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13 UNITED STATES DISTRICT COURT
14 EASTERN DISTRICT OF CALIFORNIA
15

16 Orion Wine Imports, LLC and Peter Creighton,

17 Plaintiffs,

18 vs.

19 Jacob Appelsmith, in his Capacity as Director
20 of the California Department of Alcoholic
21 Beverage Control,

22 Defendant.
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Case No. 2:18-cv-01721-KJM-DB

**AMICUS CURIAE BRIEF OF
CALIFORNIA BEER AND
BEVERAGE DISTRIBUTORS AND
WINE AND SPIRITS WHOLESALERS
OF CALIFORNIA**

Date: September 19, 2018

Time: 10:00 a.m.

Place: Courtroom 3, Federal Court
Building, 501 I Street,
Sacramento CA

Judge: Hon. Kimberly J. Mueller

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1 **I. INTRODUCTION**

2 The Twenty-first Amendment to the U.S. Constitution prohibits “importation” of alcohol
3 into a state, for “delivery” in that state, in violation of the state’s laws. See U.S. CONST. amend.
4 XXI § 2. It relaxes the usual operation of the dormant Commerce Clause, giving states “virtually
5 complete control over whether to permit importation or sale of liquor and how to structure the
6 liquor distribution system.” *Granholm v. Heald*, 544 U.S. 460, 488 (2005). “State policies are
7 protected under the Twenty-first Amendment when they treat liquor produced out of state the
8 same as its domestic equivalent.” *Granholm*, 544 U.S. at 489.

9 Like most states, California has exercised this power to adopt a three-tier system that
10 separates the manufacturing, wholesaling and retailing of alcohol, extensively regulates each tier,
11 and funnels imported alcohol into that system. This system serves the goals of promoting
12 competition, creating a safe and orderly marketplace, and raising tax revenue, and is
13 “unquestionably legitimate.” *Granholm*, 544 U.S. at 489.

14 Plaintiffs wish California had made different policy choices. They want to import alcohol
15 into California without having a physical presence in the state, to directly sell that imported
16 alcohol to a particular tier of the three-tier system (retailers), and to immediately deliver the
17 imported alcohol where they see fit instead of where California law prescribes.

18 Plaintiffs try to dress up this wish-list of policy decisions as constitutional claims, but the
19 effort fails under settled law. California law treats imported and domestic *liquor* (or here, wine)
20 the same, so its three-tier system is protected under the Twenty-First Amendment. *Granholm*, 544
21 U.S. at 469. This non-discrimination principle applies only to liquor and its producers—not
22 wholesalers like plaintiffs—as *Granholm*, two federal statutes, multiple federal courts of appeals,
23 and the history of the Twenty-First Amendment all confirm. Plaintiffs’ allegation that California
24 discriminates against out-of-state wholesalers cannot state a claim, because California is
25 constitutionally permitted to do so. And California’s “virtually complete control” over structuring
26 liquor distribution authorizes it to funnel imported alcohol into the three-tier system at the
27 manufacturer and wholesaler levels, as it has, not the retail level, as plaintiffs wish.

28 The three-tier system, and the requirement for alcohol wholesalers to have a physical

1 presence in the state, are Constitutionally-protected—which is dispositive here. The system and
 2 its requirements are also sound policy. Requests to restructure California’s alcohol distribution
 3 system must be directed to the legislature, not the courts. The Court should dismiss the complaint.

4 **II. INTEREST OF AMICI**

5 California Beer and Beverage Distributors (“CBBB”) and Wine and Spirits Wholesalers
 6 of California (“WSWC”) are nonprofit trade associations representing the interests of alcohol
 7 beverage wholesalers in California. Their members operate on the second-tier level of the three-
 8 tier system. CBBB and WSWC, among other goals, are dedicated to: (1) sustaining and
 9 strengthening the three-tier regulatory system governing the manufacture, sale and distribution of
 10 alcoholic beverages; (2) supporting an independent and competitive system of distribution; and
 11 (3) maintaining a safe and orderly market for the sale of alcoholic beverages in California.²

12 CBBB and WSWC are interested in this case because plaintiffs seek to bypass a key
 13 element of the three-tier system as applied to wine imports. California law requires that alcoholic
 14 beverage imports be consigned and delivered to licensed importers. Such importers generally
 15 must either be manufacturers or wholesalers, or sell exclusively to them. Those importers owe
 16 excise taxes on the imported wine. Under this system, retailers are generally prohibited from
 17 receiving delivery of imports directly from out-of-state. Plaintiffs seek to invalidate the
 18 requirement to consign and deliver wine imports to importers (manufacturers or wholesalers) and
 19 deliver wine directly from outside the state to retailers. Plaintiffs’ claim, if successful, would
 20 effectively rewrite parts of California’s three-tier system and tax laws, and impair enforcement of
 21 alcoholic beverage control laws by the Department of Alcoholic Beverage Control (“ABC”).

22 Amici have a strong interest in preserving their members’ ability to compete fairly and on
 23

24 ¹ The parties stipulated (Dkt. 23) and the Court ordered (Dkt. 26) that CBBB and WSWC may
 25 participate as amici, including by filing this brief. The Court has broad discretion to consider
 26 amicus briefs. *Hoptowitz v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds*
 27 *by Sandin v. Conner*, 515 U.S. 472 (1995). Although there is a pending motion for leave to
 28 amend, CBBB and WSWC are submitting this brief now to ensure their submission is timely.

² California law recognizes the unique interest of CBBB, as the major trade association
 representing California beer distributors, in defending alcoholic beverage laws. State law entitles
 CBBB to intervene as a party in any court proceeding involving the validity of any portion of the
 ABC Act. *See* Bus. & Prof. Code § 25008(b).

1 the merits, and in preserving California’s ability to regulate alcoholic beverage importation and
 2 distribution effectively. Therefore, they submit this brief describing the three-tier system, how
 3 plaintiffs’ claims would undermine that system, and why plaintiffs’ Commerce Clause challenge
 4 states no claim under settled law. CBBB and WSWC agree with Director Appelsmith’s motion to
 5 dismiss the Privileges and Immunities Clause claim and do not separately address it.

6 **III. ARGUMENT**

7 **A. Legal Standard For Motion to Dismiss**

8 On a 12(b)(6) motion, the Court must accept sufficient *factual* allegations, but not *legal*
 9 conclusions, as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The complaint’s allegations are
 10 mainly legal conclusions about isolated provisions of California’s Alcoholic Beverage Control
 11 (“ABC”) Act. We summarize California’s three-tier system, then explain how the statutes
 12 challenged by plaintiffs fit in, then detail why plaintiffs’ complaint states no claim.

13 **B. The California Statutory Framework At Issue.**

14 “Following repeal of the Eighteenth Amendment, the vast majority of states, including
 15 California, enacted alcoholic beverage control laws. These statutes sought to forestall the
 16 generation of such evils and excesses as intemperance and disorderly marketing conditions that
 17 had plagued the public and the alcoholic beverage industry prior to prohibition.” *California Beer*
 18 *Wholesalers Ass’n, Inc. v. Alcoholic Bev. etc. Appeals Bd.* 5 Cal.3d 402, 407–408 (1971). These
 19 statutes, codified in the ABC Act, Bus. & Prof. Code §§ 23000 *et seq.*, sought largely “to prevent
 20 the resurgence of tied-houses following repeal of the Eighteenth Amendment.” *Retail Digital*
 21 *Network, LLC v. Prieto*, 861 F.3d 839, 843 (9th Cir. 2017) (en banc) (“*RDN*”). “Tied-houses” are
 22 “retailers and saloons that are controlled by ‘larger manufacturing or wholesale interests.’” *Id.*

23 “The principal method utilized by state legislatures to avoid these antisocial developments
 24 was the establishment of a triple-tiered distribution and licensing scheme.” *California Beer*
 25 *Wholesalers*, 5 Cal.3d at 407-08. Under that system, “[m]anufacturing interests were to be
 26 separated from wholesale interests; [and] wholesale interests were to be segregated from retail
 27 interests.” *RDN*, 861 F.3d at 843 (quoting *California Beer Wholesalers*, 5 Cal.3d at 407–408); *see*
 28 *also* Cal. Bus. & Prof. Code §§ 25500-25512. In 2015, the California Legislature reaffirmed this

1 system, highlighting its purposes of preventing vertical and horizontal integration and promoting
2 temperance. *See RDN*, 861 F.3d at 843 (citing Cal. Bus. & Prof. Code § 25500.1).

3 Here is how the three-tier system works. Some of the principles that follow have limited
4 statutory exceptions, but to our knowledge none of those exceptions are relevant here. Unless
5 otherwise specified, all statutory cites in this brief are to the California Business & Professions
6 Code. The Code is available online at <https://leginfo.legislature.ca.gov/faces/codes.xhtml>.

7 The California ABC regulates importation and distribution of alcoholic beverages.
8 Licensing is the bedrock principle underlying the three-tier system. It is a misdemeanor to
9 exercise the privilege of a licensee without having that license. § 23300. There are licenses for
10 **manufacturers** of beer, wine (manufacturers are called winegrowers), brandy, and distilled
11 spirits. § 23320(a), subdivisions (1)-(4). There are also licenses for **wholesalers** of beer and wine,
12 distilled spirits, and brandy. § 23320(a), subdivisions (17-18a). And there are numerous types of
13 **retail** licenses covering specified kinds of alcoholic beverages and sales under specified
14 conditions. § 23320(a), subdivisions (20)-(37). (“On-sale” and “off-sale” are types of retail
15 licenses, denoting whether the beverage is for consumption on or off the premises. § 23399 [on-
16 sale], § 23393, 23393.5, and 23394 [off-sale])

17 In general, a manufacturing licensee can sell only to holders of wholesaler’s,
18 manufacturer’s, or certain other non-retail licenses. § 23356(b). A wholesaler’s license only
19 authorizes the licensee to sell the beverage to others licensed to resell the beverage (*i.e.*, *not* to
20 consumers), or to export it. § 23378. Retailers can generally sell only to consumers and can only
21 buy from wholesalers or sometimes manufacturers. §§ 23394 (off-sale retail license generally
22 authorizes sale only to consumers and not for resale), 23402 (retail on- or off-sale licensee can
23 only purchase for retail sale from manufacturer or wholesaler licensees), 23026 (retail sale means
24 sale by an on- or off-sale licensee for consumption and not for resale).

25 The independence of each tier is enforced by generally prohibiting manufacturers and
26 wholesalers from holding retail licenses. *E.g.*, §§ 23776 (wholesaler’s license generally cannot be
27 granted to on-sale or off-sale licensee, *i.e.*, retailer), 23784 (retailer’s on-sale license cannot be
28 granted to holder of manufacturer’s, importer’s or wholesaler’s license, or vice versa). Similarly,

1 manufacturers and wholesalers are typically prohibited from owning a controlling interest in a
2 retailer. *E.g.*, §§ 25503.11, 25500(a)(1) (manufacturer or wholesaler cannot hold direct or indirect
3 ownership of any interest in on-sale license), 23772 (distilled-spirits manufacturer’s license
4 cannot be held by any person with direct or indirect interest in distilled spirits wholesaler’s or
5 retailer’s license). Partly to enforce the prohibition on cross-ownership, corporate and limited-
6 liability company licensees must identify all their owners to the ABC. §§ 23405-23405.2

7 Retailers’ independence from manufacturers and wholesalers is also enforced by
8 prohibiting manufacturers and wholesalers from economically coercing or bribing retailers.
9 Manufacturers and wholesalers cannot give or lend money or other things of value to a holder of
10 an on-sale or off-sale license, or own any direct or indirect interest in the business of a holder of
11 an on-sale or off-sale license. *E.g.*, §§ 25500-25502. Nor can a manufacturer or wholesaler
12 provide alcoholic beverages to a retailer on consignment, provide free alcoholic beverages, give
13 secret rebates or discounts, or even pay retailers for advertising in connection with advertising
14 and sale of distilled spirits. § 25503. *See RDN*, 861 F.3d at 843, 851 (prohibition on paying
15 retailers for advertising in § 25503(h) “serves the important and narrowly tailored function of
16 preventing manufacturers and wholesalers from exerting undue and undetectable influence over
17 retailers. Without such a provision, retailers and wholesalers could side-step the triple-tiered
18 distribution scheme by concealing illicit payments under the guise of ‘advertising’ payments.”).

19 Violation of these provisions, or any provision of the ABC Act, is a crime. § 25617
20 (“Every person convicted for a violation of any of the provisions of this division...is guilty of a
21 misdemeanor” punishable by a \$1000 fine and/or six months in jail).

22 **Importers** typically fit into this system at the manufacturer and wholesaler tiers.
23 “Importers” include: (a) Any consignee of alcoholic beverages brought into California for
24 delivery or use in California; (b) Any person, except a licensed public warehouse, to whom
25 delivery is first made in California of alcoholic beverages brought into California for delivery or
26 use in California; (c) persons importing alcoholic beverage for use in certain federal enclaves
27 such as military bases; and (d) any person bringing alcoholic beverages into California that are
28 not consigned to any person and that are for delivery or use in California. § 23017. There are

1 importers' licenses for beer, wine, distilled spirits and brandy. § 23320(a)(10)-(13).

2 An importer's license authorizes the licensee to import the specified kind of alcohol.
 3 § 23374. An ordinary importer's license has no sale privileges; it only authorizes the holder to
 4 transfer the beverage to itself under another license. *Ibid.* Such a license is only available to
 5 holders of a manufacturer's or wholesaler's license. § 23775 ("An importer's license shall be
 6 issued only to a person or manufacturer who holds a license authorizing the sale for resale").
 7 A different kind of importer's license, called an importer's "general" license, is available for beer,
 8 wine, and distilled spirits. A person can hold a *general* importer's license without having a
 9 manufacturer's or wholesaler's license, but the alcohol is still imported at the manufacturer or
 10 wholesaler tier. A general importer's licensee can only sell to manufacturers, wholesalers and
 11 other importers—not to retailers. §§ 23374.6 ("A beer and wine importer's general license
 12 authorizes the person to whom issued to become an importer of beer or wine and to sell state tax
 13 paid beer or wine to beer manufacturer's, wine grower's, beer and wine wholesaler's, wine
 14 rectifier's and beer and wine importer's general licensees"), 23374.5 (similar for distilled spirits).
 15 An importer's general license cannot be held by a retailer or even a person who owns any interest
 16 in a retail license. §§ 23375.6 (beer/wine), 23375.5 (distilled spirits).³ In short, California funnels
 17 imported alcoholic beverages into the three-tier system at the manufacturer or wholesaler level.

18 The holder of an importer's license is not authorized to sell or deliver wine to retailers
 19 unless it *also* has a wholesaler's license. Then it can transfer the beverages to itself under the
 20 wholesaler's license and use the *wholesaler's* license to sell to retailers. §§ 23374, 23378, 23402.

21 **Licensed public warehouses.** A public warehouse is "any place licensed for the storage
 22 of, but not for sale of, alcohol, or alcoholic beverages, for the account of other licensees..." §§
 23 23036, 23375. It is one of the types of premises to which imports may come to rest. § 23661.

24 Under this system, only a person with the requisite license may perform the licensed
 25 activities, and only at the premises for which the license was issued. §§ 23355 (license authorizes

26 ³ Section 23378.2 authorizes a licensed importer or wholesaler to hold a retail package "off-sale"
 27 license (*i.e.* a license allowing it to sell to consumers for consumption elsewhere), if it sells wine
 28 and no other alcohol from the retail premises. ("Off-sale" is defined in § 23393.) Even if this
 applies to a general importer's license, the importer's licensee can still only sell to manufacturers,
 wholesalers and other importers—not to retailers. §§ 23374.6.

1 licensee to “exercise the rights and privileges specified in this article and no others at the
2 premises for which issued”), 23300 (“No person shall exercise the privilege or perform any act
3 which a licensee may exercise or perform under the authority of a license unless the person is
4 authorized to do so by a license issued pursuant to this division”).

5 Besides regulating distribution of alcoholic beverages, the three-tier system enables tax
6 collection. California imposes excise taxes and surtaxes on the sale of alcoholic beverages by
7 manufacturers, wholesalers and importers. Cal. Rev. & Tax. Code §§ 32151 (excise tax at
8 specified rates “imposed upon all beer and wine sold in this State ... by a manufacturer, wine
9 grower, or importer”), 32220 (excise surtax at specified rates “imposed upon all beer and wine
10 sold in this state by a manufacturer, winegrower, or importer, and upon all distilled spirits sold in
11 this state by a manufacturer, distilled spirits manufacturer’s agent, brandy manufacturer,
12 winegrower, importer, rectifier, wholesaler”). In the case of imported beer or wine, this tax is
13 owed when the beer or wine is received by the importer. It is “presumed” with exceptions not
14 relevant here “that all beer and wine imported into this State by a beer manufacturer or wine
15 grower or importer has been sold in this State [triggering the tax] at the time it is received by the
16 licensee.” § 32175.

17 The statute plaintiffs challenge, § 23661, funnels imported alcoholic beverages into the
18 three-tier system. It provides that, with exceptions not relevant here, “alcoholic beverages may be
19 brought into this state from without this state for delivery or use within the state only by common
20 carriers and *only when the alcoholic beverages are consigned to a licensed importer*, and only
21 *when consigned to the premises of the licensed importer* or to a licensed importer or customs
22 broker *at the premises of a public warehouse licensed under this division.*” Bus. & Prof. Code §
23 23661 (emphasis added).

24 Thus section 23661 regulates *where* in the three-tier structure alcoholic beverages are
25 consigned to and delivered upon arrival in California. They may be consigned only to licensed
26 importers. As already seen, a licensed importer must ordinarily either be a licensed manufacturer
27 or wholesaler, or sell only to licensed manufacturers or wholesalers. The net effect is to place
28 imported alcohol into the three-tier system at the manufacturer or wholesaler level. Section 23661

1 also regulates where imported alcoholic beverages may be delivered: to the licensed importer
2 either at its licensed premises or at a licensed public warehouse. This delivery triggers the duty to
3 pay excise taxes to the state. Rev. & Tax. Code §§ 32175 (importer is presumed to have sold the
4 beverage, and so owes excise taxes, upon receiving the alcoholic beverage), 32151 (tax on
5 alcoholic beverages sold by importer), 32220 (surtax on alcoholic beverages sold by importer).
6 The importer must also keep records of importation, sale and distribution of alcoholic beverages
7 other than wine (§ 25752) or make reports of imports (Rev. & Tax. Code §32452), enabling the
8 ABC and the Board of Equalization (tax collector) to confirm shipments and the tax due.
9 Requiring wholesalers to be licensed in California and to have a physical presence in California
10 also facilitates ABC enforcement of tied-house restrictions. *See* Pp. 17-18, below.

11 The three-tier system seeks to suppress several evils. They include preventing “the ability
12 and potentiality of large firms to dominate local markets through vertical and horizontal
13 integration and the excessive sales of alcoholic beverages produced by the overly aggressive
14 marketing techniques of larger alcoholic beverage concerns.” *RDN*, 861 F.3d at 843 (quoting *Cal.*
15 *Beer Wholesalers Ass’n v. Alcoholic Beverage Control Appeals Bd.*, 5 Cal.3d 402, 406 (1971));
16 *Actmedia, Inc. v. Stroh*, 830 F.3d 957, 959-60 (9th Cir. 1986).

17 **C. Plaintiffs’ Complaint.**

18 Plaintiffs’ complaint alleges that § 23661 violates the dormant Commerce Clause and the
19 Privileges and Immunities Clause in Article IV of the United States Constitution. Plaintiffs’
20 allegations mash together discrete issues: whether a business “located” outside the state can
21 obtain licenses needed to import wine on similar terms as in-state businesses; whether a business
22 (even if headquartered out of state) must have an in-state premises or arrangement with an in-state
23 warehouse in order to import wine; and whether an importer can arrange for the wine to be
24 physically delivered directly to a retailer from out of state or alternatively, whether the wine’s
25 first physical stop in California must be the importer’s premises.

26 Plaintiffs cite no law prohibiting out-of-state importers or wholesalers like Orion from
27 obtaining the same licenses, on the same terms, available to California importers or wholesalers.
28 But even if California required a physical premises here, it would not violate the Commerce

1 Clause. See Part III.D.1 below. Federal courts of appeals hold that states may go even further than
2 California has, and require alcohol wholesalers or retailers to be *residents* of the state. The
3 Commerce Clause, as limited by the Twenty-First Amendment, prohibits states from
4 discriminating against out-of-state *liquor* (or wine in this case), but does not prohibit them from
5 requiring *wholesalers* to have an in-state presence.

6 Section 23661 *does* require the importer to have an in-state premises *or* use a licensed
7 public warehouse in California to import wine. Under § 23661, any wine imported into California
8 must be delivered to the importer at this premises or warehouse. *See also* § 24041, second
9 sentence. This requirement is constitutional: since a state can validly require wholesalers to be in-
10 state residents, it can obviously require them to have a facility in-state.

11 Last, under § 23661, wine cannot be shipped directly to a retailer from out of state. As
12 detailed at pages 6-8 above, its first stop in California must be the importer’s licensed premises or
13 a licensed public warehouse, and the importer must be a manufacturer or wholesaler or sell only
14 to manufacturers or wholesalers. Imported alcoholic beverages cannot be shipped directly to a
15 retailer because a retailer generally cannot hold an importer’s license. This requirement, too, is
16 constitutional. Plaintiffs would like California to put imported wines directly into the *retail* tier of
17 the three-tier system, bypassing one tier. But California has chosen to put them into the
18 *manufacturer and wholesale* tiers, which it has the right (and good sense) to do.

19 **D. Count I (Commerce Clause) Fails To State A Claim.**

20 As a matter of law, the complaint fails to state a Commerce Clause claim. Section 23661
21 is protected from the dormant Commerce Clause by the Twenty-First Amendment.

22 Section 2 of the Twenty-First Amendment prohibits “importation” of alcoholic beverages
23 into a state in violation of its laws.

24 “The aim of the Twenty-First Amendment was to allow States to maintain an effective
25 and uniform system for controlling liquor by regulating its transportation, importation, and use.”
26 *Granholm v. Heald*, 544 U.S. 460, 484 (2005). The “importation and manufacture of intoxicants”
27 is an area where the “State’s authority under the Twenty-First Amendment is transparently clear.”
28 *Craig v. Boren*, 429 U.S. 190, 206 (1976). The Amendment “grants the States virtually complete

1 control over whether to permit importation or sale of liquor and how to structure the liquor
 2 distribution system.” *Id.* at 469 (quoting *California Retail Liquor Dealers Ass’n v. Midcal*
 3 *Aluminum, Inc.*, 445 U.S. 97, 110 (1980)).

4 Importantly here, “the Twenty-first Amendment ...limits the effect of the dormant
 5 Commerce Clause on a State’s regulatory power over the delivery or use of intoxicating
 6 beverages within its borders....” *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996).

7 *Granholm*, 544 U.S. 460, is the Supreme Court’s latest explanation of the relationship
 8 between the Twenty-First Amendment and the dormant Commerce Clause. As detailed below,
 9 under *Granholm* section 23661 and the three-tier system of which it is a part are protected by the
 10 Twenty-First Amendment from Commerce Clause attack, because (a) these laws treat in-state and
 11 out-of-state wine equivalently and (b) the three-tier system is “unquestionably legitimate,”
 12 including its requirement of an in-state wholesaler.

13 *Granholm* involved Michigan and New York laws that discriminated against out-of-state
 14 *producers* of alcoholic beverages (not wholesalers, as alleged here). The state laws in question
 15 allowed in-state wineries to sell directly to consumers, but prohibited out-of-state wineries from
 16 doing so. *Granholm* traced the Twenty-First Amendment’s history, concluding the Amendment
 17 was intended to lift Commerce Clause restrictions while requiring states to treat liquor (including
 18 wine, for this purpose) produced in-state with liquor produced out-of-state. *Granholm* explained
 19 that the Twenty-First Amendment had its origins in the Wilson Act and Webb-Kenyon Act, 27
 20 U.S.C. §§ 121 and 122 (both still in force). *See* 544 U.S. at 484. The Wilson Act authorizes states
 21 to regulate imported intoxicating “liquors or liquids”– but only to the “same extent and in the
 22 same manner” as the state law regulates “liquors or liquids” produced inside the state:

23 That all fermented, distilled, or other *intoxicating liquors or liquids transported*
 24 *into any State or Territory ... for use, consumption, sale or storage therein, shall*
 25 *upon arrival in such State or Territory be subject to the operation and effect of the*
 26 *laws of such State or Territory enacted in the exercise of its police powers, to the*
same extent and in the same manner as though such liquids or liquors had been
produced in such State or Territory”

27 27 U.S.C. § 121 (emphasis added).

28 The Webb-Kenyon Act prohibits “shipment or transportation” of intoxicating beverages

1 into a state in violation of that state’s laws. 27 U.S.C. § 122; *see Granholm*, 544 U.S. at 481. It
2 “extended the Wilson Act to allow the States to intercept liquor shipments before those shipments
3 reached the consignee.” *Granholm*, 544 U.S. at 482. Its purpose is to “prevent the immunity
4 characteristic of interstate commerce from being used to permit the receipt of liquor through such
5 commerce in States contrary to their laws,” and to “take from *intoxicating liquor* the protection of
6 the interstate commerce laws in so far as necessary to deny them an advantage over the
7 *intoxicating liquors* produced in the state into which they were brought” *Granholm*, 544 U.S.
8 at 482, 483 (emphasis added; citation omitted). Thus both the Wilson Act and the Webb-Kenyon
9 Act lifted dormant Commerce Clause objections to state regulation of importation of intoxicating
10 liquids or liquors, but only to the extent that they treat the imported *liquors* (or here wine) the
11 same extent as *liquors* “produced” in-state. 544 U.S. at 483. The Wilson Act and Webb-Kenyon
12 Act do not protect out-of-state *distributors* against discrimination; they protect *liquors* produced
13 out-of-state, and necessarily the liquors’ producers, against discrimination.

14 *Granholm* explained that the Twenty-First Amendment “was intended to
15 constitutionaliz[e]” these two acts. 544 U.S. at 508 (quoting *Craig*, 429 U.S. at 206). It held that
16 Michigan’s and New York’s laws, because they treated wine made out-of-state differently from
17 that made in-state, were “straightforward attempts to discriminate in favor of local producers,”
18 and this “discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first
19 Amendment.” 544 U.S. at 489. The Court invalidated them because they did not advance a
20 legitimate purpose that could not adequately be served by reasonable nondiscriminatory
21 alternatives. 544 U.S. at 489-493.

22 *Granholm* repeatedly emphasized that the Wilson Act, Webb-Kenyon Act and Twenty-First
23 Amendment prohibit states from treating *liquors* produced out of state differently from *liquors*
24 produced in-state. *See* Wilson Act, 27 U.S.C. § 121 (making all imported liquors “subject to the
25 operation and effect of the laws of such State ... to the same extent and in the same manner as
26 though such ... liquors had been produced in such State”); *Granholm*, 544 U.S. at 483-84 (“The
27 Wilson Act reaffirmed, and the Webb-Kenyon Act did not displace, the Court’s line of Commerce
28 Clause cases striking down state laws that discriminated against *liquor produced* out of state.”); *id.*

1 at 483 (“If Congress’ aim in passing the Webb–Kenyon Act was to authorize States to discriminate
 2 against out-of-state *goods* then its first step would have been to repeal the Wilson Act. It did not do
 3 so.”); *id.* at 483 (the Webb-Kenyon Act does not “abdicate control over interstate commerce as to
 4 permit discrimination against the intoxicating *liquor* brought into one state from another”) (citation
 5 omitted); *id.* at 484 (“The cases under the Webb-Kenyon Act uphold state prohibition and
 6 regulation ... yet they clearly forbid laws which discriminate arbitrarily and unreasonably against
 7 *liquor* produced outside of the state”) (citation omitted); *id.* at 486 (“[T]he Twenty-first
 8 Amendment ... does not displace the rule that States may not give a discriminatory preference to
 9 their own *producers.*”) (emphases added).

10 *Granholm* simultaneously made clear that its holding does not call the three-tier system
 11 into question, and the Twenty-First Amendment in fact “protects” state alcoholic beverage
 12 distribution laws as long as they do not discriminate against *liquor* produced out-of-state:

13 The States argue that any decision invalidating their direct-shipment laws would
 14 call into question the constitutionality of the three-tier system. This does not
 15 follow from our holding. “The Twenty-first Amendment grants the States virtually
 16 complete control over whether to permit importation or sale of liquor and how to
 17 structure the liquor distribution system.” [Citation] ... *States may ... funnel sales*
 18 *through the three-tier system.* We have previously recognized that the three-tier
 system itself is “*unquestionably legitimate.*” [Citation] *State policies are protected*
under the Twenty-first Amendment when they treat liquor produced out of state the
same as its domestic equivalent.

19 544 U.S. at 488 (emphasis added). *Accord, Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276
 20 (1984) (invalidating state excise tax that discriminated against *alcoholic beverages* made out of
 21 state by exempting some alcoholic beverages made in-state).

22 Here, *Granholm* dictates that section 23661 and related California laws are protected by
 23 the Twenty-First Amendment and do not violate the Commerce Clause, for at least two reasons.

24 1. Plaintiffs’ Claim That California Discriminates Against Out-of-State
 25 Wholesalers Does Not State a Commerce Clause Violation Under The
 Twenty-First Amendment.

26 “State policies are protected under the Twenty-first Amendment when they *treat liquor*
 27 *produced out of state* the same as its *domestic equivalent.*” *Granholm*, 544 U.S. at 489 (emphasis
 28 added). That is this case. Under the three-tier system, a winegrower in California can sell to a

1 wine wholesaler in California, who in turn can sell to a retailer, who in turn can sell to a
2 customer. An out-of-state winegrower in, say, New York can sell to that identical California
3 wholesaler (who only needs an importer’s license in addition to a wholesaler’s license), who can
4 again sell to the identical retailer, who can sell to the identical customer. Because they treat in-
5 state and out-of-state wine equally, California’s laws are “protected under the Twenty-First
6 Amendment.” *Granholm*, 544 U.S. at 469.

7 Plaintiffs here theorize a *different* kind of discrimination. They assert that California law
8 treats out-of-state *wholesalers* differently from in-state *wholesalers*, either by denying them
9 licenses on the same terms as in-state businesses or by requiring an in-state premises.

10 But claiming discrimination against out-of-state wholesalers states no claim under the
11 Commerce Clause—which, as limited by the Twenty-First Amendment, only prohibits states
12 from discriminating against out-of-state *liquors* and their producers. Federal courts of appeals
13 have uniformly made clear that under *Granholm*, a state can require wholesalers and retailers to
14 be physically in the state. For example, *Southern Wine and Spirits v. Div. of Alcohol and*
15 *Tobacco*, 731 F.3d 799, 809-810 (8th Cir. 2013), upheld a Missouri law requiring alcoholic
16 beverage wholesalers to reside in Missouri. The Eighth Circuit held that this law was protected
17 against Commerce Clause challenge because it did not treat out-of-state liquor differently from
18 in-state liquor. “*Granholm*’s guidance applies readily to the residency requirement at issue in this
19 case. The residency requirement defines the extent of in-state presence required to qualify as a
20 wholesaler in the three-tier system. [Citation] The rule does not discriminate against out-of-state
21 liquor products or producers.” 731 F.3d at 810. *Southern Wine* explains that *Granholm* “drew a
22 bright line between the producer tier and the rest of the system.” 731 F.3d at 810.

23 Similarly, in *Arnold’s Wines v. Boyle*, 571 F.3d 185, 191 (2d Cir. 2009) New York law
24 discriminated against out-of-state retailers and in favor of in-state retailers. The New York law
25 allowed in-state retailers to deliver alcoholic beverages to consumers at home, but did not allow
26 out-of-state retailers the same privilege. Interpreting *Granholm*, the Second Circuit upheld the
27 law because it did not discriminate against *products* made out of state: “Because New York’s
28 three-tier system treats in-state and out-of-state liquor the same, and does not discriminate against

1 out-of-state products or producers, we need not analyze the regulation further under Commerce
2 Clause principles.” 731 F.3d at 810. *Accord, Wine Country Gift Baskets.com v. Steen*, 612 F.3d
3 809, 820 (5th Cir. 2010) (“*Granholm* prohibited discrimination against out-of-state *products* or
4 *producers*. Texas has not tripped over that bar by allowing in-state retailer deliveries.”).
5 (emphasis added).

6 Some courts of appeals interpret *Granholm* to allow a limited form of Commerce Clause
7 scrutiny of state alcoholic beverage control laws regarding the wholesale and retail tiers. But even
8 those courts agree that state law can validly require wholesalers and retailers to have a physical
9 in-state presence—the nub of plaintiffs’ challenge here. The Fifth Circuit holds that *Granholm*
10 allows Commerce Clause scrutiny of the three-tier system, “but to a lesser extent when the
11 regulations concern the retailer or wholesaler tier as distinguished from the producer tier, of the
12 three-tier distribution system.” *Cooper v. Tex. Alcoholic Bev. Comm’n*, 820 F.3d 730, 743 (5th
13 Cir.), *cert. denied*, 137 S.Ct. 494 (2016). But *Cooper* agrees that state laws may even go beyond
14 requiring wholesalers to have a physical presence, and require them to be in-state residents.
15 “Because of the Twenty-first Amendment, states may impose a physical-residency requirement
16 on retailers and wholesalers of alcoholic beverages despite the fact that the residency
17 requirements favor in-state over out-of-state businesses.” *Cooper*, 820 F.3d at 743 (citing *Wine*
18 *Country Gift Baskets*, 612 F.3d at 821).

19 Even the court of appeals that has most aggressively interpreted *Granholm* to apply to
20 non-producer tiers of the distribution system agrees that a state can permissibly require a
21 wholesaler to be physically in the state. *Byrd v. Tenn. Wine and Spirits Retailers Ass’n* 883 F.3d
22 608, 622-23 (6th Cir. 2018), *petition for certiorari filed Jul. 20, 2018*.⁴ *Byrd* involves a Tennessee
23

24 ⁴ *Byrd* concludes that *Granholm* “discussed the relationship between the dormant Commerce
25 Clause and the Twenty-first Amendment in the context of ‘producers’ simply because *Granholm*
26 involved ... that step in the three-tier system,” and that *Granholm* did not indicate “that the
27 Twenty-first Amendment automatically protects laws regarding wholesalers and retailers.” 883
28 F.3d at 621-22. *Byrd* is wrong on this point, and conflicts with *Arnold’s Wines* and *Southern Wine*
& *Spirits*. *Byrd* overlooks that the Wilson and Webb-Kenyon Acts protect state law from the
Commerce Clause as long as the state law treats imported “liquids or liquors” the same as those
“produced” in-state. The Twenty-First Amendment constitutionalizes those Acts. Regardless,
even *Byrd* acknowledges that a state can require wholesalers and retailers to be within the state.

1 law requiring owners of alcoholic beverage retailers to live in Tennessee for two years before
2 obtaining a license (known as a durational-residency requirement). *Byrd* cites with approval the
3 Fifth Circuit’s conclusion in *Cooper* that “requiring wholesalers and retailers to be in the state is
4 permissible, but requiring owners to reside within the state for a certain period is not.” 883 F.3d at
5 623 n.8 (citing *Cooper*, 820 F.3d at 743) (emphasis added). California has no durational-
6 residency requirement for a wholesaler’s or importer’s license.

7 The Ninth Circuit’s closest opinion is consistent with other circuits’ analysis. *Black Star*
8 *Farms, LLC v. Oliver*, 600 F.3d 1225 (9th Cir. 2010), involved Arizona’s laws regulating direct
9 shipment of wine from wineries. It “generally require[d] all alcoholic beverages sold to
10 consumers in the state to pass through a three-tier distribution system comprised of producers,
11 wholesalers, and retailers.” *Id.* at 1227. However, it allowed two facially neutral exceptions.
12 Wineries (whether in- or out-of-state) could ship directly to retailers or consumers if they
13 produced less than 20,000 gallons of wine annually, and could ship small volumes to consumers
14 who purchased the wine while physically present at the winery. *Id.* at 1227. Because plaintiff
15 alleged that Arizona discriminated against wineries out of state, *Granholm*’s principle of non-
16 discrimination against out-of-state liquors applied. The Ninth Circuit held that the facially neutral
17 laws did not discriminate against out-of-state wineries and affirmed summary judgment for the
18 state. *Id.* at 1231-1235. Nothing in *Black Star* calls into question *Granholm*’s statement that state
19 law is protected when it treats liquor produced out of state the same as its domestic equivalent.

20 As these cases confirm, under *Granholm*, plaintiffs state no claim by alleging that
21 California is violating their rights by requiring a physical in-state presence or by assertedly
22 discriminating against non-resident wholesalers like Orion.

23 2. The Three-Tier System Is “Unquestionably Legitimate.”

24 *Granholm* establishes another, independently dispositive principle. “States may ... funnel
25 sales through the three-tier system.” *Granholm*, 544 U.S. at 489. “

26 Plaintiffs’ claim here attacks the three-tier system itself. Plaintiffs complain that an
27 importer can transfer imported wine to itself under its wholesaler’s license (complaint ¶ 9), but
28 that is simply the mechanism by which the law funnels the imported wine into the three-tier

1 system. Under the wholesaler’s license it can sell to the third tier, retailers. Plaintiffs would prefer
2 that imports be funneled directly into the retail tier, but *which tier of the three-tier system to*
3 *funnel imports into* is a policy matter for the state. The Twenty-First Amendment explicitly grants
4 states control over “importation” of alcoholic beverages, and *Granholm* reaffirms that California
5 has virtually complete control over the three-tier system and the right to funnel sales through it.

6 Plaintiffs’ claim that California must allow a wholesaler with no presence in California to
7 distribute wine, must allow it to deliver that wine directly to retailers, and must create a license
8 for it to do so, is an attack on the three-tier system itself. *Arnold’s Wines* confronted a similar
9 attack on New York’s law requiring retailers to be present and licensed in New York. “[B]ecause
10 in-state retailers make up the third tier in New York’s three-tier regulatory system, Appellants’
11 challenge to the ABC Law’s provisions requiring all wholesalers and retailers be present in and
12 licensed by the state [citation] is a frontal attack on the constitutionality of the three-tier system
13 itself.” 571 F.3d at 190. *Granholm* “reaffirmed that the three-tier system is an ‘unquestionably
14 legitimate’ exercise of the states’ powers under the Twenty-first Amendment to regulate the
15 importation and use of alcohol.” *Id.* The Fourth Circuit agrees. “[A]n argument that compares the
16 status of an in-state retailer with an out-of-state retailer—or that compares the status of any other
17 in-state entity under the three-tier system with its out-of-state counterpart—is nothing different
18 than an argument challenging the three-tier system itself.” *Brooks v. Vassar*, 462 F.3d 341, 352
19 (4th Cir. 2006) (upholding Virginia law allowing in-state retailers to deliver directly to consumers
20 while out-of-state retailers could not). The Eighth Circuit, too, agrees that requiring an in-state
21 presence is constitutional under *Granholm*. “There is no archetypal three-tier system ... the
22 [*Granholm*] Court cited the ‘in-state wholesaler’ in connection with the very sentence affirming
23 that ‘the three-tier system itself is unquestionably legitimate.’” *Southern Wines & Spirits*, 731
24 F.3d at 810 (citing *Granholm*, 544 U.S. at 489). “In-state wholesalers, therefore, must be
25 ‘integral’ to the three-tier system under *Granholm*.” 731 F.3d at 810.

26 Plaintiffs’ claim here falls squarely under *Arnold’s Wines*, *Brooks* and *Southern Wines &*
27 *Spirits*. Their attempt to require California to allow distribution by a wholesaler with no in-state
28 presence, and to require California to allow importation directly to retailers, is an attack on

1 California’s three-tier system.

2 (1) Plaintiffs’ claim seeks to allow them to deliver imported wine directly from out-of-
3 state to a California-licensed retailer. But under current law the retailer receiving that delivery
4 would be considered an “importer” under § 23017(b) (person to whom delivery is first made of
5 alcoholic beverages brought from out of state). That would be illegal: a retailer cannot generally
6 hold an importer’s license. § 23375.6; *see* pp. 4, 6 above. Either the definition of “importer”
7 would have to be rewritten, or retail license privileges would have to be expanded into
8 importation previously allocated solely to the manufacturer and wholesaler tiers.

9 (2) California would have to change how it charges and collects taxes on alcoholic
10 beverages. Under current law, excise taxes on beer and wine are imposed on the “manufacturer,
11 wine grower, or importer.” Cal. Rev. & Tax. Code §§ 32151, 32220. Plaintiffs’ claim would
12 bypass delivery to the current importers, who are manufacturers and wholesalers. So for wine
13 delivered directly from out of state to retailers, California would have to move the point of
14 taxation up or down the distribution chain and create an administrative apparatus to enforce that
15 tax. Either out-of-state entities such as Orion would have to become the point of taxation, or
16 retailers would have to. Either way, California would have to expand enforcement of its excise
17 tax laws to numerous additional taxpayers—collecting taxes either from potentially thousands of
18 small and large distributors across the country or potentially thousands of retail liquor stores
19 throughout California.

20 (3) The Department of Alcoholic Beverage Control would be far less able to enforce
21 compliance with the ABC Act by applicants and licensees with no in-state presence than in-state
22 applicants and licensees. Under current law, Section 23661 funnels imports and tax collection to a
23 manageable number of manufacturers and wholesalers, all with physical premises in California,
24 subject to inspection by the ABC and subject to California’s criminal-law jurisdiction for
25 violation of alcoholic beverage control laws or tax laws. Plaintiffs seek to invalidate section
26 23661 and enable wholesalers with no in-state presence to send alcohol directly to licensed
27 retailers in California. They would thereby eliminate both the requirement that
28 wholesaler/importers have a physical presence in California and the centralized entry points for

1 alcoholic beverages imported into California. Eliminating these features would devastate
2 enforcement of the ABC Act.

3 The ABC investigates license applicants. § 23958. To that end, it can issue subpoenas for
4 attendance of witnesses and production of documents and testimony. § 25751; Cal. Gov. Code §
5 11181. But a California agency's subpoena would have no effect in another state. Similarly, the
6 ABC can examine the books, records and premises of any licensee. § 25753. It is not clear
7 whether ABC would have a legal right to examine such books outside the State.

8 The inability to subpoena such information could impair the ABC's investigation,
9 especially because applications and enforcement of license laws can involve information in the
10 hands of third parties. A few examples: the Personal Affidavit required for a license application
11 asks about interests in retail licensees, employment history and criminal history.
12 <https://www.abc.ca.gov/FORMS/ABC208A.pdf>. The application for a non-retail license asks
13 whether the applicant has an interest in a retail license, has furnished or given a thing of value to a
14 retail licensee, or has an interest in the manufacture, importation or distribution of distilled spirits.
15 <https://www.abc.ca.gov/FORMS/ABC140.pdf>. The Individual Financial Affidavit asks about the
16 applicant's financial resources and obligations. <https://www.abc.ca.gov/FORMS/ABC208B.pdf>.

17 Another example: To enforce the tied-house laws (pp. 3-5 above), the ABC must be able
18 to determine whether an out-of-state licensee owns any significant interest in a business that holds
19 a retail license. It also needs a way to determine, on an ongoing basis, whether the supplier has
20 provided money or any thing of value to a California retailer. But if plaintiffs had the right to sell
21 and deliver directly to California retailers, so would other out-of-state suppliers. A California
22 state agency like ABC lacks both the subpoena power and the resources to send agents all over
23 the country to investigate potential violations and enforce California laws against potentially
24 thousands of suppliers in dozens of states.

25 (4) If plaintiffs' claim succeeded, California would have to track thousands of small
26 shipments among innumerable permutations of out-of-state vendors and in-state retailers. That
27 would make the three-tier system exponentially harder to administer and enforce.

28 It does not matter whether these problems are surmountable. California is not required to

1 shift responsibilities among tiers of its licensing system, change the way it collects taxes and
 2 impair its ability to regulate, all to reduce expense to Orion. Such a duty would be inconsistent
 3 with the Twenty-First Amendment’s grant of “virtually complete control” over importation and
 4 the structure the liquor distribution system. *Granholm*, 544 U.S. at 488. Further, Orion could
 5 import wine on exactly the same terms as wholesalers headquartered in California, merely by
 6 renting a small amount of licensed warehouse space in California and obtaining California
 7 wholesaler’s and importer’s licenses. Orion could then receive imports in California and sell them
 8 to retailers. *See* §§ 23661 (authorizing delivery consigned to importer at licensed public
 9 warehouse), 24041 (“A license at a public warehouse shall be required by an out-of-state business
 10 whose alcoholic beverages come to rest, are stored, and shipped from a public warehouse in
 11 California.”), 23378 (wholesaler’s license authorizes sale to persons holding licensing authorizing
 12 sale, such as retailers). Whether California law *could* be structured to enable Orion to distribute
 13 directly from Florida is beside the point. “There is no narrow tailoring requirement under the
 14 Twenty-first Amendment.” *Southern Wine & Spirits*, 731 F.3d at 812. Rather, California has
 15 “virtually complete control over whether to permit importation or sale of liquor and how to
 16 structure the liquor distribution system.” *Granholm*, 544 U.S. at 488.

17
 18 3. The Test For State Laws That *Conflict With* Federal Laws Does Not Apply,
 And In Any Case Is Satisfied.

19 *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 901-02 (9th Cir. 2008), examined
 20 whether California’s ABC laws were preempted by a federal antitrust law with which they
 21 conflicted. *Maleng* held that in harmonizing state and federal powers in the setting of state laws
 22 that actually conflict with federal laws that were enacted under the Commerce Clause, “the key
 23 question is ‘whether the interests implicated by a state regulation are so closely related to the
 24 powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding
 25 that its requirements directly conflict with express federal policies.’” 522 F.3d at 902. *Maleng* is
 26 off point here, because this case does not involve a conflict with a federal law. When a state law
 27 conflicts with federal law, the state law must give way under the Supremacy Clause if Congress
 28 had power to enact the federal law. And although the Twenty-First Amendment limits the

1 *dormant* Commerce Clause, it does not repeal federal power under the Commerce Clause to enact
 2 *affirmative* legislation regulating interstate commerce in liquor. *Capital Cities Cable, Inc. v.*
 3 *Crisp*, 467 U.S. 691, 712-13 (1984). In other words, the scope of Congress’ power to *enact* law
 4 regarding alcoholic beverages under the Commerce Clause is broader than the scope of the
 5 *dormant* Commerce Clause’s nullification of state law regarding alcoholic beverages under the
 6 Twenty-First Amendment. *Maleng* involved the former; this case involves the latter.

7 In any case, here the interests served by the three-tier system are closely related to core
 8 state interests reserved to California by the Twenty-First Amendment. These interests include
 9 “promoting temperance, ensuring orderly market conditions, and raising revenue” through
 10 regulation of the production and distribution of alcoholic beverages. *North Dakota v. United*
 11 *States*, 495 U.S. 423, 432 (1990) (plurality); *Arnold’s Wines, Inc.*, 571 F.3d at 188; *Beskind v.*
 12 *Easley*, 325 F.3d 506, 513 (4th Cir. 2003). As detailed above, plaintiffs’ claim, if successful,
 13 would disrupt California’s maintenance of orderly market conditions through the strict separation
 14 of wholesale and retail tiers, and frustrate California’s raising of revenue from excise taxes
 15 through bypassing the tier of the distribution system where they are paid.

16 **IV. CONCLUSION**

17 As shown above, California’s system for regulating the importation, distribution and sale
 18 of alcohol is carefully crafted to address the harms that can arise from the disorderly sale of such
 19 products. Neither the wisdom nor the efficiency of that system is before this Court. Nor is the
 20 Court’s task to analyze that system as it would the sale of goods that are not the subject of an
 21 express provision of the U.S. Constitution. Rather, the sole questions before this Court are
 22 whether California is authorized by the U.S. Constitution to implement a three-tier system as a
 23 means of regulating the transportation, importation and use of alcohol in California, and whether
 24 requiring delivery to a wholesaler at an in-state premises furthers that system. To those questions,
 25 the answer is “yes.” The motion to dismiss should be granted.

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28 ///

1 Dated: September 14, 2018

Respectfully submitted,

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⁵ Brian C. Rocca, the filer of this document, hereby attests that he obtained the authorization of any other signatory prior to the document's filing.

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CERTIFICATE OF SERVICE

Case Name: *Orion Wine Imports, LLC, and Peter E. Creighton v. Jacob Applesmith* No. **2:18-cv-01721-KJM-DB**

I hereby certify that on September 14, 2018, I electronically filed the following document with the Clerk of the Court by using the CM/ECF system:

**AMICUS CURIAE BRIEF OF
CALIFORNIA BEER AND BEVERAGE DISTRIBUTORS
AND WINE AND SPIRITS WHOLESALERS OF CALIFORNIA**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under the penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 14, 2018, at San Francisco, California

Donna M. Gilliland
Declarant

/s/ Donna M. Gilliland
Signature