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

Derek Block, *et al.*,	:	
	:	
	:	
Plaintiffs,	:	**Case No. 2:20-cv-03686**
	:	
v.	:	**Judge Sarah D. Morrison**
	:	
Jim Canepa, *et al.*,	:	**Magistrate Judge Chelsey M. Vascura**
	:	
Defendants.	:	

DEFENDANTS' MOTION TO DISMISS

Defendants Jim Canepa, Superintendent of the Ohio Division of Liquor Control; Dave Yost, Attorney General of Ohio; Thomas J. Stickrath, Director of the Ohio Department of Public Safety; and Deborah Pryce, Chair of the Ohio Liquor Control Commission respectfully move the Court to dismiss the complaint of Plaintiffs Derek Block, Kenneth M. Miller, and House of Glunz, Inc. Defendants move for dismissal on three bases: (1) Plaintiffs lack standing to invoke this Court's Article III jurisdiction; (2) Defendants Superintendent Canepa, Director Stickrath, and Chair Pryce are entitled to immunity from suit in this Court; and (3) Plaintiffs fail to state a claim upon which relief can be granted. A memorandum in support is attached.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

MEMORANDUM IN SUPPORT

I. INTRODUCTION

To protect the health, safety, and welfare of its residents, the State of Ohio ("State" or "Ohio"), through the duly elected representatives of its General Assembly, established a comprehensive liquor control law. The law utilizes a system of permits, regulations, and inspections to ensure that the transportation, sale and consumption of alcohol in Ohio take place in a safe and orderly manner. Each of the Defendants in this case—Jim Canepa, Superintendent of the Ohio Division of Liquor Control ("Superintendent Canepa"); Dave Yost, Attorney General of Ohio ("Attorney General Yost"); Thomas J. Stickrath, Director of the Ohio Department of Public Safety ("Director Stickrath"); and Deborah Pryce, Chair of the Ohio Liquor Control Commission ("Chair Pryce")—plays a unique role in enforcing the liquor control laws. Accordingly, each Defendant is responsible for ensuring the health and safety of Ohioans.

Plaintiffs Derek Block, Kenneth M. Miller, and House of Glunz, Inc. are unburdened by such health and safety concerns. Their interest is solely in the ability to purchase or sell wine, free of restrictions. To that end, they challenge two crucial tenets of Ohio's liquor control laws—the limitations on the amount of alcohol an individual may transport into the state at a given time and the restrictions on direct shipments of alcohol to Ohio consumers by out-of-state entities that are not subject to Ohio's standards and oversight.

In addition to lacking any apparent concern for the welfare of Ohioans, Plaintiffs' complaint is legally deficient in multiple respects. As a threshold matter, Plaintiffs lack standing to bring their claims in this Court. Additionally, Superintendent Canepa, Director Stickrath, and Chair Pryce are immune from suit in this Court under the doctrine of state sovereign immunity enshrined in the Eleventh Amendment. Finally, these procedural deficiencies notwithstanding, Plaintiffs fail to state a claim upon which relief can be granted. Plaintiffs claim that the challenged

statutory provisions constitute unlawful economic protectionism that is prohibited by the dormant Commerce Clause. In making this argument, Plaintiffs ignore key provisions of the Twenty-First Amendment, which empowers states to regulate the transportation and importation of liquor within their boundaries. Accordingly, the federal courts have recognized that state liquor control laws, such as Ohio's, that are designed to promote health and safety rather than economic interests are not subject to invalidation under the dormant Commerce Clause. In light of the procedural and substantive deficiencies of Plaintiffs' complaint, the Court should dismiss this case and allow Defendants to continue to fulfill their obligations to protect Ohio's residents.

II. FACTUAL BACKGROUND

A. Ohio Liquor Control Law

The Ohio General Assembly enacted a comprehensive legal scheme for regulating the transportation, distribution, and sale of alcohol in Ohio. Ohio Rev. Code Chapter 4301 and 4303. Under this scheme, wine is manufactured, distributed, and sold at retail through a "three-tier system."[1] *Tri-County Wholesale Distribs. v. Wine Group, Inc.*, 565 F. App'x 477, 478 (6th Cir. 2012). *See also generally* Ohio Rev. Code Chapter 4303. Ohio law defines "wine" to include "all liquids fit to use for beverage purposes containing not less than one-half of one per cent of alcohol by volume and not more than twenty-one percent alcohol by volume, which is made from the fermented juices of grapes, fruits, or other agricultural products[.]" Ohio Rev. Code § 4301.01(B)(3).

In the three-tier system, the wine manufacturer or importer (first tier) may sell wine to a

[1] Beer is also manufactured, distributed, and sold through the three-tier system. *See* Ohio Rev. Code § 4303.02 (permit for certain manufacturers of beer); Ohio Rev. Code § 4303.06 (permit for wholesale distributors of beer); Ohio Rev. Code § 4303.11 (permit for retailers of beer). The State has the exclusive right to distribute and sell spirituous liquor. Ohio Rev. Code § 4301.10(A)(3); Ohio Rev. Code § 4301.19.

wholesale distributor (second tier) who may then sell to a retailer (third tier). *Tri-County Wholesale Distribs.*, 565 F. App'x at 478; *see also*, *e.g.*, Ohio Rev. Code § 4303.03 (permit for wine manufacturer); Ohio Rev. Code § 4303.07 (permit for wholesale distributors of wine); Ohio Rev. Code § 4303.12 (permit for retailers of wine). A retailer may then sell wine to consumers. *See*, *e.g.*, Ohio Rev. Code § 4303.12. Ohio law also allows residents over twenty-one years of age to transport up to four and one-half liters of wine into the State upon returning from a foreign country, another state, or any other United States territory or possession. Ohio Rev. Code § 4301.20(L).

Participants at each tier of the three-tier system must hold a permit issued by the Division. Generally, no one person or entity can hold a permit in more than one tier. *See, e.g.*, Ohio Adm. Code 4301:1-1-24(C) (prohibiting retail permit holders from having any financial interest in a wholesale distributor). For example, a business that holds a wholesale permit cannot also hold a retail permit. *Id.* In order to sell wine at retail in Ohio, an entity must obtain one of several available retail permits, which are available only to entities with a physical presence in Ohio.[2] Ohio Rev. Code § 4303.12. Plaintiffs focus primarily on C-2 permits. (Compl., Doc. 1 at PageID # 4, ¶ 13.) A C-2 permit holder can ship wine to Ohio consumers who are over the age of 21. Ohio Rev. Code §§ 4301.01(A)(2), 4303.12, 4303.27.

Ohio law does permit out-of-state entities to ship wine directly to Ohio consumers in some circumstances. An S permit is available to a person or entity that meets one of the following three criteria: (1) is a brand owner or United States importer of beer or wine; (2) is the designated agent of a brand owner or importer for all beer or wine sold in Ohio by that owner or importer; or (3) is a wine manufacturer that produces less than 250,000 gallons of wine per year and is entitled to a

[2] The following permit types authorize carryout wine sales at retail: C-2, D-2, D-3x, D-5, D-5a, D-5b, D-5c, D-5d, D-5i, and D-5j. *See* Ohio Rev. Code §§ 4303.12, 4303.14, 4303.151, 4303.18, 4303.181.

federal tax credit under 27 C.F.R. § 24.278. Ohio Rev. Code § 4303.232(A)(1). The S permit is available to Ohio entities as well as out-of-state entities. *Id.* An S permit holder may ship wine to Ohio consumers through a common carrier that holds an H permit issued by the Division. Ohio Rev. Code § 4303.232(C). Thus, a retailer that is a brand owner or importer of a wine or is designated as the agent of that brand owner or importer can obtain an S permit and directly ship wine to Ohio consumers. Ohio Rev. Code § 4303.232.

B. Defendants' Enforcement Responsibilities

Responsibility and authority for the enforcement of Ohio's liquor control laws is diffused across several State offices, and each Defendant has a discrete role in enforcing the laws. The Division of Liquor Control, under the direction of Superintendent Canepa, has numerous responsibilities, which are principally set forth in Ohio Rev. Code § 4301.10(A). These responsibilities include, in relevant part: controlling the traffic of beer and intoxicating liquor in Ohio; granting or refusing permits for the manufacture, distribution, and sale of intoxicating liquor; enforcing the administrative provisions of Ohio Revised Code Chapters 4301 and 4303, as well as related administrative rules and orders of the Ohio Liquor Control Commission; and inspecting the premises of permit holders. Ohio Rev. Code § 4301.10(A).

Attorney General Yost, along with local and municipal prosecutors, is authorized to prosecute any person charged with the violation of Ohio's liquor control laws. Ohio Rev. Code § 4301.10(A)(4). Additionally, Attorney General Yost is authorized by federal law to seek injunctive relief for violations of Ohio laws regulating the transportation or importation of intoxicating liquor, which includes wine. 27 U.S.C. § 122a. The Department of Public Safety, under the direction of Director Stickrath, is charged with maintaining an investigative unit to conduct investigations and enforcement activity authorized by the Ohio liquor control laws. Ohio Rev. Code § 5502.13.

Finally, the Liquor Control Commission, chaired by Chair Pryce, is authorized, in relevant part, to suspend, revoke, or cancel permits issued by the Division, to hear and determine appeals from decisions of the Division, and to hear and determine all complaints for the revocation of liquor permits. Ohio Rev. Code § 4301.04. The Commission is also authorized to adopt and promulgate administrative rules necessary to carry out Ohio's liquor control laws. Ohio Rev. Code § 4301.03.

C. Plaintiffs' Factual Allegations

Plaintiffs challenge both Ohio's prohibition of direct-to-consumer shipments by out-of-state retailers and Ohio's limitations on the amount of wine that an individual may transport into the State. (Compl., Doc. 1 at PageID # 7-9, ¶¶ 28-40). According to the complaint, Plaintiffs Derek Block and Kenneth Miller are Ohio residents and wine collectors. (*Id.* at PageID # 2-3, ¶¶ 4-5.) Both Block and Miller allege that they wish to purchase wines sold by out-of-state retailers. (*Id.* at PageID # 2-3 & 6-7, ¶¶ 4-5, 24-25.) Both allege that they would order wine from out-of-state retailers and have them shipped to their homes in Ohio if it were lawful to do so. (*Id.*) Additionally, both Block and Miller allege that they would purchase wine from out of state and transport it back to Ohio if it were lawful to do so. (*Id.*)

Block alleges that he attempted to purchase wine from out-of-state retailers, but was unable to complete those orders. (*Id.* at PageID # 6, ¶ 24.) Miller identifies specific retailers from whom he would like to purchase wine for shipment to his Ohio residence, but has not alleged any actual attempt to do so. (*Id.* at ¶ 25.) Neither Block nor Miller alleges any actual attempt to personally transport more than 4.5 liters of wine into the State. (*See generally* Compl., Doc. 1, PageID # 1-11).

Plaintiff House of Glunz, Inc. is an Illinois-based wine retailer. (*Id.* at PageID # 3, ¶ 6.) As

part of its business operations, House of Glunz accepts orders remotely through the internet, telephone, and other means, and fulfills those orders through direct-to-consumer shipments. (*Id.*) According to Plaintiffs' complaint, House of Glunz would sell and ship wine to Ohio consumers if it were lawful to do so. (*Id.*) House of Glunz further alleges that it cannot afford to establish a physical presence in Ohio and that retailers located outside Ohio cannot obtain a C-2 permit or any other permit that would allow them to sell wine over the Internet and ship that wine to Ohio consumers.[3] (*Id.* at PageID # 4-5, ¶¶ 13-17.) Several customers have asked House of Glunz to ship wine to Ohio, but House of Glunz alleges that it is unable to do so under Ohio law. (*Id.* at PageID # 6, ¶ 23.) House of Glunz does not allege that it has made any concrete plans or attempts to sell and ship wine to an Ohio consumer. (*See generally*, Compl., Doc. 1, PageID # 1-11) Nor does House of Glunz allege that it made any attempt to obtain any permit from the Ohio Division of Liquor Control, including an S permit, that would allow for the direct shipment of some wines to Ohio consumers. (*See generally id.*; *see also* Ohio Rev. Code § 4303.232.)

None of the Plaintiffs allege any action by any of the Defendants in this case. (*See generally* Compl., Doc. 1, PageID # 1-11.) The complaint contains no allegation that the Division of Liquor Control ever denied House of Glunz a permit or took any action to prevent any of the Plaintiffs from buying, selling, or transporting liquor. There is no allegation that Attorney General Yost prosecuted or threatened to prosecute any of the Plaintiffs. Nor is there any allegation that Attorney General Yost has taken any injunctive action that would impact any of the Plaintiffs. There is no allegation that Plaintiffs have been the subject of any investigation or other law enforcement activity by the Department of Public Safety. Finally, there is no allegation that the Liquor Control

[3] This is a misstatement of law. Out-of-state retailers that are brand owners or importers or agents of a brand owner or importer can obtain an S permit to directly sell and ship wine to Ohio consumers. Ohio Rev. Code § 4303.232.

Commission has suspended, cancelled, or revoked any permit, conducted any hearing concerning Plaintiffs, or promulgated a rule that affects any of the Plaintiffs.

III. LAW AND ARGUMENT

Plaintiffs' complaint is flawed in three major respects. First, Plaintiffs fail to establish standing to bring either of their two dormant Commerce Clause claims. Plaintiffs allege only a single concrete injury, and that injury is neither traceable to any action of a Defendant nor redressable by a favorable decision from this Court. In fact, Plaintiffs do not even allege *any* acts by *any* defendant. Moreover, a decision invalidating the challenged provisions of Ohio's liquor control laws will result in a more *restrictive* regime—not the more permissive regime Plaintiffs seek. Given Plaintiffs' failure to establish standing, the Court lacks jurisdiction under Article III of the United States Constitution, and the case must be dismissed accordingly.

Second, three of the Defendants—Superintendent Canepa, Director Stickrath, and Chair Pryce—are immune from suit in federal court pursuant to the Eleventh Amendment of the United States Constitution. U.S. CONST. amend. XI. Those three defendants are sued in their official capacities, and none of them has taken or threatened any enforcement action regarding the shipment or transportation of wine into Ohio. Therefore, they are entitled to the protections of state sovereign immunity, and any claims against them must be dismissed.

Third, Plaintiffs fail to state a claim upon which relief can be granted. Plaintiffs claim that Ohio's laws must be invalidated under the dormant Commerce Clause of the United States Constitution. However, Plaintiffs ignore the fact that the Twenty-First Amendment to the United States Constitution grants states the authority to regulate the transportation or importation of intoxicating liquor into their respective state boundaries. U.S. CONST. amend. XXI, § 2. Ohio's liquor control laws establish a comprehensive system of regulation designed to protect the health,

safety, and welfare of the State's residents, not economic interests. The provisions challenged by the Plaintiffs are an integral part of that system. They are a valid exercise of the State's authority under the Twenty-First Amendment, and not subject to invalidation under the dormant Commerce Clause. Therefore, Plaintiffs' claims should be dismissed pursuant to FED. R. CIV. P. 12(b)(6).

A. Plaintiffs lack standing to invoke the Court's Article III jurisdiction.

Out of the gate, Plaintiffs' complaint fails to establish even the bare minimum requirement of standing. Standing is necessary to invoke the jurisdiction of the federal courts conferred by Article III of the Constitution of the United States. *Nat'l Rifle Ass'n. of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997), citing *Allen v. Wright*, 468 U.S. 737, 750 (1994). A plaintiff must establish standing before the court can consider the merits of the plaintiff's claim. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). In cases involving multiple plaintiffs, at least one plaintiff must have standing to seek each form of relief requested in the complaint. *Town of Chester v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1650-51 (2017).

To establish the "constitutional minimum of standing," a plaintiff must establish: (1) the plaintiff suffered an injury in fact; (2) the injury is "fairly traceable" to the alleged action of the defendant; and (3) the injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Each of these requirements is an "indispensable part" of a plaintiff's case, and the plaintiff bears the burden of proving each of them "with the manner and degree of evidence required at the successive stages of the litigation." *Id*. at 561. At the pleading stage, the plaintiff must prove each element of standing through the factual allegations raised in the complaint. *Id*.

Even accepting all of the allegations in the complaint as true, none of the three Plaintiffs have standing to invoke this Court's Article III power. With respect to Plaintiffs' first claim—

challenging Ohio's restrictions on the amount of wine an individual may transport into the state—Plaintiffs fail to establish any of the three elements of standing. With respect to Plaintiffs' second claim—challenging Ohio's prohibition on direct shipments of wine by out-of-state retailers—every Plaintiff fails to establish the elements of causality and redressability. Only one Plaintiff, Block, alleges an injury in fact. That alleged injury is not traceable to any alleged action by any of the Defendants. In fact, *Plaintiffs do not even allege any actions or omissions by the Defendants*. Therefore, the requisite causal connection between Block's alleged injury and the Defendants' alleged action is absent. The essential element of redressability is also absent. A favorable decision rendered against Defendants would, at most, invalidate the more permissive revisions of Ohio's liquor control laws, leaving in tact a more restrictive regime that would not serve Plaintiffs' objectives.

The absence of any one of the three essential elements of standing is fatal to a plaintiff's case. *Lujan*, 504 U.S. at 561. The fact that all three elements are absent from Plaintiffs' first claim and two of the three elements are missing from the second claim only further highlights the deficiency of Plaintiffs' complaint. Plaintiffs failed to properly invoke the jurisdiction of this Court, and their case should be dismissed for lack of standing.

1. Block's unsuccessful efforts to complete wine purchases from out-of-state retailers are the only concrete injury alleged in the complaint.

With one exception, Plaintiffs' complaint fails to establish any injury in fact. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560). "For an injury to be 'particularized' it 'must affect that plaintiff in a personal and individual way.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560, n. 1). "A 'concrete injury' must

be '*de facto*'; that is, it must actually exist." *Spokeo*, 136 S. Ct. at 1549. A hypothetical or conjectural injury is not concrete and does not establish standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103. Relatedly, an allegation of a "possible future injury" does not satisfy the requirements for standing under Article III. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). "A threatened injury must be certainly impending to constitute an injury in fact." *Id*. (internal quotations omitted).

a. Plaintiffs fail to allege any injury in fact with respect to their first claim.

With respect to Plaintiffs' claim challenging Ohio's limitations on the amount of wine an individual can transport into the State, none of the Plaintiffs allege a particular, concrete injury. House of Glunz does not allege any actual or planned attempt to have an individual transport more than 4.5 liters of wine into Ohio. (*See generally*, Compl., Doc. 1, PageID # 1-11.) Block and Miller both state their desires to travel to other states and personally transport more than 4.5 liters of wine back to Ohio, and allege that they would act on these desires if Ohio law permitted them to do so. (*Id.* at PageID # 2-3 & 7, ¶¶ 4-5, 26.)

Due to the requirement that an injury be concrete and particularized, plaintiffs lack standing in cases where the alleged injury is a frustration of the plaintiff's future intentions, absent some concrete plan to carry out those intentions. *See Lujan*, 504 U.S. at 564. For example, in *Lujan*, the Supreme Court found that conservation group members' stated intentions to visit particular foreign nations and observe particular endangered species in the future were insufficient to establish that the members suffered a concrete injury as a result of a regulation that allegedly threatened endangered species in foreign nations. *Id*. The Court determined that, "[s]uch 'some day' intentions -- without any description of concrete plans, or indeed even any specification of *when* the some day will be -- do not support a finding of the 'actual or imminent' injury that our cases

require." *Id*. at 564; *see also Stefanovic v. Univ. of Tenn.*, 1999 U.S. App. LEXIS 5978, at *11 (6th Cir. March 30, 1999) (a plaintiff's stated intention to apply for employment at a university but for the university's affirmative action program was "too speculative and remote" to constitute an actual injury); *Tenn. Republican Party v. SEC*, 863 F.3d 507, 520 (6th Cir. 2017) (allegation that a political contribution rule would chill future donations to a political party was insufficient to establish imminent injury).

Block's and Miller's hypothetical future plans lack any indicia of the concreteness or particularity required to establish an injury in fact. They do not indicate how, when, or where they would purchase the wine. (Compl., Doc. 1, PageID # 2-3 & 7, ¶¶ 4-5, 26.) In fact, their plans are even *less* specific than the future intentions of the plaintiffs in *Lujan* and *Stefanovic*. In *Lujan*, the plaintiff class members identified which specific countries they intended to visit and which particular endangered species they wished to observe. *Lujan*, 504 U.S. at 563-564. In *Stefanovic*, the plaintiff identified a specific university to which he intended to apply for employment. *Stefanovic*, 1999 U.S. App. LEXIS 5978 at *11. In both cases, the court found the intentions too remote and speculative to constitute an injury in fact. Accordingly, Block's and Miller's less detailed plans fail to establish an injury in fact, and Plaintiffs' first claim should be dismissed.

b. Block's unsuccessful attempt to purchase wine from out-of-state retailers is the only alleged injury in fact with respect to Plaintiffs' second claim.

With respect to Plaintiffs' second claim challenging Ohio's restriction on direct shipments of wine to consumers, only Block sufficiently alleges an injury in fact. Block alleges that he actually attempted to order wine for shipment to his home from out-of-state retailers, but his orders could not be completed because they were prohibited by Ohio law. (Compl., Doc. 1, at PageID # 6, ¶ 24.) Because he alleges the disruption of actual, concrete attempts to purchase wine from out-

of-state, Block sufficiently establishes an injury in fact. Miller, on the other hand, does not. Miller merely alleges that he desires to purchase wines from out-of-state retailers for shipment to his home. (*Id.* at PageID # 6-7, ¶ 25.) Unlike Block, Miller does not allege that he made any actual purchase attempts that were thwarted. (*Id.*) Instead, he alleges that he "wants the opportunity" to make such purchases. (*Id.*) A desire for future opportunities, absent any concrete plan, is insufficient to establish an injury in fact.

House of Glunz also fails to establish an injury in fact with respect to Plaintiffs' second claim. House of Glunz alleges that it desires to directly sell and ship wine to consumers in Ohio, but is prevented from doing so because it cannot obtain a proper permit under Ohio law. (*Id.* at PageID # 3, 5, & 8, ¶¶ 6, 14, 15, 37.) It insists that it would obtain such a permit if one were available. (*Id.* at PageID # 8-9, ¶¶ 38-39.) Notably, however, the complaint is devoid of any allegation that House of Glunz made any actual effort to obtain such a permit. (*See generally,* Compl., Doc. 1, PageID # 1-11.)

Generally, a plaintiff challenging the constitutionality of a permit scheme must actually apply for the permit in order to establish an injury in fact.[4] *See*, *e.g.*, *Miller v. City of Wickliffe*, 852 F.3d 497, 502, 506 (6th Cir. 2017) (holding that a nightclub lacked standing to challenge a city's nightclub permit ordinance when the nightclub never applied for a permit in the first place); *Libertarian Party v. Cuomo*, 2020 U.S. App. LEXIS 25323 at *26 (2d Cir. Aug. 11, 2020) (holding that plaintiffs who failed to apply for a gun license lacked standing to challenge a state's firearm licensing scheme). However, plaintiffs are not necessarily required to apply for a permit in order

[4] This is generally not a requirement in cases involving challenges to a permitting scheme on First Amendment free speech grounds, if the scheme allows administrative officials to exercise "unbridled discretion to license speech." *See*, *e.g.*, *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763-68 (1988)

to obtain standing if the permit "would not have been granted" under existing law. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 944 (1982).

In the complaint, House of Glunz focuses exclusively on its inability to obtain a C-2 permit, which allows for the direct shipment of wine to Ohio consumers. The C-2 permit is available only to retailers with a physical presence in Ohio, which renders the permit unavailable to House of Glunz. However, the C-2 permit is not the only Ohio liquor permit that allows for direct shipment of wine to Ohio consumers. The S permit is available to certain out-of-state retailers and allows those retailers to ship directly to Ohio consumers. Ohio Rev. Code § 4303.232. This is precisely what House of Glunz wishes to do. Yet, House of Glunz did not attempt to apply for an S permit or even make any effort to see if it would qualify for such a permit. Plaitniffs' complaint simply sidesteps the S permit altogether. This sidestepping cannot erase the fact that House of Glunz failed to make a bare-minimum effort to obtain a permit for which they may be eligible. Due to this failure, House of Glunz cannot establish any injury in fact. Block's thwarted attempt to purchase wine from out-of-state retailers for delivery to his home is the only concrete injury alleged in the complaint.

2. Block's injury cannot be fairly traced to the conduct of any Defendants, because the complaint does not allege any conduct by any Defendant.

Block's alleged injury is not enough to save Plaintiffs' case. To satisfy the second requirement of Article III standing, "[t]he plaintiff must show 'a fairly traceable connection between the plaintiff's injury and the complained-of-conduct of the defendant.'" *Bucholz v. Tanick*, 946 F.3d 855, 866 (6th Cir. 2020) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998)). This is accomplished by showing "the asserted injury was the consequence of the defendants' actions." *Warth v. Seldin*, 422 U.S. 490, 505 (1975). The allegations in the complaint do not allege any causal connection between Block's unsuccessful attempts to purchase

wine and any action by any of the Defendants. There is no indication in the complaint that any Defendant interfered with Block's purchases. Thus, Block's allegations fail to meet the essential requirement of traceability. In fact, the complaint does not allege *any* act or omission by any of the Defendants. Therefore, to the extent that the Court finds that Plaintiffs alleged any further concrete injuries, those injuries also cannot be fairly traced to any action by any Defendant. Plaintiffs' complaint should be dismissed accordingly.

3. Any alleged injury will not be redressed by a favorable decision in this case, because Ohio law mandates a *more* restrictive liquor control regime in the event that the current restrictions are found unconstitutional.

Plaintiffs also fail to establish the third essential element of standing—redressability. Even if a plaintiff alleges a concrete injury fairly traceable to the defendant's actions, the plaintiff must also show "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). Plaintiffs ask the Court to declare unconstitutional Ohio Rev. Code §§ 4301.58(B), 4301.60 and 4303.25 (which generally prohibit the direct shipment of wine by out-of-state retailers) as well as Ohio Rev. Code § 4301.20 (which limits the amount of wine an individual can transport into Ohio). (Compl., Doc. 1, PageID # 9, Prayer for Relief, ¶¶ A-B.) Plaintiffs further request an injunction prohibiting Defendants from enforcing the challenged laws and allowing unrestricted transport and shipment of wine into the Sate. (*Id.* at Prayer for Relief, ¶¶ C-D.) However, the Ohio General Assembly has already established the proper remedy in the event that the existing restrictions are found unconstitutional, and that remedy is not the more permissive regime the Plaintiffs seek.

When a court finds that a state law violates the dormant Commerce Clause by discriminating unfairly between in-state and out-of-state interests, the violation may be cured either by "leveling up" and providing the out-of-state interests with the more favorable treatment

previously reserved for in-state actors or by "leveling down" and providing the in-state actors with the less advantageous treatment previously accorded to out-of-state actors. *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1806 (2015) ("Whenever government impermissibly treats like cases differently, it can cure the violation by either 'leveling up' or 'leveling down.'").

Recently, the Sixth Circuit Court of Appeals considered a dormant Commerce Clause challenge to a Michigan law that allowed in-state retailers to directly ship alcohol to consumers, but did not allow out-of-state retailers to do the same. *Lebamoff Enters. v. Whitmer*, 956 F.3d 863 (6th Cir. 2020). The court determined that, if the plaintiff prevailed, the proper remedy would need to consider the intent of the Michigan legislature. *Id*. at 876. The court noted that the Michigan legislature expressed a preference for severing any unconstitutional provisions and leaving the remaining laws intact, as well as a preference for maintaining "strong, stable, and effective regulation" by ensuring that beer and wine sold at retail in Michigan passed through the three-tier system. *Id*. Accordingly, the court indicated that the proper remedy to plaintiff's alleged injury, had plaintiff prevailed, would result in more restrictive laws for in-state retailers rather than more permissive laws for out-of-state retailers. *Id*. at 876-77.

Like the Michigan legislature, the Ohio General Assembly has explicitly stated a preference for severing any invalid portions of the Ohio Revised Code and leaving as much of the law intact as possible. Ohio Rev. Code § 1.50. Specifically, the Ohio Revised Code provides:

> If any provisions of a section of the Revised Code or the application thereof to any person or circumstance 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.

Ohio Rev. Code § 1.50.

Furthermore, Ohio's liquor control laws are expansive and create a comprehensive scheme

for regulating, limiting, and controlling the transport and sale of liquor in the state. Ohio Rev. Code Chapter 4301 and 4303. The permitting scheme that Plaintiffs challenge allow permit holders to engage in activity—the transport and sale of wine—that would otherwise be prohibited by the liquor control laws. *See e.g.* Ohio Rev. Code § 4301.58 (prohibiting the manufacture and retail sale of alcohol without a permit). Thus, if the Court finds part of the permitting scheme unconstitutional, the proper remedy, in accordance with the clear intent of the Ohio General Assembly, would be to further restrict the activity of in-state actors, not to eviscerate the established control system and introduce a free-for-all.

Additionally, the provision that limits the amount of wine an individual may transport into the state, Ohio Rev. Code § 4301.20(L), is part of a section that lists *exemptions* from the generally more restrictive liquor control scheme. *See* Ohio Rev. Code § 4301.20 ("This chapter and Chapter 4303. of the Revised Code do not prevent the following…"). Therefore, if the Court invalidates this provision, the remedy, in accordance with Ohio Rev. Code § 1.50, is to eliminate the relevant exemptions. Thus, instead of being able to transport only 4.5 liters of wine into Ohio at a given time, Block and Miller will not be able to transport *any* wine. Ultimately, the available legal remedies will not redress any of the Plaintiffs' alleged injuries.

Insofar as Plaintiffs have failed to establish two of the three essential elements of standing, they have failed to meet their burden for invoking the jurisdiction and authority of this Court under Article III. Their complaint should be dismissed accordingly.

B. Superintendent Canepa, Director Stickrath, and Chair Pryce are immune from suit under the Eleventh Amendment of the Constitution.

In addition to lacking jurisdiction over all Defendants due to Plaintiffs' failure to establish standing, the Court also lacks jurisdiction over Superintendent Canepa, Director Stickrath, and Chair Pryce due to the state sovereign immunity provision in the Eleventh Amendment to the

United States Constitution. Under the Eleventh Amendment, federal courts lack jurisdiction to hear suits by private citizens against a State unless the State unequivocally consents to suit or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate state immunity. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990). This principle holds true regardless of the nature of the suit. *Pennhurst* at 100. Further, a suit against a state official in his or her official capacity is not a suit against the official; rather, it is a suit against the official's office. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (citing *Brandon v. Holt*, 469 U.S. 464, 471 (1985)). It is therefore no different than a suit against the State itself and is also barred by Eleventh Amendment immunity. *See Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 654 n.8 (6th Cir. 2007) (citing *Will*, 491 U.S. at 71).

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

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

Id. at 157 (emphasis added); *see also Floyd v. Cnty. of Kent*, 454 F. App'x. 493, 499 (6th Cir. 2012) (noting that, for the *Young* exception to apply, the state official sued "must have, by virtue of the office, some connection with the alleged unconstitutional act or conduct of which the plaintiff complains"); *Austin v. Kasich*, No. 2:12-cv-983, 2013 U.S. Dist. LEXIS 46059, at *8-9

(S.D. Ohio Mar. 29, 2013) ("[T]he Ex parte Young fiction does not apply unless the officer sued has 'some connection with the enforcement of the act.'").

Moreover, to overcome the State's Eleventh Amendment immunity, the *Young* standard "requires that the state official threaten or be about to commence proceedings[.]" *Brown v. Strickland*, No. 2:10-cv-166, 2010 U.S. Dist. LEXIS 63878, at *9 (S.D. Ohio June 28, 2010); s*ee also Kelley v. Metro. Cnty. Bd. of Educ*., 836 F.2d 986, 990 (6th Cir. 1987) (barring suit under Eleventh Amendment where state official defendants did not threaten to enforce any unconstitutional act). It is not sufficient that the state official have the general authority to enforce the law. *Russel v. Lundergan-Grimes*, 784 F.3d 1037, 1048 (6th Cir.2015). Instead, "[e]njoining a statewide official under *Young* based on his obligation to enforce a law is appropriate when there is a realistic possibility the official will take legal or administrative actions against the plaintiff's interests." *Id*.

All of the Defendants named in this case are state officials sued in their official capacities. Three of the four state Defendants have not taken or threatened legal or administrative action to enforce the prohibitions on shipments by out-of-state retailers (that do not have an S permit) or the limitations on the amount of wine that an individual may bring into the State. The Division of Liquor Control, under the Direction of Superintendent Canepa, does issue and deny liquor permits and enforce laws and regulations with respect to permit holders. Similarly, the Department of Public Safety, under the direction of Director Stickrath, does, when appropriate, conduct investigations and related law enforcement actions against suspected violators of Ohio liquor laws. Finally, the Liquor Control Commission, chaired by Chair Pryce, does cancel, suspend, and revoke permits due to violations of Ohio law, hear appeals from Division decisions, and promulgate administrative rules necessary to carry out the Ohio liquor control laws. However, neither the

Division, nor the Department, nor the Commission has taken or threatened any legal or administrative action to halt shipments by out-of-state retailers or prosecute out-of-state consumers for transporting more than 4.5 liters of wine into the State.[5] Therefore, Superintendent Canepa, Director Stickrath, and Chair Pryce are immune from this suit under the Eleventh Amendment, and should be dismissed from this case accordingly.

C. Plaintiffs fail to state a claim for relief under the dormant Commerce Clause.

In addition to the foregoing jurisdictional defects of Plaintiffs' complaint, Plaintiffs' complaint fails as a matter of law to state a claim upon which relief may be granted. Ohio's laws limiting the amount of wine that an individual may transport into the State and generally prohibiting direct shipments of wine by out-of-state retailers are a valid exercise of the State's power under the Twenty-First Amendment of the United States Constitution. The challenged provisions of Ohio law serve legitimate, non-protectionist interests of the State, including public health and safety measures. Because the challenged provisions are a valid exercise of power granted to the State by the Twenty-First Amendment, Plaintiffs' complaint fails to state a valid claim for relief and must be dismissed pursuant to FED. R. CIV. P. 12(b)(6).

1. The Twenty-First Amendment grants States broad power to regulate the distribution of alcohol within their borders, and State alcohol laws that can be justified as public health or safety measures do not violate the dormant Commerce Clause.

To determine whether Plaintiffs' complaint states a viable claim, the Court must consider the "accordion-like interplay of two provisions of the United States Constitution[:]" the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and the Twenty-First Amendment. *Lebamoff*, 956 F.3d at 869.

[5] Attorney General Yost has taken enforcement action under 27 U.S.C. § 122a to halt illegal direct shipments of wine and spiritous liquor to Ohio consumers. *See State ex rel. Yost v. Wine.com et al.*, 2:20-cv-3430 (S.D. Ohio).

"While the Commerce Clause grants Congress the power to eliminate state laws that discriminate against interstate commerce, the Twenty-First Amendment grants States the power to regulate commerce with respect to alcohol." *Id.* A review of the interplay between these two Constitutional provisions reveals that the challenged portions of Ohio's liquor control laws are a valid exercise of the State's powers under the Twenty-First Amendment and do not offend the Commerce Clause.

The Twenty-First Amendment repealed Prohibition and replaced it with a system of state control of alcohol. Pursuant to the Twenty-First Amendment, "The transportation or importation into any State … for delivery or us therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2. The Twenty-First Amendment grants states "broad power," *Granholm v. Heald*, 544 U.S. 460, 493 (2005), and "broad latitude to regulate the distribution of alcohol within their borders." *Lebamoff*, 956 F.3d at 869. The Ohio General Assembly enacted Ohio's three-tier system in accordance with this grant of authority. Today, most states utilize three-tier systems, which the Supreme Court has described as "'unquestionably legitimate.'" *Granholm*, 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)).

The Supreme Court has applied a two-step analysis for determining whether a state law regulating alcohol violates the Commerce Clause. The first step, as in any dormant Commerce Clause case, considers whether the challenged regulation discriminates against out-of-state goods or non-resident economic actors. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2461-62 (2019). The second step recognizes that the Twenty-First Amendment "was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens, [and therefore asks] whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate

nonprotectionist ground." *Id.* at 2474. Only "[w]here the predominant effect of a law is protectionism, not the protection of public health or safety," will a state law regulating alcohol be struck down as violating the dormant Commerce Clause. *Id.*

2. Applying the Supreme Court's two-part test, the Sixth Circuit recently upheld Michigan's similar statutory scheme limiting direct-to-consumer shipments of alcohol to in-state retailers.

This Court need not look any farther than the Sixth Circuit's recent decision in *Lebamoff* to conclude that the challenged Ohio liquor control laws are constitutional. In *Lebamoff*, the Sixth Circuit held that "The Twenty-first Amendment permits Michigan to treat in-state retailers (who operate within the three-tier system) differently than out-of-state retailers (who do not)[.]" *Lebamoff*, 956 F.3d at 867. Specifically, in considering a statutory scheme strikingly similar to the one under consideration in Count II of Plaintiffs' complaint, the court found that Michigan may limit direct-to-consumer alcohol deliveries to in-state retailers in accordance with its powers under the Twenty-First Amendment.

The *Lebamoff* court found Michigan's laws, which permit in-state, but not out-of-state, retailers to offer at home deliveries, to be based on legitimate, nonprotectionist grounds. The court reasoned that "Michigan's law promotes plenty of legitimate state interests, and any limits on a free market of alcohol distribution flow from the kinds of traditional regulations that characterize this market, not state protectionism." *Lebamoff*, 956 F.3d at 871. The court noted that States have legitimate interests in "'promoting temperance and controlling the distribution of [alcohol].'" *Id.* (quoting *North Dakota*, 495 U.S. at 433).

To promote these interests, "States have 'virtually complete control over whether to permit importation or sale of liquor and how to structure the[ir] liquor distribution system[s]." *Id.* (quoting *Granholm*, 544 U.S. at 488). Funneling sales of alcohol through a three-tier system is a common

and effective method chosen by states to promote temperance and otherwise control the distribution of alcohol. As explained by the Sixth Circuit, "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." *Id.* at 872.

The *Lebamoff* court observed that Michigan's three-tier system and the related prohibition on out-of-state direct deliveries serve legitimate health and safety interests such as allowing the State to perform inspections and enforce other regulations regarding advertisements and minimum pricing. Because the Court found Michigan's laws to promote public health and safety and serve legitimate, nonprotectionist interests, the Sixth Circuit held that the laws are a valid exercise of the state's powers under the Twenty-First Amendment and do not offend the dormant Commerce Clause.

3. The challenged provisions of the Ohio Liquor Control Act are a valid exercise of the State's power under the Twenty-First Amendment.

Pursuant to the two-part test set forth by *Tenn. Wine* and applied by the Sixth Circuit in *Lebamoff*, the laws that Plaintiffs challenge are a valid exercise of Ohio's power under the Twenty-First Amendment. Like the laws under consideration in *Lebamoff*, the laws that Plaintiffs challenge do not offend the Commerce Clause. For purposes of this Motion only, Defendants will assume that Plaintiffs can survive step one of *Tenn. Wine's* two-part test (*ie*. that Plaintiffs can overcome the hurdle of establishing that the challenged provisions have a discriminatory effect on interstate commerce).[6] However, Plaintiffs' complaint cannot, as a matter of law, survive step two of *Tenn.*

[6] While Defendants make this assumption for purposes of this Motion, Defendants question whether the challenged provisions discriminate against out-of-state goods or non-resident economic actors and expressly reserve the right to later argue that the provisions do not discriminate against interstate commerce. *See Lebamoff*, 956 F.3d at 870 (noting that "[A]ny notion of discrimination assumes a comparison of substantially similar entities" and questioning whether Michigan retailers may properly be compared to out-of-state retailers when "Michigan-

Wine's two-part test. Ohio's liquor control laws—including those limiting the amount of wine that an individual may transport into the State and generally prohibiting direct shipments by out-of-state retailers—serve legitimate, nonprotectionist interests.

The challenged laws are integral to maintaining Ohio's three-tier system and advancing the State's legitimate public health and safety interests, as well as the State's interest in the orderly collection of tax revenue. For various health and safety reasons, Ohio generally requires retailers to obtain the alcohol that they sell through the three-tier system and to be physically present in the state before the sale or delivery of alcohol can occur. This is a fundamental requirement of any three-tier system. The State is able to impose various health and safety measures due to the fact that alcohol sold in Ohio is generally funneled through the three-tier system.

For example, Ohio law authorizes the State to demand and analyze samples of wine from in-state retail permit holders. Ohio Adm. Code 4301:1-1-03(B)(1). The State is able to conduct inspections of the premises of in-state retail permit holders. Ohio Adm. Code 4301:1-1-12(A). The State is also able to regulate advertisements of in-state permit holders to ensure that such advertisements do not encourage or condone excessive use of alcoholic beverages. Ohio Adm. Code 4301:1-1-44. Additionally, the three-tier system enables the State to impose mandatory minimum pricing on the sale of wine. Ohio Adm. Code 4301:1-1-03(C). Ohio's mandatory markups on the price of wine reflect the State's policy and intent "to maintain effective control over the sale and distribution of wine..., to prevent abuses caused by the disorderly and unregulated sale of wine [and] prevent aggressive sales practices that improperly stimulate purchase and consumption, thereby endangering the state's efforts to promote responsible, and discourage

based retailers may purchase only from Michigan wholesalers and must operate within its three-tier system and comply with its other regulations.").

intemperate, consumption of alcoholic beverages[.]" *Id.* Thus, the challenged provisions have the predominant effect of protecting public health and safety, and are not merely intended as protectionist measures.

In addition to these health and safety interests, Ohio's three-tier system, and the challenged laws in particular, serve the State's legitimate interest in facilitating the proper collection of tax revenue. *See, e.g.*, Ohio Rev. Code § 4303.232 (requiring S permit holders to collect and pay taxes relating to the delivery of wine to a personal consumer and authorizing the State to refuse to renew the S permit of any entity that fails to do so); Ohio Rev. Code § 4303.33 (governing the filing of tax returns and the payment of taxes by permit holders). Permit holders are required to collect and remit proper taxes, and the State is authorized to revoke the permit of entities who fail to remit proper taxes. *See* Ohio Rev. Code § 4303.271(D)(2). Additionally, C-2 permit holders are required to purchase wine that they intend to sell to Ohio consumers only from manufacturers and distributors who hold a license issued by the State of Ohio, which also helps to facilitate the proper collection and remittance of tax revenue. Ohio Rev. Code § 4303.35; *see also generally Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 854 (7th Cir. 2000) (upholding Indiana's ban on direct deliveries from out-of-state retailers and finding that the law simply channeled all alcohol through in-state distributors to facilitate state taxation and regulation, "precisely" what the Twenty-First Amendment is for).

In sum, Ohio's laws limiting the amount of wine that an individual may transport into the State and generally prohibiting direct shipments of wine by out-of-state retailers serve legitimate, nonprotectionist interests. Therefore, they are a valid exercise of the state's power under the Twenty-First Amendment. They are essential to preserving Ohio's three-tier system, a system that the Supreme Court has described as "'unquestionably legitimate.'" *Granholm*, 544 U.S. at 489

(quoting *North Dakota*, 495 U.S. at 432. Because "[t]he Twenty-first Amendment permits [Ohio] to treat in-state retailers (who operate within the three-tier system) differently than out-of-state retailers (who do not)," *Lebamoff*, 956 F.3d at 867, Plaintiffs' Complaint fails as a matter of law to state a claim upon which relief may be granted.

IV. CONCLUSION

Because Plaintiffs' complaint is legally deficient in multiple respects, Defendants respectfully request that this Court dismiss Plaintiffs' complaint in its entirety. As a threshold matter, Plaintiffs lack standing to bring either of their claims in this Court. With respect to Plaintiffs' first claim—challenging Ohio's restrictions on the amount of wine an individual may transport into the state—Plaintiffs fail to establish any of the three essential elements of standing. With respect to Plaintiffs' second claim—challenging Ohio's prohibition on direct shipments of wine by out-of-state retailers—Plaintiffs fail to establish the elements of causality and redressability. The only injury alleged by Plaintiffs—the frustration of Block's attempt to purchase wine from an out-of-state retailer—is not alleged to have been caused by any of the Defendants. Furthermore, Plaintiffs also cannot demonstrate that their purported injury would be redressable in this action because the proper remedy, as expressed by the Ohio General Assembly, would be to further restrict, not expand, commerce in alcoholic beverages in the State.

In addition to failing to establish standing, Plaintiffs' complaint suffers from another procedural defect. Accepting the allegations in the complaint as true, Superintendent Canepa, Director Stickrath, and Chair Pryce are immune from suit in this Court pursuant to the doctrine of Eleventh Amendment immunity. Therefore, at a minimum, Superintendent Canepa, Director Stickrath, and Chair Pryce must be dismissed from this action.

Finally, irrespective of these procedural deficiencies, Plaintiffs fail to state a claim upon

which relief can be granted. Plaintiffs' claims that the challenged statutory provisions constitute unlawful economic protectionism prohibited by the dormant Commerce Clause fail as a matter of law. The Twenty-First Amendment empowers states to regulate the transportation and importation of liquor within their boundaries. Accordingly, federal courts have recognized that state liquor control laws, such as Ohio's, that are designed to promote health and safety rather than economic interests are not subject to invalidation under the dormant Commerce Clause. In light of these procedural and substantive deficiencies of Plaintiffs' complaint, Defendants respectfully request that the Court dismiss this case in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that the foregoing *Defendants' Motion to Dismiss* was filed electronically on September 21, 2020. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Trista M. Turley-Martin

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