No. 17-2495

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LEBAMOFF ENTERPRISES, INC.; JOSEPH DOUST; and IRWIN BERKLEY, Plaintiffs-Appellants, v. BRUCE RAUNER, LISA MADIGAN, CONSTANCE BEARD, and DONOVAN BORVAN, in their official capacities, Defendants-Appellees, and WINE AND SPIRITS DISTRIBUTORS OF ILLINOIS, Intervening Defendant-Appellee.	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 1:16-cv-08607 The Honorable SAMUEL DER-YEGHIAYAN, Judge Presiding.

BRIEF OF DEFENDANTS-APPELLEES

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JURISDICTIONAL STATEMENT

The jurisdictional statement of Plaintiffs-Appellants Lebamoff Enterprises, Inc., Joseph Doust, and Irwin Berkley ("Plaintiffs") is not complete and correct. Defendants-Appellees Bruce Rauner, Lisa Madigan, Constance Beard, and Donovan Borvan[1] ("Defendants") provide this statement as required by Circuit Rule 28(b).

Plaintiffs filed a complaint in the district court against Defendants under 42 U.S.C. § 1983, alleging violations of the Commerce Clause and the Privileges and Immunities Clause of the United States Constitution. R. 1-7 (A.12-18).[2] The district court subsequently allowed Intervening Defendant-Appellee Wine and Spirits Distributors of Illinois to intervene in the action. R. 82. The district court had jurisdiction over Plaintiffs' federal claims pursuant to 28 U.S.C. § 1331.

On June 8, 2017, the district court granted Defendants' motion to dismiss under Federal Rule of Civil Procedure ("Rule") 12(b)(6) and terminated the action. R. 112 (A.2). On June 19, 2017, Plaintiffs moved to alter the judgment under Rule 59(e). R. 121 (A.20). Because this motion was timely filed within the prescribed 28-day period, it tolled the time to appeal. *See* Fed. R. App. P. 4(a)(4)(A). The district

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[1] Donovan Borvan succeeded U-Jung Choe as Executive Director of the Illinois Liquor Control Commission and should therefore be substituted as a Defendant-Appellee pursuant to Federal Rule of Appellate Procedure 43(c).

[2] The electronic record on appeal is consecutively paginated (at the top of each page), *see* 7th Cir. Doc. No. 15-2, and thus is cited herein, *e.g.*, "R. 1." The Brief of Plaintiffs-Appellants is cited as "Appellants' Br. at ___," and the Appendix attached to that brief is cited as "A. ___."

court denied the Rule 59(e) motion on June 27, 2017. R. 136 (A.11). The district court never entered a separate judgment pursuant to Rule 58. *Id.*

On July 24, 2017, Plaintiffs filed a timely notice of appeal within 30 days of the district court's denial of the Rule 59(e) motion, *see* R. 137; 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A), and within 150 days from the entry of that order, *see* Fed. R. App. P. 4(a)(7). This Court has jurisdiction over the appeal from a final judgment pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether Plaintiffs' dormant Commerce Clause claim was properly dismissed for failure to state a claim, because *Granholm v. Heald*, 544 U.S. 460 (2005), foreclosed challenges to inherent aspects of the three-tier system and, alternatively, because sections 5/5-1(d) and 5/6-29.1(b) of the Illinois Liquor Control Act of 1934 do not discriminate against out-of-state retailers.

2. Whether Doust's Privileges and Immunities Clause claim was properly dismissed for failure to state a claim because Doust alleged no fundamental right or disparate treatment.

3. Whether the district court acted well within its discretion in denying Defendants' motion to amend the complaint because any amendment would have been futile.

STATEMENT OF THE CASE

Plaintiffs filed this action in the district court seeking, among other things, declaratory relief that sections 5/5-1(d) and 5/6-29.1(b) of the Illinois Liquor Control Act of 1934 ("Liquor Control Act" or "Act") were unconstitutional. R. 1-7 (A.12-18). Plaintiffs contended that these provisions, which govern the delivery and shipment of alcoholic liquors, violated the dormant Commerce Clause and the Privileges and Immunities Clause of the United States Constitution by discriminating against out-of-state retailers. *Id.* The district court dismissed the complaint in its entirety upon determining that these provisions were not discriminatory under Supreme Court precedent. R. 112 (A.2).

A. The Liquor Control Act

In Illinois, the manufacturing, sale, and distribution of alcoholic liquor is governed by a three-tier regulatory system, codified in the Liquor Control Act. *See* 235 ILCS 5/1-1 *et seq*. Illinois implemented this system to protect "the health, safety and welfare of the People of the State of Illinois" and to foster and promote "temperance in the consumption of alcoholic liquors . . . by sound and careful control and regulation of the manufacture, sale, and distribution of alcoholic liquors." *Id.* § 5/1-2; *see id.* § 5/6-1.5. To that end, subject to a few delineated exceptions, any person seeking to manufacture, transfer, deliver, or sell alcoholic liquor in Illinois must obtain a license issued by the Illinois Liquor Control Commission ("Commission") and comply with the three-tier regulatory scheme outlined in the Act. *Id.* § 5/2-1.

The first tier of this system governs manufacturers and producers, who are permitted to sell alcoholic liquors to licensed distributors and importing distributors. *Id.* § 5/5-1(a-1). At the second tier, distributors are allowed to purchase that alcoholic liquor wholesale, store it, and then sell it to licensed retailers. *Id.* § 5/5-1(b). And at the third tier, licensed retailers may purchase alcoholic liquors from licensed distributors and sell it to customers for use or consumption. *Id.* § 5/5-1(d).

To obtain a retail license, retailers must reside in Illinois, *id.* § 5/6-2, and may sell alcoholic liquors "only in the premises specified in the license," *id.* § 5/5-1(d). Retailers with "an off premise" license or "a combined on premise consumption and off premise" license, however, are permitted "to transfer, deliver, or ship alcoholic liquor to the purchaser for use or consumption." *Id.* Those deliveries must comply with all local laws, *id.*, and the retailers are responsible for implementing safeguards to ensure that individuals accepting delivery are at least 21 years old, *id.* § 5/6-20(b).

In 2008, the Illinois General Assembly enacted section 5/6-29.1(b) of the Act, which imposes two additional restrictions on retailers. *First*, it prohibits retailers from importing alcoholic liquors from a point outside the State. *Id.* § 5/6-29.1(b). *Second*, and relatedly, this provision prevents retailers from shipping alcoholic liquors to Illinois consumers from any point outside the State. *Id.* These restrictions are consistent with the three-tier system's purpose because section 5/6-29.1(b) ensures that alcoholic liquors enter the State through licensed manufacturers and distributors before reaching the consumer at a retail location. Only after alcoholic liquor has passed through this system may retailers ship or deliver it to consumers.

As support for these restrictions, the General Assembly found that selling alcoholic liquors from a point outside the State "through various direct marketing means, such as catalogs, newspapers, mailers, and the Internet, directly to residents of this State poses a serious threat to the State's efforts to prevent youths from accessing alcoholic liquor; to State revenue collections; and to the economy of this State." *Id.*; *see also id.* § 5/6-29.1(a) (additional findings).

In the same amendment, the General Assembly created an exception to this delivery regime that allowed in-state and out-of-state producers of wine to obtain a license that would allow them to ship directly to consumers in accordance with *Granholm*. *Id.* § 5/6-29. Before this amendment, the Act allowed a "holder of an alcoholic beverage license in a state which affords Illinois licensees or adult residents an equal reciprocal shipping privilege [to] ship . . . not more than 2 cases of wine . . . to any adult resident of this State." 235 ILCS 5/6-29 (2006). Although referenced in Plaintiffs' opening brief on appeal, *see* Appellants' Br. at 11, neither version of this provision is relevant to the outcome of this case, which challenges only sections 5-5/1(d) and 5/6-29.1(b) of the Act.

B. District Court Proceedings

In September 2016, Plaintiffs filed this action in the district court against Defendants, alleging that sections 5/5-1(d) and 5/6-29.1(b) of the Liquor Control Act violated the Commerce Clause and the Privileges and Immunities Clause of the United States Constitution. R. 1-7 (A.12-18). Plaintiffs sought a judgment declaring these provisions unconstitutional and an injunction "prohibiting Defendants from

enforcing those statutes and requiring them to allow out-of-state wine retailers to sell, ship, and deliver directly to consumers in Illinois." R. 6-7 (A.17-18).

The complaint contained the following allegations. Plaintiff Lebamoff Enterprises is an "Indiana corporation that operates 15 wine retail stores in Fort Wayne, Indiana," as well as a website. R. 2-3 (A.13-14). Over the course of its 55 years in business, it "developed an extensive base of loyal customers who trust it to recommend, obtain, supply, sell and deliver wine to them." *Id.* Customers requested that Lebamoff Enterprises "sell and ship wine to Illinois, . . . but [it was] unable to do so as a result of the Illinois ban." R. 3 (A.14). It previously handled wine deliveries and "intends to sell and ship wines directly to consumers in Illinois if the laws prohibiting such sales and shipments are removed or declared unconstitutional." *Id.*

Plaintiff Doust, the co-owner and operator of Lebamoff Enterprises, "is a professional wine consultant, advisor, and merchant who resides in and is a citizen of Indiana." R. 5 (A.16). Plaintiff Berkley is a regular purchaser of fine wine who "would purchase wine from out-of-state retailers and have those wines shipped to his residence in Illinois, if Illinois law permitted him to do so." R. 2 (A.13). Defendants included Illinois Governor Rauner, Illinois Attorney General Madigan, Commission Chairperson Beard, and former Commission Executive Director Choe, who was succeeded by Commission Executive Director Borvan. R. 3 (A.14).

Plaintiffs raised two claims based on these allegations. First, they asserted that the "statutory scheme discriminates against out-of-state wine retailers and provides economic advantages and protection to wine retailers in Illinois, in violation

of the Commerce Clause of the United States Constitution." R. 5 (A.16). Specifically, Plaintiffs claimed that the "laws of the State of Illinois treat interstate sales, shipment and delivery of wine by retailers differently and less favorably than intra-state sales, shipment and delivery of wine." *Id.* Lebamoff Enterprises further asserted that if it "were permitted to sell, ship and deliver its wine directly to consumers in the State of Illinois, it would comply with applicable laws and regulations concerning permits, licenses, labeling, reporting, proof of age, and payment of taxes." *Id.*

Second, Doust alleged that the "ban on wine sales and deliveries by out-of-state merchants denies [him] the privilege to engage in his occupation in the state upon the same terms as Illinois citizens, and therefore violates the Privileges and Immunities Clause in Article IV." R. 6 (A.17). Doust "wants to practice his profession as a wine merchant in Illinois by consulting with, obtaining wines for, and delivering wines to Illinois residents, but is prevented from doing so by Illinois law." *Id.*

In the district court, the parties agreed that there were no factual issues and that they did "not anticipate that a trial [would] be necessary." R. 22-23. Instead, they intended to resolve the claims on the pleadings. *Id.* To that end, Defendants filed a motion to dismiss both claims under Rule 12(b)(6) for failure to state a claim. R. 40. According to Defendants, Plaintiffs failed to "show that the Act discriminates against out-of-state retailers; rather, [it] requires that all retailers who wish to do business in Illinois must comply with Illinois' three-tier system," which is

constitutional under the Supreme Court's decision in *Granholm*. R. 44. Instead of suggesting discrimination, Defendants argued, the complaint reflected Plaintiffs' desire "to bypass Illinois' three-tier system and sell alcohol directly to consumers despite the fact that it (1) does not receive its alcohol from licensed in-state wholesalers and (2) does not have a license to sell liquor in Illinois." *Id.* Because no retailers, in-state or out-of-state, are allowed to bypass the three-tier system in this manner, Plaintiffs were seeking to undercut the system to receive preferential treatment. R. 41, 44.

As to the Privileges and Immunities Clause claim, Defendants contended that Doust likewise failed to show any discrimination. R. 48. Instead, Doust sought "to engage in the business in Illinois of selling alcoholic liquor at retail[ ] without holding a retail liquor license, something that the Act prohibits anyone, in-state or out-of-state, from doing." *Id.* Finally, Defendants contended that the claims against Rauner and Madigan should be dismissed "because they [were] not proper defendants for plaintiffs' constitutional challenge." R. 50. Wine and Spirits Distributors of Illinois intervened in the action and joined Defendants' motion to dismiss. R. 60, 82. Plaintiffs opposed the dismissal of the claims, but consented to dismissing Rauner and Madigan from the action. R. 84.

In June 2017, the district court dismissed Plaintiffs' claims. R. 112 (A.2). The court first concluded that the Commerce Clause claim "fail[ed] at the most basic starting point," as Plaintiffs could not "show that [the Act] provides for differential treatment of in-state and out-of-state economic interests." R. 115 (A.5). Instead, to

allow "Plaintiffs to operate outside the three-tier system in Illinois, while in-state-retailers diligently operate within the regulatory system . . . , would actually provide Out-of-State Plaintiffs with an unfair advantage over the in-state retailers rather than remove any self-perceived disadvantage to Plaintiffs." R. 117 (A.7). In short, Plaintiffs sought "to foster unfair advantages in commerce, which is ironically contrary to the Commerce Clause." *Id.* And regarding the Privileges and Immunities Clause claim, the district court noted that Doust had not identified any interest that would trigger the clause's protections or, alternatively, any disparate treatment. R. 119 (A.9).

Plaintiffs moved to alter the judgment, reopen the case, and obtain leave to file an amended complaint. R. 121 (A.20). They attached to the motion a proposed first amended complaint, which purported to clarify that Doust was "being denied a license to sell and deliver wine into Illinois upon the same terms and subject to the same regulations as in-state residents, and that he intended to comply with Illinois alcoholic beverage laws, not evade them." R. 132. The district court denied the motion, concluding that "Plaintiffs have not shown or even argued that the court erred in dismissing the instant action" and that the request was "untimely," as the action had been terminated. R. 136 (A.11). It also held that "[t]he record also reflects that any attempt by Plaintiffs at amending the complaint would be futile." *Id.* Plaintiffs appealed. R. 137.

SUMMARY OF ARGUMENT

In Illinois, alcoholic liquor must pass through a three-tier regulatory system before being sold to consumers at retail. As part of this system, licensed retailers purchase alcoholic liquor from licensed in-state distributors. And with the appropriate license, retailers may sell and ship that liquor to consumers pursuant to sections 5/5-1(d) and 5/6-29.1(b) of the Liquor Control Act. Under the guise of making a narrow challenge to these shipping regulations, Plaintiffs seek to create a broad exception to Illinois' regulatory scheme that would allow out-of-state retailers to bypass entirely the three-tier system and ship unregulated alcoholic liquor from their inventory in Indiana directly to Illinois consumers. This Court should reject their efforts to secure preferential treatment for out-of-state retailers and affirm the judgment of the district court.

The district court's decision that Plaintiffs failed to state a claim under the dormant Commerce Clause was correct for several independent reasons. To begin, this claim was foreclosed by the Supreme Court's decision in *Granholm*. Because the relief Plaintiffs sought—to ship alcoholic liquor directly to Illinois consumers—would disrupt the basic functioning of the three-tier system, it is best construed as a direct challenge to the system's validity. As a result, this claim runs headlong into *Granholm*'s affirmation that three-tier regulatory systems are "unquestionably legitimate." 544 U.S. at 489 (internal quotation marks omitted). Plaintiffs' allegations also fell short because sections 5/5-1(d) and 5/6-29.1(b) of the Act do not discriminate against out-of-state retailers. To the contrary, as section 5/6-29.1(b)'s

text makes clear, these importation and delivery restrictions apply to all retailers, irrespective of their location. Finally, Plaintiffs' claim was fundamentally distinct from those raised in *Granholm* because they did not allege discrimination against any products or producers.

The district court also properly decided that Doust failed to state a claim under the Privileges and Immunities Clause for many of these same reasons. In particular, he alleged no violation of a fundamental right or the existence of disparate treatment. Nor did the district court abuse its discretion in concluding that amending the complaint would have been futile. Plaintiffs, who do not challenge the futility ruling on appeal, incorrectly contend that they were entitled to an opportunity to amend their complaint before the district court closed the case. As this Court has made clear, however, district courts may deny post-judgment motions to amend where, as here, the proposed amendment would be futile.

ARGUMENT

I. In This Case, The Standards Of Review Are *De Novo* And Abuse Of Discretion.

This Court reviews *de novo* a district court's order granting a motion to dismiss under Rule 12(b)(6) for failure to state a claim. *Kubiak v. City of Chi.*, 810 F.3d 476, 480 (7th Cir. 2016). On *de novo* review, this Court applies the same legal and procedural standards that the district court would in deciding whether a claim should have been dismissed, *see Santiago v. Walls*, 599 F.3d 749, 756 (7th Cir. 2010), and may affirm the action's dismissal on any ground supported by the record and law, *see Hernandez v. Cook County Sheriff's Office*, 634 F.3d 906, 912 (7th Cir. 2011).

Pursuant to Rule 12(b)(6), a court must dismiss any portion of the complaint that fails to state a claim upon which relief can be granted. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Rule 8(a)(2) requires that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). It must give defendants fair notice of the claim and the grounds on which it rests, pleading facts that set forth a plausible, not simply speculative, right to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

This Court applies the abuse of discretion standard when reviewing the denial of a Rule 59(e) motion, *see Obriecht v. Raemisch*, 517 F.3d 489, 492 (7th Cir. 2008), and a motion to amend the complaint, *see Hall v. Norfolk So. Ry. Co.*, 469 F.3d 590, 594 (7th Cir. 2006). Under the abuse of discretion standard, it "will not reverse if [it] merely conclude[s] that [it] would have reached a different decision if asked to

consider the issue in the first instance; rather, the district court's decision must strike [it] as fundamentally wrong." *Id.* (internal quotation marks omitted).

II. The District Court Properly Dismissed Plaintiffs' Dormant Commerce Clause Claim.

A. The Twenty-First Amendment Permits States To Establish Three-Tier Systems That Regulate Evenhandedly.

This appeal involves the intersection of the dormant Commerce Clause, which prohibits state discrimination against interstate commerce, and the Twenty-first Amendment, which "grants the States virtually complete control" over the structure of their liquor distribution systems. *Granholm*, 544 U.S. at 488 (internal quotation marks omitted). As to the latter, section two of the Twenty-first Amendment vests broad authority in the States: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. In accordance with that authority, States "have the power to . . . prevent the unlawful diversion of liquor into their regulated intrastate markets." *North Dakota v. United States*, 495 U.S. 423, 431 (1990). This includes "funnel[ing] sales through the three-tier system," which the Supreme Court has recognized is "'unquestionably legitimate.'" *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 432).

Nevertheless, the Twenty-first Amendment "did not immunize state alcohol laws from challenge under other parts of the Constitution." *Ind. Petroleum Marketers & Convenience Store Ass'n v. Cook*, 808 F.3d 318, 321 (7th Cir. 2015)

(citing *Granholm*, 544 U.S. at 484-88). For instance, as relevant here, "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Granholm*, 544 U.S. at 487. The dormant Commerce Clause typically precludes states from "mandat[ing] differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* at 472. This limitation is "essential" because the "mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States." *Id.*

When facing a Commerce Clause challenge to a state liquor regulation, however, courts consider the Twenty-first Amendment and the dormant Commerce Clause each "in light of the other and in the context of the issues and interests at stake in any concrete case." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 584 (1986) (internal quotation marks omitted). This is so because the Twenty-first Amendment "limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996); *see North Dakota*, 495 U.S. at 433 ("Given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly."); *Monarch Beverage Co., Inc. v. Cook*, 861 F.3d 678, 686 (7th Cir. 2017) (Easterbrook, J., concurring) ("State limits on the extent of the competition thus have a long pedigree, and regulation of the liquor industry receives an additional boost from § 2 of the Twenty-First Amendment.").

Courts generally engage in a multi-step process to resolve these challenges, the first of which is to determine whether the regulation discriminates against interstate commerce. *See Lebamoff Enters., Inc. v. Huskey*, 666 F.3d 455, 460 (7th Cir. 2012). A state law is discriminatory when it "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests." *Granholm*, 544 U.S. at 487. For example, the statutes in *Granholm* were discriminatory because they created an exception to the three-tier system for in-state producers, allowing them to ship their products directly to consumers, whereas out-of-state producers were required to go through the three-tier system. *Id.* at 473-74. A state law is constitutional, however, when it "treat[s] liquor produced out of state the same as its domestic equivalent," *id.* at 489, or when it is part of "an effective and uniform system for controlling liquor by regulating its transportation, importation, and use," *id.* at 484-85.

If a court determines that a law directly discriminates against out-of-state goods or interests, it then asks "whether the Twenty-first Amendment blocks the challenge." *Lebamoff Enters., Inc.*, 666 F.3d at 460; *see also Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 821 (5th Cir. 2010) (second step in cases that "facially discriminate against out-of-state interests" includes whether statutes at issue are "saved by Section 2 of the Twenty-first Amendment"). As part of this analysis, courts assess "whether [the] state regime advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm*, 544 U.S. at 489 (internal quotation marks omitted).

Statutes that have incidental effects on interstate commerce, by contrast, are subject to a lower, yet-to-be-defined, level of scrutiny. *See Lebamoff Enters., Inc.* 666 F.3d at 462 (explaining that courts continue to "wrestle with the continued applicability of the *Pike [v. Bruce Church, Inc.*, 397 U.S. 137 (1970),] standard to state laws that while they discriminate incidentally against interstate commerce are at the same time within the Twenty-first Amendment's gravitational field").

This Court, however, need not address that question here, as Plaintiffs have limited their case to direct discrimination, contending on appeal only that "Illinois directly discriminates against interstate commerce and favors local business interests by prohibiting out-of-state retailers from shipping wine to Illinois consumers." Appellants' Br. at 11. In fact, Plaintiffs expressly concede that this purported "deliberate" discrimination is "not the incidental byproduct of an antiquated liquor code." *Id.* As a result, they have forfeited any argument that the provisions at issue discriminate incidentally against out-of-state retailers. *See Gross v. Town of Cicero, Ill.*, 619 F.3d 697, 704-05 (7th Cir. 2010).

B. Plaintiffs' Commerce Clause Claim Is Foreclosed By *Granholm*.

As a threshold matter, this Court may affirm the district court's dismissal of Plaintiffs' dormant Commerce Clause claim on the independent ground that the Supreme Court's decision in *Granholm* has foreclosed it, without undertaking the analysis described above. As the district court correctly noted, "all alcohol sold in Illinois by a retailer directly to Illinois consumers must pass through the three-tier system." R. 116 (A.6). Plaintiffs' effort to ship wine to Illinois consumers without

having obtained it through that system is thus best understood as an attack on the validity of the system itself. *Id.* Because the Supreme Court in *Granholm* acknowledged that the three-tier scheme is "unquestionably legitimate," 544 U.S. at 489 (internal quotation marks omitted), this challenge is foreclosed by binding precedent, *see, e.g.*, *United States v. Jordan*, 485 F.3d 982, 984 (7th Cir. 2007) (precedent "remains valid until the Supreme Court overrules it").

In their complaint, Plaintiffs alleged that Lebamoff Enterprises and its co-owner Doust want to ship and deliver wine from their inventory in Indiana directly to consumers in Illinois. R. 4-5 (A.15-16). Under the three-tier system, however, retailers are required to purchase alcoholic liquors from Illinois licensed distributors, who have obtained that liquor from licensed manufacturers. 235 ILCS 5/5-1(a-1), (b), (d). As a corollary to that rule, retailers are prohibited from shipping alcoholic liquor to consumers from a point outside the State, as that alcoholic liquor necessarily would not have passed from licensed distributors to the retailer. *Id.* § 5/6-29.1(b).

Plaintiffs, who do not purchase their wine from licensed Illinois distributors, are thus seeking to establish a loophole in the three-tier system that would give out-of-state retailers the considerable benefit of bypassing the first and second tiers of the Illinois regulatory scheme. Such an exception would allow out-of-state retailers to ship alcoholic liquors directly to Illinois consumers, without the regulatory protections that Illinois has established pursuant to its authority under the Twenty-first Amendment. *See North Dakota*, 495 U.S. at 447 (Scalia, J. concurring) ("The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold

for use in the State be purchased from a licensed in-state wholesaler."); *Lebamoff Enters., Inc.*, 666 F.3d at 461 ("The state has decreed, as it is authorized to do by the Twenty-First Amendment, that any winery that wants to sell its wine through a retailer rather than directly to the consumer must sell the wine to a wholesaler, for resale to the retailer, for resale to the consumer.") (internal citation omitted).

This challenge to a foundational principle of the three-tier system is therefore foreclosed by *Granholm*'s affirmation of that system's legitimacy, which even the *Granholm* dissenters acknowledged. *See* 544 U.S. at 495 (Stevens, J., dissenting) ("Can it be doubted that a State might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?") (internal quotation marks omitted); *id.* at 517 (Thomas, J., dissenting) (referencing the "widespread, unquestioned acceptance of the three-tier system of liquor regulation"). Moreover, Plaintiffs' proposal runs afoul of one of *Granholm*'s basic premises, that exceptions to the three-tier importation scheme favoring one group's economic interests—here, out-of-state retailers—cannot be countenanced.

For that reason, at least three other circuits have rejected challenges to nearly identical statutes. Most recently, the Fifth Circuit upheld Texas regulations allowing in-state retailers to ship alcohol to local, in-state consumers, but prohibiting out-of-state retailers from doing the same. *See Wine Country Gift Baskets.com*, 612 F.3d at 811. That court drew a distinction between intrinsic aspects of the three-tier systems

that the Court recognized as legitimate in *Granholm* and discrimination that "is not inherent in the three-tier system itself." *Id.* at 818. It thus based its analysis on the premises that "Texas may have a three-tier system," that it may require retailers to "purchase their alcoholic beverages from Texas-licensed wholesalers," and that it may "prohibit out-of-state retailers from" making sales in Texas. *Id.* at 819.

The court concluded that the claim, which focused on importation of alcoholic liquors, "challenged an inherent aspect of [the three-tier] system." *Id.* at 821. Its decision was augmented by the fact that in Texas, in-state deliveries were limited to local customers. *Id.* at 820; *cf. McBurney v. Young*, 569 U.S. 221, 235 (2013) ("Virginia's FOIA law neither 'regulates' nor 'burdens' interstate commerce; rather, it merely provides a service to local citizens that would not otherwise be available at all."). In short, *Granholm* had "already worked out the answer to the analysis" when it asserted that the three-tier system was "unquestionably legitimate." *Wine Country Gift Baskets.com*, 612 F.3d at 821.

The Second Circuit reached the same conclusion. *See Arnold's Wines, Inc.*, 571 F.3d at 190. There, plaintiffs challenged a statute that allowed "New York-licensed retailers, but not out-of-state retailers, [to] deliver liquor directly to New York residents." *Id.* at 188. That court likewise treated this claim as "a frontal attack on the constitutionality of the three-tier system itself." *Id.* at 190. As a result, it concluded that the challenge was "directly foreclosed by the *Granholm* Court's express affirmation of the legality of the three-tier system." *Id.*

The Fourth Circuit similarly addressed amendments to Virginia's personal import exception that enabled "only retailers in Virginia [to] sell directly to consumers." *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) (Niemeyer, J., plurality op.) (emphasis omitted). That court rejected the view that "in-state retailers [were] favored over out-of-state retailers" under that regulatory scheme. *Id.* (emphasis omitted). As it explained, any "argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart" is challenging the three-tier system itself. *Id.* And a claim seeking to disturb the system "is foreclosed by the Twenty-first Amendment and the Supreme Court's decision in *Granholm*." *Id.*

For their part, Plaintiffs contend that this view is "untenable" for several reasons, none of which is persuasive. *First*, Plaintiffs attempt to cast *Granholm*'s declaration that the three-tier system is "unquestionably legitimate" as dictum lifted from "a plurality opinion in a case involving neither the Commerce Clause nor a discriminatory law, *North Dakota*." Appellants' Br. at 17. This is inaccurate. As the Second Circuit explained in rejecting this very argument, "the *Granholm* Court noted that the challenged regulations were discriminatory exceptions to, rather than integral parts of, the underlying three-tier system." *Arnold's Wines*, 571 F.3d at 191. Therefore, "[h]ad the three-tier system itself been unsustainable under the Twenty-first Amendment, the *Granholm* Court would have had no need to distinguish it from the impermissible regulations at issue." *Id.*; *see id.* at 197 (Calabresi, J., concurring)

("And the Court stated, clear as day, that the three-tier system itself is unquestionably legitimate.") (internal quotation marks omitted).

Moreover, the specific assertion that the three-tier system is unquestionably legitimate was not an offhand remark. Rather, it was made to address the States' concern that "any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system" itself. *Granholm*, 544 U.S. at 488. The Court settled the matter, reiterating that the "Twenty-first Amendment grants the States virtually complete control over . . . how to structure the liquor distribution system"; that the States may "funnel sales through the three-tier system"; and, ultimately, that "the three-tier system itself is unquestionably legitimate." *Id.* at 489 (internal quotation marks omitted). So long as the regulations at issue "treat liquor produced out of state the same as its domestic equivalent," the Court reasoned, they are "protected under the Twenty-first Amendment." *Id.*

As a final point on this issue, that *North Dakota* did not involve a dormant Commerce Clause claim does not alter the analysis. The Court there grappled with constitutional challenges to liquor regulations that involved the well-known tension between the Twenty-first Amendment and other constitutional provisions. *See North Dakota*, 495 U.S. at 426. Against that backdrop, it also included a substantive discussion of the three-tier system's legitimacy, which was undoubtedly relevant to the issues raised in *Granholm*. *See id.* at 433-34. Accordingly, Plaintiffs are wrong to suggest that *Granholm*'s reasoning can be disregarded as insignificant *dicta*. But

even if it were *dicta*, "it is compelling *dicta*." *Wine Country Gift Baskets.com*, 612 F.3d at 816; *see Arnold's Wines*, 571 F.3d at 191 ("[I]f dicta this be, it is of the most persuasive kind.") (internal quotation marks omitted).

Second, Plaintiffs assert that this "interpretation is at odds with *Bacchus* and *Healy*, both of which applied the nondiscrimination principle to laws completely within the three-tier system." Appellants' Br. at 17-18. Plaintiffs do not explain how the claims in those cases challenged inherent aspects of their respective three-tier systems, and that conclusion is not evident from either case. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 265 (1984), the Court held that a Hawaii regulation exempting "certain locally produced alcoholic beverages" from the Hawaii excise tax imposed on the sale of liquor at wholesale violated the dormant Commerce Clause. And in *Healy v. Beer Institute*, 491 U.S. 324, 326 (1989), the Court struck down a regulation requiring "out-of-state shippers of beer to affirm that their posted prices for products sold to Connecticut wholesalers are . . . no higher than the prices at which those products are sold in the bordering States." Neither of these regulations, which created discriminatory exceptions to the three-tier system, can fairly be described as inherent to that system.

Third, Plaintiffs argue that the Second Circuit's analysis "contradicts *Granholm* itself," as *Granholm* also held that "discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment." Appellants' Br. at 18 (internal quotation marks omitted). This too is inaccurate. For starters, neither the Second Circuit in *Arnold's Wines* nor Defendants here suggest that the

Twenty-first Amendment precludes review of state liquor regulations under the dormant Commerce Clause. *See Arnold's Wines*, 571 F.3d at 188-89. As discussed, *see* Section II.A, the Supreme Court and this Court have made clear that courts may entertain dormant Commerce Clause challenges to alcoholic liquor regulations that discriminate against out-of-state interests. Moreover, Plaintiffs' reliance on dormant Commerce Clause cases that do not invoke the Twenty-first Amendment lends itself to an incomplete analysis at best. *See* Appellants' Br. at 11-12. The district court here applied the appropriate standard. This Court should as well.

C. The District Court Properly Determined That The Liquor Control Act Does Not Discriminate Against Plaintiffs.

Alternatively, this Court, like the district court, should conclude that "Plaintiffs cannot show that [the Liquor Control Act] provides for differential treatment of in-state and out-of-state economic interests." R. 115 (A.5). Indeed, sections 5/5-1(d) and 5/6-29.1(b) of the Act do not discriminate against out-of-state retailers or their economic interests. *See Granholm*, 544 U.S. at 487. To the contrary, these provisions impose delivery and shipment restrictions on *all* retailers and the alcoholic liquors that they sell as part of "an effective and uniform system for controlling liquor." *Id.* at 484-85.

Plaintiffs ignore the equal reach of these provisions, instead relying on an incomplete summary of the law. Most significantly, Plaintiffs have packaged their claim around the following dichotomy: section 5/5-1(d), which governs licensed in-state retailers, allows shipment of alcoholic liquors to consumers in Illinois, whereas section 5/6-29.1(b), which governs out-of-state retailers, does not. Appellants' Br. at

3. This is an incorrect depiction of the Act, these provisions, and of section 5/6-29.1(b) in particular. To begin, the restrictions in section 5/6-29.1(b) are not limited to a specific subset of retailers. In fact, the statutory text makes clear that it applies evenhandedly to all retailers, not just those operating out of state:

> *Any person* manufacturing, distributing, or *selling* alcoholic liquor who knowingly ships or transports or causes the shipping or transportation of any alcoholic liquor from a point outside this State to a person in this State *who does not hold a manufacturer's, distributor's, importing distributor's, or non-resident dealer's license*, other than . . . a shipment authorized by Section 6-29, . . . is in violation of this Act.

235 ILCS 5/6-29.1(b) (emphasis added). Plaintiffs' argument, which frames this provision as applicable only to out-of-state retailers, therefore, fails from the start.

As a substantive matter, the restrictions in this provision (1) prohibit retailers, who by definition do not hold "a manufacturer's, distributer's, importing distributor's, or non-resident dealer's license," from importing alcoholic liquors from a point outside of the State, and (2) prevent retailers, who are included in the term "any person . . . selling alcoholic liquor," from shipping alcoholic liquors from a point outside of the State directly to Illinois consumers, who likewise do not hold "a manufacturer's, distributer's, importing distributor's, or non-resident dealer's license." *Id.* Nothing in section 5/6-29.1(b) limits its reach to out-of-state retailers, as Plaintiffs suggest. Instead, it regulates all retailers "on evenhanded terms." *Granholm*, 544 U.S. at 493; *see Baude v. Heath*, 538 F.3d 608, 611 (7th Cir. 2008) (no

direct discrimination because "[e]very rule applies to every winery, no matter where it is located").

Applying these restrictions to in-state retailers furthers the goals of the three-tier system in a meaningful way; their inclusion in section 5/6-29.1(b) was not an incidental byproduct of the statutory scheme. For instance, the first limitation, as applied to in-state retailers, ensures that all alcoholic liquors sold at retail are funneled through the three-tier system rather than directly imported from an out-of-state source. *See* 235 ILCS 5/6-29.1(b). For the system to operate as intended, licensed retailers may not import alcohol directly from unlicensed, out-of-state sources. *See id.* § 5/5-1(d); *see* 11 Ill. Admin. Code § 100.480 ("[N]o person shall import alcoholic liquor into this State for a non-personal or commercial use without first obtaining a license to import issued by the Commission, such as a manufacturer's, importing distributor's, railroad, airplane and foreign importer's license."). Instead, as section 5/6-29.1(b) reiterates, importation is limited to those who hold a "manufacturer's, distributor's, importing distributor's, or non-resident dealer's license." 235 ILCS § 5/6-29.1(b).

The delivery restriction, which prohibits retailers from shipping directly to consumers from a point outside the State, likewise contributes to the broader statutory scheme by ensuring that alcoholic liquors sold at retail pass through the three-tier system. *Id.* Most obviously, this restriction prevents alcoholic liquors from entering the State at retail via "various direct marketing means, such as catalogs, newspapers, mailers, and the Internet." *Id*. But it also limits an in-state retailer's

ability to ship alcoholic liquors from out-of-state inventory to fulfill an order that it receives in its store or on its website. *Id.* Take, for example, a nationwide or regional retail chain that has retail stores in both Chicago and Indianapolis. If a consumer at the Chicago location requests a bottle of wine that the retail chain only has available in its Indianapolis retail location, section 5/6-29.1(b) would prevent the Chicago retailer from shipping that wine from the store in Indianapolis either to the consumer directly or to its store for the consumer to collect there. As discussed, the Chicago retailer is only able to sell alcoholic liquor to consumers that has first passed through a licensed distributor.

There is likewise no discrimination when section 5/6-29.1(b) is viewed in conjunction with section 5/5-1(d). That provision confirms that even after the 2008 amendments, only retailers issued off-premise liquor licenses may "transfer, deliver, or ship alcoholic liquor to the purchaser for use or consumption." *Id.* § 5/5-1(d). It does not grant in-state retailers blanket authority to ship alcoholic liquor to consumers outside the three-tier system. And one reason, among others, that out-of-state retailers cannot benefit from section 5/5-1(d) is that they do not purchase their alcoholic liquor from licensed distributors. This is not discriminatory; it is a foundational tenet of the three-tier system itself. *See Arnold's Wines*, 571 F.3d at 191 ("The challenged regulations here are evenhanded and permissibly aimed at 'combat[ing] the perceived evils of an unrestricted traffic in liquor,' rather than accomplishing 'mere economic protectionism.'" (quoting *Bacchus,* 468 U.S. at 276)).

As the district court noted, "[t]o allow Out-of-State Plaintiffs to operate outside the three-tier system in Illinois, while in-state retailers diligently operate within the regulatory system . . . would actually provide Out-of-State Plaintiffs with an unfair advantage over the in-state retailer rather than remove any self-perceived disadvantage to Plaintiffs." R. 117 (A.7); *see Wine County Gift Baskets.com*, 612 F.3d at 820 ("The illogic is shown by the fact that the remedy being sought in this case . . . would grant out-of-state retailers dramatically greater rights than Texas ones."). This type of exception would create incentives for retailers to operate outside of the three-tier system, not remedy any purported discrimination within it.

The Second Circuit reached the same conclusion in upholding New York's regulatory scheme in *Arnold's Wines*. That court upheld the scheme as constitutional because it "treat[ed] in-state and out-of-state liquor evenhandedly under the state's three-tier system, and thus complie[d] with *Granholm*'s nondiscrimination principle." 571 F.3d at 191. In so concluding, the court relied upon the fact that "[a]lcohol sold by in-state retailers directly to consumers in New York has already passed through the first two tiers—producer and wholesaler—and been taxed and regulated accordingly." *Id.* Because this "regulatory scheme mandates that both in-state and out-of-state liquor pass through the same three-tier system before ultimate delivery to the consumer," it does not violate the nondiscrimination principle. *Id.*

Critically, Plaintiffs also have not alleged discrimination against out-of-state products or producers, as was the case in *Granholm* and *Bacchus*. The Supreme

Court has drawn a distinction between discrimination against out-of-state liquor, or on shipping requirements discriminating against that liquor, *see Healy,* 491 U.S. at 326, and the regulations inherent in the three-tier system itself. Based on that distinction, in *Granholm* it concluded that "[s]tate policies are protected [from a dormant Commerce Clause challenge] under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." 544 U.S. at 489; *see id.* at 472 ("The mere fact of nonresidence should not foreclose a *producer* in one State from access to markets in other States."); *id.* at 486 ("States may not give a discriminatory preference to their own *producers*.") (emphases added).

This distinction has also been echoed in circuit court decisions following *Granholm*. In *Wine Country Gift Baskets.com*, for example, the court emphasized that "*Granholm* prohibited discrimination against out-of-state *products* or *producers*," in reaching its conclusion that "Texas has not tripped over that bar by allowing in-state *retailer* deliveries." 612 F.3d at 820 (emphasis in original). Similarly, the Fourth Circuit stated that "the dormant Commerce Clause only prevents a State from enacting regulation that favors in-state producers and thus discriminates *against* interstate commerce." *Brooks*, 462 F.3d at 354 (Niemeyer, J., plurality op.) (emphasis in original); *see S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 810 (8th Cir. 2013) (*Granholm* "drew a bright line between the producer tier and the rest of the system").

And prior to *Granholm*, this Court employed similar principles in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000), rejecting a challenge to an

Indiana provision that regulated "direct shipments to consumers." This Court noted that regulations on importation are allowed "unless the state has used its power to impose discriminatory conditions on importation, one that favors Indiana sources of alcoholic beverages over sources in other states." *Id.* But because "Indiana insists that *every* drop of liquor pass through its three-tiered system and be subjected to taxation," wine "originating in California, France, Australia, or Indiana passes through the same three tiers and is subjected to the same taxes." *Id.* Therefore, there was no discrimination. *Id.*; *see Ind. Petroleum Marketers*, 808 F.3d at 322 ("[T]he dormant Commerce Clause isn't violated by a three-tier distribution system that treats all alcohol sales equivalently regardless of origin.").

Plaintiffs rejoin that *Granholm* did not limit the analysis to producers, *see* Appellants' Br. at 15, pointing to an isolated statement in the decision: "States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses," 544 U.S. at 472. But Plaintiffs here are retailers, not producers as in *Granholm* or shippers as in *Healy*. And more importantly, the Illinois statutory scheme is dissimilar from the Michigan and New York regulations struck down in *Granholm*.

The Michigan statute, for example, "allow[ed] in-state wineries to ship directly to consumers," but out-of-state wineries, "whether licensed or not, face[d] a complete ban on direct shipment." *Granholm*, 544 U.S. at 473-74. In that scheme, then, "out-of-state wine, but not all in-state wine," was required "to pass through an in-state wholesaler and retailer before reaching consumers." *Id.* at 474. The New York

statute also placed restrictions on out-of-state wineries that did not apply to in-state wineries, as "[i]n-state producers [were able to] ship directly to consumers from their wineries," but out-of-state wineries were required to "open a branch office and warehouse in New York" to become a licensed distributor. *Id.* Here, by contrast, all alcoholic liquor sold at retail in Illinois must pass through the three-tier system; there are no exceptions for in-state retailers to bypass that system.

Finally, Plaintiffs incorrectly assert that "most lower federal courts reviewing discriminatory state liquor laws have found no constitutional basis for differentiating among retailers based on whether they are affiliated with a winery, or for stripping traditional retail stores of their constitutional right to engage in interstate commerce free from discriminatory state regulations." Appellants' Br. at 14. As an initial matter, that ignores the decisions of the Second, Fourth, and Fifth Circuits on issues nearly indistinguishable from those that Plaintiffs raise here. In any event, the circuit court decisions that Plaintiffs rely on, *see Freeman v. Corzine*, 629 F.3d 146 (3d Cir. 2010), and *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994), are inapposite.

In *Freeman*, the court straightforwardly applied *Granholm* in striking down a regulatory system that "allow[ed] in-state, but not out-of-state, wineries to sell directly to consumers," as well as a regulation that enabled "in-state wineries to bypass wholesalers and sell directly to retailers." *Freeman*, 629 F.3d at 159-60. It also upheld a challenge to "New Jersey's ban on direct shipments of wine from any winery." *Id.* at 162. None of these issues is relevant here. And in *Cooper*, which predates *Granholm* by more than a decade, the Fifth Circuit addressed Texas' three-

year residency requirement for mixed beverage permits. *See* 11 F.3d at 555. Plaintiffs do not challenge any residency provisions here, focusing instead on the provisions regulating delivery. Moreover, as discussed, the Fifth Circuit issued a decision—*Wine Country Gift Baskets.com*—following *Granholm* that decided the very issue raised in this case and thus would control in that circuit.

In conclusion, Plaintiffs failed to state a dormant Commerce Clause claim because the provisions that they challenge do not discriminate against out-of-state retailers as a matter of law. But if this Court were to conclude that they stated a claim that sections 5/5-1(d) and 5/6-29.1(b) are discriminatory, Defendants agree that the case should be remanded for further proceedings on the State's regulatory interests. *See* Appellants' Br. at 13. And in any event, this Court should reject Plaintiffs' request to "require[e] [Defendants] to allow out-of-state wine retailers to sell, ship, and deliver directly to consumers in Illinois," R. 7 (A.18), as less intrusive remedies could resolve the purported discrimination, such as prohibiting any direct shipment from retailers to Illinois consumers.

III. The District Court Also Properly Dismissed The Privileges And Immunities Clause Claim.

Additionally, this Court should uphold the district court's dismissal of Doust's Privileges and Immunities Clause claim under Rule 12(b)(6). The district court correctly determined that "Plaintiffs have not identified any interest in their complaint that would trigger the protections of the Privileges and Immunities Clause" and, alternatively, they did "not indicate any disparate treatment." R. 119 (A.9). As with the dormant Commerce Clause claim, the district court explained,

"Plaintiffs' allegations indicate that Doust is seeking to deal directly with Illinois consumers without proceeding through the three-tier regulatory system in place to protect the public welfare." *Id.* The district court properly concluded that these allegations did not state a Privileges and Immunities Clause claim.

Under the Privileges and Immunities Clause, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. The object of the Clause "is to strongly constitute the citizens of the United States as one people, by placing the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *McBurney*, 569 U.S. at 226 (internal quotation marks and alterations omitted). That does not mean, however, that "'state citizenship or residency may never be used by a State to distinguish among persons.'" *Id.* (quoting *Baldwin v. Fish & Game Comm'n of Mont.,* 436 U.S. 371, 383 (1978)). In fact, the Supreme Court has "long held that the Privileges and Immunities Clause protects only those privileges and immunities that are 'fundamental.'" *Id.*; *see Baldwin*, 436 U.S. at 383 ("Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally.").

To state a Privileges and Immunities Clause claim, a plaintiff must allege the violation of a fundamental right, as well as disparate treatment related to that right. Doust failed to make sufficient allegations on either front. In terms of the purported fundamental right at issue here, Doust alleged that the Illinois statutory scheme

"denie[d] [him] the privilege to engage in his occupation in the state upon the same terms as Illinois citizens." R. 6 (A.17). Specifically, Doust sought to "practice his profession as a wine merchant in Illinois by consulting with, obtaining wines for, and delivering wines to Illinois residents." *Id.*

But selling alcoholic liquor is not a fundamental right. *See, e.g.*, *Monarch Beverage Co., Inc.*, 861 F.3d at 681 ("Indiana's prohibited-interest law . . . doesn't burden a fundamental right."); *Kelly v. City of Chi.*, 4 F.3d 509, 513 (7th Cir. 1993) ("Nobody in Illinois has an inherent property right to sell liquor."); *Brown v. City of Lake Geneva*, 919 F.2d 1299, 1302 (7th Cir. 1990) ("[A] liquor license does not rise to the level of a fundamental right, such that its denial is protected by equal protection principles."). This is also reflected in Illinois law: "The right to deal in intoxicating liquors is not an inherent right, but is always subject to the control of the State in the legitimate exercise of its police power." *Hornstein v. Ill. Liquor Control Comm'n*, 412 Ill. 365, 369 (1952). In fact, the Illinois Supreme Court has expressly held that this right is not "one of the privileges and immunities of citizens of the United States." *Id.* at 370 (internal quotation marks omitted).

Doust attempts to sidestep this precedent by framing the right to sell alcoholic liquors as a broader right to engage in his profession as a wine merchant, Appellants' Br. at 20, relying upon the proposition that "the Privileges and Immunities Clause protects the right of citizens to ply their trade, practice their occupation, or pursue a common calling," *McBurney*, 569 U.S. at 227 (internal quotation marks omitted). But Doust has not explained how being a wine merchant meaningfully differs from

selling wine at retail, an activity that this Court has determined is not a fundamental right. To the contrary, his allegations define a wine merchant as someone "who sells and ships wine to Illinois residents." R. 6 (A.17). And because Doust seeks to sell wine at retail to Illinois consumers, he must comply with the applicable regulatory framework.

Alternatively, this Court may affirm on the independent ground that Doust failed to allege disparate treatment. *See Swedenberg v. Kelly*, 358 F.3d 223, 229 (2d Cir. 2004), *rev'd on other grounds*, *Granholm*, 544 U.S. 460 (no violation of Privileges and Immunities Clause where "the statutory scheme operates without regard to residency and does not provide New York residents with advantages unavailable to nonresidents"). Doust's allegations—that the "ban on wine sales and deliveries by out-of-state merchants denies [him] the privilege to engage in his occupation in the state upon the same terms as Illinois citizens," R. 6 (A.17)—distort the nature of the evenhanded regulations here, which apply to all retailers.

As discussed, *see supra* Section II.C, the Liquor Control Act does not allow anyone, whether in-state or out-of-state, to evade the three-tier regulatory system by shipping alcoholic liquors to Illinois consumers from a point outside of the State or by engaging in this profession without the appropriate license. *See* 235 ILCS 5/5-1(d), 5/6-29.1(b). Because Doust can "do[ ] business in [Illinois] on terms of substantial equality with the citizens of [Illinois]," *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 280 (1985), this Court should conclude that he stated no claim under the Privileges and Immunities Clause.

IV. The District Court Acted Within Its Discretion In Denying Plaintiffs' Motion To Alter The Judgment And Amend The Complaint.

Finally, the district court did not abuse its discretion when it denied Plaintiffs' motion to alter the judgment and amend the complaint. After the district court granted Defendants' motion to dismiss and terminated the action, Plaintiffs filed a motion to alter the judgment, reopen the case, and grant leave to file an amended complaint. *See* R. 121 (A.20). Plaintiffs framed the amendments as a clarification of their initial position that "Doust (a nonresident) was in fact being denied a license to sell and deliver wine into Illinois upon the same terms and subject to the same regulations as in-state residents, and that he intended to comply with Illinois alcoholic beverage laws, not evade them." R. 132. The district court denied the motion on the grounds that any such amendment would be futile. R. 136 (A.11).

On appeal, Plaintiffs do not address the district court's futility ruling. *See* Appellants' Br. at 23-24. Consequently, they have forfeited any argument that the ruling was erroneous. *See Gross*, 619 F.3d at 704-05. Instead, Plaintiffs contend that under *Runnion v. Girl Scouts of Greater Chi. & N.W. Ind.*, 786 F.3d 510 (7th Cir. 2015), the district court erred by terminating the case before allowing them an opportunity to amend their complaint. *See* Appellants' Br. at 23. This understanding of the law, as well as its application here, is incorrect.

When a district court terminates a civil action on the same day that it grants a motion to dismiss, district courts "lack[ ] jurisdiction to entertain a motion for leave to amend the complaint unless the plaintiff also moves for relief from the judgment," as was done here. *See Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008) (internal

quotation marks omitted). Even when the motion is brought under Rule 59(e), courts employ the same "liberal standard for amending pleadings under Rule 15(a)(2)" that they would if the motion had been made before termination of the case. *Runnion*, 786 F.3d at 521. Under Rule 15(a)(2), a party may amend its complaint with the court's leave, which the "court should freely give . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). In other words, litigants are given the same opportunity to amend their complaint as those who file prior to the case's termination, so long as they file a concurrent motion for relief from judgment, as Plaintiffs did here.

In *Runnion*, this Court asserted that "[o]rdinarily, . . . a plaintiff whose original complaint has been dismissed under Rule 12(b)(6) should be given at least one opportunity to try to amend her complaint before the entire action is dismissed." 786 F.3d at 519. Nevertheless, it also reiterated that district courts may deny a motion to amend "[w]here it is clear that the defect cannot be corrected so that amendment is futile," among other reasons. *Id.* at 520. Therefore, even under *Runnion*, the district court appropriately undertook a futility analysis.

The record in this case further confirms the district court's decision to engage in this analysis. For one thing, Plaintiffs attached the proposed amended complaint to the motion, which allowed the court to assess whether the defect was corrected by the slight changes made to the allegations. *See* R. 123 (A.23); *Runnion*, 786 F.3d at 520. For another, the parties represented to the court that they intended for their claims to be resolved on the pleadings, as there were no principal factual issues. *See*

R. 22-23. To that end, the briefing focused on the discrimination analysis, as both parties believed that this issue would be dispositive.

As a final matter, forfeiture aside, the district court did not abuse its discretion in concluding that the amendment would be futile. It is well-established that a motion to amend a complaint is futile where the "amended complaint did not correct the deficiencies in the first," *Adams v. City of Indianapolis*, 742 F.3d 720, 734 (7th Cir. 2014), or "merely restate[d] the same facts using different language, or reasserts a claim previously determined," *Bower v. Jones*, 978 F.2d 1004, 1008 (7th Cir. 1992) (internal quotation marks omitted). Courts are thus not required to entertain an amendment if it still would fail "to state a valid theory of liability, or could not withstand a motion to dismiss." *Id.* (internal quotation marks omitted).

Here, Plaintiffs made modest changes to the allegations in their complaint, intended only to clarify that Lebamoff Enterprises "would obtain a license if one were available, and comply with the same rules concerning labeling, shipping, reporting, obtaining proof of age, and paying taxes as in-state retailers do." R. 127 (A.26). Those allegations, however, would not cure the central defects of the complaint. To begin, although Lebamoff Enterprises alleged that it would comply with the same rules as in-state retailers, it omitted from that list of rules any indication that it would purchase its alcohol from an Illinois licensed distributor or refrain from shipping from a point outside of the State. Those regulations, which apply to *all* retailers, are central components of the three-tier system that remained unaddressed in the proposed amendment. *See* R. 126-27 (A.25-26). Instead,

Lebamoff Enterprises doubled down on its request to "deliver and ship wine from its inventory [in Indiana] to consumers in Illinois." R. 126 (A.25). As in their original complaint, Plaintiffs sought to achieve a benefit for themselves that was not available even to in-state retailers.

The proposed amendment also did not cure the defects of Doust's Privileges and Immunities Clause claim. Like Lebamoff Enterprises, Doust alleged that he would obtain a license if it were available, but did not confirm that he would comply with the shipping regulations that apply to all retailers. R. 128 (A.27). Doust further failed to differentiate his claim as a wine merchant from that of a retailer, and provided no additional detail on the fundamental right requirement discussed above, *see supra* Section II. *See also Adams*, 742 F.3d at 734 ("The proposed second amended complaint was longer than the first, but the disparate-impact claims were again pleaded in wholly conclusory terms."); *Brunt v. Serv. Emps. Int'l Union*, 284 F.3d 715, 720 (7th Cir. 2002) ("We agree with the district court that even with these additional factual allegations, the complaint fails to support a claim."). And even if there were allegations of disparate treatment, Doust would still fail to overcome the presumption of validity of state regulatory schemes under the Twenty-first Amendment. *See supra* Section II.A.

In sum, the district court acted well within its discretion in assessing the merits of the proposed amended complaint and ultimately denying the motion to amend on grounds of futility. *See Hukic v. Aurora Loan Servs.*, 588 F.3d 420, 432 (7th Cir. 2009) ("District courts have broad discretion to deny leave to amend where

. . . the amendment would be futile.") (internal quotation marks omitted). This Court should not disturb that decision.

CONCLUSION

For the foregoing reasons, Defendants-Appellees Bruce Rauner, Lisa Madigan, Constance Beard, and Donovan Borvan request that this Court affirm the judgment of the district court.

Dated December 20, 2017

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I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2013, in 12-point Century Schoolbook font, and complies with Federal Rule of Appellate Procedure 32(a)(7)(A) in that the brief is 9,963 words.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on December 20, 2017, I electronically filed the foregoing Brief of Defendants-Appellees with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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