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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
Beverage Control,

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

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

Date: December 21, 2018
Time: 10:00 a.m.
Place: Courtroom 3, Federal
Court Building, 501 I
Street, Sacramento CA
Judge: Hon. Kimberly J.
Mueller
Action Filed: June 14, 2018

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1 Amici Curiae California Beer and Beverage Distributors (“CBBDD”) and Wine and Spirits
2 Wholesalers of California (“WSWC”) submit this amicus brief supporting defendant’s
3 October 17, 2018 Motion to Dismiss Plaintiffs’ Second Amended Complaint (“MTD,” Dkt. 33).

4 **I. INTRODUCTION**

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

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

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

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

1 liquor distribution authorizes it to funnel imported alcohol into the three-tier system at the
 2 manufacturer and wholesaler levels, as it has, not the retail level, as plaintiffs wish. The Court
 3 should dismiss the complaint.

4 **II. INTEREST OF AMICI**

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

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

21 Amici have a strong interest in preserving their members’ ability to compete fairly and on
 22 the merits, and in preserving California’s ability to regulate alcoholic beverage importation and
 23 distribution effectively. Therefore, they submit this brief describing how the challenged statutes

24 ¹ The parties stipulated (Dkt. 23) and the Court ordered (Dkt. 26) that CBBB and WSWC may
 25 participate as amici. The Court has broad discretion to consider amicus briefs. *Hoptowit v. Ray*,
 26 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S.
 472 (1995).

27 ² California law recognizes the unique interest of CBBB, as the major trade association
 28 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 form part of California’s three-tier system for alcohol distribution, why they are protected against
 2 Commerce Clause challenge by the Twenty-First Amendment, and why that conclusion is not
 3 affected by the Supreme Court’s grant of certiorari in *Tennessee Wine & Spirits Retailers Assn. v.*
 4 *Byrd*, U.S. Supreme Court No. 18-96. Thus, as Defendant’s MTD points out, the Twenty-First
 5 Amendment protects California’s system against Plaintiffs’ Commerce Clause attack. Dkt. 33-1,
 6 pp. 5:9-12, 5:25-6:2. CBBB and WSWC agree with Director Appelsmith’s motion to dismiss the
 7 Privileges and Immunities Clause claim and do not separately address it.

8 **III. ARGUMENT**

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

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

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

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

25 “The principal method utilized by state legislatures to avoid these antisocial developments
 26 was the establishment of a triple-tiered distribution and licensing scheme.” *California Beer*
 27 *Wholesalers*, 5 Cal.3d at 407-08. Under that system, “[m]anufacturing interests were to be
 28 separated from wholesale interests; [and] wholesale interests were to be segregated from retail

1 interests.” *RDN*, 861 F.3d at 843 (quoting *California Beer Wholesalers*, 5 Cal.3d at 407–408); *see*
2 *also* Cal. Bus. & Prof. Code §§ 25500-25512. In 2015, the California Legislature reaffirmed this
3 system, highlighting its purposes of preventing vertical and horizontal integration and promoting
4 temperance. *See RDN*, 861 F.3d at 843 (citing Cal. Bus. & Prof. Code § 25500.1).

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

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

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

27 The independence of each tier is enforced by generally prohibiting manufacturers and
28 wholesalers from holding retail licenses. *E.g.*, §§ 23776 (wholesaler’s license generally cannot be

1 granted to on-sale or off-sale licensee, *i.e.*, retailer), 23784 (retailer’s on-sale license cannot be
 2 granted to holder of manufacturer’s, importer’s or wholesaler’s license, or vice versa). Similarly,
 3 manufacturers and wholesalers are typically prohibited from owning a controlling interest in a
 4 retailer. *E.g.*, §§ 25503.11, 25500(a)(1) (manufacturer or wholesaler cannot hold direct or indirect
 5 ownership of any interest in on-sale license), 23772 (distilled-spirits manufacturer’s license
 6 cannot be held by any person with direct or indirect interest in distilled spirits wholesaler’s or
 7 retailer’s license). Partly to enforce the prohibition on cross-ownership, corporate and limited-
 8 liability company licensees must identify all their owners to the ABC. §§ 23405-23405.2

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

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

24 **Importers** typically fit into this system at the manufacturer and wholesaler tiers.
 25 “Importers” include: (a) Any consignee of alcoholic beverages brought into California for
 26 delivery or use in California; (b) Any person, except a licensed public warehouse, to whom
 27 delivery is first made in California of alcoholic beverages brought into California for delivery or
 28 use in California; (c) persons importing alcoholic beverage for use in certain federal enclaves

1 such as military bases; and (d) any person bringing alcoholic beverages into California that are
 2 not consigned to any person and that are for delivery or use in California. § 23017. There are
 3 importers' licenses for beer, wine, distilled spirits and brandy. § 23320(a)(10)-(13).

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

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

23 **Licensed public warehouses.** A public warehouse is "any place licensed for the storage
 24 of, but not for sale of, alcohol, or alcoholic beverages, for the account of other licensees..." §§
 25 23036, 23375. Upon importation to California, alcohol may first be delivered to an importer at a

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 licensed public warehouse. § 23661. California law allows an “out-of-state business” to obtain a
2 license to have alcohol come to rest, be stored, and be shipped from such a warehouse. § 24041.

3 Under this system, only a person with the requisite license may perform the licensed
4 activities, and only at the premises for which the license was issued. §§ 23355 (license authorizes
5 licensee to “exercise the rights and privileges specified in this article and no others at the
6 premises for which issued”), 23300 (“No person shall exercise the privilege or perform any act
7 which a licensee may exercise or perform under the authority of a license unless the person is
8 authorized to do so by a license issued pursuant to this division”).

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

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

26 Thus section 23661 regulates *where* in the three-tier structure alcoholic beverages are
27 consigned to and delivered upon arrival in California. They may be consigned only to licensed
28 importers. As already seen, a licensed importer must ordinarily either be a licensed manufacturer

1 or wholesaler, or sell only to licensed manufacturers or wholesalers. The net effect is to place
 2 imported alcohol into the three-tier system at the manufacturer or wholesaler level. Section 23661
 3 also regulates where imported alcoholic beverages may be delivered: to the licensed importer
 4 either at its licensed premises or at a licensed public warehouse. This delivery triggers the duty to
 5 pay excise taxes to the state. Rev. & Tax. Code §§ 32175 (importer is presumed to have sold the
 6 beverage, and so owes excise taxes, upon receiving the alcoholic beverage), 32151 (tax on
 7 alcoholic beverages sold by importer), 32220 (surtax on alcoholic beverages sold by importer).
 8 The importer must also keep records of importation, sale and distribution of alcoholic beverages
 9 other than wine (§ 25752) or make reports of imports (Rev. & Tax. Code § 32452), enabling the
 10 ABC and the Board of Equalization (tax collector) to confirm shipments and the tax due.
 11 Requiring wholesalers to be licensed in California and to have a physical presence in California
 12 also facilitates ABC enforcement of tied-house restrictions. *See* Pp. 17-18, below.

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

19 **C. Plaintiffs’ Second Amended Complaint and Opposition to Director**
 20 **Appelsmith’s Motion to Dismiss.**

21 Plaintiffs’ Second Amended Complaint (2AC) alleges that § 23661 violates the dormant
 22 Commerce Clause and the Privileges and Immunities Clause in Article IV of the United States
 23 Constitution. (Dkt. 32 pp. 2:5, 7:19-22) Their 2AC and their opposition to Director Appelsmith’s
 24 motion to dismiss crystallize several dispositive points.

25 First, plaintiffs do *not* allege that California law treats *wine* produced outside California
 26 differently from *wine* produced in California. Rather, they attack what they assert is
 27 discrimination against out-of-state *wholesalers/importers*. Plaintiffs allege that a business
 28 “located within the state” can obtain licenses allowing it to import, sell and deliver to California

1 retailers, while a business “located outside the state” cannot get a license allowing it to import,
 2 sell and deliver “directly” to California retailers. (2AC ¶¶ 7-10) Plaintiffs’ opposition to Director
 3 Appelsmith’s motion to dismiss confirms that they assert that California’s wine-import laws are
 4 “discriminatory” against out-of-state importers. (Dkt. 35 at 4:19-6:15, 6:16-8:7)

5 Second, the complaint’s vague use of the word “located” obscures an important point. The
 6 actual law, not plaintiffs’ characterization, controls; the complaint’s legal conclusions are not
 7 accepted as true. *Iqbal*, 556 U.S. at 678. Plaintiffs cite no law preventing a wholesaler
 8 headquartered outside California, or owned by non-residents of California, from obtaining the
 9 same wholesaler’s and importer’s licenses, on the same terms, available to California wholesalers
 10 and importers. The statutes cited in the complaint (§§ 23661, 23374, 23775 and 23778) do not
 11 distinguish between wholesalers headquartered and owned in California or elsewhere. Rather, the
 12 statutes cited in the complaint require *all* importers to have a *physical premises* in California at
 13 which to receive delivery of the imported alcohol. § 23661 requires that alcohol imported into
 14 California be consigned to a licensed importer consigned for delivery at either the importer’s
 15 premises or a licensed public warehouse. Necessarily this must be a premises in California, since
 16 it is a place for delivery of alcohol imported into California. § 24041 confirms that an “out-of-
 17 state business” such as Orion may obtain a “license at a public warehouse” in California to have
 18 alcohol come to rest, be stored and delivered from there.

19 Plaintiffs acknowledge that they could get a license to sell directly to California retailers
 20 by establishing a physical presence in California: “The only way the Plaintiffs could sell the wine
 21 they have imported from other countries directly to California retailers would be to open a new
 22 import/wholesale business in California with physical premises in the state” (Dkt. 35 at 6:6-9)
 23 (citing § 23661). Plaintiffs, however, overstate the requirement. As already seen, Section 23661
 24 does not require them to open a new *business* in California. They merely need a physical premises
 25 in California at which to take delivery, which can be rented warehouse space.

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

27 These laws do not violate the Commerce Clause, for at least two independent reasons.
 28 Every federal court of appeals to address the issue agrees that the Twenty-First Amendment (1)

1 protects state law discriminating against out-of-state *wholesalers* of alcoholic beverages, and (2)
 2 protects state law requiring wholesalers or retailers to have a physical presence up to and
 3 including physical residency. Whether or not Plaintiffs’ Commerce Clause arguments would be
 4 correct with respect to some *other* article of commerce, they are incorrect with respect to alcohol.

5 “[T]he Twenty-first Amendment ... limits the effect of the dormant Commerce Clause on
 6 a State’s regulatory power over the delivery or use of intoxicating beverages within its borders....”
 7 *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996). The Amendment “grants the
 8 States virtually complete control over whether to permit importation or sale of liquor and how to
 9 structure the liquor distribution system.” *Granholm v. Heald*, 544 U.S. 460, 469 (2005) (quoting
 10 *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)).

11 *Granholm*, 544 U.S. 460, is the Supreme Court’s latest explanation of the relationship
 12 between the Twenty-First Amendment and the dormant Commerce Clause. *Granholm* involved
 13 Michigan and New York laws that discriminated against out-of-state *producers* of alcoholic
 14 beverages (not wholesalers, as alleged here). The state laws in question allowed in-state wineries
 15 to sell directly to consumers, but prohibited out-of-state wineries from doing so. *Granholm* traced
 16 the Twenty-First Amendment’s history, concluding the Amendment was intended to lift
 17 Commerce Clause restrictions while requiring states to treat liquor (including wine, for this
 18 purpose) produced in-state with liquor produced out-of-state. *Granholm* explained that the
 19 Twenty-First Amendment had its origins in the Wilson Act and Webb-Kenyon Act, 27 U.S.C. §§
 20 121 and 122 (both still in force). *See* 544 U.S. at 484. The Wilson Act authorizes states to
 21 regulate imported intoxicating “liquors or liquids”– but only to the “same extent and in the same
 22 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*
 27 *same extent and in the same manner as though such liquids or liquors had been*
 28 *produced in such State or Territory”*

27 U.S.C. § 121 (emphasis added).

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 The Twenty-First Amendment “was intended to constitutionaliz[e]” these two acts.
15 *Granholm*, 544 U.S. at 508 (quoting *Craig v. Boren*, 429 U.S. 190, 206 (1976)). *Granholm* held
16 that Michigan’s and New York’s laws, because they treated *wine* made out-of-state differently
17 from that made in-state, were “straightforward attempts to discriminate in favor of local
18 producers,” and this “discrimination is contrary to the Commerce Clause and is not saved by the
19 Twenty-first Amendment.” 544 U.S. at 489.

20 *Granholm* repeatedly emphasized that the Wilson Act, Webb-Kenyon Act and Twenty-First
21 Amendment prohibit states from treating *liquors* produced out of state differently from *liquors*
22 produced in-state. *See, e.g., Granholm*, 544 U.S. at 483-84 (“The Wilson Act reaffirmed, and the
23 Webb-Kenyon Act did not displace, the Court’s line of Commerce Clause cases striking down state
24 laws that discriminated against *liquor produced* out of state.”); *id.* at 484 (“The cases under the
25 Webb-Kenyon Act uphold state prohibition and regulation ... yet they clearly forbid laws which
26 discriminate arbitrarily and unreasonably against *liquor* produced outside of the state”) (citation
27 omitted); *id.* at 486 (“[T]he Twenty-first Amendment ... does not displace the rule that States may
28 not give a discriminatory preference to their own *producers.*”) (emphases added).

1 *Granholm* simultaneously made clear that its holding does not call the three-tier system into
2 question. The Twenty-First Amendment in fact “protects” state alcoholic beverage distribution
3 laws as long as they do not discriminate against *liquor* produced out-of-state: “*States may ...*
4 *funnel sales through the three-tier system.* We have previously recognized that the three-tier
5 system itself is “*unquestionably legitimate.*” [Citation] State policies *are protected under the*
6 *Twenty-first Amendment when they treat liquor produced out of state the same as its domestic*
7 *equivalent.*” 544 U.S. at 488 (emphasis added). *Accord, Bacchus Imports, Ltd. v. Dias*, 468 U.S.
8 263, 276 (1984) (invalidating state excise tax that discriminated against *alcoholic beverages* made
9 out of state by exempting some alcoholic beverages made in-state).

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

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

15 “State policies are protected under the Twenty-first Amendment when they *treat liquor*
16 *produced out of state* the same as its *domestic equivalent.*” *Granholm*, 544 U.S. at 489 (emphasis
17 added). That is this case. Plaintiffs do not claim that California law treats wine produced out-of-
18 state differently from wine produced in-state. It does not. Under the three-tier system, a
19 winegrower in California can sell to a wine wholesaler in California, who in turn can sell to a
20 retailer, who in turn can sell to a customer. An out-of-state winegrower in, say, New York can sell
21 to that identical California wholesaler (who only needs an importer’s license in addition to a
22 wholesaler’s license), who can again sell to the identical retailer, who can sell to the identical
23 customer. Because they treat in-state and out-of-state wine equally, California’s laws are
24 “protected” under the Twenty-First Amendment. *Granholm*, 544 U.S. at 469.

25 As detailed above, plaintiffs claim that California law violates the Commerce Clause by
26 assertedly discriminating against out-of-state alcohol wholesalers and by requiring, in section
27 23661, that importers have space in a licensed public warehouse or other in-state physical
28 premises. These arguments state no claim. As detailed below, every federal court of appeals to
address the issue has held that the Twenty-First Amendment protects state laws that discriminate

1 against out-of-state wholesalers or retailers or require a physical presence, up to and including
2 requiring the wholesaler to be resident in the state. (There is a split in authority over whether state
3 laws can go even further and require the licensee to have been resident within the state for a
4 certain period of years. That split is moot here because California has no such law.)

5 *Southern Wine and Spirits v. Div. of Alcohol and Tobacco*, 731 F.3d 799, 809-810 (8th
6 Cir. 2013), upheld a Missouri law requiring alcoholic beverage wholesalers to reside in Missouri.
7 The Eighth Circuit held that this law was protected against Commerce Clause challenge because
8 it did not discriminate against out-of-state producers. “The residency requirement defines the
9 extent of in-state presence required to qualify as a wholesaler in the three-tier system. [Citation]
10 The rule does not discriminate against out-of-state liquor products or producers.” 731 F.3d at 810.
11 *Southern Wine* explains that *Granholm* “drew a bright line between the producer tier and the rest
12 of the system.” 731 F.3d at 810.

13 *Arnold’s Wines v. Boyle*, 571 F.3d 185, 191 (2d Cir. 2009) upheld a New York law
14 discriminating against out-of-state retailers. The New York law allowed in-state retailers to
15 deliver alcoholic beverages to consumers at home, but did not allow out-of-state retailers the
16 same privilege. Interpreting *Granholm*, the Second Circuit upheld the law because it did not
17 discriminate against *products* made out of state: “Because New York’s three-tier system treats in-
18 state and out-of-state liquor the same, and does not discriminate against out-of-state products or
19 producers, we need not analyze the regulation further under Commerce Clause principles.” 731
20 F.3d at 810. *Accord, Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 820 (5th Cir. 2010)
21 (“*Granholm* prohibited discrimination against out-of-state *products* or *producers*. Texas has not
22 tripped over that bar by allowing in-state retailer deliveries.”). (emphasis added).

23 The Fourth Circuit similarly upheld a state law discriminating against out-of-state retailers
24 in *Brooks v. Vassar*, 462 F.3d 341 (4th Cir. 2006). *Brooks* acknowledged that discrimination in
25 favor of local *wineries* violated the Commerce Clause. *Id.* at 354-55. But it held that Virginia law
26 could discriminate against out-of-state *retailers* by allowing residents to purchase unlimited wine
27 from in-state retailers but only import one gallon from out-of-state suppliers. “[T]his argument
28 must be that in-state *retailers* are favored over out-of-state *retailers*. But an argument that

1 compares the status of an in-state retailer with an out-of-state retailer—or that compares the status
 2 of any other in-state entity under the three-tier system with its out-of-state counterpart—is
 3 nothing different than an argument challenging the three-tier system itself.” *Id.* at 352.

4 The Fifth Circuit holds that states may even require wholesalers and retailers to be
 5 physically resident in the state and discriminate against out-of-state businesses:

6 Because of the Twenty-first Amendment, *states may impose a physical-residency*
 7 *requirement on retailers and wholesalers of alcoholic beverages despite the fact that*
 8 *the residency requirements favor in-state over out-of-state businesses.* [Citation] The
 9 Twenty-first Amendment does not, however, authorize states to impose a durational-
 10 residency requirement on the *owners* of alcoholic beverage retailers and wholesalers.

11 *Cooper v. Tex. Alcoholic Bev. Comm’n*, 820 F.3d 730, 743 (5th Cir.), *cert. denied*, 137 S.Ct. 494
 12 (2016) (citing *Wine Country Gift Baskets*, 612 F.3d at 821) (emphasis added).

13 Last, the Sixth Circuit agrees with the Fifth: a state can permissibly require a wholesaler
 14 or retailer to be physically resident in the state. *Byrd v. Tenn. Wine and Spirits Retailers Ass’n*
 15 883 F.3d 608, 622-23 (6th Cir. 2018), *certiorari granted*, ___ U.S. ___, 2018 WL 3496882 (U.S.
 16 Sept. 27, 2018).⁴ *Byrd* involved a Tennessee law imposing what is known as a durational
 17 residency requirement. This law required owners and officers of alcoholic beverage retailers to
 18 live in Tennessee for two years before obtaining a license (*i.e.* residence for a *duration* of two
 19 years). *Byrd* reasoned that laws requiring alcoholic-beverage wholesale and retail licensees to be
 20 *physically* in the state are valid, but laws requiring their owners to reside in the state *for a certain*
 21 *period* are not: “*requiring wholesalers and retailers to be in the state is permissible*, but requiring
 22 owners to reside within the state for a certain period is not.” 883 F.3d at 623 n.8 (citing *Cooper*,
 23 820 F.3d at 743) (emphasis added). California does not require presence for a certain period.

24 The Ninth Circuit has not addressed the issue, and its closest opinion is consistent with
 25 these other circuits’ analysis. *Black Star Farms, LLC v. Oliver*, 600 F.3d 1225 (9th Cir. 2010),

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

1 involved Arizona laws regulating direct shipment of wine from wineries. It “generally require[d]
2 all alcoholic beverages sold to consumers in the state to pass through a three-tier distribution
3 system comprised of producers, wholesalers, and retailers.” *Id.* at 1227. However, it allowed two
4 facially neutral exceptions. *Id.* at 1227. The Ninth Circuit held that the facially neutral laws did
5 not discriminate against out-of-state wineries and affirmed summary judgment for the state. *Id.* at
6 1231-1235. Nothing in *Black Star* calls into question *Granholm*’s conclusions that the three-tier
7 system is unquestionably legitimate and state law is protected when it treats liquor produced out
8 of state the same as its domestic equivalent.

9 Plaintiffs wrongly assert that *Black Star* makes ordinary Commerce Clause anti-
10 discrimination principles, such as those in *Oregon Waste Sys., Inc. v. Dept. of Env’l Quality*, 511
11 U.S. 93, 99 (1994), “applicable to state liquor laws.” (Dkt. 35 at 4) *Black Star* involved alleged
12 discrimination at the producer level (*i.e.* against out-of-state wineries). As already discussed,
13 Commerce Clause anti-discrimination principles apply at the producer level. They do not apply at
14 the wholesale and retail levels, which are at issue here. Pp. 9-14 above.

15 Nor is the uniform law allowing states to prefer in-state wholesalers and retailers, or even
16 require them to be residents, changed by the Supreme Court’s grant of certiorari in the Sixth
17 Circuit case, *Byrd*. The question presented for the Supreme Court’s review in *Byrd* focuses
18 specifically on the validity of *durational*-residency requirements. The question presented is:
19 “Whether the Twenty-First Amendment empowers States, consistent with the dormant Commerce
20 Clause, to regulate liquor sales *by granting* retail or wholesale *licenses only to individuals or*
21 *entities that have resided in-state for a specified time.*” Petition for a Writ of Certiorari, No. 18-
22 96, at i (emphasis added). Citing the cases described above, the petition for certiorari explained
23 that the Fifth and Sixth Circuits had struck down *durational*-residency requirements, while the
24 Eighth Circuit had upheld them and the Second and Fourth Circuits had upheld other residency-
25 related restrictions. *See id.* at 17-23. But as already seen, *all of the cases on either side of this split*
26 agree that the Twenty-First Amendment protects state laws that do what plaintiffs say California
27 law does: discriminate against out-of-state wholesalers and retailers or require a physical
28 presence, up to and including physical residence in the state.

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

2 *Granholm* establishes another, independently dispositive principle. “States may ... funnel
3 sales through the three-tier system.” *Granholm*, 544 U.S. at 489. Plaintiffs’ claim here attacks the
4 three-tier system itself. Plaintiffs complain that an importer can transfer imported wine to itself
5 under its wholesaler’s license (SAC ¶ 9), but that is the mechanism by which the law funnels the
6 imported wine into the three-tier system. Under the wholesaler’s license it can sell to the third
7 tier, retailers. Plaintiffs would prefer that imports be funneled directly into the retail tier, but
8 *which tier of the three-tier system* to funnel imports into is a policy matter for the state. The
9 Twenty-First Amendment explicitly grants states control over “importation” of alcoholic
10 beverages, and *Granholm* reaffirms that California has virtually complete control over the three-
11 tier system and the right to funnel sales through it.

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

1 that ‘the three-tier system itself is unquestionably legitimate.’” *Southern Wines & Spirits*, 731
2 F.3d at 810 (citing *Granholm*, 544 U.S. at 489). “In-state wholesalers, therefore, must be
3 ‘integral’ to the three-tier system under *Granholm*.” 731 F.3d at 810.

4 Plaintiffs’ claim here falls squarely under *Arnold’s Wines, Brooks* and *Southern Wines &*
5 *Spirits*. Their attempt to require California to allow distribution by a wholesaler with no in-state
6 presence is an attack on California’s three-tier system. If adopted, their arguments would require
7 significant changes in California’s structure for alcoholic-beverage distribution and impair
8 California’s ability to enforce alcoholic-beverage control laws. For example:

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

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

26 (3) The Department of Alcoholic Beverage Control would be far less able to enforce
27 compliance with the ABC Act by applicants and licensees with no in-state presence than in-state
28 applicants and licensees. Section 23661 funnels imports and tax collection to a manageable

1 number of manufacturers and wholesalers, all with physical premises in California, subject to
2 inspection by the ABC and subject to California's criminal-law jurisdiction for violation of
3 alcoholic beverage control laws or tax laws. Plaintiffs seek to invalidate section 23661 and enable
4 wholesalers with no in-state presence to send alcohol directly to licensed retailers in California.
5 They would thereby eliminate both the requirement that wholesaler/importers have a physical
6 presence in California and the centralized entry points for alcoholic beverages imported into
7 California. Eliminating these features would devastate enforcement of the ABC Act.

8 The ABC investigates license applicants. § 23958. To that end, it can issue subpoenas for
9 attendance of witnesses and production of documents and testimony. § 25751; Cal. Gov. Code §
10 11181. But a California agency's subpoena would have no effect in another state. Similarly, the
11 ABC can examine the books, records and premises of any licensee. § 25753. It is not clear
12 whether ABC would have a legal right to examine such books outside the State.

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

22 Another example: To enforce the tied-house laws (pp. 3-5 above), the ABC needs to
23 determine whether an out-of-state licensee owns an interest in a business that holds a retail
24 license. It also needs to determine, on an ongoing basis, whether the supplier has provided money
25 or any thing of value to a California retailer. A California agency like ABC lacks both the
26 subpoena power and the resources to send agents all over the country to investigate violations and
27 enforce California laws against thousands of suppliers in dozens of states.

28 (4) If plaintiffs' claim succeeded, California would have to track thousands of small

1 shipments among innumerable permutations of out-of-state vendors and in-state retailers. That
2 would make the three-tier system exponentially harder to administer and enforce.

3 It does not matter whether these problems are surmountable. California is not required to
4 shift responsibilities among tiers of its licensing system, change the way it collects taxes and
5 impair its ability to regulate, all to reduce expense to Orion. Such a duty would be inconsistent
6 with the Twenty-First Amendment’s grant of “virtually complete control” over importation and
7 the structure the liquor distribution system. *Granholm*, 544 U.S. at 488. Further, Orion could
8 import wine on exactly the same terms as wholesalers headquartered in California, merely by
9 renting a small amount of licensed warehouse space in California and obtaining California
10 wholesaler’s and importer’s licenses. Orion could then receive imports in California and sell them
11 to retailers. *See* §§ 23661 (authorizing delivery consigned to importer at licensed public
12 warehouse), 24041 (“A license at a public warehouse shall be required by an out-of-state business
13 whose alcoholic beverages come to rest, are stored, and shipped from a public warehouse in
14 California.”), 23378 (wholesaler’s license authorizes sale to persons holding licensing authorizing
15 sale, such as retailers). Whether California law *could* be structured to enable Orion to distribute
16 directly from Florida is beside the point. “There is no narrow tailoring requirement under the
17 Twenty-first Amendment.” *Southern Wine & Spirits*, 731 F.3d at 812. Rather, California has
18 “virtually complete control over whether to permit importation or sale of liquor and how to
19 structure the liquor distribution system.” *Granholm*, 544 U.S. at 488.

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

22 *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 901-02 (9th Cir. 2008), examined
23 whether California’s ABC laws were preempted by a federal antitrust law with which they
24 conflicted. *Maleng* held that in harmonizing state and federal powers in the setting of state laws
25 that actually conflict with federal laws that were enacted under the Commerce Clause, “the key
26 question is ‘whether the interests implicated by a state regulation are so closely related to the
27 powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding
28 that its requirements directly conflict with express federal policies.’” 522 F.3d at 902. *Maleng* is

1 off point here, because this case does not involve a conflict with a federal law. When a state law
2 conflicts with federal law, the state law must give way under the Supremacy Clause if Congress
3 had power to enact the federal law. And although the Twenty-First Amendment limits the
4 *dormant* Commerce Clause, it does not repeal federal power under the Commerce Clause to enact
5 *affirmative* legislation regulating interstate commerce in liquor. *Capital Cities Cable, Inc. v.*
6 *Crisp*, 467 U.S. 691, 712-13 (1984). In other words, the scope of Congress’ power to *enact* law
7 regarding alcoholic beverages under the Commerce Clause is broader than the scope of the
8 *dormant* Commerce Clause’s nullification of state law regarding alcoholic beverages under the
9 Twenty-First Amendment. *Maleng* involved the former; this case involves the latter.

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

19 **IV. CONCLUSION**

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

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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 November 16, 2018, I electronically filed the following document with the Clerk of the Court by using the CM/ECF system:

REVISED 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 November 16, 2018, at San Francisco, California

Jennifer Gray
Declarant

/s/ Jennifer Gray
Signature