Case No. 23-16148

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REED DAY and ALBERT JACOBS,

Plaintiffs-Appellants,

v.

BEN HENRY, Director of the Arizona Department of Liquor Licenses and Control, TROY CAMPBELL, Chair of the Arizona State Liquor Board, and KRIS MAYES, Arizona Attorney General, in their official capacities, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona

No. 2:21-cv-01332

COMBINED ANSWERING BRIEF OF STATE DEFENDANTS

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INTRODUCTION

This case is a dormant Commerce Clause challenge by two wine aficionados to Arizona's liquor licensing scheme, and in particular, Arizona laws regarding the importation and delivery of wine.

The Twenty-first Amendment empowers Arizona to regulate both the "importation … of intoxicating liquors" into the state and the "transportation" of liquor within the state. Like many states, Arizona regulates wine through a "three-tiered system" of suppliers, wholesalers, and retailers. As a general matter, that means suppliers (wineries) must be licensed and sell to licensed wholesalers; wholesalers must receive the wine at an in-state facility and sell only to licensed retailers; and retailers must have an in-state physical location (a store) from which they sell to consumers. The United States Supreme Court has repeatedly affirmed the constitutionality of that basic model and its essential features.

Plaintiff-Appellants Reed Day and Albert Jacobs disagree with the State's decision to regulate wine through that three-tiered system. They want to order wine remotely from unlicensed retailers throughout the country and have that wine imported into Arizona and delivered directly to their homes, without the wine passing through any Arizona-licensed

supplier, wholesaler, or retailer. Arguing that the Commerce Clause requires the State to permit such transactions, Plaintiffs mischaracterize state law and use misleading language that obscures the issues here.

Plaintiffs say Arizona allows "in-state retailers" to ship wine directly to consumers (i.e., home delivery after a non-face-to-face transaction), but does not allow "out-of-state retailers" to do the same thing. That is inaccurate. As Plaintiffs use them, those "in-state" and "out-of-state" descriptors are misnomers and do not mean what those terms normally convey in typical Commerce Clause cases. What Plaintiffs really mean by "out-of-state retailers" is *unlicensed* retailers in other states, importing product directly to consumers outside of Arizona's three-tiered system.

To be clear, the State prohibits that sort of transaction for *all* unlicensed retailers, whether they are an Arizona or non-Arizona company. No retailer can sell wine to Arizonans without a license and without operating within the State's three-tiered system. It is perfectly legal under the Twenty-first Amendment for a state to treat unlicensed and licensed retailers differently. What matters is that, in exercising that regulatory power, Arizona treats similarly situated in-state and out-of-state interests identically.

The requirements are the same for any corporation or limited liability company seeking a retail license to sell wine in the state. Relevant here, the company must establish an in-state storefront, hire an Arizona resident to manage the store, and hold its license through an agent who is a resident. Importantly, the company need not be a resident, owned by a resident, formed under Arizona law, or be present for a minimum period of time to satisfy the storefront requirement. And once licensed, non-Arizona companies have the exact same privileges as Arizona companies in how they can sell and ship wine throughout the state.

In short, Plaintiffs' case relies on using Commerce Clause language (in-state/out-of-state) to disguise a distinction (licensed/unlicensed) that has nothing to do with where a company is from. Indeed, the majority of circuits to hear similar challenges have rejected them. And before the Court even reaches those merits issues, Plaintiffs' case fails for lack of Article III standing. For these reasons, among others, the Court should affirm.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 because Plaintiffs challenge state laws as violating the U.S. Constitution. ER-043–

053.[1] Under 28 U.S.C. § 1291, this Court has jurisdiction over the district court's summary judgment order, which disposed of all claims. ER-021. The district court entered final judgment for Defendants on August 9, 2023. *Id.* Plaintiffs timely filed their notice of appeal on August 28, 2023. Doc. 68.

STATEMENT OF THE ISSUES

1. Plaintiffs challenge the retail storefront requirement but not other aspects of the statutory scheme that still prohibit their proposed transactions. And Arizona law does not prohibit the wines that Plaintiffs wish to purchase from coming to market in the state. Can Plaintiffs satisfy the causation and redressability requirements to establish Article III standing?

2. The U.S. Supreme Court has repeatedly affirmed that the basic three-tiered system for alcohol distribution is a constitutional exercise of state power under the Twenty-first Amendment and does not violate the dormant Commerce Clause. Can Plaintiffs prove a Commerce Clause claim when they challenge only an essential feature of that system? And even if

[1] Citations using "Doc." and "Dkt." refer to the district court's and this Court's dockets, respectively. Citations to "SER" refer to Appellees' combined Supplemental Excerpts of Record, filed concurrently herewith.

that feature is deemed nonessential, does it amount to cognizable discrimination under the dormant Commerce Clause?

3. States do not need to justify their nondiscriminatory policy determinations. But even if Plaintiffs can challenge an essential feature of the three-tiered system, and even if the storefront requirement has a disparate effect on out-of-state interests that is cognizable under the dormant Commerce Clause, can the storefront requirement be justified as a health and safety measure or on other nonprotectionist grounds?

STATEMENT OF THE CASE

I. Legal Background

A. The U.S. Supreme Court has held that the three-tiered system for alcohol distribution is "unquestionably legitimate."

This case implicates two constitutional provisions: the dormant Commerce Clause and the Twenty-first Amendment. Under the Commerce Clause, "Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause's "'negative' aspect"—the so-called dormant Commerce Clause—also "prohibits state laws that unduly restrict interstate commerce." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019) (citation omitted).

At the same time, § 2 of the Twenty-first Amendment prohibits "[t]he transportation or importation into any State … for delivery or use therein of intoxicating liquors, in violation of the [State's] laws," meaning states can regulate *inter*state "importation" of alcohol no less than *intra*state "transportation." U.S. Const. amend. XXI, § 2. "Indeed, all 'importation' involves shipments from another state," and "every statute limiting importation leaves intrastate commerce unaffected." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000). Section 2 thus "gives the States regulatory authority that they would not otherwise enjoy" over other articles of commerce. *Tenn. Wine*, 139 S. Ct. at 2474.

With that authority, states can "control shipments of liquor during their passage through their territory," and "take appropriate steps to prevent the unlawful diversion of liquor into their regulated intrastate markets." *North Dakota v. United States*, 495 U.S. 423, 431 (1990). Overall, the Constitution "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system," *Granholm v. Heald*, 544 U.S. 460, 488-89 (2005) (citation omitted), so long as states do not "favor in-state economic interests over [similarly situated] out-of-state interests," *Tenn. Wine*, 139 S. Ct. at 2471.

Many states have adopted a three-tiered system for alcohol distribution. Under that model, alcohol must be funneled into the state through state-licensed suppliers, wholesalers, and retailers: the suppliers "may sell only to licensed wholesalers; wholesalers may sell only to licensed retailers or other wholesalers; and only licensed retailers may sell to consumers." *Tenn. Wine*, 139 S. Ct. at 2457; *see also North Dakota*, 495 U.S. at 428, 432. The Supreme Court has "recognized that the three-tier system itself is 'unquestionably legitimate,'" *Granholm*, 544 U.S. at 489 (citation omitted), including all the "essential feature[s] of a three-tiered scheme." *Tenn. Wine*, 139 S. Ct. at 2471; *see also Granholm*, 544 U.S. at 489 ("The Twenty-first Amendment ... empowers [states] to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." (citation omitted)).

B. Arizona has adopted the basic three-tiered system for wine.

"Arizona regulates the sale of [wine] through a three-tier distribution system" of suppliers, wholesalers, and retailers. *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1227 (9th Cir. 2010); *see* SER-041 (visual aid of Arizona's system submitted at summary judgment hearing); SER-026 (at 24:17-20, referring to visual aid). Wineries must be licensed in Arizona and may sell only to Arizona-licensed wholesalers. A.R.S. §§ 4-243.01(A)(1), 4-201(A), 4-

244(1)-(2). The winery must invoice the wholesaler, and the wine must then "be unloaded and remain at the wholesaler's premises for at least twenty-four hours" (the "at-rest requirement"). *Id.* § 4-243.01(A)(2), (B). Arizona-licensed wholesalers can sell only to Arizona-licensed retailers. *Id.* §§ 4-244(1)-(3), 4-243.01(E)(2).

Retailers must purchase product from an Arizona-licensed wholesaler and have an Arizona retail license. A.R.S. §§ 4-243.01(A)(3)(a)-(b), (E)(2), 4-244(1)-(2), (7). To get a retail license, a corporation or limited liability company must establish a physical presence in the state (the "storefront requirement") and designate an Arizona resident to manage the store. *Id.* § 4-202(C); *see id.* § 4-201(A)-(D), (G), (I); *see generally id.* § 4-207 (referring to "premises" of retailer license applicants). The company licensee must be qualified to do business in Arizona and must hold the retail license through an agent who is a resident. *Id.* § 4-202(A); *see* A.A.C. R19-1-201(A)(3), (6). But the company does not itself need to be a resident, be owned by a resident, or be present in the state for any minimum period before seeking licensure. *See* A.R.S. § 4-202(A); A.A.C. R19-1-201(A)(3), (6).[2]

[2] If a natural person or general partnership chooses to be the retail licensee (a rare—if not almost unheard-of—business decision as a practical

Once a company is an Arizona-licensed retailer, it can sell wine through face-to-face transactions at its in-state storefront, or it can take remote orders (e.g., via phone or online) and deliver the wine to Arizona households using a common carrier or independent contractor, subject to certain limitations and requirements. A.R.S. § 4-203(J) (explaining that direct shipment privileges are available to Arizona licensees with "off-sale privileges"); *see id.* § 4-101(28) (defining "off-sale retailer").

Two discrete exceptions to this system are available to wineries. First, small wineries (annual production of fewer than 20,000 gallons of wine) can obtain a farm winery license that allows them to sell and ship wine directly to Arizona consumers and retailers. A.R.S. § 4-205.04(C)(7), (9). As these shipments are coming from a limited-production winery, there is no cap on the quantity they can ship. *See id.* Second, wineries can apply for a one-year

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matter), it must be a resident. A.R.S. § 4-202(A). For limited partnerships, only an individual general partner must be a resident; a corporate general partner is treated as a corporate licensee, and a limited partner need not be an Arizona resident or U.S. citizen. *Id.* Plaintiffs have never challenged the residency requirement for individuals and partnerships (they plainly lack standing to do so). And striking down that requirement would not help them because the storefront requirement would still prohibit their proposed transactions. Accordingly, this brief's use of "company" and "retailer" refers only to corporations and LLCs and the licensing requirements for those business forms (which, to repeat, do not include residency).

renewable and revocable license to ship twelve nine-liter cases of wine directly to consumers for personal use. A.R.S. § 4-203.04(B), (D)-(E), (F)(1)(c), (3)-(4); *see Black Star Farms*, 600 F.3d at 1227-28 (discussing exceptions, one of which has since been amended).

II. Procedural Background

A. Plaintiffs requested different relief in their Complaint, summary judgment filings, and at oral argument below.

Plaintiffs collect wine. ER-045, 054-057. They sued the Arizona Attorney General, the Director of the Department of Liquor Licenses and Control, and the Chair of the State Liquor Board (collectively, "the State"). ER-043. The Wine and Spirits Wholesalers Association of Arizona intervened as a defendant. Docs. 13, 15. A wine retailer in Florida and that company's owner and operator were also plaintiffs but were dismissed with prejudice. ER-045–046; ER-262 (Docs. 32-33).

The Complaint asserts one violation of the Commerce Clause. ER-047. Although Plaintiffs never amended the Complaint, the statutes they attacked and the relief they sought often changed throughout the proceedings below, which is relevant to waiver and forfeiture issues now on appeal. *See* SER-

042 (chart of Plaintiffs' various requests for relief submitted at summary judgment hearing); SER-019 (at 17:20-23, referring to chart).

To start, the Complaint asked the district court to declare unconstitutional A.R.S. § 4-201(A)-(D) and § 4-202(A). ER-052 (seeking relief as to "provisions set forth in paragraph 24"), ER-050–051 (¶ 24 citing only "§§ 4-201(A)-(D) and 4-202(A)"). Those provisions address the licensure application process and require a retail license to be held through an Arizona-resident agent. But the Complaint did not seek relief as to at least seven other provisions that also require a retailer to be present and participate in Arizona's three-tiered system, including that a resident must manage the retail store (§ 4-202(C)); a retailer must purchase from an Arizona-licensed wholesaler (§§ 4-243.01(A)(3), (E)(2), 4-244(7)); and the product the retailer sells must have complied with the at-rest requirement at the wholesaler's facility (§ 4-243.01(B)). *See* SER-042 (chart citing unchallenged statutes).

When Plaintiffs moved for summary judgment, their requested relief changed. The "remedy" they identified pertained to the at-rest requirement only: they asked the court to enjoin "Ariz. Rev. Stat. § 4-243.01(B) but clearly limit the injunction to allow direct shipping by [unlicensed] out-of-state

retailers." SER-057–058. Plaintiffs' reply brief sought different relief, asking the district court to "order state officials to allow [unlicensed] out-of-state retailers to apply for and be issued direct wine seller's permits under A.R.S. § 4-203.04." SER-071. Plaintiffs thus urged the court to rewrite a statute that applies only to wineries and to order the State to extend a licensing privilege for wineries to unlicensed retailers in other states.

Then, during oral argument on the parties' cross-motions for summary judgment, Plaintiffs' requested relief continued to evolve. Initially, Plaintiffs asked the district court to hold unconstitutional all statutes—they did not identify which ones—that prevent unlicensed retailers in other states from importing wine directly to Arizona consumers, and then "direct that the legislature fix it." SER-007–013 (at 5:06-12, 6:24–9:16, 10:02–11:16). Later, Plaintiffs narrowed their request again and "challeng[ed] only the requirement that retailers must have physical premises in the state in order to directly ship to consumers," ER-007; *see* SER-037 (at 35:21-23), which was more consistent with their arguments below generally, *e.g.*, SER-062.

Importantly (albeit, confusingly), Plaintiffs "recognize the value of the three-tier system," SER-017 (at 15:20-23), and have repeatedly disclaimed any challenge to "the state's authority to require out-of-state wine retailers

be licensed through the state … [and] to require that wine be distributed through a three-tier system," SER-100–101; *see, e.g.*, SER-046.

B. The district court granted summary judgment for Defendants.

The district court granted summary judgment for the State and Intervenor Defendants. ER-005–021. The court held that Plaintiffs failed to meet their burden to establish standing. ER-009. Specifically, Plaintiffs did not establish redressability "because it [was] unclear which provisions [they] actually challenge[d]," and therefore the court found it likely that unchallenged provisions would still prevent unlicensed retailers from selling and shipping directly to Arizona consumers. ER-008–010. The court also found it lacked authority "to rewrite the licensing and regulatory scheme to enable out-of-state retailers to obtain a license" or "as proposed at oral argument, [to] command[] the legislature to rewrite the statutes within a particular timeframe." ER-011–012.

Even assuming Plaintiffs had standing, the district court found their claims failed on the merits because Arizona law is not discriminatory on its face or in effect. ER-012–018. And even if Arizona's retail storefront requirement had some differential impact on some out-of-state companies,

it is "an essential feature of the three-tier system" and is also "supported by legitimate, nonprotectionist state interests." ER-018–020.

STANDARD OF REVIEW

This Court "review[s] the grant of summary judgment de novo." *Sanders v. County of Ventura*, 87 F.4th 434, 437 (9th Cir. 2023).

SUMMARY OF ARGUMENT

Plaintiffs' dormant Commerce Clause claim fails for four reasons.

First, Plaintiffs lack Article III standing because they cannot establish causation or redressability. Plaintiffs' asserted injury—the unavailability of certain wines for sale in Arizona—flows from the free-market decisions of private third parties: licensed wholesalers have decided not to carry those wines, and retailers that might carry those wines (or persuade wholesalers to carry them) have chosen not to seek an Arizona retail license to do business in the state. Arizona law is entirely consistent with Plaintiffs being able to purchase the wines of interest, if only third parties decide to sell them.

Plaintiffs also cannot satisfy the redressability inquiry for reasons this Court identified in a nearly identical challenge. *See Orion Wine Imps., LLC v. Appelsmith*, 837 F. App'x 585 (9th Cir. 2021). Plaintiffs attack only some of the statutes that prevent their desired transactions, but other unchallenged

statutes still prohibit unlicensed retailers from importing wine directly to Arizonans outside the State's three-tiered system. To the extent Plaintiffs seek to expand the scope of their challenge on appeal, they have unequivocally waived and forfeited any broader requests for relief.

Second, precedent forecloses Plaintiffs' challenge because they attack an essential feature of the basic three-tiered system, and the U.S. Supreme Court has repeatedly confirmed that the basic three-tiered model and its essential features are constitutional.

As the majority of circuits to consider this question have recognized, a storefront requirement for retailers is a necessary component for the three-tiered system to exist. Requiring retailers to be physically present is integral to a state's authority to funnel all interstate and intrastate alcohol distribution through its three-tiered system, require retailers to purchase from licensed wholesalers, and monitor retail operations for health and safety and regulatory compliance. Because Plaintiffs attack an essential part of an indisputably constitutional whole, their claim fails as a matter of law. Binding precedent prevents further scrutiny.

Third, even if the Court proceeds in its analysis, the storefront requirement does not violate the dormant Commerce Clause. Plaintiffs

never compare similarly situated in-state and out-of-state entities, a necessary starting point to prove discrimination. In any event, Arizona law treats out-of-state and in-state interests identically, and Plaintiffs proffer no evidence of a discriminatory effect.

The only so-called discrimination Plaintiffs urge is not cognizable under the dormant Commerce Clause, but rather an inherent consequence of the power that states have under the Twenty-first Amendment. Any limitation on *inter*state commerce will necessarily leave *intra*state commerce untouched. Likewise, all essential features of the basic three-tiered system that require a brick-and-mortar presence (for both wholesalers and retailers) necessarily require out-of-state entities to travel into the state to comply, while in-state-based entities will already be present. That unavoidable incidence of geography, without more, is not unconstitutional.

And ***fourth***—although, again, Plaintiffs' claim never makes it this far—the undisputed record establishes that the retail storefront requirement is a legitimate and nonprotectionist measure to protect public health and safety, ensure an orderly market and compliance with taxation requirements, facilitate competitive fairness, and maintain Arizona communities' say about how alcohol flows into the state. The Court should affirm.

ARGUMENT

I. Plaintiffs cannot establish Article III standing.

To have standing, a plaintiff must show an "(1) 'injury in fact,' (2) 'a causal connection between the injury and the conduct complained of,' and (3) a likelihood 'that the injury will be redressed by a favorable decision.'" *Novak v. United States*, 795 F.3d 1012, 1017-18 (9th Cir. 2015) (citation omitted). Here, Plaintiffs fail to establish causation and redressability.[3]

A. Plaintiffs' claimed injury is caused by the independent choices of third parties, not by Arizona law.

Plaintiffs' alleged injury must be "'fairly traceable' to the [defendants'] alleged misconduct, and not the result of [the choices] of some third party." *Wash. Env't Council v. Bellon*, 732 F.3d 1131, 1142 (9th Cir. 2013). If "the causal chain involves numerous third parties whose independent decisions collectively have a significant effect on plaintiffs' injuries, [it] is too weak to support standing." *Id.* (citation omitted).

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[3] The State has not disputed the injury-in-fact requirement insofar as Plaintiffs' asserted harm is the unavailability of certain wines for purchase in Arizona, as they asserted below. *See* ER-008. But Plaintiffs are not—as they now say (at 11) on appeal—"the object of the regulation[s]" at issue, and they cannot claim an injury on that basis. Arizona's licensing requirements apply to suppliers, wholesalers, and retailers—not consumers. *See generally, e.g.*, A.R.S. §§ 4-201(A), 4-203, 4-244, 4-250.01(A)-(B).

Plaintiffs' sole causation argument (at 13) is that the State prohibits them from receiving direct shipments of wine from non-Arizona retailers. But nothing in Arizona law prohibits particular wines or retailers from coming to market in the state. Indeed, Plaintiffs agreed with the district court that "consumer choices are limited because the retailer doesn't choose to be licensed in the state," and "[a]ny retailer could choose to be licensed." SER-038 (at 36:11-15). As Plaintiffs' own assertions reveal, to the extent they cannot buy certain wines it is because Arizona-licensed wholesalers have decided not to stock them (*see* ER-048, ¶ 17), or because retailers that might sell that product "have no interest in developing a physical presence in Arizona" (SER-037 (at 35:09-13)), and "no business reasons" to pursue a retail license in Arizona (ER-051, ¶ 25).

For instance, Total Wine and BevMo—companies formed in other states but licensed as retailers in Arizona—"carry a vast number of wines" but only a "few of the wines [Plaintiffs are] typically interested in purchasing." ER-054–057. But at any point, Total Wine and BevMo (or any other Arizona-licensed retailers and wholesalers) could begin stocking the "rare, unusual, older vintage, or other limited-supply wines" that interest Plaintiffs, eliminating their asserted harm. ER-048, ¶ 17. Plaintiffs' Article

III injury is the unavailability of certain wines—they have no stake in who makes those wines available to them. And even if nothing changed about Arizona law, Plaintiffs' injury would disappear if third parties simply made different choices, proving they "collectively have a significant effect on plaintiffs' injuries." *Bellon*, 732 F.3d at 1142.[4]

B. Plaintiffs cannot establish redressability.

"To establish Article III redressability, the plaintiffs must show that the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court's power to award." *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020). For several reasons, any version of Plaintiffs' requested relief fails one or both of those two prongs.

1. The relief Plaintiffs seek is still unclear.

As an initial matter, it's difficult to analyze redressability because Plaintiffs still do not clearly and consistently attack specific statutes or request precise relief; often they simply refer generally to "Arizona law" (at

[4] Plaintiffs have never developed a different causation argument. *See* SER-045; SER-063; SER-113. They cannot raise the hypothetical injuries of unlicensed companies, such as the costs of licensure, and the Opening Brief cites (at 12-13) no evidence that the physical location requirement is driving the choices of third parties regarding the availability of wines.

1, 3) or a "ban" on unlicensed sales (at 12, 15, 24). Although the Opening Brief cites parts of the statutory scheme in the Background (at 4-6), there are no specific citations in the Introduction (at 1), Statement of the Issue (at 3), Summary of Argument (at 15-17), or "Remedy" and Conclusion sections (at 42-43) that clarify what Plaintiffs want this Court to hold unconstitutional. *See also* Dkt. 16 at 6 (Table of Authorities, illustrating sparse statutory citations); *see also* Fed. R. Civ. App. P. 28(a)(5) (requiring a "statement of the issues"), (7) ("summary of the argument … must contain ***a succinct, clear, and accurate*** statement"), (9) (conclusion must "stat[e] the ***precise relief sought***") (all emphases added).

To the extent Plaintiffs describe their attacks with more specificity, they are contradictory and still unclear. Sometimes Plaintiffs refer only to the retail storefront requirement (at 14, 25), consistent with their general focus in the district court. *E.g.*, SER-038. Other times, they gesture at the requirement that retailers purchase from licensed wholesalers, while still conceding that Arizona can "impose such a requirement" (at 28, 30-31).

Although difficult to respond to arguments that "are not specifically and distinctly argued in [the] opening brief," *SNJ Ltd. v. Comm'r of Internal Revenue*, 28 F.4th 936, 944 n.7 (9th Cir. 2022) (citation omitted), the State

attempts to address the various requests Plaintiffs might be urging. But Plaintiffs' failure to "clearly and distinctly" state the precise relief sought should be construed against them, particularly when standing is their burden. *Harger v. Dep't of Lab.*, 569 F.3d 898, 904 n.9 (9th Cir. 2009); *see also Orr v. Plumb*, 884 F.3d 923, 932 (9th Cir. 2018) (recounting the Court's "usual rule … that arguments … omitted from the opening brief are deemed forfeited").

2. Plaintiffs' attack on the retail storefront requirement does not establish redressability.

Plaintiffs challenge (at 14) "Arizona's requirement that wine retailers must be physically located in the state." But even if the Court struck down the storefront requirement, that relief would not allow unlicensed retailers in other states to import wine directly to Arizonans because other unchallenged statutes would still prohibit that transaction. *See Nuclear Info. & Res. Serv. v. Nuclear Regul. Comm'n*, 457 F.3d 941, 955 (9th Cir. 2006) (no redressability when an unchallenged rule would dictate the same result even if the challenged rule were struck down).

Specifically, even without the retail storefront requirement, an unlicensed retailer that imported wine directly to Plaintiffs would still

violate Arizona law by not holding a license through a resident agent (§ 4-202(A)); shipping wine without a direct shipment license (§ 4-203.04(A)(H)(1)); and selling wine that was not invoiced to an Arizona-licensed wholesaler and did not "remain at the wholesaler's premises for at least twenty-four hours" (§ 4-243.01(A)(3), (B)).

Plaintiffs have acknowledged those other requirements still apply. They expressly (at 14) "are not challenging the state's authority to regulate out-of-state wine retailers [by] requiring them to be licensed through the state." In other words, they are not challenging the fact that "[i]t is unlawful" to "sell or deal in spirituous liquors in this state without first having procured a license duly issued by the board." A.R.S. § 4-244(1). And Plaintiffs have not disputed that if "[a]n out-of-state [company] engage[s] in business in this state as [an] importer … [or a] retailer," that company will be subject to Arizona's "laws, rules or regulations." A.R.S. § 4-250.01(A); *see also id.* § 4-203.04(H) (same for any "person who knowingly sells and ships wine directly to a purchaser in this state").

This case is thus exactly like *Orion Wine Imports, LLC v. Appelsmith*, which was a challenge to similar California laws (brought by Plaintiffs' same counsel here). There too, "the fatal flaw for Plaintiffs' challenge" was that

"other independent provisions of [California law], which Plaintiffs [did] not challenge, would still prohibit Plaintiffs' proposed transaction." *Orion Wine*, F. App'x at 586. For the same reasons, standing is lacking here because "a favorable ruling [as to the storefront requirement] would not remedy Plaintiffs' alleged injury, the cornerstone of redressability." *Id.*

3. Plaintiffs waived any broader request for relief.

"Forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right." *Honcharov v. Barr*, 924 F.3d 1293, 1295 n.1 (9th Cir. 2019) (per curiam) (citation omitted). Both principles apply here to the extent Plaintiffs purport (at 4-6) to challenge anything other than the retail storefront requirement.

Plaintiffs have had five bites at the apple to identify their requested relief: the Complaint, three summary judgment briefs, and oral argument below. They moved the goalpost each time, including during several colloquies with the district court. SER-008–013 (at 6:01–9:16, 10:02–11:16); *see* SER-042. Plaintiffs ultimately confirmed they attack only the retail storefront requirement, consistent with the majority of their arguments.

> THE COURT: … The discrimination comes from the requirement to have physical presence in the state?

> COUNSEL: Yes.

SER-037 (at 35:13-23).

> THE COURT: Just the physical presence requirement is so onerous that it amounts to an unconstitutional imposition on commerce?
>
> COUNSEL: Exactly, Your Honor.

SER-038 (at 36:17-20); *see* SER-063 (similar assertion).

Thus, although they still failed to identify specific statutes, Plaintiffs expressly narrowed the scope of their challenge (waiver), and they declined to commit to and develop arguments about other statutes (forfeiture). Accordingly, they cannot now seek broader relief on appeal. *See Orion Wine*, 837 F. App'x at 586 ("[W]e are not obligated to consider every possible argument Plaintiffs could have made but did not, particularly where, as here, standing was raised, briefed, and argued below."); *see also Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1180 (9th Cir. 2015) ("We apply a general rule against entertaining arguments on appeal that were not presented or developed before the district court." (citation omitted)).

At the same time, Plaintiffs have been emphatic about what they are *not* challenging.

- "[Plaintiffs are not] challenging the state's authority to require that wine be distributed through a three-tier system that separates producers, wholesalers and retailers." SER-101.

- "Plaintiffs take no issue with the requirement that retailers must purchase wine from a wholesaler." SER-068.

- "Plaintiffs are not challenging the underlying rule that everyone who wants to distribute wine in Arizona must have a license." SER-046.

- "[Plaintiffs] are not challenging the state's authority to require out-of-state wine retailers be licensed through the state, have a permit, and pay licensing fees to ship to Arizona residents." SER-100–101.

- "Defendants mischaracterize the Plaintiffs' position as advocating for unlicensed retailers to be allowed to ship directly to Arizona consumers. No one is suggesting that this Court should enjoin the State from licensing and regulating cross-border alcohol sales. There is no dispute that totally unlicensed and unregulated alcohol sales could pose potential risks to public health and safety." SER-068–069 (citations omitted).

With these specific concessions, Plaintiffs unequivocally waived a challenge to the requirements that retailers be licensed (at 6); sell wine purchased from an Arizona-licensed wholesaler (at 6, 28-29, 31); and that wine be shipped to and invoiced by an Arizona-licensed wholesaler (at 6, 31). The Court should reject Plaintiffs' attempts to "raise[] additional challenges to other provisions of" Arizona law "for the first time on appeal." *Orion Wine*, 837 F. App'x at 586.

4. Even the broadest requested relief discernable in Plaintiffs' brief does not establish redressability.

Even if all the "features" Plaintiffs newly discuss (at 4-6) were struck down, they still could not establish redressability. Plaintiffs have not attacked A.R.S. § 4-201(A) or § 4-203.04(H), which require retailers to have an Arizona license and therefore would still prohibit unlicensed, direct-to-consumer importation. Indeed, although it is inconsistent with their other arguments, Plaintiffs say (at 30) they are not "asking that [unlicensed] out-of-state retailers be exempt from the state's three-tier system." *See also* SER-068–069 (similar). Rather, Plaintiffs (at 30-31) "want out-of-state retailers to be allowed to participate in Arizona's three-tier system as a licensed direct shipper." *See also* SER-100–101 (protesting the lack of a permit "that would allow delivery from [a retailer's] out-of-state premises directly").

But no such license exists. The Arizona Legislature chose the basic three-tiered system and created no exception for the importation of product that is not from Arizona-licensed wholesalers, and by a retailer without an in-state storefront. This Court cannot rewrite existing statutes or order the legislature to create a new license to implement Plaintiffs' preferred policy. *See, e.g.*, *Juliana*, 947 F.3d at 1171 (stating "an Article III court [lacked power]

to order, design, supervise, or implement the plaintiffs' requested remedial plan" including because it "would necessarily require a host of complex policy decisions entrusted … to … the executive and legislative branches").

For all these reasons, Plaintiffs' requested relief—whatever that might be—fails the redressability prongs, and the Court should affirm for lack of Article III standing. In all events, Plaintiffs' challenge to the retail storefront requirement fails on the merits.

II. Arizona's three-tiered system does not violate the dormant Commerce Clause.

A. Plaintiffs must show that a nonessential feature of Arizona's three-tiered system discriminates against similarly situated in-state and out-of-state interests.

Plaintiffs approach this case as if it involved any other commodity, treating the Twenty-first Amendment as an afterthought and "impotent" "defense" to the dormant Commerce Clause (at 31-32). That's improper. Both clauses must be construed together on the same plane, giving effect to "nondiscrimination principle[s]" in light of the fact that "§ 2 grants States latitude with respect to the regulation of alcohol." *Tenn. Wine*, 139 S. Ct. at 2470; *e.g.*, *Bridenbaugh*, 227 F.3d at 851 ("[Section] 2 … empowers [states] to control alcohol in ways that it cannot control cheese.").

Importantly, this Court is not writing on a blank slate as to the interplay between those two clauses. The Supreme Court has repeatedly affirmed that the "basic three-tiered model" for alcohol distribution is a constitutional exercise of state power under the Twenty-first Amendment and does not violate the dormant Commerce Clause. *Tenn. Wine*, 139 S. Ct. at 2457, 2471; *see Granholm*, 544 U.S. at 488-89; *North Dakota*, 495 U.S. at 428, 432. Given that binding backdrop, Plaintiffs must prove two things when challenging a state's alcohol regulation under the Commerce Clause.

First, Plaintiffs must identify for attack "a requirement [in Arizona law that] is *not* an *essential feature* of a three-tiered scheme," because the essential features of that constitutional system are necessarily constitutional. *Tenn. Wine*, 139 S. Ct. at 2471-72 (emphasis added). Put differently, because the basic three-tiered system "has been given constitutional approval," the only type of effect of the system "that would be questionable, then, is that which is not inherent in the three-tier system itself." *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 818, 819-20 (5th Cir. 2010).

To be sure, to the extent states incorporate additional requirements into their systems, "each [nonessential] variation must be judged based on its own features." *Tenn. Wine*, 139 S. Ct. at 2471-72. But the core three-tiered

system and its essential features are constitutional as a matter of law. *See id.*; *Granholm*, 544 U.S. at 488-89; *North Dakota*, 495 U.S. at 428, 432; *see also, e.g.*, *Lebamoff Enters. Inc. v. Whitmer*, 956 F.3d 863, 869-70 (6th Cir. 2020) ("A State's 'decision to adhere to a three-tier distribution system is immune from direct challenge on Commerce Clause grounds.'" (citation omitted)).

Second, Plaintiffs must show that the nonessential feature they challenge discriminates against similarly situated in-state and out-of-state interests, meaning it "directly regulates or discriminates against interstate commerce, or … its effect is to favor in-state economic interests over out-of-state interests." *Tenn. Wine*, 139 S. Ct. at 2471 (citation and emphasis omitted). Plaintiffs cannot make either showing.

B. The retail storefront requirement is an essential feature of the three-tiered system and thus constitutional.

The storefront requirement is integral to the basic three-tiered model and is therefore as constitutionally sound as the three-tiered system itself. Plaintiffs' claim fails for that reason alone.

1. The three-tiered system has three essential features.

Funneling alcohol sales through three licensed tiers is a decades-old policy approach to protecting public health and safety, "promoting

temperance, ensuring orderly market conditions, and raising revenue." *North Dakota*, 495 U.S. at 432. The caselaw identifies three essential features of that "unquestionably legitimate" system. *Granholm*, 544 U.S. at 489 (citation omitted).

Separation and Linkage. The first essential feature is the separation of the supplier and retailer tiers, which are linked together by the wholesaler tier. *E.g.*, *Tenn. Wine*, 139 S. Ct. at 2471-72. This feature was adopted, in large part, to avoid the corruption and excessive consumption associated with the "tied-house" relationship between producers and retailers before the Twenty-first Amendment. *See id.* at 2463 n.7; *see also B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 218-19 (4th Cir. 2022) (discussing same); *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1176 (8th Cir. 2021) (same). Now, in light of the Twenty-first Amendment, each state can "require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." *Granholm*, 544 U.S. at 489 (citation omitted).

Licensure. The second essential feature is a state's power to require licensure and provide that "[n]o person may lawfully participate in the sale of alcohol without the appropriate license." *See Tenn. Wine*, 139 S. Ct. at 2457 (discussing how suppliers "may sell only to licensed wholesalers;

wholesalers may sell only to licensed retailers … and only licensed retailers may sell to consumers").

Physical Presence. The third essential feature is the physical presence of retailers and wholesalers in the state of sale. *E.g.*, *Lebamoff*, 956 F.3d at 870 ("The federal courts also have permitted States … to require retailers to be physically based in the State."); *Tenn. Wine*, 139 S. Ct. at 2471-72 (distinguishing residency and durational residency requirements from in-state presence), 2474-75 (discussing states' power to "monitor [retailer] operations through on-site inspections" of stores "physically located within the State"); *see also Granholm*, 544 U.S. at 489.

The three-tiered model is premised on a state's ability to identify licensees in each tier, hold them to certain standards, and require that all alcohol flow through those tiers within its borders so that the state can always trace the product. Without an in-state storefront, though, that's not possible. If a retailer is not present, the state cannot inspect the product for quality and safety; inspect sale and tax records; ensure the retailer is purchasing directly from licensed wholesalers in the state; trace the alcohol the retailer sells up through the licensed wholesaler and supplier; or conduct on-site investigations. There simply is no three-tiered system if the

thousands of retailers throughout the country can bypass the State's distribution model and import alcohol directly to Arizonans.

2. Supreme Court precedent recognizes physical presence is integral to the three-tiered system.

Precedent confirms this common sense understanding of the storefront requirement's practical role in the system.

When *Granholm* reiterated that "the three-tier system itself is 'unquestionably legitimate,'" the Supreme Court adopted an earlier assertion that the "Twenty-first Amendment … empowers [a state] to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 447 (Scalia, J., concurring)). If a state can require wholesalers to be present as a condition of licensure, and can require all retailers to buy product from those "licensed in-state wholesaler[s]," *id.*, then retailers must be present in the state to purchase that product.

More recently, the Court made this even clearer, explaining that states have authority to "monitor [in-state retail] stores' operations through on-site inspections, audits, and the like" and can "requir[e] a nonresident to designate an agent to receive process or to consent to suit." *Tenn. Wine*, 139

S. Ct. at 2475. A state can "also mandate more extensive training for managers and employees and could even demand that they demonstrate an adequate connection with and knowledge of the local community." *Id.* at 2476. Those Court-sanctioned requirements are only logically possible if a state can take the initial step of requiring a retailer to establish an in-state storefront—with operations the state can monitor and inspect, and employees within the state's borders whom the state can regulate—as a condition of licensure.

Although *Tennessee Wine* addressed a durational residency requirement (which Arizona does not have), it is illuminating here. *See id.* at 2456, 2471-72. As the Supreme Court observed in that case, a durational residency requirement is different from a simple residency requirement, and both of those are different from a physical presence (storefront) requirement. *Id.* Noting that other states have three-tiered schemes without durational or residency components, the Court cited an amicus curiae brief filed by 35 states and the District of Columbia ("States' Amicus Br."). *See id.* at 2472 (citing States' Amicus Br. at 24-25, 27). That brief separately discussed durational and residency requirements and then explained:

> Another variation on these regulations is an ***instate presence requirement for retail operations***. Unlike the residency requirement, which ties the liquor license to the individual, the in-state presence requirement ties the license to ***the premises*** where the alcohol is sold. In Illinois, for example, a corporate retailer, though not required to be a resident of the State, ***must have a retail storefront in the State***. These requirements are not mutually exclusive, and some States have opted for both presence and residency requirements.

States' Amicus Br. at 25, 2018 WL 6168781 (citations omitted, emphases added).

With the Court fully aware of those distinctions, *Tennessee Wine* thus "expressly distinguished between the two-year residency requirement at issue and a State's requirement that retail liquor stores be physically located within the State." *Sarasota Wine*, 987 F.3d at 1183. In striking down the former, the Court was not addressing—much less disapproving of—the latter. More than that, the two-year durational residency requirement was *not* an essential feature "needed to enable the State to maintain oversight over liquor store operators" precisely *because* physical presence *is* an essential feature. *See Tenn. Wine*, 139 S. Ct. at 2475; *see id.* at 2471-72. That is, because a state can require retailers to be "physically located within the State" and "can monitor the stores' operations through on-site inspections,"

it does not need to require a retailer corporation or LLC to be a resident for a minimum period of time. *See id.* at 2475; *see also id.* at 2471-72.

Accordingly, Plaintiffs (at 5, 18, 25-26, 28-29, 33) incorrectly equate Arizona's storefront/physical presence requirement with residency, and they wrongly suggest that a retail storefront requirement is an optional variation of the three-tiered system. Requiring all licensed retailers—whether in-state or out-of-state companies—to have a brick-and-mortar presence in the state is a practical necessity for the three-tiered model.

3. Most circuits recognize a retail storefront requirement is essential to the three-tiered system.

Nearly all circuits to consider this issue have recognized that the retailer tier's physical in-state presence is an essential feature of the three-tiered system, and therefore—as a necessary corollary—states can prohibit direct-to-consumer importation of wine from unlicensed retailers in other states. Some courts so concluded even before *Tennessee Wine*, illustrating how obviously fundamental a storefront requirement is. *See, e.g.*:

- *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 229 (4th Cir. 2022) (stating that "the Retail Wine Importation Bar simply assures that all wine sold to North Carolina consumers by retailers goes through the State's three-tier system" and calling that requirement "with respect to wine shipping by retailers … an ***essential aspect*** of North Carolina's three-tier system"); *see also id.* at 227-28;

- *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1175, 1182, 1184 (8th Cir. 2021) (stating that "Missouri's requirements that licensed liquor retailers … have a ***physical presence*** in the State, and purchase liquor sold in the State from licensed in-state wholesalers" are "an ***essential feature*** of its three-tiered scheme");

- *Lebamoff Enters. Inc. v. Whitmer*, 956 F.3d 863, 873 (6th Cir. 2020) ("Michigan could not maintain a three-tier system … without barring direct deliveries from outside its borders.");

- *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 743 (5th Cir. 2016) ("[S]tates may impose a ***physical-****residency* ***requirement*** on retailers ….");

- *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 819 (5th Cir. 2010) ("Texas may have a three-tier system. That system authorizes retailers ***with locations within the State*** to acquire Texas permits if they meet certain eligibility requirements. Those retailers must purchase their alcoholic beverages from Texas-licensed wholesalers….");

- *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 186, 187 (2d. Cir. 2009) (upholding challenged law "insofar as it requires that all liquor sold within the State of New York to pass through New York's three-tier regulatory system" against a claim that certain statutes were "unconstitutional to the extent that they prohibit out-of-state wine retailers from selling and delivering wine directly to New York consumers"); *id.* at 192 (calling the challenged laws "an ***integral part*** of New York's three-tier system");

- *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849, 853 (7th Cir. 2000) (upholding a law that made "unlawful all ***direct shipments from out of state*** to Indiana consumers" because "§ 2 enables a state to do to ***importation*** of liquor—including direct deliveries to consumers in original packages—what it chooses to do to internal sales of liquor") (all emphases added).

Plaintiffs urge (at 41-42) the Court to ignore the majority approach and repeat the errors of two cases in the minority. The first involved a challenge to Ohio laws "preventing out-of-state wine retailers from shipping wine directly to Ohio consumers." *Block v. Canepa*, 74 F.4th 400, 404 (6th Cir. 2023). Although the Sixth Circuit had already "upheld a Michigan law that is nearly identical to Ohio's," the *Block* panel departed from that precedent (*Lebamoff*), distinguishing it as a fact- and evidence-specific holding. *Block*, 74 F.4th at 407, 413-14. But *Lebamoff*'s holding was based on purely legal and broadly applicable reasoning.

In that earlier case, the Sixth Circuit observed that "States, like Michigan, [can] require retailers to be physically based in the State." *Lebamoff*, 956 F.3d at 870. And the court found "nothing unusual … about prohibiting direct deliveries from out of state" because forcing a state to allow importation from unlicensed retailers outside its borders "necessarily means opening [the state] up to alcohol that passes through [unlicensed] out-of-state wholesalers," which would "create a sizeable hole in the three-tier system." *Id.* at 872, 873. Only after that dispositive reasoning did the Sixth Circuit reject the plaintiff's case-specific arguments about the state's interests in the three-tiered system—which was dicta anyway because requiring

retailers to have an in-state presence was not "discrimination based on state citizenship or residency." *Id.* at 875; *see also id.* at 873-74, 876.[5]

In addition to disregarding *Lebamoff*'s binding reasoning, the *Block* panel misapplied *Tennessee Wine*. The court remanded for the district court to "consider[] the competing evidence" about the benefits and effects of Ohio's law. *Block*, 74 F.4th at 413-14. But, it's only after finding a law discriminatory that a court can require a state to prove "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. States are not required to justify their nondiscriminatory policy decisions, and as a matter of law, "a physical presence requirement [is one] that the U.S. Supreme Court and [the Sixth Circuit] permit" because it is an essential feature of the three-tiered system. *See Lebamoff*, 956 F.3d at 876.

[5] The *Block* panel relied almost exclusively on the two-judge concurrence in *Lebamoff*, rather than the majority opinion. *See Block*, 74 F.4th at 413-14. Although the *Lebamoff* concurrence expressed "reservations" about precedent, it acknowledged the court was "bound by the Supreme Court's protection of a traditional three-tier system" and that "Michigan [could] largely rely on what has already been found to inherently protect public health" to support its physical presence requirement. *Lebamoff*, 956 F.3d at 878-79 (concurring, J., McKeague) (citing cases).

Anvar v. Dwyer, 82 F.4th 1 (1st Cir. 2023), was similarly misguided. There, the district court had correctly "upheld the in-state-presence requirement [as] integral to Rhode Island's three-tier system." *Id.* at 9. But the First Circuit deemed the requirement to be facially discriminatory without grappling with Supreme Court precedent to the contrary. *Id.* at 9-10. The court also plainly misunderstood how the three-tiered system works in asserting (with no explanation) that "nothing inherent in the three-tier system … necessarily demands an in-state-presence requirement for retailers." *Id.* at 10-11. To illustrate, consider the following.

A California retailer wants to sell wine to Arizona consumers without setting up an Arizona storefront, but it wants to comply with the rest of Arizona law. So, the California retailer would have to purchase product from an Arizona-licensed wholesaler (in Arizona), meaning the product would be shipped from Arizona to California, only for the California retailer to import the product back into Arizona to consumers. But that absurd transaction is not legal. The wholesaler in Arizona cannot sell to the unlicensed retailer in California—it can only sell to Arizona-licensed retailers. And the California-licensed retailer cannot purchase from the wholesaler in Arizona, because California requires it to purchase from

California-licensed wholesalers. *See Orion Wine*, 837 F. App'x at 586 n.2 (discussing California law); *see also Arnold's Wines*, 571 F.3d at 192 n.2 (discussing why this sort of "absurd arrangement" would be unlawful).

In sum, knocking out the retail storefront requirement destroys the three-tiered system—that's why it is an essential feature. States do not have to defend the constitutionality of features that are essential to the constitutional system they comprise. Otherwise, any plaintiff can bring this same challenge in every state with a three-tiered system, and each state will have to spend its limited resources defending identical features that are integral to a model the Supreme Court has repeatedly upheld.

To prevent that unnecessary burden on states (and courts), and to avoid the potential for intra-circuit conflict and confusion, this Court should hold that the retail storefront requirement is an essential feature of the three-tiered system and thus necessarily constitutional. Because Plaintiffs attack an essential part of a constitutional whole, their claim fails. Full stop.

C. Arizona does not discriminate between similarly situated in-state and out-of-state interests.

Even if this Court proceeds in the analysis, the storefront requirement does not facially "discriminate[] against interstate commerce" or have the

"effect [of] favor[ing] in-state economic interests over out-of-state interests." *Tenn. Wine*, 139 S. Ct. at 2471 (citation and emphasis omitted).

1. Arizona law is not facially discriminatory.

On the face of Arizona's licensing requirements, there is no "differential treatment of in-state and out-of-state economic interests." *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013) (citation omitted). The State treats Arizona companies and non-Arizona companies identically. Companies seeking retail licensure look at the same list of requirements, regardless of where they were formed or where their shareholders and owners reside.

The reality that companies formed in other states must come into Arizona to establish a storefront—while Arizona companies will likely already be in the state—is not facial discrimination under the dormant Commerce Clause. It is always true that any regulation on alcohol "limiting importation leaves *intra*state commerce unaffected." *Lebamoff*, 956 F.3d at 873 (citation omitted, emphasis added). The State's power to set the terms of importation will always "involve[] shipments from another state" and thus possibly settle differently on out-of-state versus in-state companies,

even if facially neutral. *Bridenbaugh*, 227 F.3d at 853. "*Every* use of § 2 could be called 'discriminatory'" in that broad sense. *See id.*

But that sort of effect is not cognizable "discrimination" under the dormant Commerce Clause. It is merely an unavoidable consequence of the Twenty-first Amendment giving states "authority that they would not otherwise enjoy" to regulate interstate transportation of alcohol, and the Supreme Court repeatedly affirming that states can require alcohol to pass through their three-tiered systems. *Tenn. Wine*, 139 S. Ct. at 2474.

2. Plaintiffs proffer no evidence of discriminatory effect.

For the same reasons, the storefront requirement is not discriminatory in effect. All retailers seeking Arizona licensure must establish a storefront, and the "mere fact that more out-of-state [retailers] than in-state [retailers] are required" to travel across state lines to comply "is not by itself sufficient to establish [it] is patently discriminatory in effect against interstate commerce." *See Black Star Farms*, 600 F.3d at 1233. That sort of "effect is not discriminatory … [because] it results from natural conditions," *see id.* at 1234, i.e., the fact that out-of-state companies will always be from out of state. Plaintiffs' theory of discrimination thus fails as a matter of law. *See id.* ("Nothing in *Granholm* suggests that the Supreme Court was concerned

about equalizing the inherent marketing advantage that accrues to in-state wineries because of their close proximity to a state's consumers." (citation omitted)).

In any event, Plaintiffs have not met their burden to provide "substantial evidence" of a discriminatory effect on out-of-state interests. *See id.* at 1233. Indeed, "looking to the law's effects, 'there [is] no reason to suspect that the gainers' [are] in-state firms or that 'the losers [are] out-of-state firms.'" *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 378 (2023) (citation omitted). To illustrate, compare a large regional or national out-of-state retailer (e.g., Total Wine, BevMo, Walgreens, or Wal-Mart) to a small local business that just organized as an Arizona LLC. To get licensed to sell retail wine to Arizonans, both the large company and the small business need to set up an in-state storefront at which they can receive product from Arizona-licensed wholesalers and conduct their operations.

Now, the small LLC may be formed under Arizona law and owned by Arizona residents. But the large out-of-state company—with more capital, infrastructure, and legal resources—will almost certainly have a lighter lift setting up a storefront than the Arizona LLC starting from scratch. Moreover, for the same reasons, the large out-of-state company will likely

have an easier time obtaining a license than any smaller *out-of-state* company (including those that may carry wines Plaintiffs prefer). But the fact that state laws might "shift business from one set of out-of-state [retailers] to another" group of out-of-state retailers is not a constitutionally significant effect. *See Pork Producers Council*, 598 U.S. at 378.

In sum, unlike a durational residency requirement, the storefront requirement is not a per se burden on out-of-state companies and per se benefit to in-state companies. A retailer's ability (and desire) to comply with Arizona's storefront requirement hinges on its resources and business model, not citizenship or residency. Plaintiffs prefer (at 25-28, 35-40) alternative regulatory approaches and want unlicensed retailers to have a more convenient way to sell to Arizonans than participating in the State's three-tiered system. But "the dormant Commerce Clause does not guarantee that [companies] may compete on the terms they find most convenient." *Rocky Mountain Farmers*, 730 F.3d at 1092 (citation omitted). Nor is there "a significant burden on interstate commerce merely because a nondiscriminatory regulation precludes a preferred, more profitable method of operat[ions] in a retail market." *Nat'l Ass'n of Optometrists & Opticians v. Harris (II)*, 682 F.3d 1144, 1154 (9th Cir. 2012).

3. Plaintiffs never compare similarly situated in-state and out-of-state interests.

"To determine whether [Arizona's] laws have a discriminatory effect it is necessary to compare [an unlicensed out-of-state entity] with a similarly situated in-state entity." *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009). Plaintiffs' arguments (at 24-31) all fail for the same general reason that they never compare similarly situated entities.

To start, Plaintiffs argue (at 25) the State cannot prohibit unlicensed companies outside of Arizona from importing wine directly to consumers because the State allows licensed retailers to deliver wine to Arizonans via common carrier under A.R.S. § 4-203(J). Plaintiffs call both of these transactions "direct shipment," but they are comparing apples and oranges. On the one hand, the prohibition of direct-to-consumer importation of wine from outside the State's three-tiered system by *unlicensed* retailers; on the other, the permission for *licensed* retailers to sell and deliver wine to consumers within the state in a different way (i.e., remote transactions and third-party shipment) as a privilege of licensure. That comparison involves two "distinct regulatory environments." *E.g.*, *Lebamoff*, 956 F.3d at 870.

For instance, Total Wine is headquartered in Maryland but is an Arizona-licensed retailer with in-state stores, and it buys product from Arizona-licensed wholesalers; therefore, it can take orders online and deliver wine to Arizona consumers using an independent contractor or common carrier. A.R.S. § 4-203(J). But according to Plaintiffs, the State violates the dormant Commerce Clause by allowing Total Wine to do those licensed intrastate transactions while prohibiting an unlicensed Maryland LLC from importing wine directly from Maryland.

Or, imagine an Arizona LLC wants to sell retail wine, but it never establishes an Arizona storefront to get licensed. Instead, the Arizona LLC finds cheaper real estate in Texas and opens a store there with a Texas-issued retail license. That Arizona LLC cannot ship wine into Arizona from Texas any more than a Texas LLC can, as both would be operating outside of Arizona's system in multiple ways. But Plaintiffs say that prohibition discriminates against both companies as "out-of-state retailers."

The fact that Total Wine has the ability to engage in licensed transactions and different methods of delivery within Arizona—which neither the unlicensed Maryland, Arizona, and Texas companies above can engage in from outside the state—is "'a constitutionally benign incident' of

a three-tier system," not discrimination. *See Lebamoff*, 956 F.3d at 872 (citation omitted). The State does not forfeit its ability to regulate the "importation [of wine]" by unlicensed retailers, amend. XXI, § 2, merely because it authorizes licensed retailers to sell and deliver wine in different ways. "New delivery options are simply new ways of allowing the heavily regulated third tier to do business." *Lebamoff*, 956 F.3d at 873.

Plaintiffs then mischaracterize (at 5, 29) *Granholm* for the proposition that a "physical presence requirement as a prerequisite to shipping wine to consumers is unconstitutional." That case involved a different tier (suppliers) and very different state laws. Michigan "allow[ed] in-state wineries to ship directly to consumers" if licensed but "[o]ut-of-state wineries, whether licensed or not, face[d] a complete ban on direct shipment" to consumers. *Granholm*, 544 U.S. at 470, 473-74.

New York also treated in-state and out-of-state wineries differently. Wineries that used New York grapes were eligible for a license to ship directly to in-state consumers and could also deliver other wineries' product if made from seventy-five percent New York grapes. *Id.* at 470. But out-of-state wineries had to establish "a branch factory, office or storeroom" in the state to do direct shipment. *Id.* And even if they did so, they were still

ineligible for the same farm winery license as in-state wineries; they could only obtain a more cumbersome license that required additional steps to do the same thing. *Id.* at 475. Those state laws did not "treat liquor produced out of state the same as its domestic equivalent" and were "straightforward attempts to discriminate in favor of local producers." *Id.* at 489.

Arizona law does not treat in-state and out-of-state interests differently; the same licensing benefits and burdens apply to all corporations and LLCs seeking a retail license. In addition, *Granholm* involved discriminatory *exceptions* from those states' three-tiered systems. Michigan and New York gave local wineries a nonessential benefit (direct shipment to consumers, rather than only to wholesalers) outside of the normal system. But the states denied the same benefit to out-of-state wineries or meted it out on different terms. *See Black Star Farms*, 600 F.3d at 1233-34 (discussing *Granholm*); *see also Lebamoff*, 956 F.3d at 874 (stating that *Granholm* involved "a discriminatory *exception* to a three-tier system" and "not delivery privileges by themselves" and citing cases in accord). Here though, Plaintiffs are not challenging a discriminatory exception from Arizona's system; they attack an essential feature that applies across the board.

In fact, Plaintiffs seek to do what Michigan and New York did but in reverse. According to Plaintiffs, only Arizona retailers must establish a storefront and purchase from Arizona-licensed wholesalers, but any other retailer in the country can bypass Arizona's system entirely. That's wrong. States are not required to advantage out-of-state interests over in-state interests. *Cf. Black Star Farms*, 600 F.3d at 1234.

Further, it's inconsistent with the Twenty-first Amendment's plain text to say that a state can only regulate alcohol once it's within the state's borders, but the state is powerless to regulate whether thousands of retailers throughout the country can import alcohol directly to its consumers. That is precisely what the Twenty-first Amendment empowered states to do. *See Tenn. Wine*, 139 S. Ct. at 2466-67 (discussing the history of the Wilson and Webb-Kenyon Acts and noting that "the text of § 2 'closely followed' the operative language of the Webb-Kenyon Act, and this naturally suggests that § 2 was meant to have a similar meaning" (citation omitted)).

Finally, Plaintiffs say (at 31) "Arizona does not in fact require its retailers to obtain their wine from wholesalers" because sometimes retailers "may buy them directly from wineries." But a limited exception does not negate the rule, and the direct shipment licenses for wineries are inapposite

here. This Court rejected a dormant Commerce Clause challenge to Arizona's "small winery" exception in A.R.S. § 4-205.04 and an earlier version of the exception in § 4-203.04, holding that both direct shipment allowances treated in-state and out-of-state wineries the same. *Black Star Farms*, 600 F.3d at 1231-35. Given that exceptions within the supplier tier—which actually *expand* access to out-of-state products—do not discriminate against wineries in that tier, it makes no sense that those exceptions would then cause discrimination against retailers in a completely distinct tier.

That comparison is incorrect anyway; wineries and retailers are in completely different regulatory positions, with "different responsibilities [and] different purposes." *Nat'l Ass'n of Optometrist (I)*, 567 F.3d at 527-28 (holding optometrists and ophthalmologists were not similarly situated, and stating that "competing in the same market is not sufficient to conclude that entities are similarly situated").

When wineries sell directly to consumers under a direct shipment license, they are selling a product they produce, under their label, and tied to their reputation, creating self-evident business incentives to ensure product integrity and proper transportation. In addition, the federal government regulates wineries and can revoke their federal permits for

violating state law. *See* 27 U.S.C. § 204; *Granholm*, 544 U.S. at 492. Thus, in addition to more oversight, wineries are doubly incentivized to comply with state regulations like age verification and other shipping and reporting requirements. Importantly too, as to health and safety issues, wineries are familiar with their own production processes; they are a state's first and last stop to investigate any potential issue; and there is no chance of a consumer receiving a counterfeit product when purchasing directly from the winery.

By contrast, retailers simply do not have the same skin in the game. They do not have any immediate investment in or production knowledge about the various wines they sell from various sources. And the consequences are entirely different if retailers from all over the country can import wine directly to Arizona consumers without that product passing through any Arizona-licensed tiers that the State can identify and hold accountable. Quite unlike the direct shipment from wineries, if there was an issue (e.g., tainted product, glass shards) with product from an unlicensed retailer outside Arizona's system, the State would not have any documentation and readily available way to trace the product's origin. It's simply inaccurate to equate the limited and still highly regulated direct

shipment licenses for wineries with the categorical exception from regulation for unlicensed retailers that Plaintiffs propose.

* * *

Plaintiffs fail all parts of their burden. They attack only an essential feature of a scheme that is constitutional under binding precedent. And even if that feature could be deemed "nonessential," it is not discriminatory.

III. The State's storefront requirement for retailers is a legitimate and nonprotectionist regulatory measure.

When analyzing a discriminatory nonessential variation of the three-tiered system, courts "engage in a different inquiry" than in other Commerce Clause cases. *Tenn. Wine*, 139 S. Ct. at 2474. The question is "whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* A state must proffer evidence to show that "the predominant effect of [the] law is [not] protectionism." *Id.*

As Plaintiffs' claim fails for multiple reasons already, the Court need not engage in this analysis. Regardless, the record establishes that the storefront requirement for retailers serves four legitimate, nonprotectionist state interests: protecting public health and safety, generating tax revenue

and ensuring effective collection, maintaining fairness between Arizona and non-Arizona companies, and moderating the amount of alcohol flowing into the State's communities. *See generally* ER-241–257 (Affidavit of Investigator Risa Williams).

A. The State satisfied its evidentiary burden.

The Arizona Department of Liquor Licenses and Control regulates alcohol sales and distribution. ER-242, ¶ 3. The Department's primary mission "is to protect the safety of the public and ensure compliance with regulations by any party involved in the distribution and sale of spirituous liquor." ER-244, ¶ 6. To that end, investigators are assigned specific geographic areas "in which they are responsible for investigating complaints, pro-active enforcement, trade practices investigations, covert underage buy programs, false identification checks, routine on-site liquor inspections and working with local law enforcement and governing bodies." ER-244, ¶ 7.

"On-site inspections are essential" to the Department's work and are only possible if a retailer has a physical presence in the state. ER-244–245, 248–249, 255–256, ¶¶ 8, 16, 34-35. For instance, with the retailer present, the Department can connect the licensee with a knowledgeable regulatory

authority for compliance questions, and "investigators [can] question licensees, owners, managers and employees to determine their knowledge of Arizona's liquor laws." ER-244–245, ¶¶ 8-9. The retailer's in-state presence allows the Department to audit retailers, "physically inspect and request records and documentation," and conduct thorough financial investigations into applicants, which is "an important tool." ER-244–245, 247–249, ¶¶ 8-9, 12-13, 16.

The Department's enforcement priorities include "keep[ing] alcohol out of the hands of underage persons in Arizona," which continues to be an issue. ER-249–250, ¶¶ 18-19. From 2017 to the first half of 2021, "investigators charged Arizona establishments with 3,189 counts related to violations of liquor laws involving minors." ER-250, ¶ 19. To address these compliance issues, investigators "run a covert underage buyer program to determine compliance with retailer sellers," and between 2017 and the first half of 2021, investigated nearly 500 locations, "resulting in 355 administrative violations and 227 criminal violations." ER-245, ¶ 9.

The Department uses "on-site routine inspections … to ensure compliance with the law" more generally as well. ER-248, ¶¶ 15-16. Investigators "conducted 2,386 random on-site inspections of establishments

of licensees" in 2016, and 1,359 inspections from 2017 through the first of 2021. ER-248, ¶ 15. Because of "the local relationship with the retail licensee," the Department is often able to resolve cases without administrative proceedings through a cooperative agreement, such as requiring additional licensee education on liquor laws. ER-248–249, 251, ¶¶ 16, 21. But of course, the Department lacks "authority to educate an out-of-state retailer face-to-face." ER-251, ¶ 21.

Enforcement efforts would suffer in other ways too without the storefront requirement. The Department "works closely with local law enforcement" to "provide support in one another's investigations." ER-252, ¶ 25. But the State would lose the "benefits [of that] close relationship between the [Department] and local enforcement" if unlicensed retailers could import wine into Arizona from anywhere in the country because the Department would lack geographic knowledge and support to enforce its laws in all those states. ER-252–253, ¶¶ 26-28. Likewise, enforcing subpoenas against unlicensed retailers also "would be more difficult," if not essentially impossible, because the Department has "limited jurisdiction to enforce the subpoena outside the state." ER-250, ¶ 20.

And perhaps the most obvious health and safety consideration is that without requiring retailers to be present and participate in Arizona's regulatory scheme, the Department would have no "knowledge of where the product [was] being shipped from [and no] way to inspect the product before the consumer purchases it," removing "the state's ability to determine the quality and integrity of the product" and whether it "came from an appropriate source." SER-248–249, ¶ 16. By contrast, the storefront requirement "facilitates inspection of liquor to determine if there are issues with the product," and if "there are issues with the product its origin can be easily tracked due to the three-tier distribution system." ER-248–249, ¶ 16.

In addition, the storefront requirement is so closely linked to the wholesaler's role in the three-tiered system that eliminating it would have outsized consequences, also undermining the health and safety and tax revenue benefits the wholesaler tier provides.

In terms of health and safety, the retailer storefront requirement means that product is coming straight from the wholesaler's facility, where the at-rest requirement gives "the wholesaler time to inspect the product for integrity and authenticity issues." ER-254, ¶ 31. Wholesalers are charged with monitoring the product they sell "to ensure its quality and integrity to

prevent degradation," as well as to ensure "proper storage, temperature regulation, and rotation by delivering it to a licensed retailer before it reaches the consumer." ER-255, ¶ 32. But "product not distributed through Arizona's three tier distribution system could come from any out-of-state retailer" in the country, depriving the State of the wholesalers' "beneficial role in identifying and helping to pull back alcohol subject to recall." ER-255–256, ¶¶ 32-33, 35.

Relatedly, the Department "routinely inspects the records of Arizona licensed wholesalers" to determine whether retailers are complying with Arizona law. ER-247–248 ¶ 14. "Arizona-licensed wholesalers have been essential in assisting the [Department's] investigations of retailers." ER-247–248, ¶ 14. But unlicensed out-of-state wholesalers would have no similar obligation to assist the Department, exacerbating the "significant difficulty [for the Department] in regulating" unlicensed retailers outside of the state who purchase from such unlicensed wholesalers. ER-247–248, ¶ 14.

In terms of collecting tax revenue, the State would have no way to know "whether the appropriate taxes were paid" without a retailer present and participating in Arizona's three-tiered system. ER-248–249, ¶ 16. Most "excise taxes are paid by the wholesalers within the 24 hour at rest period."

ER-253–254, ¶¶ 30-31. If unlicensed retailers anywhere in the country could sell product that had not come through an Arizona-licensed wholesaler, the State would have no "authority to inspect out-of-state retailers to determine if they are paying their appropriate sales taxes," and "no way of recovering taxes it didn't know were delinquent." ER-248–249, 253–254, ¶¶ 16, 30. The result would be to decentralize the State's current collection method at the wholesaler tier and spread it out across thousands of unknown and unlicensed retailers around the country, with significant and destabilizing consequences. *See* ER-253–254, ¶¶ 30-31.

In addition to those weighty interests, the State also has an interest in competitive fairness between licensed retailers that come to Arizona and participate in the State's system and unlicensed retailers with no in-state presence and regulatory oversight. The State would not "have the resources to ensure compliance of potentially thousands of out-of-state retailers" if they could import wine directly to Arizonans. ER-252–253, ¶ 27. As a result, Arizona-licensed retailers would be subject to Arizona's regulatory obligations and restrictions but would be competing against unlicensed retailers with none of the same limitations.

Finally, the retail storefront requirement means that Arizonans retain their ability to comment on an application for a retail license and object to alcohol being sold in a particular part of their community. *See* ER-253, ¶ 29; *see generally* A.R.S. § 4-201(A)-(D). Plaintiffs' preferred policy determination would strip the State and its communities of the say they currently have over how and where alcohol is sold, even though "§ 2 was adopted to give each State the authority to address alcohol-related public health and safety issues *in accordance with the preferences of its citizens*." *Tenn. Wine*, 139 S. Ct. at 2474 (emphasis added).

This "concrete evidence" proves that the storefront requirement "actually promotes public health [and] safety," among other interests, and its "predominant effect" plainly is not protectionism." *See id.*

B. Plaintiffs' evidence and arguments are irrelevant.

Plaintiffs do not contend that any disputes of material facts precluded summary judgment; rather, they ask (at 43) this Court to reverse in their favor, asserting the State has failed to meet its burden. Plaintiffs have three general arguments (at 35-41), which all fail.

First, Plaintiffs argue (at 34-35) that the storefront requirement "does not actually promote public health or safety because direct [importation of

wine from unlicensed retailers] poses no such threat to begin with." In support, they discuss (at 35, 38-39) other states that have decided to regulate alcohol differently and create the sort of license Plaintiffs prefer.[6]

From other statements in their Opening Brief and below, though, it's clear Plaintiffs do not (at 16-17) actually dispute that "increased access by minors," "alcohol-related public health or safety problems," and "[o]ver-consumption" are "obviously" concerns related to alcohol sales and distribution. *See also* SER-069 ("There is no dispute that totally unlicensed and unregulated alcohol sales could pose potential risks to public health and safety."). And they are simply wrong about the record, which includes uncontroverted evidence that compliance with Arizona law—including age verification requirements and over-service prohibitions—remains a problem, whether in the context of in-person sales at retailer premises, remote sales and delivery from retailers, or direct shipments from wineries.

[6] Plaintiffs seem to object (at 36) to the admissibility of Investigator Williams' testimony under Federal Rules of Evidence 701 and 702, although they develop no argument. Investigator Williams is a lay witness; Rule 702 is inapplicable. And to the extent any of her testimony is opinion and necessary to affirm (which the State does not concede) it satisfies Rule 701, including because it is "based on [her] own personal knowledge or information." ER-241, ¶ 1.

E.g., ER-245, 248–250, ¶¶ 9, 15, 18-20. The Department relies heavily on retailers' presence in the state to address these ongoing concerns. *See*, *e.g.*, ER-244–245, 248–249, 255–256, ¶¶ 8-9, 15-16, 34-35.

Second, Plaintiffs argue (at 37) the State must satisfy something akin to strict scrutiny and prove that nondiscriminatory alternatives are insufficient. Plaintiffs mischaracterize *Tennessee Wine* on this score. The Supreme Court announced a clear test: "we ask 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. Disproving the availability of alternatives is not part of the State's burden.

In its reasoning and application of that test, the Court found a defense of the durational residency requirement "implausible on its face" because there were "ready alternatives" that could achieve the same asserted objective. *Id.* at 2474-75. But considering the availability of adequate alternatives as *evidence* of whether a law is truly serving nonprotectionist interests is a far cry from requiring a state to affirmatively disprove the availability of such alternatives. *See B-21 Wines*, 36 F.4th at 224-25 (rejecting same argument about the *Tennessee Wine* test).

Last, Plaintiffs again draw (at 36-37) improper comparisons to the limited direct shipment licenses available to wineries. Relatedly, Plaintiffs wrongly cite other states' distinct regulatory schemes, which are irrelevant to the State's evidence here about the specific interests *its chosen* scheme serves. Whether other policy approaches to alcohol regulation are effective is not the question. The question is whether *this* challenged requirement "can be justified." *Tenn. Wine*, 139 S. Ct. at 2474. Plainly, it can.

Plaintiffs cannot answer the State's evidence by arguing that Arizona should have weighed its interests differently to arrive at a completely distinct and less restrictive policy approach. There simply is no alternative to the storefront requirement for retailers that would preserve the State's current system and serve the same interests because, as explained, that requirement is indispensable to the three-tiered model. The dormant Commerce Clause does not require a least-common-denominator approach to state liquor regulations that will ensure the greatest access and product availability possible. Plaintiffs must make those policy arguments to the Arizona Legislature.

CONCLUSION

The Court should affirm because Plaintiffs lack standing. In the alternative, Plaintiffs' claim fails as a matter of law because they challenge an essential feature of the constitutional three-tiered system.

Although Plaintiffs' claim cannot survive to the next step of the analysis, the Court can also affirm because Plaintiffs have not shown that Arizona law is discriminatory under the dormant Commerce Clause, and in all events, the record establishes that the storefront requirement is a nonprotectionist regulation that serves legitimate state interests.

Respectfully submitted this 8th day of March, 2024.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Circuit Rule 32-1(a) because it contains 12,601 words according to the word-processing system used to prepare the brief.

2. This brief complies with the typeface and typestyle requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Book Antiqua type style.

Dated this 8th day of March, 2024.

By */s/ Luci D. Davis*

CERTIFICATE OF SERVICE

I certify that I presented the above and foregoing for filing and uploading to the CM/ECF system which will send electronic notification of such filing to all counsel of record.

Dated this 8th day of March, 2024.

/s/ Luci D. Davis