APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-16148

REED DAY; ALBERT JACOBS,
PLAINTIFFS-APPELLANTS

v.

BEN HENRY, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ARIZONA DEPARTMENT OF LIQUOR LICENSES AND CONTROL; TROY CAMPBELL, CHAIR, ARIZONA STATE LIQUOR BOARD, IN THEIR OFFICIAL CAPACITIES; KRIS MAYES, IN HER OFFICIAL CAPACITY AS ARIZONA ATTORNEY GENERAL, DEFENDANTS-APPELLEES

AND

WINE AND SPIRITS WHOLESALERS ASSOCIATION OF ARIZONA, INTERVENOR-DEFENDANT-APPELLEE

Filed: September 5, 2025

Before: SMITH, JR., BADE, and FORREST, Circuit Judges.

ORDER

The Opinion filed March 4, 2025 and appearing at 129 F.4th 1197 (9th Cir. 2025), is withdrawn. It may not be cited as precedent by or to this court or any district court of the Ninth Circuit. The withdrawal of the Opinion moots the pending petition for panel rehearing and rehearing en banc.

That Opinion is replaced by the amended Opinion filed simultaneously with this Order. The parties may file new petitions for panel rehearing or rehearing en banc regarding the amended Opinion.

OPINION

SMITH, Circuit Judge.

Plaintiff-Appellants Reed Day and Albert Jacobs are Arizona residents who desire to ship wine directly to themselves from retailers who do not maintain in-state premises in Arizona. Arizona's statutory scheme, however, prevents such shipments. As a result, Plaintiffs brought a civil rights action against various Arizona state officials pursuant to 42 U.S.C. § 1983, challenging this statutory scheme, which they claim violates the Commerce Clause. Plaintiffs now appeal the district court's order granting summary judgment to the state officials and an intervenor-defendant. For the reasons explained below, we affirm.

BACKGROUND

Like many states, Arizona utilizes a "three-tier" system to regulate the sale and distribution of alcohol. This system allocates the sale and distribution of alcohol among producers, wholesalers, and retailers. Licensed wholesalers must buy from producers (sometimes called suppliers) and then sell to licensed retailers, who then sell

to consumers. The three-tier framework arose because of "tied-house" saloons in the pre-Prohibition era, in which alcohol producers set up saloonkeepers who promised to sell only their products and to meet minimum sales goals. *Lebamoff Enters. Inc. v. Whitmer*, 956 F.3d 863, 867 (6th Cir. 2020). The tied-house system led to excessive alcohol consumption, and after the Eighteenth Amendment was repealed, states used the significant authority given to them by § 2 of the Twenty-first Amendment to create strict boundaries between producers and consumers of alcohol. *Id.* at 867-68.

Arizona's current statutory scheme subjects all three tiers of alcohol sales and distribution to a series of complex—and overlapping—statutes and regulations. For example, all liquor shipped into Arizona must be invoiced to the wholesaler by the supplier and must be held by the wholesaler for at least twenty-four hours. Ariz. Rev. Stat. § 4-243.01(B). Meanwhile, retailers may only buy from wholesalers, registered retail agents, or a handful of other clearly defined sources. *Id.* § 4-243.01(A)(3). Retailers must hold their license through an Arizona resident (or qualifying corporation) and must have a physical premise managed by an Arizona resident. *Id.* § 4-202(A), (C). Only licensed retailers may take orders off-site (*e.g.*, by phone or internet) and ship directly to consumers within the state. *Id.* § 4-203(J). Knowingly shipping wine directly to a purchaser in Arizona without the proper retail license is a class 2 misdemeanor. *Id.* § 4-203.04(H)(1).

As a result of these—and other—provisions, retailers who do not maintain premises in Arizona cannot ship directly to consumers within the state, but licensed retailers with in-state premises may do so. A limited exception exists for out-of-state wineries, which may receive a license

to ship small quantities of their product directly to consumers. *Id.* § 4-203.04(F). The "physical-premise" or "presence" requirement, as this restriction is sometimes called, has been the subject of increasing litigation in recent years, with plaintiffs across a variety of states challenging similar requirements as a violation of the dormant Commerce Clause that cannot be otherwise justified by § 2 of the Twenty-first Amendment.

PROCEDURAL BACKGROUND

Plaintiffs are Arizona residents and self-described "avid wine drinker[s]" who want to have wine shipped directly to them from retailers who do not have in-state premises. Following in the footsteps of litigants in other states, Plaintiffs sued Defendants—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 pursuant to 42 U.S.C. § 1983. Plaintiffs sought a declaratory judgment that the ban on direct shipping from retailers without in-state premises is unconstitutional and an injunction barring Defendants from enforcing the laws that prohibit retailers without in-state premises from shipping wine to Arizona consumers. The Wine and Spirits Wholesalers Association of Arizona later joined as Intervenor-Defendant.

On August 12, 2022, Plaintiffs and Defendants filed cross-motions for summary judgment. Plaintiffs argued that because no license exists that would give a retailer without in-state premises shipping privileges, Arizona's laws discriminate against out-of-state interests in violation of the Commerce Clause. Plaintiffs then argued that these discriminatory laws could not be otherwise upheld as serving the state's legitimate interests in public health and safety because Arizona did not prove that it could not

serve those interests through nondiscriminatory alternatives. In contrast, Defendants argued that the relevant laws are not discriminatory because they treat in-state and out-of-state prospective licensees the same and that, regardless, the interests served by the regulatory scheme are "more than sufficient" to sustain the laws. Intervenor-Defendant filed its own motion for summary judgment on September 9, 2022, echoing Defendants' arguments and explaining the importance of Arizona's presence requirement to the functioning of the state's three-tier scheme.

On August 9, 2023, the district court granted Defendants' and Intervenor-Defendant's motions for summary judgment and denied Plaintiffs' motion. *Day v. Henry*, 686 F. Supp. 3d 887, 890 (D. Ariz. 2023). The district court reasoned that it was unlikely that Plaintiffs had standing and that, even if they did, their claims still failed on the merits. *Id.* at 892, 894. The district court agreed with Defendants and Intervenor-Defendant that the physical-premise requirement is not discriminatory and that, regardless, this requirement is essential to Arizona's three-tier system and is supported by legitimate nonprotectionist state interests. *Id.* at 895-99. On August 28, 2023, Plaintiffs timely appealed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the standing issue de novo. *Hall v. Norton*, 266 F.3d 969, 975 (9th Cir. 2001). We also review de novo the district court's summary judgment order. *2-Bar Ranch Ltd. P'ship v. U.S. Forest Serv.*, 996 F.3d 984, 990 (9th Cir. 2021).

ANALYSIS

I. PLAINTIFFS HAVE MET THE REQUIREMENTS FOR ARTICLE III STANDING

As a threshold matter, Plaintiffs have met the requirements for Article III standing. These requirements are threefold: a plaintiff must have (1) suffered an injury-in-fact that is (2) traceable to the defendant's challenged conduct, and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). If "a favorable judicial decision would not require the defendant to redress the plaintiff's claimed injury, the plaintiff cannot demonstrate redressability unless she adduces facts to show that the defendant or a third party are nonetheless likely to provide redress as a result of the decision." *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (citations omitted). Plaintiffs must also show that the relief they seek is "within the district court's power to award." *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020).

The district court found that it was "doubtful" that Plaintiffs could show standing because of two distinct problems with the element of redressability. *Day*, 686 F. Supp. 3d at 892. First, because it was "unclear which provisions Plaintiffs actually challenge," it was likely that unchallenged provisions would still block their desired relief. *Id.* A plaintiff cannot meet redressability if he or she challenges only part of a regulatory scheme and other uncontested laws would still prevent relief. *See Nuclear Info. & Res. Serv. v. Nuclear Regul. Comm'n*, 457 F.3d 941, 955 (9th Cir. 2006). Second, the district court found that it was not clear "that the [c]ourt could, or in any event, would grant the relief that Plaintiffs request," which included enjoining unidentified statutes, rewriting the regulations,

or commanding the legislature to redo the licensing scheme. *Day*, 686 F. Supp. 3d at 892, 894. The district court rejected the idea of "leveling down," in which it could cure the constitutional issue by enjoining retailers with in-state premises from shipping to Arizona consumers (as opposed to "leveling up" by extending shipping rights to all retailers), because doing so would "not . . . provide these Plaintiffs with the relief that they request." *Id.* at 893.

We disagree with the district court and find that Plaintiffs have met the requirements for standing. Standing is a threshold consideration that must be determined before considering the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). Notably, a plaintiff satisfies redressability "when he shows that a favorable decision will relieve a discrete injury to himself," not that "a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (emphasis in original). Moreover, a district court is not limited to a plaintiff's proposal and instead "may enter any injunction it deems appropriate, so long as the injunction is no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Kirola v. City & Cnty. of San Francisco*, 860 F.3d 1164, 1176 (9th Cir. 2017) (internal quotation marks omitted).

As a preliminary matter, Plaintiffs did challenge the relevant laws, routinely listing in their complaint and briefing the specific statutes they were challenging. Therefore, Plaintiffs' claims do not possess the fatal flaw of failing to identify independent provisions that would still block relief should the court enjoin only the challenged statutes. *See Nuclear Info. & Res. Serv.*, 457 F.3d at 955. Instead, what Plaintiffs inconsistently identified was their requested *relief*: They routinely changed which

particular statutes they wanted enjoined and later agreed with the district court that they wanted the court to direct the legislature to "fix" the unconstitutional laws generally. But, as noted above, the district court was not limited to Plaintiffs' suggestions and had the authority to create its own remedy. *See Sharp v. Weston*, 233 F.3d 1166, 1173 (9th Cir. 2000) ("Once a constitutional violation has been found, a district court has broad powers to fashion a remedy."). Redressability is meant only to be "a constitutional minimum, depending on the relief that federal courts are *capable* of granting." *Kirola*, 860 F.3d at 1176 (emphasis in original).

Here, the district court was capable of granting at least some relief. For example, the district court could have enjoined the enforcement of the statutory scheme as applied to all liquor retailers and wholesalers inside *and* outside of Arizona. This solution would negate the Commerce Clause issue by eliminating enforcement of the allegedly discriminatory laws altogether.[1] Although such an injunction might be broad, it is not the kind of relief that is outside the power of Article III courts under *Juliana*. *See Johnson v. City of Grants Pass*, 72 F.4th 868, 882 (9th Cir. 2023) (explaining that enjoining the enforcement of a few municipal ordinances "cannot credibly be compared to an injunction seeking to require the federal government to 'phase out fossil fuel emissions and draw down excess atmospheric CO2'" (quoting *Juliana*, 947 F.3d at

[1] Intervenor-Defendant protests that such a "leveling up" would contravene the Arizona Legislature's intent to "retain the current three-tier" system. 2006 Ariz. Sess. Laws 1098. Any such restraint would be a merits determination about the appropriate remedy, not an Article III constraint on the district court's power. To hold otherwise would allow states to litigation-proof any regulatory scheme by including "level-down" provisions to defeat standing.

1164-65)), *rev'd on other grounds*, *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024). Therefore, because the district court was capable of granting at least some relief, and regardless of whether that relief—or any other possible relief—might ultimately prove appropriate on the merits, the redressability requirement of standing has been met. *See Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50, 63 (9th Cir. 2024) (stating that "redressability should not be conflated with the merits").

II. LEGAL BACKGROUND ON THE TWENTY-FIRST AMENDMENT

Plaintiffs' suit focuses on the tension between two constitutional provisions: § 2 of the Twenty-first Amendment and the Commerce Clause. In 1920, the Eighteenth Amendment became effective, ushering in Prohibition by banning the manufacture, sale, or transportation of liquor. U.S. Const. amend. XVIII § 1. Thirteen years later, the country changed course and ratified the Twenty-first Amendment, repealing the Eighteenth Amendment. U.S. Const. amend. XXI § 1. But the Twenty-first Amendment "did not return the Constitution to its pre-1919 form." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000). Rather, while § 1 repealed the Eighteenth Amendment, § 2 added new language clarifying that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI § 2. This addition was modeled on pre-Prohibition legislation that was intended to "give each State a measure of regulatory authority over the importation of alcohol." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 525, 528 (2019). The wording used in this pre-Prohibition legislation—and later in § 2—was framed "not as a

measure conferring power on the States but as one prohibiting conduct that violated state law." *Id.* at 526.

Over time, the broad language of § 2 has come into conflict with other parts of the Constitution, most notably the Commerce Clause, which reserves for Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. 1, § 8, cl. 3. The "negative" reading of this clause—known as the "dormant Commerce Clause"—prevents states from adopting protectionist measures that unduly restrict interstate commerce. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 368-69 (2023). Although the Supreme Court initially treated § 2 as functionally overriding other constitutional provisions, including the Commerce Clause, it eventually walked back that interpretation, and the Court now considers the Dormant Commerce Clause to limit a state's ability to discriminate against interstate commerce under the Twenty-first Amendment. *See Tenn. Wine*, 588 U.S. at 529-31 (discussing the evolution of the Supreme Court's understanding of § 2).

Two recent cases, *Granholm* and *Tennessee Wine*, navigate this tension between the Dormant Commerce Clause and the Twenty-first Amendment and form the foundation of the dispute between the parties in this case. First, in *Granholm*, the Court considered whether Michigan and New York laws that allowed in-state, but not out-of-state, wineries to sell directly to consumers violated the Dormant Commerce Clause, and if so, whether that discrimination was authorized by the Twenty-first Amendment. *Granholm v. Heald*, 544 U.S. 460, 465-66 (2005). The Court held that the answer to the first question was yes, because the underlying cases "involve[d] straightforward attempts to discriminate in favor of local producers,"

and that the answer to the second question was no, because the states had provided "little concrete evidence" that could otherwise justify such discriminatory schemes. *Id.* at 489, 492. The Supreme Court concluded that "[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." *Id.* at 493.

Second, in *Tennessee Wine*, the Supreme Court expanded *Granholm*'s logic beyond the producer tier, concluding that Tennessee's "onerous" durational residency requirement for retailers—to obtain an alcohol retail license, an individual had to be a resident of the state for two years, and a corporation could not get a retail license until all of its officers, directors, and capital stock owners satisfied that same requirement—was a discriminatory scheme that violated the Dormant Commerce Clause. 588 U.S. at 511, 518. The Court then concluded that this discriminatory scheme could not otherwise be justified as advancing the goals of the Twenty-first Amendment because the provision at issue had "at best a highly attenuated relationship to public health or safety" and because the overall nature of the scheme made it "hard to avoid the conclusion that [the laws'] purpose and effect is protectionist." *Id.* at 539-40. The Court therefore struck down the scheme as unconstitutional. *Id.* at 543.

In the years since, courts have implicitly and explicitly interpreted *Tennessee Wine* as creating a two-part test for assessing the constitutionality of state alcohol regulations.[2]

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[2] Courts that have explicitly adopted a two-part test based on *Tennessee Wine* include the First, Third, and Fourth Circuits. *See Anvar v. Dwyer*, 82 F.4th 1, 8 (1st Cir. 2023); *Jean-Paul Weg LLC v. Dir. of N.J. Div. of Alcoholic Beverage Control*, 133 F.4th 227, 234 (3d Cir. 2025); *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 222 (4th Cir. 2022). Meanwhile, the Sixth and Eighth Circuits have conducted somewhat

At step one of the test, the court must address whether the challenged statutory scheme discriminates against nonresidents. *Id.* at 539. If not, then the scheme is constitutional, and the court need not proceed to step two. However, if the laws *are* discriminatory, the court then asks "whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* If so, the scheme is constitutional despite its discriminatory nature. *See id.*

Since *Tennessee Wine*, our sister circuits have split as to how to handle both parts of this test. As detailed below, we conclude that we need not decide whether Arizona's scheme is discriminatory at step one of the *Tennessee Wine* test because Arizona's physical-presence requirement may otherwise be upheld at step two as an essential feature of Arizona's three-tier system.

III. WE NEED NOT DECIDE WHETHER ARIZONA'S LAWS ARE DISCRIMINATORY

At step one of the *Tennessee Wine* test, we ask whether a particular liquor regulation is discriminatory. There are three ways that a statutory scheme can discriminate against out-of-state interests: facially, purposefully, or in practical effect. *See Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009). The first step in analyzing any law under the dormant Commerce Clause is "to determine whether it 'regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against

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similar analyses, but under less clear formulations of the *Tennessee Wine* test. *See Lebamoff Enters. Inc. v. Whitmer*, 956 F.3d 863, 871 (6th Cir. 2020); *Block v. Canepa*, 74 F.4th 400, 412-13 (6th Cir. 2023); *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1181, 1184 (8th Cir. 2021).

interstate commerce.'" *Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or.*, 511 U.S. 93, 99 (1994) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). Discrimination means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* This differential treatment must be "as between persons or entities who are similarly situated." *See Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1230 (9th Cir. 2010). The party challenging the scheme "bears the burden of showing discrimination." *Id.*

Plaintiffs urge us to find at the first step of the *Tennessee Wine* test that Arizona's laws improperly discriminate against interstate commerce. Plaintiffs argue that *Granholm* and *Tennessee Wine*, in which the Supreme Court found various state wine laws to be discriminatory, necessarily dictate a similar outcome here; that Arizona is giving its wine retailers "exclusive access" to the e-commerce market, which is improper economic protectionism; and that because Arizona does not carry most old, foreign, and rare wines, Arizona is also depriving its citizens of the right "to have access to the markets of other States on equal terms." In response, Defendants argue that Arizona's laws are not discriminatory because retailers from any state are free to obtain licenses, and that, unlike the kind of durational residency requirement at issue in *Tennessee Wine*, a physical-premise requirement is not a "per se burden" on out-of-state companies. The district court agreed with Defendants, finding that there was no discrimination because Arizona's physical-premise requirement "applies evenhandedly to in-state and out-of-state retailers." *Day*, 686 F. Supp. 3d at 896.

Whether this kind of requirement is discriminatory has split the circuits. In the pre-*Granholm* era, the Seventh Circuit easily found that such requirements were not

discriminatory, commenting that "[e]very use of § 2 could be called 'discriminatory' in the sense that plaintiffs use that term, because every statute limiting importation leaves intrastate commerce unaffected." *Bridenbaugh*, 227 F.3d at 853 (emphasis omitted). Meanwhile, between *Granholm* and *Tennessee Wine*, the Second Circuit determined that New York's physical-premise requirement was not discriminatory because it "evenhandedly regulate[d] the importation and distribution of liquor within the state." *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 192 (2d Cir. 2009). The Fifth Circuit came to a similar conclusion. *See Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 821 (5th Cir. 2010) (concluding that Texas could require its authorized retailers to sell from locations physically located in Texas).

In the immediate aftermath of *Tennessee Wine*, our sister circuits seemed reluctant to deviate from prior caselaw. In *Lebamoff Enterprises, Inc. v. Whitmer*, the first post-*Tennessee Wine* case, the Sixth Circuit expressed doubt that Michigan's physical-premise requirement was discriminatory, although it ultimately determined that it did not need to decide the case on that basis because Michigan's law could otherwise be justified at what is now known as step two of the *Tennessee Wine* test. *See* 956 F.3d at 870-71. Then, in *Sarasota Wine Market, LLC v. Schmitt*, the Eighth Circuit held that Missouri's physical-premise requirement might be "economically and socially anachronistic" but that the scheme did not discriminate against out-of-state interests because it applied the same licensing requirements to all retailers and the rules governing direct shipment applied "evenhandedly" to all those who qualified for the relevant license. 987 F.3d 1171, 1184 (8th Cir. 2021).

Following *Sarasota Wine Market*, however, circuits have uniformly found that such requirements are discriminatory, albeit on inconsistent grounds. First, in *B-21 Wines, Inc. v. Bauer*, the Fourth Circuit concluded that because in-state retailers had privileges that out-of-state retailers did not, North Carolina's laws were facially discriminatory. 36 F.4th 214, 223 (4th Cir. 2022). Then, the Sixth Circuit seemed to contradict its prior tentative reasoning in *Lebamoff*, apparently assuming (without further explanation) in *Block v. Canepa* that Ohio's direct-shipment restriction was discriminatory. *See* 74 F.4th 400, 413 (6th Cir. 2023). Shortly after *Block*, the First Circuit found that Rhode Island's laws "facially discriminate[d]" against out-of-state retailers by forcing licensees to maintain a physical premise in the state, which meant that out-of-state retailers could not deliver alcohol to Rhode Island residents as in-state retailers could. *Anvar v. Dwyer*, 82 F.4th 1, 9 (1st Cir. 2023). Finally, and most recently, the Third Circuit held that such requirements were discriminatory *in effect* (rather than simply on their face) because they imposed heightened financial burdens on out-of-state retailers. *Jean-Paul Weg LLC v. Dir. of N.J. Div. of Alcoholic Beverage Control*, 133 F.4th 227, 236 (3d Cir. 2025).

Ultimately, like the Sixth Circuit in *Lebamoff*, we conclude that we need not wade into this particular part of the "quagmire" that constitutes our Dormant Commerce Clause jurisprudence. *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). As explained below, we hold that even if Arizona's physical-premise requirement is discriminatory, it can nonetheless be upheld at step two of the *Tennessee Wine* test. Accordingly, we assume without deciding that Arizona's laws are discriminatory and proceed to step two.

IV. ARIZONA'S PHYSICAL-PREMISE REQUIREMENT MAY BE UPHELD AS AN ESSENTIAL PART OF THE STATE'S THREE-TIER SCHEME

At step two of the *Tennessee Wine* test, courts ask "whether the challenged [regime] can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *B-21 Wines*, 36 F.4th at 222 (alteration in original) (quoting *Tenn. Wine*, 588 U.S. at 539). If a court answers in the affirmative, the regulatory scheme is "shielded by § 2." *See Tenn. Wine*, 588 U.S. at 539-40.

A circuit split has developed regarding step two of this test as well, although the break here is somewhat cleaner than the compound fracture that characterizes the variety of approaches to the application of step one. Specifically, in the post-*Tennessee Wine* era, the Third, Fourth, and Eighth Circuits have held that physical-premise requirements may be upheld simply because they are an essential feature of a state's three-tier scheme.[3] *See B-21 Wines*, 36 F.4th at 228; *Sarasota Wine Mkt.*, 987 F.3d at 1184; *Jean-Paul Weg*, 133 F.4th at 239 (alternatively holding that New Jersey's regulations were "independently justified as essential features of" a three-tier scheme). The justification is that the three-tier scheme is inherently tied to the public health and safety measures the Twenty-first Amendment was intended to promote. *See B-21 Wines*, 36 F.4th at 226-28. In contrast, the First Circuit has held that "a discriminatory aspect of a state's version of the three-tier system cannot be given a judicial seal of approval

[3] Before *Tennessee Wine*, several circuits came to similar conclusions. *See, e.g.*, *Arnold's Wines*, 571 F.3d at 191-92; *Wine Country*, 612 F.3d at 818-19.

premised . . . on the virtues of three-tier systems generally" and that "concrete evidence" must demonstrate that the "predominant effect" of the challenged regulatory scheme is to advance goals like public health and safety. *Anvar*, 82 F.4th at 10-11 (citation omitted). The Sixth Circuit's current approach is largely similar to that of the First Circuit.[4] *See Block*, 74 F.4th at 414 (remanding to the district court to analyze competing evidence as to whether Ohio's physical-premise requirement primarily promoted public health or protectionism).

The district court adopted the current majority approach as an alternative holding. That is, the district court concluded that even *if* Arizona's laws were discriminatory, the physical-premise requirement is "such an essential feature" of Arizona's three-tier system that "it is supported by legitimate, nonprotectionist state interests." *Day*, 686 F. Supp. 3d at 897. The district court reasoned that opening the state to direct deliveries from retailers without in-state premises would "effectively eliminate the role" of Arizona's wholesalers and "create a sizable hole in the three-tier system." *Id.* at 898 (quoting *Lebamoff*, 956 F.3d at 872). The district court rejected—among other arguments—Plaintiffs' contention that the state's interests were not legitimate because other states allow out-of-

[4] *Lebamoff* had held that Michigan's presence requirement could be justified in part because "there is no other way it could preserve the regulatory control provided by the three-tier system." 956 F.3d at 874. However, although *Block* purported not to overrule *Lebamoff*, its conclusion that Ohio needed to provide evidence supporting the public health benefits of its direct shipment ban is largely at odds with the broad language of the *Lebamoff* majority opinion regarding the necessity of these laws to the functioning of a three-tier scheme. *Block*, 74 F.4th at 413-14. Instead, *Block* functionally follows the *Lebamoff* concurring opinion. *See id; see also Lebamoff*, 956 F.3d at 877-79 (McKeague, J., concurring).

state shipping, pointing out that the Twenty-first Amendment allows states to determine for themselves how best to regulate alcohol within their borders. *Id.* at 898-99. The district court also rejected Plaintiffs' argument that Arizona has abandoned the three-tier system for wine by allowing certain wineries to ship directly to customers, noting that "[c]reating an exception is not abandoning the entire system." *Id.* at 899.

We agree with the district court. As an initial matter, in *Granholm*, the Supreme Court reiterated that the "three-tier system itself is 'unquestionably legitimate.'" 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)). Although Plaintiffs claim this language is merely dictum, the *Granholm* Court made this statement in the context of finding that the challenged regulations were a discriminatory exception to the three-tier scheme, rather than—as the defendants there argued—an integral part of it. *Id.* at 488-89. As the Second Circuit pointed out when rejecting an identical argument, "[h]ad the three-tier system itself been unsustainable under the Twenty-first Amendment, the *Granholm* Court would have had no need to distinguish it from the impermissible regulations at issue." *Arnold's Wines*, 571 F.3d at 191. Moreover, the *Tennessee Wine* Court subsequently spoke approvingly of the three-tier system, distinguishing the unnecessary durational residency requirement at issue from elements that were "essential" to the functioning of that system. *See* 588 U.S. at 535.

As several of our sister circuits have recognized since *Tennessee Wine*, the physical-premise requirement is—unlike the durational residency requirement at issue in *Tennessee Wine*—an essential piece of the "unquestionably legitimate" three-tier system. *See B-21 Wines*, 36 F.4th at 228 (holding that North Carolina's requirement

was an "integral part" of the state's three-tier system because it "directly relate[d] to North Carolina's ability to separate producers, wholesalers, and retailers"); *Jean-Paul Weg*, 133 F.4th at 239 (concluding that "permitting out-of-state retailers to sell alcohol from outside of a state's three-tier system creates a regulatory hole large enough to shake the foundations of the three-tier model"); *Sarasota Wine Mkt.*, 987 F.3d at 1183 ("Sarasota without question attacks core provisions of Missouri's three-tiered system . . . ."").

By removing the physical-premise requirement, we would effectively be hacking off two of the three legs that constitute Arizona's three-tiered system. As a practical matter, in-state retailers (i.e., licensed retailers with physical premises in Arizona) *are* the third tier of the state's three-tier system. *See Arnold's Wines*, 571 F.3d at 190 ("[B]ecause in-state retailers make up the third tier in New York's three-tier regulatory system, Appellants' challenge to the [statutory] provisions requiring all wholesalers and retailers be present in and licensed by the state is a frontal attack on the constitutionality of the three-tier system itself." (citation omitted)). As traditionally understood, the three-tier system "has an opening at the top available to all," and once the product is inside that system, it must remain within the system. *Wine County*, 612 F.3d at 815. Relatedly, because—as a legal and practical matter—out-of-state retailers could not be subject to Arizona's wholesaler requirements,[5] and because different

[5] As other circuits have recognized—and as Plaintiffs do not meaningfully refute—there are myriad practical and legal issues that would crop up if Arizona tried to regulate out-of-state wholesalers or if out-of-state retailers had to comply with Arizona's wholesaler purchase requirement. *See Lebamoff*, 956 F.3d at 872-73 (discussing the extraterritoriality doctrine); *Arnold's Wines*, 571 F.3d at 192 n.3 (dis-

states treat wholesalers differently, allowing direct shipment from retailers without in-state premises functionally eliminates Arizona's control over the wholesaler tier. *See also Lebamoff*, 956 F.3d at 872 ("Opening up the State to direct deliveries from out-of-state retailers necessarily means opening it up to alcohol that passes through out-of-state wholesalers or for that matter no wholesaler at all.").

Simply put, allowing direct shipment of wine to Arizona consumers from out-of-state retailers would cut so many holes in the state's "unquestionably legitimate" three-tier system that the system would functionally cease to exist.[6] And because the physical-premise requirement is therefore an "essential feature" of Arizona's three-tier system, we may uphold it without further determinations as to whether its predominant effect is to support public health and safety. *See B-21 Wines*, 36 F.4th at 227 n.8. Nonetheless, we acknowledge that the physical-presence requirement does bear on a state's ability to support public health and safety. For example, Arizona conducted thousands of on-site inspections of licensees' establishments between 2016 and 2021, in addition to run-

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cussing the "absurd operational result" that would occur if the Indiana-based Arnold's Wines were required to purchase its inventory from New York wholesalers only to ship the wine back to New York consumers).

[6] Although the First Circuit concluded that "there is nothing inherent in the three-tier system—which aims at preventing vertical integration between alcohol producers, wholesalers, and retailers—that necessarily demands an in-state-presence requirement for retailers," *Anvar*, 82 F.4th at 10-11, that reasoning overlooks the basic framework of § 2. The three-tier system might be premised on separating the tiers, but the Twenty-first Amendment explicitly gave each state the power to regulate alcohol importation for itself. U.S. Const. amend. XXI § 2.

ning covert underage buyer programs. Arizona also inspects the records of wholesalers to determine whether a retailer is complying with Arizona liquor laws. Notably, the *Tennessee Wine* Court acknowledged the importance of in-state physical premises for such reasons, commenting that "on-site inspections" could serve as one way to maintain oversight over liquor stores. *Tenn. Wine*, 588 U.S. at 541; *see also Jean-Paul Weg*, 133 F.4th at 239 (concluding that "New Jersey's physical presence requirement [was] key to enforcing its [three-tier] system by keeping retailers within its investigators' jurisdiction"). Without a physical-premise requirement, the three-tier scheme falls apart, and so do some of the benefits that come with it.

Like the district court, we reject Plaintiffs' assertion that Arizona does not have a three-tier system for wine anymore because wineries can now sell directly to consumers (and so, the logic goes, Arizona cannot justify the physical-premise requirement on the grounds that it is essential to a system that no longer exists). *Day*, 686 F. Supp. at 899. A limited exception does not swallow the whole. There are only about 11,000 wineries in the United States, as opposed to approximately 400,000 wine retailers. As of June 30, 2021, Arizona had only granted 1,030 direct shipment licenses. Allowing deliveries from such a small number of wineries is a minor exception that does not negate the existence of Arizona's much larger three-tier system, and it is within Arizona's discretion to create this kind of limited exception. *See B-21 Wines*, 36 F.4th at 226 (rejecting the argument that North Carolina had "abandoned" its three-tier systems by permitting direct shipments from wineries).

We also reject the argument that Arizona must prove that nondiscriminatory alternatives would be insufficient

to further the state's interest in public health and safety. As other circuits to consider this issue have noted, such a requirement "conflates the proper Twenty-first Amendment inquiry with a traditional analysis under the dormant Commerce Clause." *Anvar*, 82 F.4th at 11; *see B-21 Wines*, 36 F.4th at 224-25 (concluding that such a requirement was not central to the *Tennessee Wine* analysis); *see also Jean-Paul Weg*, 133 F.4th at 238. In *Tennessee Wine*, the Supreme Court did discuss the existence (or lack thereof) of nondiscriminatory alternatives, but only after determining that the law at issue was a discriminatory regime that was not otherwise authorized by the Twenty-first Amendment. *See* 588 U.S. at 540-43. Here, Arizona's physical-premise requirement is authorized by the Twenty-first Amendment as an essential feature of the state's three-tier scheme, so no further consideration of nondiscriminatory alternatives was necessary. Regardless, the existence of such alternatives is merely a relevant factor that a district court may consider when assessing whether the challenged laws promote public health and safety; on its own, it "does not, for purposes of a Twenty-first Amendment inquiry, necessarily invalidate a challenged law." *Anvar*, 82 F.4th at 11.

Over the last century, the Supreme Court has slowly but steadily limited the outer reaches of the Twenty-first Amendment, rejecting the view that § 2 shields all state alcohol regulations from the Dormant Commerce Clause and instead applying an increasingly stricter framework through which we analyze the constitutionality of these laws. *See Arnold's Wines*, 571 F.3d at 192-201 (Calabresi, J., concurring) (discussing the history of Twenty-first Amendment jurisprudence). But until and unless the Supreme Court decides to withdraw its wholesale support for this long-standing model, we agree that "we should be no more invasive of the 'unquestionably legitimate' three-

tiered system than the Supreme Court has mandated." *Sarasota Wine Mkt.*, 987 F.3d at 1184; *see also Arnold's Wines*, 571 F.3d at 201 (Calabresi, J., concurring) ("[W]hile the general direction of Supreme Court jurisprudence has been toward prohibiting any discriminatory state regulation, it is not for our court to say how far or how fast we should move along that vector."). The Supreme Court has not yet struck such a blow to § 2, and neither do we.

CONCLUSION

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

FORREST, Circuit Judge, concurring in part and dissenting in part.

I agree that Plaintiffs have standing to challenge Arizona's restrictions that allow only in-state retailers to ship wine to Arizona consumers, and therefore I join Section I of the majority's analysis. But because Arizona's law is discriminatory and because the district court failed to properly analyze whether Arizona has a legitimate non-protectionist basis for its residency-based shipping restrictions, I respectfully dissent from the majority's merits analysis under *Tennessee Wine & Spirits Retailers Association v. Thomas*, 588 U.S. 504 (2019), in Section II. I would remand for the district court to conduct the required evidentiary inquiry into whether Arizona's discriminatory regulations may be justified on legitimate public health or safety grounds.

TENNESSEE WINE ANALYSIS

As the majority explains, the Supreme Court has developed a two-step framework to reconcile the apparent tension between § 2 of the Twenty-first Amendment and the dormant Commerce Clause. See Maj. Op. 13-15. We apply normal Commerce Clause principles at the first step, finding suspect any state regulation that discriminates against interstate commerce. *See Tennessee Wine*, 588 U.S. at 533, 539. A finding of discrimination is typically fatal. *Id.* at 539. But the Twenty-first Amendment gives states some leeway when regulating alcohol. *Id.* If the state provides concrete evidence that its discriminatory regime advances public health, safety, or another legitimate non-protectionist interest that could not be served by nondiscriminatory measures, it may continue to enforce its discriminatory regulations. *Id.* at 539-40.

I. STEP ONE: DISCRIMINATION

The majority does not decide whether Arizona's shipping restriction discriminates against interstate commerce at *Tennessee Wine*'s first step because it concludes that, regardless, plaintiffs' claim fails at step two. I would reach this first issue and conclude that Arizona's law is discriminatory.

Arizona argues its shipping restriction is not discriminatory because it distinguishes only between licensed and unlicensed retailers, not between residents and nonresidents. There is no guarantee, the argument goes, that an in-state retailer will have a brick-and-mortar presence and an Arizona manager, and thus be eligible for a license. And out-of-state retailers can obtain the proper license. All they have to do is open a storefront in Arizona and hire an Arizonan to manage the store and hold the license. That view of interstate commercial discrimination defies both precedent and common sense.

If I said I would only hire clerks who had studied in my alma mater's law library, I could not maintain that I have no hiring preference for University of Idaho students. Sure, a Harvard student could fly to Spokane, drive to Moscow, read a few cases in the library, and then apply. Likewise, there is no guarantee that any given University of Idaho student has studied in the law library. But that is not the point. I have plainly adopted a preference for University of Idaho students and discriminated against all others.

The Supreme Court has never allowed such easy workarounds to the Commerce Clause's antidiscrimination command. Take *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). Madison allowed the sale of pasteur-

ized milk only if it was bottled within five miles of city limits, and all other milk only if it was sourced from within twenty-five miles. *Id.* at 350-51. An Illinois distributor had no difficulty convincing the Court that the ordinance "plainly discriminate[d] against interstate commerce." *Id.* at 354. And that is because the state had "erect[ed] an economic barrier" foreclosing "competition from without the State." *Id.* There is no indication that the Court would have reached a different decision had it considered that the Illinois corporation could have purchased a Madison dairy and hired some industrious Madisonian milkers to gain access to that market.

More to the point, the Supreme Court has rejected precisely the argument that Arizona makes. In *Granholm v. Heald*, the Court reviewed a licensing scheme that allowed out-of-state wineries to ship wine directly to consumers only if they opened an in-state branch office and warehouse. 544 U.S. 460, 474-75 (2005). The Court concluded that the "instate 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.'" *Id.* at 475 (quoting *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963)).

It draws too fine a line to look only to a retailer's state of incorporation. *Granholm* did not define residency based on legal formalities. Rather, it concluded that New York would require an out-of-state firm to "become a resident" if the firm were forced to establish an in-state presence to obtain equal access to the New York market. *Id.* At bottom, Arizona allows only those retailers willing to set up shop in-state to ship wine to Arizonans. That type of "economic isolationism" is "facially discriminatory, in part because it tend[s] 'to discourage domestic corporations from plying their trades in interstate commerce.'"

Camps Newfound/Owatonna Inc. v. Town of Harrison, 520 U.S. 564, 579 (1997) (quoting *Fulton Corp. v. Faulkner*, 516 U.S. 323, 333 (1996)). Defining regulations as neutral by looking only to where a retailer is headquartered or based would allow precisely the "economic Balkanization" that the dormant Commerce Clause seeks to avoid. *See Granholm*, 544 U.S. at 472 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)).

Arizona's attempt to distinguish *Granholm* is unavailing, at least at this stage in the analysis. It argues that *Granholm* applies only to exceptions to a state's three-tier scheme, and that Plaintiffs' challenge is to an integral part of its three-tier scheme. A law's relationship to the three-tier system, though, is at most relevant at the second step of the *Tennessee Wine* analysis. *See* 588 U.S. at 535. It has no bearing on whether a law is discriminatory. *See id.*; *Granholm*, 544 U.S. at 476; *see also B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 222-23, 227-28 (4th Cir. 2022) (considering the law's centrality to the three-tier system at step two after finding it discriminatory at step one).

As to *Tennessee Wine*, it is true that Tennessee implemented a more egregious two-year waiting period before new state residents could obtain a retail license, 588 U.S. at 504. But nowhere did the Supreme Court purport to establish that scheme as the floor of unconstitutionality. A regulatory regime like Arizona's may be slightly less problematic but discriminatory all the same.

Ultimately, we are faced with much the same licensing scheme and arguments that the Fourth Circuit confronted in *B-21 Wines*. That court acknowledged

> that out-of-state wine retailers can obtain a permit to ship their product to North Carolina residents, provided, inter alia, that those retailers are managed or

> owned by a North Carolina resident, have in-state premises, and buy their product from an in-state wholesaler. But that prospect does not eliminate the statutorily mandated differential treatment.

Id. at 223 n. 5 (citing *Granholm*, 544 U.S. at 474-75). Whatever complexities and disagreements there may have been at step two of the *Tennessee Wine* framework, *compare id.* at 227-29, *with id.* at 232-38 (Wilkinson, J., dissenting), the Fourth Circuit had no difficulty finding North Carolina's scheme discriminatory at step one.[7] Neither should we.

II. STEP TWO: LEGITIMATE REGULATORY BASIS

Because Arizona's licensing scheme is discriminatory, it would be invalid if applied to any product other than alcohol. *See Granholm*, 544 U.S. at 476; *Tennessee Wine*, 588 U.S. at 539. But § 2 of the Twenty-first Amendment may yet come to Arizona's rescue. Beyond repealing Prohibition, that Amendment preserved states' authority to regulate alcohol by prohibiting "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof." U.S. Const. amend. XXI § 2. Thus, notwithstanding the dormant Commerce Clause, a discriminatory regulation on alcohol is permissible if it is "justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Tennessee Wine*, 588 U.S. at 539.

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[7] *See also Anvar v. Dwyer*, 82 F.4th 1, 9 (1st Cir. 2023); *Block v. Canepa*, 74 F.4th 400, 413-14 (6th Cir. 2023); *Jean-Paul Weg v. Dir. of N.J. Div. of Alcoholic Beverage Control*, 133 F.4th 227, 235-36 (3d Cir. 2025); *Chicago Wine Co. v. Braun*, ___ F.4th ___, 2025 WL 2218630, at *5-7 (7th Cir. Aug. 5, 2025) (Scudder, J., concurring in the judgment).

However, "[w]here the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by § 2." *Id.* at 539-40. Not only must the ends be legitimate, but a State cannot employ discriminatory means unless "nondiscriminatory alternatives would be insufficient to further [its] interests." *Id.* at 540. Arizona must bring "concrete evidence" to the means-ends inquiry at *Tennessee Wine*'s second step; "mere speculation" and "unsupported assertions" will not do. *Id.* at 539-40 (quoting *Granholm*, 544 U.S. at 490, 492).

Some of our sister circuits sidestep imposing this evidentiary burden and hold that regulations essential to a state's three-tier system, including physical presence requirements, are per se legitimate. *See B-21 Wines*, 36 F.4th at 227-29; *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1180-84 (8th Cir. 2021); *Jean-Paul Weg, LLC v. Dir. of N.J. Div. of Alcoholic Beverage Control*, 133 F.4th 227, 239 (3d Cir. 2025). The majority joins them. I would not.

Our sister circuits that have adopted the per se validity rule for essential components of three-tier systems have grabbed at language in *Granholm* and *Tennessee Wine* calling that system "unquestionably legitimate." *See, e.g.*, *B-21*, 36 F.4th at 227 (quoting *Granholm*, 544 U.S. at 489) (citing *Tennessee Wine*, 588 U.S. at 534). As the Third Circuit recently reasoned, "if the system itself if constitutional, then the core features that define the system are also constitutional." *Jean-Paul Weg, LLC*, 133 F.4th at 239. The majority mimics this pattern. Maj. Op. 22 (quoting *Granholm*, 544 U.S. at 489).

If *Tennessee Wine* meant to create a carveout to its usual rule that states must produce concrete evidence that discriminatory regulations serve legitimate interests, it picked an exceedingly odd way to do so. In that case, the

Court chastised the plaintiffs for "read[ing] far too much into *Granholm*'s discussion of the three-tiered model," particularly where *Granholm* did not concern "an essential feature of a three-tiered scheme." 588 U.S. at 535. Fresh off the Court's warning against overreading its discussions of the three-tier model, the majority and some of our sister circuits read *Tennessee Wine*'s discussion of this model to covertly create a new step two in the analysis by negative inference. *See B-21 Wines*, 36 F.4th at 234 (Wilkinson, J., dissenting) (criticizing this practice); *Chicago Wine Co. v. Braun*, ___ F.4th ___, 2025 WL 2218630, at *7-8 (7th Cir. Aug. 5, 2025) (Scudder, J., concurring in the judgment) (same). Under their reasoning, first we decide if the challenged law is discriminatory. Then we decide if it is essential to the three-tier system. Only if we answer "yes" to the former and "no" to the latter would we reach the second (now third) part of the *Tennessee Wine* inquiry and examine whether concrete evidence shows that the regulation advances legitimate health or safety interests. *See, e.g.*, *Sarasota Wine*, 987 F.3d at 1183-84 (skipping "evidentiary weighing" for physical premise requirements that are essential to the three-tier system). As the majority states, "because the physical-premise requirement is [] an 'essential feature' of Arizona's three-tier system, we may uphold it without further determinations as to whether its predominant effect is to support public health and safety." Maj. Op. 24.

Rather than read that middle question into the Supreme Court's test, I would conduct the typical step-two analysis. Given the Supreme Court's flattering descriptions of the three-tier scheme, *e.g. Tennessee Wine*, 588 U.S. at 534-35, a regulation's central place in such a scheme may be powerful evidence of its legitimacy. But the three-tier system is ultimately a means to promote the public welfare, not an end in itself. The inquiry remains

whether, based on "concrete evidence" rather than "speculation," a regulation promotes public health, safety, or another non-protectionist goal in a way that a nondiscriminatory regulation could not. *Id.* at 539-40; *accord Anvar v. Dwyer*, 82 F.4th 1, 9-11 (1st Cir. 2023); *Block v. Canepa*, 74 F.4th 400, 412-14 (6th Cir. 2023).

Of course, the majority is correct that the Twenty-first Amendment gives states power to regulate alcohol importation, Maj. Op. 24 n.6, but that power is not limitless—it must be exercised within the bounds of our constitutional order. And as Judge Wilkinson has noted, "some of what the Twenty-first Amendment appears to give, the Commerce Clause takes away." *B-21 Wines, Inc.*, 36 F.4th at 230 (Wilkinson, J., dissenting). Granting per se validity to the essential features of any three-tiered system a state chooses to adopt cedes more power to the states than they rightly have. *See id.* at 235 (explaining that beyond "vertical quarantine" of producers, wholesalers, and retailers, "there is no one archetypal three-tier system" and "each variation must be judged based on its own features") (citations omitted).

I also disagree with the majority that Arizona's residency-based shipping requirement is an essential feature of its three-tier system. The majority suggests that "allowing direct shipment from retailers without in-state premises functionally eliminates Arizona's control over the wholesale tier." Maj. Op. 24. That is plainly false. Again, as Judge Wilkinson explained:

> Prohibiting wine shipments to consumers from out-of-state retailers is no more essential to a three-tiered model than residency requirements. One can easily imagine a state maintaining a strict licensing regime to ensure that the tiers remain distinctly owned, while treating in-state and out-of-state retailers alike. . . .

> In no way is the three-tiered system jeopardized by a requirement of evenhandedness. Allowing imported wine does not necessitate allowing *unregulated* wine. Nothing stops [the state] from requiring out-of-state retailers to obtain a state shipping license and comply with the same conditions as in-state retailers.

Id. (citations omitted).

Moreover, in thinking about what is an essential feature of a three-tiered system, we must keep in mind that the dormant Commerce Clause only prohibits *discriminatory* regulations. How can we decide whether a regulation is essential without considering both sides of the coin—the favoritism for in-state retailers, coupled with the discrimination against out-of-state retailers? Even if I accepted that allowing out-of-state shipments would undercut Arizona's three-tier system, I would widen the aperture to consider whether Arizona's scheme that allows direct shipments from in-state but not out-of-state retailers is an essential part of its three-tier system. After all, it is the allowance of in-state shipments as much as the disallowance of out-of-state shipments that creates a dormant Commerce Clause problem. If Arizona's allowance for in-state shipments is not essential to its three-tier system, then its discrimination is not essential to its three-tier system. It could eliminate the in-state shipping allowance to cure its dormant Commerce Clause problem while doing no harm to its three-tier system.

For all these reasons, the majority errs in joining the Third, Fourth, and Eighth Circuits in applying a per se validity rule at step two of the *Tennessee Wine* analysis. Taking a hands-off approach to any "essential" feature of a three-tiered system adopted by a state abdicates our duty to uphold the Constitution.

Despite adopting a per se validity rule, the majority proceeds to explain that Arizona's residency-based shipping requirement serves public health and safety, Maj. Op. 24-25, and that the availability of nondiscriminatory alternatives should be given limited weight in the public-health-and-safety analysis, *id.* 26. The discussion of these issues is superfluous to the court's holding and, therefore, is dicta. And I decline to address these issues even though they are not superfluous to my view of the case because the district court bypassed the requisite evidentiary weighing and relied on the residency-based shipping regulations' perceived centrality to Arizona's three-tier system. Accordingly, rather than wading into these fact-intensive issues on an incomplete record, I would remand for the district court to determine whether concrete evidence supports Arizona's contentions that limiting direct shipment privileges to retailers with instate storefronts and Arizona managers advances the state's legitimate health and safety goals, and that nondiscriminatory regulations would be an inadequate substitute. *See Anvar*, 82 F.4th at 11 (remanding for the district court to conduct the appropriate evidentiary analysis); *Block*, 74 F.4th at 414 (same).

For these reasons, I respectfully dissent from Section II of the majority's analysis.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Civ. No. 21-01332

REED DAY AND ALBERT JACOBS, PLAINTIFFS,

v.

BEN HENRY, ET AL., DEFENDANTS

AND

WINE AND SPIRITS WHOLESALERS ASSOCIATION OF ARIZONA, INTERVENOR-DEFENDANT

Filed: August 8, 2023

ORDER

Before the Court are three motions for summary judgment: Plaintiffs Reed Day and Albert Jacobs' ("Plaintiffs") Motion for Summary Judgment (Doc. 38), Defendants Ben Henry, Troy Campbell, and Kris Mayes in their official capacities ("State Defendants") Motion for Summary Judgment (Doc. 43), and Defendant Wine and Spirits Wholesalers Association of Arizona's ("Intervenor-Defendant") Motion for Summary Judgment (Doc. 46). For the following reasons, State-Defendants' and Intervenor-

Defendant's motions for summary judgment are granted and Plaintiffs' Motion for Summary Judgment is denied.

BACKGROUND

Plaintiffs challenge aspects of Arizona's wine regulation scheme as violations of the dormant Commerce Clause.

Arizona uses a system to regulate alcohol sales and distribution known as a "three-tier" system. In a three-tier system, there are three distinct types of licensees that the state regulates: producers, wholesalers, and retailers. This system requires, as the Arizona State Legislature has said, "a separation between manufacturing interests, wholesale interests and retail interests in the production and distribution of spirituous liquor in order to prevent suppliers from dominating local markets through vertical integration and to prevent excessive sales of spirituous liquor produced by overly aggressive marketing techniques." 1991 Ariz. Sess. Laws, Ch. 52, § 1.

As Arizona's system is currently structured, wine imported into the State typically must pass through Arizona wholesalers before reaching retailers, and ultimately consumers. Those wholesalers are subject to a number of regulations, including a requirement to hold alcohol for 24-hours before selling to retailers, periodic inspections, and excise taxes. Wholesalers must buy spirituous liquor directly from a licensed supplier who is the primary source of supply for the brand, i.e., the producers. Wholesalers then sell to licensed retailers. The licensed retailers must have a physical premise in Arizona and must order, purchase, or receive all of their wines from Arizona licensed wholesalers, registered retail agents, or, in limited circumstances, Arizona farm wineries. Retailers may ship wine to consumers directly from their physical premises

and their physical premises are subject to inspection by state officials.

Because a retailer must have a physical premise in the state to be licensed, and the products must be purchased from a producer by an Arizona wholesaler which must hold the alcohol for 24-hours before selling to an Arizona retailer, an out-of-state retailer may not ship directly to consumers. An exception exists for in-state and out-of-state wineries, which may apply for and receive a license to sell and ship limited quantities of the wines that they produce directly to consumers. A.R.S. § 4-203.

The only remaining Plaintiffs in this suit are two individuals who describe themselves as "avid wine drinker[s] and collector[s]" that reside in Arizona. (Doc. 1 ¶¶ 3-4.) They assert that because in-state wine retailers can provide wine directly to consumers by online orders due to their physical presence in Arizona, but out-of-state wine retailers cannot unless they obtain such a presence and otherwise comply, Arizona law violates the dormant Commerce Clause. They ask the Court to enjoin or modify the laws establishing this framework to require that out-of-state retailers be permitted to sell directly to Arizona consumers.

DISCUSSION

An initial challenge with assessing Plaintiffs' claims is that they do not clearly identify the precise laws or regulations that they challenge in this lawsuit. The Court is not certain whether Plaintiffs challenge one law or regulation or many. In their Motion for Summary Judgment, Plaintiffs cite several statutes and regulations under "The Law Being Challenged" (Doc. 38 at 4), nevertheless, they cite

only one provision that they seek to enjoin (or, more accurately, modify) in the "Remedy" section (Doc. 38 at 15). They ask the Court to enjoin the law that requires:

> [a]ll 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. § 4-243.01(B). Plaintiffs add that when enjoining this provision, the Court should "clearly limit the injunction to allow direct shipping by out-of-state retailers, while leaving intact the State's ability to enforce other aspects of its permit requirement." (Doc. 38 at 16.) In response to the Defendants' motions for summary judgment and at oral argument, however, Plaintiffs stated that they challenged only the requirement that retailers must have physical premises in the state in order to directly ship to consumers.

Ultimately, the outcome Plaintiffs hope for—the ability for out-of-state retailers to ship wine to consumers in Arizona—is clear. It does not seem, however, that the Court could accomplish this objective by enjoining any single statute or regulation alone. Regardless of whether the Plaintiffs wish the Court to re-work only one statute of the regulatory program, or make a more comprehensive adjustment, their claims do not survive summary judgment.

I. STANDING

Article III standing is a threshold jurisdictional question. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). The "irreducible constitutional minimum of

standing" has three requirements. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). First, Plaintiffs must demonstrate an injury in fact, a "harm suffered by the plaintiff that is concrete and actual or imminent." *Steel Co.*, 523 U.S. at 103 (internal quotations omitted). Second, Plaintiffs must show causation—"a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Id.* "And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury." *Id.* "The burden of establishing these three elements falls upon the party asserting federal jurisdiction." *Cent. Data Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002). "[A]t the summary judgment stage the plaintiffs need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing elements." *Id.*

In this case, neither party appears to dispute that an injury exists, and other courts have held that in-state residents can properly show an injury when state law prevents them from purchasing wines not available in that state. *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1178 (8th Cir. 2021) ("[Individual plaintiffs] cannot afford the time and expense of traveling to out-of-state retailers to purchase a few bottles of rare wine and personally transport them home. This is alleged economic injury, whatever one might think of the severity of the injury." (internal quotations omitted)).

Whether Plaintiffs sufficiently show Article III standing is at least doubtful, however, because it is difficult to see how their claims are redressable for two reasons. First, because it is unclear which provisions Plaintiffs actually challenge, it is likely that unchallenged provisions may prevent them from obtaining the relief they seek.

And second, if Plaintiffs challenge (albeit, without identifying) all the laws that preclude them from obtaining wine from some out-of-state retailers, it is not clear that the Court could, or in any event, would grant the relief that Plaintiffs request.

Unchallenged Provisions: Arizona's three-tier system for regulating alcohol arises out of many statutes working in concert. The inability for retailers to ship directly to consumers from out of state is a byproduct of the statutes creating the system under which alcohol must move from a producer to a licensed Arizona wholesaler to a licensed Arizona retailer before sale to a consumer. Different statutes establish each of these requirements. *See* A.R.S. § 4-203.04; A.R.S. § 4-243.01; A.R.S. § 4-244(1); A.R.S. § 4-201(A)-(D).

If Plaintiffs challenge any of these statutes individually, it is unlikely that a finding in their favor would redress their injury because other statutes would continue to prevent shipping to consumers from out of state. For example, Plaintiffs assert that the Court should enjoin A.R.S. § 4-243.01(B)—the requirement that alcohol be shipped to an Arizona wholesaler and remain with the wholesaler for at least 24 hours—in a manner that makes it possible for out-of-state retailers to directly ship to consumers. But such a remedy would not solve the Plaintiffs' problem because other statutes still impede Plaintiffs' proposed outcome. The preceding statutory subsection states that it is unlawful for a retailer to order, purchase or receive any spirituous liquor from any source other than an Arizona-licensed wholesaler. A.R.S. § 4-243.01(A)(3). There is no evidence suggesting that the rare wines Plaintiffs seek to order online would be or could be purchased from Arizona wholesalers by out-of-

state retailers. *See Orion Wine Imports, LLC v. Appelsmith*, 837 F. App'x 585, 586 (9th Cir. 2021) ("[G]iven that other provisions of the [liquor laws] that Plaintiffs do not challenge would inflict the same injury by barring the proposed transaction, . . . the connection between Plaintiffs' alleged injury and the challenged provision . . . is too attenuated for Article III standing.")

In response, Plaintiffs instead state that they "challenge Arizona's requirement that wine retailers must be physically located in the state to ship directly to consumers." (Doc. 48 at 11.) Although Plaintiffs do not cite a law or laws for this proposition, State Defendants characterize this challenge as a challenge to A.R.S. § 4-203(J), which requires that licensed retailers ship alcohol directly to consumers only from the (in-state) premises associated with their retail license. This statute still raises the same concern with redressability. Even if the Court enjoined the requirement that alcohol be shipped only from in-state retail premises, out of state retailers would still be unable to comply with other statutory requirements, including the requirement that the wine be shipped first to an Arizona wholesaler, then held for twenty-four hours, then shipped to an Arizona retailer.

Leveling-Down Remedy: To the extent Plaintiffs argue that they seek a remedy that enjoins or modifies all laws impeding the direct shipment of wine from out-of-state retailers, it may solve the unchallenged provisions problem, but it creates a new redressability problem. It is unclear that the Court could or would grant such a remedy when narrower remedies are available; in other words, the Court would likely "level down" in regulation rather than "leveling up."

The Supreme Court has explained that remedies for unconstitutional statutes should be limited to the problem, enjoining "only the statute's unconstitutional applications while leaving the others in force . . . or . . . sever[ing] its problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 321 (2006). The Court has provided three general principles for remedies when "confronting a statute's constitutional flaw": (1) "the Court tries not to nullify more of a legislature's work than is necessary;" (2) "the Court restrains itself from rewriting state law to conform it to constitutional requirements;" and (3) "the touchstone for any decision about remedy is legislative intent." *Id.* (internal quotations omitted).

Here, even if this Court found a constitutional violation in how the statutes work together to prevent online sales and direct shipping from out-of-state retailers to consumers, any constitutional defect could be cured in different ways—some of which might grant Plaintiffs relief, and others of which would not. Plaintiffs identify a number of statutes and regulations which would, apparently, have to be rewritten to provide them relief. Plaintiffs' requested relief would require complete exemption from the three-tier system for out-of-state retailers or would require the Court to rewrite the licensing and regulatory scheme to enable out-of-state retailers to obtain a license. Both options are likely beyond the Legislature's intent and the Court's "constitutional mandate and institutional competence." *Ayotte*, 546 U.S. at 329.

Because "the touchstone for any decision about remedy is legislative intent," and "the Court tries not to nullify more of a legislature's work than is necessary," this Court could create a restrictive, rather than expansive, remedy for a constitutional violation. *See Ayotte*, 546 U.S.

at 321. The Legislature might well prefer this method of curing any potential constitutional infirmity. Under such a scenario, the remedy would be to enjoin online sales and shipping by in-state retailers. This more limited remedy would leave the three-tier system largely intact while eliminating the allegedly unconstitutional disparity between out-of-state and in-state retailers' abilities to directly ship to consumers. This remedy would not, however, provide these Plaintiffs with the relief that they request—access to direct shipment of out-of-state retailers' wines. If the remedy would affect Plaintiffs' abilities to access a wider variety of wines at all, it would likely restrict, rather than enlarge the variety to which they have access by preventing in-state retailers from shipping directly to their homes. Such a result cannot be reasonably seen as redressing Plaintiffs' injuries.

However, the redressability inquiry appears to depend on what relief the Court *could* conceivably grant, rather than the relief it should or would grant. The Ninth Circuit has framed this inquiry as whether the plaintiffs can show that the relief they seek is "within the district court's power to award." *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020). In *Juliana*, for example, the Ninth Circuit held that plaintiffs had no standing to bring a claim for a declaratory and injunctive relief ordering the government to implement a plan to phase out fossil fuel emissions. *Id.* at 1165. The Court found that the plaintiffs' injuries were not redressable because a declaratory judgment or injunction aimed solely at government activity would be insufficient to provide them relief because a declaratory judgment alone would not "suffice to stop catastrophic climate change." *Id.* at 1170. The Court would have to "order, design, supervise, or implement the plaintiffs' requested remedial plan." *Id.* at 1171. Such a remedy

is, according to the Ninth Circuit, "beyond the power of an Article III court." *Id.*

In this case, for the reasons noted above, the Court doubts the extent to which it could properly navigate implementing Plaintiffs' proposed remedies, such as enjoining several statutes not identified, rewriting the regulations to create a licensing scheme, or as proposed at oral argument, commanding the legislature to rewrite the statutes within a particular timeframe. Nevertheless, even assuming the Plaintiffs do have standing because the Court could conceivably provide a remedy that would redress the Plaintiffs' alleged injury, Plaintiffs' claims fail on the merits.

II. MOTIONS FOR SUMMARY JUDGMENT

A. Legal Standard

The parties dispute, to some degree, the relevant standard for a dormant Commerce Clause challenge involving the Twenty-First Amendment. The parties agree, and the Supreme Court's recent case *Tennessee Wine* indicates, that the first step of the inquiry is whether the challenged regulation discriminates against out-of-state economic interests. 139 S. Ct. 2449, 2461 (2019). If the regulation is not discriminatory, there is no dormant Commerce Clause violation. If the regulation is discriminatory, the next step is to examine the law's relation to its purpose. Here, the parties disagree on the standard at the second step.

Plaintiffs advocate for essentially a strict scrutiny standard, contending that the Court should assess whether the law "is narrowly tailored to advance a legitimate local purpose." *Tenn. Wine*, 139 S. Ct. at 2461. Defendants point to a different standard from *Tennessee*

Wine, under which the Court evaluates "whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* at 2474. None of the circuit courts that have addressed challenges like this one after *Tennessee Wine* have held that a strict scrutiny standard is appropriate; they have all endorsed the lesser standard assessing whether the requirement is justified as a public health or safety measure or on some other legitimate nonprotectionist ground. *Lebamoff Enters. Inc. v. Whitmer*, 956 F.3d 863, 871 (6th Cir. 2020); *B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 220 (4th Cir. 2022); *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d at 1183-84. Moreover, in *Tennessee Wine*, the reference to the strict scrutiny standard is in a general discussion of the Court's dormant Commerce Clause cases, while the Court actually applies the lesser standard when analyzing the discriminatory laws at issue. *Id.* ("Recognizing that § 2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens, we ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground."). This demonstrates that strict scrutiny is not appropriate, and the Court will apply the standard adopted by the Supreme Court.

B. Whether the Laws Are Discriminatory

The laws that Plaintiffs challenge are not facially discriminatory, nor are they discriminatory in effect because they apply evenhandedly. Plaintiffs concede that the prohibition on out-of-state retailers from shipping wine directly to consumers "is not written down explicitly in a statute but is deduced from numerous statutes." (Doc. 38

at 4.) Plaintiffs' claim, at its core, challenges the requirement that a retailer have in-state premises in order to obtain a license and must ship wine from those premises. In Plaintiffs' words, they only "challenge Arizona's requirement that wine retailers must be physically located in the state to ship directly to consumers." (Doc. 48 at 11.)

The first question then is whether the challenged regulation discriminates against out of state interests. The Supreme Court defines impermissible discrimination under the dormant Commerce Clause as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald*, 544 U.S 460, 472 (2005). And the Ninth Circuit has emphasized that "the 'differential treatment' must be as between persons or entities who are similarly situated." *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1230 (9th Cir. 2010).

1. Similarly Situated

The premises requirement does not discriminate against similarly situated out-of-state entities. It is not clear that Plaintiffs argue that the regulations are facially discriminatory. Because they say that the ban is "not written down explicitly," it appears that they argue the regulations have a discriminatory effect. To that end, Plaintiffs state that they challenge the fact that "there is no permit available for out-of-state retailers that would allow delivery from their out-of-state premises directly to consumers located in Arizona." (Doc. 48 at 10.) They contrast this with the fact that properly licensed in-state retailers may take online orders from consumers and ship from their licensed retail premises to the consumer's address in Arizona. However, the fact that unlicensed retailers cannot ship to consumers from out of state and licensed retailers

can ship to consumers from in state is a feature of the liquor regulation system in Arizona, not a flaw. The fact that licensed entities have privileges that unlicensed entities do not is the very purpose of a licensing scheme; a party must comply with the burden of getting a license to obtain the benefits of having a license.

Retailers with physical premises in Arizona are subject to Arizona's specific three-tier system and regulations. These include, but are not limited to, on-site liquor inspections, investigation of complaints, covert underage buyer programs, audits and other financial inspections, and investigation of records to determine compliance with Arizona liquor laws. (Doc. 44 at 3-5.) Out-of-state retailers without a physical premise in Arizona are not subject to any of the regulations that apply to Arizona's retailers, and they are not required to obtain alcohol from Arizona wholesalers or wholesalers under Arizona's oversight and regulation.

It is doubtful that retailers subject to all of Arizona's liquor regulations and retailers subject to none of them can be seen as similarly situated. Other courts have recognized that when granting plaintiffs' requested relief would allow the out-of-state entity "dramatically greater rights" than the in-state entity, they are likely not similarly situated. *See Wine Country Gift Bakets.com v. Steen*, 612 F.3d 809, 820 (5th Cir. 2010); *cf. Lebamoff*, 956 F.3d at 873 ("[Licensed] retailers all live with the bitter and sweet of Michigan's three-tier system . . . [Plaintiff] seizes the sweet and wants to take a pass on the bitter."). Here, Plaintiffs request just that. They ask for in-state retailers to remain subject to the state's three-tier system, while exempting out-of-state retailers from the require-

ments. An outcome that would result in such broad disparities between the regulations to which the entities are subject demonstrates that they are not similarly situated.

Any suggestion that *Granholm v. Heald* forecloses this determination fails to recognize that the *Granholm* case addressed a discriminatory exception to the three-tier system, and an exception involving an entirely different tier—producers. In *Granholm*, Plaintiffs challenged Michigan's liquor laws which allowed in-state wineries (producers) to bypass the wholesaler tier and ship directly to consumers, while banning out-of-state wineries from shipping to Michigan consumers. 544 U.S. at 469. Plaintiffs also challenged New York's laws which allowed only local wineries or out-of-state wineries using at least seventy-five percent New York grapes to ship directly to consumers. *Id.* at 470. In that case, in-state wineries were permitted to ship directly to consumers, thus bypassing the wholesaler tier in the system. Out-of-state wineries were not afforded the same exception.

Importantly, the wine that in-state producers were shipping to consumers did not have to go through the state's three-tier system in that case. Therefore, wine made by out-of-state producers, also having not been funneled through the state's three-tier system, can be seen as similarly situated. The Supreme Court stated that the requirements imposed on out-of-state producers was "just an indirect way of subjecting out-of-state wineries, but not local ones, to the three-tier system." *Id.* at 474. *Granholm* thus requires only that an exemption from the three-tier system granted to in-state producers must also be granted to out-of-state producers, because none of them will have been funneled through the three-tier system. Plaintiffs in this case ask for the reverse; they ask that in-state retailers be subject to the three-tier system,

while out-of-state retailers be exempt. *Granholm* does not require such a result.

2. Evenhanded Application

Moreover, Arizona's physical premises requirement applies evenhandedly to in-state and out-of-state retailers. To start, the physical premises requirement does not outright prevent an out-of-state retailer from obtaining a license. Indeed, as Plaintiffs concede, several have. (Doc. 44 at 6; Doc. 50 at 10 (noting that several large out-of-state companies such as Walmart, Sam's Club, and Total Wine have retail licenses and operate retail premises in Arizona, despite being headquartered elsewhere)). Despite the fact that some out-of-state retailers have obtained licenses and may sell and ship wine to Arizona consumers, Plaintiffs contend that some out-of-state retailers may find it onerous to comply or not want to comply with the premises requirement, thus making the requirement discriminatory.

The Second Circuit has held that a nearly identical challenge did not violate the dormant Commerce Clause because New York's "laws evenhandedly regulate the importation and distribution within the state." *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 191 (2d Cir. 2009). It emphasized that while creating specific exceptions to the three-tier system applicable only to in-state producers was discriminatory and protectionist, merely requiring that "all liquor—whether originating in state or out of state—pass through the three-tier system," is not. *Id.* The same is true in this case.

Tennessee Wine demonstrates how a premises requirement is not discriminatory as compared to a durational residency requirement. In that case, Plaintiffs challenged Tennessee's requirement that to obtain a license

to sell alcohol, an individual corporation must demonstrate that they have been a bona fide resident of the state for at least two years. 139 S. Ct. at 2454. There, unlike here, the prerequisites to obtaining a license plainly favored in-state residents. If one was not an in-state resident, she had to change her residency and wait until two years passed to obtain a license. Here, no such prerequisite favoring in-state residents exists. Instead, if an out-of-state company wants to obtain a license to sell wine to consumers, it must comply with the same requirements as companies located in the state, and establish a physical premise in Arizona, from which it will receive, sell, and ship its wine. Likewise, if an in-state company does not have physical retail premises in the state, it may not obtain a license to sell or ship wine to consumers in the state.

Multiple circuit courts have reaffirmed this position after *Tennessee Wine*. In *Sarasota Wine Market*, the Eighth Circuit held that Missouri's licensing requirements, which are substantially similar to the ones at issue here, did not violate the dormant Commerce Clause. 987 F.3d at 1184. It explained that because the state "imposes the same licensing requirements on in-state and out-of-state retailers," it does not discriminate against out of state retailers or wholesalers. *Id.* The Court noted that in *Tennessee Wine*, the Supreme Court "expressly distinguished between the two-year residency requirement at issue and a State's requirement that retail liquor stores be physically located in the state." *Id.* at 1183. And despite recognizing that the requirements for licensure "are likely to impose greater costs than would otherwise be incurred by an out-of-state retailer selling to Missouri consumers," it found no dormant Commerce Clause violation because "the rules governing direct shipments of wine to Missouri consumers apply evenhandedly to all who qualify for a Missouri retailers license." *Id.* at 1183-84; *see also*

Lebamoff, 956 F.3d at 875-76 ("Residents of Indiana are on 'the same footing' as residents of Michigan. To sell alcohol in Michigan, they simply have to play by the Michigan rules—just as they have to do in Indiana. So far, over 1,800 non-residents have gotten Michigan retail licenses. [Plaintiff] can do the same.").

Here, too, there is no discriminatory advantage or exception offered to Arizona corporations. Therefore, Arizona's system does not discriminate against out-of-state interests and thus does not run afoul the dormant Commerce Clause.

C. Legitimate State Interests

However, even if the requirement to establish a physical retail premise in Arizona to obtain a license is discriminatory, the premises requirement is such an essential feature of the three-tier system that it is supported by legitimate, nonprotectionist state interests. For this inquiry, the question is "whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Tenn. Wine*, 139 S. Ct. at 2474. Several courts before and after *Tennessee Wine* have recognized the legitimacy of a state's interest in preserving the three-tier system, which is what Arizona's premises requirement does.

The state offers several reasons for wanting to maintain its three-tier system and prevent direct shipping from unlicensed, out-of-state retailers. These include: (1) the regulation of the quantity of alcohol; (2) regulation of the quality of alcohol; (3) the state's interest in protecting minors; and (4) the state's interest in revenue. For example, the State explains that on-site routine inspections are used to ensure compliance with the law, which Plaintiffs do not dispute. The State also explains that it routinely

inspects the records of Arizona licensed wholesalers to determine if a retailer is in compliance with liquor laws and is purchasing from an appropriate source.

In response, Plaintiffs primarily allege that the State's interests are not legitimate because some other states successfully allow out-of-state retail shipping. Plaintiffs acknowledge that unlicensed and unregulated alcohol sales could pose a threat to public health and safety but appear to argue that the premises requirement is insufficiently related to those purposes because other states can and do allow direct shipping. (Doc. 56 at 9.) This argument misses the fact that "[t]he aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." *Granholm*, 544 U.S. at 484. A determination that the State forfeited its interest in maintaining its three-tier system merely because other states have abandoned aspects of the system or allowed for direct shipping would be inconsistent with each state's ability to regulate alcohol within its borders.

At least three other circuits since *Tennessee Wine* have reaffirmed that requiring physical premises in state is a fundamental aspect of the three-tier system and serves the state's legitimate interests in maintaining that system. *See*, *e.g.*, *Lebamoff*, 956 F.3d at 873 ("Michigan could not maintain a three-tier system, and the public-health interests the system promotes, without barring direct deliveries from outside its borders."); *Sarasota Wine Mkt.*, 987 F.3d at 1183; *B-21 Wines*, 36 F.4th at 229 (concluding that North Carolina's Retail Wine Importation Bar is "justified on the legitimate nonprotectionist ground of preserving North Carolina's three-tier system"). Here, the state has asserted the same interest in preserving its

three-tier system, which has been upheld as "unquestionably legitimate." *Granholm*, 544 U.S. at 489. As several cases addressing the same issue explain, "there is nothing unusual about the three-tier system, about prohibiting direct deliveries from out of state to avoid it, or about allowing in-state retailers to deliver alcohol within the state." *Lebamoff*, 956 F.3d at 872. To open the state up to direct deliveries from retailers without physical premises in the state would "effectively eliminate the role of [Arizona's] wholesalers" and "create a sizeable hole in the three-tier system." *Id.*

In arguing that the state's interests are not legitimate, Plaintiffs focus almost exclusively on theoretical nondiscriminatory approaches that Arizona could take to allow direct wine shipments. To the extent the state is required to show that alternative nondiscriminatory approaches are not reasonably available, it meets that burden here. If the premises requirement is discriminatory, the State demonstrates that no nondiscriminatory alternative is available to maintain its ability to inspect wholesalers, inspect retail premises and books, and ensure alcohol is funneled through a three-tier system. Although Plaintiffs point to other states' approaches or alternatives such as "issu[ing] guidelines for responsible direct shipping" or creating "reciprocal enforcement agreements," these alternatives would not maintain Arizona's interests in inspecting its wholesalers and retailers and ensuring alcohol is funneled through Arizona's three-tier system. (Doc. 48 at 21.) Plaintiffs' proposed alternatives would ask the State to abandon its own ability to conduct inspections in favor of potentially creating a mutual agreement with another state to inspect or enforce violations. This alternative is entirely speculative and largely impairs the State's legitimate interest in its own regulation and enforcement.

Plaintiffs' remaining two challenges to the State's asserted interests likewise fail. First, contrary to Plaintiffs' assertion, the Supreme Court has not rejected physical presence requirements nor found that they are not essential to a three-tiered scheme. In the case Plaintiffs cite for this proposition, *Granholm*, the question was whether New York could require out-of-state wineries to establish offices, warehouses, and distribution operations in the state prior to direct shipping, while exempting in-state wineries from such requirements. 544 U.S. at 474-75. Thus, the Supreme Court's discussion of the physical presence requirement was in the context of determining whether New York's scheme was discriminatory; there, it was discriminatory because in-state wineries did not need to comply with the same requirements imposed on out-of-state wineries. *Id.* In any event, *Granholm* does not stand for the broad-brush assertion that the Supreme Court has rejected physical presence requirements or found them to be nonessential in the three-tiered system. As *Granholm* states, "[s]tates may . . . funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is 'unquestionably legitimate.'" 544 U.S. at 489.

And second, Plaintiffs' argument that Arizona has abandoned the three-tier system for wine specifically by allowing certain wineries to ship directly to consumers is incorrect. Creating an exception is not abandoning the entire system. *See*, *e.g.*, *B-21 Wines*, 36 F.4th at 226 ("[T]here is no single 'one size fits all' three-tier system that a state must either adhere to or abandon entirely."). Moreover, Defendants provide several reasons why the exception at the producer level should not expand to the retailer level. For example, wineries produce their own products and thus exercise quality control over the prod-

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

Therefore, the premises requirement, and its consequent burdens and benefits to retailers who decide whether or not to obtain a license in Arizona, do not violate the dormant Commerce Clause.

CONCLUSION

Accordingly,

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment (Doc. 38) is **DENIED**.

IT IS THEREFORE ORDERED that State Defendants' Motion for Summary Judgment (Doc. 43) is **GRANTED**.

IT IS FURTHER ORDERED that Intervenor-Defendant's Motion for Summary Judgment (Doc. 46) is **GRANTED**.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment accordingly and terminate this action.

Dated this 9th day of August, 2023.

/s/ G. Murray Snow
G. MURRAY SNOW
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-16148

REED DAY; ALBERT JACOBS,
PLAINTIFFS-APPELLANTS

v.

BEN HENRY, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ARIZONA DEPARTMENT OF LIQUOR LICENSES AND CONTROL; ET AL., DEFENDANTS-APPELLEES

AND

WINE AND SPIRITS WHOLESALERS ASSOCIATION OF ARIZONA, INTERVENOR-DEFENDANT-APPELLEE

Filed: March 4, 2025

Before: SMITH, JR., BADE, and FORREST, Circuit Judges.

OPINION

SMITH, Circuit Judge:

Plaintiff-Appellants Reed Day and Albert Jacobs are Arizona residents who desire to ship wine directly to

themselves from retailers who do not maintain in-state premises in Arizona. Arizona's statutory scheme, however, prevents such shipments. As a result, Plaintiffs brought a civil rights action against various Arizona state officials pursuant to 42 U.S.C. § 1983, challenging the statutory scheme, which they claim violates the Commerce Clause. Plaintiffs now appeal the district court's order granting summary judgment to the state officials and an intervenor-defendant. For the reasons explained below, we affirm.

BACKGROUND

Like many states, Arizona utilizes a "three-tier" system to regulate the sale and distribution of alcohol. This system allocates the sale and distribution of alcohol among producers, wholesalers, and retailers. Licensed wholesalers must buy from producers (sometimes called suppliers) and then sell to licensed retailers, who then sell to consumers. The three-tier framework arose because of "tied-house" saloons in the pre-Prohibition era, in which alcohol producers set up saloonkeepers who promised to sell only their products and to meet minimum sales goals. *Lebamoff Enters. Inc. v. Whitmer*, 956 F.3d 863, 867 (6th Cir. 2020). The tied-house system led to excessive alcohol consumption, and after the Eighteenth Amendment was repealed, states used the significant authority given to them by § 2 of the Twenty-first Amendment to create strict boundaries between producers and consumers of alcohol. *Id.* at 867-68.

Arizona's current statutory scheme subjects all three tiers of alcohol sales and distribution to a series of complex—and overlapping—statutes and regulations. For example, all liquor shipped into Arizona must be invoiced to the wholesaler by the supplier and must be held by the wholesaler for at least twenty-four hours. Ariz. Rev.

Stat. § 4-243.01(B). Meanwhile, retailers may only buy from wholesalers, registered retail agents, or a handful of other clearly defined sources. *Id.* § 4-243.01(A)(3). Retailers must hold their license through an Arizona resident (or qualifying corporation) and must have a physical premise managed by an Arizona resident. *Id.* § 4-202(A), (C). Only licensed retailers may take orders off-site (*e.g.*, by phone or internet) and ship directly to consumers within the state. *Id.* § 4-203(J). Knowingly shipping wine directly to a purchaser in Arizona without the proper retail license is a class 2 misdemeanor. *Id.* § 4-203.04(H)(1).

As a result of these—and other—provisions, retailers who do not maintain premises in Arizona cannot ship directly to consumers within the state, but licensed retailers with in-state premises may do so. A limited exception exists for out-of-state wineries, which may receive a license to ship small quantities of their product directly to consumers. *Id.* § 4-203.04(F). The "physical premise" or "presence" requirement, as this restriction is sometimes called, has been the subject of increasing litigation in recent years, with plaintiffs across a variety of states challenging similar requirements as a violation of the dormant Commerce Clause that cannot be otherwise justified by § 2 of the Twenty-first Amendment.

PROCEDURAL BACKGROUND

Plaintiffs are Arizona residents and self-described "avid wine drinker[s]" who want to have wine shipped directly to them from retailers who do not have in-state premises. Following in the footsteps of petitioners in other states, Plaintiffs sued Defendants—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

pursuant to 42 U.S.C. § 1983. Plaintiffs sought a declaratory judgment that the ban on direct shipping from retailers without in-state premises is unconstitutional and an injunction barring Defendants from enforcing the laws that prohibit retailers without in-state premises from shipping wine to Arizona consumers. The Wine and Spirits Wholesalers Association of Arizona later joined as Intervenor-Defendant.

On August 12, 2022, Plaintiffs and Defendants filed cross-motions for summary judgment. Plaintiffs argued that because no license exists that would give a retailer without in-state premises shipping privileges, Arizona's laws discriminate against out-of-state interests in violation of the Commerce Clause. Plaintiffs then argued that these discriminatory laws could not be otherwise upheld as serving the state's legitimate interests in public health and safety because Arizona did not prove that it could not serve those interests through nondiscriminatory alternatives. In contrast, Defendants argued that the relevant laws are not discriminatory because they treat in-state and out-of-state prospective licensees the same and that, regardless, the interests served by the regulatory scheme are "more than sufficient" to sustain the laws. Intervenor-Defendant filed its own motion for summary judgment on September 9, 2022, echoing Defendants' arguments and explaining the importance of Arizona's presence requirement to the functioning of the state's three-tier scheme.

On August 9, 2023, the district court granted Defendants' and Intervenor-Defendant's motions for summary judgment and denied Plaintiffs' motion. *Day v. Henry*, 686 F. Supp. 3d 887 (D. Ariz. 2023). The district court reasoned that it was unlikely that Plaintiffs had standing and that, even if they did, their claims still failed on the merits. *Id.* at 892, 894. The district court agreed with Defendants

and Intervenor-Defendant that the physical premise requirement is not discriminatory and that, regardless, this requirement is essential to Arizona's three-tier system and is supported by legitimate nonprotectionist state interests. *Id* at 897-98. On August 28, 2023, Plaintiffs timely appealed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the standing issue de novo. *Hall v. Norton*, 266 F.3d 969, 975 (9th Cir. 2001). We also review de novo the district court's summary judgment order. *2-Bar Ranch Ltd. P'ship v. United States Forest Serv.*, 996 F.3d 984, 990 (9th Cir. 2021).

ANALYSIS

I. PLAINTIFFS HAVE MET THE REQUIREMENTS FOR ARTICLE III STANDING.

As a threshold matter, Plaintiffs have met the requirements for Article III standing. These requirements are threefold: a plaintiff must have (1) suffered an injury-in-fact that is (2) traceable to the defendant's challenged conduct, and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). If "a favorable judicial decision would not require the defendant to redress the plaintiff's claimed injury, the plaintiff cannot demonstrate redressability unless she adduces facts to show that the defendant or a third party are nonetheless likely to provide redress as a result of the decision." *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018) (citations omitted). Plaintiffs must also show that the relief they seek is "within the district court's power to award." *Juliana v. United States*, 947 F.3d 1159, 1170 (9th Cir. 2020).

The district court found that it was "doubtful" that Plaintiffs could show standing because of two distinct problems with the element of redressability. *Day*, 686 F. Supp. 3d at 892. First, because it was "unclear which provisions Plaintiffs actually challenge," it was likely unchallenged provisions would still block their desired relief. *Id.* A plaintiff cannot meet redressability if he or she only challenges part of a regulatory scheme and other uncontested laws would still prevent relief. *See Nuclear Info. & Res. Serv. v. Nuclear Regul. Comm'n*, 457 F.3d 941, 955 (9th Cir. 2006). Second, the district court found that it was not clear "that the [c]ourt could, or in any event, would grant the relief that Plaintiffs request," which included enjoining unidentified statutes, rewriting the regulations, or commanding the legislature to redo the licensing scheme. *Day*, 686 F. Supp. 3d at 892, 894. The district court rejected the idea of "leveling down," in which it could cure the constitutional issue by enjoining retailers with in-state premises from shipping to Arizona consumers (as opposed to "leveling up" by extending shipping rights to all retailers), because doing so would "not . . . provide these Plaintiffs with the relief that they request." *Id.* at 893.

We disagree with the district court and find that Plaintiffs have met the requirements for standing. Standing is a threshold consideration that must be determined before considering the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). Notably, a plaintiff satisfies redressability "when he shows that a favorable decision will relieve a discrete injury to himself," not that "a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982). Moreover, a district court is not limited to a plaintiff's proposal and instead "may enter any injunction it deems appropriate, so long as the injunction is 'no more burdensome to the defendant

than necessary to provide complete relief to the plaintiffs.'" *Kirola v. City and Cnty. of San Francisco*, 860 F.3d 1164, 1176 (9th Cir. 2017) (quoting *United States v. AMC Ent., Inc.*, 549 F.3d 760, 775 (9th Cir. 2008)).

As a preliminary matter, Plaintiffs did challenge the relevant laws, routinely listing in their complaint and briefing the specific statutes they were challenging. Therefore, Plaintiffs' claims do not possess the fatal flaw of failing to identify independent provisions that would still block relief should the court enjoin only the challenged statutes. *See Nuclear Info. & Res. Serv.*, 457 F.3d at 955. Instead, what Plaintiffs inconsistently identified was their requested *relief*: They routinely changed which particular statutes they wanted enjoined and later agreed with the district court that they wanted the court to direct the legislature to "fix" the unconstitutional laws generally. But, as noted above, the district court was not limited to Plaintiffs' suggestions and had the authority to create its own remedy. *See Sharp v. Weston*, 233 F.3d 1166, 1173 (9th Cir. 2000) ("Once a constitutional violation has been found, a district court has broad powers to fashion a remedy."). Redressability is meant only to be "a constitutional minimum, depending on the relief that federal courts are *capable* of granting." *Kirola*, 860 F.3d at 1176.

Here, the district court was capable of granting at least some relief. For example, the district court could have enjoined the enforcement of the statutory scheme as applied to all liquor retailers and wholesalers inside *and* outside of Arizona. This solution would negate the Commerce Clause issue by eliminating enforcement of the allegedly discriminatory laws altogether.[1] Although such an

[1] Intervenor-Defendant protests that such a "leveling up" would contravene the Arizona Legislature's intent to "retain the current three-tier" system. 2006 Ariz. Sess. Laws 1098. Any such restraint

injunction might be broad, it is not the kind of relief that is outside the power of Article III courts under *Juliana*. *See Johnson v. City of Grants Pass*, 72 F.4th 868, 882 (9th Cir. 2023) (explaining that enjoining the enforcement of a few municipal ordinances "cannot credibly be compared to an injunction seeking to require the federal government to 'phase out fossil fuel emissions and draw down excess atmospheric CO2'") (quoting *Juliana*, 947 F.3d at 1164-65), *rev'd on other grounds*, *City of Grants Pass, Oregon v. Johnson*, 603 U.S. 520 (2024). Therefore, because the district court was capable of granting at least some relief, and regardless of whether that relief—or any other possible relief—might ultimately prove appropriate on the merits, the redressability requirement of standing has been met. *See Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50, 63 (9th Cir. 2024) (stating that "redressability should not be conflated with the merits").

II. ARIZONA'S PHYSICAL PRESENCE REQUIREMENT IS NOT DISCRIMINATORY.

Plaintiffs' suit focuses on the tension between two constitutional provisions: § 2 of the Twenty-first Amendment and the Commerce Clause. In 1920, the Eighteenth Amendment became effective, ushering in Prohibition by banning the manufacture, sale, or transportation of liquor. U.S. Const. amend. XVIII § 1. Thirteen years later, the country changed course and ratified the Twenty-first Amendment, repealing the Eighteenth Amendment. U.S. Const. amend. XXI § 1. But the Twenty-first Amendment "did not return the Constitution to its pre-1919 form."

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would be a merits determination about the appropriate remedy, not an Article III constraint on the district court's power. To hold otherwise would allow states to litigation-proof any regulatory scheme by including "level-down" provisions to defeat standing.

Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 853 (7th Cir. 2000). Rather, while § 1 repealed the Eighteenth Amendment, § 2 added new language clarifying that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI § 2. This addition was modeled on pre-Prohibition legislation that was intended to "give each State a measure of regulatory authority over the importation of alcohol." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 525, 528 (2019). The wording used in this legislation—and later in § 2—was framed "not as a measure conferring power on the States but as one prohibiting conduct that violated state law." *Id.* at 526.

Over time, the broad language of § 2 has come into conflict with other parts of the Constitution, most notably the Commerce Clause, which reserves for Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. 1, § 8, cl. 3. The "negative" reading of this clause—known as the "dormant Commerce Clause"—prevents states from adopting protectionist measures that unduly restrict interstate commerce. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 368-69 (2023). Although the Supreme Court initially treated § 2 as functionally overriding other constitutional provisions, including the Commerce Clause, it eventually walked back that interpretation. *Tenn. Wine*, 588 U.S. at 529-30. Instead, the Supreme Court now finds that state laws that violate other parts of the Constitution are not necessarily saved by the Twenty-first Amendment. *See Granholm v. Heald*, 544 U.S. 460, 486-87 (2005). Regarding the Commerce Clause in particular, the Court has found that § 2 does not abrogate Congress's Commerce

Clause powers and that state regulation of alcohol is limited by the Clause's nondiscrimination principle. *Id.* at 487.

In *Tennessee Wine*, the Supreme Court set out a two-part test to manage the ongoing tension between § 2 and the Commerce Clause. *See B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 222 (4th Cir. 2022). First, when a plaintiff challenges the constitutionality of state liquor regulations pursuant to the Commerce Clause, the court must address whether the challenged statutory scheme is discriminatory. *Tenn. Wine*, 588 U.S. at 539. If the laws are not discriminatory, then the scheme is constitutional, and the court need not proceed to the second step. However, if the laws *are* discriminatory, the court then asks "whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* If so, the scheme is constitutional despite its discriminatory nature.

There are three ways that a statutory scheme can discriminate against out-of-state interests: facially, purposefully, or in practical effect. *See Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009). The first step in analyzing any law under the dormant Commerce Clause is "to determine whether it 'regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce.'" *Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or.*, 511 U.S. 93, 99 (1994) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). Discrimination means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* This differential treatment must be "as between persons or entities who are similarly situated." *See Black Star Farms LLC v. Oliver*, 600 F.3d 1225,

1230 (9th Cir. 2010). The party challenging the scheme bears the burden of showing discrimination. *Id.*

Plaintiffs urge us to find at the first step of the *Tennessee Wine* test that Arizona's laws improperly discriminate against interstate commerce. First, Plaintiffs argue that *Granholm* and *Tennessee Wine*, in which the Supreme Court found various state wine laws to be discriminatory, necessarily compel a similar outcome here. Second, Plaintiffs point to data, noting that e-commerce constitutes twenty percent of all retail sales generally and arguing that Arizona "gives its own wine retailers exclusive access" to that market, which is the kind of "economic protectionism" the Commerce Clause prohibits. Plaintiffs also cite data showing that Arizona wine stores carry approximately fifteen percent of the wines available nationally and that foreign, old, and rare wines are readily available in other states but not in Arizona, and use this data to argue that depriving a citizen of the right "to have access to the markets of other States on equal terms" is also a violation of the Commerce Clause under *Granholm*.

In response, Defendants argue that Arizona's laws are not discriminatory because retailers from any state are free to obtain licenses. They argue that although obtaining a license requires an in-state storefront, an Arizona resident to manage the store, and that the license be held through a resident, the fact that the company need not be a resident, owned by a resident, formed under Arizona law, or be present a minimum amount of time—plus the fact that Arizona companies and non-Arizona companies have the same privileges once licensed—means the Commerce Clause is not implicated. Defendants also note that Total Wine, a company headquartered in Maryland, is an Arizona-licensed retailer that maintains in-state stores and buys products from Arizona-licensed wholesalers,

and therefore can directly ship to Arizona consumers. Defendants argue that unlike a durational residency requirement, a physical premise requirement is not a "per se burden" on out-of-state companies because the storefront requirement relies on a company's resources and business model, not its citizenship or residency.

The district court agreed with Defendants, finding that there was no discrimination because Arizona's presence requirement "applies evenhandedly to in-state and out-of-state retailers." *Day*, 686 F. Supp. 3d at 896. The district court noted that the presence requirement does not outright prevent an out-of-state retailer from obtaining a license, pointing out that several large companies such as Walmart, Sam's Club, and Total Wine had acquired licenses and opened retail premises in Arizona even though they are headquartered elsewhere. *Id.* Unlike in *Tennessee Wine*, in which a strict two-year durational residency requirement "plainly favored in-state residents," the district court found that here, "no such prerequisite favoring in-state residents exists." *Id.* at 897. Instead, if an out-of-state company wants to sell wine to consumers in Arizona, it needs to comply with the same requirements as in-state companies; Arizona companies are just as burdened by the physical premise requirement as out-of-state companies. *Id.*

We conclude that Plaintiffs have not met their burden of showing that the liquor laws at issue here are discriminatory. Arizona's laws apply even-handedly to all wine retailers, no matter whether that retailer is headquartered, incorporated, or otherwise based in another state. While Plaintiffs claim that Arizona "directly discriminates" against out-of-state retailers because it "issues licenses to in-state retailers that permit them to sell wine online and ship it to consumers" in Arizona but "will not issue similar

licenses or give similar shipping privileges to out-of-state retailers," this argument distorts the issue. Arizona gives *licensed* retailers the privilege of directly shipping to customers. The requirement that a retailer establish a physical premise in Arizona that is managed by an Arizona resident to obtain a license applies to all retailers, not just those based in another state. There is no clear-cut "in-state" and "out-of-state" divide in the manner that Plaintiffs characterize the issue.

Furthermore, neither *Granholm* nor *Tennessee Wine* prohibit Arizona from implementing a physical premise requirement as a matter of law. Plaintiffs rely heavily on language from *Granholm* that 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 (internal quotation marks and citation omitted). But *Granholm* made those comments in the context of reviewing a New York statutory scheme that created a discriminatory *exception* to the three-tier scheme. *See id.* As the Second Circuit explained in a substantially similar case to this one, "*Granholm* validates evenhanded state policies regulating the importation and distribution of alcoholic beverages under the Twenty-first Amendment. It is only where states create discriminatory exceptions to the three-tier system . . . that their laws are subject to invalidation based on the Commerce Clause." *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2d Cir. 2009). Like the Second Circuit, we decline to construe the language of *Granholm* to reach the circumstances of this case.

Plaintiffs also rely on *Tennessee Wine*, but that case similarly does not mandate a finding of discrimination here. In *Tennessee Wine*, the Supreme Court struck down Tennessee's durational residency requirement, which was

so "onerous" as to be expressly discriminatory. 588 U.S. at 511. Under Tennessee law, individuals had to be Tennessee residents for two years before they could obtain a liquor retail license, and the "extraordinarily restrictive" rules for corporations meant a corporation could not obtain a retail license unless all its officers, directors, and capital stock owners satisfied the individual residency requirement. *Id.* Here, there is no durational residency requirement: Arizona requires that a physical premise be managed, and the retail license held, by an Arizona resident but there is no durational aspect, and the residency requirement does not apply to the owners or operators of the business. Moreover, Arizona's premise requirement is not so "onerous" as to be expressly discriminatory. As the district court noted, out-of-state businesses can (and do) obtain retail licenses in Arizona. *Day*, 686 F. Supp. 3d at 896. For example, Total Wine, which is owned by residents of Maryland, was one of the parties involved in *Tennessee Wine* because of difficulties it had obtaining a retail license in Tennessee. 588 U.S. at 512. In contrast, Total Wine already owns and operates stores in Arizona. *Day*, 686 F. Supp. 3d at 896.

Indeed, the fact that out-of-state businesses possess Arizona retail licenses and have obtained direct shipping privileges supports the conclusion that Arizona's laws do not have a discriminatory effect in practice. As Defendants observe, setting up a physical storefront in Arizona is not a "per se burden on out-of-state companies and per se benefit to in-state companies" because a retailer's ability to comply with the physical premise requirement is based in large part on a company's resources and business model, not its citizenship or residency. A major national retailer like Total Wine undoubtedly devotes a much smaller portion of its resources to setting up a physical

storefront in Arizona than a smaller business incorporated in Arizona with less access to capital. And although Plaintiffs argue that the issue is not "whether an out-of-state firm could move to Arizona and open a liquor store" but whether "Arizona can *require* them" to do so, they are mistaken. First, Plaintiffs again misstate the statutory requirements: firms do not have to "move" to Arizona to get licensed, they merely have to open a physical store. Second, as the Supreme Court recently emphasized, "[c]ompanies that choose to sell products in various States must normally comply with the laws of those various States." *Nat'l Pork Producers Council*, 598 U.S. at 364.

The burden is on the Plaintiffs to show that, even though some businesses have obtained Arizona retail licenses, Arizona's laws are nonetheless still discriminatory in practice. *See Black Star Farms LLC*, 600 F.3d at 1230. They have not met this burden. Rather, Plaintiffs make the conclusory allegation that "[i]t would be economically prohibitive for a retailer to set up separate operations in multiple states . . . and impossible for it to comply with multiple state laws, each requiring it to buy its wine only from wholesalers in that state." However, in neither the briefs nor the record do they address that out-of-state businesses have successfully obtained Arizona retail licenses. The record merely indicates that, at best, some other out-of-state retailers (such as K&L Wine Merchants) have chosen not to obtain Arizona retail licenses. That some retailers have chosen not to establish physical premises in Arizona, however, is insufficient to demonstrate that the scheme as a whole has a discriminatory effect.

Otherwise, the record includes some evidence demonstrating that there might be an issue of fact as to (1) whether Arizona's laws are necessary to protect public

health and safety, and (2) the effect of the physical premise requirement on consumer choice. But the issue of public health and safety is not relevant to whether Arizona's laws are discriminatory, i.e., the first part of the *Tennessee Wine* test.[2] And the fact that Arizona's laws limit the availability of certain wines within the state because those wines are currently only offered elsewhere is not sufficient on its own, absent any specific prohibitions on the importation of certain wines, to establish a dormant Commerce Clause violation. *See Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1145, 1155 (9th Cir. 2012) (holding, in a dormant Commerce Clause challenge to Cal-

[2] Circuits have come to conflicting conclusions as to whether, at the second part of the *Tennessee Wine* test, a presence requirement must be supported by evidence that it advances the goals of the Twenty-first Amendment or, instead, is justified as a necessary part of the "unquestionably legitimate" three-tier system. *Compare Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1183-84 (8th Cir. 2021) (stating that "we should be no more invasive of the 'unquestionably legitimate' three-tiered scheme than the Supreme Court has mandated"); *B-21 Wines, Inc.*, 36 F.4th at 229 (holding that North Carolina's physical premise requirement was "justified on the legitimate nonprotectionist ground of preserving North Carolina's three-tier system"); *and Arnold's Wines, Inc.*, 571 F.3d at 190 (stating that the challenge to New York's physical premise requirement was "a frontal attack on the constitutionality of the three-tier system itself" in contravention of *Granholm*); *with Anvar v. Dwyer*, 82 F.4th 1, 11 (1st Cir. 2023) (holding that Rhode Island's physical premise requirement "must be supported by 'concrete evidence' demonstrating that its predominant effect advances the goals of the Twenty-first Amendment"); *and Block v. Canepa*, 74 F.4th 400, 414 (6th Cir. 2023) (holding that the district court "should have considered" how the plaintiffs' evidence that Ohio's physical premise requirement promotes protectionism compares to the defendants' evidence that the restriction promotes public health). Because we find that Arizona's laws are not discriminatory, we need not address the issue. *See Tenn. Wine*, 588 U.S. at 539.

ifornia laws preventing opticians from offering prescription eyewear at the same location in which examinations are conducted, that there was no significant burden on interstate commerce in part because the plaintiffs had "not produced evidence that the challenged laws interfere with the flow of eyewear into California; any optician, optometrist, or ophthalmologist remains free to import eyewear originating anywhere into California and sell it there").

Plaintiffs want to obtain wine, over the phone or via the internet, from a retailer in any state and have it delivered directly to their home. That is an understandable desire. But "the dormant Commerce Clause does not . . . guarantee Plaintiffs their preferred method of operation." *Id.* at 1151. Instead, at summary judgment, the question we must examine is "whether the *record* adduced by [Plaintiffs] was sufficient to support a verdict in [their] favor to the effect that this facially neutral and even-handed scheme does have such a prohibited discriminatory effect." *Black Star Farms LLC*, 600 F.3d at 1231. Plaintiffs have not met their burden of either demonstrating that Arizona's laws are not neutral or that they substantially burden interstate commerce in practice. Therefore, Plaintiffs have not sufficiently demonstrated that Arizona's alcohol laws violate the dormant Commerce Clause.

Finally, as several other courts have observed, if the kind of laws at issue here were found to be discriminatory, then *all* laws relying on the authority of § 2 would likely be discriminatory. *See, e.g.*, *Bridenbaugh*, 227 F.3d at 853 (stating that "[*e*]*very* use of § 2 could be called 'discriminatory' in the sense that plaintiffs use that term, because every statute limiting importation leaves intrastate commerce unaffected"); *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1184 (8th Cir. 2021) (noting that Missouri

imposed the same physical premise requirements on in-state and out-of-state retailers and so "[v]iewed from this perspective, laws establishing a three-tiered distribution system may be economically and socially anachronistic, but they do not discriminate against out-of-state retailers and wholesalers"). The effect of the presence requirement is simply to "mandate[] that both in-state and out-of-state liquor pass through the same three-tier system before ultimate delivery to the consumer." *Arnold's Wines, Inc.*, 571 F.3d at 191. To find this kind of basic importation restriction discriminatory would therefore render § 2 "a dead letter." *Bridenbaugh*, 227 F.3d at 853. The Supreme Court has not yet struck such a blow to § 2, and neither do we.

CONCLUSION

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

FORREST, Circuit Judge, concurring in part and dissenting in part.

I agree that Plaintiffs have standing to challenge Arizona's restrictions that allow only in-state retailers to ship wine to Arizona consumers, and therefore I join Section I of the majority's analysis. But because Arizona's law is discriminatory, I respectfully dissent from the majority's merits analysis under *Tennessee Wine & Spirits Retailers Association v. Thomas*, 588 U.S. 504 (2019), in Section II. I would remand for the district court to conduct the required evidentiary inquiry into whether Arizona's discriminatory regulations may be justified on legitimate, non-protectionist grounds.

TENNESSEE WINE ANALYSIS

As the majority explains, the Supreme Court has developed a two-step framework to reconcile the apparent tension between § 2 of the Twenty-first Amendment and the dormant Commerce Clause. *See* Maj. Op. 12-13. We apply normal Commerce Clause principles at the first step, finding suspect any state regulation that discriminates against interstate commerce. *See Tennessee Wine*, 588 U.S. at 533, 539. A finding of discrimination is typically fatal. *Id.* at 539. But the Twenty-first Amendment gives states some leeway when regulating alcohol. *Id.* If the state provides concrete evidence that its discriminatory regime advances public health, safety, or another legitimate non-protectionist interest that could not be served by nondiscriminatory measures, it may continue to enforce its discriminatory regulations. *Id.* at 539-40.

I. STEP ONE: DISCRIMINATION

The majority holds that Plaintiffs' challenge fails at *Tennessee Wine*'s first step because Arizona's shipping

restriction does not discriminate against interstate commerce. The thinking is that the restriction distinguishes only between licensed and unlicensed retailers, not between residents and nonresidents. There is no guarantee that an in-state retailer will have a brick-and-mortar presence and an Arizona manager, and thus be eligible for a license. And out-of-state retailers can obtain the proper license. All they have to do is open a storefront in Arizona and hire an Arizonan to manage the store and hold the license. With respect, that view of interstate commercial discrimination defies both precedent and common sense.

If I said I would only hire clerks who had studied in my alma mater's law library, I could not maintain that I have no hiring preference for University of Idaho students. Sure, a Harvard student could fly to Spokane, drive to Moscow, read a few cases in the library, and then apply. Likewise, there is no guarantee that any given University of Idaho student has studied in the law library. But that is not the point. I have plainly adopted a preference for University of Idaho students and discriminated against all others.

The Supreme Court has never allowed such easy workarounds to the Commerce Clause's antidiscrimination command. Take *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). Madison allowed the sale of pasteurized milk only if it was bottled within five miles of city limits, and all other milk only if it was sourced from within twenty-five miles. *Id.* at 350-51. An Illinois distributor had no difficulty convincing the Court that the ordinance "plainly discriminate[d] against interstate commerce." *Id.* at 354. And that is because the state had "erect[ed] an economic barrier" foreclosing "competition from without the State." *Id.* There is no indication that the Court would have reached a different decision had it considered that

the Illinois corporation could have purchased a Madison dairy and hired some industrious Madisonian milkers to gain access to that market.

More to the point, the Supreme Court has rejected precisely the argument that the majority accepts here. In *Granholm v. Heald*, the Court reviewed a licensing scheme that allowed out-of-state wineries to ship wine directly to consumers only if they opened an in-state branch office and warehouse. 544 U.S. 460, 474-75 (2005). The Court concluded that the "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.'" *Id.* at 475 (quoting *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963)).

The majority draws too fine a line by looking only to a retailer's state of incorporation. *Granholm* did not define residency based on legal formalities. Rather, it found that New York would require an out-of-state firm to "become a resident" if the firm were forced to establish an in-state presence to obtain equal access to the New York market. *Id.* At bottom, Arizona allows only those retailers willing to set up shop in-state to ship wine to Arizonans. That type of "economic isolationism" is "facially discriminatory, in part because it tend[s] 'to discourage domestic corporations from plying their trades in interstate commerce.'" *Camps Newfound/Owatonna Inc. v. Town of Harrison*, 520 U.S. 564, 579 (1997) (quoting *Fulton Corp. v. Faulkner*, 516 U.S. 323, 333 (1996)). The majority's definition of neutral regulations—looking only to where a retailer "is headquartered, incorporated, or otherwise based," Maj. Op. 16—would allow precisely the "economic Balkanization" that the dormant Commerce Clause seeks to avoid. *See Granholm*, 544 U.S. at 472 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)).

The majority's attempt to distinguish *Granholm* is unavailing, at least at this stage in the analysis. It holds that *Granholm* applies only to exceptions to a state's three-tier scheme, and by implication, that Plaintiffs' challenge is to an integral part of Arizona's three-tier scheme. *See* Maj. Op. 16-17. A law's relationship to the three-tier system, though, is at most relevant at the second step of the *Tennessee Wine* analysis. *See* 588 U.S. at 535. It has no bearing on whether a law is discriminatory. *See id.*; *Granholm*, 544 U.S. at 476; *see also B-21 Wines, Inc. v. Bauer*, 36 F.4th 214, 222-23, 227-28 (4th Cir. 2022) (considering the law's centrality to the three-tier system at step two after finding it discriminatory at step one).

As to the majority's discussion of *Tennessee Wine*, it is true that Tennessee implemented a more egregious two-year waiting period before new state residents could obtain a retail license, 588 U.S. at 504. But nowhere did the Supreme Court purport to establish that scheme as the floor of unconstitutionality. A regulatory regime like Arizona's may be slightly less problematic but discriminatory all the same.

Ultimately, we are faced with much the same licensing scheme and arguments that the Fourth Circuit confronted in *B21 Wines*. That court acknowledged

> that out-of-state wine retailers can obtain a permit to ship their product to North Carolina residents, provided, inter alia, that those retailers are managed or owned by a North Carolina resident, have in-state premises, and buy their product from an in-state wholesaler. But that prospect does not eliminate the statutorily mandated differential treatment.

Id. at 223 n. 5 (citing *Granholm*, 544 U.S. at 474-75). Whatever complexities and disagreements there may

have been at step two of the *Tennessee Wine* framework, *compare id.* at 227-29, *with id.* at 232-38 (Wilkinson, J., dissenting), the Fourth Circuit had no difficulty finding North Carolina's scheme discriminatory at step one. Neither should we.

II. STEP TWO: LEGITIMATE REGULATORY BASIS

Because Arizona's licensing scheme is discriminatory, it would be invalid if applied to any product other than alcohol. *See Granholm*, 544 U.S. at 476; *Tennessee Wine*, 588 U.S. at 539. But § 2 of the Twenty-first Amendment may yet come to Arizona's rescue. Beyond repealing Prohibition, that Amendment preserved states' authority to regulate alcohol by prohibiting "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof." U.S. Const. amend. XXI § 2. Thus, notwithstanding the dormant Commerce Clause, a discriminatory regulation on alcohol is permissible if it is "justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Tennessee Wine*, 588 U.S. at 539. However, "[w]here the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by § 2." *Id.* at 539-40. Not only must the ends be legitimate, but a State cannot employ discriminatory means unless "nondiscriminatory alternatives would be insufficient to further [its] interests." *Id.* at 540. Arizona must bring "concrete evidence" to the means-ends inquiry at *Tennessee Wine*'s second step; "mere speculation" and "unsupported assertions" will not do. *Id.* at 539-40 (quoting *Granholm*, 544 U.S. at 490, 492).

Some circuits hold that regulations essential to a state's three-tier system, including physical presence requirements, are per se legitimate. *See B-21 Wines*, 36

F.4th at 227-29; *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1180-84 (8th Cir. 2021); *see also* Maj. Op. 19-20 n.2 (collecting cases in the circuit split). Arizona would have us join them. I would not.

Courts that have adopted the per se validity rule for essential components of three-tier systems have grabbed at language in *Granholm* and *Tennessee Wine* calling that system "unquestionably legitimate." *See, e.g.*, *B-21*, 36 F.4th at 227 (quoting *Granholm*, 544 U.S. at 489) (citing *Tennessee Wine*, 588 U.S. at 534). But if *Tennessee Wine* meant to create a carveout to its usual rule that states must produce concrete evidence that discriminatory regulations serve legitimate interests, it picked an exceedingly odd way to do so.

Tennessee Wine chastised the plaintiffs for "read[ing] far too much into *Granholm*'s discussion of the three-tiered model," particularly in a case that did not concern "an essential feature of a three-tiered scheme." 588 U.S. at 535. Fresh off the Court's warning against overreading its discussions of the three-tier model, other circuits have read *Tennessee Wine*'s discussion of this model to covertly create a new step two in the analysis by negative inference. *See B-21 Wines*, 36 F.4th at 234 (Wilkinson, J., dissenting). First, we decide if the law is discriminatory. Then we would decide if it is essential to the three-tier system. Only if we answer "yes" to the former and "no" to the latter would we reach the second (now third) part of the *Tennessee Wine* inquiry and examine whether concrete evidence shows that the regulation advances legitimate health or safety interests. *See, e.g.*, *Sarasota Wine*, 987 F.3d at 1183-84 (skipping "evidentiary weighing" for physical premise requirements that are essential to the three-tier system).

Rather than read that middle question into the Supreme Court's test, I would conduct the typical step-two analysis. Given the Supreme Court's flattering descriptions of the three-tier scheme, *e.g. Tennessee Wine*, 588 U.S. at 534-35, a regulation's central place in such a scheme may be powerful evidence of its legitimacy. But the three-tier system is ultimately a means to promote the public welfare, not an end in itself. The inquiry remains whether, based on "concrete evidence" rather than "speculation," a regulation promotes public health, safety, or another non-protectionist goal in a way that a nondiscriminatory regulation could not. *Id.* at 539-40; *accord Anvar v. Dwyer*, 82 F.4th 1, 9-11 (1st Cir. 2023); *Block v. Canepa*, 74 F.4th 400, 412-14 (6th Cir. 2023).

Here, the district court bypassed the requisite evidentiary weighing and relied on the regulations' perceived centrality to Arizona's three-tier system. Accordingly, I would remand for the district court to determine whether concrete evidence supports Arizona's contentions that limiting direct shipment privileges to retailers with in-state storefronts and Arizona managers advances the state's legitimate health and safety goals, and that nondiscriminatory regulations would be an inadequate substitute. *See Anvar*, 82 F.4th at 11 (remanding for the district court to conduct the appropriate evidentiary analysis); *Block*, 74 F.4th at 414 (same).

For these reasons, I respectfully dissent from Section II of the majority's analysis.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-16148

REED DAY; ALBERT JACOBS,
PLAINTIFFS-APPELLANTS

v.

BEN HENRY, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ARIZONA DEPARTMENT OF LIQUOR LICENSES AND CONTROL; TROY CAMPBELL, CHAIR, ARIZONA STATE LIQUOR BOARD, IN THEIR OFFICIAL CAPACITIES; KRIS MAYES, IN HER OFFICIAL CAPACITY AS ARIZONA ATTORNEY GENERAL, DEFENDANTS-APPELLEES

AND

WINE AND SPIRITS WHOLESALERS ASSOCIATION OF ARIZONA, INTERVENOR-DEFENDANT-APPELLEE

Filed: October 1, 2025

Before: SMITH, JR., BADE, and FORREST, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

Judge Forrest would grant the petition for panel rehearing. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.