No. 23-16148

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

Appeal from the U.S. District Court for the District of Arizona
No. 2:21-cv-01332-GMS

ANSWERING BRIEF OF APPELLEE WINE & SPIRITS WHOLESALERS ASSOCIATION OF ARIZONA

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, Appellee Wine and Spirits Wholesalers Association of Arizona states that is not a publicly held company and is not a parent, subsidiary, or other affiliate of a publicly held corporation.

Date: March 8, 2024

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INTRODUCTION

Arizona, like most states, regulates alcohol by routing it through a "three-tier system" comprised of three distinct licensed tiers: (1) producers, (2) wholesalers, and (3) retailers. With limited exceptions, producers sell only to wholesalers; wholesalers distribute producer's products to retailers; and retailers sell directly to consumers. *See* A.R.S. § 4-243.01(A)(3). Participants in each tier must obtain a state license.

In this case, Plaintiffs seek to exempt unlicensed wine retailers operating outside of Arizona from Arizona's three-tier system of alcohol regulation. Although Plaintiffs now claim that the trial court "mischaracterized" their requested relief, Plaintiffs' counsel unambiguously told the court not just once but twice at oral argument that they seek "an exception to the three-tier system" for out-of-state retailers without physical premises in Arizona. SER-013, -017.[1]

In other words, Plaintiffs ask this Court to find that several of Arizona's statutes, including the requirements that retailers purchase their wine from an Arizona-licensed wholesaler and have physical

[1] Citations to "SER" refer to Appellees' combined Supplemental Excerpts of Record filed concurrently with the State Defendants' Answering Brief.

premises located within the State, are constitutional as applied to licensed retailers operating within the State but not as to unlicensed retailers operating outside the State. *See* SER-012. Plaintiffs' requested relief would put those unlicensed out-of-state retailers in a far better position than licensed retailers operating in the State and effectively demolish Arizona's three-tier system.

Plaintiffs' position is contrary to the Twenty-First Amendment and the caselaw. No court has ever held that the dormant Commerce Clause requires a state to exempt out-of-state businesses from the state's three-tier alcohol distribution system.

Indeed, the U.S. Supreme Court has affirmed the legitimacy of the three-tier distribution system and wholesaler purchase requirements. *Granholm v. Heald*, 544 U.S. 460, 466 (2005) ("We have held previously that States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment."); *see also North Dakota v. United States*, 495 U.S. 423, 447 (1990) (Scalia, J., concurring in judgment) ("The Twenty-First Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler.").

The district court followed recent decisions from the Fourth, Sixth, and Eighth Circuits rejecting similar dormant Commerce Clause challenges. Plaintiffs offer no valid reason for this Court to diverge. The licensing requirements at issue apply evenhandedly to all licensees regardless of citizenship, do not discriminate against similarly-situated out-of-state entities, and serve vital State interests, including the preservation of Arizona's three-tier system.

And before the Court even reaches these merits issues, the Court should find that Plaintiffs lack standing given their failure to challenge certain Arizona laws that would prevent the transactions Plaintiffs desire.

On either standing grounds or the merits, this Court should affirm the judgment in favor of Defendants.

ISSUES PRESENTED

1. Whether Plaintiffs have shown standing where they failed to challenge an applicable statute that would bar the relief they seek?

2. Whether the dormant Commerce Clause requires Arizona to exempt out-of-state businesses from its three-tier system of alcohol regulation, including the requirements that Arizona licensed wine retailers maintain physical premises within the State and purchase

their wine from Arizona licensed wholesalers, and the requirement that all wine shipped into the State be delivered to an Arizona wholesaler and remain there for at least 24 hours before delivery to a retailer?

STATUTORY AUTHORITIES

Except for the following, all applicable statutes are contained in Plaintiffs' Opening Brief.

1991 Ariz. Sess. Laws, Ch. 52, § 1:

The legislature finds that it is necessary and proper to require a separation between the manufacturing interests, wholesale interests and retail interests in the production and distribution of spirituous liquor in order to prevent suppliers from dominating local markets through vertical integration and to prevent excessive sales of spirituous liquor produced by overly aggressive marketing techniques. The legislature further finds that the narrow exception established by this act to the general prohibition against tied interests must be limited to its express terms so as not to undermine the general prohibition and intends that this act be construed accordingly.

2006 Ariz. Sess. Laws, Ch. 310 § 9(A):

A. The purpose of this act is to conform Arizona laws regarding the intrastate and interstate sales and deliveries of wine to the

provisions of Public Law 107-273, div. C Title I, section 11022 and to conform to the requirements of the decision of the United States Supreme Court in Granholm v. Heald, 544 U.S. 460, 125 S.Ct. 1885 (2005) by adopting nondiscriminatory laws governing the sale and delivery of wine produced by small wineries. This act is intended to provide for a separate method of regulating only the sale and delivery of wine produced by small wineries. Other than the specific exceptions established by existing law and this act for domestic farm wineries, it is the intent of this act to retain the current three-tier method of regulating the sale and delivery of spirituous liquor and the current revenue collection and enforcement law.

STATEMENT OF THE CASE

I. Factual Background.

A. Arizona Uses a Three-Tier System to Regulate Alcohol.

Arizona has adopted the three-tier system of alcohol regulation subject to limited exceptions, not at issue in this case, for direct

shipment by licensed wineries[2] and farm winery license holders.[3] A.R.S. § 4-243.01(A)(3). Under the three-tier system, producers sell products to wholesalers, wholesalers distribute those products to retailers, and retailers sell to consumers. Participants in each tier must obtain a state license.

States have used the basic three-tier framework for alcohol regulation since the end of Prohibition as a way to avoid the ills of "tied-house" saloons, in which producers "set up saloonkeepers with a building and equipment in exchange for promises to sell only their drinks and to meet minimum sales goals." *Lebamoff Enterprises Inc. v. Whitmer*, 956 F.3d 863, 867 (6th Cir. 2020). While tied-houses created an efficient market scheme, they "often encouraged irresponsible drinking." *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2463 n.7 (2019). By design, "[t]he purpose of the [three-tier] system, for better or worse, is to make it harder to sell alcohol by

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[2] Wineries, both in- and out-of-Arizona, can apply for a direct-to-consumer (DTC) shipment license that allows for direct shipment of up to twelve nine-liter cases of wine to Arizona residents. A.R.S. § 4-203.04(F).

[3] The farm winery license is only available to very small or limited production wineries and allows the licensee to sell and deliver products made at the licensee's winery. A.R.S. § 4-205.04.

requiring it to pass through regulated in-state wholesalers." *Lebamoff*, 956 F.3d at 875; *see also Tenn. Wine*, 139 S.Ct. at 2463 n.7.

The Arizona State Legislature has specifically found "that it is necessary and proper to require a separation between manufacturing interests, wholesale interests and retail interests in the production and distribution of spirituous liquor in order to prevent suppliers from dominating local markets through vertical integration and to prevent excessive sales of spirituous liquor produced by overly aggressive marketing techniques." 1991 Ariz. Sess. Laws, Ch. 52, § 1. In 2006, the Arizona Legislature affirmed its intent to "retain the current three-tier method of regulating the sale and delivery of spirituous liquor and the current revenue collection and enforcement law" in the face of any successful constitutional challenges to the State's alcohol laws. *See* 2006 Ariz. Sess. Laws, Ch. 310 § 9.

1. The Producer Tier.

Wineries are required to have both a state and a federal license. *See* 27 U.S.C. § 204; A.R.S. § 4-201(A). The federal government does not issue permits or licenses to alcohol retailers.

A winery has the sole discretion on whether to sell wine to any market, including whether to distribute wine in Arizona via Arizona's three-tier system. A winery may choose to limit the sale of its product to certain locations or markets for various business reasons over which wholesalers have no control. SER-138, ¶ 60.

2. The Wholesaler Tier.

Arizona wholesalers play a key role in the three-tier system, as they are the in-state path through which wine must pass before reaching Arizona consumers. To obtain a wholesaler license, a business applicant (and its owners) must submit to an onerous administrative review and background checks. A.R.S. § 4-202.

Under Arizona's three-tier system, wholesalers are required to purchase spirituous liquor directly from a licensed supplier who is the primary source of supply for that brand, i.e. the wine producers and importers. A.R.S. § 4-243.01(A)(2). In addition to making sure that all excise tax is paid on such products entering Arizona, the direct purchase of products from wine producers and importers helps ensure the safety of the product itself and prevents the introduction of counterfeit and unsafe products from outside of Arizona. SER-089, ¶ 14.

With limited exceptions for licensed Arizona farm wineries and wineries outside of Arizona holding a direct-to-consumer shipment license, Arizona law requires that all wine shipped into the State for resale first be delivered to a licensed Arizona wholesaler and remain there for at least 24 hours prior to resale and delivery to a licensed Arizona retailer. A.R.S. § 4-243.01(B). This is what is commonly referred to as a "come-to-rest" or "at-rest" requirement.

This "at-rest" requirement allows wholesalers to inspect products for integrity and authenticity issues while it is at rest at their facility before sale and delivery to retailers. SER-088, ¶ 9; ER-254 ¶ 31. If a product is determined to be defective or unsafe, the wholesaler can quickly locate the defective product in its possession, remove it from distribution, and identify and contact the retailers that purchased the defective product so that it can be collected immediately from the retailer's premises and removed from the marketplace. SER-089, ¶ 15.

Within the three-tier system, Arizona wholesalers are required to pay a luxury tax, also known as an excise tax, of $0.84 per gallon of vinous liquor that is less than 24% alcohol and $4.00 per gallon of

vinous liquor that is more than 24% alcohol. A.R.S. § 42-3052.[4] Wholesalers must file returns with the State of Arizona indicating the amount of liquor sold to retailers and the amount of luxury tax paid. A.R.S. § 42-3354(D).

Arizona liquor laws strictly regulate the wholesaler tier in order to prevent commercial coercion or bribery and to maintain separation between the three tiers. For example, Arizona-licensed wholesalers cannot acquire any property interest in a retailer. A.R.S. § 4-243(A)(3). Nor can they provide credit or bonuses to retailers, sell at below cost, or require retailers to purchase a certain amount of product. *Id.* §§ 4-243(A)(7)-(9), (C). Wholesalers cannot pay or credit a retailer for a promotion or advertising. A.A.C. R19-1-319(A)(6). And wholesalers cannot offer products to retailers at a price not available to other retailers other than a certain volume-based discount. *Id.* R19-1-319(A)(12), (13).

[4] In 2021, luxury taxes on vinous liquor generated approximately $19 million in revenue for the State. SER-120 ¶ 14. Portions of these taxes support the State Drug Treatment and Education Fund and the Department of Corrections Fund. *Id.*

There are approximately 114 licensed wine wholesalers in Arizona. SER-118, ¶ 10.

3. The Retailer Tier.

Retailers, like wholesalers, must be licensed. The license requirements apply to all applicants, whether the applicant company is based in or outside of Arizona. Put another way, in-State and out-of-State retailers are subject to the same terms and conditions for receiving a retailer's license.

Retail license applications are subject to detailed background checks. *See* A.R.S. § 4-202; *see also* SER-124 ¶ 26. A retailer license must be held through a qualified agent who is an Arizona resident. A.R.S. § 4-202(A), (C). The licensee must also designate an Arizona resident to manage the company's Arizona premises. *Id.* All Arizona retail licensees must maintain a physical brick-and-mortar premise within the State. *See* A.R.S. §§ 4-201; 4-203, 4-206.01, 4-207.

A.R.S. § 4-243.01(A)(3) requires Arizona licensed retailers to order, purchase, or receive all of their wine from an Arizona licensed wholesaler, an Arizona registered retail agent, or, in limited instances,

from an Arizona-licensed farm winery.[5] The holder of an Arizona retail license with off-sale privileges (the right to sell alcohol for consumption elsewhere) may deliver wine to Arizona consumers directly from their premises using a common carrier, among other methods. *See* A.R.S. § 4-203(J).

Many out-of-state businesses have Arizona "off-premise" retail licenses to sell liquor, including grocery stores, drug stores, and national chain liquor stores. SER-149, ¶ 17; *see also* SER-125, ¶ 30.

B. Enforcement of Arizona's Alcohol Statutes.

The Arizona Department of Liquor and License Control (the "Department") is tasked with regulating alcohol in Arizona and ensuring compliance with Arizona's alcohol statutes (located in Title 4 of the Arizona Revised Statutes) and regulations. SER-123, ¶ 23.

The Department routinely inspects the records of Arizona licensed wholesalers. SER-124, ¶ 25. In addition, Department investigators often request records from wholesalers to determine whether or not a retailer

[5] Licensed farm wineries that produce not more than twenty thousand gallons of wine in a calendar year are allowed to sell some of their product to on-sale and off-sale retailers. *See* A.R.S. § 4-205.04(C)(7).

is in compliance with Arizona liquor laws and is purchasing from the appropriate source. *Id.*

Arizona-licensed wholesalers' and retailers' premises are always subject to inspection by Department officials and Arizona peace officers during the hours in which the premises are occupied to enforce and ensure compliance with Arizona law. A.R.S. § 4-118.

The Department routinely conducts on-site inspections of retailer's premises to ensure compliance with Arizona law during which inspectors can review financial records and question licensees, owners, managers and employees to determine their knowledge of Arizona's liquor laws. SER-126–27, ¶ 34. Department investigators also conduct covert operations to determine violations of over service and sale to minors. *Id.* In 2016, the DLLC conducted 2,386 random on-site inspections of establishments of licensees resulting in 435 citations being issued and 729 separate criminal counts charged. SER-127, ¶ 36.

The Department works closely with and relies upon the assistance (and resources) of local law enforcement with regard to investigations of possible Title 4 violations. SER-127, ¶ 37; SER-153–54 ¶¶ 25-26.

Without the ability to physically inspect out-of-state retailers and

their records, the Department's ability to determine if alcohol came from an appropriate source, the safety and legitimacy of the product, and whether appropriate taxes were paid would be severely diminished. ER-248–49, ¶ 16; ER-255, ¶ 33. In the event of a recall, the Department would have a much harder time identifying which out-of-state retailers are carrying the defective product before it is sold to consumers. *Id*.

The direct shipment of alcohol to residences raises the risk that alcohol will get into the hands of minors. Indeed, the Department has found evidence of past shipments that do not comply with State laws and regulations designed to prevent minors from obtaining alcohol. ER-249–50, ¶¶ 18-19. In addition, Department investigators routinely report evidence of minors using fake identification to purchase alcohol via the internet or phone applications that will then be delivered directly to their homes. ER-250, ¶ 19.

II. Procedural Background.

A. Plaintiffs' Complaint Seeks a Limited Injunction that Does Not Include the State-Licensed Wholesaler Purchase Requirement.

The Complaint was filed by Plaintiffs Albert Reed and Jacob Day, two Arizona residents who describe themselves as "avid wine drinker[s]

and collector[s]," on July 30, 2021.[6] ER-045, ¶¶ 3-4. Plaintiffs Reed and Day alleged that they wished to purchase wine from retailers located outside of Arizona who are not licensed in Arizona and have it directly shipped to their residences in Arizona. *Id.*

Plaintiffs' Prayer for Relief asked the Court to "Declar[e] that the provisions set forth in paragraph 24 … are unconstitutional," and enjoin "defendants from enforcing those laws." ER-052. Paragraph 24 of the Complaint referred to A.R.S. §§ 4-201(A)-(D) (the physical premises requirement for retailers) and 4-202(A) (the licensing and in-state qualification requirements). ER-050–51, ¶ 24.

The State defendants filed their answer on September 13, 2021. ER-037. The Wine and Spirits Wholesalers Association of Arizona (the "Association"), which represents the largest licensed wine and spirits wholesaler companies in Arizona, intervened and filed its answer on October 13, 2021. ER-022.

The parties participated in discovery, including depositions of Plaintiffs Reed and Day. Contrary to the allegations in their complaint

[6] Plaintiffs Thewinetobuy.com, LLC (a wine retailer located in Florida) and Mitchell Soffer (owner of Thewinetobuy.com) were dismissed with prejudice by stipulation on April 11, 2022. ER-045.

and declarations, both Plaintiffs affirmed in their depositions that they have purchased and imported wine from retailers located in other states. SER-136–37, ¶¶ 54-55. Indeed, it is undisputed that Dr. Day gets the majority of his wine shipped to him from out-of-state retailers, which he admitted was illegal under Arizona law. *Id.*

B. The Parties' Summary Judgment Motions.

The parties filed simultaneous motions for summary judgment on August 12, 2022.

1. Plaintiffs' Motion for Summary Judgment.

Plaintiffs' evidence to support their motion for summary judgment largely focused on availability of certain rare or hard-to-find wines from licensed Arizona wine retailers and customer convenience. *See, e.g.*, SER165–70. In terms of the regulatory interests served by the regulations, Plaintiffs' "evidence" boiled down to the fact that a minority of states allow consumers to receive wine shipments directly from retailers operating out-of-state under a separate permitting system and inadmissible hearsay consisting of informal emails from officials in those states reporting few problems with permittees in 2020 and 2021. *See* SER-055.

Significantly, Plaintiffs did not bring forth any evidence that a retailer who carries Plaintiffs' desired rare wines intended to (and would qualify to) obtain a retailer license in Arizona but had not applied for a license because of the challenged regulations.

Plaintiffs' summary judgment briefing did not provide clarity as to which provisions were being challenged and the specific relief sought. In contrast to their Complaint, Plaintiffs' Motion for Summary Judgment asked the court to "enjoin the defendants from enforcing A.R.S. § 4-243.01(B) [24-hour at-rest requirement for wine shipped into the state] but clearly limit the injunction to allow direct shipping by out-of-state retailers . . . ." SER-058. Plaintiffs' reply brief took yet another position, arguing that the court could "order state officials to allow out-of-state retailers to apply for and be issued direct wine seller's permits under A.R.S. § 4-203.04 [license applicable only to certain wineries]." SER-071.

2. Defendants' Summary Judgment Motions Produced Evidence Showing the Legitimate Goals Served by Arizona's Wine Laws.

The Opening Brief refers exclusively to the evidence presented by Plaintiffs in their summary judgment motion, while entirely ignoring

the Defendants' motions and corresponding statements of fact and evidence, even though the trial court relied upon Defendants' evidence in reaching its decision. The record confirms that Defendants put forth concrete evidence showing that the challenged laws further legitimate state goals, such as public health and safety, tax collection, and preservation of Arizona's three-tier system.

The State has affirmed that prohibiting unlicensed out-of-state retailers from importing wine directly to Arizona consumers and requiring that retailers have a physical premise in Arizona serve many state interests, including "ensuring the equal treatment of in-state and foreign companies, limiting the amount of alcohol and alcohol merchants in communities, allowing communities input in decisions impacting the sale and service of alcohol affecting them, providing access to facilities and persons for purposes of regulatory inspections and enforcement, providing jurisdiction for the enforcement of administrative powers and law enforcement authority, obtaining background checks, collecting applicable taxes and fees, and maintaining the three tier system of alcohol regulations with its well-documented benefits." ER-069.

The State also put forth evidence showing that if retailers operating out-of-state were allowed to directly ship wine to Arizona consumers without having physical premises in Arizona, the Department's ability to inspect and determine the quality and integrity of products carried by retailers prior to purchase by a consumer would be diminished, as would the Department's ability to monitor and inspect retailers. *See* ER-247–56.

Furthermore, states that have allowed direct-to-consumer shipping by retailers without a brick-and-mortar premise have found significant non-compliance with their shipping laws, including failure to pay taxes and failure to comply with underage verification requirements. *See* SER-133–35, ¶¶ 48-49. Many of these states have had to devote additional enforcement, auditing, and prosecutorial resources to monitor direct-to-consumer shipping by out-of-state retailers. SER-135–36 ¶ 51.

C. Plaintiffs Concede at Oral Argument that They Seek an Exception from Arizona's Three-Tier System for Retailers Located Outside the State.

The trial court held oral argument on the parties' motions for summary judgment on July 21, 2023.

At the beginning of the argument, the trial judge asked Plaintiffs' counsel to identify the requested relief, given the inconsistent requests in Plaintiffs' briefing. *See* SER-007:2-6, 008:3-8.

Plaintiffs' counsel initially told the court that they were not seeking to stay the operation of any laws. SER-007:7-12. Plaintiffs' counsel asked the court to declare the statutes cited in Plaintiffs' complaint unconstitutional and direct the legislature "to adopt a model bill" allowing for direct-to-consumer shipping from retailers located out-of-state within six months. *Id.*; *see also* SER-008–11.

When the trial judge pointed out that the legislature might not choose to create a new shipping permit, Plaintiffs' counsel admitted they sought to enjoin Arizona's laws as to out-of-state retailers, but not in-state retailers. SER-012:13-14. In Plaintiffs' counsel own words: "**We want an exception to the three-tier system**. We're not asking that the three-tier system be struck down completely." SER-013:14-16 (emphasis added).

Plaintiffs reaffirmed this requested relief a few minutes later:

> THE COURT: So basically, as you said at the start, you just want an exception to the three-tiered system for out-of-state retailers to ship into the state?
>
> MR. EPSTEIN: That is correct, Your Honor, and the

violation is primarily --

THE COURT: Does that virtually do away with the three-tier system?

MR. EPSTEIN: Absolutely not. We recognize the value of the three-tier system.

SER-017:15-23.

D. The Trial Court Rules in Favor of Defendants.

The trial court issued a 17-page decision awarding summary judgment in favor of Defendants on August 9, 2023. ER-005–21.

The trial court doubted whether standing existed, given Plaintiffs' failure to challenge some laws that would impede the direct shipments of wine that Plaintiffs seek and that Plaintiffs' requested remedy would effectively demolish key provisions of Arizona's three-tier system despite a legislative intent clause in favor of leveling down. ER-009–11.

But even assuming that Plaintiffs had shown standing, the court held that Plaintiffs' claims fail on the merits. ER-012. The trial court held that Arizona's wine laws "are not facially discriminatory, nor are they discriminatory in effect because they apply evenhandedly." ER-013:17-18. While the trial court could have ended its inquiry there, it also held that the undisputed evidence showed that the laws served legitimate public health and

safety goals and that no nondiscriminatory alternative "is available to maintain [the State's] ability to inspect wholesalers, inspect retail premises and books, and ensure alcohol is funneled through a three-tier system." ER-019:18-21.

SUMMARY OF ARGUMENT

First, this Court should find that Plaintiffs lack standing because they failed to challenge, among other provisions, the state-licensed wholesaler purchase requirement below. Plaintiffs admit that retailers licensed in other states cannot purchase their wine from an Arizona-licensed wholesaler. As such, this unchallenged provision separately prevents the relief Plaintiffs seek.

Second, the trial court correctly found that the laws at issue apply evenhandedly and do not discriminate against similarly-situated out-of-state companies. Many out-of-state companies have received Arizona alcohol retail licenses. An unlicensed retailer in another state does not operate in the same regulatory environment as an Arizona-licensed retailer, and thus cannot be considered similarly-situated for dormant Commerce Clause purposes.

Third, the trial court correctly concluded, in line with several recent Circuit decisions addressing similar statutes, that the laws serve

legitimate public health and safety goals, including the preservation of Arizona's three-tier system, inspection of wholesalers and retailers for compliance with Arizona laws, and generation of revenue. The physical premise requirement and the licensed wholesaler purchase requirement are essential elements of Arizona's three-tier system. Other alternatives eliminate the role of Arizona's wholesalers and do not preserve Arizona's ability to conduct inspections. Thus, the provisions are constitutional under the applicable dormant Commerce Clause analysis.

ARGUMENT

I. Plaintiffs Cannot Establish Causation or Redressability.

The trial court doubted whether Plaintiffs could establish standing but held that, regardless, Plaintiffs' claim failed on the merits. Doc. 66 at 8. The trial court's doubts were well founded. Plaintiffs cannot show either causation or redressability as necessary for Article III standing. *See Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547 (2016). This Court can affirm the judgment on standing grounds alone. *See Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003) ("We may affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning we adopt.").

The remaining Plaintiffs in this case are two Arizona residents who claim that they are unable to have wine delivered to them in Arizona directly from retailers operating out-of-state that are not licensed in Arizona. ER-045, ¶¶ 3, 4.[7] Assuming that Plaintiffs have adequately pled an Article III injury, causation and redressability are lacking because Plaintiffs failed to challenge applicable Arizona regulations that separately bar the relief Plaintiffs seek.

This Court's decision in *Orion Wine Imports, LLC v. Appelsmith,* 837 F. App'x 585, 586 (9th Cir. 2021), which also involved a dormant Commerce Clause challenge to a wine law, is directly on point. The plaintiff wine importers in *Orion* challenged a specific provision of California law but did not challenge other independent provisions that "would still prohibit Plaintiffs' proposed transaction." *Id.* at 585. Thus, because the unchallenged provisions would "inflict the same 'injury,'" this Court held that the connection between the alleged injury and the challenged provision was "too 'attenuated' for Article III standing." *Id.* (internal citations omitted). Moreover, plaintiffs could not establish

[7] Discovery revealed that Plaintiffs have in fact ordered and received wine delivered from out-of-state retailers in spite of Arizona's regulations. *See* SER-0136–37, ¶¶ 54-55; SER-165 ¶ 2.

redressability because a favorable ruling as to the only challenged statute would not remedy the alleged injury. *Id.*

The same holds true here. As discussed below, unchallenged provisions of Arizona law would prohibit Plaintiffs' proposed transaction: the purchase and importation of wine from a retailer operating out-of-state directly to an Arizona resident. Accordingly, Plaintiffs lack standing.

A. Plaintiffs Did Not Seek to Enjoin the Wholesaler Purchase Requirement Below.

Despite multiple opportunities both below and before this Court, Plaintiffs have yet to clearly identify which statutory provisions they claim are unconstitutional and should be enjoined. To add further confusion, Plaintiffs' requested relief differed at every turn below.

First, Plaintiffs' prayer for relief in their Complaint asked the Court to declare the "provisions set forth in paragraph 24" of the Complaint, A.R.S. §§ 4-201(A)-(D) and 4-202(A), unconstitutional and enjoin them. ER-050-51, ¶ 24; ER-052.[8]

[8] Plaintiffs appear to have abandoned any challenge to Sections 4-201(A)-(D), as these provisions are not mentioned in the Opening Brief at all.

In contrast, Plaintiffs' motion for summary judgment asked the court to enjoin the enforcement of "A.R.S. § 4-243.01(B) [the 24-hour at-rest requirement] but clearly limit the injunction to allow direct shipping by out-of-state retailers." SER-058. According to Plaintiffs, "[t]his would remove the barrier that has been preventing the plaintiffs from exercising their constitutional rights to engage in interstate commerce." *Id.*

In response to Defendants' motions for summary judgment, Plaintiffs asserted that they "challenge Arizona's requirement that wine retailers must be *physically* located in the state to ship directly to consumers," without identifying any particular challenged provision. SER-101.

Plaintiffs' reply took another route, advocating the court to "order state officials to allow out-of-state retailers to apply for and be issued direct wine seller's permits under A.R.S. § 4-203.04." SER-071. Section 4-203.04 allows licensed wineries, in certain limited situations, to directly ship wine produced by the licensee to Arizona consumers.

At oral argument, Plaintiffs confirmed more than once that they sought nothing less than an exemption from the three-tier system for

retailers operating out-of-state. SER-013, -017. Plaintiffs further argued that the Arizona legislature should be commanded to "rewrite the statutes" to create a direct-shipment permit system for out-of-state retailers to directly ship wine to Arizona consumers. ER-012; SER-009–11.

Little wonder the trial court remarked it was "unclear which provisions Plaintiffs actually challenge." ER-009. But even with Plaintiffs' frequently changing positions, the trial court correctly found one constant remained: Plaintiffs did not seek to enjoin the requirement under A.R.S. § 4-243.01(A)(3) that Arizona-licensed retailers purchase, order, and receive their spirituous liquor from an Arizona-licensed wholesaler. *Id.*

This unchallenged law independently bars Plaintiffs from ordering and receiving wine directly from retailers operating outside of Arizona. The trial court found there was "no evidence suggesting that the rare wines Plaintiffs seek to order online would be or could be purchased from Arizona wholesalers by out-of-state retailers." *Id.*

Plaintiffs do not disagree with this point. In fact, they admit "[i]t is impossible for most out-of-state retailers to comply with Arizona's

local wholesaler rule because they are required to buy their wine from wholesalers in their home states." Op. Br. at 6. Thus, it is undisputed that the state-licensed wholesaler purchase requirement would prevent Plaintiffs' desired transactions.

Plaintiffs try to cure the lack of causation/redressability by arguing for the first time on appeal that the court should enjoin the state-licensed wholesaler purchase requirement. Op. Br. at 5-6. Plaintiffs' challenge comes too late. *See Orion Wine Imports*. 837 F. App'x at 586 (refusing to consider additional challenges to other laws raised for the first time on appeal). Because Plaintiffs chose not to seek an injunction of Arizona's wholesaler purchase requirement below, they cannot establish causation or redressability.

B. Plaintiffs' Injury Would Not Be Remedied by Leveling Down.

Even to the extent that Plaintiffs' requested relief could be interpreted as seeking a sweeping injunction against every provision of Arizona law impeding the shipment of wine from retailers' out-of-state premises, Plaintiffs still cannot show redressability. *See* ER-010–11.

The Arizona Legislature has unambiguously stated its intent: if there is a constitutional infirmity, it should be addressed in a manner to

"retain the current three-tier method of regulating the sale and delivery of spirituous liquor and the current revenue collection and enforcement law." *See* 2006 Ariz. Sess. Laws, Ch. 310 § 9.

Accordingly, if the court held that the statutes violated the dormant Commerce Clause by discriminating against similarly-situated out-of-state interests without serving legitimate public health and safety goals, the proper remedy would be to "level down" rather than enjoining essential elements of Arizona's three-tier system or order the legislature to craft an entirely new permit system within a certain timeframe (a remedy beyond the power of the courts). *See Ayotte v. Planned Parenthood of N. New England,* 546 U.S. 320, 328-29 (2006); *Juliana v. United States*, 947 F.3d 1159, 1171 (9th Cir. 2020) ("[I]t is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan . . . any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches."); *Beskind v. Easley*, 325 F.3d 506, 517-20 (4th Cir. 2003).

While leveling-down aligns with legislative intent, it would not

allow Plaintiffs to engage in their desired transactions, i.e. receipt of wine directly from retailers operating outside Arizona. Thus, Plaintiffs' alleged injury would persist (and perhaps worsen), despite a ruling in their favor. As such, redressability is lacking.

II. Legal Principles Governing Plaintiffs' Commerce Clause Challenge.

A. Liquor Is Subject to a Different Commerce Clause Analysis than Other Products.

Section 2 of the Twenty-first Amendment provides:

> 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.

Section 2 was "adopted to give each State the authority to address alcohol-related public health and safety issues" as it sees fit. *Tenn. Wine*, 139 S. Ct. at 2474. "[E]fficiency is not the goal of the Twenty-First Amendment, whether in the form of easy-to-get alcohol or easy-to-pay-for alcohol." *Lebamoff Enterprises Inc. v. Whitmer*, 956 F.3d 863, 868 (6th Cir. 2020). Rather, the goal of the Twenty-first Amendment was to "delegate[] to each State the choice whether to permit sales of alcohol within its borders and, if so, on what terms and in what way." *Id.*

Section 2 grants states "virtually complete control" over the distribution of alcohol within its borders. *Granholm*, 544 U.S. at 488. A state's power under Section 2 is "at its apex when it comes to regulating the activity to which the provision expressly refers," i.e, the importation and transportation for delivery of alcoholic beverages. *See Tenn. Wine*, 139 S. Ct. at 2471; *see also North Dakota*, 495 U.S. at 431 (plurality opinion) ("the State has virtually complete control over the importation and sale of liquor and the structure of the liquor distribution system" (cleaned up)). "Given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly." *North Dakota,* 495 U.S. at 433.

This does not mean that state alcohol regulation is immune from a dormant Commerce Clause inquiry. *See Tenn. Wine*, 139 S. Ct. at 2462, 2474. Rather, because Section 2 provides States with unique "leeway" and "regulatory authority that they would not otherwise enjoy," state alcohol regulations are subject to a "different inquiry" from the typical dormant Commerce Clause analysis. *Id.* at 2474.

B. The *Tennessee Wine* Inquiry.

The parties agree that the two-part test set forth in *Tennessee Wine* governs dormant Commerce Clause challenges to state liquor laws. *See* Op. Br. at 19.

First, Plaintiffs bear the burden of showing that the challenged law discriminates against similarly-situated out-of-state economic interests either directly or in effect. Op. Br. at 19; *see Tenn. Wine*, 139 S. Ct. at 2469-70; *Granholm*, 544 U.S. at 487-90; *Black Star Farms, LLC v. Oliver,* 600 F.3d 1225, 1230 (9th Cir. 2008). "If the answer to that inquiry is no, the court's assessment ends and the challenged regime is constitutional." *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 222 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 567 (2023).

Second, the court asks "whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Tenn. Wine*, 139 S.Ct. at 2474. Legitimate health and safety purposes include "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota*, 495 U.S. at 432.

If the State can show with "concrete evidence" that the

"predominant effect" of the law is not economic protectionism, the law must be upheld. *Id.* In other words, a law that has a "demonstrable connection" to a legitimate interest is constitutional. *Id.*

As part of this inquiry, the court may examine whether there are "obvious alternatives that better serve" the State's public health and safety goals which do not discriminate against out-of-state entities. *Id.* at 2476. But while the existence of nondiscriminatory alternatives may be relevant to the inquiry, "it does not transform the applicable framework into the test that ordinarily applies to a dormant Commerce Clause challenge when the Twenty-first Amendment is not implicated." *B-21 Wines*, 36 F.4th at 225; *see also Anvar v. Dwyer,* 82 F. 4th 1, 11 (2023) ("the mere existence of possible alternatives does not, for purposes of a Twenty-first Amendment inquiry, necessarily invalidate a challenged law").

Under the "less demanding standard of review" applied by *Tennessee Wine*, *B-21 Wines*, 36 F.4th at 225, the state is not required to prove that a statute is a perfect fit or that "nothing else will work" as Plaintiffs argue. *See* Op. Br. at 21-22. Instead, the state cannot simply ignore "obvious" nondiscriminatory alternatives that better meet its

goals. *Tenn. Wine*, 139 S.Ct. at 2476.

C. Essential Features of the Three-Tier System Are Constitutional.

The Supreme Court has repeatedly and unequivocally upheld the three-tier distribution system as "unquestionably legitimate." *Granholm*, 544 U.S. at 489 (quoting *North Dakota,* 495 U.S. at 432). "States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment." *Id.* at 466. Put another way, states may constitutionally "funnel sales through the three-tier system." *Id.* at 489; *see also North Dakota,* 495 U.S. at 447 (Scalia, J., concurring in judgment) ("The Twenty-First Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler.").

As a result, the Supreme Court distinguishes between an "essential feature" of a three-tier system and one that is not. *Tenn. Wine*, 139 S.Ct. at 2471. An "essential feature" in this context is one that flows from the "basic three-tiered model of separating producers, wholesalers, and retailers." *Id.*

In *Tennessee Wine*, the Supreme Court took care to explain that the 2-year durational residency requirement was not "an essential

feature of a three-tiered scheme" and had not been adopted by many states. 139 S.Ct. at 2471-72.

The Court found that the durational residency requirement had "at best" "a highly attenuated relationship to public health and safety." *Id.* at 2474. The record was "devoid" of evidence that the durational residency requirement promoted public health or safety. *Id.* at 2474. And the Court rejected the retailers' new claim of public health and safety benefits as "implausible on its face." *Id.* at 2475. Durational residency was not necessary to thoroughly investigate applicants. Furthermore, the durational residency requirement was "not needed" for State oversight, "since the stores at issue [were] physically located within the State," meaning the State could "monitor the stores' operations through on-site inspections, audits, and the like." *Id.* at 2475.

Because the evidence showed that the regulation was predominantly a protectionist measure and not essential to the three-tier system, the Court found it violated the dormant Commerce Clause. *Id.* at 2476.

In contrast, as discussed in the following section, federal courts

have uniformly rejected challenges to essential features of a state's three-tier system like those at issue here.

D. No Court Has Granted the Relief Plaintiffs Seek Here.

Relying on factually dissimilar cases involving price-affirmation statutes and tax exemptions, the Opening Brief claims that the 21st Amendment "has proven fairly impotent over the years." Op. Br. at 32-33. Reading Plaintiffs' brief, one might incorrectly surmise that no relevant authority has been issued since *Tennessee Wine*.

To the contrary, multiple circuits have recently rejected similar challenges regarding direct shipping from out-of-state unlicensed retailers. The Opening Brief devotes a single paragraph to these cases (even though Plaintiffs' counsel was involved in all of them), suggesting that three different Circuit courts failed to follow *Tennessee Wine* and *Granholm*. Op. Br. at 41-42. What Plaintiffs do not discuss is the fact that the Supreme Court denied certiorari in all three cases. *Lebamoff Enterprises, Inc. v. Whitmer*, 141 S. Ct. 1049, 208 L. Ed. 2d 520 (2021); *Sarasota Wine Mkt., LLC v. Schmitt*, 142 S. Ct. 335, 211 L. Ed. 2d 178 (2021); *B-21 Wines, Inc. v. Bauer*, 143 S. Ct. 567, 214 L. Ed. 2d 336 (2023).

Contrary to Plaintiffs' argument, a review of the decisions shows that in each instance, the court faithfully applied the *Tennessee Wine* test and found that the challenged laws were essential to the three-tier system and promoted legitimate non-protectionist goals.

1. *Lebamoff Enterprises v. Whitmer*

In *Lebamoff Enterprises v. Whitmer*, the plaintiffs asserted that Michigan's law which allowed licensed, in-state retailers to deliver wine directly to consumers, but barred unlicensed, out-of-state retailers from doing the same violated the Commerce Clause. 956 F.3d at 863, 873.

The court started with three basic, well-established premises:

1. The three-tier system is constitutional, *id.* at 869 (citing *Granholm*);
2. State may regulate wholesalers "to control the volume of alcohol sold in a State and the terms on which it is sold," *id.* at 870; and
3. States may "require retailers to be physically based in the State" in order to more effectively ensure retailers' regulatory compliance such as through in-person inspections, *id.*

The Sixth Circuit reasoned that if states can do all this, then it follows that a state can limit wine delivery options to licensed in-state retailers.

First, the Sixth Circuit questioned whether the law was

discriminatory at all, given that in-state retailers operated in a different regulatory environment from the out-of-state retailers who did not have to operate within Michigan's three-tier system. *Id.* at 870-71. But even assuming that the law discriminated against out-of-state retailers, the Sixth Circuit found that prohibiting out-of-state deliveries promotes "plenty of legitimate state interests." *Id.* at 871.

Specifically, the court recognized that the plaintiffs' challenge, if successful, "would create a sizeable hole in the three-tier system." *Id.* at 872.

> 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. That effectively eliminates the role of Michigan's wholesalers.

Id. (internal citations omitted). Without the delivery restrictions, the court noted that Michigan faced "a substantial risk that out-of-state alcohol [would] get diverted into the retail market," thereby "disrupting the alcohol distribution system and increasing alcohol consumption." *Id.* (quotation omitted). Moreover, because states cannot control the way out-of-state retailers obtain wine, "[o]nce out-of-state delivery opens, the least regulated (and thus the cheapest) alcohol will win." *Id.*

The simple reality is that "Michigan could not maintain a three-tier system, and the public-health interests the system promotes, without barring direct deliveries from outside its borders." *Id.* at 873. Thus, the Sixth Circuit upheld the challenged laws. It noted that out-of-state retailers who want to deliver in Michigan can do so, but they must apply for a Michigan license and "live with the bitter and sweet of Michigan's three-tier system," including the requirement to buy only from Michigan wholesalers. *Id.*

The *Lebamoff* decision included a separate concurrence by two members of the panel, which affirmed that Michigan had presented sufficient evidence that the in-state retailer requirement served public health, pointing to Michigan's ability to monitor retail stores through on-site inspections. *Id.* at 879 (McKeague, J., concurring).

In a subsequent decision, the Sixth Circuit considered a challenge to Ohio's regulations regarding direct shipment of wine. *Block v. Canepa*, 74 F. 4th 400 (6th Cir. 2023). The *Block* court did not question the basic premises and reasoning of *Lebamoff* but cautioned that a trial court must consider the evidence submitted by both sides in determining whether a specific challenged law promotes legitimate,

non-protectionist goals under the *Tennessee Wine* test. *Id.* at 414. The *Block* court noted that the plaintiffs in *Lebamoff* "failed to produce sufficient countervailing evidence showing that Michigan's public health concerns are mere speculation or unsupported assertions, or that the predominant effect of the in-state retailer requirement is not the protection of public health." *Id.* (cleaned up). Because the district court had not considered the evidence regarding the predominant effect of the Ohio laws at issue, the *Block* court reversed and remanded for further proceedings. *Id.*

2. Sarasota Wine Market, LLC v. Schmitt

The Eighth Circuit adopted the Sixth Circuit's reasoning in *Sarasota Wine Market, LLC v. Schmitt*, 987 F.3d 1171 (8th Cir. 2021), which challenged Missouri's law permitting only licensed in-state retailers to ship alcohol directly to consumers. *Id.* at 1176.

The Eighth Circuit held that retail delivery restrictions are an "essential feature" of the three-tier system. *Id.* at 1184; *see also id.* at 1183 (noting that complaint "without question attacks core provisions" of the three-tiered system). It further found the plaintiffs' challenge to the delivery restrictions would create a gap in the three-tier system,

such that if an out-of-state retailer was "acquired or controlled by one or more wine producers, Missouri would be compelled to permit alcohol sales and deliveries into Missouri by a twenty-first century version of the tied house." *Id.* at 1182.

Accordingly, the restrictions did not violate the dormant Commerce Clause. *Id.* at 1184.

3. B-21 Wines, Inc. v. Bauer

The Fourth Circuit also rejected a challenge similar to Plaintiffs' claims in this case.

The Fourth Circuit found that even though the bar on importation of wine by out-of-state retailers discriminated against out-of-state retailers, the regulations were justified on legitimate nonprotectionist grounds because they are an "integral part of North Carolina's three-tier system." *B-21 Wines*, 36 F.4th at 223-24, 228. The court emphasized that direct shipping from out-of-state retailers "would completely exempt those out-of-state retailers from the three-tier requirement" and eliminate the role of the state's wholesalers. *Id.* at 228. That, in turn, "would open the North Carolina wine market to less regulated wine, undermining the State's three-tier system and the established public

interest of safe alcohol consumption that it promotes." *Id.*

Because the statutes at issue "simply assure[d] that all wine sold to North Carolina consumers by retailers goes through the State's three-tier system," the statutes were constitutional. *Id.* at 229.

4. ***Anvar v. Dwyer***

The First Circuit in *Anvar v. Dwyer*, 82 F.4th 1 (2023) did not determine the constitutionality of Rhode Island's in-state presence requirement for retailers. After finding the challenged law discriminatory, the First Circuit remanded to the trial court to determine whether the State presented evidence showing the physical premise requirement furthers legitimate non-discriminatory goals and whether the plaintiffs had sufficiently rebutted the State's evidence. *Id.* at 10-12. Notably, the First Circuit affirmed summary judgment in favor of Defendants that the state-licensed wholesaler purchaser requirement is constitutionally valid because plaintiffs failed to challenge it on appeal. *Id.* at 9.

Thus, no Circuit has ever found an in-state presence requirement for retailers or a state-licensed wholesaler purchaser requirement unconstitutional under the Commerce Clause. To the contrary, courts

have upheld such requirements as necessary elements of the three-tier system.

Here, there can be no question that this case involves essential elements of Arizona's three-tier system. Plaintiffs have admitted that they challenge the three-tier system itself as applied to retailers operating out of state. SER-013, -017. This Court should follow every other Circuit to reach the issue and reject Plaintiffs' dormant Commerce Clause challenge to essential features of Arizona's three-tier system.

III. Arizona's Regulations Do Not Discriminate Against Out-Of-State Interests.

This Court's inquiry can begin and end with the first prong of the *Tennessee Wine* test. Arizona's wine laws do not discriminate against similarly situated out-of-state interests.

The Supreme Court "defines impermissible discrimination under the dormant Commerce Clause as differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." ER-013 (quoting *Granholm*, 544 U.S. at 472). A statute may discriminate against out-of-state entities "either on its face or in practical effect." *Black Star Farms*, 600 F.3d at 1231 (internal quotation omitted). But "any notion of discrimination assumes a comparison of

substantially similar entities." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997); *see also Black Star Farms*, 600 F.3d at 1230 ("Of course, the differential treatment must be as between persons or entities who are similarly situated." (internal quotation omitted)).

A. The Statutes Apply Evenhandedly to In-State and Out-of-State Applicants.

There is no single statute that bars the transactions Plaintiffs seek. Rather, the "inability for retailers to ship directly to consumers from out of state is a byproduct of the statutes creating the system under which alcohol must move from a producer to a licensed Arizona wholesaler to a licensed Arizona retailer before sale to a consumer." ER-009:8-11.

For the first time on appeal, Plaintiffs identify four features of Arizona's regulatory system they claim "prevent out-of-state retailers from shipping wine directly to consumers." Op. Br. at 4.

First, Arizona law allows non-Arizona companies to hold a retail license so long as they are "qualified to do business" in Arizona. A.R.S. § 4-202(A). All corporate and limited liability business licenses must be held by an agent who is an Arizona resident, and the premises must be managed by an Arizona resident. *Id.* § 4-202(A), (C). Retailer licenses

are only available to retail premises operating within the state of Arizona.

Second, Arizona-licensed retailers may take telephone or internet orders for wine and ship it directly to consumers from their licensed premises. A.R.S. § 4-203(J).

Third, with limited exceptions, Arizona-licensed retailers must purchase their wine directly from an Arizona-licensed wholesaler. A.R.S. § 4-243.01(A)(3).

Fourth, wine must be shipped from out-of-state must be delivered to an Arizona-licensed wholesaler and held at-rest for 24 hours. *See* A.R.S. § 4-243.01(B).

None of these provisions facially discriminate against out-of-state businesses. Rather, they apply evenly to any license applicant, whether from Arizona or another state.

The undisputed record below confirms that many out-of-state businesses have obtained Arizona retailer licenses. SER-149, ¶ 17; *see also* SER-125, ¶ 30. On the flip side, as the district court noted, an Arizona business without physical premises within the state would also be barred from directly shipping wine to customers. ER-017:4-6 ("if an

in-state company does not have physical retail premises in the state, it may not obtain a license to sell or ship wine to consumers in the state").

The real distinction here is not between in-state or out-of-state businesses, but between Arizona licensed retailers and unlicensed retailers who operate in another state. *See* ER-014.

These two groups, however, are not similarly situated for Commerce Clause purposes. *See Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 820 (5th Cir. 2010) ("Wine Country is not similarly situated to Texas retailers and cannot make a logical argument of discrimination. The illogic is shown by the fact that the remedy being sought in this case — allowing out-of-state retailers to ship anywhere in Texas because local retailers can deliver within their counties — would grant out-of-state retailers dramatically greater rights than Texas ones."); *see also Sarasota Wine*, 987 F.3d at 1184 (holding that the laws challenged "do not discriminate against out-of-state retailers and wholesalers" because the laws impose the "same licensing requirement on in-state and out-of-state retailers").

B. Unlicensed Retailers Operating Out-of-State Are Not Similarly Situated for Commerce Clause Purposes.

Plaintiffs concede that if out-of-state retailers were exempt from

Arizona's three-tier system, this "could mean they were not similarly situated to in-state retailers." Op. Br. at 30. Yet, that is precisely what Plaintiffs seek: a regulatory exemption from Arizona's three-tier system available *only to* out-of-state retailers. SER-013, -017. Plaintiffs may not call it an exemption in their Opening Brief but they still argue that retailers operating in other states need not (and cannot) purchase wine from an Arizona-licensed wholesaler, i.e. wine that has gone through Arizona's three-tier system. Op. Br. at 31.

Accordingly, this case presents the opposite situation from that in *Granholm*, where in-state entities were exempt from the three-tier system but out-of-state entities were forced to pass through the state's three-tier system. 544 U.S. at 467. Because the "wine that in-state producers were shipping to consumers did not have to go through the state's three-tier system . . . wine made by out-of-state producers, also having not been funneled through the state's three-tier system, can be seen as similarly situated." ER-015:21-24. "*Granholm* thus requires only that an exemption from the three-tier system granted to in-state producers must also be granted to out-of-state producers, because none of them will have been funneled through the three-tier system." ER-

015:26–016:1.

Here, Arizona requires all licensed retailers (except in limited circumstances not challenged here) to participate in Arizona's three-tier system, including purchasing wine from an Arizona-licensed wholesaler. Thus, Arizona statutes evenhandedly apply to all licensed retailers to ensure that wine sold to Arizona residents by Arizona-licensed retailers passes through Arizona's three-tier system.

The fact that licensed retailers may take advantage of certain delivery methods, like shipping, does not create impermissible discrimination. "The fact that licensed entities have privileges that unlicensed entities do not is the very purpose of a licensing scheme; a party must comply with the burden of getting a license to obtain the benefits of having a license." ER-014:16-18. *See also Nat'l Ass'n of Optometrists & Opticians v. Harris,* 682 F.3d 1144, 1154 (9th Cir. 2012) (holding that "Supreme Court precedent establishes that there is not a significant burden on interstate commerce merely because a non-discriminatory regulation precludes a preferred, more profitable method of operations in a retail market").

Plaintiffs' argument that the Constitution entitles out-of-state

retailers to greater rights than those afforded to in-state businesses is without support in the law and should be rejected.

C. The Alleged Unavailability of Certain Wines Does Not Demonstrate Impermissible Discrimination.

Plaintiffs do not cite any case law supporting their novel argument that the fact that certain wines are not carried by state-licensed retailers shows impermissible dormant Commerce Clause discrimination. *See* Op. Br. at 26-28. At most, this evidence shows that there is not a large market in Arizona for these specific rare wines.

In any event, Plaintiffs have no evidence that an out-of-state retailer who carries the rare wines they wish to consume would pursue an Arizona retailer license (and its attendant requirements). If anything, Plaintiffs' hearsay evidence shows that retailers do not choose to obtain a license in every state that allows direct-to-consumer shipping. *Compare* ER-167 (K&L website shipping policy showing shipment to 8 states) and ER-170 (Hickory Farms website shipping policy showing shipment to 4 states) *with* ER-217 (purportedly identifying 13 states that allow direct-to-consumer shipping by retailers operating outside of the state).

It is entirely speculative that the specific wines Plaintiffs seek

would be available from an Arizona-licensed retailer but for the challenged regulations. *See also* SER-037:9-13 (stating that "three very large retailers . . . have no interest in developing a physical presence in Arizona or buying their wine from a wholesaler in this state").

IV. Arizona's Wine Regulations Serve Legitimate Purposes.

But even if the statutes at issue could be considered discriminatory (they're not), they easily pass the second prong of the *Tennessee Wine* analysis.

A. The Laws Are Essential to Arizona's Three-Tier System.

Multiple courts, before and after *Tennessee Wine*, have recognized that the physical premise requirement, the state-licensed wholesaler purchase requirement, and the at-rest requirement constitute essential features of a three-tiered system and are thus constitutional. *See Wine Country Gift Baskets.com*, 612 F.3d at 821 (requiring physical location of retailers within the State is a "critical component of the three-tier system"); *Arnold's Wines, Inc. v. Boyle,* 571 F.3d 185, 188 (2d Cir. 2009) (challenge to retailer license and physical presence requirement is "a frontal attack on the constitutionality of the three-tier system itself"); *Lebamoff*, 956 F.3d at 873 ("Michigan could not maintain a three-tier

system, and the public-health interests the system promotes, without barring direct deliveries from outside its borders."); *Sarasota Wine*, 987 F.3d at 1183-84 (allowing out-of-state retailers to direct ship would "permit alcohol sales and deliveries into Missouri by a twenty-first century version of the tied house"); *B-21 Wines*, 36 F.4th at 228 ("[T]he direct shipping of alcoholic beverages to North Carolina consumers by out-of-state retailers would completely exempt those out-of-state retailers from the three-tier requirement.").

Plaintiffs concede they necessarily seek to exempt out-of-state retailers from Arizona's three-tier system, which would "open the [Arizona] wine market to less regulated wine, undermining the State's three-tier system and the established public interest of safe alcohol consumption that it promotes." *See B-21 Wines*, 36 F.4th at 228. If Plaintiffs are successful, out-of-state retailers would not have to purchase from a wholesaler who complies with Arizona's specific regulations or from any wholesaler at all. *Lebamoff,* 956 F.3d at 872. In fact, Plaintiffs argue that the Constitution bars states from "directly regulat[ing] business practices in other states." *See* Op. Br. at 6.

Accordingly, Arizona would be deprived of all the benefits that

wholesalers bring, including but not limited to the payment of luxury taxes, the ability to monitor products for legitimacy and safety, and the ability to quickly facilitate recalls if necessary. *See* ER-247, ¶ 14; ER-253–56, ¶¶ 30-35. Unlicensed out-of-state wholesalers would have no obligation to comply with Arizona's liquor laws or ensure that a retailer in their state is complying with Arizona law.

As essential features of Arizona's three-tier system, the challenged laws withstand dormant Commerce Clause scrutiny. *See* ER-018 (holding that "the premises requirement is such an essential feature of the three-tier system that it is supported by legitimate, nonprotectionist state interests"); *B-21 Wines,* 36 F.4th at 227-29 (finding that North Carolina's Retail Wine Importation Bar was an "essential aspect of North Carolina's three-tier system" and was thus "justified on the legitimate nonprotectionist ground of preserving North Carolina's three-tier system").

B. The Laws Promote Public Health and Safety.

The trial court held that based on the undisputed evidence, the State offered several legitimate, non-protectionist reasons to "maintain its three-tier system and prevent direct shipping from unlicensed, out-

of-state retailers," including the regulation of the quantity and quality of alcohol, protecting minors, and revenue generation. ER-018:8-11.

Allowing retailers to directly ship wine to Arizona consumers without having physical premises in Arizona would undermine the Department's ability to inspect and monitor retailers' regulatory compliance. Indeed, the Supreme Court in *Tennessee Wine* acknowledged that a physical premise requirement allows the State to monitor a retailer "through on-site inspections, audits, and the like." 139 S.Ct. at 2475.

Here, the undisputed evidence shows the Department regularly undertakes on-site inspections of retail premises to enforce compliance with Arizona's laws and that such inspections often reveal violations. SER-126–27, ¶¶ 34, 36. Arizona's ability to conduct random, unannounced inspections acts as a significant deterrent for retailers when it may mean losing their license in the state where their premises are located. But it does not carry the same weight for a retailer who could continue to operate in their home state.

The Department would not have the same tools and resources to monitor compliance with Arizona's laws outside of Arizona. For

example, the Department would lose the benefit of assistance from local Arizona law enforcement in investigating possible violations. ER-252–53, ¶¶ 26-28. Nor would the Department be able to use local wholesaler records to determine whether retailers purchased liquor from an appropriate source and paid the applicable taxes. *See* ER-018:11-15; ER-253–254, ¶¶ 30, 33. And the Department's ability to determine the quality or integrity of products before they are purchased by consumers and the ability to quickly recall tainted or unsafe products would be diminished. ER-254–256, ¶¶ 31-33, 35; ER-248–249, ¶ 16. Moreover, Arizona does not currently have the resources to ensure compliance of potentially thousands of out-of-state retailers. ER-253, ¶ 27.

C. Arizona Is Not Constitutionally Required to Adopt a Permit System Used by a Minority of States.

The Opening Brief does not address the evidence put forth by the State below. Instead, Plaintiffs rely (as they did below) on the fact that a minority of states (13 jurisdictions and the District of Columbia) allow out-of-state retailers to directly ship wine to in-state consumers under a permitting system. Op. Br. at 35.

But the mere availability of an alternative does not show that the predominant effect of the challenged laws is protectionism. Otherwise,

alcohol regulation would truly be a race to the bottom. Under Plaintiffs' argument, once one state loosened its regulations, every other state would constitutionally be required to follow suit. Such a result is contrary to the "aim of the Twenty-first Amendment . . . to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." *Granholm*, 544 U.S. at 484. And it is contrary to the Supreme Court's guidance in *Granholm* and *North Dakota* that states have "virtually complete control" over the importation of liquor and the structure of the state's liquor distribution system. *Id.* at 388; *North Dakota*, 495 U.S. at 431.

Nevertheless, the trial court further found that Plaintiffs' proposed alternatives would not allow the State "to maintain its ability to inspect wholesalers, inspect retail premises and books, and ensure alcohol is funneled through a three-tier system." ER-019:18-21. In short, the State would give up its ability to conduct on-site routine inspections in favor of a potential "mutual agreement with another state to inspect or enforce violations. This alternative is entirely speculative and largely impairs the State's legitimate interest in its own regulation and enforcement." ER-019:25-28.

The trial court also affirmed the State's justifications for treating retailers differently than producers (who are in limited instances, exempt from Arizona's three-tier system):

> For example, wineries produce their own products and thus exercise quality control over the products. Wineries are also regulated by the federal government, and revocation of a license means it cannot operate in any state. Retailers, on the other hand, do not produce their own products and are regulated by individual states with varying degrees of regulations and oversight. These differences provide sufficient justification for the State's decision to exempt certain wineries from funneling alcohol through the three tiers but require that all retailers must operate within the three-tiered system.

ER-020:21-28.

The Opening Brief does not mention or rebut the trial court's analysis. At most, the Opening Brief generally claims that the testimony from the State's witnesses was speculative as to what problems might arise if Arizona adopted Plaintiffs' proposed alternative. *See* Op. Br. at 36. This cursory statement is insufficient to preserve any challenge to the State's evidence below. *See Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief.").

Regardless, Plaintiffs' argument fails. Of course, no one can

predict the outcome of a new system with complete accuracy. But who is better situated to explain the likely outcomes than the very officials tasked with enforcing Arizona's alcohol regulations?

Moreover, the officers' concerns about enforcement against retailers operating from other states are well-founded based on other states' experience, as shown in the evidence presented to the trial court. States that allow direct-to-consumer shipping by retailers without an in-state physical presence have experienced non-compliance with payment of taxes and underage verification requirements. *See* SER-133–35, ¶¶ 48-49. As one example, Michigan found that 33% of the total bottles of wine shipped into Michigan in 2019 (734,365 bottles) were shipped illegally. SER-134, ¶ 49. Many of these states have had to devote additional enforcement, auditing, and prosecutorial resources to monitor direct-to-consumer shipping. SER-135–36, ¶ 51. Indeed, here the record shows that the Plaintiffs have purchased and imported wine from retailers operating outside of Arizona, in contravention of Arizona's laws. *See* SER-136–37, ¶¶ 54-55.

Arizona is entitled to rely on other states' experiences as support for its decision to maintain its three-tier system. *Cf. Brnovich v.*

Democratic Nat'l Comm., 141 S. Ct. 2321, 2348 (2021) (noting consequences of election fraud in other states and holding that "[t]he Arizona Legislature was not obligated to wait for something similar to happen closer to home"); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986) (holding that city "was entitled to rely on the experiences" of other cities and was not required "to conduct new studies or produce evidence independent of that already generated by other cities"); *Genusa v. City of Peoria*, 619 F.2d 1203, 1211 (7th Cir. 1980) ("A legislative body is entitled to rely on the experience and findings of other legislative bodies as a basis for action.").

As discussed above, there are many legitimate health and public safety concerns served by the three-tier system, the at-rest requirement, the Arizona-licensed wholesaler purchase requirement, and the physical premise requirement. Plaintiffs may dislike the inefficiencies inherent in the safeguards built into three-tier system, but that system is meant to make it harder and more expensive to purchase alcohol, as a way to address the health and safety issues associated with alcohol consumption. *See Lebamoff*, 956 F.3d at 875. Inefficiency alone does not render the three-tier system

unconstitutional.

CONCLUSION.

The Court should reject Plaintiffs' attempt to create a hole in Arizona's three-tier system and affirm the judgment in favor of Defendants.

RESPECTFULLY SUBMITTED this 8th day of March, 2024.

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CERTIFICATE OF COMPLIANCE

I am the attorney for Appellee Wine & Spirits Wholesalers Association of Arizona. This brief contains 10,655 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6), as the brief has been prepared in a proportional typeface in 14-point Century Schoolbook font.

I certify that this brief complies with the word limit of Cir. R. 32-1.

GALLAGHER & KENNEDY, P.A.

/s/Hannah H. Porter March 8, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on March 8th, 2024, I electronically filed the foregoing Answering 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/ Hannah H. Porter