Katie Jacoy
Western Counsel

TO: Senate Business & Transportation Committee

FROM: Wine Institute

DATE: February 27, 2017

RE: **Opposition to SB 316**

Wine Institute is a public policy association representing 834 California wineries of all sizes. Given the positive impact a local wine industry can have on a state's economy, we understand the Oregon legislature's investment in the Oregon wine industry. However, we do not believe that Oregon should add another element to its already discriminatory wine tax scheme, making out-of-state wineries contribute to the benefit and expansion of Oregon wineries to their own detriment. We believe SB 316 and the entire wine tax scheme is a violation of the Commerce Clause. We, therefore, urge your opposition to SB 316.

SB 316 Exacerbates Discrimination Against Out-of-State Wineries

Oregon already has discriminatory laws in place that benefit Oregon wineries and economically harm out-of-state wineries. In 1977, when Oregon had about 10 wineries, a small winery tax exemption was enacted. This tax exemption has existed for 40 years and currently has no sunset date. Oregon wineries disproportionally benefit from this exemption, with the vast majority paying no privilege tax. In 1983, in addition to the existing wine privilege tax, a 2 cent per gallon tax on all wine was added. This funding is dedicated to the Oregon Wine Board (OWB), which markets and promotes only Oregon wine. Since the vast majority of Oregon wineries pay no privilege tax due to the exemption, about 70% of this funding for Oregon wine promotion is paid on out-of-state wine. Wine Institute opposes both of these existing discriminatory laws.

Small Winery Tax Exemption

Four decades ago, the Oregon legislature enacted a tax exemption on the first 40,000 gallons sold annually in Oregon from a US manufacturer producing less than 100,000 gallons (ORS 473.050(5)). The Oregon wineries disproportionally benefit from this tax exemption in comparison to out-of-state wineries. **The total revenue impact from the small winery exemption for 2015-2017 biennium is estimated to be $4.4 million or $2.2 million per year.** In 2015, the revenue impact from the exempt gallonage of Oregon wineries was $1,833,625.21, while the value of all out-of-state wineries exempt gallonage only amounted to $366,375. **83% of the value of this tax exemption benefitted Oregon wineries.** *(2017-2019 Tax Expenditure Report-Research Section DOR and DAS Chief Financial Office, 7.001 re ORS 473.050(5) Small Winery)*

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As Oregon's Tax Expenditure report notes, nearly all of Oregon's wineries qualify for the tax exemption. According to OLCC's spreadsheet "Gallons of Wine Removed from Bond or Imported into Oregon" there are 474 Oregon wineries. Of the 474 wineries, 450 Oregon wineries are eligible for the tax exemption (they produce less than 100,000 gallons). **428 Oregon wineries do not pay any Oregon wine excise because they produce less than 40,000 gallons of wine per year.**

There are 8,595 U.S. wineries located outside of Oregon. In 2015, 24 Oregon wineries (or winery groups) produced 100,000 gallons or more compared to 298 of out-of-state wineries. These wineries pay the Oregon excise tax on all sales in Oregon. This exemption discriminates against all wineries that produce 100,000 gallons or more, and disproportionally benefits Oregon wineries. *(See Wines & Vines Direct to Consumer report 2017 for the number US wineries.)*

The exemption has been in effect continuously for 40 years and has no sunset date. "It was enacted to help small Oregon wineries get established and allows these wineries enough profit to stay in business until they become large enough to compete with the established, high volume wineries." In 1977, when the exemption was enacted, there were approximately 10 licensed wineries in Oregon. Today, the stated number of Oregon wineries varies from 474 to 900 wineries, but even at the lower number this is phenomenal growth. *(2017-2019 Tax Expenditure Report-Research Section DOR and DAS Chief Financial Office, 7.001 re ORS 473.050(5) Small Winery)*

Moreover, volume is not the only measure of winery success – value must also be considered. The vast majority of wineries in the U.S. produce less than 40,000 gallons. The Limited Production wineries (less than 1,000 cases or 2,378 gallons) and the Very Small wineries (1,000 to 4,999 cases or 2,378 – 11,898 gallons) had the highest average price per bottle shipped directly to consumers. The average price per bottle shipped for Limited Production wines was $50.98 and for Very Small wineries was $55.52. Oregon wines had the second highest average bottle price of wine shipped out of a wine region at $38.09, exceeded only by Napa at $61.72. (See Wines & Vines Direct to Consumer report 2017.) In addition, Oregon wineries sell just under 40% of the wine sold in Oregon, which is comparable to Washington wineries in their home market.

Additional Privilege Tax for Oregon Wine Board

In 1983, the legislature enacted an additional 2 cents per gallon on all non-exempt wine sold in Oregon to provide funding to the Oregon Wine Board (OWB). Even though the OWB exists solely for the benefit of the Oregon wine industry, out-of-state wines sold in Oregon bear this additional 2 cents in tax. Out-of-state wine is forced to fund efforts to market competitors wine. **In 2015, the 2 cent tax on all wine sold (after the exemption discussed above) raised $300,850, only 27% of this funding was raised from the tax on Oregon wine ($81,892.10).** In 2015, $218,957.90 in tax on out-of-state wine went to the OWB to benefit Oregon wineries. This tax has been paid for 34 years and is **NOT** paid on exempt gallonage, so for years until an Oregon winery exceeded 40,000 gallons in sales in Oregon – no Oregon winery paid this tax to help fund their marketing board.

SB 316 Takes Money from Others to Fund Wine Marketing

The structure of this proposal gives the impression that Oregon wineries would be paying for this promotional activity. In reality, **only 30% of the wine privilege tax revenue raised was from Oregon wines in 2015; 70% was raised on out-of-state wine.**

In addition, since the bill dedicates a portion of an existing tax, at first blush, it appears that it wouldn't have much negative impact. In reality, this $1.5 million would reduce funds available to the State's General Fund. In a biennium when Oregon has a budget shortfall of $1.8 billion, the decision where to spend every dollar has significant impacts. This bill would permanently institute an almost 100% increase in the statutorily mandated funding for the OWB. This $1.5 million per year should be weighed against all proposed cuts to the State's General Fund and requests for additional money for existing or new programs. SB 316 would be yet another never-ending payment by out-of-state wineries to subsidize our competitors.

OWA/OWB Asking for Federal Excise Tax Relief

While OWA/OWB are asking for a $1.5 million handout from the state, they are also asking the Federal government for tax relief, along with all wine associations nationally. Legislation introduced by Sen. Ron Wyden would reduce federal excise taxes for every Oregon winery while also raising the ABV threshold that triggers higher wine excise tax rates. An Oregon Winegrowers Association document provides that the possible savings from the tax proposal would be:

SIZE OF WINERY	ANNUAL EXCISE TAX	WYDEN TAX PROPOSAL	SAVINGS
5k Case (11,890 gallons)	$2,021	$832	$1,189
20k Case (47,560 gallons)	$8,085	$3,329	$4,756
50k Case (118,900 gallons)	$37,223	$10,213	$27,010

The Federal Excise Tax bill has a good chance of passing this year. Oregon wineries should do as the rest of the wine industry is doing - wait for the benefit from the Federal tax savings and then reinvest the savings into our local industries.

SB 316 – Violates the Commerce Clause

There are different ways to make investments in Oregon's wine industry, some constitutional and others not. We believe SB 316, dedicating even more wine privilege tax to the OWB for promotion of Oregon wine violates the Commerce Clause. The purpose of the negative or dormant Commerce Clause is to create a national market. The US Supreme Court has struck down state laws that burden out-of-state

entities to give a benefit to in-state entities. SB 316 is yet another installment in a discriminatory tax scheme that, in effect, demands that out-of-state wineries contribute to the benefit and expansion of Oregon wineries to their own economic detriment.

SB 316 proposes to dedicate an additional $1.5 million dollars per year of the privilege tax collected on all wine sold in Oregon to the OWB. The OWB exists solely for the benefit of the Oregon wine industry, managing marketing, research and education initiatives that support and advance the industry. The program funded with this earmarked wine tax revenue, according to the bill, must include efforts to target prospective consumers of Oregon wines, encouraging tourism in wine-producing areas of this state and promoting ongoing purchases of Oregon wine by visitors to Oregon who have returned home. **In 2015, 70% of the privilege tax revenue was raised by taxing out-of-state wines. This proposal would dedicate $1.5 million of the wine tax revenue paid primarily by out-of-state wines to fund the marketing and promotion of only Oregon wines.** Given the national marketplace for wine, wineries in all states are in direct competition for retail customers and consumers nationwide to purchase their products. This dedicated, yearly promotional money would clearly benefit Oregon wine, and put out-of-state wine at a severe disadvantage in the marketplace. As structured, SB 316 is discriminatory, in effect, creating an undue burden on interstate commerce and is therefore in violation of the Commerce Clause.

Attached is a legal analysis of the Oregon wine tax scheme authored by Wine Institute's General Counsel, Tracy Genesen. She concludes that SB 316 is a protectionist measure which violates the Commerce Clause, Article 1 Section 8 of the United States Constitution. The proposed dedicated wine privilege tax is clearly designed to support and advance the Oregon wine industry, while the vast majority of Oregon wineries are exempt from shouldering that burden. Importantly, this tax creates significant economic burdens and disadvantages for out-of-state wineries. This is exactly the kind of discriminatory tariff that the Supreme Court has struck down time and time again.

Conclusion

If it is a priority for the legislature to give the wine industry a significant and permanent increase in funding for promotional activity, then to avoid constitutional challenge, it cannot be directly tied to the wine privilege tax. It would be more appropriate for Oregon wine industry members to pay for Oregon wine promotion by increasing the existing agricultural assessment, currently $25 per ton of grapes, under ORS 473.045, or by increasing the dues they pay their trade associations, as we do in California.

Thank you for the opportunity to testify before the committee. I would be happy to respond to any questions the committee may have.

TO: Senate Business & Transportation Committee

FROM: Tracy Genesen, General Counsel, Wine Institute

DATE: February 27, 2017

RE: Senate Bill 316

Dear Chairman Beyer and Members of the Senate Business & Transportation Committee,

Wine Institute is the largest California wine trade association representing 834 wineries of all sizes. Among our core purposes is to insure that California wineries are allowed fair, non-discriminatory access to markets in all 50 states. We have become aware that Oregon Senate Bill 316 (SB 316) seeks to dedicate $1.5 million of privilege tax on all wineries doing business in Oregon which will unfairly and disproportionately place substantial economic burdens on California wineries. This "wine privilege" tax is discriminatory in effect and as such violates the Commerce Clause, Article 1 Section 8 of the United States Constitution.

I. LEGISLATIVE HISTORY OF TAXATION ON OUT-OF-STATE WINERIES

Small Winery Tax Exemption

In 1977, the Legislature enacted a tax exemption on the first 40,000 gallons sold annually in Oregon from a US manufacturer producing less than 100,000 gallons (ORS 473.050(5)). The Oregon Liquor Control Commission's (OLCC) evaluated the purpose of the tax exemption and determined that its purpose was to help small Oregon wineries get established and allow these wineries to grow sufficiently to compete with large wineries. Importantly, OLCC went on to note that nearly all Oregon wineries are small enough to qualify for the full small winery tax exemption, while the privilege tax is actually being shouldered primarily by out-of-state wineries that do not qualify for the small winery tax exemption. The Oregon wineries disproportionally benefit from this tax exemption.

Additional Privilege Tax for Oregon Wine Board

In 1983, the legislature enacted an additional 2 cents per gallon privilege tax on all non-exempt wine sold in Oregon to provide funding to the Oregon Wine Board (OWB). Even though the OWB exists solely for the benefit of the Oregon wine industry, out-of-state wines sold in Oregon bear this additional 2 cents in tax. Out-of-state wine therefore funds efforts to market in-state competitors' wines. As the majority of Oregon wineries qualify for the small tax exemption, most Oregon wineries do not pay the 2 cent tax that helps fund their marketing board.

II. PROPOSED LEGISLATION

Senate Bill 316

This bill proposes to dedicate $1.5 million dollars per year of the privilege tax collected on all wine sold in Oregon to the OWB. The bill provides that the program funded with this earmarked wine tax revenue must be designed to: (a) focus on the development of new market expansion, especially for small wineries; (b) increase awareness of Oregon wines by domestic and foreign customers; (c) leverage increased research investments; and enhance existing local promotional events throughout this state. It also provides that the "program must include, but need not be limited to, efforts to target prospective consumers of Oregon wines, encouraging tourism in wine-producing areas of this state and promoting ongoing purchases of Oregon wine by visitors to Oregon who have returned home." S. 316, 79th Assembly (2017)

This proposal would dedicate wine tax revenue paid by out-of-state wines to fund the marketing and promotion of exclusively Oregon wines. Out-of-state wineries are literally funding the promotion and market expansion of their competitors' wines, at great expense and competitive disadvantage to themselves.

SB 316 is yet another installment in a discriminatory tax scheme that, in effect, demands that out-of-state wineries contribute to the benefit and expansion of Oregon wineries to their own economic detriment.

SB 316's proposal to funnel $1.5 million of privilege tax funds, primarily sourced from out-of-state wineries is unconstitutional; the proposed legislation's discrimination creates an undue burden on interstate commerce and is therefore in violation the Commerce Clause.

III. ARGUMENT

The Court's basic principle for identifying if a state tax is discriminatory against interstate commerce is broad and flexible. In *Granholm v. Heald*, 554 U.S. 472 (2005), the Court articulated "time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Federal Constitution's Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."

Discriminatory Tax Systems – In-State and Out-of-State

In *Bacchus Imports, LTD. v. Dias, Director of Taxation of Hawaii*, 468 US 263 (1984), appellant importers challenged the constitutionality of the Hawaii liquor tax, a 20% excise tax on sales of liquor at wholesale. The Supreme Court of Hawaii upheld the tax against challenges based on the Equal Protection Clause, the Import-Export Clause, and the Commerce Clause. The importers appealed.

Upon appeal, the US Supreme Court held that on the facts of the case, it was undisputed that the purpose of the exemption was to aid the Hawaiian industry and that the exemption was clearly discriminatory since it applied only to locally produced beverages, even though it did not apply

to all such products. The legislation was constituted to be "economic protectionism" in every sense of the phrase. The Court therefore concluded that the Hawaii liquor tax exemption for okolehao or pineapple wine violated the Commerce Clause because it had both the purpose and effect of discriminating in favor of local products. Similarly, the small winery tax exemption exempts from all privilege tax the first 40,000 gallons of sales in Oregon for wineries producing less than 100,000 gallons which exempts the vast majority of Oregon wines from paying the wine privilege tax. According to OLCC reports, in 2015 only 24 Oregon wineries produced more than 100,000 gallons of wine. The remaining 450 Oregon wineries qualified for the exemption. All except 46 Oregon wineries produce 40,000 gallons or less, so pay no Oregon privilege tax. According to Wines & Vines Direct to Consumer 2017 report, there is a total of 9,069 wineries in the United States. There are 8,595 wineries in the United States outside of Oregon. 298 of these out-of-state wineries produce 100,000 gallons or more and would not be eligible for an exemption. These out-of-state wineries pay the excise tax on all sales in Oregon.

The Court noted that "virtually every discriminatory statute allocates benefits and burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense." *Bacchus Imps. v. Dias,* 468 US 263 (1984) The Oregon tax system unequivocally benefits one party at the expense of another. Oregon wineries will directly benefit from having tax proceeds fund the OWB, while out-of-state wineries will be severely burdened as their excise taxes will lower their competitive stance in the Oregon marketplace. "The central purpose of the provision was not to empower states to favor local liquor industries by erecting barriers to competition." *Ibid.*

Further, a Commerce Clause violation cannot be justified based on the rationale that a state is endeavoring to build up their own domestic commerce by means of unequal or oppressive burdens upon the industry of other states. *Ibid.* This is precisely what SB 316 is seeking to achieve. The bill clearly is aimed at further building up Oregon wine industry commerce by means of subjecting wineries in other states to an oppressive tax system and dedicating tax revenue on out-of-state wine to Oregon wine promotion.

Discriminatory Tax Systems – Tax Funds Subsidizing Local Interests

The tax scheme in *West Lynn Creamery v. Healy*, 512 US 186 (1994), mirrors the proposed subsidy and tariff system found in SB 316.

The petitioner milk buyers, comprised of a creamery and a dairy, purchased raw milk outside of Massachusetts but did business in Massachusetts. After milk prices plummeted in the state, respondent Massachusetts Department of Food and Agriculture issued a pricing order that taxed all the raw milk sold by dealers to Massachusetts retailers. This was 97% percent of the state's supply. The resulting revenue was then disbursed as a subsidy to Massachusetts dairy farmers. Petitioners filed an action to challenge the pricing order as a violation of the Commerce Clause. The state's supreme court upheld the pricing order. On appeal, the US Supreme Court reversed, stating that the Negative Commerce Clause jurisprudence had long forbidden state tariffs because they discriminated against interstate commerce by burdening out-of-state competitors to the

benefit of in-state businesses. A state could not use its regulatory powers to tax and to subsidize state businesses to effect the illegitimate aim of imposing what was in effect a tariff. The Court held that a nondiscriminatory tax had been coupled with a legitimate subsidy to create an effect that nonetheless violated the Commerce Clause. The pricing order violated the negative Commerce Clause because, like a tariff, it benefitted in-state economic interests by burdening out-of-state competitors, such as the milk buyers. The subsidies given to in-state dairy farmers in *West Lynn Creamery* were borne directly from the tax proceeds from out-of-state providers. Similarly, the tax fund fueling SB 316 are the direct proceeds channeled primarily from out-of-state "large" wineries. While direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation does. *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 567 (1997).

SB 316 reflects the discriminatory tax scheme in *West Lynn Creamery.* Like the tax in *West Lynn,* the "wine privilege tax" to be dedicated to the OWB applies to all sales in Oregon by "all wineries" in this case producing 100,000 gallons or more of wine as well as the non-exempt sales in Oregon of those producing under 100,000 gallons. The vast majority of suppliers producing 100,000 gallons of wine or more per/year are out-of-state wineries, while the vast majority of wineries in Oregon produce less than 100,000 gallons/year and sell less than 40,000 gallons in Oregon. These wineries are **exempt from all privilege tax.** The sole purpose and effect of this tax is to subsidize the Oregon wine industry. It benefits Oregon economic interests by burdening out-of-state winery competitors.

Discriminatory Tax Systems – Size Differentials

While *Bacchus Imps v. Dias* clearly exempted in-state wine from taxation, in *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1 (1st Cir. 2010), the Massachusetts state statute appeared to apply its tax equally to in-state and out-of-state wineries. Defendant Massachusetts officials appealed from a United States District Court for the District of Massachusetts injunction against Mass. Gen. Laws ch.138, §19F, which established differential methods for distributing wines. Plaintiffs, a group of California winemakers argued that the statute discriminated against interstate commerce in light of both the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and U.S. Const. amend. XXI, §2.

Section 19F allowed "small" wineries, defined by Massachusetts as those producing 30,000 gallons of grape wine or less a year, to obtain a "small winery shipping license" that allowed them to sell their wines in an expanded distribution system: (1) direct shipping to consumers, (2) through wholesaler distribution, (3) through retail distribution. All of Massachusetts wineries fell under the "small" winery definition. 27 of Massachusetts's 31 wineries had obtained "small" business licenses. In contrast, only 26 of the 2,933 out of state "small" wineries obtained licenses.

"Large" wineries, defined by Massachusetts as wineries who produce more than 30,000 gallons of grape wine annually had only two options to distribute their wine: (1) wholesale distribution or (2) obtain a "large winery shipping license" to sell directly to consumers. No winery defined

to be "large" existed within the state of Massachusetts, and the 637 out-of-state wineries that qualified as "large" did not get the same advantages as "small" wineries and instead had to choose between direct shipping and wholesaler distribution.

The Court held that §19F violated the Commerce Clause as Massachusetts has used its cap to expand the distribution options available to "small" wineries, including all Massachusetts wineries, but not to similarly situated "large" wineries, all of which are outside Massachusetts. All such advantages given to "small" wineries had no relation to the market challenges caused by the relative size of the wineries. §19F's statutory context, legislative history, and other factors also yielded an unavoidable conclusion that the discrimination was purposeful. Nor did § 19F serve any legitimate local purpose that could be furthered by a nondiscriminatory alternative. As a general matter, in order to justify a discriminatory tax, the state must demonstrate that the scheme "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 567, (1997). SB 316 could have simply proposed to have the taxes on in-state wineries fund the OWB as a nondiscriminatory alternative.

Some "small" wineries out-of-state received some benefit from the Massachusetts expanded distribution system at the expense of "large" wineries in-state, there does not have to be a clear demarcation that one group must totally and completely benefit at the expense of another for the Commerce Clause to be violated. In *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994), The Town of Clarkstown passed a flow control ordinance that discriminated against local and non-local entities in favor of a single local proprietor. The Court reversed because the ordinance violated the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, as it favored local enterprises and discriminated against non-local entities, stating that "favoring a single local proprietor makes the ordinance's protectionist effect even more acute, for it squelches competition in the waste-processing service altogether, leaving no room for outside investment." *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994). Similarly, under the current Oregon tax system, some "large" in-state wineries are burdened, yet the mere fact that not all "large" wineries in Oregon receive a benefit does not save the statute from Constitutional infirmity.

Not surprisingly, Massachusetts's wineries under §19F in *Family Winemakers of Cal v. Jenkins* took advantage of the benefits the Legislature afforded them. The Courts also note that "section 19F's unusual regulatory features do track one thing precisely: the unique attributes of Massachusetts's own wine industry." *Family Winemakers of Cal.* v. Jenkins, 592 F.3d 1 (1st Cir. 2010). SB 316 has been crafted after reviewing the historical impact the small winery exemption and the additional privilege tax has affected the Oregon wine industry to insure that in-state wineries largely benefit and out-of-state wineries are burdened "by causing local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share of the total sales in the market. State laws that alter conditions of competition to favor in-state interests over out-of-state competitors in a marketplace have long been subject to invalidation." *Ibid.* Out-of-state wineries, who's tax funds will be funding the OWB marketing program will be burdened as they will be paying into a state program that directly benefits their competitors and

skews the marketplace. The Courts will not look kindly on the overt nature of discrimination that is being proposed.

IV. ECONOMIC IMPACT (Calculations are attached as Exhibit A)

To highlight the detrimental economic impact SB 316 will have on out-of-state wineries, the proposals are restated here: SB 316 proposes to dedicate $1.5 million dollars per year of the privilege tax collected on all wine sold in Oregon to the OWB. The bill provides that the program funded with this earmarked wine tax revenue must be designed to: (a) focus on the development of new market expansion, especially for small wineries; (b) increase awareness of Oregon wines by domestic and foreign customers; (c) leverage increased research investments; and enhance existing local promotional events throughout this state. It also provides that the "program must include, but need not be limited to, efforts to target prospective consumers of Oregon wines, encouraging tourism in wine-producing areas of this state and promoting ongoing purchases of Oregon wine by visitors to Oregon who have returned home." S. 316, 79th Assembly (2017)

The following exhibits an economic burden to out-of-state wineries:

- In 2015, only 24 Oregon wineries produced 100,000 gallons or more. The remaining 450 Oregon wineries were eligible for the small tax exemption. All, except 46 Oregon wineries, produce 40,000 gallons or less. **All of the Oregon sales of 428 Oregon wineries are exempt from privilege tax.**
- In comparison, there are 8,595 wineries in the United States outside of Oregon. 298 of these out-of-state wineries produce 100,000 gallons or more and would not be eligible for an exemption. **These wineries pay the Oregon excise tax on ALL sales in Oregon.** (See Wines & Vines Direct to Consumer report 2017 for the number US wineries.)
- **83% of the value of the small tax exemption is inured to the benefit of Oregon wineries.** (The 2017-2019 Tax Expenditure Report-Research Section DOR and DAS Chief Financial Office, 7.001 re ORS 473.050(5) Small Winery.)
- In 2015, the 2 cent tax on all non-exempt wine sold raised $300,850**, only 27% of this funding was raised from the tax on Oregon wine** ($81,892.10). To contrast, **73% of all funding raised from the 2 cent tax was from out-of-state wine** ($218,957.90).
- In 2015, **70% of the total wine privilege tax revenue was raised by taxing out-of-state wines**. The total wine privilege tax revenue raised was $10,170,756.20 with $7,091,849.38 (70%) on out-of-state wine and $3,078,906.82 (30%) from Oregon wine.

Finally, the vast majority of wine sold by out-of-state wineries in Oregon comes through a distributor. Since privilege taxes are levied at the producer level, taxes are marked up by the distributors and retailers as the wines move through the three-tier system. They are usually double by the time they reach the consumer. There is a clear economic benefit to this tax system, especially for those Oregon wineries producing 40,000 gallons or less who have no privilege tax

burden on any of the wine that they sell in Oregon. These savings would allow such wineries to offer lower prices to consumers, giving them an unfair advantage in the marketplace.

V. CONCLUSION

The "negative" aspect of the Commerce Clause prohibits economic protectionism, that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. *West Lynn Creamery v. Healy*, 512 US 186, (1994).

SB 316 proposes to dedicate an additional $1.5 million dollars per year of the privilege tax collected on all wine sold in Oregon to the OWB. The OWB exists solely for the benefit of the Oregon wine industry, managing marketing, research and education initiatives that support and advance the industry. The program funded with this earmarked wine tax revenue, according to the bill, must include efforts to target prospective consumers of Oregon wines, encouraging tourism in wine-producing areas of this state and promoting ongoing purchases of Oregon wine by visitors to Oregon who have returned home.

SB 316 is a protectionist measure which violates the Commerce Clause, Article 1 Section 8 of the United States Constitution. The proposed dedicated wine privilege tax is clearly designed to support and advance the Oregon wine industry, while the vast majority of Oregon wineries are exempt from shouldering that burden. Importantly, this tax creates significant economic burdens and disadvantages for out-of-state wineries. This is exactly the kind of discriminatory tariff that the Supreme Court has struck down time and time again.

EXHIBIT A

BASED ON OLCC 2015 REPORTS

Wine sold in Oregon in 2015:

Taxable wine gallons (after exemption) in 2015 (See OLCC's website – Malt Beverage and Wine Stats):

	15,042,503.7
Oregon wine gallons total exempt in 2015:	2,655,209.71
Estimated out-of-state exempt based on revenue:	543,838
Total wine gallons sold in Oregon	**18,241,551.4**
Wine gallons produced in Oregon & sold in Oregon	**7,179.361.93**
Oregon produces 39.4% of the wine sold in Oregon	

	14% & under (.67)	**over 14% (.77)**
Total gallons taxed after exemption in 2015:	14,119,716.50	922,787.18
Tax collected	$9,460,210.06	$710,546.13
Total tax collected	$10,170,756.20	

OR wines under 14% taxed gallons	4,046,897.89	477,254.33
Tax collected	$2,711,420.99	$367,485.83
Total privilege tax collected on OR wines	$3,078,906.82 (30%)	
Total privilege tax collected on out-of-state wines	$7,091,849.38 (70%)	

(See OLCC's spreadsheet "Gallons of Wine Removed from Bond or Imported into Oregon" as of December 2015)

Amount raised by the 2 cents

Taxable wine gallons in 2015:	15,042,503.7
X .02	$300,850
Amount collected on OR wine (4,094,605.22 x .02)	$81,892.10 (27%)
Amount collect on out-of-state wine	$218,957.90 (73%)

The revenue impact of the small wineries exemption, 2015-2017 is $4,400,000 that is for two years, so estimated for a single year would be $2,200,000. In 2015, the OR wineries exemption revenue impact was $1,833,625.21, so based on this the revenue impact from out-of-state wineries taking this exemption is only $366,374.79. 83% of the revenue impact from the exemption was from OR wineries.*(2017-2019 Tax Expenditure Report-Research Section DOR and DAS Chief Financial Office, 7.001 re ORS 473.050(5) Small Winery)*