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 Dept. 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,

WINE AND SPIRITS WHOLESALERS ASSOCIATION OF ARIZONA,
Intervening Defendant – Appellee.

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

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APPELLANTS' REPLY BRIEF TO ANSWERING BRIEFS OF STATE DEFENDANTS AND WINE & SPIRITS WHOLESALERS

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I. Introduction

Arizona allows in-state retailers to sell wine online and ship it to consumers. Out-of-state retailers may not do so because Arizona will not issue licenses to them. To qualify for a license, a retailer must have a physical presence in the State and be operated by an Arizona resident. The Supreme Court holds that physical-presence and residency 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 v. Heald,* 544 U.S. 460, 475 (2005). A residency requirement "blatantly favors the State's residents." *Tenn. Wine & Spirits Retailers Assoc. v. Thomas*, 139 S.Ct. 2449, 2457 (2019). Neither one is protected by the Twenty-first Amendment.

The Court has said in no uncertain terms that a state may choose whether or not to allow direct shipment of wine to consumers, but "[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms," *Granholm*, 544 U.S. at 493, unless the State can prove that discrimination is "reasonably necessary" to protect public health or safety. *Tenn. Wine,* 139 S.Ct. at 2470. To establish reasonable

necessity, the State must produce "concrete evidence" that the physical-presence "requirement actually promotes public health or safety [and] that nondiscriminatory alternatives would be insufficient to further those interests." *Id.* at 2474. Careful judicial scrutiny of the State's purported justification is required 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).

In their answering briefs, the State and Wholesalers make five arguments:

1. Plaintiffs lack standing because they cannot establish causation and redressability.
2. The physical-presence requirement for retailers is *per se* constitutional because it is an essential element of the state's three-tier system; no evidence is required.
3. Plaintiffs have not met their initial burden to establish that Arizona's physical-presence requirement discriminates against interstate commerce.

4. The State has satisfied its burden to prove that requiring physical presence for retailers protects public safety.
5. The State is not required to prove that a nondiscriminatory alternative such as an evenhanded licensing system would be ineffective.

In their briefs, the Defendants barely mention the leading case on interstate commerce in alcoholic beverages -- *Granholm v. Heald*. It is the Supreme Court's only case to review a physical-presence requirement for wine shipping and it held the requirement unconstitutional. "States cannot require an out-of-state firm to become a resident in order to compete on equal terms." 544 U.S. at 475. The Court rejected the argument advanced by the Defendants.

> States have broad power to regulate liquor under § 2 of the Twenty-first Amendment. This power, however, 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 [businesses]. If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.

544 U.S. at 493. The Defendants' only references to *Granholm* are to cite two phrases of *dicta* as support for their argument that the Court has affirmed that retailers may be required to have physical-presence in

the state and purchase their wine from in-state wholesalers. *E.g.*, Wholesaler Br. at 2. In fact, *Granholm* struck down New York's physical-presence requirement and never said anything about the wholesaler-purchase rule because it was not an issue. They make no argument to explain why *Granholm* should not control the outcome, apparently hoping that if they ignore it, it will go away.

Rather than directly discussing *Granholm* and *Tenn. Wine*, the Defendants rely heavily on a Sixth Circuit case, *Lebamoff Enter., Inc. v. Whitmer,* 956 F.3d 863 (6th Cir. 2020), and its interpretation of the Supreme Court's precedents. *Lebamoff* gave those precedents a very narrow reading, declined to require the State to prove that its ban on interstate retailer shipping advanced a state interest that could not be served by reasonable nondiscriminatory alternatives, and upheld the constitutionality of Michigan's ban on wine shipping under the Twenty-first Amendment alone. That case is no longer good law. It has been superseded and confined to its facts by *Block v. Canepa,* 74 F.4th 400 (6th Cir. 2023).

II. 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). The Defendants do not dispute injury, offer only token objection to causation, and focus on redressability. "A plaintiff's burden to demonstrate redressability is 'relatively modest.'" *Tucson v. City of Seattle,* 91 F.4th 1318, 1325 (9th Cir. 2024).

A. Causation

Plaintiffs have established causation. The Plaintiffs cannot shop for wine online at out-of-state retailers and have it shipped to them because Arizona law prohibits it. The State concedes this. ER-065-66 (Def. Admissions 2, 3 and 5). The State briefly suggests that Plaintiffs' harm is caused by the independent acts of hundreds of out-of-state retailers "choosing" not to be licensed in Arizona, State Br. at 26, but the argument is specious. Arizona does not permit out-of-state retailers to become licensed so no independent choice is involved.

B. Redressability.

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). Plaintiffs' injury is loss of their right to engage in interstate commerce with out-of-state wine retailers because Arizona's alcohol laws prohibit such transactions. The officials responsible for enforcing those laws are defendants, so there is little question that the court is able to grant relief. 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). Once the ban on interstate wine shipping is removed, the Plaintiffs confirm they would then place such orders, ER-060 (Reed Decl.¶ 5); ER-063 (Jacobs Decl. ¶ 8), and out-of-state retailers would likely ship the wine to them. They ship to other states. ER 150-52 (Tanford Decl. ¶¶ 3, 5, 6, 7, 8); ER 167 (K&L shipping policy); ER 168--69 (Oakville shipping policy).

The Defendants argue that the court is unable to grant relief because out-of-state retailers would still be prohibited from shipping wine to the Plaintiffs by eight other statutes, which Plaintiffs have not challenged. State Br. at 29-35; Wholesaler Br. at 24-28. They are wrong on both counts.

First, the Defendants misstate the principle of redressability. Loss of standing based on a lack of redressability generally occurs only when multiple actors are responsible for the harm, some of them are not parties, and the non-parties would be likely to continue to engage in the harmful activity even if the parties were enjoined. *Lujan*, 504 U.S. at 568–70 (federal agencies charged with implementing the law were not parties). *Accord, Western Watersheds Project v. Grimm,* 283 F.Supp.3d 925, 942 (D. Id. 2018), *citing Goat Ranchers of Oregon v. Williams,* 379 Fed. Appx. 662 (2010). That is not the situation here. Even if some of the eight other statutes cited by the Defendants actually might prevent out-of-state retailers from shipping wine to consumers after the physical-presence and residency requirements were struck down, they are all parts of the same set of liquor laws administered and enforced by the defendants. If the Defendants can be enjoined from enforcing some, they can be enjoined from enforcing all. No other agency is involved.

Second, six of the statutes cited by the Defendants probably would not actually prevent out-of-state retailers from shipping wine to the plaintiffs if the physical-presence and residency rules were struck down. Those statutes are:

1. A.R.S. § 4-203.04(H)(1). Defendants claim it prohibits shipping wine without a direct shipping license. It does not. That statute actually concerns permits for wineries and has nothing to do with shipping by retailers.
2. A.R.S. § 4-243.01(A)(3). Defendants assert that it would prohibit out-of-state retailers from selling wine that they did not buy from an Arizona wholesaler. It would not. The statute on its face limits this requirement to retailers "in this state" and says nothing about out-of-state retailers, licensed or not. Indeed, it is doubtful Arizona could constitutionally regulate how retailers in other states must acquire their inventory. *Healy v. Beer Inst.,* 491 U.S.324, 336 (1989).
3. A.R.S. § 4-243.01(B). Defendants contend that this statute requires all liquor shipped into Arizona to be invoiced to a wholesaler, not to a consumer. It does not. The statute expressly applies only to wine shipped "by the primary source of supply,"[1] and has nothing to do with wine shipped by retailers.

[1]"Primary source of supply" means the distiller, producer, owner of the commodity at the time it becomes a marketable product." A.R.S. § 4-243.01(E).

4. A.R.S. § 4-203.04(H). Defendants contend this statute makes any person who ships wine to a purchaser (including an out-of-state retailer) subject to all Arizona's laws, including the wholesaler-purchase rule. It does not. That statute applies to wineries and has nothing to do with retail shipping.
5. A.R.S. § 4-201(A). Defendants assert that this provision independently would require retailers to have licenses that do not currently exist. They are wrong. That statute is only procedural, providing that anyone who wants a license should apply to the Director, defendant Ben Henry.
6. A.R.S. § 4-250.01(A). Defendants contend that this provision independently prohibits interstate shipping because it makes anyone engaged in alcohol distribution in the state subject to Arizona law. They are wrong. The statute is procedural and has no provision that addresses retailer shipping.

That leaves two statutes which the Defendants assert might continue to prevent out-of-state retailers from shipping wine to consumers even if the physical-presence requirement were enjoined and therefore defeat redressability: A.R.S. §§ 4-202 and 4-244(1). Their argument is based on

their contention that the Plaintiffs have not challenged them. The argument is nonsense.

First, the Defendants say that A.R.S. § 4-202 imposes a residency requirement on the issuance of a license which out-of-state retailers cannot satisfy. They are correct that this statute requires the licensee or its registered agent to be an Arizona resident, but incorrect when they say we are not challenging it. We specifically challenged this provision as unconstitutional under *Tenn. Wine*, in our Opening Brief at 4-5. We challenged it in our Complaint ¶ 23 (ER-049-50) and on summary judgment. Dist. Ct. Doc. 38 at 4. It has always been central to our complaint that Arizona's physical-presence *and residency* requirements are unconstitutionally discriminating against out-of-state retailers. The injury is redressable by enjoining its enforcement.

Second, the Defendants say that A.R.S. § 4-244(1) would continue to prohibit out-of-state retailers from selling wine without a license. They are correct that this provision prohibits unlicensed sales, but incorrect when they claim we are not challenging this provision as applied to interstate wine shipping. This provision is at the core of our claim -- Arizona requires licenses but issues them only to retailers with physical

presence in the state and will not issue them to out-of-state retailers. Opening Br. at 4-5, 13-15, 25-26. This constitutes basic discrimination against out-of-state retailers. We challenged the application of this law to out-of-state retailers in our Complaint ¶ 23 (ER-049-50) and in our motion for summary judgment. Dist. Ct. Doc. No. 38 at 4. The injury is redressable by enjoining the defendants from denying licenses to out-of-state retailers.

Third, contrary to the assertions by the Defendants, the Plaintiffs did in fact challenge all the various other statutes Defendants claim could continue to prohibit future shipments of wine from out-of-state retailers if the physical-presence and residency requirement were struck down. They are set out in the Complaint ¶ 23 (ER-049-50) and in our motion for summary judgment. Dist. Ct. Doc. No. 38 at 4. Even if we had failed to list one, it would not defeat standing.

> The fact that Plaintiffs did not challenge [another] statute, which criminalizes the same conduct, does not jeopardize the redressability of their injury." ... In addressing redressability, Plaintiffs are not required to challenge all laws that plausibly criminalize their desired course of conduct..."

Tucson v. City of Seattle, 91 F.4th at 1326. Any other rule would require the plaintiffs to be mind readers and predict correctly which other

statutes and rules the defendants might invoke in the future. See discussion under Remedy, *infra* at 41-43. Courts would end up litigating hypothetical issues about laws that might never be applied and have not yet caused an injury. This "would necessarily conflict with the injury-in-fact doctrine." *Id.*[2]

Finally, the Wholesalers argue that even if Plaintiffs prevail, the injury would not be redressed because the court could not extend shipping privileges to out-of-state retailers. Instead, it would have to achieve equality by taking away shipping rights from in-state retailers. Wholesaler Br. at 28-30. They base this on the preamble to the Farm Winery Act, A.R.S. § 4-205.04 (2006 Ariz. Sess. L. 310 § 9), that expresses a legislative preference for maintaining the current method of regulating alcohol distribution. A court might follow this language and remedy the discrimination by "leveling down" -- nullifying in-state retailer's shipping privileges, or it might not. Federal courts are not

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[2]The Wholesalers rely on a irrelevant non-precedential panel decision in *Orion Wine Imports v. Applesmith,* 837 F.App'x 585 (9th Cir. 2021) involving entirely different issues that found a Florida importer lacked standing to challenge a California law requiring foreign wine shipped into the state to be received by a licensed importer because the plaintiff was not seeking to be licensed as a California importer.

bound by such hortatory statements. However, redressability turns on whether the judge has the ability to grant meaningful relief, not on a prediction whether the judge will actually award what plaintiffs want. *Tucson v. City of Seattle*, 91 F.4th at 1325-26.

III. **The physical-presence requirement is not exempt from the usual rule that the State must prove that discriminatory state liquor laws are reasonably necessary to protect public health**

Under *Granholm* and *Tenn. Wine*, the State normally bears the burden to justify a discriminatory state liquor law by presenting evidence that it genuinely advances public health or safety and that nondiscriminatory alternatives would be ineffective. *Granholm*, 544 U.S. at 489; *Tenn. Wine,* 139 S.Ct at 2474. The Defendants argue that Arizona's physical-presence requirement is exempt from this burden and is *per se* constitutional under the Twenty-first Amendment, because requiring retailers to be located in the state is an essential element of a three-tier system and therefore immune from judicial scrutiny.

The argument has four premises -- 1) Arizona has a three-tier system for distributing wine, 2) the Supreme Court holds that the three-tier system is unquestionably legitimate, 3) requiring retailers to be physically located in the state is an essential element of the three-tier

system, and 4) therefore, the physical-presence requirement is not subject to any scrutiny under the Commerce Clause but can be upheld under the Twenty-first Amendment alone. State Br. at 36-37; Wholesaler Br. at 34-35. Each of these premises is false.

1. The argument fails at step one. Arizona does not have a three-tier system for wine. Wine producers may bypass the wholesaler and retailer tiers and sell directly to consumers. A.R.S. §§ 4-203.04, 4-205.04. Arizona probably used to have a three-tier system (many states did), any maybe still does for spirits, but it no longer does for wine.

2. The argument fails at step two. The Supreme Court has never held that discriminatory aspects of a state's three-tier system (if it had one) are unquestionably legitimate or exempt from scrutiny. The Defendants rely entirely on one phrase of *dictum* in *Granholm,* that "We have previously recognized that the three-tier system itself is "unquestionably legitimate." 544 U.S. at 489. This was not a holding. The Court was merely paraphrasing a earlier plurality opinion in a Supremacy Clause case about state regulation of liquor sold on military bases. *North Dakota v. U.S.,* 495 U.S. 423, 432 (1990). Neither interstate commerce nor discrimination was involved and the *North*

Dakota opinion itself was limited to nondiscriminatory laws. *Id.* If there had been any doubt about whether this was meant as a general principle, the Court put that to rest in *Tenn. Wine.* "Although *Granholm* spoke approvingly of that basic model, it did not suggest that § 2 sanctions every discriminatory feature that a State may incorporate into its three-tiered scheme." 139 S.Ct. at 2471.

3) The argument fails at step three. The Supreme Court has never said that "essential elements" of a three-tier system are immune from scrutiny and has rejected the argument that laws regulating in-state retailers are more important and therefore subject to lesser scrutiny. The only time the Court discussed "essential elements" was to reject the concept. It held that a residency requirement for retail licensees "is ***not*** an essential feature of a three-tiered scheme." *Tenn. Wine,* 139 S.Ct. at 2471 (emphasis added). "[M]any such schemes do not impose [the] requirements." Id at 2472. The same is true for physical-presence requirements. They could not be considered essential because many other states do not require them. ER-215-16 (Table of state laws). The only time the Court discussed whether a more lenient review standard should be used for retailers because of their importance, it rejected the

idea, holding that "there is no sound basis for this distinction *Tenn. Wine,* 139 S.Ct at 2470-71.

4) The argument fails at step four. Physical-presence and residency requirements are not given special protected status by the Twenty-first Amendment. The Supreme Court has twice struck them down. 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). A "residency requirement for retail license applicants blatantly favors the State's residents," "violates the Commerce Clause and is not shielded by § 2 of the Twenty-first Amendment." *Tenn. Wine.* 139 S.Ct. at 2457. All "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Granholm,* 544 U.S. at 487, not just some state regulations.

The State relies on two things: *dictum* from *Granholm* and scattered cases from other circuits. First, they falsely claim that *Granholm* held 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." State Br. at 15, 38. It did not. This phrase is *dictum* at

best. It is part of a parenthetical description of a concurring opinion in a case not involving the Commerce Clause and followed immediately by the limitation to nondiscriminatory laws only.

> We have previously recognized that the three-tier system itself is "unquestionably legitimate." *North Dakota v. United States, 495 U.S., at 432*. See also *id.*, at 447 (Scalia, J., concurring in judgment) ("The Twenty-first Amendment ... empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler"). State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers. The discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.

544 U.S. at 489.

Second, the Defendants rely on scattered cases from other circuits which they say show that a majority of circuits affirm the *per se* constitutionality of physical-presence and in-state wholesaler-purchase rules. They are wrong. Only one held that a physical-presence requirement for retailers was *per se* constitutional, albeit on somewhat narrow grounds. *Sarasota Wine Mkt, LLC v. Schmitt*, 987 1171, 1183 (8th Cir. 2021).[3] All others hold to the contrary, that the

[3]The panel relied on a prior 8th Circuit case which had upheld a physical-presence requirement for wholesalers. The panel distinguished the

constitutionality of physical-presence requirements cannot be decided *per se,* but are subject to the same fact-based judicial scrutiny as any other discriminatory state liquor law. *Anvar v. Dwyer*, 82 F.4th 1, 10-11 (1st Cir. 2023); *Block v. Canepa*, 74 F.4th 400, 413-14 (6th Cir. 2023); *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 224-25 (4th Cir. 2022);[4] *Lebamoff Enter., Inc. v. Rauner,* 909 F.3d 847, 855-56 (7th Cir. 2018).

Six of the other cases cited by the Defendants as authority for the constitutionality of discriminatory physical-presence rules are irrelevant. Two did not involve discriminatory laws. *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809 (5th Cir. 2010); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009). One was decided before *Granholm*. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000). Two have been superseded by more recent contrary opinions. *Lebamoff*

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residency requirement at issue in Tenn. Wine from a physical-presence requirement, and said *Tenn. Wine* had not specifically addressed physical-presence requirements, so it would continue to follow circuit precedent even though "[t]here are passages in the *Tenn. Wine* opinion that may forecast a future decision that ... physical presence requirements, or the mandate to purchase only from in-state wholesalers, are subject to an evidentiary weighing to determine [their] public health and safety benefit").

[4] After considering the facts, the majority decided 2-1 that the State had carried its burden to justify its law.

Enters., Inc. v. Whitmer, 956 F.3d 863 (6th Cir. 2020), *superseded and confined to its facts by Block v. Canepa,* 74 F.4th 400 (6th Cir. 2023); *Bridenbaugh, supra*, *superseded by Lebamoff Enter., Inc. v. Rauner, supra.* One was dismissed for lack of jurisdiction *Cooper v. Tex. Alco. Bev. Comm.,* 820 F.3d 730 (5th Cir. 2016). There simply is no genuine dispute that *Granholm* and *Tenn. Wine* require a fact-based judicial inquiry into whether the State has presented enough evidence to justify its need to engage in discrimination that would otherwise violate the Commerce Clause.

IV. The physical-presence requirement is discriminatory.

The Defendants also argue that the physical-presence requirement may be upheld without further inquiry because the Plaintiffs have not met their initial burden to establish that it discriminates against interstate commerce. The offer two reasons: 1) The law is even-handed and/or 2) In-state and out-of-state retailers are not similarly situated.[5] Neither has merit.

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[5]The Wholesalers offer a third argument that the unavailability of certain wines does not demonstrate discrimination. Br. at 49-50. The argument is irrelevant. Discrimination is established by insulating Arizona retailers from interstate competition and denying residents access to the markets of other states. Opening Br. at 26-29.

A. Arizona discriminates against interstate commerce by allowing in-state, but not out-of-state, retailers to ship wine to consumers

Arizona allows in-state retailers to sell wine online and ship it to consumers. It prohibits out-of-state retailers from doing so and will not issue them licenses. This is discrimination against interstate commerce in its most basic sense -- the different treatment of in-state and out-of-state economic actors that harms out-of-state entities, protects in-state businesses from interstate competition, and deprives citizens of their right to have access to the markets of other States on equal terms.. "[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). See Opening Br. at 24-30.

The State argues briefly that the law is not discriminatory because everyone is subject to the same rules that require physical-presence in Arizona in order to ship wine to consumers. Anyone could move to Arizona, so any disadvantage to out-of-state retailers results from "natural conditions" that they happen to be out of state. State Br. at 49-51. The argument is specious. The issue is not whether an out-of-state

firm could move to Arizona and open a liquor store. It is whether Arizona can *require* them to move to Arizona in order to sell online and ship to consumers. Plaintiffs are challenging Arizona's ban on interstate commerce, not its regulation of in-state businesses. Arizona admits that it will not issue licenses to out-of-state retailers that would allow them to ship wine to consumers like in-state retailers do. ER-059 (State Admissions 1-2).

B. In-state and out-of-state retailers are similarly situated.

The Defendants' second argument is that in-state and out-of-state retailers are not similarly situated. State Br. at 53-60, Wholesaler Br. at 43-46. The argument is incomprehensible and the Defendants never actually explain why they think in-state and out-of state retailers are not similarly situated. They allude to the fact that in-state retailers are licensed and out-of-state retailers are not, but that cannot possibly defeat a claim that Arizona discriminates against out-of-state retailers by refusing to give them licenses. The Defendants' only authority is *Lebamoff Entr., Inc. v. Whitmer,* 956 F.3d at 870, 873, but that case is no longer good law, having been superseded and confined to its facts by *Block v. Canepa,* 74 F.4th 400 (6th Cir. 2023).

The argument is nonsense because the Supreme Court has repeatedly found to the contrary. 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. *Gen. Motors v. Tracy*, 519 U.S. 278, 298-99 (1997); *Best & Co. v. Maxwell,* 311 U.S. 454, 456 (1940). Indeed, the in-state and out-of-state wineries in *Granholm v. Heald,* were in exactly the same position as the retailers in this case. The in-state winery was licensed and regulated by New York; the out-of-state winery was not because New York would not give it a license unless it had physical premises in the state. The Court had "no difficulty concluding that New York … discriminates against interstate commerce through its direct-shipping laws" when it treats in-state and out-of-state wine sellers differently. 544 U.S. at 476. If a state could defeat a claim of discrimination simply by refusing to issue licenses to out-of-state firms, it would effectively repeal the dormant Commerce Clause because no out-of-state retailer could ever challenge a discriminatory licensing law.

V. Arizona has not proved that its physical-presence requirement is reasonably necessary to protect public health or safety

"[S]tate regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Granholm,* 544 U.S. at 487. Therefore, when the plaintiffs show that a liquor law discriminates against interstate commerce, the burden shifts to the State to show that "the challenged requirement can be justified as a public health or safety measure" and 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, 74. Proving that a discriminatory law is reasonably necessary is a two-part test. The state must show that the challenged requirement actually advances its public-safety interests and that reasonable nondiscriminatory alternatives would be ineffective. The Defendants claim they have met the first part of the test and are not required to meet the second part. Neither argument has merit.

Because a discriminatory liquor law would otherwise violate the Commerce Clause, the burden is on the State to show more than a minimal connection to public health. It must show that the

"predominant effect" of the law is the protection of public health or safety. *Id.* To make this showing, the State must prove two things:
1) That the law "*actually* promotes public health or safety," not just that it is intended to do so. *Tenn. Wine,* 139 S.Ct. at 2474 (emphasis added).,
2) That "nondiscriminatory alternatives would be insufficient to further those interests" *Id. Accord Granholm,* 544 U.S. at 489 ("We still must consider whether [the law] 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives'"). "Concrete evidence" is required; "speculation [and] unsupported assertions are insufficient to sustain a law that would otherwise violate the Commerce Clause." *Id.* at 2474. The State's justification requires careful judicial scrutiny 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).

The State has no concrete evidence on either element. It largely argues two strawmen. First, it mischaracterizes the issue as whether it can prohibit unlicensed and unregulated direct shipping by out-of-state

retailers which might pose a threat to public health and tax collection because the State would not know who was shipping what to consumers. State Br. at 61-65. The actual dispute is whether interstate wine shipments would pose a threat to the state's interests if they were licensed and regulated. If Arizona licensed out-of-state retailers and required them to report sales, officials would know exactly who was shipping what. Second, Defendants argue that the central role of wholesalers is of "outsized importance" so they can inspect, monitor, track and tax wine. State Br. at 64-66; Wholesaler Br. at 50-52. But actions speak louder than words and Arizona already allows in-state and out-of-state wineries to bypass the "important" wholesalers and sell wine directly to consumers. A.R.S. § 4-203.04. The Defendants offer no explanation why a wholesaler is not necessary when wine is sold by a winery but suddenly becomes indispensable when the same bottle of wine is sold by an out-of-state retailer.

A. The State has not shown that its physical-presence requirement actually advances public health or safety

In order for a state to justify a discriminatory liquor law, it cannot simply assert its general interest in regulating alcohol distribution.

Everyone agrees alcohol sales should be regulated. It must prove that regulation would be ineffective in this one situation so a total ban is necessary to protect public health and safety, *Tenn. Wine,* 139 S.Ct. at 2457, 2474. The first step in making this showing requires the State to prove that the law "*actually* promotes public health or safety" in specific ways. *Tenn. Wine,* 139 S.Ct. at 2474 (emphasis added). This requires more than just testimony showing that regulation of alcohol in general is a good idea. It requires evidence that this particular activity -- interstate retail wine shipping -- poses a specific threat to public health. so that banning shipments reduces that threat. "[T]he burden is on the State," *Granholm,* 544 U.S. at 492, concrete evidence is required, and speculation and unsupported assertions are insufficient. *Id*. at 490.

The list of legitimate state interests protected by the Twenty-first Amendment is short. It includes the protection of public health and safety and maybe raising tax revenue. *Id.* at 2470.[6] But it does not

[6] Tax revenue is not an issue in this case because cross-border deliveries 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 (Maryland Comptroller Report).

include bureaucratic interests such as facilitating orderly markets,[7] 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. It does not include ensuring that the licensee is subject to state jurisdiction because "this objective [can] be achieved by ... requiring a nonresident to ... consent to suit in [state] courts." *Tenn. Wine,* 139 S.Ct at 2475. It does not include investigating licensees, educating them about the law, or maintaining oversight over liquor store operations because these can be done electronically. *Id.* It does not include preserving local community control once the State allows state-wide shipping from its own retailers. *See id.*, 139 S.Ct. at 2475-76. Almost all the State's asserted reasons for requiring physical-presence in Arizona are on this list.

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[7]The Wholesalers misleadingly cite an old plurality opinion in a case not involving discrimination, *North Dakota v. U.S.*, 495 U.S. at 432, for the claim that "ensuring orderly markets" is a legitimate ground for discrimination. Br. at 32. To the extent that this ever applied to discriminatory laws, it has been overruled by *Granholm's* explicit statement to the contrary.

The State makes two specific arguments that an in-state presence requirement for retailers advances public health or safety.

First, the State claims that physical presence reduces youth access by facilitating on-site sting operations and other enforcement activities. State Br. at 62. It is difficult to see any connection between on-site enforcement activities and youth access via online ordering and home delivery miles away from the store, and the State offers none. In any event, the youth-access argument was rejected by the Supreme Court in *Granholm* because "[t]he States provide little evidence that the purchase of wine over the Internet by minors is a problem" in the first place, or that if they ordered online, they would be more likely to order from out-of-state sources than from in-state sources. 544 U.S. at 490-91. Without evidence, the mere fear of youth access was not enough in *Granholm*, and is not enough now. The State offers nothing new.

Second, the Defendants assert that if out-of-state retailers are allowed to ship wine directly to consumers, bypassing the wholesalers, the state will lose the ability to inspect the wine or track any defective products and a host of safety issues may arise. Wholesaler Br. at 53-54. The problems with this argument are myriad.

1) There is no evidence the state actually inspects wine in the first place. Some 80 million bottles pass through state wholesalers every year. ER-200 (NIH consumption data).[8] There is not a shred of evidence the state actually inspects, opens and/or tests any of it for any purpose.

2) There is no evidence that there has ever been any defective wine that the State has had to track. ER-138 (Wark Report ¶ 36).

3) If there ever were any defective wine, it would actually be easier to track it if it had been shipped by FedEx which keeps detailed tracking records than if it had been bought anonymously over the counter at a local liquor store.

4) The only "evidence" the State has produced are witnesses who speculate that public health problems *might* occur in the future even though such problems have not happened anywhere else. None of the witnesses claims to have ever seen any such incidents. Speculation without personal knowledge is inadmissible under FED.R.EVID. 701 and constitutionally inadequate under *Tenn.*

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[8]Total consumption in Arizona of 17,739,000 gallons = 88,695,000 bottles, all but a handful of which pass through wholesalers.

Wine, 139 S.Ct at 2474 ("mere speculation' or 'unsupported assertions' are insufficient").

5) Arizona already allows out-of-state wineries to ship to consumers despite the inability to inspect the wine, A.R.S. § 203.04, and has experienced no problems with youth access, ER-61 (Def. Interrog. Answer No. 5), or with any alcohol-related public health and safety issues. ER-64 (Def. Interrog. Answer No. 11). "If licensing and self-reporting provide adequate safeguards for [one] there is no reason to believe they will not suffice for [the other]." *Granholm* 544 U.S. at 491. To justify singling out and banning only shipping by out-of-state retailers, the state would have to prove it "poses such a *unique* threat that it justifies [the] discriminat[ion]" *Id.* at 492 (emphasis added). The State has not done so.

A number of other states allow direct shipping and they have experienced none of the problems feared by the Defendants. They safely 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 Expert Report ¶32). None has reported that any actual public health or safety problems have arisen because of direct-to-consumer shipping. ER-177-94 (Correspondence from regulators); ER-127-28 (Maryland Comptroller report). They have seen no increase in consumption, either for adults, ER-200-02 (NIH per capita consumption data), or for underage persons. ER-203 (CDC data). See also ER-103-15 (FTC Report); ER-138 (Wark Expert Rep. ¶¶33-34). The only "evidence" from the Defendants is a report about "suspected" illegal activity that has not actually occurred, SER-133-34, and irrelevant reports that illegal shipping occurs in states that make shipping illegal. SER-134-35.

Indeed, Arizona's true reason for barring out-of-state retailers is obvious -- to protect Arizona retailers from competition. In a moment of candor, the State admits that one of its interests is "competitive fairness" between in-state and out-of-state retailers. It fears that out-of-state retailers might have a competitive advantage if they had lower regulatory costs, and that local retailers might therefore have trouble competing. State Br. at 66. Protectionism is not a permissible interest under the Twenty-first Amendment. *Tenn. Wine*, 139 S.Ct. at 2469.

B. Arizona can protect its interests by using the same permit system it uses for out-of-state wineries

Even if the State had any concrete evidence to show that interstate wine shipping *actually* posed any public health or safety risks, that would not be enough to justify a total ban. It must first show that reasonable alternatives would not be effective. *Granholm*, 544 U.S. at 489; *Tenn. Wine*, 139 S.Ct at 2474-75. The State has not even tried to do so, but merely argues (without citing any authority) that "[d]isproving the availability of alternatives is not part of the State's burden." State Br. at 69. The Supreme Court says otherwise.

The Court has decided one direct shipping case -- *Granholm v. Heald*. It rejected the very argument the State offers here, that its inability to investigate out-of-state wine shippers justified banning direct shipping.

> In summary, the States provide little concrete evidence for the sweeping assertion that they cannot police direct shipments by out-of-state wineries. Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods. The "burden is on the State to show that 'the discrimination is demonstrably justified.'" The Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable.

544 U.S. at 492-93. The Court affirmed this burden on the State to

demonstrate that nondiscriminatory alternatives would be ineffective in *Tenn. Wine*.

> The provision at issue here expressly discriminates against nonresidents [and] the record is devoid of any "concrete evidence" showing that the 2-year residency requirement actually promotes public health or safety; nor is there evidence that nondiscriminatory alternatives would be insufficient to further those interests.... [T]he Association has attempted to defend the 2-year residency requirement on public health and safety grounds ... but the Association does not explain why this objective could not easily be achieved by ready alternatives.

139 S.Ct. at 2474-75.

> No evidence has been offered that durational-residency requirements actually foster [responsible] sales practices... Not only is [it] ill suited to promote responsible sales and consumption practices ... but there are obvious alternatives that better serve that goal without discriminating against nonresidents.

139 S.Ct at 2476.

The Wholesalers concede that the existence of nondiscriminatory alternatives is relevant but dispute that it is determinative. They point out that another circuit has said that the mere existence of *possible* alternatives does not necessarily invalidate a discriminatory law. Br. at 33-34. This is a strawman argument. No one argues that the mere existence of a possible alternative would invalidate a discriminatory law. The Court says that the State is only required to show that

"*reasonable* nondiscriminatory alternatives" would be ineffective. *Granholm*, 544 U.S., at 489; *Tenn. Wine,* 139 S.Ct. at 2459.

In this case an objectively reasonable alternative exists: an evenhanded licensing system that requires out-of-state retailers to obtain a license, consent to jurisdiction, post a bond, submit complete reports of sales, remit taxes, verify the age of online purchasers and use a state-approved delivery service. Arizona already uses a permit-and-reporting system to regulate direct shipment from out-of-state wineries. A.R.S. § 4-203.04. It uses permits to regulate every other aspect of liquor distribution in the state. The Supreme Court has endorsed permits. *Granholm*, 544 U.S. at 491-92 (state interests can "be achieved through the alternative of an evenhanded licensing requirement"); *Tenn. Wine,* 139 S. Ct. at 2475-76 (state may regulate retail licenses and impose conditions). The permit system has been endorsed by a task force of the National Conference of State Legislatures (ER-226), the Federal Trade Commission, ER-115-17, and by other circuits. *E.g., Bainbridge v. Turner,* 311 F.3d 1104, 1110 (11th Cir. 2002). Other states safely regulate home deliveries of wine through a permit system. ER-137 (Wark Expert Report ¶ 32); ER-172, 175 (letters from regulators).

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 state officials occasionally inspect the physical premises of in-state retailers to see if they are selling to minors but could not inspect the premises of an out-of-state retailer. State Br. at 61-62. The same is true for out-of-state wineries, of course, but Arizona allows them to ship wine to consumers. A.R.S. § 4-203.04(A). Defendants offer no explanation why on-site inspections are needed for one and not the other. More fundamentally, the State does not explain what the connection is between on-site inspections and wine that was purchased online and shipped to a consumer miles away who never set foot in the store.

The Defendants briefly assert that Arizona might not have the resources to ensure compliance of "potentially" thousands of out-of-state retailers. State Br. at 66; Wholesaler Br. at 54. They do not elaborate, explain what they would lack the resources to do, or explain where they got their speculative number of "potentially thousands" of out-of-state retailers. The record shows that fewer than 200 out-of-state retailers

have actually obtained licenses in state that issue them and those states have no difficulty ensuring compliance. ER-139 (Wark Report ¶ 42); ER-171-76 (shipper licenses and state correspondence).

The State offers some other bureaucratic reasons for conducting on-site visits, *e.g.,* to check the books, review inventory, and educate the employees about the law. State Br. at 61-62. The Supreme Court has been clear that such administrative concerns are not sufficient to justify a total ban 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.

Finally, the Defendants argue that just because other states use a permit system does mean Arizona has to. Wholesaler Br. at 54-57. They are partly correct. The Twenty-first Amendment gives each state the ability to decide whether it can safely allow retailers to take online orders and ship wine to consumers, but it does not give them the authority to discriminate between in-state and out-of-state retailers.

Tenn. Wine, 139 S.Ct at 2457.

> States have broad power to regulate liquor under § 2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing [in-state] direct shipment... If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms

Granholm, 544 U.S. at 493. Without any evidence that a permit system would be ineffective, the State cannot meet the Supreme Court's requirement that it demonstrate that the direct-shipping ban is "reasonably necessary." *Tenn. Wine*, 139 S.Ct. at 2457. They have "fallen far short of showing that the [law] is valid." *Id.* at 2476.

VI. Remedy

The presumptive remedy when a state law has been preventing plaintiffs from exercising a constitutional right is to dismantle the barrier so plaintiffs may exercise that right in the future. *Califano v. Westcott*, 443 U.S. 76, 89-90 (1979). The State does not dispute this basic principle, but merely expresses uncertainty exactly how the district court would craft an injunction, given the interlocking nature of Arizona's liquor laws. State Br. at 27-29. Its concerns are misplaced.

The district court has considerable discretion in crafting the terms of an injunction to grant relief. *Melendres v. Maricopa Cty.*, 897 F.3d at 1221. As plaintiffs have alleged from the beginning, there are several statutes that in combination prohibit out-of-state retailers from shipping wine to Arizona residents directly and indirectly. See ER 049-50 (Complaint ¶23); Opening Br. at 4-6.

At the core are A.R.S. §§ 4-201(A)-(D) which authorizes retail licenses only for premises located in Arizona and 4-202(A) which requires that licenses be held by an Arizona resident. Defendants can be enjoined from enforcing them. The validity of other statutes depends on how they are interpreted by defendants. A.R.S. § 4-243.01(A)(3) requires licensed retailers "in the state" to buy their wine from Arizona wholesalers but the State suggests this might also apply to out-of-state retailers. Br. at 15. A.R.S. § 4-243.01(B) requires wine shipped into the state "by the primary source of supply" to be invoiced to a wholesaler, but the State suggests it might apply to out-of-state retailers even though they are not the primary source of supply. State Br. at 30. A.R.S. § 4-203.04(H) prohibits shipping wine to consumers without a direct shipment license. It is part of the statute governing wineries, not

retailers, but the State suggests it might also apply to retailers. State Br. at 30. A.R.S. § 4-250.01(A) provides that an out-of-state retailer doing business in Arizona is subject to a penalty if they violate the title, and the State suggests this independently bars direct shipping. State Br. at 30. Finally, A.R.S. § 4-244(1) prohibits selling wine without a license. This is unproblematic if Arizona were to authorize future direct shipping licenses for out-of-state retailers, but is a *de facto* discriminatory requirement as long as Arizona refuses to issue licenses.

Such complexities are generally resolved with an agreed order after the court has issued its decision on the constitutionality of Arizona's physical-presence and residency requirements. There is nothing inherently problematic in using an injunction to redress a complex problem with multiple statutes implicated. *See Armstrong. v. Schwartzenegger*, 622 F.3d 1058, 1072-73 (9th Cir. 2010).

VII. Conclusion

For the reasons expressed in this and the opening brief, 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 on remedy.

Respectfully submitted,
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This brief complies with the type-volume limitation of Cir. R. 32, because it contains no more than 8400 words in sections identified by Fed. R. App. P. 32(f). It contains 7761 words, as calculated by the word count program in WordPerfect. 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 March 29, 2024, I filed the foregoing with the court's CM/ECF system that will serve all parties by electronic mail.

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