In the United States Court of Appeals
for the Ninth Circuit

No. 23-16148

REED DAY and ALBERT JACOBS,
Plaintiffs - Appellants

vs.

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,
Defendants – Appellees

and

WINE AND SPIRITS WHOLESALERS ASSOCATION OF ARIZONA,
Intervening Defendant – Appellee

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

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Brief of All Appellants

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I. INTRODUCTION

Plaintiffs challenge the constitutionality of Arizona law that prohibits out-of-state retailers from shipping wine directly to consumers but allows in-state retailers to do so. Arizona issues the necessary licenses only to retailers with a physical premise located in the state and will not issue licenses to retailers physically located outside the state. Whether this difference in treatment is constitutional depends on the interplay between the Commerce Clause,[1] which prohibits discrimination against interstate commerce, and § 2 of the Twenty-first Amendment,[2] which gives states broad latitude to regulate the sale of alcohol within their borders. The proper balance between those two provisions is set out in two Supreme Court cases: *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct. 2449 (2019) and *Granholm v. Heald,* 544 U.S. 460 (2005), which place the burden on the State to justify the need to discriminate. It has not done so.

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[1] "The Congress shall have the power [to] regulate commerce ...among the several states." U.S. CONST., ART. I, § 8, cl. 3.

[2] "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.

II. JURISDICTION

A. District court jurisdiction. Plaintiffs-Appellants brought this action in the United States District Court for the District of Arizona pursuant to 42 U.S.C. § 1983, alleging that certain Arizona statutes which prohibit out-of-state retailers from shipping wine to consumers, but allow in-state retailers to do so, discriminate against interstate commerce in violation of the Commerce Clause. They sued state officials with responsibility for enforcing those laws in their official capacity, seeking declaratory and injunctive relief. The district court had federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3), which confer original jurisdiction on district courts to hear suits alleging the violation of rights and privileges under the U.S. Constitution.

B. Court of appeals jurisdiction. The Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291. This is an appeal from a final judgment disposing of all claims and terminating the case entered on August 9, 2023. Plaintiffs filed a timely notice of appeal on August 28, 2023.

III. STATEMENT OF THE ISSUE

Plaintiffs challenge the constitutionality of Arizona's laws prohibiting out-of-state retailers from shipping wine directly to consumers but allowing in-state retailers to do so. They contend that this ban violates the Commerce Clause because it discriminates against interstate commerce and is not protected by the Twenty-first Amendment because the State has not shown that banning a few shipments by out-of-state retailers is reasonably necessary to protect public health or safety, given that it already allows in-state retailers and out-of-state wineries to ship wine to consumers. The district court upheld the law under the Twenty-first Amendment without considering the Commerce Clause or applying the standards set by the Supreme Court. Plaintiffs raise one issue on appeal:

When properly considering both the Twenty-first Amendment and the Commerce Clause under the standards set in *Granholm* and *Tennessee Wine*, may Arizona prohibit out-of-state retailers from shipping wine directly to consumers when it allows in-state retailers to do so?

IV. STANDARD OF REVIEW

This Court reviews the grant of summary judgment *de novo*. *Swoger v. Rare Coin Wholesalers*, 803 F.3d 1045, 1047 (9th Cir. 2015). Summary judgment is proper if, when drawing all inferences in the light most favorable to the non-moving party, the moving party shows that there is no genuine dispute as to any material fact and it is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). Once the moving party meets the requirements of Rule 56 by showing there is an absence of evidence to support the non-moving party's case, the burden shifts to the party resisting the motion, who must set forth specific facts showing that there is a genuine issue for trial. *Porter v. Cal. Dep't of Corr.*, 419 F.3d 885, 891 (9th Cir. 2005).

V. STATEMENT OF THE CASE

A. The laws at issue

This appeal challenges four related features of Arizona's alcohol regulatory system that prevent out-of-state retailers from shipping wine directly to consumers:

1. *Discriminatory licensing rules*. Arizona issues licenses to retailers with a physical presence in Arizona that allows them to sell and ship

wine to consumers. Ariz. Rev. Stat. § 4-203. The State will not issue an equivalent license to an out-of-state retailer and shipping wine without a license is subject to civil and criminal penalties. A.R.S. §§ 4-246 & 4-250.01(A). Arizona issues licenses to sell and deliver wine at retail only to individuals who are bona fide residents of Arizona or corporations organized under the laws of Arizona and operated by an agent who is an Arizona resident, pursuant to A.R.S. § 4-202(A) & (C) and Ariz. Admin. Code R19-1-201(A). A residency requirement as a prerequisite to obtaining a liquor license is unconstitutional under *Tennessee Wine Retailers Assoc. v. Thomas*, 139 S.Ct. 2449 (2019).

2. *Discriminatory physical-presence rule*. Arizona allows retailers to take telephone or internet orders for wine and ship it to consumers only if it has premises located in Arizona from which the shipments must originate. A.R.S. § 4-203(J). It prohibits retailers located in other states from shipping wine to Arizona consumers from premises outside Arizona. A.R.S. § 4-243.01(B) and Ariz. Admin. Code R19-1-104(C)-(D). A physical presence requirement as a prerequisite to shipping wine to consumers is unconstitutional under *Granholm v. Heald,* 544 U.S. 460 (2005).

3. *Discriminatory local wholesaler rule.* Arizona allows retailers to sell and ship wine to consumers only if it is purchased from an Arizona wholesaler. A.R.S. §§ 4-243.01(A)(3) and 4-244(7). It 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. *E.g.*, Fla. Stat. 561.14(3). The requirement is therefore unconstitutional under *Granholm v. Heald,* 544 U.S. 460 (2005) because it attempts to directly regulate business practices in other states and has the same practical and legal effect as an explicit ban on direct shipments.

4. *Preventing residents from engaging in interstate commerce.*

Arizona residents may not order wine from a retailer physically located in another state and have it delivered directly to them. Arizona prohibits out-of-state wine from being shipped to anyone other than a wholesaler. A.R.S. § 4-243.01(B); Ariz. Admin. Code R19-1-104(C)-(D). Depriving citizens of their right to have access to the markets of other States on equivalent terms is unconstitutional under *Granholm v. Heald,* 544 U.S. 460 (2005).

B. Proceedings below

On July 30, 2021, three Arizona consumers and a wine retailer from Florida filed a lawsuit in the United States District Court of Arizona challenging the constitutionality of the ban on cross-border deliveries. ER-046 (Complaint). They contend that Arizona law discriminates against interstate commerce in violation of the dormant Commerce Clause, U.S. Const., Art. I, § 8, and is not justified by § 2 of the Twenty-First Amendment. They sued the Director of the Arizona Department of Liquor Licenses and Control, the Chair of the Arizona State Liquor Board, and the Attorney General of Arizona, in their official capacities, for declaratory and injunctive relief.

The State defendants filed an answer on September 13, 2021. ER-031. The Wine and Spirits Wholesalers Association of Arizona ("Wholesalers") intervened and filed its answer on October 13, 2021. ER-022. The defendants denied all the material allegations.

The wine retailer plaintiff and a single consumer plaintiff were dismissed by stipulation on April 11, 2022. ER-262 (Docket). On August 12, 2022, the remaining consumer Plaintiffs filed a motion for summary judgment accompanied by 43 exhibits. ER-263 (Docket). On the same

day, the State Defendants and Wholesalers filed cross-motions for summary judgment. ER-263-64 (Docket). On September 9, 2022, the Plaintiffs filed their combined Responsive memorandum to the defendants' motions for summary judgment. ER-264. On September 12, 2022, The State Defendants and Wholesalers filed their respective Responses to Plaintiffs' Motion for Summary Judgment. *Id*. On September 26, 2022, each party filed their respective Reply briefs. *Id*.

On July 21, 2023, the District Court held oral argument. ER-006. On August 9, 2023, the District Court denied the Plaintiffs' motion for summary judgment and granted the State Defendants' and the Wholesaler's motions for summary judgment. ER-010-027. On August 28, 2023, the Plaintiffs timely filed a Notice of Appeal. ER-008.

C. Summary of facts

1. Plaintiff Reed Day is a resident of Arizona, and a wine consumer who wants to have wine shipped to him from out-of-state retailers. ER-054 (Reed Decl. ¶¶2, 3, 5). The local wine shops available to Plaintiff Day carry few of the wines that he is interested in purchasing. ER-054 (Reed Decl. ¶¶ 3-4). In his experience, there is a broader selection of wines available online, the pricing of wine is more competitive online,

and home delivery is more convenient because traveling to purchase specific wines is impracticable. ER-054-55 (Reed Decl. ¶¶ 3-4, 9-10). He has attempted to buy wine from out-of-state retailers and have it delivered to him but has been unable to do so because Arizona law prohibits such transactions. ER-054 (Reed Decl. ¶ 5). He intends to purchase wines from out-of-state retailers and have them shipped to his residence in Arizona if it were lawful to do so. ER-055 (Reed Decl. ¶ 8).

2. Plaintiff Albert Jacobs is a resident of Scottsdale, Arizona, and an avid wine drinker. ER-056 (Jacobs Decl. ¶¶ 2, 3). He has attempted to buy wine from out-of-state retailers and have it delivered to him but has been unable to do so because Arizona law prohibits such transactions. ER-056 (Jacobs Decl. ¶5). The local wine shops available to Plaintiff Jacobs carry few of the wines that he is interested in purchasing because the available wines are typically newer vintages. ER-056 (Jacobs Decl. ¶4). In his experience, there is a broader selection of wines available online, there is more price competition online, and home delivery is more convenient because traveling to purchase specific wines is impracticable. ER-056-57 (Jacobs Decl. ¶¶ 3-4, 9-10). He intends to purchase wines from out-of-state retailers and have them

shipped to his residence in Arizona if it were lawful to do so. ER-057. (Jacobs Decl. ¶ 8).

3. Direct shipping of wine from out-of-state retailers to consumers has caused no significant public health or safety risk in the states that have been allowing it over the past fifteen years. ER-078, 086, 103-15 (FTC Report at 4, 12, 26-38) ER-128 (Maryland Study at 8); ER-138 (Wark Report ¶¶ 33-34); ER-198 (SAMHSA National Survey); ER-200 (NIH consumption data); ER-202 (Summary table). Those states do not have higher rates of consumption by adults or minors. ER-195-97 (SAMSHA Report to Congress); ER-138 (Wark Report ¶¶ 33-34); ER-203 (Summary of Youth Consumption); ER-213 (Alcohol Delivery and Underage Drinking at 4); ER-200-01 (NIH consumption data); ER-202 (Summary table). States that allow direct-to-consumer wine sales do not have higher rates of problematic behavior associated with alcohol such as traffic fatalities, aggravated assaults, or domestic violence. ER-064 (Def. Interrog. Answer No. 11); ER-140 (Wark Report ¶ 51). There have not been any documented incidents of unsafe wine being shipped. ER-064 (Def. Interrog. Answer No. 12).

4. Other states are able to effectively monitor wine shipments and collect taxes through a permit system in which out-of-state shippers consent to jurisdiction, limit sales volume, submit reports and taxes, and use common carriers that verify age on delivery. ER-081, 115-17 (FTC Report at 4, 38-40); ER-177-91 (Correspondence). It has not been burdensome because fewer than 200 retailers have actually applied for such permits. ER-139 (Wark Report ¶ 42). Indeed, Arizona has been able to effectively monitor direct shipments from out-of-state wineries through a permit system. ER-061 (Def. Interrog. Answer No. 5).

D. Standing

In every case, Plaintiffs must satisfy the three elements of standing: (1) injury, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). Where a plaintiff is the object of the regulation, as in this case, "there is ordinarily little question that the [act] has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id.* at 561-62. "The loss of [constitutional rights], for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Plaintiffs have established an injury in fact, which is undisputed. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (*quoting Lujan*, 504 U.S. at 560). Reed Day and Albert Jacobs attempted to order wine from out-of-state wine retailers but were denied and informed that the wine could not be shipped to them because they resided in Arizona and out-of-state wine retailers are prohibited from shipping directly to Arizona consumers. ER-054 (Reed Decl. ¶¶2, 5); ER-056 (Jacobs Decl. ¶¶ 2, 5). Arizona's unconstitutional ban prevented the Plaintiffs from engaging in legitimate interstate commerce. The Supreme Court has found, "cognizable injury from unconstitutional discrimination against interstate commerce does not stop at members of the class against whom a State ultimately discriminates, and customers of that class may also be injured . . . Consumers who suffer this sort of injury from regulation forbidden under the Commerce Clause satisfy the standing requirements of Article III." *GMC v. Tracy*, 519 U.S. 278, 286 (1997).

Plaintiffs have established causation. Plaintiffs cannot receive the wine directly from out-of-state retailers because Arizona law prohibits it. ER-059-60 (Def. Admissions Nos. 2,3, and 5). No independent third party or intervening cause is involved. *Hall v. United States Dep't of Agric.,* 984 F.3d 825, 834 (9th Cir. 2020).

Plaintiffs have established redressability. "A plaintiff meets the redressability requirement if it is likely, although not certain, that his injury can be redressed by a favorable decision" *Wolfson v. Brammer*, 616 F.3d 1045, 1056 (9th Cir. 2010). The district court has considerable discretion in fashioning a remedy and crafting an injunction to correct offenses to the Constitution. *Melendres v. Maricopa Cty*., 897 F.3d 1217, 1221 (9th Cir. 2018). Thus, the district court has the authority and ability to craft an injunction prohibiting state officials from enforcing the unconstitutional provisions at issue.

Arizona's unconstitutional prohibition on out-of-state wine sales is achieved through multiple statutes "working in concert" to regulate alcohol, and the District Court opined that out-of-state retailers might not be able to comply with all of Arizona's alcohol regulation if any single regulation were struck down. ER-009 (Slip Op. at 5). It focused

specifically on the requirement that retailers obtain their wine from an Arizona wholesaler, which it thought would independently prevent out-of-state retailers from shipping and make the complaint non-redressable. *Id*. The court was wrong. The defendants can be enjoined from enforcing that rule as well. For this reason, when the plaintiff has been adversely affected by government action and those officials are parties to the case, "there is ordinarily little question that … a judgment preventing … the action will redress it." *Lujan v. Defenders of Wildlife,* 504 555, 561-62 (1992).

Moreover, Plaintiffs are not challenging the state's authority to regulate out-of-state wine retailers requiring them to be licensed through the state, have a permit, and pay licensing fees to ship to Arizona residents. Plaintiffs challenge Arizona's requirement that wine retailers must be *physically* located in the state to ship directly to consumers.

It is undisputed that retailers physically located outside of Arizona cannot ship wine directly to consumers. Simply because Arizona has crafted its alcohol regulatory scheme in a way that uses multiple statutes to create the prohibition at issue does not make the issue non-

redressable. Plaintiffs are being denied their constitutional right to engage in interstate commerce. These are cognizable injuries caused by the Arizona law that would be redressed if the unconstitutional shipping ban was declared unconstitutional and defendants enjoined from enforcing it, so standing has been established.

VI. SUMMARY OF ARGUMENT

Arizona law treats in-state wine retailers more favorably than out-of-state retailers. It gives in-state retailers the exclusive privilege to engage in online sales and home deliveries of wine. This difference in treatment discriminates against out-of-state retailers, protects in-state retailers from competition, and denies consumers access to the vast array of wines sold in other states.

If the product were anything other than alcohol, the law could easily be struck down because each of these effects is a "virtually *per se*" violation of the Commerce Clause. *Tenn. Wine,* 139 S.Ct. at 2471; *Granholm v. Heald*, 544 U.S. 460, 487 (2005). If the law did not discriminate against out-of-state retailers it could easily be upheld because the Twenty-first Amendment gives states broad power to enact evenhanded alcohol regulations. *Tenn. Wine,* 139 S.Ct at 2457. But in

cases like this when a both conditions are present – the law is discriminatory and the product is alcohol – neither provision alone controls the outcome. *Id.* at 2474. "[Both] the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered." *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 275 (1984).

In *Tennessee Wine*, the Supreme Court set the proper compromise: When the plaintiffs show that a liquor law is discriminatory in purpose or effect, the burden shifts to the State to show that the difference in treatment of in-state and out-of-state entities is "reasonably necessary to protect the States' asserted interests." *Tenn. Wine*, 139 S.Ct. at 2470. The State must produce "concrete evidence" that the law "actually promotes public health or safety [and] nondiscriminatory alternatives would be insufficient." *Id.* at 2474. If the State fails to prove that the predominant effect of a protectionist law is "the protection of public health or safety, it is not shielded by § 2." *Id.*

The State has not come close to meeting this burden. Over-consumption of alcohol is obviously a public health and safety concern, but the State has presented no evidence that direct shipping of wine

contributes to it. To the contrary, data show that states which allow direct wine shipping by out-of-state retailers do not have higher rates of consumption, increased access by minors, or more alcohol-related public health or safety problems of any kind. Those states regulate, monitor and tax direct shipping through a permit system. Arizona already uses a permit system to allow direct shipping by in-state retailers and out-of-state wineries without any apparent problems. The Supreme Court has endorsed the permit system as a reasonable nondiscriminatory alternative. The State has no evidence that a permit system would suddenly become ineffective in this one situation.

At best, the State has some witnesses who speculate that there might be future public health problems it could not prevent if direct shipping from out-of-state retailers were allowed, but "[s]peculation [and] unsupported assertions are insufficient to sustain a law that would otherwise violate the Commerce Clause." *Tenn. Wine*, 139 S.Ct. at 2474.

VII. ARGUMENT

A. The framework for analyzing the constitutionality of a discriminatory state liquor law.

Arizona law treats in-state wine retailers more favorably than out-of-state retailers. It gives retailers located in Arizona the exclusive privilege to engage in online sales and home deliveries of wine. It prohibits out-of-state retailers from doing so. This difference in treatment discriminates against out-of-state retailers, protects in-state retailers from competition, and denies consumers access to the vast array of wines sold in other states. Each of these effects is a violation of the Commerce Clause. *Tenn. Wine,* 139 S.Ct. at 2471.

If the product were anything other alcohol, the law could easily be struck down. Discrimination against interstate commerce is a "virtually *per se"* violation of the Commerce Clause. *Granholm*, 544 U.S. at 487. And if no discrimination were involved, a ban on direct shipping that applied equally to all retailers could be easily upheld. The Twenty-first Amendment gives states broad power to enact *even-handed* alcohol regulations. *Tenn. Wine,* 139 S.Ct at 2457. But in cases like this when both conditions are present -- the law is discriminatory and the product is alcohol -- neither provision alone controls the outcome. "[Both] the

Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered." *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263, 275 (1984).

The Twenty-first Amendment did not "repeal" the Commerce Clause. The Supreme Court holds that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," *Granholm,* 544 U.S. at 487, and it "has repeatedly declined to read § 2 as allowing the States to violate the 'nondiscrimination principle.'" *Tenn. Wine,* 139 S.Ct. at 2470. A liquor law's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Healy v. Beer Inst.*, 491 U.S. 324, 344 (1989) (Scalia, J., concurring). This has been the Court's consistent position for sixty years. *See Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 331-332 (1964). Nothing could be clearer.

When both provisions are implicated, the courts "engage in a different inquiry" than they would under either provision alone. *Tenn. Wine,* 139 S.Ct at 2474. When the plaintiffs show that a liquor law is discriminatory in purpose or effect, the burden shifts to the State to show that the difference in treatment of in-state and out-of-state

entities is "reasonably necessary to protect the States' asserted interests" in public health or safety. *Tenn. Wine*, 139 S.Ct. at 2470, 2474. This inquiry "require[s] an examination of the actual purpose and effect of a challenged law" because not "every statute enacted ostensibly for the promotion of the public health, the public morals, or the public safety is to be accepted as a legitimate exertion" of state authority. *Id* at 2473*, quoting Mugler v. Kansas,* 123 U.S. 623, 661 (1887) (internal quotation marks omitted). If the State fails to prove that the predominant effect of the law is "the protection of public health or safety, it is not shielded by § 2." *Id.* This framework for analyzing the constitutionality of a discriminatory liquor law applies to all laws regardless of whether they affect producers, distributors, retailers or consumers. "There is no sound basis for [a] distinction" among them. *Tenn. Wine*, 139 S.Ct at 2471.

The Supreme Court has set out four elements to be considered when deciding if a state has shown that a discriminatory law is reasonably necessary to protect public health or safety.

- Has the State shown that the "requirement *actually* promotes public health or safety?" *Tenn. Wine,* 139 S.Ct. at 2474 (emphasis

added). This is a question of the actual effect of the law, not just its purpose or potential. *Id.*

- Has the State shown that "nondiscriminatory alternatives would be insufficient to further those interests?" *Id.* Without such proof, the State has not shown that discrimination is "reasonably necessary." *Id.* at 2470.
- "Concrete evidence" is required. "[S]peculation [and] unsupported assertions are insufficient to sustain a law that would otherwise violate the Commerce Clause." *Id.*at 2474.
- The "burden is on the State." *Granholm v. Heald,* 544 U.S. at 492. It must present enough admissible and persuasive evidence to show that the "*predominant* effect of the law is ... the protection of public health or safety," not protectionism. *Tenn. Wine*, 139 S.Ct at 2474 (emphasis added). In a case like this one, where the protectionist effect is strong and definite -- the entire home delivery market is reserved for in-state retailers -- the State's evidence must be equally strong that significant adverse effects would occur if the total ban were lifted and that nothing else will

work. *Id.* at 2474-76.[3]

The question in each case is whether the State has justified a specific discriminatory feature of its regulatory system, not whether its overall regulatory scheme is valid. Many states, including Arizona, have adopted some variation of a three-tier regulatory system, and *dictum* in *Granholm* said that "[w]e have previously recognized that the three-tier system itself is 'unquestionably legitimate.'" 544 U.S. at 489.[4] But the Supreme Court itself has clarified that this *dictum* "did not suggest that § 2 sanctions every discriminatory feature that a State may incorporate into its three-tiered scheme." *Tenn. Wine*, 139 S.Ct at 2471. Courts must "analyze [each] provision on its own." *Id.* at 2474.

The District Court did not follow these guidelines. It deferred to the

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[3] This is the equivalent of a preponderance of evidence standard. Predominance and preponderance mean the same thing. *Am. Heritage Dictionary* 1388 (5th ed. 2011).

[4] *Granholm* was referring to *North Dakota v. U.S.*, 495 U.S. 423, 432 (1990), a plurality opinion in a case not involving the Commerce Clause. Historically, many states had three-tier systems requiring liquor to pass through three separate entities – a producer, wholesaler and retailer. Although the name persists as a euphemism for the states' overall regulatory structure, it is doubtful that any state still has a three-tier system for wine. Forty-five states allow wine producers to sell directly to consumers, bypassing the other two tiers – wholesalers and retailers. ER-134 (Wark Report ¶ 20).

Twenty-first Amendment, did not put the burden of proof on the State, and did not assess whether the State had produced concrete evidence to show the discrimination was necessary to protect public health because the permit system would be ineffective.

B. Arizona's laws allowing in-state, but not out-of-state, retailers to ship wine to consumers is unconstitutional.

The Supreme Court has been clear on four key principles:

- "[S]tate regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Granholm v. Heald,* 544 U.S. at 487. The Court "has repeatedly declined to read § 2 as allowing the States to violate the 'nondiscrimination principle.'" *Tenn. Wine,* 139 S.Ct. at 2470.
- The Twenty-first Amendment is not a defense. It gives states the power to choose whether or not to allow direct shipping but "does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state" entities. *Granholm v. Heald,* 544 U.S. at 493.
- If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms," *id.,* unless it can prove that discrimination

is "reasonably necessary" to protect public health or safety. *Tenn. Wine*, 139 S.Ct. at 2470, 2474.

- To prove reasonable necessity, the State must show that the "requirement actually promotes public health or safety," *id.* at 2474, and that discrimination is necessary because "nondiscriminatory alternatives would be insufficient to further those interests." *Id.*

The questions, then, are whether the ban is discriminatory, and if so, has the state proved that it is reasonably necessary to protect public health or safety.

1. The ban is discriminatory

Arizona's direct shipping ban discriminates against out-of-state retailers and violates *Granholm's* holding that if a state chooses to allow direct shipping, it must do so on evenhanded terms.

A restriction on interstate commerce can violate the nondiscrimination principle of the Commerce Clause in any of four ways: (1) when it "directly regulates or discriminates against interstate commerce," *Tenn. Wine*, 139 S.Ct at 2471, (2) "when its effect is to favor in-state economic interests over out-of-state interests," *id.*, (3) when it

"deprive[s] citizens of their right to have access to the markets of other States on equal terms," *id.,* or (4) when it "require[s] an out-of-state firm to become a resident in order to compete on equal terms." *Granholm,* 544 U.S. at 475. Arizona's statutory scheme challenged herein meets all four definitions of discrimination.

First, it directly discriminates against out-of-state retailers. Arizona issues licenses to in-state retailers that permit them to sell wine online and ship it to consumers' homes throughout the state, A.R.S. § 4-203, but it will not issue similar licenses or give similar shipping privileges to out-of-state retailers. "[D]ifferential treatment between in-state and out-of-state [sellers] constitutes explicit discrimination against interstate commerce." *Granholm*, 544 U.S. at 467. Plaintiffs have shown that a licensed wine retailer physically located in Arizona may sell wine over the internet or by telephone and ship it to consumers via common carrier without the customer appearing in person at the store. ER-060 (Def. Admissions No.5). Out-of-state retailers with no physical premise in Arizona may not do so. ER-059 (Def. Admissions Nos. 1-3). Thus, the Plaintiffs, as Arizona residents, are precluded by law from obtaining the wine products that are readily available in other states for similarly

situated consumers.

Second, the ban favors in-state economic interests and protects them from competition. Internet ordering and home delivery of goods is an important marketplace. E-commerce constitutes about 20% of all retail sales, amounts to over $1 trillion per year, and is steadily increasing. U.S. Census Bureau, Quarterly Retail E-commerce Sales, 3d Quarter 2023 (www.census.gov/retail/ecommerce.html, viewed 12/29.2023). Arizona gives its own wine retailers exclusive access to it. "[P]rotecting [local businesses] from the rigors of interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits," *West Lynn Creamery v. Healy*, 512 U.S. 186, 205 (1994), and "is not shielded by § 2" of the Twenty-first Amendment. *Tenn. Wine,* 139 S.Ct. at 2474.

Third, the ban denies Arizona's residents access to the markets of other states. Most of the wine distributed in the United States is available only from sellers outside Arizona. ER-131-32 (Wark Report ¶ 11). For the 36-month period spanning July 1, 2019 to December 31, 2021, the Federal Alcohol and Tobacco Tax and Trade Bureau approved 343,645 wines for sale in the United States. *Id*. (Wark Report ¶¶ 8-12).

Arizona wine stores carry only about 15% of the wines available for sale nationally. Retailers can only sell what they can get from Arizona wholesalers, ER-131 (Wark Report ¶ 10), and the wholesalers only distribute approximately 50,000 wines in Arizona. *Id*. (Wark Report ¶ 11). The majority of wines not available in Arizona are available for sale somewhere in the U.S. from a merchant who will ship it to consumers in states where shipping is legal. ER-134 (Wark Report ¶ 19).

Although some domestic wines can be purchased directly from the winery if not available in local stores, that is not true for foreign wines, which can be purchased only from retailers. *Id*. (Wark Report ¶ 20). Foreign wines account for 63% of the wines approved for sale in the United States and are only sold by retailers. *Id*. Among them are wines recommended by national publications that consumers are likely to look for. For example, in May, 2021, twelve Greek wines were recommended by Wine Enthusiast, ER-141-46, and in March, 2021, twelve additional Greek wines were recommend by the New York Times. ER-147-49. An internet search found that sixteen of the wines identified in those articles were not available from any Arizona source but were offered for

sale by at least one retailer in another state that ships wine to other states. ER-152 (Tanford Decl. ¶ 7). In November 2020, nineteen wines from South Africa were recommended by Wine Spectator. ER-154-62. An internet search found that fifteen of the wines identified in that article were not available from any Arizona source but were offered for sale by at least one retailer in another state that ships wine to other states. ER-151-52 (Tanford Decl. ¶ 6).

Collectors of rare and old vintage wines also cannot find them in ordinary wine stores. They are available only from auction houses and specialty wine retailers located mostly in California, Illinois, and New York. ER-132 (Wark Report ¶ 12); ER-163 (Gralla Aff. ¶ 12).

All these wines would be available to consumers if they could buy them from out-of-state retailers and have them shipped. Arizona forbids it and "depriv[ing] citizens of their right to have access to the markets of other States on equal terms" violates the Commerce Clause. *Granholm*, 544 U.S. at 473.

Fourth, the ban effectively requires an out-of-state retailer to establish physical premises in the state and buy its wine from an Arizona wholesaler in order to be eligible for the privilege of direct

shipment. A.R.S. §§ 4-202(A) & (C); A.R.S. § 4-203; A.R.S. §§ 4-243.01(A)(3) & (B); and A.R.S. § 4-244(7). The Supreme Court has ruled such requirements are unconstitutional. An "in-state presence requirement runs contrary to our admonition that States cannot require an out-of-state firm to become a resident in order to compete on equal terms." *Granholm,* 544 U.S. at 475 (citations omitted). If one state could require it, so could all 50. It would be economically prohibitive for a retailer to set up separate operations in multiple states, *id*., and impossible for it to comply with multiple state laws, each requiring it to buy its wine only from wholesalers in that state. Like other kinds of residency laws, a physical-presence requirement "blatantly favors the State's residents." *Tenn. Wine,* 139 S.Ct at 2457. When the *effect* of a law is protectionist, it violates the Commerce Clause regardless of whether it is discriminatory on its face, *Tenn. Wine*, 139 S.Ct. at 2471, *Granholm,* 544 U.S. at 487, and regardless of whether the discriminatory effect was intended. *Bacchus Imports Ltd. v. Dias*, 468 U.S. at 273.

The District Court decided that there was no discrimination because in-state and out-of-state retailers were not similarly situated. Local

retailers were subject to Arizona's laws and were required to get their wine from Arizona wholesalers, and out-of-state retailers were not. ER-014 (Slip Op. at 10). However, the District Court's decision is inconsistent with prior holdings of the Supreme Court, expressly finding that in-state and out-of-state companies are similarly situated if they sell the same product, regardless of whether they operate in different regulatory environments. *GMC v. Tracy*, 519 U.S. 278, 298-99 (1997); *Best & Co. v. Maxwell,* 311 U.S. 454, 456 (1940). This includes companies selling wine. In *Granholm v. Heald,* the Supreme Court had "no difficulty concluding that New York … discriminates against interstate commerce through its direct-shipping laws" when it treated in-state and out-of-state wine sellers differently even though the out-of-state entities were not subject to most New York regulations. 544 U.S. at 476.

The District Court mischaracterized the issue as Plaintiffs asking that out-of-state retailers be exempt from the state's three-tier system, which could mean they were not similarly situated to in-state retailers. ER-015 (Slip Op. at 11). This is patently incorrect. Plaintiffs want out-of-state retailers to be allowed to participate in Arizona's three-tier

system as a licensed direct shipper. *See* ER-051 (Compl. ¶ 27) (retailer "would obtain a permit [and] comply with … regulations"); ER-052 (Compl. Request for Relief ¶ C) ("Plaintiffs do not request that the defendants be enjoined from establishing a licensing system [for] out-of-state wine retailers . . ."). If Arizona wanted retailers to get their wine only from wholesalers it could impose such a requirement as long as it were not discriminatory. Virtually all other states require alcohol to pass through a wholesaler.[5] What Arizona cannot do is require that everyone use an Arizona wholesaler. That is simple economic protectionism, and the State would have to justify a residency requirement for wholesalers under the same "reasonable necessity" standard as the requirement that retailers be physically located in the state. The issue is a red herring, however, because Arizona does not in fact require its retailers to obtain their wine from wholesalers. They may buy them directly from wineries. A.R.S. § 4-205.04.

2. The State has not established a Twenty-first Amendment defense

Merely invoking the Twenty-first Amendment is not a defense.

[5]*See* https://www.sovos.com/shipcompliant/resources/wine-distribution-rules-by-state/.

Although section 2 "gives each State leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable," it "is not a license to impose all manner of protectionist restrictions on commerce in alcoholic beverages." *Tenn. Wine*, 139 S.Ct at 2457. "[T]he Court has repeatedly declined to read § 2 as allowing the States to violate the "nondiscrimination principle" of the Commerce Clause. *Id.* at 2470. A liquor law's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." *Healy*, 491 U.S. at 344 (1989) (Scalia, J., concurring).

Indeed, the Amendment has proven fairly impotent over the years. It gave states power to maintain local Prohibition after national Prohibition was repealed but beyond that it "does not license the States to ignore their obligations under other provisions of the Constitution." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). State laws that violate other Constitutional provisions "are not saved by the Twenty-first Amendment." *Retail Digital Network, LLC v. Applesmith*, 810 F.3d 638, 652 (9th Cir. 2016). In the Supreme Court, the Amendment has never prevailed over the nondiscrimination principle of the Commerce Clause. *Tenn. Wine, supra; Granholm v Heald, supra;*

Healy v. Beer Inst., supra; Bacchius Imports Ltd. v. Dias, supra. It does not permit states to violate the First Amendment, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (restricting liquor advertising); the Establishment Clause, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122, n. 5 (1982) (church veto of bar permit); the Equal Protection Clause, *Craig v. Boren*, 429 U.S. 190, 204-09 (1976) (lower drinking age for women); the Import/Export Clause, *Dept. of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 345-46 (1964) (taxing Scotch); or the Due Process Clause. *Wisconsin v. Constantineau,* 400 U.S. 433, 436 (1971) (sheriff forbidding sales to "drunkards").

In order for a state to justify a discriminatory liquor law, it cannot simply invoke magic words like 'Twenty-first Amendment" or "three-tier system." It must prove that this particular discriminatory regulation is "reasonably necessary" to protect the State's asserted interests. *Tenn. Wine*, 139 S.Ct at 2470. The list of legitimate state interests protected by the Twenty-first Amendment is short. It includes the protection of public health and safety, *Tenn. Wine,* 139 S.Ct. at 2457, 2474, and maybe raising tax revenue. *Id.* at 2470.[6] But it does not include

[6] Tax revenue is not an issue in this case because cross-border deliveries

bureaucratic interests such as facilitating orderly markets, ensuring regulatory accountability, and monitoring financial records and sales, because "these objectives can also be achieved through the alternative of an evenhanded licensing requirement." *Granholm,* 544 U.S. at 492. Not "every statute enacted ostensibly for the promotion of the public health, the public morals, or the public safety is to be accepted as a legitimate exertion" of state authority. *Tenn. Wine,* 139 S.Ct at 2473. The State must prove with "concrete evidence" that the particular law is reasonably necessary to achieve these goals, not just that some kind of regulation is needed. "The burden is on the State," *Granholm*, 544 U.S. at 492, and speculation and unsupported assertions are insufficient. *Id.* at 490.

To establish "reasonableness," the State must show that the "requirement *actually* promotes public health or safety." *Tenn. Wine,* 139 S.Ct at 2474 (emphasis added). If a restriction has only an attenuated or speculative relationship to public health, it is not shielded by the Twenty-first Amendment. *Id.* The record in this case is

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of wine may be taxed, *S.D. v. Wayfair, Inc.,* 138 S.Ct. 2080 (2018), and bringing new shippers into the system actually increases revenue. ER-127-28 (Maryland Study at 7-8).

overwhelming that banning direct shipping of wine does not actually promote public health or safety because direct shipping poses no such threat to begin with.

Forty-five states allow some form of direct-to-consumer wine shipping. ER-134 (Wark Report ¶ 20). Thirteen jurisdictions and the District of Columbia have allowed shipping to its residents by out-of-state retailers. *Id*. (Wark Report ¶ 19); ER-215-18 (States Allowing Direct Shipping). Most regulate those shipments by requiring the shipper to obtain a direct-shipping permit, limit the amount of wine they ship, remit taxes, consent to jurisdiction and audits, label packages as containing alcohol, and use a state-approved carrier who verifies age on delivery. ER-137 (Wark Report ¶ 32). None have reported that any public health or safety problems have arisen because of direct-to-consumer shipping.[7] ER-177-91 (Correspondence); ER-126-28 (Maryland Study at 6-8); ER-174 (Neb. Email). States that require adult signature on delivery report no increase in youth access and no

[7] This is hardly surprising because wine is among the most heavily regulated products in the country -- regulated, inspected and tested by every state, the federal Tax and Trade Bureau, see 27 C.F.R. 24.1 et seq. (more than 200 TTB wine regulations), and the Food and Drug Administration. 21 C.F.R. 110.35.

problems with shipments to minors. ER-081, 089, 103-115 (FTC Report at 4, 12, 26-38); ER-128 (Maryland Study at 8); ER-138 (Wark Report ¶¶ 33-34); ER-198-99 (SAMHSA National Survey).

Indeed, Arizona itself allows out-of-state wineries to ship wine directly to consumers, A.R.S. § 4-203.04(A), and has not experienced any instances of wine being delivered to minors. ER-061 (Def. Interrog. Answer No. 5). States that allow interstate direct shipping by retailers have not experienced increased consumption of wine by adults. ER-200-02 (NIH consumption data, Summary table). There is no evidence that Arizona home deliveries of wine has had any impact on alcohol-related public health and safety issues, including traffic accidents, crime, workplace absenteeism, or domestic violence. ER-064 (Def. Interrog. Answer No. 11).

The only "evidence" the State has produced are three witnesses who speculate that public health problems *might* occur in the future if direct shipping were allowed, even though such problems have not happened anywhere else. Speculation without a factual basis is inadmissible under FED.R.EVID. 701-702 and constitutionally inadequate under *Tenn. Wine,* 139 S.Ct at 2474 ("mere speculation' or 'unsupported

assertions' are insufficient").

Even if the State could show that direct-to-consumer wine shipping might increase some public health and safety risks, it would not be enough to justify a total ban on such shipments. The State must also prove that "nondiscriminatory alternatives would be insufficient to further those interests" and minimize the risks. *Tenn. Wine,* 139 S.Ct. at 2474-75; *Granholm*, 544 U.S. at 489-90, 492-93. Without such evidence, the State has not established necessity and "fall[s] far short of showing that the [law] is valid." *Tenn. Wine,* 139 S.Ct. at 2476.

Arizona cannot possibly meet this test. "In this age of split-second communications by means of computer networks ... there is no shortage of less burdensome, yet still suitable, options." *Id.* at 2475, *quoting Cooper v. McBeath*, 11 F.3d 547, 554 (5th Cir. 1994). Arizona cannot claim that wine shippers located outside Arizona are too hard to monitor because it already allows wineries located outside Arizona to ship directly to consumers. A.R.S. § 4-203.04(A). It cannot claim that thousands of wine shippers located outside Arizona would be too numerous to regulate because fewer than 200 actually get direct shipping permits in states that authorize them. ER-139 (Wark Report ¶

42). It cannot claim that direct shipping presents too great a risk of youth access or increased consumption because it already allows direct shipping by wineries, A.R.S. § 4-203.04(A) & (J), and in-state retailers. ER-061 (Def. Admission No. 5). It cannot claim that FedEx and other common carriers cannot be trusted to verify age on delivery because it already licenses them to ship wine. A.R.S. § 4-203.04(J). It cannot claim that it would be too hard to collect taxes on direct shipments because it already collects taxes from out-of-state wineries that ship directly to consumers. A.R.S. § 4-203.04(G)(5).

In each of these situations, states manage to protect their-interests in public health and safety and raising revenue through a permit system in which the shipper obtains a permit and complies with state regulations that limit the quantity that may be shipped and require the shipper to report sales, remit taxes, and verify the age of the recipient. Arizona uses just such a regulated permit for direct shipments from out-of-state wineries. A.R.S. 4-203.04(F)-(G). Forty-five states use such a licensing system to allow out-of-state wineries to deliver wine to consumers and thirteen states allow out-of-state retailers to do so. ER-134 (Wark Report ¶¶ 19- 20). This kind of permit system has been

identified twice by the Supreme Court as a reasonable alternative to a total ban. *Granholm*, 544 U.S. at 491-92 ("protecting public health and safety, and ensuring regulatory accountability [can] be achieved through the alternative of an evenhanded licensing requirement"); *Tenn. Wine,* 139 S. Ct. at 2475-76. It has been endorsed by a Task Force of the National Conference of State Legislatures,[8] the Federal Trade Commission, ER-081, 115-17 (FTC Report); ER-177-91 (Correspondence), and by other circuits. *E.g., Bainbridge v. Turner,* 311 F.3d 1104, 1110 (11th Cir. 2002). It is a reasonable nondiscriminatory alternative.

Other states manage to safely regulate home deliveries of wine through a permit system. ER-137 (Wark Report ¶ 32); ER-177-91 (Correspondence from regulators). Indeed, the State of Maryland found that revenue actually increased after shipping was authorized. ER-127-28 (Maryland Study at 7-8). Arizona regulates all other aspects of liquor distribution through permits, including direct shipping by in-state retailers and out-of-state wineries. A.R.S. § 4-203.04(A), (J); A.R.S. § 4-

[8]*See* https://freethegrapes.org/model-direct-shipping-bill/ (viewed 10/7/21). The model bill was cited twice as evidence of a nondiscriminatory alternative in *Granholm,* 544 U.S. at 491.

203.04(G)(5). The State has no concrete evidence to show that the permit system would suddenly stop being effective in this one situation.

The only evidence presented by the State that even remotely relates to the feasibility of the licensing alternative is that it occasionally inspects the physical premises of in-state retailers and checks to see if they are selling to minors (in person at the store), but could not inspect the premises of an out-of-state retailer. ER-248-49 (Williams Aff. ¶ 15-16). The same is true for out-of-state wineries, of course, but Arizona allows them to ship wine. A.R.S. § 4-203.04(A). It presents no evidence that any of these on-site inspections of retailers have anything to do with problems that could arise when wine is ordered online and delivered to private homes miles away from the store being inspected. Indeed, the reasons offered for inspections are mostly bureaucratic, *e.g.*, to check the books, review inventory, educate the employees about the law. ER- 244-51 (Williams Aff. ¶¶8, 14, 21). The Supreme Court has been clear that such administrative concerns are not sufficient to justify discrimination because "[t]hese objectives can also be achieved through the alternative of an evenhanded licensing requirement." *Granholm,* 544 U.S. at 492. "[R]ecords and sales data can be mailed, faxed, or

submitted via e-mail." *Id.* The State's desire to maintain oversight over alcohol distribution is "insufficient" by itself to justify discrimination against nonresidents. *Tenn. Wine,* 139 S.Ct. at 2475.

The absence of evidence is dispositive. Where a state claims it is banning interstate commerce in order to protect the public but "the record is devoid of any 'concrete evidence' showing that the [law] actually promotes public health or safety; nor is there evidence that nondiscriminatory alternatives would be insufficient to further those interests," the ban is unconstitutional. *Tenn. Wine,* 139 S.Ct. at 2474.

The District Court did not follow the guidelines set forth in *Granholm* and *Tennessee Wine.* It relied instead on three cases from other circuits that held that the Twenty-first Amendment had effectively overruled the Commerce Clause and authorized states to ban direct shipping without presenting any concrete evidence to show that the ban advanced a legitimate local purpose that could not be served by nondiscriminatory alternatives. One was a split opinion. *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214 (4th Cir. 2022). One has since been confined to its facts by the same circuit. *See Block v. Canepa*, 74 F.4th 400 (6th Cir. 2023), limiting *Lebamoff Enterp., Inc. v. Whitmer*, 956 F.3d 863

(6th Cir. 2020). None were followed by the First Circuit. *Anvar v. Dwyer*, 82 F.4th 1 (1st Cir. 2023). All are contrary to G*ranholm* and *Tennessee Wine.*

This court should follow the analysis set by the Supreme Court that the Twenty-first Amendment and general legitimacy of the three-tier system does not shield discriminatory State laws. They may be upheld only if the State produces concrete evidence and not just mere assertions that the law actually advances public health or safety and discrimination is reasonably necessary because other alternatives would be ineffective.

C. Remedy

Because the District Court ruled against the plaintiffs, it did not decide on a remedy. In *dictum* in the context of standing, it expressed concern that it might not be able to enjoin defendants from enforcing the direct shipping ban, so the only way to make in-state and out-of-state retailers equal might be to "level down" – take away shipping rights from in-state retailers. ER-010-11 (Slip op. at 6-7).

It was wrong on both counts. The district court has considerable discretion in fashioning a remedy and crafting an injunction to correct

offenses to the Constitution. *Melendres*, 897 F.3d at 1221. But enjoining an otherwise valid law because it is "easier" is not a viable option. *Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996). When a state has been unconstitutionally giving benefits to some and denying them to others, as in this case, the presumptively correct remedy is extension rather than nullification. *Califano v. Westcott*, 443 U.S. 76, 89-90 (1979). Taking away direct shipping privileges from in-state retailers who are not parties and have had no opportunity to be heard is not consistent with Due Process. See *Heckler v. Mathews*, 465 U.S. 728, 733, 738-40 (1984); *Nguyen v. INS*, 533 U.S. 53, 95-96 (2001) (Scalia J., concurring).

VIII. CONCLUSION

For the foregoing reasons, the court should reverse the judgment of the District Court, enter summary judgment in favor of the Plaintiffs, and remand the case for further proceedings.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(I) because it contains no more than 13,000 words in sections identified by Fed. R. App. P. 32(f). It contains 8,512 words, as calculated by the word count program in Microsoft Word. It complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it was prepared in 14-point Century Schoolbook.

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2024, I filed the foregoing with the court's CM/ECF system that will serve all parties by electronic mail.

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Addendum: Selected Provisions of Arizona Administrative Code and Arizona Statutes

Ariz. Admin. Code R19-1-104(C) An individual or entity that ships or offers for shipping spirituous liquor from a point outside Arizona to a final destination in Arizona shall ensure that:

1. With the exception of wine that is being shipped under A.R.S. § 4-203.04(J) or A.R.S. § 4-205.04(C)(7) or (9) by a domestic farm winery licensee or beer that is being shipped under A.R.S. § 4-205.08(D)(5) by a domestic microbrewery licensee, the spirituous liquor is consigned to a wholesaler authorized to sell or deal in the particular spirituous liquor being shipped; and
2. The spirituous liquor is placed for shipping with:
    a. A common carrier or transportation company that is in compliance with all Arizona and federal law regarding operation of an interstate transportation business, or
    b. The wholesaler to whom the spirituous liquor is consigned.

Ariz. Admin. Code R19-1-104(D) A common carrier or transportation company hired to transport spirituous liquor from a point outside Arizona to a final destination in Arizona shall ensure that:

1. The common carrier or transportation company maintains possession of the spirituous liquor from the time the spirituous liquor is placed for shipping until it is delivered; and
2. With the exception of spirituous liquor that is being shipped under A.R.S. § 4-203.04(J) or A.R.S. § 4-205.04(C)(7) or (9) by a domestic farm winery licensee, the spirituous liquor is delivered to the licensed premises of the wholesaler to whom the spirituous liquor is consigned.

Ariz. Admin. Code R19-1-201(A) Except as provided in subsection (B) and not withstanding any other law, the following pre-requisites apply for a license under A.R.S. Title 4 and this Chapter.

1. If an individual applies for a license, the individual shall be:
    a. A citizen of the United States or a legal resident alien, and
    b. A bona fide resident of Arizona;

2. If a partnership applies for a license, each partner shall meet the criteria in subsection (A)(1);

3. Except as provided in subsection (A)(6), if a corporation or limited liability company applies for a license, the corporation or limited liability company shall:

a. Be qualified to do business in Arizona, and

b. Hold the license through an agent who is an individual that meets the criteria in subsection (A)(1);

4. If a limited partnership applies for a license:

a. An individual general partner, but not a limited partner, shall meet the criteria in subsection (A)(1); and

b. A corporate general partner shall meet the criteria in subsection (A)(3);

5. If a club or governmental entity applies for a license, the club or governmental entity shall hold the license through an agent who is an individual that meets the criteria in subsection (A)(1);

6. If an out-of-state entity applies for a license, the out-of-state entity shall hold the license through an agent who meets the standard described in A.R.S. § 4-202(A).

A.R.S. § 4-202(A) Every spirituous liquor licensee, other than a club licensee, a corporation licensee, a limited liability company licensee or an out-of-state licensee, shall be a citizen of the United States and a bona fide resident of this state or a legal resident alien who is a bona fide resident of this state. If a partnership, each partner shall be a citizen of the United States and a bona fide resident of this state or a legal resident alien who is a bona fide resident of this state, except that for a limited partnership an individual general partner is required to meet the qualifications of an individual licensee, a corporate general partner is required to meet the qualifications of a corporate licensee and a limited partner is not required to be a citizen of the United States, a legal resident alien or a bona fide resident of this state. If a corporation or limited liability company, it shall be a domestic corporation or a foreign corporation or a limited liability company that has qualified to do business in this state. A person shall hold a club license, corporation license, limited liability company license, partnership license or out-of-state license through an agent who shall be a natural person and meet

the qualifications for licensure, except that an agent for an out-of-state license as specified in section 4-209, subsection B, paragraph 2 need not be a resident of this state. Notice of change of agent shall be filed with the director within thirty days after a change. For the purposes of this subsection, "agent" means a person who is designated by an applicant or licensee to receive communications from the department and to file documents and sign documents for filing with the department on behalf of the applicant or licensee.

A.R.S. § 4-202(C) Each applicant or licensee shall designate a person who shall be responsible for managing the premises. The designated person may be the applicant or licensee. The manager shall be a natural person and shall meet all the requirements for licensure. The same person may be designated as the manager for more than one premises owned by the same licensee. Notice of a change in the manager shall be filed with the director within thirty days after a change.

A.R.S. § 4-203(J) Notwithstanding subsection B of this section, the holder of a retail license in this state having off-sale privileges, except a bar, beer and wine bar or restaurant licensee, may take orders by telephone, mail, fax or catalog, through the internet or by other means for the sale and delivery of spirituous liquor off of the licensed premises to a person in this state in connection with the sale of spirituous liquor. Notwithstanding the definition of "sell" prescribed in section 4-101, the placement of an order and payment pursuant to this section is not a sale until delivery has been made. At the time that the order is placed, the licensee shall inform the purchaser that state law requires a purchaser of spirituous liquor to be at least twenty-one years of age and that the person accepting delivery of the spirituous liquor is required to comply with this state's age identification requirements as prescribed in section 4-241, subsections A and K. The licensee may maintain a delivery service and may contract with one or more independent contractors, that may also contract with one or more independent contractors, or may contract with a common carrier for delivery of spirituous liquor if the spirituous liquor is loaded for delivery at the premises of the retail licensee in this state and delivered in this state. Except if the person delivering the order has personally retrieved and bagged or otherwise packaged the container of spirituous liquor for

delivery and the licensee records, or requires to be recorded electronically, the identification information for each delivery, all containers of spirituous liquor delivered pursuant to this subsection shall be conspicuously labeled with the words "contains alcohol, signature of person who is twenty-one years of age or older is required for delivery". The licensee is responsible for any violation of this title or any rule adopted pursuant to this title that is committed in connection with any sale or delivery of spirituous liquor. Delivery must be made by an employee of the licensee or other authorized person as provided by this section who is at least twenty-one years of age to a customer who is at least twenty-one years of age and who displays an identification at the time of delivery that complies with section 4-241, subsection K. The retail licensee shall collect payment for the full price of the spirituous liquor from the purchaser before the product leaves the licensed premises. The director shall adopt rules that set operational limits for the delivery of spirituous liquors by the holder of a retail license having off-sale privileges. With respect to the delivery of spirituous liquor, for any violation of this title or any rule adopted pursuant to this title that is based on the act or omission of a licensee's employee or other authorized person, the mitigation provision of section 4-210, subsection G applies, with the exception of the training requirement. For the purposes of this subsection and notwithstanding the definition of "sell" prescribed in section 4-101, section 4-241, subsections A and K apply only at the time of delivery. For the purposes of compliance with this subsection, an independent contractor, a subcontractor of an independent contractor, the employee of an independent contractor or the employee of a subcontractor is deemed to be acting on behalf of the licensee when making a delivery of spirituous liquor for the licensee.

A.R.S. § 4-203.04(A) The director may issue a direct shipment license to any winery that holds a federal basic permit issued by the United States alcohol and tobacco tax and trade bureau and a current license to produce wine issued by this state or any other state. A farm winery licensed pursuant to section 4-205.04 and a winery holding a producer's license or a limited producer's license issued by this state may also hold a direct shipment license.

A.R.S. 4-203.04(F) Notwithstanding any other law, a licensee annually may sell and ship nine-liter cases of wine that is produced by the licensee directly to a purchaser in this state pursuant to all of the following:

1. The licensee may sell and ship:

(a) Until December 31, 2017, up to six nine-liter cases of wine.

(b) Beginning January 1, 2018 and until December 31, 2018, up to nine nine-liter cases of wine.

(c) Beginning January 1, 2019 and for each year thereafter, up to twelve nine-liter cases of wine.

2. The wine may be ordered by any means, including telephone, mail, fax or the internet.

3. The wine is for personal use only and not for resale.

4. Before shipping the wine, the licensee shall verify the age of the purchaser who is placing the order by obtaining a copy of the purchaser's valid photo identification as prescribed in section 4-241, subsection K demonstrating that the person is at least twenty-one years of age or by using an age verification service.

5. The wine may be shipped to a residential or business address but not to a premises licensed pursuant to this title.

6. All containers of wine shipped pursuant to this subsection shall be conspicuously labeled with the words "contains alcohol, signature of person age 21 or older required for delivery".

7. The licensee may not sell or ship wine to a purchaser pursuant to this subsection unless the purchaser could have carried the wine lawfully into or within this state.

8. The delivery must be made by a person who is at least twenty-one years of age.

9. The delivery must be made only during the hours of lawful service of spirituous liquor to a person who is at least twenty-one years of age.

10. The delivery must be made only after inspection of the valid photo identification as prescribed in section 4-241, subsection K of the person accepting delivery that demonstrates that the person is at least twenty-one years of age.

11. Payment for the price of the wine must be collected by the

licensee not later than at the time of delivery.

A.R.S. § 4-203.04(G) A licensee shall:

1. Not later than January 31 of each year, file a report regarding the wine shipped to purchasers in this state during the preceding calendar year that includes the information required in paragraph 2 of this subsection.
2. Complete a record of each shipment at the time of shipment. The licensee shall ensure that the record provides the following information:
   (a) The name of the licensee making the shipment.
   (b) The address of the licensee making the shipment.
   (c) The license number.
   (d) The date of shipment.
   (e) The address at which delivery is to be made.
   (f) The amount shipped.
3. On request, allow the director or the department of revenue to perform an audit of the records of wine shipped to purchasers in this state. The director may request the licensee submit records to demonstrate compliance with this section. The licensee shall maintain records of each shipment of wine made to purchasers in this state for two years.
4. Be deemed to have consented to the jurisdiction of the department, any other agency of this state, the courts of this state and all related laws, rules or regulations.
5. Pay the department of revenue all transaction privilege taxes and luxury taxes on sales of wine under the direct shipment license to purchasers in this state. For transaction privilege tax and luxury tax purposes, all wine sold pursuant to this section shall be deemed to be sold in this state.
6. Ship not more than the total number of nine-liter cases of wine authorized under subsection F, paragraph 1 of this section to any purchaser in this state in any calendar year for personal use.

A.R.S. § 4-203.04(J) Common carriers, other than railroads as defined in section 40-201, that transport wine into and within this state shall:

1. Keep records of wine shipped to purchasers in this state, including the direct shipment licensee's name and address, the recipient's name and address, the shipment and delivery dates and the weight of wine shipped.
2. Remit the records kept pursuant to paragraph 1 of this subsection on request of the department.

A.R.S. § 4-243.01(A)

It is unlawful:

1. For any supplier to solicit, accept or fill any order for any spirituous liquor from any wholesaler in this state unless the supplier is the primary source of supply for the brand of spirituous liquor sold or sought to be sold and is duly licensed by the board.
2. For any wholesaler or any other licensee in this state to order, purchase or receive any spirituous liquor from any supplier unless the supplier is the primary source of supply for the brand ordered, purchased or received.
3. Except as provided by section 4-243.02 for a retailer to order, purchase or receive any spirituous liquor from any source other than any of the following:
   - **(a)** A wholesaler that has purchased the brand from the primary source of supply.
   - **(b)** A wholesaler that is the designated representative of the primary source of supply in this state and that has purchased such spirituous liquor from the designated representative of the primary source of supply within or without this state.
   - **(c)** A registered retail agent as defined in section 4-101.
   - **(d)** A farm winery that is licensed under section 4-205.04 and that is subject to the limits prescribed in section 4-205.04, subsection C, paragraph 7.
   - **(e)** A licensed microbrewery licensed under section 4-205.08.
   - **(f)** A craft distiller that is licensed under section 4-205.10 and that is subject to the limits prescribed in section 4-205.10, subsection C, paragraph 5.

A.R.S. § 4-243.01(B) All spirituous liquor shipped into this state shall be invoiced to the wholesaler by the primary source of supply. All spirituous liquor shall be unloaded and remain at the wholesaler's premises for at least twenty-four hours. A copy of each invoice shall be transmitted by the wholesaler and the primary source of supply to the department of revenue.

A.R.S. § 4-244(7) It is unlawful . . . For any retail licensee to purchase spirituous liquors from any person other than a solicitor or salesman of a wholesaler licensed in this state.

A.R.S. § 4-246
A. A person violating any provision of this title is guilty of a class 2 misdemeanor unless another classification is prescribed.
B. A person violating section 4-242.01, subsection A or section 4-244, paragraph 9, 14, 34, 42 or 44 is guilty of a class 1 misdemeanor.
C. A person violating section 4-229, subsection B or section 4-244, paragraph 31 is guilty of a class 3 misdemeanor.
D. In addition to any other penalty prescribed by law, the court may suspend the privilege to drive of a person who is under eighteen years of age for a period of up to one hundred eighty days on receiving the record of the person's first conviction for a violation of section 4-244, paragraph 9.
E. In addition to any other penalty prescribed by law, a person who is convicted of a violation of section 4-244, paragraph 42 shall pay a fine of at least $500.
F. In addition to any other penalty prescribed by law, a person who is convicted of a violation of section 4-241, subsection L, M or N shall pay a fine of at least $250.
G. A person that violates section 4-244, paragraph 47 is subject to a civil penalty as prescribed in section 4-210.01.

A.R.S. § 4-250.01(A) An out-of-state person engaged in business in this state as a producer, exporter, importer, rectifier, retailer or wholesaler without a license issued under this title shall comply with this title as if licensed by this state. An out-of-state person engaged in business in this state as a producer, exporter, importer, rectifier, retailer or wholesaler shall be deemed to have consented to the jurisdiction of the department,

any other agency of this state, the courts of this state and all other related laws, rules or regulations. An out-of-state person engaged in business in this state as a producer, exporter, importer, rectifier, retailer or wholesaler who violates this title is subject to a fine or a civil penalty and suspension or revocation of the right to do business in this state.

A.R.S. § 4-205.04(C)

6. If the licensed farm winery is not otherwise engaged in the business of a distiller, vintner, brewer, rectifier, blender or other producer of spirituous liquor in any jurisdiction, the licensed farm winery may hold licenses prescribed in section 4-209, subsection] B, paragraph 12 on the licensed farm winery premises or other retail premises. Except as provided in paragraph 5 of this subsection, the licensed farm winery shall purchase all other spirituous liquor for sale at the on-sale retail premises from wholesalers that are licensed in this state, except that a licensed farm winery may:

(a) Purchase wine from other farm wineries pursuant to paragraph 7 of this subsection.

(b) Make deliveries of the wine that the farm winery produces to the farm winery's own commonly controlled retail licensed premises.

7. A licensed farm winery that produces not more than twenty thousand gallons of wine in a calendar year may make sales and deliveries of the wine that the licensed farm winery produces to on-sale and off-sale retailers.

8. Notwithstanding section 4-244, paragraphs 3 and 7, an on-sale or off-sale retailer may purchase and accept delivery of wine from a licensed farm winery pursuant to paragraph 7 of this subsection.