No. 23-16148

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REED DAY and ALBERT JACOBS,
***Plaintiffs-Appellants*,**
v.
BEN HENRY, Director of Ariz. Dept. of Liquor Licenses & Control,
TROY CAMPBELL, Chair of Ariz. State Liquor Board, and
KRIS MAYES, Arizona Attorney General,
in their official capacities,
***Defendants-Appellees*,**

and

WINE AND SPIRITS WHOLESALERS ASSOCIATION OF ARIZONA,
Intervening Defendant-Appellee

On appeal from the United States District Court for the District of Arizona, No. 2:21-cv-01332,
Hon. G. Murray Snow, District Judge

BRIEF *AMICUS CURIAE* FOR THE NATIONAL BEER WHOLESALERS ASSOCIATION IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus does not have parent corporations and does not issue any stock.

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STATEMENT OF INTEREST[1]

The National Beer Wholesalers Association has been the national membership organization of American beer wholesalers since 1938. NBWA has over 3,000 members. Many of these wholesalers, which also are referred to in the trade as "distributors," are family-owned and have operations focusing on a single State. NBWA's members reside in all 50 States and employ over 130,000 people.

Appellees have provided this Court with sufficient reasons to affirm—both as a threshold matter due to the Plaintiffs' lack of Article III standing, and because the Twenty-first Amendment provides firm constitutional grounding for the challenged laws. The NBWA agrees with those arguments. *See* State Br. 25–71; WSW Ariz. Br. 23–59. NBWA offers this brief to provide its perspective on the merits issues, explaining how Plaintiffs' theory of the dormant Commerce Clause threatens the sound regulation not only of wine, but also of beer and alcohol more generally—and not only in Arizona, but throughout the entire country.

[1] All parties to the appeal have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no person, party, or party's counsel contributed money intended to fund the preparation or submission of this brief.

These issues are critical to NBWA and its members. Although each State's system of regulating alcohol varies in important ways, a central mandate of most state systems, as Appellees explain, is that the vast majority of alcohol must run through at least three separate tiers before it reaches consumers—from the producers that manufacture the alcohol, to the independent wholesalers that include NBWA's members, and then on to retailers, who are themselves independent of both producers and wholesalers and who sell the alcohol directly to the public. This regulatory structure enables States to effectively regulate the importation of alcohol into the State and creates a transparent and accountable distribution system.

No State's three-tier system is exactly the same as any other's, but one commonality, as Arizona has suggested, is that many States have concluded that their systems cannot work, as applied to wine or any other kind of alcohol, unless both wholesalers and retailers have physical presences within their borders. *See* State Br. 39. Yet Plaintiffs ask this Court to adopt a nationwide constitutional rule—and one that would not be limited to wine. If Plaintiffs' arguments became the law, it would be illegal for any State to mandate a physical-presence requirement for

wholesalers and retailers of wine, beer, or any other kind of alcohol. That rule, taken to its logical conclusion, could even require States like Arizona to allow sales by retailers who did not first purchase their alcohol from independent wholesalers. That result would threaten the diverse systems of regulation that have long stemmed the social ills associated with alcohol—perhaps even more so as applied to the market for beer, given that there are even more retailers nationwide for beer (over 600,000 of them) than for wine or spirits. That result also would threaten the livelihood of the NBWA members who play an essential role in these systems in various States.

NBWA is thus filing this brief to supplement the presentation of the parties and other amici about the constitutional issues presented in this case in three respects. Part I of this brief provides additional context about the original understanding and history of the Twenty-first Amendment. Part II addresses the practical and constitutional limits on a State's ability to apply its alcohol laws to transactions between out-of-state wholesalers and retailers. Part III provides additional context about the constitutional insignificance of Arizona's decision to allow a small amount of wine to be shipped directly from wineries to consumers.

ARGUMENT

Under the Supreme Court's decision in *Tennessee Wine & Spirits Retailers Association v. Thomas*, a state alcohol law that "discriminates on its face against nonresidents" still must be "sustained" under the Twenty-first Amendment, despite the dormant Commerce Clause's anti-discrimination principle, if the "requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." 139 S. Ct. 2449, 2474 (2019). Appellees have explained and other Circuits have rightly held that physical-presence requirements are due to be upheld because they are essential features of a three-tiered system that do not "discriminate on [their] face against nonresidents." *Id.*; *see* State Br. 48–60; WSW Ariz. Br. 43–50; *Lebamoff Enters. Inc. v. Whitmer*, 956 F.3d 863, 870–71 (6th Cir. 2020); *Sarasota Wine Mkt., LLC v. Schmitt,* 987 F.3d 1171, 1184 (8th Cir. 2021). The focus of this brief is on Appellees' equally correct argument that, even if this Court needed to proceed to the next part of the test, these requirements also are "justified as a public health or safety measure or on some other legitimate nonprotectionist ground" and thus constitutional regardless. *Tenn. Wine*, 139 S. Ct. at 2474.

Appellees have already explained why this is true for Arizona's wine laws, through the detailed evidentiary showing they made before the District Court. *See* State Br. 60–70; WSW Ariz. Br. 50–59. NBWA submits this brief to explain why its members' experience as participants in Arizona's and other three-tier systems throughout the nation bolsters the conclusion.

In addition to what the evidence shows about the specific need for these laws in the Arizona wine market, laws of this sort are justified in every State and as to every type of alcohol, including beer, for a more fundamental reason—one that is based in the federalism principles that underlie the Constitution generally and the Twenty-first Amendment specifically. Because section two of the Twenty-first Amendment is by its nature a federalism provision, it entitles each State to enforce its own sourcing, pricing, and safety laws as to all the alcohol sold within its borders. That is not a controversial proposition, but it is critical, because it explains why physical-presence requirements are justified on public health and safety grounds. Common sense and the Constitution show that a State cannot effectively enforce its alcohol laws against the retail-

ers and wholesalers involved in the chain of distribution to in-state residents unless both the retailer and the wholesaler are physically present within that State. That consideration justifies all state laws, like the ones at issue here, requiring all such retailers and wholesalers to be physically present within that State's borders.

In this respect, three points are critical.

The first, which will be elaborated upon in Part I of this brief, is that the constitutional text and historical evidence demonstrate that the very purpose of section two of the Twenty-first Amendment was to give each individual State the authority to adopt its own system of alcohol regulation. As a result, each State's laws regulating the importation of alcohol into the State and the wholesaler-retailer relationship will necessarily be different, in the details, from virtually every other State's. And that, the framers of the Twenty-first Amendment believed, would be a very good thing, in light of the differences that exist among the States. States like Arizona are thus constitutionally entitled to require all alcohol sold to persons within their borders to be subject to their *own* laws—rather than subject to the different laws their sister States have adopted when determining the best route for their own citizens.

The second critical point, which will be elaborated upon in Part II of this brief, is that no individual State, whether Arizona or any other, will be able to impose its full panoply of alcohol laws on retailers and wholesalers that are involved in this chain of distribution unless they have physical presences within that particular State. As a practical matter, it is not feasible for a State like Arizona to enforce the pricing and safety laws that are unique to it against entities—and, especially, wholesalers—that do no business within their borders and sell no alcohol directly to their citizens. There are strong reasons to conclude that any attempt by a State to enforce these laws on some out-of-state entities would not even be legally possible, due to the constraints the Twenty-first Amendment and the Constitution place on a State's ability to regulate transactions that happen wholly outside its borders. The Twenty-first Amendment thus entitles a State to require wholesalers and retailers in the chain of distribution of alcohol into that State to first establish physical presences there, so the State can effectively and constitutionally subject those entities to its laws. That is why, even though the details of state alcohol regulatory systems are different, physical-presence requirements like the ones at issue here are virtually uniform.

The third critical point, elaborated upon in Part III of this brief, is that Plaintiffs cannot demolish these three-tier systems merely by pointing to relatively minor exceptions a State has created to them—such as Arizona's legitimate choice, like the one made by many other States, to allow a very small portion of the wine consumed within its borders to come directly to consumers from wineries that the federal government regulates. The numbers show that these sales are a very small percentage of the business done by wineries. In spinning this exception as the destruction of Arizona's three-tier system as to wine, Plaintiffs are trying to drive an exceedingly large Mack Truck through an exceedingly small mouse hole. Just as the Twenty-first Amendment entitles States to adopt their own systems of alcohol regulation, it also entitles them to adopt even-handed exceptions without jettisoning the general structures that have long allowed them to keep the industry competitive while keeping the social ills of alcohol abuse at bay.

The pages that follow discuss those three points in turn.

I. Physical-presence requirements are justified by each State's interests in enforcing its own, unique laws regulating alcohol within its borders

When courts assess the constitutionality of State physical-presence requirements of this sort—whether they apply to wine, beer, or spirits—it should matter a great deal that no two States have identical alcohol laws. Neither Florida nor any other State from which Plaintiffs hope to purchase alcohol has a system that regulates the relationship between retailers and wholesalers in the exact same way Arizona does. The States where Plaintiffs' preferred retailers are situated will necessarily regulate transactions between those retailers and wholesalers in ways that are meaningfully different from Arizona's chosen path.

That development has occurred not by historical accident, but by constitutional design. The most fundamental premise of the Twenty-first Amendment was that, if Prohibition was to be lifted, the Constitution needed to give States the latitude and authority to adopt and apply their own, unique laws tailored to their own, unique communities. A brief summary of the history of how the Twenty-first Amendment got us to this point, and what some of the current state-to-state differences are, follows.

A. The Twenty-first Amendment empowers each State to develop its own system for regulating alcohol

Alcohol consumption has been a problem for as long as we have had our Republic, but things were worse before the Twenty-first Amendment freed States to take appropriate action. As the Supreme Court explained in *Tennessee Wine*, "[b]etween 1780 and 1830, Americans consumed 'more alcohol, on an individual basis, than at any other time in the history of the nation.'" 139 S. Ct. at 2463 n.6 (quoting RICHARD MENDELSON, FROM DEMON TO DARLING: A LEGAL HISTORY OF WINE IN AMERICA 11 (2009)). The century that followed "prompted waves of state regulation," some of which fell prey to lawsuits challenging those state laws on dormant Commerce Clause grounds. *Id.* at 2463. By 1919, the entire country had chosen to adopt nationwide Prohibition through the Eighteenth Amendment, which imposed a ban on the manufacture, sale, transportation, and importation of alcoholic beverages across the United States. *See* U.S. CONST. amend. XVIII, § 1.

But Prohibition backfired, and fifteen years later the Twenty-first Amendment effectuated its repeal. The amendment's structure and history reveal a purpose that is of critical importance to the case now before the Court. The amendment was designed not to wave the white flag on

governmental regulation seeking to stem alcohol consumption, but instead to encourage each State to adopt its own, diverse regulatory approach that promoted alcohol industry competition while heading off the social ills alcohol had caused. The Amendment's first section thus ended Prohibition, providing that "[t]he eighteenth article of amendment to the Constitution of the United States is hereby repealed." U.S. CONST. amend. XXI, § 1. The next section underscored that alcohol regulation would be the domain of each State, making it unconstitutional for anyone to break any given State's laws regarding "[t]he transportation or importation" of alcohol "for delivery or use therein." U.S. CONST. amend. XXI, § 2.

The historical evidence confirms that the Twenty-first Amendment endorses an approach under which, as Justice Brandeis put it in another context, "a single courageous state may, if its citizens choose, serve as a laboratory." *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). A study commissioned at that time by John D. Rockefeller Jr., called *Toward Liquor Control*, has become a leading source on the original understanding of the Twenty-first Amendment. *See 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 357 (1987) (O'Connor, J.,

dissenting); *Tenn. Wine*, 139 S. Ct. at 2480 (Gorsuch, J., dissenting); *B-21 Wines, Inc. v. Bauer,* 36 F. 4th 214, 218 (4th Cir. 2022); *Lebamoff*, 956 F.3d at 867. The study's authors, Raymond Fosdick and Albert Scott, explained that the Eighteenth Amendment's "mistake" had not necessarily been the policy choice it embodied of banning alcohol *per se*, but rather the assumption that the United States was "a single community in which a uniform policy of liquor control could be enforced." RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL 6 (1933) (republished by the Center for Alcohol Policy in 2011). When citizens adopted the Eighteenth Amendment, the authors observed, they "overlooked the fact that in a country as large as this, racially diversified, heterogeneous in most aspects of its life and comprising a patchwork of urban and rural areas, no common rule of conduct in regard to a powerful human appetite could possibly be enforced." *Id.* at 6–7.

As Rockefeller discussed in the introduction to *Toward Liquor Control*, the only way to achieve a stable equilibrium after the repeal of Prohibition was "carefully laid plans of control" by individual States and even individual communities within them. *See* ROCKEFELLER, *supra*, at xiii. The study's authors thus urged States to utilize their new discretion

to pass alcohol laws that promoted temperance while reflecting "[w]hat" their particular "Community want[ed]." FOSDICK & SCOTT, *supra*, at 8. Fosdick and Scott emphasized that if "the new system is not rooted in what the people of each state sincerely desire at this moment, it makes no difference how logical and complete it may appear as a statute—it cannot succeed." *Id.* at 98.

B. Each State has its own system for separating and regulating the tiers of alcohol distribution

While Fosdick and Scott urged each State to tailor its post-Prohibition alcohol regulations to the distinct needs and views of its citizenry, Rockefeller also commissioned the authors to develop a more generally applicable "program of action" based on a "study of the practice and experience" in various localities. ROCKEFELLER, *supra*, at xiv. Their proposals were adopted, in some form or fashion, in many States. *See* Stephen Diamond, *The Repeal Program*, *in* SOCIAL & ECONOMIC CONTROL OF ALCOHOL 100 (Carole L. Jurkiewicz & Murphy J. Painter eds., CRC Press 2008); Mark R. Daniels, Toward Liquor Control*: A Retrospective*, *in* SOCIAL & ECONOMIC CONTROL, *supra*, at 230. Chief among those proposals was the suggestion that if a state government chose not to adopt a control

model under which it took charge of all alcohol sales within its borders, it should at least regulate alcohol through the selective issuance of licenses to private businesses. *See* FOSDICK & SCOTT, *supra*, at 24–40.

As Appellees have noted, the States that chose the licensing model separated the tiers of distribution, thus creating the three-tier systems common in many States today. *See* State Br. 15; WSW Ariz. Br. 5–6. That move was essential, as the Appellees also have observed, because vertical integration in the alcohol industry, and particularly "tied-house" saloons, had been a major driver of excess consumption before prohibition. *See* State Br. 38; WSW Ariz. Br. 6. These "tied-house" retailers were economically linked to specific alcohol producers and sold "exclusively the product of [that] manufacturer." FOSDICK & SCOTT, *supra*, at 29. Manufacturers pressured these retailers to sell more alcohol, at prices so low that it "encouraged irresponsible drinking." *Tenn. Wine*, 139 S. Ct. at 2463 n.7 (citing THOMAS R. PEGRAM, BATTLING DEMON RUM: THE STRUGGLE FOR A DRY AMERICA, 1800-1933, at 95 (1998)).

Most States ultimately addressed the problem by not only mandating separation of manufacturers from retailers, but also by "interposing a wholesaler level between the supplier and retailer" and thus creating

these systems' second tier. Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages*, *in* SOCIAL & ECONOMIC CONTROL, *supra*, at 33. Regulation of transactions that occur between the retailers and the wholesalers in this tier have become a key component of state alcohol law. Because there are usually fewer local wholesalers in the system compared to the numbers of national suppliers or local retailers, these regulations help the government to collect taxes, track alcohol, and conduct recalls when unsafe products threaten the public health. *See generally Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 5 (1st Cir. 2010) (describing the "hourglass" structure of three-tier systems); *see also* State Br. 65 (noting "the wholesalers' 'beneficial role in identifying and helping to pull back alcohol subject to recall'"). These industry regulations also prevent alcohol from being sold to retailers at the prices and amounts that gave rise to the overconsumption crisis associated with the pre-Prohibition tied-house saloon.

That said, consistent with the structure and history of the Twenty-first Amendment, there is not a unified, national three-tier system. By constitutional design, there are 50 different alcohol markets. That is because the amendment "gives each State leeway," as the Supreme Court

noted in *Tennessee Wine*, "in choosing the alcohol-related public health and safety measures that its citizens find desirable." 139 S. Ct. at 2457. So each State ultimately chose its own, individualized method of keeping the tiers within its jurisdiction separate and regulating the transactions between wholesalers and retailers. Some States mandate more restrictive barriers between these tiers and more careful monitoring of these wholesaler-to-retailer transactions, and some States opt for a looser approach.

The States' different choices are apparent from the facts of this case. As Appellee Wine and Spirits Wholesalers of Arizona has explained, Arizona's restrictions on wholesalers are, as compared to some other States', "strict[.]" WSW Ariz. Br. 10. They not only prohibit wholesalers from "acquir[ing] an interest in property" owned "by the retailer," but also take specific, additional steps to maintain separation between the tiers. ARIZ. REV. STAT. § 4-243(A)(3). Arizona prohibits wholesalers from "extend[ing] credit to the retailer on a sale." *Id.* § 4-243(A)(7). Arizona precludes wholesalers from "offer[ing] or giv[ing] a bonus, a premium or compensation to the retailer." *Id.* § 4-243(A)(9). Arizona also prohibits wholesalers from "requir[ing] the retailer to take and dispose of a certain

quota of spirituous liquor." *Id.* § 4-243(A)(8). Arizona likewise protects the safety of alcohol within its borders, and wards off the harms of counterfeit alcohol, by requiring wholesalers to purchase their alcohol only from "the primary source of supply for the brand," and generally requiring retailers to likewise acquire their alcohol only from wholesalers that "purchased the brand from the primary source of supply." *Id.* § 4-243.01(A)(2) & (A)(3)(a). No one contends that these facially neutral pricing and safety laws discriminate against interstate commerce or are otherwise unconstitutional. They are instead part of a system of regulating alcohol that is "unquestionably legitimate." *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)).

Those specific Arizona provisions stand in contrast to the different but no less legitimate regulations in other states—including in Florida, the State in which the retailer that previously was a plaintiff in this case, Thewinetobuy.com, operates. *See* WSW Ariz. Br. 15 n.6. Unsurprisingly, the Florida provisions regulating the relationship between wholesalers and retailers in that State contain rules that are different, in certain ways, from the ones in Arizona. *See* FLA. STAT. ANN. § 561.42. To take one

example, whereas Arizona expressly prohibits its wholesalers from making sales on credit to its retailers, Florida law expressly *allows* its wholesalers and retailers to engage in this practice to a certain extent. FLA. STAT. ANN. § 561.42(2) ("Credit for the sale of liquors may be extended to any vendor up to, but not including, the 10th day after the calendar week within which such sale was made.").

Comparisons to other States reveal myriad other differences in the details of the regulatory choices made. The upshot is that any alcohol Plaintiffs wish to purchase from retailers from outside Arizona will not have been regulated in the precise way that, in Fosdick and Scott's words, is "rooted in what the people of" Arizona "sincerely desire." FOSDICK & SCOTT, *supra*, at 98. If this alcohol were allowed to enter the Arizona marketplace, it would create a market that is incongruent with the individualized regulatory decisions Arizona's lawmakers have made. As the Sixth Circuit has suggested, a rule under which Arizona can be compelled to allow its citizens to purchase this alcohol, outside the specific and strict regulatory system it has chosen, "leaves too much room for out-of-state retailers" not only "to undercut local prices and to escape the State's in-

terests in limiting consumption," but also to evade the State's laws reflecting its own particularized judgment of how to best ensure that the product remains safe. *See Lebamoff*, 956 F.3d at 872.

The Plaintiffs' proposed nationwide rule, which would bar a State from limiting licensed retailers to those who are physically present and thus a part of that State's own three-tier system, is thus contrary to the Twenty-first Amendment's recognition that each State is allowed to choose its own individual path. The existence of differences between Arizona and other States in their three-tier regulations—and even the *potential* for those differences—justifies Arizona's decision to limit alcohol sales within its borders to retailers that are subject to its laws, and thus that purchase all their alcohol from wholesalers that also are within the State.

II. Arizona cannot effectively enforce its alcohol laws as to transactions between retailers and wholesalers that occur wholly outside its borders

There is no quick and easy work-around to the federalism problem Plaintiffs' theory would create. Plaintiffs and others have suggested that Arizona could simply impose its own three-tier system on any out-of-state

entity that wants to sell alcohol within Arizona's borders—by, for example, "impos[ing]" a "requirement" that any alcohol sold by one of those out-of-state retailers to Arizona residents have first come to those retailers "from wholesalers." Plaintiffs' Br. 31. But that is no solution at all.

As an initial matter, in articulating the argument this way, Plaintiffs are dramatically understating the complexity of each State's laws and the diversity among the regulatory structures each State employs. No State simply requires its retailers to purchase their alcohol "from wholesalers" without any elaboration. Plaintiffs' Br. 31. Far from it. As shown by Arizona's prohibitions on credit sales, bonuses, and quotas, each State uses a myriad of methods to regulate transactions between wholesalers and retailers in its borders and keep these tiers separate and apart. *See supra* at 16–17 (citing ARIZ. REV. STAT. § 4-243). As Florida's express allowance of those same credit sales shows, different States can take markedly different approaches. *See supra* at 18 (citing FLA. STAT. ANN. § 561.42). Plaintiffs concede that the out-of-state retailers from which they wish to purchase alcohol can themselves purchase that alcohol only from wholesalers in "their home states," such as Florida, and cannot go through Arizona-based wholesalers instead. Plaintiffs' Br. 6

(citing FLA. STAT. § 561.14(3)). So if Arizona wanted to ensure that the alcohol coming into the State was subject to its entire regulatory system, it would need to impose this legal framework on not only those out-of-state retailers, but also the out-of-state wholesalers that sold those retailers that alcohol—even though those wholesalers might not directly conduct any business in Arizona at all.

There would be no practicable way for Arizona to do so. Consider what would happen if Arizona were compelled to grant Thewinetobuy.com, the former plaintiff in this case that is physically based in Florida, a permit allowing it to ship its products from its store in Sarasota to consumers in Arizona. Even if that permit were conditioned on Thewinetobuy.com's promise to follow all of Arizona's rules as to the wine it purchased for eventual sale to Arizonans—including Arizona's prohibition on wholesaler-to-retailer credit sales—that prohibition would not apply as to any alcohol that Thewinetobuy.com purchased for eventual sales to Floridians. *See supra* at 16–18 (contrasting ARIZ. REV. STAT. § 4-243(A)(7) with FLA. STAT. ANN. § 561.42(2)). So, when a case of wine arrived at a consumer's home in Phoenix through a shipment that came

from Thewinetobuy.com, how could Arizona regulators possibly determine that the wine had been acquired from a wholesaler in accordance with the ban on credit sales under Arizona law, and not been among the alcohol that Thewinetobuy.com had procured from Florida wholesalers on credit? And, for that matter, how could Thewinetobuy.com even have *known*, when it purchased that wine from that Florida wholesaler, that it eventually would sell it to an Arizona consumer and thus needed to comply with Arizona's prohibition on credit sales then?

Consider another example—this one relating to Arizona's above-referenced requirement that wholesalers purchase their alcohol from "the primary source of supply for the brand" and that retailers generally purchase their alcohol from those wholesalers. ARIZ. REV. STAT. § 4-243.01(A)(2). This law is designed to prevent the sale of counterfeit alcohol, which poses stark health risks. *See generally* Patrick Maroney, *Fake Alcohol and Interstate E-Commerce*, at 13 (Center for Alcohol Policy March 2020), *available at* https://www.centerforalcoholpolicy.org/wp-content/uploads/2020/03/CAP-2020-Report-on-Counterfeit-Alcohol_FINAL.pdf. But some States have no such laws. *Cf.* CAL. BUS. & PROF. CODE § 23672 (establishing primary-source requirement for distilled liquor but

not beer or wine). If a retailer from one of those States were to ship alcohol into Arizona, how would Arizona regulators possibly determine that the alcohol had been acquired from a wholesaler who, rather than following the rules in those States, had instead purchased it from the original source as Arizona law required? Again, how would that retailer even have *known*, when it acquired the alcohol from that wholesaler, that the alcohol eventually would go to a consumer in Arizona, and thus that it needed to comply with the primary-source-of-supply rules at that time?

There are no good answers to these questions. The suggestion that Arizona could enforce any of its three-tier laws as to wholesaler-to-retailer transactions that occurred outside its borders is a flight of fancy.

Even if there were some practicable way for Arizona to do so, the very notion that Arizona should be put in a position where it must enforce its laws as to wholesaler-to-retailer transactions outside its borders would offend the federalism precepts undergirding the Twenty-first Amendment. The amendment's text speaks not to a State's authority to pass laws regulating *other* alcohol markets, but instead a State's authority to pass laws regulating transportation or importation into *that* State, for delivery or use "*therein*." U.S. CONST. amend. XXI, § 2 (emphasis

added). The amendment's framers believed that the distribution system in any given State needed to reflect what the "Community want[s]" not in neighboring States, but in *that* State. FOSDICK & SCOTT, *supra*, at 8. The Supreme Court has said that the Twenty-first Amendment grants each State "virtually complete control over" distribution within its borders, but Florida's control over its own system would be illusory if Arizona were required, as Plaintiffs' proposed rule would mandate, to dictate the terms under which Fort Lauderdale wholesalers could sell alcohol to retailers on South Beach. *Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980).

Plaintiffs' theory also is contrary to the precepts of our federalism more generally. As the Sixth Circuit has observed, the very concept of a State regulating a transaction between two out-of-state entities is in tension with the principle, which courts historically have located in the dormant Commerce Clause, known as the "extraterritoriality doctrine." *Lebamoff*, 956 F.3d at 872 (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)). The Supreme Court has since emphasized that the doctrine may not limit a State's ability to pass nondiscriminatory laws that merely have "effects" outside its borders, and it has suggested that the doctrine

may be more appropriately located within other provisions of the Constitution such as the Privileges and Immunities or Full Faith and Credit Clauses. *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1153, 1157 (2023); *id.* at 1175 (Kavanaugh, J., concurring in part and dissenting in part). But the Court has cast no doubt on the proposition that this doctrine precludes a State from enforcing laws "that *directly* regulate[] out-of-state transactions by those with *no* connection to the State." *Id.* at 1157 n.1 (majority opinion). A State's dictation of the terms on which an out-of-state wholesaler could sell alcohol to an out-of-state retailer would run afoul of this principle.

The bottom line is that, whether as a matter of practical necessity or constitutional mandate, neither Arizona nor any other State will be able to effectively enforce its laws regulating its three-tier system if the retailers that sell alcohol to the State's citizens are not physically present there. This consideration by itself justifies physical-presence requirements for both retailers and wholesalers, and for all forms of alcohol. As the Fourth Circuit has observed, "a state's interest in preserving its three-tier system for alcohol distribution can itself constitute a legitimate nonprotectionist ground inherently tied to public health and safety

measures the Twenty-First Amendment was passed to promote." *B-21 Wines*, 36 F. 4th at 226 (internal quotation marks omitted).

III. Arizona's exception for winery shipments does not mandate abandonment of Arizona's alcohol-regulatory system as a whole

These justifications for physical-presence requirements, based in concepts of federalism and judicial deference to the diverse choices States have made, do not simply disappear whenever a State creates a minor exception to its alcohol laws. To this end, Plaintiffs and others have suggested that the choice many States have made to allow small amounts of wine to be shipped directly from wineries to consumers means that the State has no three-tier system for wine at all, and therefore cannot justify physical-presence requirements for the wholesalers and retailers that also wish to participate in a given State's market. Plaintiffs' Br. 37–38. The Appellees have explained why that argument falls flat. *See* State Br. 57–60; WSW Ariz. Br. 56. The Twenty-first Amendment counsels the same level of deference to all of a State's decisions about how to imple-

ment its alcohol laws—whether they concern which requirements to impose or which exceptions to make, and whether they concern wine, beer, or spirits. Two additional points in this regard bear elaboration here.

The first point is that the numbers show that this particular exception as to wine does not create the gaping hole in state alcohol-control systems that Plaintiffs and others have sought to portray. A recent report from Wine Business Analytics suggests that over the previous 12 months, shipments from wineries to consumers accounted for only 3.8% of total sales by wineries throughout the country. *See* Wine Business Analytics, https://winebusinessanalytics.com (visited March 18, 2024) (permanent link at https://perma.cc/FM7Q-RU6K). Another recent report suggests, in turn, that less than 20% of this alcohol comes from the "large" wineries that would tend to sell at lower average prices. *See* Sovos ShipCompliant et al., DIRECT-TO-CONSUMER WINE SHIPPING REPORT, at 24–25 (2024), available at https://sovos.com/shipcompliant/content-library/wine-dtc-report/ (permanent link at https://perma.cc/4LUA-MP8X). Allowing shipments from the much more numerous out-of-state retailers of wine, let alone out-of-state retailers of other types of alcohol, would, by comparison, open the floodgates.

The second point is that a State can be especially comfortable allowing those shipments from out-of-state wineries because they, unlike retailers, are subject to federal enforcement of that State's law against those wineries. As Arizona observes in its briefing here, "the federal government regulates wineries and can revoke their federal permits for violating state law." State Br. 58–59 (citing 27 U.S.C. § 204; *Granholm*, 544 U.S. at 492). The pertinent statutes require federal regulators—previously at Alcohol, Tobacco, and Firearms, and now at the Alcohol and Tobacco Tax and Trade Bureau—to condition these permits "upon compliance" by the winery "with the twenty-first amendment and laws relating to the enforcement thereof." 27 U.S.C. § 204(d). Critically, there is no federal permit for wine retailers, or for retailers of any type of alcohol. So as a previous ATF ruling has explained, whereas the agency "will intervene when it is determined that there is a continuing, material, adverse impact upon a State through the actions of a [winery] located outside the boundaries of the affected State," its "authority does not extend to situations where an out-of-State retailer is making the shipment into the State." Bureau Ruling, Direct Shipment Sales of Alcohol Beverages, 2000 WL 1370849 (ATF June 2000).

Especially with the federal regulatory apparatus in place as to wineries, a State can reasonably choose, without undermining the goals of its three-tier system or risking excessive consumption, to "increase choice" in this way. *Lebamoff*, 956 F.3d at 875. The Twenty-first Amendment has achieved much over the years, but its Framers recognized that none of the provisions adopted by the States in the wake of Prohibition would "carry with them an element of finality." FOSDICK & SCOTT, *supra*, at 97. Consistent with that vision, state alcohol laws have always been "among the most rapidly changing in the country." FOCUS, *State-Level Alcohol Laws Face a Federal Challenge in the Supreme Court*, http://www.leoninepublicaffairs.com/focus/state-level-alcohol-laws-face-federal-challenge-supreme-court/ (last visited March 18, 2024). When a State makes these sorts of accommodations to the changing demands and needs of its citizenry, it does not abandon the general and noble project that began with the Twenty-first Amendment and continues today.

CONCLUSION

For these reasons and those given by the Appellees, this Court should affirm the District Court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

9th Cir. Case Number: 23-16148

I am the attorney for the amicus.

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Signature: s/ John C. Neiman, Jr.

Date: March 18, 2024