

No. 23-16148

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REED DAY and ALBERT JACOBS,

Plaintiffs-Appellants,

v.

BEN HENRY, et al.

Defendants-Appellees,

**WINE AND SPIRITS WHOLESALERS
ASSOCIATION OF ARIZONA.**

Intervenor-Defendant-Appellee.

*U.S. District Court For the District of Arizona, No. 2:21-cv-01332-GMS
Hon. Chief District Judge G. Murray Snow*

**BRIEF OF WINE & SPIRITS WHOLESALERS OF AMERICA,
INC. AND AMERICAN BEVERAGE LICENSEES AS AMICI
CURIAE IN SUPPORT OF APPELLEES**

Jacob Hegeman
WINE & SPIRITS WHOLESALERS
OF AMERICA, INC.
804 15th St. NW, Ste. 1120
Washington, DC 20005
Telephone: 202.371.9792

Frederick Yarger
William Sowers, Jr.
WHEELER TRIGG O'DONNELL LLP
370 17th Street, Suite 4500
Denver, CO 80202-5647
Telephone: 303.244.1800

*Attorneys for Wine & Spirits Wholesalers Association of America and
American Beverage Licensees*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *amici* state that they do not have parent corporations, nor does they issue any stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT.....	ii
TABLE OF AUTHORITIES.....	v
STATEMENT OF AMICUS CURIAE	1
ARGUMENT	2
I. Section 2 of the Twenty-first Amendment grants States more freedom to regulate the market for alcohol than for any other article of commerce.	2
A. <i>Tennessee Wine’s</i> “Different Inquiry”	4
B. Courts Routinely Uphold Essential Features of the Three-Tier System	8
II. Arizona’s physical presence requirements are essential features of its three-tier system, nondiscriminatory, and key to advancing State regulatory objectives.	9
A. Appellants are challenging an “essential feature” of the Arizona three-tier system.....	9
B. Requiring physical presence as part of a licensing framework that is open to everyone is nondiscriminatory and does not offend the dormant Commerce Clause.	13
C. Physical presence requirements advance legitimate state policies.	15
III. Appellants’ claimed injury is not redressable because courts cannot rewrite Arizona’s alcohol laws to meet appellants’ policy objectives.....	20

IV. Appellants seek to impose their own policy preferences by removing regulations for out-of-state retailers, which would destroy the public health and safety, economic, and consumer benefits of the three-tier system.	24
A. States’ ability to effectively regulate their alcohol marketplaces and keep citizens safe depends on the integrity of the three-tier system.....	27
1. Wholesalers serve an important regulatory function.....	27
2. Licensed retailers create additional, independent regulatory value from which consumers directly benefit.....	30
3. Change to the three-tier system is properly made through State legislatures and regulatory agencies.....	31
B. The wholesale tier increases consumer choice and availability, and consumers approve of them.	33
C. The wholesale tier creates economies of scale and other efficiencies that benefit producers, retailers, and the overall market.	37
CONCLUSION	39

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	5
<i>Anvar v. Dwyer</i> , 82 F.4th 1 (1st Cir. 2023)	7
<i>Arnold’s Wines, Inc. v. Boyle</i> , 571 F.3d 185 (2d Cir. 2009).....	16
<i>Ayotte v. Planned Parenthood of N. New England</i> , 546 U.S. 320 (2006)	20, 23, 24
<i>B-21 Wines, Inc. v. Bauer</i> , 36 F.4th 214 (4th Cir. 2022), <i>cert. denied</i> , 143 S. Ct. 567 (2023)	passim
<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984)	4
<i>Black Star Farms LLC v. Oliver</i> , 600 F.3d 1225 (9th Cir. 2010)	13
<i>Bridenbaugh v. Freeman-Wilson</i> , 227 F.3d 848 (7th Cir. 2000)	4
<i>Brooks v. Vassar</i> , 462 F.3d 341 (4th Cir. 2006)	13
<i>Byrd v. Tenn. Wine & Spirits Retailers Ass’n</i> , 883 F.3d 608 (6th Cir. 2018), <i>aff’d sub nom. Tenn. Wine</i> , 139 S. Ct. 2449 (2019)	16
<i>Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.</i> , 445 U.S. 97 (1980)	3, 8
<i>City of Renton v. Playtime Theatres, Inc.</i> , 475 U.S. 41 (1986)	6

<i>Granholm v. Heald</i> , 544 U.S. 460 (2005)	8, 25, 27, 30
<i>Lebamoff Enters. Inc. v. Whitmer</i> , 956 F.3d 863 (6th Cir. 2020)	passim
<i>North Dakota v. United States</i> , 495 U.S. 423 (1990)	26, 39
<i>Or. Waste Systems, Inc. v. Dep’t of Env’t Quality</i> , 511 U.S. 93 (1994)	3
<i>Orion Wine Imports, LLC v. Appelsmith</i> , 837 F. App’x 585 (9th Cir. 2021)	22, 23
<i>Sarasota Wine Mkt., LLC v. Schmitt</i> , 987 F.3d 1171 (8th Cir. 2021)	passim
<i>Swedenburg v. Kelly</i> , 232 F. Supp. 2d 135 (S.D.N.Y. 2002)	6
<i>Tenn. Wine & Spirits Retailers Ass’n v. Thomas</i> , 139 S. Ct. 2449 (2019)	passim
<i>United States v. Anheuser-Busch InBev SA/NV</i> , No. 16-01483, 2018 WL 6684721 (D. D.C. July 20, 2016)	26, 34
<i>Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n</i> , 945 F-3d 206 (5th Cir. 2019)	5
<i>Wine Country Gift Baskets.com v. Steen</i> , 612 F.3d 809 (5th Cir. 2010)	8, 16
Statutes	
235 Ill. Comp. Stat. 5/6-29.1	12
Ala. Code § 28-7-20	21
Ariz. Rev. Stat. § 4-201	11

Ariz. Rev. Stat. § 4-202..... 11

Ariz. Rev. Stat. § 4-203..... 11, 12

Ariz. Rev. Stat. § 4-203.04..... 12

Ariz. Rev. Stat. § 4-206.01..... 11

Ariz. Rev. Stat. § 4-207..... 11

Ariz. Rev. Stat. Ann. § 4-243.01..... 11

Cal. Bus. & Prof. Code § 23402..... 21

Cal. Bus. & Prof. Code § 23660..... 12

Cal. Bus. & Prof. Code § 23661..... 12

Colo. Rev. Stat. § 44-3-409..... 21

Colo. Rev. Stat. § 44-3-410..... 21

Conn. Gen. Stat. § 30-76..... 22

Del. Code Ann. tit. 4, § 511..... 22

Del. Code Ann. tit. 4, § 701..... 12

Fla. Stat. Ann. § 561.545..... 12

Ga. Code Ann. § 3-3-31..... 12

Ga. Code Ann. § 3-3-32..... 12

Ga. Code Ann. § 560-2-3-.08..... 22

Hi. Stat. Title 16. Sec. 281-31..... 22

IA Admin Code 185.4.21..... 22

Ind. Code § 7.13-14-4..... 22

Ind. Code § 7.1-5-11-1.5..... 12

Iowa Code § 123.178 22

Kan. Stat. Ann. § 41-708 22

Ky. Rev. Stat. Ann. § 243.240 22

Ky. Rev. Stat. Ann. § 244.165 12

LA Stat. Ann. § 26.85 22

Mass. Gen. Laws ch. 138, § 23 22

MD. Code Reg. 14.23.01.02 22

ME. Rev. Stat. Ann. tit. 28-A § 1201 22

ME. Rev. Stat. Ann. tit. 28-A § 1401 22

Miss. Code Ann. § 67-1-41 22

Mo. Rev. Stat. § 311.280 22

Mont. Code Ann. § 16-3-402 12

N.C. Gen. Stat. § 18B-102 12

N.D. Admin. Code 10-08-03-01 22

N.J. Admin Code § 13:2-23.12 22

N.M. Stat. § 60-7A-11 22

N.Y. Alco. Bev. Cont. Law § 102 12

Neb. Rev. Stat. § 53-175 22

Nev. Rev. Stat. § 369.487 22

NH Rev. Stat. Ann. § 177:6 22

Ohio Rev. Code §4305-35 22

Okla. Stat. tit. 37A § 6-108 22

R.I Gen. Laws § 3-7-18 22

S. C. Code § 7-702 22

S.D. Codified Laws § 35-4-60 22

Tenn. Code Ann. § 57-3-404 22

Tex Alco. Bev. § 22.01 22

Tex Alco. Bev. § 23 22

Tex Alco. Bev. § 24.01 22

Tex Alco. Bev. § 25.01 22

Tex Alco. Bev. § 26.01 22

Tex Alco. Bev. § 61.71 22

U.S. Const. amend. XXI, § 2 3

Va. Code § 4.1-326 22

W. Va. Code § 175-1-3.2 22

W. Va. Code § 60-6-13 12

Wis. Stat. § 125.69 22

Rules

Ark. ABC Division Rules Title 3 Subtitle C § 3.7 21

Other Authorities

Amy Lombard, *The Cutthroat World of \$10 Ice Cream*,
 N.Y. TIMES (Aug. 13, 2021) 35

*Attorney General Nessel, Michigan Liquor Control
 Commission Crack Down on Illegal Wine Shipments
 in Michigan* 19

Center for Alcohol Policy, *Combating Fake, Counterfeit, and Contraband Alcohol Challenges in the United Kingdom through the Alcohol Wholesaler Registration Scheme (AWRS)* (2017) 26, 28

Center for Alcohol Policy, *National Alcohol Regulation Sentiment Survey* (2021) 32, 33, 37

David S. Sibley & Padmanabhan Srinagesh, *Dispelling the Myths of the Three-Tier Distribution System* (2008)..... 2, 37, 38

Debbi Beavers, *Kansas Alcoholic Beverage Control Division: Legislative Briefing* (Jan. 19, 2021) 17

Letter from John Yeomans, President, National Liquor Law Enforcement Association, to Senator Michael Bergstrom, Chairman, CIED Task Force (July 29, 2021)..... 19

Marc Sorini, *Understanding the Three-Tier System: Its Impacts on U.S. Craft Beer and You* 36

Neil Houghton and Marin Gjaja., *For Small and Large Brewers, the U.S. Market Is Open*, Boston Consulting Group (June 19, 2014)..... 35

Pamela S. Erikson, *Safe and Sound: How the Three-Tier System of U.S. Alcohol Regulations Helps Ensure Safe Products and Protects against Revenue Loss*, Campaign for a Healthy Alcohol Marketplace..... 34

Rebecca S. Williams & Kurt M. Ribisl, *Internet Alcohol Sales to Minors* (2012)..... 19

Roni Elias, *Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After Granholm*, 14 DePaul Bus. & Com. L.J. 209, 212 (2016) 38

<i>Size and Shape of the Global Illicit Alcohol Market,</i> Euromonitor (Nov. 6, 2018).....	25
The Alcohol Tobacco Trade and Tax Annual Report, <i>Fiscal Year 2020</i>	36
Tim Stockwell, et al., <i>Government Options to Reduce the Impact of Alcohol on Human Health: Obstacles to Effective Policy Implementation,</i> NUTRIENTS, 2021, 13, 2846 at 2–3 (Aug. 19, 2021)	28
Travis Hill, <i>Virginia Alcoholic Beverage Control Division: Update on Direct Shipment of Beer and Wine (License and Tax Compliance)</i> (Jan. 8, 2019)	18
Wines Vines Analytics, <i>U.S. Wineries—By State,</i> January 2023	17

STATEMENT OF AMICUS CURIAE¹

Wine & Spirits Wholesalers of America, Inc. (“WSWA”) is a national trade organization and the voice of the wine and spirits wholesale industry. Founded in 1943, WSWA represents more than 370 wine or spirits wholesalers in all 50 states and the District of Columbia. American Beverage Licensees (“ABL”) is an association representing approximately 12,000 licensed off-premises alcohol retailers (such as package liquor stores) and on-premises alcohol retailers (such as bars and restaurants) across the nation.

The wholesalers and retailers represented by *amici* have a strong interest in maintaining the integrity of the three-tier state regulatory system for the beverage-alcohol market and protecting the public health benefits that flow from it. This case challenges Arizona’s alcohol regulations and threatens nationwide disruption of States’ ability to regulate alcohol within their borders. *Amici* have an interest in

¹ All parties consent to the filing of this Amicus Brief.

No party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money intended to fund preparing or submitting the brief; and no person, other than *amici*, their members, or their counsel, contributed money intended to fund the preparation or submission of this brief.

addressing (1) the challenged Arizona statutes and their province in the national regulatory landscape; (2) the role of physical presence requirements; (3) the negative effects of judicial deregulation of State-based alcohol marketplaces; and (4) the correct application of the Supreme Court’s framework for evaluating the constitutionality of State alcohol regulation.

ARGUMENT

I. Section 2 of the Twenty-first Amendment grants States more freedom to regulate the market for alcohol than for any other article of commerce.

Like nearly every other State, Arizona relies on a three-tier regulatory system to control the distribution and sale of alcohol. *See Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2457 (2019). Under their three-tier systems, States separately license alcohol producers, wholesalers, and retailers. *Id.*; *see also* David S. Sibley & Padmanabhan Srinagesh, *Dispelling the Myths of the Three-Tier Distribution System* at 4 (2008), <https://perma.cc/2EW3-68XU>. Although limited exceptions exist, alcohol sold within these systems, including wine, moves from producers to licensed wholesalers to licensed retailers and, finally, to consumers.

The three-tier system is enabled by the Twenty-first Amendment, which made two key changes to alcohol regulation in the United States. Section 1 repealed the Eighteenth Amendment, ending Prohibition and returning alcohol to lawful commerce. Section 2, meanwhile, replaced Prohibition with a system of strict state-level regulation: “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. This language “grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.” *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980).

Because of the Twenty-first Amendment, the usual dormant Commerce Clause rule, under which States may not engage in “differential treatment of in-state and out-of-state economic interests,” *Or. Waste Systems, Inc. v. Dep’t of Env’t Quality*, 511 U.S. 93, 99 (1994), does not operate with equal force when it comes to alcohol regulation. States *can* burden the interstate flow of alcohol through regulations they could not impose to, for example, “control cheese.” *See, e.g.*,

Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000), and they can treat licensed retailers (which operate within a state’s three-tier system and maintain a physical premise in the State) differently from unlicensed retailers (which do not). Courts are particularly deferential to State alcohol regulation when, like here, the challenged law is an “essential feature” the of the three-tier system. *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 227 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 567 (2023).

A. *Tennessee Wine*’s “Different Inquiry”

In the context of the Twenty-first Amendment, the dormant Commerce Clause analysis is more deferential than usual because States enjoy “regulatory authority that they would not otherwise enjoy” if not for Section 2 of the Twenty-first Amendment. *Tennessee Wine*, 139 S. Ct. at 2474. Only when States discriminate against out-of-state interests through egregious methods—by engaging in unjustified protectionism—do they lose the “deference” generally afforded to “laws enacted to combat the perceived evils of an unrestricted traffic in liquor.” *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984).

Once a court determines that a state law discriminates against out-of-state goods or companies, the court must look for ‘concrete evidence’ that the statute ‘actually promotes [a State’s legitimate interest, including] public health or safety.’” *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n*, 945 F-3d 206, 213 (5th Cir. 2019) (quoting *Tenn. Wine*, 139 S. Ct. at 2474). If, and only if, the State fails to provide concrete evidence, then the court considers whether there is any evidence that “nondiscriminatory alternatives would be insufficient to further those interests.” *Id.*; see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 256 (1986) (using “concrete evidence” as “some evidence”).

Concrete Evidence. A State fails the “concrete evidence” step only if it cannot provide *any* evidence that the statute promotes public health or safety. For example, the Supreme Court determined that the State in *Tennessee Wine* presented *no* concrete evidence at all. Tr. of Oral Argument at 42, *Tenn. Wine*, 139 S. Ct. 2449 (No. 18-96) (“[The State] didn’t—it didn’t file a single affidavit. It didn’t put forward any kind of a witness. It didn’t put on any defense whatsoever.”). *Granholm* turned on a similar dearth of evidence—in fact, New York “explicitly

concede[d],” in the district court, that its disparate treatment of out-of-state wineries was “intended to be protectionist.” *Swedenburg v. Kelly*, 232 F. Supp. 2d 135, 146 (S.D.N.Y. 2002) (citing State Liquor Authority Divisional Order No. 714, ¶ 4 (Aug. 31, 1976)).

The lesson from *Granholm* and *Tennessee Wine* is that alcohol regulation survives constitutional scrutiny if the State offers *any* evidence that tends to show the “predominant effect” of a challenged regulation is the promotion of a State’s legitimate interest. And, as they are “entitled” to do in other constitutional contexts, States can “rely on the experiences” of other States for evidence supporting their regulatory scheme. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986). In practice, this means States need not “conduct new studies or produce evidence independent of that already generated by other [States], so long as whatever evidence the [State] relies upon is reasonably believed to be relevant to the problem that the [State] addresses.” *Id.* at 51–52.

Nondiscriminatory Alternatives. Courts undertake the “nondiscriminatory alternatives” inquiry only if a State provides *no* concrete evidence supporting a contested regulation. *See B-21 Wines*, 36

F.4th at 224–25 (under *Granholm* and *Tennessee Wine*, “the availability of nondiscriminatory alternatives” is not “central” to the analysis and need be discussed only if a state’s “discriminatory regime[] contravene[s] the dormant Commerce Clause and [is] not saved by the Twenty-first Amendment.” (emphasis added)).

The First, Fourth, Sixth, and Eighth Circuits have rejected efforts to read *Tennessee Wine*’s “nondiscriminatory alternatives” analysis as synonymous with or approaching strict scrutiny.² Strict scrutiny and its “narrow tailoring” is *never* appropriate, even if a State regulation plainly differentiates between in-state and out-of-state businesses. While strict scrutiny requires States to consider *every* nondiscriminatory alternative means of regulation, the *Tennessee Wine* test requires only that States demonstrate they are not *ignoring* “*obvious* alternatives that better serve” their interests—a far lighter burden. *Tenn. Wine*, 139 S. Ct. at 2476 (emphasis added).

² See, e.g., *Anvar v. Dwyer*, 82 F.4th 1, 11 (1st Cir. 2023); *B-21 Wines*, 36 F.4th at 225; *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1180 (8th Cir. 2021); *Lebamoff Enters. Inc. v. Whitmer*, 956 F.3d 863, 873 (6th Cir. 2020).

B. Courts Routinely Uphold Essential Features of the Three-Tier System

Because the three-tier system itself is constitutional, *Granholm v. Heald*, 544 U.S. 460, 489 (2005), courts have repeatedly rejected challenges to the “essential features” of States’ three-tier system.” *B-21 Wines*, 36 F.4th at 229 (challenging a “statute that permitted only in-state retailers to sell alcoholic beverages to consumers was ‘nothing different than an argument challenging the three-tier system itself’” (citation omitted)); *see also, e.g., Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1182 (8th Cir. 2021).

Put simply, three-tier systems of alcohol regulation fall within Section 2’s “virtually complete” regulatory authority, *Cal. Retail Liquor Dealers Ass’n*, 445 U.S. at 110, and, as courts across the country have recognized, they are valid exercises of State power. Once a court determines that a plaintiff is challenging an essential feature of the three-tier system—and eliminating that feature would change the character of the three-tier system itself—the court need not conduct a full commerce clause analysis because “*Granholm* already worked out the answer.” *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 821 (5th Cir. 2010). Thus, courts have upheld state alcohol regulations—

even “discriminatory requirements”—where the challenged statutory provisions are “essential features of the three-tier system . . . authorized by the Twenty-first Amendment.” *B-21 Wines*, 36 F.4th at 227.

II. Arizona’s physical presence requirements are essential features of its three-tier system, nondiscriminatory, and key to advancing State regulatory objectives.

Appellants challenge Arizona’s physical presence requirements, which are an “essential feature” of the three-tier system. Because the three-tier system is unquestionably legitimate, the Court need not engage in a full dormant Commerce Clause analysis; Arizona’s three-tier system must be upheld under the Twenty-first Amendment. Yet even if the Court does engage in a dormant Commerce Clause analysis, Arizona’s law must stand. As the district court recognized, the challenged provisions are not discriminatory, and they advance legitimate State regulatory objectives.

A. Appellants are challenging an “essential feature” of the Arizona three-tier system.

The court need not engage in a full dormant Commerce Clause analysis because Appellants challenge an essential feature of the three-tier system: Arizona’s physical presence requirements. *See Appellants’ Br.* at 14. Because physical presence requirements are an essential

feature of the three-tier system, they are entitled to substantial deference and, accordingly, they have been repeatedly upheld. *E.g.*, *B-21 Wines*, 36 F.4th at 228 (allowing “direct shipping of alcoholic beverages ... by out-of-state retailers” would “undermin[e] the [] three-tier system”); *Lebamoff Enters. Inc. v. Whitmer*, 956 F.3d 863, 872 (6th Cir. 2020) (“Opening up the State to direct deliveries from out-of-state retailers necessarily means opening it up to alcohol that passes through out-of-state wholesalers or for that matter no wholesaler at all . . . creat[ing] a sizeable hole in the three-tier system.”); *Sarasota Wine*, 987 F.3d at 1184 (the rules governing shipments of liquor were an “essential feature of [Missouri’s] three-tiered scheme.”).

In *Sarasota Wine*, for example, the Eighth Circuit considered whether “Missouri’s requirements that licensed liquor retailers be residents of Missouri, have a physical presence in the state, and purchase liquor sold in the State from licensed in-state wholesalers” violated the dormant Commerce Clause. *Id.* at 1182. The court rejected that argument because the licensing requirements, which include a physical premise requirement, are “an essential feature of” the three-

tier system. *Id.* at 1184. That conclusion, applicable here, defeated any theory of discrimination.

Under Arizona’s laws, out-of-state alcohol producers are required to route alcohol through an in-state wholesaler, which must unload the alcohol and hold it for twenty-four hours. Ariz. Rev. Stat. Ann. § 4-243.01(B). All alcohol shipped into Arizona must be invoiced to the wholesaler, and the wholesaler must send copies of the invoices to the department of revenue. *Id.* In that way, the wholesale tier in Arizona, like the wholesale tier in other states, serves as an in-state regulatory linchpin and “play[s] a key role” as the “in-state path through which all alcohol passes before reaching consumers.” *Lebamoff*, 956 F.3d at 868.

The retail tier, too, is highly regulated. To be licensed, a retailer must be qualified to do business in the state and its license must be held through a qualified agent. Ariz. Rev. Stat. § 4-202(A), (C). Retailers must also maintain brick-and-mortar premise within the State. *Id.* §§ 4-201; 4-203; 4-206.01; 4-207. And, with limited exceptions, they must purchase alcohol from the wholesale tier.³ *Id.* § 4-243.01(A). If a retailer

³ Arizona allows in- and out-of-state wineries to obtain a “direct shipment license,” allowing the winery to ship limited quantities of its

(Footnote cont'd on next page)

complies with those requirements, it may offer home delivery of wine to Arizona customers. *Id.* § 4-203(J).

Neither the statutes discussed in *Lebamoff, Sarasota Wine*, and *B-21 Wines* nor the Arizona statutes challenged here are outliers. Thirty-seven States prohibit out-of-state retailers from shipping wine to in-state consumers.⁴ Even more States, 43, prohibit out-of-state retailers from shipping spirits to in-state consumers.⁵

Arizona’s three-tier system thus mirrors the systems upheld in other states. These provisions, common nationwide, preserve the integrity of three-tier systems. As other Circuits have acknowledged, “an 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

wine directly to purchasers in Arizona. *Id.* § 4-203.04; *see also supra* at 17 (discussing direct shipment of wine under Arizona law).

⁴ *E.g.*, Del. Code Ann. tit. 4, § 701; Ga. Code Ann. § 3-3-31, -32; 235 Ill. Comp. Stat. 5/6-29.1; Ind. Code Ann. § 7.1-5-11-1.5; Ky. Rev. Stat. Ann. § 244.165; Mont. Code Ann. § 16-3-402; N.Y. Alco. Bev. Cont. Law § 102; N.C. Gen. Stat. § 18B-102.

⁵ *E.g.*, Cal. Bus. & Prof. Code § 23660, -61; Del. Code Ann. tit. 4 § 701; Fla. Stat. Ann. § 561.545(1); Ga. Code Ann. § 3-3-31, -32; 235 Ill. Comp. Stat. 5/6-29.1; N.Y. Alco. Bev. Cont. Law § 102; W. Va. Code § 60-6-13.

no different from a “challeng[e] [to] the three-tier system itself.” *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) (dictum).

B. Requiring physical presence as part of a licensing framework that is open to everyone is nondiscriminatory and does not offend the dormant Commerce Clause.

If the Court does engage in a dormant Commerce Clause analysis, Appellants’ claim fails because Arizona’s physical-presence requirement is non-discriminatory. The dormant Commerce Clause bans “differential treatment of in-state and out-of-state economic interests” between “entities who are similarly situated.” *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1230 (9th Cir. 2010). If, however, the entities are not similarly situated, they can be treated differently.

As the district court recognized, Arizona’s statute does not treat similarly situated “in-state” and “out-of-state” retailers differently. Order, ECF No. 66 at 10. Instead, it treats “licensed” and “unlicensed” retailers differently. An in-state retailer that does not comply with the licensing requirements—for example by being based in Arizona but maintaining only online stores instead of a physical store—would *not* qualify for a license and could not ship directly to consumers. And a retailer based outside of Arizona *could* become licensed if it met all

licensing requirements, including by obtaining a physical store in Arizona. Indeed, as Appellants concede, several out-of-state retailers *have* obtained an Arizona license. *Id.* at 12. The problem, as Appellants admitted at oral argument, is not that out-of-state retailers cannot comply with the regulations; they simply do not want to. SER-037 (“[T]hree very large retailers . . . have no interest in developing a physical presence in Arizona or buying their wine from a wholesaler in this state. They each buy their wines from their wholesalers in their own states.”).

The two groups of retailers that Arizona law treats differently—licensed versus unlicensed retailers—are not similarly situated. *See Lebamoff*, 956 F.3d at 870 (Retailers from different states “operate in distinct regulatory environments.”). Retailers who submit to the licensing requirements, including by opening a brick-and-mortar store in Arizona, “are subject to” Arizona’s regulations, including “on-site liquor inspections, investigations of complaints, covert underage buyer programs, audits and other financial inspections, and investigations of records to determine compliance with Arizona liquor laws.” Order, ECF No. 66 at 10. Unlicensed retailers without a physical presence in

Arizona are not, and could not be, subject to any of those regulations.
Id.

In that way, although Arizona’s three-tier system differentiates between two groups of retailers that are not similarly situated, it is evenhanded in its treatment of in-state retailers versus out-of-state retailers. The “rules governing direct shipments of wine to [Arizona] consumers apply evenhandedly to all who qualify for a[n Arizona] retailers license.” *Sarasota Wine*, 987 F.3d at 1184; *see also Lebamoff*, 956 F.3d at 875-76.

C. Physical presence requirements advance legitimate state policies.

Even if Arizona’s physical presence requirements were discriminatory—which they are not—Arizona produced concrete evidence that the physical presence requirements at issue advance a legitimate State interest, so they must be upheld. Presence requirements allow States like Arizona to achieve policy, regulatory, and marketplace objectives through wholesaler and retailer participation. Order ECF No. 66 at 2 (Arizona aims to “prevent suppliers from dominating local markets through vertical integration and to prevent excessive sales of spiritous liquor produced by overly

aggressive marketing techniques.” (quoting the Arizona legislative history)); *see also Tenn. Wine*, 139 S. Ct. at 2474 (the three-tier system efficiently promotes important State interests, including responsible sales and consumption practices and fostering public health and safety).

The Supreme Court has acknowledged that when retailers are “physically located within the State ... the State can monitor the stores’ operations through on-site inspections, audits, and the like.” *Tenn. Wine*, 139 S. Ct. at 2475. These legitimate interests, which promote public health and safety goals, do not evaporate when a licensed in-state retailer makes sales by in-state shipping or delivery.⁶

Seeking to downplay the regulatory importance of in-state presence requirements, Appellants emphasize that many States, including Arizona, permit *wineries* (not retailers) to ship limited amounts of wine directly to consumers, across state borders. *See* Appellants’ Br. 35-36. Appellants claim this limited exception to the three-tier system and related presence requirement requires an

⁶ *See also, Byrd v. Tenn. Wine & Spirits Retailers Ass’n*, 883 F.3d 608, 623 (6th Cir. 2018), *aff’d sub nom. Tenn. Wine*, 139 S. Ct. 2449 (2019); *Wine Country Gift Baskets.com*, 612 F.3d at 818–20 (5th Cir. 2010); *Arnold’s Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2d Cir. 2009).

additional, massive exception—for roughly 400,000 wine *retailers* in the United States, ER-139—as a matter of constitutional law. *Id.* Wineries, however, are limited in number: There are only around 11,000 in the entire country, and the vast majority are small businesses.⁷ Given these limitations, they are a manageable exception to three-tier systems nationwide.

Yet even that limited exception has created opportunities for noncompliance. Several States or state-affiliated entities have found that out-of-state retailers regularly exploit the winery direct-to-consumer exception, resulting in increases in, among other things: (1) unauthorized shipments; (2) tax evasion; and (3) receipt of alcohol by minors. For example, Kansas, which permits direct-to-consumer shipments by licensed wineries, investigated vendors that targeted residents via social media.⁸ Kansas found that:

- 95% of these vendors illegally sold and shipped spirits into

⁷ Wines Vines Analytics, *U.S. Wineries—By State*, January 2023, <https://winesvinesanalytics.com/statistics/winery>.

⁸ Debbi Beavers, *Kansas Alcoholic Beverage Control Division: Legislative Briefing* (Jan. 19, 2021), http://www.kslegislature.org/li/b2021_22/committees/ctte_s_fed_st_1/misc_documents/download_testimony/ctte_s_fed_st_1_20210127_01_testimony.html.

the State.

- 100% illegally shipped beer to Kansas consumers.
- 71% shipped wine to Kansas consumers without the required state licensure; of those, 50% also lacked a federal license.
- Unmarked packages containing alcohol products were delivered to or collected by minors as young as seven years old.

Kansas is not alone in its findings. This evasion of state regulations exists even in States that intentionally permit out-of-state retailers to ship alcohol to in-state consumers. In Virginia, for instance, a study by the Commonwealth's Alcoholic Beverage Control Authority revealed that, in just a four-month period, 39% of shipments from out-of-state retailers were unauthorized.⁹

Even more troubling, a North Carolina study confirmed that direct shipment of alcohol to consumers increases underage receipt of

⁹ Travis Hill, *Virginia Alcoholic Beverage Control Division: Update on Direct Shipment of Beer and Wine (License and Tax Compliance)* (Jan. 8, 2019), http://sfac.virginia.gov/pdf/Public%20Safety/2019/010819_No1_ABC.pdf.

alcohol.¹⁰ These problems are far from isolated; they exist nationwide, and Arizona is no exception.¹¹

Out-of-state vendors engaging in the practices Appellants seek to force Arizona to accept have therefore demonstrably failed to self-police. Indeed, in some cases they *intentionally* flout state law, forcing States to pursue expensive, time-consuming federal lawsuits against out-of-state entities, rather than the efficient State administrative proceedings available against in-state licensees.¹² Unlike their in-state counterparts, out-of-state retailers are hidden from effective oversight and can undermine State alcohol regulations from afar.

¹⁰ See, e.g., Rebecca S. Williams & Kurt M. Ribisl, *Internet Alcohol Sales to Minors* (2012) (explaining that 45% of sampled underage purchase orders were successfully received by underage buyers and concluding that “vendors do not adequately prevent online sales to minors”), <https://jamanetwork.com/journals/jamapediatrics/fullarticle/1149402>.

¹¹ Letter from John Yeomans, President, National Liquor Law Enforcement Association, to Senator Michael Bergstrom, Chairman, CIED Task Force (July 29, 2021), available at <https://www.wswa.org/sites/default/files/2021-07/NLLEA%20ALEC%20CIED%20Letter.pdf>

¹² See Attorney General Nessel, *Michigan Liquor Control Commission Crack Down on Illegal Wine Shipments in Michigan*, <https://www.michigan.gov/ag/news/press-releases/2020/10/07/ag-nessel-michigan-liquor-control-commission-crack-down-on-illegal-wine-shipments-in-michigan>.

If physical presence requirements were invalidated and out-of-state retailers had a right to engage in direct-to-consumer shipping or delivery, as Appellants seek, the exception would exacerbate the tax losses and public safety concerns already seen from the exploitation of winery direct-shipment. The number of domestic wine retailers is 36 times *larger* than the relatively small number of wineries: there are roughly *400,000 wine retailers* across the country. ER-139.

Arizona has thus presented concrete evidence that the presence requirements advance legitimate state interests. As a result, the Court need not reach the nondiscriminatory alternatives portion of the *Tennessee Wine* test. *B-21 Wines*, 36 F.4th at 224–25.

III. Appellants’ claimed injury is not redressable because courts cannot rewrite Arizona’s alcohol laws to meet appellants’ policy objectives.

Alternatively, as the district court recognized, Appellants lack standing to bring a dormant Commerce Clause claim because their alleged injury is not redressable. Remedies for unconstitutional statutes must be limited to narrowly addressing the problem and enjoining only the unconstitutional application, while leaving in force the rest of the statute. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320,

328 (2006). That principle is especially appropriate here, where striking down more of Arizona’s law than necessary would infringe on the State’s broad regulatory authority under the Twenty-first Amendment. Appellants’ alleged harms are therefore not redressable for two reasons.

Lack of Requested Relief. As the district court recognized, Appellants challenged only a narrow portion of Arizona’s statutes regulating alcohol sales: the law requiring liquor to be shipped to a wholesaler, where it must be unloaded and remain for 24 hours. Order, ECF No. 66 at 3. Even if a court were to strike down that portion of the law, other sections of the law would still bar out-of-state retailers from shipping alcohol directly to Arizona consumers—for example, the requirement that all retailers purchase their inventory from licensed wholesalers. *Id.* at 5. Retailers in other States cannot purchase their inventory from Arizona wholesalers—even for the purpose of shipping to Arizona consumers—because they are required to purchase inventory from their *own* State’s wholesalers.¹³ Thus, even without Arizona’s

¹³ Thirty-five States in addition to Arizona require licensed retailers to purchase from wholesalers within the State. Ala. Code § 28-7-20; Ark. ABC Division Rules Title 3 Subtitle C § 3.7; Cal. Bus. & Prof. Code § 23402; Colo. Rev. Stat. §§ 44-3-409 and 44-3-410; Conn. Gen.

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physical presence requirements, the unlicensed retailers could not comply with Arizona law. “[B]ecause Plaintiffs’ proposed transaction would still be prohibited by the . . . Act even if [the court] were to strike down [the requested portion] as unconstitutional, a favorable ruling would not remedy Plaintiffs’ alleged injury, the cornerstone of redressability.” *Orion Wine Imports, LLC v. Appelsmith*, 837 F. App’x 585, 586 (9th Cir. 2021).

Appellants contend that the Court can simply “enjoin [Arizona] from enforcing” the requirement that “retailers obtain their wine from an Arizona wholesaler” as well.¹⁴ Appellants’ Br. at 14. In that way,

Stat. § 30-76; Del. Code Ann. tit. 4, § 511; Ga. Code Ann. § 560-2-3-.08; Hi. Stat. Title 16. Sec. 281-31(t); Ind. Code § 7.13-14-4; IA Admin Code 185.4.21(123); Iowa Code § 123.178; Kan. Stat. Ann. § 41-708; Ky. Rev. Stat. Ann. § 243.240(2); LA Stat. Ann. § 26.85; ME. Rev. Stat. Ann. tit. 28-A § 1201, § 1401(9); MD. Code Reg. 14.23.01.02; Mass. Gen. Laws ch. 138, § 23; Miss. Code Ann. § 67-1-41; Mo. Rev. Stat. § 311.280; Neb. Rev. Stat. § 53-175; Nev. Rev. Stat. § 369.487; NH Rev. Stat. Ann. § 177:6; N.J. Admin Code § 13:2-23.12; N.M. Stat. § 60-7A-11; N.D. Admin. Code 10-08-03-01; Ohio Rev. Code §4305-35; Okla. Stat. tit. 37A § 6-108; R.I Gen. Laws § 3-7-18; S. C. Code § 7-702; S.D. Codified Laws § 35-4-60; Tenn. Code Ann. § 57-3-404; Tex Alco. Bev. §§ 22.01; 23; 24.01; 25.01; 26.01; 61.71(19); Va. Code § 4.1-326; W. Va. Code § 175-1-3.2; Wis. Stat. § 125.69(6).

¹⁴As in the district court, Appellants are unclear about what they seek. On the same page where Appellants contend that the Court

(Footnote cont'd on next page)

Appellants ask the Court to dismantle Arizona’s three-tier system entirely by eliminating the responsibilities of the wholesaler tier. But as the Court demonstrated in *Orion*, that is not how redressability works. 837 F. App’x at 586 (dismissing the lawsuit rather than enjoining addition, unchallenged portions of the statute). Appellants do not allege that the requirement that *all* retailers purchase from Arizona-licensed wholesalers is unconstitutional. Yet they ask the Court to enjoin Arizona from applying that constitutional provision so that out-of-state retailers can ship directly to consumers. Because courts cannot enjoin constitutional state laws to enact the policy preferences of litigants, Appellants’ alleged injury is not redressable. *See Ayotte*, 546 U.S. at 328.

Leveling Down. The only remedy the Court could impose—a “leveled down” remedy—would not redress appellants’ purported harm. Because the “constitutional mandate and institutional competence” of

should simply strike down the wholesaler tier of the three-tier system, Appellants also argue that they are not challenging the regulatory system generally but are challenging the “requirement that wine retailers must be *physically* located in the state to ship directly to consumers.” Appellants’ Br. at 14.

courts are limited, courts must restrain themselves from “rewrit[ing] state law to conform it to constitutional requirements.” *Ayotte*, 546 U.S. at 329. (citation omitted). Instead, the Court should step down by enjoining the narrowest portion of the law possible. *Id.* (The Court tries not to “nullify more of a legislature’s work than is necessary.”).

Appellants are not entitled to a remedy that would modify all laws impeding the direct shipment of wine from out-of-state retailers. Thus, the solution would be to prohibit in-state direct shipping by retailers, rather than exempt out-of-state retailers from the regulations that Arizona has imposed and causing severe harm to the three-tier system. That solution would not solve Appellants’ purported harm: Appellants still could not have wine shipped directly from out-of-state, unlicensed retailers. Moreover, counsel for Appellants explained that Appellants were “clearly not” seeking that step-down remedy. SER-009. Appellants’ claim is therefore not redressable.

IV. Appellants seek to impose their own policy preferences by removing regulations for out-of-state retailers, which would destroy the public health and safety, economic, and consumer benefits of the three-tier system.

Appellants’ attack on the three-tier system and the physical premise requirements is merely an attempt to impose their own policy

preference through the judiciary, instead of through the political process. If nationwide supplier delivery or shipping is authorized through judicial deregulation, the in-state purchase requirement of Arizona's alcohol distribution framework would be rendered obsolete and the integrity of similar State systems would be threatened. *See, e.g., B-21 Wines, Inc.* , 36 F.4th at 229. And the citizens of those States would be deprived of the policies they voted for.

The Supreme Court has long understood the public health and safety benefits promoted by the three-tier system. *See Granholm v. Heald*, 544 U.S. 460, 489 (2005). This system has many regulatory benefits, demonstrated by the effect of its absence in international markets.¹⁵ In those markets, unchecked competition for market share drives down prices, promotes excess consumption, and increases consumer susceptibility to illicit or tainted alcohol.¹⁶ Additionally, less-regulated markets result in less consumer choice because large

¹⁵ *Size and Shape of the Global Illicit Alcohol Market*, Euromonitor (Nov. 6, 2018), https://www.tracit.org/uploads/1/0/2/2/102238034/illicit_alcohol_-_white_paper.pdf.

¹⁶ *Id.*

suppliers dominate.¹⁷ For these reasons, the legal system in this country has sought to preserve the “orderly market conditions” generated by three-tier systems nationwide.¹⁸ *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion); *see also Tenn. Wine*, 139 S. Ct. at 2475.

Moreover, States have adopted the three-tier system—including physical presence requirements—because it is an effective way to achieve policy objectives. The wholesale tier in particular serves a vital regulatory function within the three-tier framework, and it also generates substantial *economic* benefits to States, producers, retailers, and consumers. Those benefits, however, depend on its continued *regulatory* function. Put simply, if out-of-state retailers had a right to bypass wholesalers and moot their regulatory role—as Appellants urge

¹⁷ *Cf.* Competitive Impact Statement at 8, *United States v. Anheuser-Busch InBev SA/NV*, No. 16-01483, 2018 WL 6684721 (D. D.C. July 20, 2016), ECF No. 3.

¹⁸ *See, e.g.*, Center for Alcohol Policy, *Combating Fake, Counterfeit, and Contraband Alcohol Challenges in the United Kingdom through the Alcohol Wholesaler Registration Scheme (AWRS)* (2017), <https://www.centerforalcoholpolicy.org/wp-content/uploads/2017/09/Combating-Fake-Counterfeit-and-Contraband-Alcohol-Challenges-in-the-United-Kingdom.pdf>.

this Court to hold—the economic benefits wholesalers provide will dissipate.

A. States’ ability to effectively regulate their alcohol marketplaces and keep citizens safe depends on the integrity of the three-tier system.

Alcohol regulation is a unique system that builds on state-specific values and societal interests, and States are constitutionally empowered to determine how best to advance citizen preferences when it comes to alcohol regulation. *Granholm*, 544 U.S. at 484. Alcohol plays an important cultural role—a glass of wine can be the perfect complement to a fine meal, while champagne can be central to a special celebration. On the other hand, alcohol is an intoxicant that, when abused, can cause serious societal problems, including death. Sensible regulation of the alcohol market must consider a range of perspectives, including public health, youth protection, and public revenue.

1. Wholesalers serve an important regulatory function.

Wholesalers are responsible for cataloguing, distributing, and remitting excise tax on nearly every drop of wine that moves through state markets. “[A]lcohol taxes [along with other measures have] been shown to be a means of delivering such diverse benefits as improved

public health outcomes, increased government revenues and greater industry profits.”¹⁹ Compliance with tax, periodic inspections, and invoicing are all conducted at the wholesaler level. *See* Order, ECF No. 66 at 2.

Wholesalers’ role as physically present market intermediaries similarly enables them to track product in a way producers and retailers cannot. As a result, they have a singular ability to quickly recall tainted or illicit products, protecting consumers from dangers that plague other countries lacking an active middle tier.²⁰ Without the wholesale tier, recalls would be near-impossible, given the universe of 400,000 retailers.

The importance of physically present wholesalers was recently underscored in an investigation of direct-to-consumer alcohol sales in

¹⁹ Tim Stockwell, et al., *Government Options to Reduce the Impact of Alcohol on Human Health: Obstacles to Effective Policy Implementation*, NUTRIENTS, 2021, 13(8), 2846 at 2–3 (Aug. 19, 2021), <https://doi.org/10.3390/nu13082846>, *supra*, at 9.

²⁰ Center for Alcohol Policy, *Combating Fake, Counterfeit, and Contraband Alcohol Challenges in the United Kingdom*, *supra*, at 6. *See also* Nicola Carruthers, *How the Industry is Tackling Fake Alcohol*, The Spirits Business (Apr. 12, 2023), <https://www.thespiritsbusiness.com/2023/04/how-the-industry-is-tackling-fake-alcohol/> (discussing the problems associated with counterfeit alcohol).

Vermont.²¹ Vermont has issued limited direct-to-consumer licenses to alcohol producers for about a decade—meaning the sales do not go through the wholesaler tier.²² In the course of determining whether to expand its direct-to-consumer alcohol licensing program, Vermont’s alcohol regulatory agency conducted undercover purchases through the direct-to-consumer process. It found that, in the 40 shipments it received, “no purchase was delivered completely lawfully.”²³ In some cases, no ID was requested (even when the alcohol was received by a minor), the shipment was never reported, or the packages were not properly marked.²⁴ Based on the study, the agency determined that direct-to-consumer shipping is “significantly underregulated and would

²¹ Vermont Department of Liquor and Lottery DTC Shipping Pilot Compliance Program, <https://legislature.vermont.gov/Documents/2024/WorkGroups/House%20Human%20Services/Bills/H.729/Witness%20Documents/H.729~Skyler%20Genest~Vermont%20Department%20of%20Liquor%20and%20Lottery%20DTC%20Shipping%20Pilot%20Compliance%20Program~1-24-2024.pdf>.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

take significant investment to properly regulate and ensure public safety.”²⁵

2. Licensed retailers create additional, independent regulatory value from which consumers directly benefit.

As the “final link in the [three-tier] chain,” *Granholm*, 544 U.S. at 469, licensed retailers play a vital role in both *preserving* the regulatory effects of the wholesale tier and *independently advancing* state regulatory objectives, from preventing underage access to assisting in product recall.

First, because licensed retailers must maintain a brick and mortar store and purchase from in-state wholesalers, they are incentivized to work with regulators—not against them. States cannot brandish the stick of on-site inspection or permit-revocation (and the resulting inability to sell stocked product) against unlicensed, out-of-state retailers because those retailers are hidden from effective oversight and can continue to sell and restock products in their home states. Licensed retailers have no such failsafe: They are required to operate, at least

²⁵ *Id.*

partially, within the State, preserving wholesalers' regulatory impact and advancing state regulatory objectives in the process.

Second, licensed retailers also generate *independent* regulatory value and increase community safety. For example, licensed retailers are subject to “on-site liquor inspections, investigation of complaints, covert underage buyer programs, audits and other financial inspections, and investigation of records to determine compliance with Arizona liquor laws.” Order, ECF No. 66 at 10. These restrictions protect consumers from unscrupulous sales practices and anticompetitive behavior. Without those physical premise requirements, States will be unable to preserve the myriad benefits that stem from in-state retailers' willing regulatory compliance and community investment.

3. Change to the three-tier system is properly made through State legislatures and regulatory agencies.

As the Supreme Court acknowledged in *Tennessee Wine*, “each State [has] the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens.” 139 S. Ct. at 2474. While addressing these concerns is no simple task, States

have succeeded, as public opinion shows.²⁶ That success is jeopardized by the specter of unwarranted judicial deregulation.

Appellants here seek to undermine Arizona’s three-tier regulatory framework because the “local wine shops . . . carry few of the wines that he is interested in purchasing” Appellants’ Br. 8. And, according to Appellants, “there is a broader selection of wines available online, the pricing of wine is more competitive online, and home delivery is more convenient because traveling to purchase specific wines is impracticable.” *Id.* at 8-9.

Consumers, like Appellants here, who want changes to the existing market regulatory structure should turn to “state-by-state political action,” *Sarasota Wine*, 987 F.3d at 1185, rather than attempt to demolish the three-tier system and impose their policy preferences through litigation. Unlike courts, policymakers and regulators employ a range of tools to create a practical and effective regulatory environment: pricing and taxation, restrictions on alcohol availability, liquor law

²⁶ Center for Alcohol Policy, *National Alcohol Regulation Sentiment Survey* (2021), at 4, https://www.centerforalcoholpolicy.org/wp-content/uploads/2021/04/CAP-2021-Survey-Report_4-30-21-2.pdf.

enforcement, monitoring and reporting, and public health messaging.²⁷

Deregulation—particularly the sudden and drastic deregulation

Appellants advocate—is a weighty decision best made in a legislative setting.

B. The wholesale tier increases consumer choice and availability, and consumers approve of them.

The carefully calibrated three-tier regulatory systems in Arizona, and states like Arizona, are popular among the consumers they protect: 85% of Americans are satisfied with alcohol regulations in their state, and 88% are satisfied with the variety of products available.²⁸ Lawsuits like this one harm the very consumers whose interests they purport to advance.

The wholesale distribution tier, and the related regulatory framework, is the mechanism that maintains consumer choice and the competitiveness of small craft breweries, wineries, and distilleries. The wholesale tier “prevents marketplace domination by large companies that would seek to greatly increase alcohol sales through aggressive

²⁷ *E.g.*, Stockwell at 2–3.

²⁸ Center for Alcohol Policy, *Sentiment Survey*, *supra*, at 4.

practices, or by controlling the entire alcohol distribution chain.”²⁹ In doing so, wholesalers serve as a bulwark protecting consumer choice.

The United States Department of Justice’s Antitrust Division acknowledged this market principle in its challenge to Anheuser-Busch InBev’s acquisition of SABMiller. DOJ explained that “[e]ffective distribution is important for a brewer to be competitive in the U.S. beer industry”³⁰ and expressed concern that a merger between large alcohol producers would increase the incentive and ability to disadvantage rivals by impeding their distribution.³¹ Other experts have come to the same conclusion: One study, for example, found that smaller beer producers can readily grow their businesses because they have “deep

²⁹ Pamela S. Erikson, *Safe and Sound: How the Three-Tier System of U.S. Alcohol Regulations Helps Ensure Safe Products and Protects against Revenue Loss*, Campaign for a Healthy Alcohol Marketplace at 2, https://www.nabca.org/sites/default/files/assets/publications/research_studies/SafeandSound.pdf.

³⁰ Competitive Impact Statement at 8, *United States v. Anheuser-Busch InBev SA/NV, and SABMiller, plc*, No. 16-cv-01483 (D. D.C. July 20, 2016), ECF No. 3.

³¹ Compl. at 3, 12, ¶¶ 7, 45–47, *United States v. Anheuser-Busch InBev SA/NV and SABMiller, plc*, No. 16-cv-01483 (D. D.C. July 20, 2016), ECF No. 1.

access to large and small retailers.”³² Without the existing regulatory regime, distribution access will contract to the detriment of small players.

These concerns reach beyond the market for beer. The independence of wholesale distributors is critical to the continued success of not just craft brewers, but vintners and distillers as well. There is a reason retail *soda* aisles are dominated by a handful of major brands, while retail *alcohol* shelves are stocked with many offerings from a range of alcohol producers, both large and small. When products rely on direct-store delivery—as do soda, ice cream,³³ and snacks—scale matters, and industry titans elbow smaller players out of the way.³⁴

But because wine wholesale distributors are *not* dominated or captured by industry goliaths, and because each wholesaler represents

³² Neil Houghton and Marin Gjaja., *For Small and Large Brewers, the U.S. Market Is Open*, Boston Consulting Group (June 19, 2014) at 1, <https://www.bcg.com/en-us/publications/2014/consumer-products-for-small-large-brewers-us-market-open>.

³³ Amy Lombard, *The Cutthroat World of \$10 Ice Cream*, N.Y. TIMES (Aug. 13, 2021), <https://www.nytimes.com/2021/08/13/business/ice-cream-premium-competition.html> (“The truth of the matter is that you have two world giants that will spend a fortune to protect what they have . . .”).

³⁴ Houghton, *supra*, *id.*

competing brands, they are able to provide industry newcomers access to retailer outlets they would be unable to garner themselves.³⁵

Three-tier regulatory systems, in turn, result in high levels of product diversity, innovation, and customer satisfaction. According to data from a recent U.S. Alcohol Tobacco Tax and Trade Bureau (“TTB”) Annual Report,³⁶ the TTB approved over 175,000 new labels in one year, representing a large range of new products. Wine product registrations, for example, grew 23%. While these label applications over-represent the number of new products that actually enter the U.S. market, they nevertheless demonstrate optimistic market-access expectations that brewers, vintners, and distillers hold under the current regulatory regime.

Consumers recognize this and understand how well the existing system works for them; the vast majority believe state regulations are

³⁵ See, e.g., Marc Sorini, *Understanding the Three-Tier System: Its Impacts on U.S. Craft Beer and You*, at 4, Craftbeer.com, <https://www.craftbeer.com/craft-beer-muses/three-tier-system-impacts-craft-beer>.

³⁶ The Alcohol and Tobacco Tax and Trade Bureau Annual Report, *Fiscal Year 2022*, <https://www.ttb.gov/images/pdfs/ttbar2022.pdf>.

“just right.”³⁷ Arizona and other States have a legitimate interest in continuing to advance consumers’ expressed preference for variety—but they cannot do so without the wholesale tier.

C. The wholesale tier creates economies of scale and other efficiencies that benefit producers, retailers, and the overall market.

Wholesale distributors are crucial intermediaries that aid the business processes of their industry counterparts. The diversity and variety of alcohol products, fluctuations in demand, prevalence of supply-chain interruptions, ever-changing consumer tastes, and challenges of marketing to different retailers (e.g., restaurants, stores, bars, etc.) create unique difficulties for both producers and retailers. To combat these challenges, wholesalers routinely inform the work of producers and retailers alike.³⁸

In addition, wholesalers often problem-solve retail-level logistics for producers and retailers using their infrastructure, which includes complex software and hardware, rolling inventory, refrigerated and unrefrigerated warehouses, sales forces, delivery forces, promotional

³⁷ Center for Alcohol Policy, *Sentiment Survey*, *supra*, at 4.

³⁸ Sibley, *supra*, at 12.

marketing material, and retail-advisory-focused staff.³⁹ Few producers have these capabilities, and to most, it would be “prohibitively expensive to assemble orders” in compliance “with applicable regulations.”⁴⁰ Wholesalers leverage their capabilities to manage the distribution function for suppliers. In the process, wholesalers increase information-system interoperability and reduce retailer costs to the tune of approximately \$7.2 billion dollars annually.⁴¹

But wholesalers do not just improve the processes of producers and retailers; they also improve consumers’ day-to-day shopping experiences. For instance, wholesalers often educate retail staff on products and companies. In turn, retailers pass this information onto consumers. In this way, wholesalers help the entire market: producers, retailers, and consumers.

³⁹ Roni Elias, *Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After Granholm*, 14 DePaul Bus. & Com. L.J. 209, 212 (2016), <https://via.library.depaul.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1341&context=bclj> (last visited Apr. 21, 2023).

⁴⁰ Sibley, *supra*, at 15

⁴¹ *Id.* at 14.

Wholesalers are, therefore, far from inert conduits in the three-tier supply chain. Enabling out-of-state retailers to evade the wholesale tier would diminish the commercial efficiencies that flow from wholesalers' regulatory and economic role.

CONCLUSION

Under the Twenty-first Amendment, State alcohol regulations are afforded “special protection” and “should not be set aside lightly.” *North Dakota*, 495 U.S. at 433. *Amici* ask the Court to affirm the decision below, uphold the challenged statutes, and ensure the continued vitality of the three-tier regulatory regime in Arizona.

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Jacob Hegeman
WINE & SPIRITS
WHOLESALEERS OF AMERICA,
INC.
804 15th St. NW, Ste. 1120
Washington, DC 20005

Respectfully submitted,

s/ Frederick Yarger

WHEELER TRIGG O'DONNELL
LLP
Frederick Yarger (CO Bar #39479)
William Sowers, Jr. (CO Bar #58499)
370 17th Street, Suite 4500
Denver, CO 80202-5647
Telephone: 303.244.1800
Facsimile: 303.244.1879
Email: yarger@wtotrial.com
sowers@wtotrial.com

Attorneys for Wine & Spirits Wholesalers Association of America

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I hereby certify that on March 15, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Christine Keitlen

Christine Keitlen