

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

DEREK BLOCK, et al.,)	
)	2:20-cv-03686-SDM-CMV
Plaintiffs,)	
)	JUDGE SARAH D. MORRISON
v.)	
)	MAGISTRATE JUDGE
JIM CANEPA, Superintendent of)	CHELSEY M. VASCURA
Liquor Control, et al.,)	
)	
Defendants.)	

**UNOPPOSED MOTION OF THE WHOLESALE BEER & WINE
ASSOCIATION OF OHIO TO INTERVENE AS A DEFENDANT**

The Wholesale Beer & Wine Association of Ohio ("WBWAO") moves pursuant to Fed. R. Civ. P. 24(a) and (b) for leave to intervene as a defendant in order to assert the defenses set forth in the proposed Answer that it has tendered as Exhibit A. Pursuant to S.D. Ohio Civ. R. 7.3, counsel for the WBWAO has consulted with counsel for the parties. Neither plaintiffs nor defendants oppose this motion. A memorandum in support follows, along with a proposed order granting this motion.

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MEMORANDUM IN SUPPORT

The Wholesale Beer & Wine Association of Ohio ("WBWAO") respectfully urges the Court to grant it leave to intervene as a defendant as a matter of right or, in the alternative, by permission pursuant to Rule 24 of the Federal Rules of Civil Procedure.

I. STATEMENT OF THE CASE

Plaintiffs filed this action on July 21, 2020. They challenge the constitutionality of four provisions of the Ohio Liquor Control Law (Ohio Rev. Code §§ 4301.20, 4301.58, 4301.60 and 4303.25) that operate to prohibit the sale, shipment and transportation of wine by out-of-state retailers directly to Ohio consumers. They allege that those provisions violate the dormant Commerce Clause of the United States Constitution. *See* Complaint ¶¶ 32, 40. Plaintiffs seek declaratory and injunctive relief against enforcement of those four provisions and any other provisions of the Ohio Liquor Control Law that prohibit out-of-state retailers from delivering wine directly to Ohio consumers. *Id.* at Prayer for Relief ¶¶ A-D. The defendants are the Superintendent of Liquor Control, the Attorney General, the Director of the Ohio Department of Public Safety, and the Chair of the Ohio Liquor Control Commission.¹

II. FACTUAL BACKGROUND

The WBWAO has a direct and vital stake in the outcome of this case.

A. The WBWAO represents Ohio beer and wine wholesalers.

Founded in 1935, shortly after the end of Prohibition, the WBWAO is an incorporated non-profit membership association of independent, family-owned distributor companies that are

¹ A related case also is assigned to this Court. *See State of Ohio, ex rel. Attorney General Dave Yost v. Wine.com, Inc., et al.*, No. 2:20-cv-03430, Related Case Mem. (S.D. Ohio Jul. 23, 2020) (Dkt. No. 7). Filed on July 8, 2020, that case is an action by the Ohio Attorney General pursuant to the Twenty-First Amendment Enforcement Act, 27 U.S.C. § 122a, to enforce compliance with Ohio liquor laws by out-of-state wine retailers. The WBWAO does not seek leave to intervene in that exercise of the authority of the Attorney General.

licensed Ohio beer and wine wholesalers. See http://www.wbwao.org/aws/WBWA0/pt/sp/home_page (last visited Aug. 20, 2020). The membership of the WBWAO includes a majority of the licensed wine wholesalers in the State of Ohio. Those licensed Ohio wholesalers account for approximately ninety percent of the total wholesale sales of wine in Ohio. See Affidavit of David A. Raber, ¶¶ 2-3 (attached as Exhibit B).

B. Wholesalers occupy a key position in the three-tier regulatory framework that governs distribution and sale of alcoholic beverages in the State of Ohio.

The Ohio General Assembly enacted the Ohio Liquor Control Law in 1933, as the nation emerged from the Prohibition era. See Ohio Legis. Serv. Comm’n, *Liquor Control Laws in Ohio* (Jan. 1959) at 8-9. By that time, Ohioans and other Americans had “paid dearly for the lessons learned at the two extremes of liquor control,” ranging from minimal regulation to complete prohibition. *Id.* at 6. The state thus struck a statutory balance that was “designed to correct the shortcomings of the saloon era and to avoid recurrence of the criminally controlled traffic of the prohibition period.” *Id.* at 8.

Through that law, Ohio (like many other states) has established a three-tier licensed distribution system for alcoholic beverages, including wine. The three-tier system consists of licensed suppliers, wholesalers and retailers. Under the Ohio law, suppliers must obtain a state license and may sell only to wholesalers licensed by the State; licensed wholesalers may sell only to licensed retailers or other licensed wholesalers; and retailers must hold a state license in order to sell to consumers. See Ohio Rev. Code §§ 4301.13, .24, .58 and Ch. 4303. The Ohio Administrative Code provides that “[a]ll alcoholic beverages imported into this state for purposes of re-sale to retail permit holders must be consigned and delivered to the warehouse of a wholesale distributor.” See Ohio Admin. Code R. 4301:1-1-22(B).

Ohio wholesalers occupy the middle tier of the three-tiered licensed distribution system. They are required to compete in one of the most heavily regulated industries, with all of the attendant responsibilities that such compliance entails. The wholesalers must comply with strict requirements for licensing, distribution, warehousing, taxing, sales, merchandising, promotion and delivery of alcoholic beverages. *See Raber Aff.* at ¶ 4. Ohio wholesalers must report detailed information as to sales made to Ohio retailers. *Id.* at ¶ 5. The state thus is able to effectively monitor sales to ensure payment of fees and taxes and compliance with Ohio laws. Failure by Ohio licensed wholesalers to comply with Ohio law subjects them to severe sanctions, including potential loss of their licenses. *Id.* at ¶ 6.

C. The Twenty-First Amendment provides for state control of alcoholic beverage distribution and sales through wholesalers.

The three-tier system operates in tandem with the Twenty-First Amendment of the United States Constitution, which repealed the Eighteenth Amendment in 1933, ending prohibition and conferring authority for control of alcoholic beverages upon the states. The Supreme Court has recognized and reaffirmed the broad grant of authority that the Twenty-First Amendment confers upon the states to regulate commerce in intoxicating liquors. *See, e.g., Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2470 (2019) (Section 2 of the Twenty-First Amendment “grants States latitude with respect to the regulation of alcohol”); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984) (confirming that state control of the liquor distribution system is “the central power reserved by § 2 of the Twenty-first Amendment”). *See also North Dakota v. United States*, 495 U.S. 423, 431-433 (1990) (“within the area of its jurisdiction, the State has virtually complete control of the importation and sale of liquor and the structure of the liquor distribution system” and state liquor control policies adopted under the

auspices of the Twenty-First Amendment “are supported by a strong presumption of validity and should not be set aside lightly”).

The Supreme Court made clear in *Granholm v. Heald*, 544 U.S. 460, 489 (2005), that states may “assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system,” and that three-tier distribution systems are “unquestionably legitimate.” See generally *Lebamoff Enters., Inc. v. Whitmer*, 956 F.3d 863, 869 (6th Cir. 2020) (Section 2 of the Twenty-First Amendment “gives the States broad latitude to regulate the distribution of alcohol within their borders”); *id.* at 870 (courts “have permitted States to regulate wholesalers (the second tier) as a way to control the volume of alcohol sold in a State and the terms on which it is sold”).

D. Ohio wholesalers would be directly affected by any change in the three-tier distribution system, to their prejudice and to the detriment of public health.

The WBWAO seeks to intervene in its representative capacity because of the adverse impact that a declaration of unconstitutionality of the four provisions of the Ohio Liquor Control Law would have on Ohio wholesalers (independent family-owned distributor companies that depend upon the operation of their businesses for their livelihoods) and the public welfare. See *Raber Aff.* at ¶¶ 7-8. Plaintiffs seek relief that would allow a large-scale bypass of the three-tier system, by allowing out-of-state retailers the benefit of limitless access to the Ohio market without the burden of compliance with the regulations to which licensed Ohio retailers must conform in order to serve the public health and safety objectives of the State of Ohio. The demise of the retail tier would threaten the collapse of the wholesale tier through which licensed retailer products must flow -- structural consequences that the WBWAO would address as an intervenor.

As an intervenor on behalf of the wholesalers, the WBWAO also would manifest its inherent interest in protecting the integrity of the structure of Ohio's alcoholic beverage distribution system, because anything that reflects adversely on the industry harms individual business reputations as well. *Id.* at ¶ 9. Those reputations are important for the wholesalers, who necessarily have made significant economic investments in the system that plaintiffs now challenge. *Id.* at ¶ 7. The WBWAO, in its representative capacity, would bring to this litigation a unique perspective, not available to the existing defendants, in the form of a practical knowledge of the internal business and commercial workings of the alcoholic beverage distribution system in Ohio. *Id.* at ¶¶ 10-11.

As organizational representative of the wholesalers, the WBWAO likewise speaks for the indispensable role that the wholesaler community plays in attainment of the public health objectives of the three-tier system. The Supreme Court has recognized that the States “have legitimate interests in promoting temperance and controlling the distribution” of alcohol. *Lebamoff*, 956 F.3d at 871 (quoting *North Dakota*, 495 U.S. at 433). The courts “have permitted States to regulate wholesalers (the second tier) as a way to control the volume of alcohol sold in a State and the terms on which it is sold.” *Lebamoff*, 956 F.3d at 870. *See also id.* at 872 (noting “the State’s interest in limiting consumption”); *Arnold’s Wines, Inc. v. Boyle*, 571 F.3d 185, 188, 191 (2d Cir. 2009) (requirement that all liquor sold within the state pass through state-controlled wholesalers promotes “core” interests of Twenty-First Amendment by “promoting temperance [and] ensuring orderly market conditions”). It is through the wholesalers that Ohio and other states are able to achieve these goals.

E. This Court previously has recognized the stake of the WBWAO in litigation that challenges the constitutionality of the Ohio Liquor Control Law.

In granting the WBWAO leave to intervene in other litigation, which involved delivery of wine by out-of-state *wineries* directly to Ohio consumers, Magistrate Judge King noted that “[t]he members of . . . WBWAO form an integral part of Ohio’s three-tiered alcohol distribution system and are directly affected by regulations promulgated by” the State. *Stahl v. Taft*, No. 2:03-cv-00597, Op. & Order (S.D. Ohio Nov. 26, 2003) at 6 (Dkt. No. 17) (attached as Exhibit C). “Thus,” wrote Magistrate Judge King, “if it were determined that Ohio’s treatment of out-of-state wineries is unconstitutional, that judgment would necessarily have a direct effect on the laws and regulations imposed upon Ohio wholesalers and retailers.” *Id.* “Any change to Ohio’s alcohol distribution system will certainly have an effect on the way Ohio wholesalers and retailers do business.” *Id.* (emphasis added). As the Court summarized in granting the WBWAO leave to intervene in that case, “a potential change in one part of Ohio’s three-tiered alcohol distribution system will necessarily affect the entire system.” *Id.* at 10 n. 6.

F. The WBWAO will present factual and legal information necessary to inform the Court’s understanding of the essential role of Ohio wholesalers in the three-tier system.

If permitted to intervene, the WBWAO would present material factual and legal information that will assist the Court in understanding the essential role of Ohio wholesalers in the three-tier system, and the constitutionality of that system, including:

1. The nature of the investments that its members have made in their businesses;
2. The business concerns and affairs of its members;
3. The interest of the members in preservation of the continuity and constitutionality of the challenged regulatory system;
4. The practical workings of the licensed three-tier wine distribution system;

5. The implications of any ruling that would declare unconstitutional any pertinent provision of the Ohio Revised Code, including, but not limited to, Sections 4301.20, .58, .60 and 4303.25;
6. The decisions in *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct 2449 (2019), *Granholm v. Heald*, 544 U.S. 460 (2005), and *Lebamoff Enters., Inc. v. Whitmer*, 956 F.3d 863 (6th Cir. 2020), and authority interpreting those decisions, which fully support the challenged regulatory system and the essential role of wholesalers within that system;
7. The fact that, as the Sixth Circuit recently observed in *Lebamoff*, “there is nothing unusual about the three-tier system, about prohibiting direct deliveries from out of state to avoid it, or about allowing in-state retailers to deliver alcohol within the State,” 956 F.3d at 872;
8. The fact that the challenged provisions impose no undue burden on interstate commerce and reasonably advance legitimate state interests;
9. The fact that the challenged provisions do *not* discriminate against interstate commerce but, on the contrary, “mandate[] that both in-state and out-of-state liquor pass through the same three-tier system before ultimate delivery to the consumer,” *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 191 (2d Cir. 2009);
10. The rule that “[i]t is only where states create discriminatory *exceptions* to the three-tier system, allowing in-state, but not out-of-state, liquor to bypass the three regulatory tiers, that their laws are subject to invalidation based on the Commerce Clause,” *id.* at 190 (emphasis added); and

11. The public health and safety benefits of the three-tier system generally; the public health and safety benefits of the wholesaler-related regulations in particular; and the reasons why prohibition of sale, shipment and transportation of wine from out-of-state retailers to Ohio consumers is an essential feature of the three-tier system.

II. ARGUMENT

The standards for intervention are set forth in Rule 24 of the Federal Rules of Civil procedure. Rule 24(a)(2) provides in pertinent part that:

On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Rule 24(a) establishes a four-element test for intervention: (1) timeliness of the application, (2) the applicant's substantial interest in the case, (3) impairment of the applicant's ability to protect that interest without intervention, and (4) inadequate representation of that interest by parties already before the court. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245-48 (6th Cir. 1997). The Sixth Circuit has embraced a “rather expansive notion of the interest sufficient to invoke intervention of right.” *Id.* at 1245. *See also Benalcazar v. Genoa Twp.*, No. 2:18-cv-01805, 2020 U.S. Dist. LEXIS 63756 at 4-5 (S.D. Ohio Apr. 13, 2020).

Rule 24(b)(1)(B) provides in pertinent part that “[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.” Rule 24(b)(3) further provides that “[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.”

A. The WBWAO has the right to intervene.

The WBWAO has the right to intervene under the standards of Rule 24(a).

1. The WBWAO motion is timely.

The motion to intervene is timely. At this preliminary stage, the defendants have not yet responded to the Complaint. No party has filed any substantive motion. Nor does it appear that there has been any discovery. The WBWAO is prepared to move expeditiously in this matter and to abide by any scheduling orders set by the Court. Plaintiffs would not suffer any prejudice if the Court grants the WBWAO leave to intervene. *See* WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE, CIVIL 2D, Vol. 7C, § 1916, p. 441 ("if the intervention will not delay the termination of the litigation, intervention will normally be allowed").

2. As representative of Ohio wholesalers, the WBWAO has a substantial interest in this action.

"Wholesalers play a key role in three-tier systems," as the Sixth Circuit recently noted. *Lebamoff*, 956 F.3d at 868. "Typically few in number and often state-owned," the court explained, "they are the in-state path through which all alcohol passes before reaching consumers. That allows States, if they wish, to control the amount of alcohol sold through price controls, taxation, and other regulations." *Id.*

Like the WBWAO in the present case, the Michigan Beer & Wine Wholesalers Association moved to intervene in the *Lebamoff* case. *Id.* at 868-69. The District Court granted the unopposed motion. *See Lebamoff Enters., Inc. v. Snyder*, No. 2:17-cv-10191 (E.D. Mich. 2018) (Dkt. Nos. 9, 13). The Sixth Circuit noted that, "[i]f successful, *Lebamoff*'s challenge would create a sizeable hole in the three-tier system" because "[o]pening up the State to direct deliveries from out-of-state retailers necessarily means opening it up to alcohol that passes through out-of-state wholesalers or for that matter no wholesaler at all." *Lebamoff*, 956 F.3d at

872. (Notably, although a certiorari petition is pending, Lebamoff’s challenge has not succeeded. Similar to the present case, the “narrow question” in *Lebamoff* was “[i]f Michigan may have a three-tier system that requires all alcohol sales to run through its in-state wholesalers, and if it may require retailers to locate within the State, may it limit the delivery options created by the new law to in-state retailers?”. *Id.* at 870. “The answer is yes,” said the Sixth Circuit. *Id.*).

As representative of the wholesalers who play the same “key role” in Ohio, the WBWAO has a direct and substantial interest in the subject matter of this action. The WBWAO is familiar with and has access to data and factual underpinnings of the Ohio Liquor Control Law and knowledge of its economic impact upon the regulated industry in which its members are engaged (much of which is not within the purview or knowledge of the named defendants). *See Raber Aff.* at ¶ 11. Hence the WBWAO is in a unique position to protect the economic interests of the Ohio wine wholesalers that it represents, whose interests will be adversely affected should plaintiffs prevail, and to vouch for the essential role that they play in the successful operation of the Ohio three-tier system.

Ohio wholesalers clearly are subject to, work within, and earn their incomes from the statutory system that the plaintiffs challenge. *See Arnold’s Wines*, 571 F.3d at 188 (the three-tier system “allows the state to oversee the financial relationships among manufacturers, wholesalers, and retailers”); *New York Pub. Interest Research Grp., Inc. v. Regents*, 516 F.2d 350 (2d Cir. 1975) (pharmacists and their association were permitted to intervene as of right to defend their financial interest with respect to a state regulation prohibiting the advertisement of prescription drug prices that was under attack in a lawsuit by consumers); *Michigan State AFL-CIO v. Miller*, *supra*. *See also Nynex Corp. v. Federal Comm’n Comm’n*, 153 F.R.D. 1, 3 (D. Me. 1994).

Intervention by the WBWAO likewise would assist the Court in understanding the potential consequences of the remedy that the plaintiffs seek. The plaintiffs want the Court to allow out-of-state retailers to deliver wine directly to Ohio consumers, outside of Ohio's three-tier distribution system. Not only would their success, as the Sixth Circuit noted as to the comparable challenge brought by Lebamoff Enterprises, at a minimum "create a sizeable hole in the three-tier system." *Lebamoff*, 956 F.3d at 872. Because wholesalers play an essential and indispensable role in the Ohio three-tier system, that "sizeable hole" could bring down the entire system. As an intervenor, the WBWAO would have a substantial and unique interest in addressing this issue.

As set forth above, this Court previously has recognized the right of the WBWAO to intervene in litigation that addresses the structure of alcoholic beverage litigation in the State of Ohio. *See Stahl v. Taft*, No. 2:03-cv-00597, Op. & Order (S.D. Ohio Nov. 26, 2003) at 6 (Dkt. No. 17) (Exhibit C). Other cases in which courts that have permitted wholesalers or their associations to intervene where a plaintiff has challenged a state's alcoholic beverage regulatory system include *Brown-Forman Corp. v. Tennessee Alcoholic Bev. Comm'n*, 860 F.2d 1354 (6th Cir. 1988), *vacated and remanded on other grounds*, 492 U.S. 902 (1989) (wholesalers association intervened as defendant with the state liquor authority); *Healy v. Beer Inst. Inc.*, 491 U.S. 324 (1989) (same). *See also, e.g., Battipaglia v. New York State Liquor Auth.*, 745 F.2d 166 (2d Cir. 1984).

3. Plaintiffs seek a remedy that would substantially impair the interests of Ohio wholesalers that the WBWAO represents.

The challenged provisions of the Ohio Liquor Control Law are the statutory mainstay of Ohio wholesaler operations. If the Court were to grant the relief that plaintiffs request and permit unregulated and unlimited direct shipment of alcoholic beverages to Ohio consumers by

hundreds of thousands of out-of-state retailers -- outside of Ohio's three-tier distribution system and outside of the Ohio wholesaler tier in particular -- Ohio wine wholesalers would be placed at a significant competitive disadvantage and would face devastating consequences to the business investments that support them and their families. Without Ohio's regulatory system, unlicensed out-of-state retailers of alcoholic beverages would be able to avoid the many requirements imposed upon Ohio licensees, such as record keeping, payment of taxes, licensing fees, anti-tied-house provisions and trade practices rules. They would be able, in the words of the Sixth Circuit, to "seize[] the sweet and . . . take a pass on the bitter." *Lebamoff*, 956 F.3d at 873.

The WBWAO clearly has a significant interest in the continuity and constitutionality of the Ohio Liquor Control Law and the distribution system set up by the Ohio Revised Code and the rules of the Ohio Liquor Control Commission. It likewise has an organizational interest in attainment of the public health objectives for which wholesaler operations are responsible under the Ohio three-tier system of liquor control, including temperance, volume control and maintenance of an orderly market and the three-tier system. The WBWAO, in its representative capacity on behalf of Ohio wholesalers, also has an interest in maintaining the integrity of Ohio's licensed alcohol distribution system. The interests of the WBWAO and its constituent wholesaler members would be impaired by a finding that the statutory provisions at issue here are unconstitutional. The WBWAO is so situated, in its representative capacity, that disposition of this action would, as a practical matter, impair or impede its ability and that of its members to protect their interests and the related public health interests if plaintiffs were to prevail.

4. The WBWAO and its members have an interest that is compatible with, but separate from, the interest of the parties.

As noted in *Michigan State AFL-CIO*, the burden of showing inadequate representation is "minimal." 103 F.3d at 1247-48. An intervenor "is not required to show that the representation

[of others] will, in fact, be inadequate.” It is enough to show that an existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments, and “a decision not to appeal by an original party to the action can constitute inadequate representation by another party's interests.” *Id.*

The Attorney General plainly is qualified to represent the interests of the Superintendent of Liquor Control, the Attorney General, the Director of the Ohio Department of Public Safety and the Chair of the Ohio Liquor Control Commission. His constitutional and statutory responsibilities require him to champion the best interests of those state officials and their agencies. The interests of the commercial wholesalers that they regulate are compatible with theirs in this case, but nonetheless separate. Moreover, the Attorney General may have the prerogative to make strategic decisions that are at odds with the interests of wholesalers -- such as how to address specific provisions of the Ohio Liquor Control Law on which wholesalers depend, what relief to advocate in the unlikely event of an adverse judgment on the merits, and whether to appeal -- and thus would leave the interests of the wholesalers unasserted.

No other defendant has the ability of the WBWAO to articulate from a business perspective the illogic of the relief sought by the out-of-state plaintiff -- which seeks to create for itself *greater* rights than those held by in-state participants in the three-tier system -- and to provide evidence of the quantities and varieties of out-of-state wine that pass through the in-state operations. The WBWAO brings to this action a unique practical perspective and unique commercial interests that would assist the Court in its fact-finding role.

And, although the State defendants and the WBWAO both seek to preserve the constitutionality of the challenged provisions of the Ohio Liquor Control Law, their reasons are different. The State has numerous legitimate reasons for safeguarding the integrity of its

distribution system (for example, promoting temperance, collecting tax revenue, monitoring alcohol sales to minors). The wholesalers are additionally concerned with their own economic welfare and investments within the existing statutory framework and in maintaining healthy competition in the marketplace within that regulatory system. Without intervention, the economic interests of Ohio wholesalers will be under-represented or unrepresented. *See Conservation Law Found. of N.E., Inc. v. Mosbacher*, 966 F.2d 39, 45 (1st Cir. 1992) (noting that a government entity charged by law to represent the public interests might not advance the narrower interests of a private entity).

The wholesalers bring a unique perspective to this litigation and intend to provide evidence that will be important for the Court in analyzing the issues before it. For example, the WBWAO stands ready to provide evidence of the specific volume and variety of wine products that passes through the operations of Ohio wholesalers -- and will demonstrate that the Ohio regulatory system does not impose an undue burden on interstate commerce. If denied the right to participate as a party, the interests of the WBWAO and its constituent members will go undefended.

B. In the alternative, the Court should grant the WBWAO permission to intervene.

If the Court were to find that the WBWAO should not be allowed to intervene as of right, this Court should permit the WBWAO to intervene because the WBWAO has satisfied all the requirements of permissive intervention under Fed. R. Civ. P. 24(b). Rule 24(b) provides that permissive intervention may be allowed to anyone who “has a claim or defense that shares with the main action a common question of law or fact.” Permissive intervention is discretionary with the court. The primary consideration in determining whether or not to grant such intervention is whether such intervention (where there are common issues of law or fact) would unduly “delay

or prejudice the adjudication or the rights of the original parties.” *See Purnell v. City of Akron*, 925 F.2d 941, 951 (6th Cir. 1991).

The Court should allow the WBWAO to intervene permissively because common questions of law and fact abound; like the State defendants, the WBWAO is committed to defending the constitutionality of the challenged provisions of the Ohio Liquor Control Law and the distribution system set up thereunder; and the WBWAO has a unique economic interest that constitutes a valid ground for intervention. *See, e.g., Brooks v. Flagg Bros.*, 63 F.R.D. 409, 415 (S.D.N.Y. 1974) (“[W]here specific segments of an industry would be vitally affected by a declaration that the statute which governs their business conduct is unconstitutional, there is little reason to exclude them from participation.”). A finding of unconstitutionality and striking of the statutory provisions at issue here would have the potential of severely impairing or even destroying Ohio wholesalers' businesses. That type of economic interest is a valid basis for permissive intervention. Also, as noted earlier, this litigation has only recently been commenced and allowing intervention will not cause undue delay or prejudice. On the contrary, engagement of the expertise of the WBWAO in the industry and its knowledge of the workings of the three-tiered distribution system in Ohio has the potential for speeding up this adjudication.

CONCLUSION

As “necessary components of the regulatory regime,” *North Dakota*, 495 U.S. at 432, the wholesalers have an essential, independent and important voice to assert in this litigation. For the reasons set forth above, the WBWAO respectfully requests that the Court grant it leave to intervene.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I filed this motion and memorandum electronically on August 20, 2020, through the CM/ECF system, which will send notification of the filing to all attorneys of record.

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