877 (McKeague, J. concurring, joined by Donald, J.).

Additionally, Defendants' own evidence demonstrates that an in-state presence requirement is not necessary to pursue its product safety aims. *See Tenn. Wine*, 588 U.S. at 540 (concluding that the state's purported health and safety rationales are undermined by the existence of nondiscriminatory alternatives). As discussed above, Ohio already allows wineries to ship large amounts of out-of-state wine into its state. *See* Ohio Rev. Code §§ 4303.071(A)(3), 4303.232(C)(1), 4303.233(D)(1). WBWAO contends that we should discount this glaring exception to the Direct Ship Restriction's presence requirement because "wineries are required to obtain a federal permit and comply with various federal . . . laws," providing "an added layer of accountability not present with retailers." Appellee's WBWAO Br. at 30.

Yet Ohio has no qualms about allowing its residents to drink wine shipped straight from out-of-state "fulfillment houses" and "brand owners," even though these entities receive no federal oversight and sit beyond the reach of Ohio inspectors. Ohio Rev. Code §§ 4303.232(A)(1), (3) (2011) (repealed 2021), 4303.234(A)(1). WBWAO, therefore, fails to explain why it is safe for Ohio residents to drink wine purchased from out-of-state wineries, fulfillment houses, and brand owners, but not retailers.

Furthermore, Ohio law imposes numerous requirements on wineries that allow the state to track the wine entering the state and ensure its safety. Ohio requires these out-of-state wineries to (1) "keep a record of each shipment of . . . wine that [it] sends to a personal consumer," (2) "provide a copy of each . . . wine shipment invoice to the tax commissioner" that "include[s] the name of each personal consumer that purchased . . . wine from the" winery, (3) provide an annual report to the Division of Liquor Control that "include[s] the name and address of each personal consumer that purchased . . . wine" from the winery and the amount they purchased, and (4) "notify a personal consumer of any health or welfare recalls of the . . . wine" they purchased. *Id.* §§ 4303.232(C)(3)(a)-(c), 4303.233(D)(3)(a)-(c) (same). The law also requires that all out-of-state wineries shipping wine into Ohio comply with the permitting and licensing requirements for wine manufacturers in their home states. *Id.* §§ 4303.232(A)(1); 4303.233(B)(1). In short, Ohio has shown that it is possible to track out-of-state wine sold in Ohio and regulate its safety without requiring an in-state presence. *See Granholm*, 544 U.S. at 492 (noting that "improvements in technology have eased the burden of monitoring out-of-state" entities); *see also Tenn. Wine*, 588 U.S. at 541 ("In this age of split-second communications by means of computer networks . . . there is no shortage of less burdensome, yet still suitable, options" to maintain oversight over alcohol retailers (quotation omitted)). We are thus unconvinced by Defendants' claim that the physical presence requirement is necessary for Ohio to pursue its product safety goals.

WBWAO also argues that Ohio's physical presence requirement enables the state to impose a population-based quota system that restricts the number of alcohol retailers in each Ohio municipality, which promotes temperance. It claims that "[a]llowing out-of-state retailers to ship unlimited quantities of alcohol directly to Ohio consumers" would dramatically increase the supply of alcohol in the Ohio market, thwarting the quota system. MSJ, R.116, PageID #6005. We are not persuaded by this argument for two reasons. First, Ohio currently allows in-state wine retailers and in- and out-of-state wineries to deliver across the state, which already unravels its location-based quota system with respect to wine. Second, Ohio does not need to allow "unlimited quantities" of wine into its market in order to avoid discriminating against out-of-state commerce. Just as Ohio Rev. Code § 4303.236 limits the numbers of bottles of wine that wineries may ship to each Ohio household per year, it could institute provisions that prescribe quotas or limits on the amount of wine that retailers may ship to consumers—so long as it applies equally to both in- and out-of-state interests. *See Granholm*, 544 U.S. at 472 ("[I]n all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" (quoting *Or. Waste Sys. Inc. v. Dep't of Env't Quality of Or.*, 511 U.S. 93, 99 (1994))). It could also ban direct-to-consumer shipping altogether, which would also cure the discriminatory injury inflicted by the Restriction.

In short, Defendants' evidence does not demonstrate that the physical presence requirement substantially promotes public health and safety. And to the extent that they draw any connection between the presence requirement and public health, it is clear that there are other non-discriminatory means of achieving those same goals. We thus conclude that the physical presence requirement is not "reasonably necessary to protect [Ohio's] asserted interest in policing" the amount of wine in the state or the safety of that wine. *Tenn. Wine*, 588 U.S. at 533.

ii. Price Control and Taxation Objectives

Defendants also claim that the Direct Ship Restriction furthers Ohio's health and safety objective of imposing price controls and taxes on wine, which promotes temperance by making wine more expensive to buy. At each level of its three-tier system, Ohio imposes price controls and excise taxes on alcohol, including wine, to increase retail prices and "prevent aggressive sales practices that improperly stimulate purchase and consumption, thereby endangering the state's efforts to . . . discourage intemperate, consumption of alcoholic beverages." Ohio Admin. Code 4301:1-1-03(C) (outlining Ohio's minimum price thresholds for wine).

Some states, including Illinois, where Plaintiff House of Glunz is located, impose no price controls on wine and allow for more discount purchase and sale of wine than does Ohio. By way of demonstrating the downstream effects of these price control disparities, Defendants point to several instances where House of Glunz has sold wine more cheaply than some comparable Ohio retailers. Defendants insist that direct shipping by retailers from states with weaker price controls would flood the local market with cheap wine, undermining Ohio's temperance objectives. They claim that direct shipping by retailers risks applying downward pressure on wine prices whereas direct shipping by wineries (currently allowed by Ohio) does not because there are between 400,000 and 640,000 wine retailers in America, but only 5,000 wineries.

We again find these rationales less than compelling. First, it does not follow purely from the number of out-of-state retailers that Ohio's market will actually be flooded with out-of-state wine absent the Direct Ship Restriction. Indeed, Plaintiffs' evidence shows that, in states that allow direct shipping by out-of-state wine sellers (retailers and wineries), the total number of out-of-state permit holders ranges from under 50 to, at most, 2,000. But Ohio can control the number of permits it issues to out-of-state retailers. And, as described above, Ohio could impose non-discriminatory limits on the amount of wine retailers may ship to avoid flooding the market with cheap wine.

As to Ohio's purported temperance objectives, Plaintiffs' evidence demonstrates that states that allow shipping by out-of-state retailers do not necessarily have higher rates of wine consumption than states that prohibit it—in some states where direct shipping is permitted, wine consumption is higher than in Ohio; in others it is lower. *See* NIH Consumption Data, R. 52-20, PageID# 3863-66. And the record does not show an obvious causation or correlation between state laws that allow direct-to-consumer wine shipping and increased wine consumption. Perhaps some states allow direct shipping because their residents already have a robust culture of wine drinking. And even Defendants' experts offer no data showing that direct shipping from out-of-state retailers actually reduces the retail price of wine; they merely speculate, without supporting evidence, that direct shipping from states with weaker price controls could "*potentially* result[] in lower prices for products shipped from out of state." Kerr Report, R.53-4, PageID #4317 (emphasis added). These are the sort of speculative and unsupported assertions that *Tennessee Wine* counsels us to reject.

Moreover, Defendants' narrative about the price control mechanisms Ohio imposes on in-state wine and its ability to impose similar price controls on out-of-state wine is contradicted by Defendants' own evidence. Defendants insist that the collection of taxes via the three-tier system is essential for keeping the price of wine high and for collecting revenue that the state uses to offset the negative social costs of drinking, but even Defendants' own expert admits that "[t]he Ohio wine tax rate is low." *Id.* at PageID #4318. Indeed, he is only able to point to three states that have lower tax rates. This leads us to question Ohio's contention that its excise taxes play a vital role in its wine price controls and revenue generation. And insofar as Ohio does view taxation of wine as an essential health and safety mechanism, it may impose taxes on out-of-state retailers. The Ohio laws that currently allow out-of-state wineries to ship wine to

Ohio consumers and retailers "all include provisions to ensure the payment of Ohio taxes." Kerr Report, R.116-1, PageID #6074; *see also* Ohio Rev. Code §§ 4303.071(A)(3), 4303.232(C)(3)(a), 4303.233(D)(3)(a).

We thus conclude that Defendants have presented insufficient evidence showing that the Direct Ship Restriction is necessary for Ohio to achieve its purported objectives of promoting temperance by controlling the price of wine and collecting taxes from its sale.

iii. Underage Drinking

Lastly, Defendants argue that the Direct Ship Restriction curbs underage drinking because minors are able to more easily acquire wine from online sources than in-person retail establishments. This is the least convincing of all of Defendants' health and safety objectives. Ohio already allows online ordering and direct shipping of all alcohol products from in-state retailers, as well as the out-of-state entities we have been discussing throughout this opinion. If Ohio "thinks there is such a risk of underage sales in the state, why expand that risk by allowing online sales" in the first place? *Lebamoff*, 956 F.3d at 878 (McKeague, J., concurring, joined by Donald, J.). And again, the Ohio laws that currently allow direct-to-consumer shipping "include provisions for . . . avoiding underage sales." Kerr Report, R.116-1, PageID #6074-75. For one thing, entities that sell and ship wine to consumers must "make a bona fide effort to ensure that the personal consumer is at least twenty-one years of age." Ohio Rev. Code § 4303.233(D)(1). And upon delivery, they must "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." *Id.* § 4303.233(D)(2). If there is a reason that Ohio can implement these controls for laws allowing direct shipping from wineries and in-state retailers, but not for out-of-state retailers, it has not explained what that reason is.

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Because the public health and safety rationales offered by Ohio are questionable and unsupported by convincing evidence, we cannot conclude that the "predominant effect" of the Direct Ship Restriction is the "protection of public health or safety," rather than "protectionism." *Tenn. Wine*, 588 U.S. at 539-40. The majority of Defendants' health and safety justifications are speculative, and the weight of their limited nonspeculative evidence is significantly undermined by the fact that Ohio already allows direct-to-consumer and direct-to-retailer wine shipping by out-of-state wineries. That Ohio allows these wine sellers to access their market demonstrates that the state is still able to pursue its health and safety aims without banning direct shipping.

It is thus clear that the predominant effect of this law is not to ensure the public health and safety, but rather to "deprive citizens of their right to have access to the markets of other States on equal terms," and instead direct them to purchase wine from Ohio retailers. *Granholm*, 544 U.S. at 473. Under *Tennessee Wine*, this sort of protectionism clearly violates the Commerce Clause. We thus hold the Direct Ship Restriction unconstitutional.

3. Transportation Restriction

We now turn to the Transportation Restriction contained in Ohio Revised Code § 4301.20(L). As with the Direct Ship Restriction, the parties agree that the Transportation Restriction discriminates between in- and out-of-state interests because it prohibits consumers from transporting more than six bottles of wine acquired outside of Ohio into the state during any thirty-day period. Ohio Rev. Code § 4301.20(L). Conversely, consumers may transport up to 288 bottles of wine they purchased from an Ohio entity. Ohio Rev. Code § 4303.236. We thus proceed to apply the *Tennessee Wine* test to the Restriction.

Defendants have advanced virtually no arguments or evidence demonstrating that the Transportation Restriction itself protects the public health and safety—their entire argument depends on us deciding that the Restriction is constitutional because it is "essential" to Ohio's constitutional three-tier system. But because the Transportation Restriction is clearly not essential to Ohio's three-tier system, which does not exist for wine, we consider the extent to which the Restriction, on its own terms, advances Ohio's purported health and safety objectives of (1) ensuring that wine retailers are physically present in Ohio and available for inspection by Ohio liquor enforcement agents and (2) controlling the amount of wine in the state and the price of wine to promote temperance.

The connection between these stated health and safety objectives and the Transportation Restriction is extremely tenuous. Ohio claims that it wants to ensure that it can inspect all wine being consumed, but with the Transportation Restriction in place, Ohioans can still personally bring up to 72 bottles of uninspected-by-Ohio out-of-state wine into the state every year. Ohio Rev. Code § 4301.20(L). If there is some public safety rationale indicating why it is safe to allow individuals to bring only six bottles of wine into the state every thirty days—but not seven, or eight, or nine, or more—the State has not shown what that is. And more importantly, Ohio allows out-of-state wineries to directly ship up to 288 bottles of wine to each household every year and to ship an unlimited quantity to Ohio retailers. *Id.* §§ 4303.071(A)(3); 4303.236(A). The effect of these statutes is that Ohioans can legally order 288 bottles of wine from a California winery but cannot personally bring home seven bottles from the same winery after road-tripping out west. It would be nonsensical to say that the Transportation Restriction itself actually helps Ohio ensure that it can inspect all of the wine sold in the state when Ohio has other laws that allow far greater quantities of uninspected-by-Ohio out-of-state wine into its market.

The Transportation Restriction also bears little relationship to Ohio's purported price control objectives inasmuch as it regulates the importation of wine into Ohio for personal use, not for resale. Defendants have presented no concrete evidence showing that, without a personal transport limit, Ohio would be flooded with so much out-of-state wine that the price of wine for sale in the state would fall so precipitously as to undermine the state's price control and attendant temperance objectives. We thus cannot conclude that the Restriction is "reasonably necessary to protect" any of the health and safety objectives asserted by Ohio. *Tenn. Wine*, 588 U.S. at 533.

Because the record is virtually "devoid of any concrete evidence showing that the [Restriction] actually promotes public health or safety," we conclude that the predominant effect of the law is not the protection of public health. *Id.* at 540 (internal quotation omitted). Rather, the law appears to have the primary effect of deterring Ohioans from buying wine from other states, thus "tilt[ing] the market in favor of in-state retailers." *Brooks v. Vassar*, 462 F.3d 341, 362 (4th Cir. 2006) (Goodwin, J. concurring and dissenting). We thus hold the Transportation Restriction unconstitutional.

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Although we remand this case to the district court with instructions to engage in further consideration of the appropriate remedies for the constitutional injuries inflicted by both the Transportation Restriction and Direct Ship Restriction, we also offer some guidance with respect to the appropriate remedy for the Transportation Restriction. The district court must fashion a remedy that is as "faithful to legislative intent" of the Ohio legislature as possible. *Ayotte*, 546 U.S. at 331. Plaintiffs ask that we enjoin the small portion of § 4301.20(L) that caps the number of bottles of wine they may bring into the state at six. The effect of enjoining the six bottle limit would be to allow Ohioans to transport up to 288 bottles of wine into and in the state regardless of whether it comes from an in- or out-of-state source. *See* Ohio Rev. Code § 4303.236(A). This approach appears to hew more closely to legislative intent than does the alternative approach of "leveling down" the Restriction and limiting the number of any type of wine that consumers may personally transport within the state to six bottles. Ohio Revised Code § 1.50 states that "[i]f any provision of a section of the Revised Code . . . is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable." Without prescribing this approach for the district court, we suggest that this section of the Ohio Code counsels in favor of an injunction against only the small offending provision of § 4301.20(L), without toying with the separate provision of § 4303.236. The remedy for the Direct Ship Restriction, however, is more complicated because it is comprised of several different statutes that work together to form the Restriction, and we do not have enough information before us to provide the district court with detailed guidance as to the remedy. However, we do note that the district court must choose the remedy that adheres most closely to the intent of the Ohio legislature without violating the Constitution, and it should consider the impact of the severability provision in § 1.50 on the appropriate remedy.

CONCLUSION

For the reasons set forth above, we **REVERSE** the district court's grant of summary judgment to Defendants and **REMAND** this case to the district court with instructions to (1) enter summary judgment for Plaintiffs, (2) declare both Restrictions unconstitutional, and (3) determine the appropriate remedies for the constitutional injuries inflicted by the Restrictions.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DEREK BLOCK, *et al.*,

Plaintiffs,

v.

JAMES V. CANEPA, *et al.*,

Defendants.

Case No. 2:20-cv-3686
Chief Judge Sarah D. Morrison
Magistrate Judge Chelsey M. Vascura

OPINION AND ORDER

Plaintiffs' constitutional challenge to Ohio's wine importation laws is before the Court following remand from the Sixth Circuit Court of Appeals. Plaintiff Kenneth M. Miller is an Ohio resident and wine collector. His co-plaintiff, The House of Glunz, Inc., is an Illinois wine retailer with no permit or license from the Ohio Division of Liquor Control.[1] Defendant Dave Yost serves as Ohio's Attorney General. The Wholesale Beer & Wine Association of Ohio ("WBWAO") has intervened as a defendant. The parties' cross-Motions for Summary Judgment (ECF Nos. 114, 116, and 119) and the WBWAO's motion to strike certain testimony and exhibits offered in

[1] Plaintiff Derek Block voluntarily dismissed his claims. (ECF No. 30.)

support of Plaintiffs' Motion for Summary Judgment (ECF No. 120) are ripe for decision.

I. FACTUAL BACKGROUND

A. Ohio law establishes a three-tier system for the sale of wine.

Alcohol "is the only consumer product identified in the Constitution. Only its regulation by States is given explicit warrant." *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 813 (5th Cir. 2010). The history of alcohol regulation in America has been told many times. *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 139 S. Ct. 2449, 2462–70 (2019); *Granholm v. Heald*, 544 U.S. 460, 476–89 (2005). Rather than recite the full history here, it is enough to say that Prohibition began with the Eighteenth Amendment and ended with the Twenty-first. *See* U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI. While § 1 of the Twenty-first Amendment repealed the Eighteenth, § 2 prohibits:

> The transportation or importation into any State. . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof[.]

U.S. Const. amend. XXI, § 2. Thus, § 2 "grants the States the power to regulate commerce with respect to alcohol." *Lebamoff Enters. Inc. v. Whitmer*, 956 F.3d 863, 869 (6th Cir. 2020), *reh'g denied*, Case No. 18-2199, Docket No. 56 (May 26, 2020), *cert. denied*, 141 S. Ct. 1049 (2021).

Ohio has taken full advantage of that power. Chapters 4301 and 4303 of the Ohio Revised Code, along with their implementing regulations, establish a comprehensive scheme governing the transportation, importation, distribution, and sale of alcoholic beverages, including wine. Those laws establish a three-tier system for distributing wine in Ohio. Entities operating in each tier (first, suppliers; second, wholesalers; and third, retailers) must obtain a permit from the Ohio Division of Liquor Control. *See, e.g.*, Ohio Rev. Code §§ 4303.03, 4303.07, 4303.10, 4303.12. Generally, permitted suppliers must sell to permitted wholesalers (who may purchase only from permitted suppliers), *see* Ohio Rev. Code §§ 4303.07, 4303.10, 4301.58(C), and permitted wholesalers must sell to permitted retailers (who may purchase only from permitted wholesalers), *see* Ohio Rev. Code. §§ 4303.03(B)(1), 4303.35; Ohio Admin. Code 4301:1-1-46(B), (F). With limited exception, wine must pass through each tier before reaching a consumer.[2] Wholesalers and retailers are required to maintain a physical presence within the state of Ohio, and all wine sold by those entities is required to "come to rest" at that physical location. (*See* ECF No. 114-1, ¶ 62.a.); *see also* Ohio Rev. Code §§ 4301.10(A)(1), 4301.10(A)(6), 4303.292(A); Ohio Admin Code 4301:1-1-22(B).

To qualify for a permit, participants in the three-tier system must comply with a host of regulations and requirements. *See* Ohio Rev. Code § 4303.25. For example, permit applicants must submit to an initial inspection of their premises by the Ohio Division of Liquor Control's Investigative Services Unit. (ECF

[2] The most notable exception is of recent vintage. Beginning in 2007, small wineries could apply for a permit to sell and deliver wine directly to Ohio consumers. (ECF No. 114-1, PAGEID # 5479–80.) In 2021, similar permits were made available to large wineries. (*Id.*) All such wineries are licensed by the federal Alcohol and Tobacco Tax and Trade Bureau. (*Id.*)

No. 116-3, ¶ 7. *See also* ECF No. 53-2, ¶ 14.) A permit holder must then submit to annual renewal inspections of their premises and books and records, as well as inspections based on any complaints the Division might receive. (ECF No. 116-3, ¶ 7. *See also* ECF No. 53-2, ¶¶ 18, 20.) During an inspection, Compliance Agents monitor for adherence to: ownership rules, *see, e.g.*, Ohio Rev. Code § 4301.24(B), Ohio Admin. Code 4301:1-1-24(B); environmental cleanliness and product safety standards, *see, e.g.*, Ohio Admin. Code 4301:1-1-17; minimum pricing requirements, *see, e.g.*, Ohio Admin. Code 4301:1-1-03; and form-of-payment restrictions, *see, e.g.*, Ohio Rev. Code § 4301.24(D). (ECF No. 53-2, ¶¶ 17–18.) If a violation is found, the permit holder may be subject to enforcement action(s), including Correction Notices and fines, up to suspension or revocation of the permit. (ECF No. 53-1, ¶ 24.)

B. Plaintiffs want to buy and sell wine at retail outside of Ohio's three-tier system.

Plaintiffs challenge two components of Ohio's three-tier system. First, Ohio law prohibits wine retailers who do not have a Division-issued permit from shipping wine directly to Ohio consumers (the "Direct Ship Restriction"). *See* Ohio Rev. Code §§ 4301.58(C), 4301.60, 4303.25, 4303.27. Because Ohio requires permitted retailers to maintain a physical presence in the state, the Direct Ship Restriction has the effect of severely limiting out-of-state retailers' ability to sell their wares to Ohio consumers—even those retailers that are licensed to sell wine by their home state. (*See* ECF No. 52-4, ¶¶ 9–13, 19, 27, 57.) And second, Ohio law prohibits individuals from transporting more than 4.5 liters (six bottles) of wine from out-of-state in any 30-day period (the "Transportation Limit"), further restricting out-of-state retailers' access to the Ohio market. *See* Ohio Rev. Code §§ 4301.20(L), 4301.60.

Mr. Miller is "an active wine consumer who looks for good wines at good prices wherever [he] can find them." (ECF No. 52-2, ¶ 2.) He would like to purchase wine from out-of-state retailers and have it shipped directly to his home in Ohio. (ECF No. 52-2, ¶ 5.) He would also like to purchase wine while out-of-state and personally transport it back home. (ECF No. 34-5, ¶ 3.) Chicago-based House of Glunz "is a family business . . . engage[d] in retail wine sales, including online sales, and has customers from all over the country[.]" (ECF No. 52-3, ¶ 1–2.) House of Glunz is licensed to sell wine by the City of Chicago and the State of Illinois. (ECF No. 50, 61:7–19.) The company would like to sell wine to Ohio consumers and ship it directly to their homes. (ECF No. 52-3, ¶¶ 5–7.) Plaintiffs contend that the Direct Ship Restriction and the Transportation Limit, which prevent them from engaging in their desired conduct, run afoul of the United States Constitution.

II. PROCEDURAL BACKGROUND

Plaintiffs' Complaint challenged the Direct Ship Restriction and the Transportation Limit by bringing claims against four state officials—Jim Canepa, Superintendent of Liquor Control for the Ohio Division of Liquor Control; Dave Yost, Ohio Attorney General; Thomas J. Stickrath, Director of the Ohio Department of Public Safety; and Deborah Pryce, Chair of the Ohio Liquor Control Commission. (ECF No. 1.)

This Court dismissed Plaintiffs' claims against Superintendent Canepa, Director Stickrath, and Chair Pryce after concluding that they were entitled to Eleventh Amendment immunity, and that the *Ex Parte Young* exception to such immunity did not apply. (ECF No. 33.) The Court also found that Plaintiffs lacked standing to challenge the Transportation Limit in a pre-enforcement action because they did not allege a credible threat of prosecution. (ECF No. 36.)

After completing discovery, the parties filed cross-motions for summary judgment on the remaining claim. The Court resolved those motions in a September 12, 2022 Opinion & Order granting summary judgment in favor of Defendants. (ECF No. 91.)

Plaintiffs appealed to the Sixth Circuit Court of Appeals, which issued an Opinion on July 17, 2023. (ECF No. 104.) The Sixth Circuit held that (i) Mr. Miller adequately alleged a credible threat of prosecution under the Transportation Limit and (ii) this Court should have conducted additional analysis of the evidentiary record before granting summary judgment. (*Id.*) It remanded the case for further proceedings, with the express mandate that this Court

> consider the facts and evidence presented in this case and determine whether the challenged statutes (1) "can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground," and whether (2) their "predominant effect" is "the protection of public health or safety," rather than "protectionism."

(*Id.* (quoting *Tenn. Wine & Spirits*, 139 S. Ct. at 2474.)

The parties have since had the opportunity to exchange supplemental discovery and brief renewed motions for summary judgment. (*See* ECF No. 111.)

III. MOTION TO STRIKE

The Court will first address the WBWAO's motion to strike Tom Wark's expert report and deposition testimony. (ECF No. 120.) Attorney General Yost joins the Motion. (ECF No. 122, PAGEID # 6669.) Plaintiffs responded in opposition (ECF No. 124) and the WBWAO replied (ECF No. 125).

The admissibility of expert testimony is governed by Federal Rule of Evidence 702:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. The Rule incorporates the Supreme Court's instruction in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), requiring the trial court to serve as a "gatekeeper," tasked with "ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597. Courts are afforded "considerable leeway" both in determining *whether* to admit expert opinion testimony and *how* to test its reliability and relevance to the case at bar. *Kumho Tire*, 526 U.S. at 152. The proponent of the expert testimony bears the burden of proving its admissibility. *See* Fed. R. Evid. 104(a); *Sigler v. Am. Honda Motor Co.*, 532 F.3d 469, 478 (6th Cir. 2008). Nonetheless, the Federal Rules of Evidence provide a "permissive backdrop," favoring the admission of expert opinion testimony. *Daubert*, 509 U.S. at 588–89.

Plaintiffs use a 2021 report by Tom Wark, Executive Director of the National Association of Wine Retailers, to support their Motion for Summary Judgment. (*See* ECF No. 119 (citing ECF No. 52-4).) The WBWAO challenges Mr. Wark's qualifications as an expert and the reliability and relevance of his opinions. (ECF No. 120.) As such, they seek to strike Mr. Wark's report and deposition transcript from the record. (*Id.*) The WBWAO's Motion is **GRANTED in part** and **DENIED in part**.

A. Mr. Wark is qualified to testify as an expert on the retail wine business.

The WBWAO first argues that Mr. Wark is not qualified to testify as an expert in this matter. (*Id.*) As of the date of his report, Mr. Wark had worked as a public relations consultant in the alcohol industry for more than thirty years. (ECF No. 52-4, PAGEID # 1276, 1287.) For thirteen of those, he was Executive Director of the National Association of Wine Retailers and publisher of a daily blog on the business of wine.

(*Id.*) Although Mr. Wark's curriculum vitae boasts expertise in "Media Relations," "Wine Industry Marketing," "Marketing Communications," "Alcohol Industry Regulation," "Writing," "Association Management," "Wine Evaluation," and "Wine Industry Politics" (ECF No. 52-4, PAGEID # 1287), Plaintiffs offer him as "an expert in the retail wine business" (ECF No. 124, PAGEID # 6706). His experience managing an association representing wine retailers qualifies him as such. *See* Fed. R. Evid. 702 advisory committee's notes to 2000 amendments ("[T]he text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience.").

B. Eleven of the fourteen proffered pieces of testimony are admissible.

The WBWAO next seeks a ruling that the contents of Mr. Wark's 2021 report are inadmissible. (ECF No. 120.) In his report, Mr. Wark offers "a basic description of the market conditions in which wine consumers and wine retailers interact" as of July 2021. (ECF No. 52-4, PAGEID # 1277.) He also draws ten "conclusions" on the basis of the recited background facts. (*Id.*, PAGEID # 1285.)

Plaintiffs oppose Defendants' motion in part because it is overbroad; only fourteen paragraphs of Mr. Wark's report are cited in their Motion for Summary Judgment. (ECF No. 124.) The Court construes Plaintiffs' argument as a disclaimer of all other paragraphs in Mr. Wark's report and will thus confine its analysis to the fourteen cited.

Paragraphs 10 and 11 discuss the availability of wines for sale in the United States at the national and local levels. Mr. Wark states that "the total number of wines approved and available for resale somewhere in the U.S. could reach up to 1 million." (ECF No. 52-4, ¶ 10.) He further describes the effect of state laws like the Direct Ship Restriction on the number of wines available to those states' consumers. (*Id.*, ¶ 11.) These general market dynamics are appropriate subjects for a wine retailing expert's testimony, and they are relevant because they illustrate the economic impact of state laws like the Direct Ship Restriction. The WBWAO's motion is **DENIED** as to paragraphs 10 and 11 of Mr. Wark's report.

Paragraphs 21, 23, and 24 describe the characteristics and experience of a wine consumer. Mr. Wark describes several legitimate—and perhaps common—circumstances in which consumers may want to buy and ship wines across state lines. (*Id.*, ¶ 21.) He again stresses the limited number of wines available in common retailer-categories, like grocery stores. (*Id.*, ¶¶ 23, 24.) This testimony is also reliably given and a relevant illustration of how state laws can impact interstate commerce in wine. The WBWAO's motion is thus **DENIED** as to paragraphs 21, 23, and 24.

Paragraphs 29 and 30 describe the experience of a wine retailer. Mr. Wark discusses considerations for brick-and-mortar wine retailers seeking to maximize profit, and the effect of those considerations on the local availability of "rare and collectible wines" in any given market. (*Id.*, ¶ 29.) He opines that the Direct Ship Restriction "bar[s] access to the vast majority of rare, hard to find and collectible wines sold by the[] relatively small number of specialty wine retailers." (*Id.*, ¶ 30.) The Court finds paragraphs 29 and 30 to be reliable testimony on a topic relevant to the issue at hand. The WBWAO's motion is **DENIED** as to paragraphs 29 and 30.

Paragraph 38 provides:

> According to the Wine Institute, 44 states currently allow shipments from out-of-state wineries to consumers. The Wine Institute is the leading authority on the wine production industry in the U.S.

The first sentence is inadmissible hearsay. *See* Fed. R. Evid. 801, 802. Because the first sentence is the report's only reference to the Wine Institute, the second sentence is irrelevant. The WBWAO's motion is **GRANTED** as to paragraph 38.

Paragraphs 41, 42, and 43 summarize the process by which consumers "most commonly" receive wine by direct shipment from an out-of-state retailer in the states that permit such activity. (ECF No. 52-4, ¶ 41; *see also id.*, ¶42 (detailing the steps as they "[m]ost often" occur).) This testimony is also reliable and relevant. The WBWAO's motion is **DENIED** as to paragraphs 41, 42, and 43.

Paragraph 44 summarizes the findings of a 2003 report by the Federal Trade Commission and a 2012 study by the Maryland Comptroller. Those reports, which are included in the record, speak for themselves. Mr. Wark's summary is inadmissible as hearsay and lesser evidence. *See* Fed. R. Evid. 802, 1002. The WBWAO's motion is **GRANTED** as to paragraph 44.

Paragraph 45 states:

> In fact, there has been no study nor any report ever produced by any law enforcement or any alcohol

> regulatory body that shows the direct shipment of wine from out-of-state retailers has led to a problem with minors obtaining alcohol in any state. While a limited number of academic and law enforcement studies have shown via coordinated "stings" that minors could be able to obtain alcohol via direct shipment, no study has shown that minors actually use the Internet to obtain alcohol. The 2015 National Survey on Drug Use and Health carried out by the Substance Abuse and Mental Health Services Administration looked at how minors obtain alcohol. No minor responding to the national survey cited the Internet as their source of alcohol. In fact, no state has produced any report or evidence that direct shipment of wine from out-of-state wineries or retailers in any way negatively impacts the health and safety of its residents.

The third and fourth sentences of paragraph 45 are inadmissible hearsay for the reasons already discussed. The first, second, and final sentences make sweeping statements that "no" study or report has ever shown that direct shipment of wine to a state's consumers results in certain adverse outcomes. In deposition, Mr. Wark acknowledged that he did not review anything outside the few studies specifically mentioned in his report. (*See* ECF No. 49, PAGEID 674–75.) This is not the type of searching review necessary to support the broad claims in his opinion. The Court cannot conclude that those sentences are based on sufficient facts or data and so, exercising its gatekeeping function, will exclude them from the record. The WBWAO's motion is **GRANTED** as to paragraph 45.

Finally, in paragraph 54, Mr. Wark states:

> All wine sold at wine retail stores is in sealed containers and has been approved for sale to the public by the TTB and the state alcohol regulatory agency in which the retailer is located. There are no reports of any contaminated or harmful wine sold and shipped from these retailers to consumers.

Neither Mr. Wark nor his proponents have shown the Court that these statements are based on sufficient facts or data to be admissible. The WBWAO's motion is **GRANTED** as to paragraph 54.

C. The deposition testimony is properly included in the record.

In view of the above rulings, the Court sees no reason to strike Mr. Wark's deposition testimony from the record. The WBWAO's motion is **DENIED** as to the deposition transcript.

IV. MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant has the burden of establishing there are no genuine issues of material fact, which may be achieved by demonstrating the nonmoving party lacks evidence to support an essential element of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1388–89 (6th Cir. 1993). The burden then shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56). When evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

A genuine issue exists if the nonmoving party can present "significant probative evidence" to show that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos.*, 8 F.3d 335, 339–40 (6th Cir. 1993). In other words, "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (concluding that summary judgment is appropriate when the evidence could not lead the trier of fact to find for the nonmoving party).

Here, Defendants have submitted sufficient admissible evidence that there is no genuine issue of material fact and they are entitled to judgment as a matter of law. Plaintiffs have failed to present significant probative evidence establishing otherwise.

A. This case must be analyzed under *Tennessee Wine*.

Plaintiffs assert that the Direct Ship Restriction and the Transportation Limit unconstitutionally discriminate against out-of-state businesses.[3] As the

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[3] Attorney General Yost concedes that Ohio's Direct Ship Restriction discriminates against out-of-state retailers. (*See* ECF No. 116, PAGEID # 5973.) Although the statutes comprising that restriction do not distinguish between instate and out-of-state businesses on their face (*see* Ohio Rev. Code §§ 4301.01, 4303.12, 4303.22, 4303.27), the Ohio Division of Liquor Control will not issue a permit to a wine retailer that does not maintain a physical presence in the state. The WBWAO argues that the implicit

Sixth Circuit recently explained in a similar case out of Michigan, such a challenge "turns on the accordion-like interplay" between the Commerce Clause and the Twenty-first Amendment:

> The [Commerce] Clause grants Congress power to preempt or permit state laws that interfere with interstate commerce, and it impliedly "prohibits state laws," as determined by the federal courts, "that unduly restrict interstate commerce." *Tenn. Wine & Spirits*, 139 S. Ct. at 2459. Under the implied prohibition, if a state law discriminates against "out-of-state goods or nonresident economic actors," it may survive only if tailored to advance a legitimate state purpose. *Id.* at 2461.
>
> . . . While the Commerce Clause grants Congress power to eliminate state laws that discriminate against interstate commerce, the Twenty-first Amendment grants the States the power to regulate commerce with respect to alcohol. Section 2 of the Amendment bars "[t]he transportation or

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nature of the discrimination deprives Plaintiffs of standing to challenge it. (ECF No. 114, PAGEID # 5414.) The Court disagrees. The state's position on out-of-state retailers' eligibility for a permit caused Plaintiffs' alleged injury and is redressable. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (discussing the three elements of Article III standing: injury-in-fact, causation, and redressability); *cf. Granholm v. Heald*, 544 U.S. 460, 477, 125 S. Ct. 1885, 161 L. Ed. 2d 796 (2005) (explaining that the Commerce Clause prevents states from imposing impermissible burdens on interstate commerce, even through application of "facially neutral laws"); *Day v. Henry*, — F.4th —, 129 F.4th 1197, 2025 U.S. App. LEXIS 4985 (9th Cir. 2025) (finding that plaintiffs in an analogous action against Arizona liquor control laws had standing to sue).

> 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." U.S. Const. amend. XXI, § 2. The section gives the States broad latitude to regulate the distribution of alcohol within their borders. *See North Dakota v. United States*, 495 U.S. 423, 432–33 (1990) (plurality opinion); *see also id.* at 447–48 (Scalia, J., concurring in the judgment). Indeed, had Congress (as opposed to the people through the ratification process) enacted this exact law, it is doubtful there would be any role for the federal courts to play. When faced with a dormant Commerce Clause challenge to an alcohol regulation, as a result, we apply a "different" test. *Tenn. Wine & Spirits*, 139 S. Ct. at 2474. Rather than skeptical review, we ask whether the law "can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* But if the "predominant effect of the law is protectionism," rather than the promotion of legitimate state interests, the Twenty-first Amendment does not "shield[ ]" it. *Id.*

Lebamoff Enters. Inc. v. Whitmer, 956 F.3d 863, 869 (6th Cir. 2020), *reh'g denied*, Case No. 18-2199, Docket No. 56 (May 26, 2020), *cert. denied*, 141 S. Ct. 1049 (2021).

In its September 2022 Opinion, this Court endeavored to apply the *Tennessee Wine* test, as illuminated by *Lebamoff*, to Plaintiffs' challenge to the Direct Ship Restriction. (*See* ECF No. 91.) The Court of Appeals found fault in this Court's approach, however, and remanded for further consideration of Plaintiffs' challenge to both the Transportation Limit and the Direct Ship Restriction. In particular, the Court was directed to evaluate

> the facts and evidence presented in this case [to] determine whether the challenged statutes (1) "can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground," and whether (2) their "predominant effect" is "the protection of public health or safety," rather than "protectionism."

(ECF No. 104 (quoting *Tenn. Wine*, 139 S. Ct. at 2474).) The Court will turn to that evidence now.[4]

B. The challenged laws can be justified on legitimate nonprotectionist grounds.

The first question before the Court is whether the challenged laws can be justified on legitimate nonprotectionist grounds. The most salient of the legitimate grounds is protecting public health and safety. *Tenn. Wine*, 139 S. Ct. at 2474 (recognizing that "§ 2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens").

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[4] Plaintiffs urge the Court to consider whether there are nondiscriminatory alternatives to the scheme established by the Ohio General Assembly. (*See* ECF No. 119, PAGEID # 6564.) But as the First Circuit Court of Appeals explained in *Anvar v. Dwyer*, that argument "conflates the proper Twenty-first Amendment inquiry with a traditional analysis under the dormant Commerce Clause." 82 F.4th 1, 11 (1st Cir. 2023); *see also id.* at 8 (explaining that nondiscriminatory alternatives are only considered if, after consideration of the *Tennessee Wine* test, "the law's predominant effect is protectionist in nature").

In arguing whether the Direct Ship Restriction and the Transportation Limit can be justified as health and safety measures, the parties offer very different framing. Plaintiffs urge the Court to focus on whether direct shipping and personal transportation threaten public health. (*See* ECF No. 119, PAGEID # 6556, 6566.) But Defendants zoom out. They argue that the Direct Ship Restriction and the Transportation Limit are trusses supporting a larger structure—namely, the three-tier system—and cannot be excised for review outside that context. (*See, e.g.*, ECF No. 116, PAGEID # 5973–74.) The difference is significant, as the state must present "concrete evidence" showing the challenged laws' "purpose and effect." *Tenn. Wine*, 139 S. Ct. at 2473–74. In Plaintiffs' frame, the relevant evidence is narrowly drawn to whether bottles shipped or carried across state lines are more dangerous than those that were not. While in Defendants', the relevant evidence goes to the system's effect on public health and safety.

Allowing out-of-state retailers to deliver wine directly to Ohio's consumers would effectively eliminate the role of Ohio's wholesalers and "create a sizeable hole in the three-tier system." *Lebamoff*, 956 F.3d at 872. *Accord B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 228 (4th Cir. 2022) (observing that striking down North Carolina's corollary to the Direct Ship Restrictions "would open the North Carolina wine market to less regulated wine, undermining the State's three-tier system and the established public interest of safe alcohol consumption that it promotes"), *reh'g denied*, No. 21-1906, Docket No. 58 (June 28, 2022), *cert. denied*, 143 S. Ct. 567 (2023); *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1184 (8th Cir. 2021) (concluding that a physical presence requirement for retailers was an "essential feature of [Missouri's] three-tiered system"); *Wine Country Gift Baskets*, 612 F.3d at 821 (same).. The same would be true if Ohio consumers could import wine themselves by buying from out-of-state retailers and bringing the product in bulk across state lines. The Court is thus persuaded that Defendants' framing is the correct one and will evaluate evidence of the purpose and effect of the challenged laws within the context of Ohio's three-tier system.

Ohio's three-tier system sets out a prescribed supply chain, with a limited number of legislatively considered exceptions. The system is designed to:

(A) Promote temperance by preventing consumption by underage persons and by discouraging abusive consumption;

(B) Promote orderly markets by requiring transparent, accountable, and stable distribution of beer and intoxicating liquor and preventing unfair competition; [and]

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

Ohio Rev. Code § 4303.011. Defendants' evidence shows how the state performs against these goals and what they serve to accomplish.

Oversight. Defendants first argue that Ohio's three-tier system allows the state regulatory and enforcement agencies to keep close watch over the movement and sale of wine throughout the state (*see* ECF No. 114-1, ¶ 4), which serves the legislative purposes of preventing underage driving and promoting orderly markets by ensuring that the distribution of wine is done in a transparent and accountable manner. Attorney General Yost offers a recent example illustrating the vital importance of these oversight mechanisms.

In January 2021, the Ohio Division of Liquor Control and the Ohio Investigative Unit ("OIU") launched a joint investigation after a consumer reported becoming ill after drinking "Saint Sadler" wine. (ECF No. 116-3, ¶ 15.) No such wine product was registered with the Division, and no such wine producer was permitted. (*Id.*) The investigation revealed that an individual, Paul Sadler, had purchased several "make your own wine" kits from a permit holder called Grape and Granary, Inc. (*Id.*, ¶ 20.) Though these kits are widely available to home-vintners, their wine is not licensed for sale. (*Id.*, ¶ 19.) OIU executed a search warrant on a warehouse connected to Sadler's operation. (ECF No. 116-5, ¶ 12; *see also* ECF No. 116-6, PAGEID # 6425.) When agents arrived, they found four people actively engaged in the bottling process[.]" (ECF No. 116-6, PAGEID # 6426.) The warehouse was "filthy, with many areas looking to be under construction[.]" (*Id.*) Wine jugs were "uncovered and open to the air with no top or means to prevent contamination." (*Id.*) There was nothing preventing fill hoses from touching the ground and nothing available to clean the fill hoses after use. (*Id.*) The restrooms "contained no hand soap or sanitary towels" for bottlers "to properly wash hands after restroom use." (*Id.*) OIU confiscated more than 600 intact bottles of Saint Sadler wine and "several gallons" more in various stages of fermentation. (ECF No. 116-5 ¶ 13.) The Division then conducted on-site inspections at licensed retailers suspected of stocking the stuff. (ECF No. 116-3, ¶ 22.)

It seized another 437 bottles from eighteen outlets. (*Id.*) This case highlights the importance of physical access to information and premises in policing alcohol sales. It also supports Defendants' position that the three-tier system—including the Direct Ship Restriction and Transportation Limit—can be justified by public health and safety.

Price Controls. Defendants next argue that the three-tier system allows the state to control alcohol prices, including by efficient collection of an excise tax at the wholesaler lever. Keeping the price of alcohol high promotes temperance, and tax proceeds are used to offset the societal costs of alcohol consumption. (*See* ECF No. 114-1, ¶ 77.)

Defendants' position is supported by expert testimony on the economics of alcohol use and testimony by individuals working inside Ohio's liquor control agencies. William Kerr, PhD, Senior Scientist and Scientific Director at the Alcohol Research Group, prepared and supplemented an expert report on the purpose and effect of Ohio's liquor control laws. (ECF No. 116-1.) Dr. Kerr has authored or co-authored more than 160 peer-reviewed articles on alcohol-related topics, including trends in alcohol consumption and the effectiveness of alcohol control policies. (*Id.*, ¶ PAGEID # 6072.) Dr. Kerr's report summarizes scholarship on the correlation between availability, prices, consumption, and bad outcomes within the market for alcoholic beverages. (*Id., generally*.) Generally, as availability increases, prices fall; as prices fall, consumption increases; and as consumption increases, so too do bad outcomes. Against that backdrop, Dr. Kerr opines that:

> Allowing the direct shipment of alcoholic beverages from retailers to Ohio consumers would be expected to increase alcohol consumption, heavy drinking and the consequences associated with alcohol use and abuse through the expansion of alcohol suppliers. Similar problems would be expected to arise if Ohioans were permitted to transport an unlimited quantity of alcoholic beverages into the State for personal consumption. This is particularly true given that the new suppliers in neighboring states may be able to supply the alcohol to Ohio consumers at lower prices, which could increase price competition and lower prices.

(*Id.*, PAGEID # 6077.)

Division agents use on-site compliance checks to ensure that licensed retailers comply with state laws, including price controls. (ECF No. 116-4.) For example, agents compare wholesaler invoices with a retailer's in-store prices to determine whether mandatory mark-ups are being charged. (*Id.*, ¶ 8.) If a retailer is not charging a mandatory mark-up, a Division agent can initiate corrective action, educate the permit holder, and "ensure that the product pricing is immediately changed" while on-site. (*Id.*)

In view of this evidence, the Direct Ship Restriction and the Transportation Limit are justified on public health and safety grounds.

C. The challenged laws' predominant effect is not protectionism.

The Court next considers whether the facts and evidence presented in this case show that the challenged laws' predominant effect is protectionism.

In support of their argument that the challenged laws' predominant effect is protectionism, Plaintiffs first demonstrate that certain wines—perhaps of a rare vintage or from emerging winemaking regions—are unavailable for purchase from Ohio-licensed retailers. (*See, e.g.*, ECF No. 52-8, PAGEID # 3809–11; ECF No. 52-11, PAGEID # 3825.) Many are also unavailable for Ohio-licensed retailers to sell. (*Id.*) Plaintiffs also show that certain products available for purchase online—for example, a Hickory Farms Mumm Napa Sparkling Wine Gift Box and a wine club membership from K&L Wine Merchants—are unavailable to Ohio consumers because they necessarily require shipment of wine across state lines. (*See* ECF Nos. 52-14, 52-16.) And while K&L Wine Merchants' wine club cannot access the Ohio market, The Wine Merchant (a Cincinnati, Ohio-based wine retailer) has a wine club that can. (*See* ECF No. 52-15.)

Next, Plaintiffs offer evidence that undermines the health and safety goals the state claims to pursue. For example, Plaintiffs undercut Dr. Kerr's testimony by showing that several Ohio retailers sell wine at discount prices—sometimes, for less than $4 per bottle. (*See* ECF Nos. 52-35, 52-36, 52-37.) They also submit studies such as a 2016 report by the National Institute on Alcohol Abuse and Alcoholism showing alcohol consumption by state (ECF No. 52-20), a 2019 report by the National Highway Traffic Safety Administration showing alcohol-impaired driving rates (ECF No. 52-21), and a 2021 report by the National Coalition Against Domestic Violence showing domestic violence rates (ECF No. 52-23). These studies do not show an obvious correlation between a state's decision to allow direct-to-consumer alcohol shipping and the outcomes they track (though the studies are unaccompanied by expert testimony or statistical analysis).[5]

Finally, Plaintiffs offer correspondence between their counsel and employees at the state liquor control agencies in six states that allow direct-to-consumer shipping. In that correspondence, the state employees respond to counsel's informal request for information about "any regulatory or monitoring issues [that] have arisen concerning improper shipments by permittees, failure to remit taxes, or anything else." (*See, e.g.*, ECF No. 52-30, PAGEID # 3952.) None of the six states report major problems. But the responses are not sworn, and there is little to no information about the responding employee—including whether that individual is authorized to respond or knowledgeable on the topic. The correspondence is now more than four years old.

Defendants argue that the challenged laws' predominant effect is the promotion of health and safety. They offer evidence on the operation and effectiveness of the state's liquor control enforcement agencies. That evidence highlights the importance of on-site inspections. For example, the Division conducts thousands of on-site inspections each year for purposes of renewing permits and investigating complaints. (ECF No. 116-2, ¶¶ 7–9) Between September 1, 2021, and January 31, 2024, the Division issued 935 Correction Notices and 46 formal

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[5] Construing the evidence in the light most favorable to the Plaintiffs, the Court overlooks certain evidentiary deficiencies in these studies and the manner in which their results are presented to the Court.

citations to permit holders. (*Id.*, ¶¶ 10–11.) The OIU conducted another 2,915 on-site compliance checks between September 1, 2021, and February 02, 2024. (ECF No. 116-5, ¶ 7.)

Beyond being unable to physically inspect store shelves and monitor compliance with laws like mandatory mark-ups and the prohibition against selling alcohol to minors (*see, e.g.*, ECF No. 116-5, ¶¶ 4–6), Dr. Kerr opines that Ohio "does not have effective enforcement tools to use against out-of-state retailers who fail to abide by Ohio law." (ECF No. 116-1, ¶ 34.) He states that fines, suspensions, and revocations would be administratively burdensome and "likely ineffective"—largely because the out-of-state retailers are outside of Ohio's three tier system. He explains that Ohio could not "cut off the flow of alcohol to a non-compliant out-of-state retailer" or "strand[]" a non-compliant out-of-state retailer "with product it cannot sell once its license is revoked or suspended[.]" (*Id.*, ¶¶ 35–36.)

In view of all the evidence in the record, the Court is persuaded that it can decide as a matter of law whether the challenged laws' predominant effect is protectionist. It is not. Defendants have produced concrete evidence that the Direct Ship Restriction and the Transportation Limit are essential components of Ohio's three-tier system, and operate with the predominant purpose and effect of promoting public health and safety. Plaintiffs have not produced sufficient evidence upon which a reasonable jury could find otherwise.

V. CONCLUSION

For these reasons, the WBWAO's Motion to Strike (ECF No. 120) is **GRANTED in part** and **DENIED**

in part. The WBWAO's and Attorney General Yost's Motions for Summary Judgment (ECF Nos. 114, 116) are **GRANTED**; Plaintiffs' Motion for Summary Judgment (ECF No. 119) is **DENIED**.

The Clerk is **DIRECTED** to **TERMINATE** this case.

IT IS SO ORDERED.

/s/ Sarah D. Morrison
SARAH D. MORRISON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

No. 22-3852

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEREK BLOCK,

Plaintiff,

KENNETH M. MILLER; HOUSE OF GLUNZ, INC.,

Plaintiffs-Appellants,

v.

JAMES V. CANEPA, et al.,

Defendants,

DAVE YOST, ATTORNEY GENERAL OF OHIO; ANDY WILSON, DIRECTOR, OHIO DEPARTMENT OF PUBLIC SAFETY,

Defendants-Appellees,

WHOLESALE BEER & WINE ASSOCIATION OF OHIO,

Intervenor Defendant-Appellee.

Before: MOORE, CLAY, and MATHIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX D

Ohio Rev. Code §4301.01(A)(2)

Except as used in sections 4301.01 to 4301.20, 4301.22 to 4301.52, 4301.56, 4301.70, 4301.72, and 4303.01 to 4303.36 of the Revised Code, “sale” and “sell” include exchange, barter, gift, offer for sale, sale, distribution and delivery of any kind, and the transfer of title or possession of beer and intoxicating liquor either by constructive or actual delivery by any means or devices whatever, including the sale of beer or intoxicating liquor by means of a controlled access alcohol and beverage cabinet pursuant to section 4301.21 of the Revised Code. “Sale” and “sell” do not include the mere solicitation of orders for beer or intoxicating liquor from the holders of permits issued by the division of liquor control authorizing the sale of the beer or intoxicating liquor, but no solicitor shall solicit any such orders until the solicitor has been registered with the division pursuant to section 4303.25 of the Revised Code.

Ohio Rev. Code §4301.20

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 §4301.58(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.

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 §4303.03

(A) Subject to division (B) of this section, permit A-2 may be issued to a manufacturer to manufacture wine from grapes, fruits, or other agricultural products; to import and purchase wine in bond for blending purposes, the total amount of wine so imported during the year covered by the permit not to exceed forty per cent of all the wine manufactured and imported; to manufacture, purchase, and import brandy for fortifying purposes; and to sell those products either in glass or container for consumption on the premises where manufactured, in sealed containers for consumption off the premises where manufactured, and to wholesale permit holders under the rules adopted by the division of liquor control.

(B)(1) The holder of an A-2 permit shall not sell directly to a retailer. In order to make sales to a retailer, the manufacturer shall obtain a B-2a permit or make the sale directly to a B-2 or B-5 permit holder for subsequent resale to a retailer.

(2) The holder of an A-2 permit shall not sell directly to a consumer unless the product is sold on the premises in accordance with division (A) of this section. In order to make sales to a consumer off the premises where the wine is manufactured, the manufacturer shall obtain an S-1 or S-2 permit.

(3) Nothing in this chapter prohibits an A-2 permit holder from also holding a B-2a, S-1, or S-2 permit.

(C) The fee for this permit is seventy-six dollars for each plant to which this permit is issued.

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 §4303.12

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 §4303.25

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 §4303.232

(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 fee for the S-2 permit is two hundred fifty dollars.

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 §4303.35

No holders of retail permits shall purchase any beer subject to the tax imposed by sections 4301.42 and 4305.01 of the Revised Code or any wine or mixed beverage subject to the tax imposed by section 4301.43 of the Revised Code for resale, except from holders of A or B permits.

No holders of retail permits shall purchase spirituous liquor for resale except from the division of liquor control, unless with the special consent of the division under particular regulations and markup provisions prescribed by the superintendent of liquor control.