UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DWINELL, LLC et al., Plaintiffs, v. JOSEPH MCCULLOUGH et al., Defendants.	Case No. 2:23-cv-10029-SB-KES ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [DKT. NO. 83]

Plaintiffs Dwinell, LLC and Buckel Family Wine LLC are wine producers who want to sell their wine directly to California retailers. They challenge several provisions of California's Alcohol and Beverage Control Act (ABC Act) under the Commerce Clause, arguing that the state's implementation of the Act discriminates against out-of-state wineries by permitting only in-state wineries to sell their wine directly to retailers. The parties now cross-move for summary judgment. Dkt. No. 83. The Court held a hearing on April 4, 2025. Because Plaintiffs have failed to demonstrate Article III standing, the Court grants summary judgment for Defendants.

I.

California's ABC Act governs the state's three-tiered licensing system for alcohol production, distribution, and sale: producers (the first tier) may obtain licenses to sell their products to wholesalers (the second tier), who sell those products to retailers (the third tier), who sell to consumers. Plaintiffs are wineries based in Washington and Colorado who want to sell their wine directly to California retailers. They bring this action under the dormant Commerce Clause, challenging two features of the ABC Act that prevent them from doing so.

First, they challenge an exception that allows wineries with an in-state presence to bypass part of the three-tier structure and sell directly to retailers (the "presence requirement"). The ABC Act provides that producers may sell directly to retailers if they obtain winegrower licenses. Cal. Bus. & Prof. Code § 23358(a)(1) ("Licensed winegrowers, notwithstanding any other provisions of this division, may also exercise the following privileges: (1) Sell wine and brandy to any person holding a license authorizing the sale of wine or brandy."); Joint Appendix of Facts (JAF) 24, Dkt. No. 83-1.[1] The statutory definition of winegrower, Cal. Bus. & Prof. Code § 23013, and the provision for the issuance of a winegrower license, *id*. § 23770, do not distinguish between in-state and out-of-state wineries. However, the Department of Alcoholic Beverage Control has taken the position that only wineries with in-state premises are eligible for winegrower licenses. JAF 41. Because Plaintiffs have no in-state premises, they are unable to obtain winegrower licenses and cannot sell directly to retailers. JAF 27, 29.

Second, Plaintiffs request that the Court enjoin Defendants from interpreting the ABC Act to prevent them from selling directly to retailers, even if they obtained winegrower licenses, by requiring them to distribute their wine through a licensed importer (the "importer requirement").[2] The ABC Act requires that all out-of-state alcohol be brought into the state by common carriers and consigned to a licensed importer, Cal. Bus. & Prof. Code § 23661(a), and prohibits retailers from obtaining an importer's license, *id*. § 23375.6. Because Plaintiffs produce all

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[1] Unless otherwise indicated, citations to the JAF are to undisputed facts, undisputed portions of partially disputed facts, or purportedly disputed facts not genuinely in dispute. To the extent the Court relies on evidence to which an evidentiary objection was raised, the Court overrules the objection, having found the contents of the evidence could be admitted at trial. *See, e.g.*, *Sandoval v. County of San Diego*, 985 F.3d 657, 666 (9th Cir. 2021) ("If the contents of a document can be presented in a form that would be admissible at trial—for example, through live testimony by the author of the document—the mere fact that the document itself might be excludable hearsay provides no basis for refusing to consider it on summary judgment."). To the extent the Court does not rely on evidence objected to by the parties, the objections are overruled as moot.

[2] Plaintiffs include in their challenge any provision of the ABC Act that prevents them from distributing their wine directly to retailers on the same terms as in-state wine producers. The challenged provisions are Cal. Bus. & Prof. Code §§ 23017(a)–(b), 23026, 23300, 23374, 23374.6, 23661(a), 23661.5, 23667, 23668, 23375.6, 23393, 23394, and 23775. Dkt. No. 58 ¶ 60.

their wine outside the state, they would still be required to use a licensed California importer to distribute and sell their wine to retailers, even if they had a winegrower license. They claim that distributing wine through an importer imposes "substantial cost[s]" on wineries. JAF 81 (disputed). Plaintiffs argue that "it should be unnecessary" for them to challenge these provisions, given that winegrower licensees may sell directly to retailers "notwithstanding any other provisions" of the Act. Dkt. No. 83 at 7; Cal. Bus. & Prof. Code § 23358(a)(1). They nevertheless challenge these provisions because Defendants threatened in prior proceedings to enforce them even if Plaintiffs obtained winegrower licenses. Dkt. No. 83 at 7; JAF 45.

Plaintiffs contend that these two features of the ABC Act—the presence requirement and the importer requirement—result in a scheme allowing California wineries to sell directly to California retailers while precluding foreign wineries from doing so. Plaintiffs therefore claim that the implementation and enforcement of these provisions of the ABC Act discriminate against interstate commerce in violation of the Commerce Clause. *See Day v. Henry*, 129 F.4th 1197, 1204 (9th Cir. 2025) (noting that the dormant Commerce Clause "prevents states from adopting protectionist measures that unduly restrict interstate commerce"). They seek injunctive and declaratory relief that would allow them to obtain winegrower licenses and sell directly to California retailers on an even playing field.

II.

The Court first considers, as it must, Defendants' standing challenge. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430–31 (2007) ("[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction.").

To establish Article III standing, the plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). A plaintiff must show that the injury was "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotations omitted). The party invoking federal jurisdiction bears the burden of demonstrating standing. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 430–31 (2021). At the summary judgment stage, "the plaintiff can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts,

which for purposes of the summary judgment motion will be taken to be true." *Wash. Env't Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013) (cleaned up). "A plaintiff's basis for standing must affirmatively appear in the [summary judgment] record." *Id.* (cleaned up).

In the context of a pre-enforcement challenge to existing laws, the challenger must demonstrate that there is a "genuine threat of imminent prosecution." *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (cleaned up) (rejecting the argument that "the mere existence of a statute can create a constitutionally sufficient direct injury"). Defendants contend that Plaintiffs have failed to meet this requirement, arguing that they have not provided evidence of a concrete plan to sell their wine to retailers in California. *See id*. (noting that a "genuine threat of imminent prosecution" includes consideration of whether there is a concrete plan to violate the law).[3]

A.

The Court begins with an overview of the prior standing challenge in this case.

In their first amended complaint (FAC), Plaintiffs claimed that they "want the opportunity to sell their wines directly to California retailers" but made no allegations that they planned to do so. Dkt. No. 30 ¶ 32. Defendants moved to dismiss the FAC, arguing that Plaintiffs' bare assertion that they "want[ed] the opportunity" to sell directly to California retailers was insufficient to demonstrate a concrete and particularized injury in fact.

Both parties analyzed Plaintiffs' alleged harm as a pre-enforcement injury, a "special subset of injury-in-fact" that involves the "anticipated enforcement of [a] challenged statute in the future." *Peace Ranch, LLC v. Bonta*, 93 F.4th 482, 487 (9th Cir. 2024). However, they disputed the applicable legal standard for pre-enforcement injury. Defendants applied the three-factor test announced by the en banc panel in *Thomas*, which requires courts to consider: (1) "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question," (2) "whether the prosecuting authorities have communicated a specific warning or

[3] Defendants also argue that Plaintiffs have failed to establish redressability. Because the Court finds that Plaintiffs have not demonstrated injury in fact, it does not address the parties' redressability arguments.

threat to initiate proceedings," and (3) "the history of past prosecution or enforcement under the challenged statute." 220 F.3d at 1139. Plaintiffs argued that the *Thomas* three-factor test had been abandoned in *Peace Ranch, LLC v. Bonta*, where the Ninth Circuit adopted the pre-enforcement framework articulated by the Supreme Court in *Susan B. Anthony List v. Driehaus* but acknowledged that it had "toggled between" that framework and the *Thomas* test. 93 F.4th at 487; *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) ("[A] plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.") (cleaned up).

The Court agreed with Defendants and applied *Thomas*, finding that the Ninth Circuit had expressly rejected Plaintiffs' argument that *Driehaus* "abrogated the Ninth Circuit's three-part test." Dkt. No. 50 at 5 (quoting *Unified Data Servs., LLC v. Fed. Trade Comm'n*, 39 F.4th 1200, 1210 n.9 (9th Cir. 2022)). The Court also found *Peace Ranch* to be consistent with the *Thomas* test, noting that *Peace Ranch* "appear[ed] to have addressed the substance of the first *Thomas* factor." Dkt. No. 50 at 5–7. Applying *Thomas*, the Court concluded that the allegations in the FAC were insufficient to demonstrate a pre-enforcement injury. *Id.* at 7–8. Plaintiffs had failed to allege "when, to whom, where, or under what circumstances" they would sell their wines to California retailers and offered no suggestion that they had even contacted any retailers. *Id.* at 7 (quoting *Unified Data*, 39 F.4th at 1211). The Court granted the motion to dismiss with leave to amend to cure the identified deficiencies. *Id.* at 8–10.

Plaintiffs' second amended complaint (SAC) added allegations that they "would promptly obtain a Winegrower license if the in-state presence requirement were removed," that they had contacted four specific wine retailers in California "about selling their wine directly to them," and that they "intend[ed] to sell and deliver [their] wines to [those] California retailers as soon as it becomes lawful to do so." Dkt. No. 58 ¶¶ 48–49. Defendants filed a motion to dismiss the SAC on the merits without raising any jurisdictional challenges. The Court denied the motion and noted that the SAC "appear[ed] to have cured the Article III problems in Plaintiffs' prior pleadings." Dkt. No. 76 at 3.

B.

Plaintiffs renew their argument that *Peace Ranch* supplies the applicable legal standard for determining whether they have established a pre-enforcement

injury. They argue that post-*Driehaus* case law in the Ninth Circuit has been mixed, noting that some panels have continued to apply *Thomas* but that others have treated *Driehaus* as a "different framework" that only requires an "intention to engage in the proscribed conduct." Dkt. No. 83 at 12–13. Plaintiffs point to language from the Ninth Circuit that "when a Ninth Circuit precedent has been undermined by a Supreme Court decision, a panel . . . may reexamine that precedent without the convening of an *en banc* panel." *Id.* at 13 (quoting *Hill v. Blind Indus. & Servs. of Maryland*, 179 F.3d 754, 762 (9th Cir. 1999)). In those circumstances, Plaintiffs argue, "the more recent decision then becomes the one that should be followed by the District Court." *Id.*

Peace Ranch, however, did not "reexamine" *Thomas*. Nor did it find *Thomas* clearly irreconcilable with *Driehaus*. *See Avilez v. Garland*, 69 F.4th 525, 533 (9th Cir. 2023) ("A three-judge panel may depart from circuit precedent only if our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority.") (cleaned up). *Peace Ranch* and *Thomas* appear to be two articulations of the same standard, rather than wholly distinct tests. *See Peace Ranch*, 93 F4th at 487 (noting that *Driehaus* "articulated a different framework, albeit incorporating part of the essence of the Ninth Circuit test"). While *Thomas* requires a "concrete plan" to violate the law, 220 F.3d at 1139, and *Peace Ranch* requires an "intention to engage in a course of conduct arguably affected with a constitutional interest," 93 F.4th at 487 (cleaned up), both tests have the same objective—i.e., to determine if there is sufficient evidence that the plaintiff would engage in the prohibited conduct if the prohibition were eliminated. A mere statement of intent, unaccompanied by reliable indicia of concreteness, is not enough.

This principle is borne out in *Driehaus* and the cases upon which it relies. *See Driehaus*, 573 U.S. at 161 (noting that the plaintiffs previously had engaged in the prohibited conduct and "pleaded specific statements they intend to make in future election cycles"); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (finding actual controversy where plaintiff had been warned twice to stop engaging in prohibited conduct and companion had been prosecuted); *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 301 (1979) (finding actual controversy where plaintiff had "actively engaged in consumer publicity campaigns in the past"); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 390–92 (1988) (finding injury in fact where plaintiff bookseller introduced 16 books believed to be banned by challenged statute and testified that law might apply to half of its inventory); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 15–16 (2010) (finding justiciable controversy where plaintiffs previously supported groups designated as terrorist

organizations under challenged law). It is also borne out in the Ninth Circuit case upon which Plaintiffs heavily rely. Indeed, the *Peace Ranch* panel concluded that the plaintiff had sufficiently pleaded intent where it "allege[d] *corroborating* past practice." 93 F.4th at 488 (emphasis added) (finding sufficient intent where plaintiff had stopped engaging in conduct after the challenged provision went into effect).

Accordingly, the Court analyzes the injury-in-fact issue by determining whether Plaintiffs have provided sufficient evidence to demonstrate a concrete plan to sell their wines to California retailers.[4]

C.

The parties dispute whether Plaintiffs have demonstrated a concrete plan or the requisite intent to sell their wine to California retailers. Defendants contend that Plaintiffs only demonstrate hypothetical intentions to do so "some day," pointing to undisputed evidence that Plaintiffs have not contacted any retailers in California. Plaintiffs counter that the "concrete plan" requirement does not require them to have contacted specific retailers and that they have sufficiently demonstrated that they would sell to California retailers if it were legal to do so.

Defendants point to substantial evidence that Plaintiffs have not had a concrete to plan to sell to California retailers at any point during the pendency of this case.[5] While Plaintiffs alleged in their SAC that they had contacted four

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[4] The Court's conclusion that the *Thomas* and *Peace Ranch* tests are not wholly distinct is consistent with its prior order. Though the Court previously found that *Thomas* "governs the injury-in-fact analysis," it in effect applied the same standard articulated in both *Thomas* and *Peace Ranch*, requiring Plaintiffs to provide concrete allegations of an actual or imminent injury. Dkt. No. 50 at 7–8.

[5] Standing is generally determined by the facts at the time a plaintiff files its complaint. *Carney v. Adams*, 592 U.S. 53, 59 (2020) ("[Plaintiff] bears the burden of establishing standing as of the time he brought this lawsuit and maintaining it thereafter.") At the hearing, Plaintiffs cited Ninth Circuit authority holding that a lack of standing at the outset of a case may be cured by filing an authorized supplemental pleading under Fed. R. Civ. P. 15(d). *Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1044–45 (9th Cir. 2015). Here, Plaintiffs neither sought leave to file a supplemental pleading nor demonstrated a concrete plan to sell to California retailers at any time during this action.

California retailers—Wolfdale's, Madrona Vineyards, Arger Family Estate, and The Wine Country—who had "agreed to take further concrete steps to arrange . . . sales," they now concede that neither their owners nor any of their employees ever contacted them.[6] Dkt. No. 58 ¶ 49; JAF 1–8, 19–20. Indeed, Plaintiffs' owners admitted at their depositions that they have not contacted any California retailers and have no plans to sell to California retailers. *See* Joint Appendix of Evidence (JAE) at 41–43, 127–29, Dkt. No. 83-2;[7] *id.* at 43 (Q: "Has Dwinell ever made any plan to sell wine to any California retailer?" A: "No."). Moreover, two of the four retailers do not even hold California retailer licenses. JAF 9–10.

In response, Plaintiffs state that if they were allowed to sell directly to retailers, they would obtain winegrower licenses and market their wine to California retailers. In a declaration, Dwinell's owner represents that the winery's "plan has been to move aggressively to find retailers in Washington, Oregon, Idaho and California willing to carry [its wine]" and that it "would begin [that process] by contacting retailers known to [them] and referred to [them]." JAE at 255 ¶ 6. Buckel's owner similarly states that the winery wants to expand its California sales and plans to contact California retailers to gauge their interest once it has a license. JAE at 261 ¶ 7, 14. He states that he "would start" by contacting Wolfdale's and The Wine Country "because they have expressed interest in carrying [Buckel's] wine." *Id.* ¶ 14; *see also* JAE at 310 ¶ 6 (declaration from The Wine Country owner stating that it "would be interested in having Buckel Family Winery self-distribute to our retailer store, if California law permitted"). Plaintiffs also point to testimony from their owners about their general process for finding retailers, which includes researching retailers, determining whether their wines may be a "good fit" for the retailers' price point, meeting with the retailers to discuss and potentially sample the wine, and "building up [a] rapport." JAE at 12–15, 110–115. They present no evidence that they have engaged in this process in California.

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[6] Plaintiffs do offer evidence that their counsel contacted the retailers after filing this suit. JAF 19–20. But as counsel admitted at the hearing, those contacts were purely litigation driven, prompted by the standing deficiencies identified by the Court. They do not reflect a concrete business plan. *See, e.g.*, JAE at 53–54 (testimony from Dwinell's owner that counsel is not authorized to act on Dwinell's behalf as an agent to sell or negotiate the sale of wine).

[7] Page number citations to the JAE refer to the page numbers at the bottom of each page.

The Court cannot conclude on this record that Plaintiffs have a concrete plan to violate the challenged provisions or that their alleged harm is "actual or imminent." *Lujan*, 504 U.S. at 560. Although two retailers have "expressed interest" in Plaintiffs' wine, JAE at 261 ¶ 14, Plaintiffs' owners have had no discussions with them. Instead, they merely declare an intent to begin contacting retailers if and when they obtain winegrower licenses. JAE at 255 ¶ 6 (declaration from Dwinell's owner stating that he "would begin" by contacting retailers known to him); *id.* at 261 ¶ 14 (declaration from Buckel's owner stating that he "would start" by reaching out to two "interested" retailers). Indeed, Plaintiffs' counsel conceded at the hearing that the record lacks evidence establishing when Plaintiffs would be able to sell their wines to California retailers if the Court ruled in their favor. That concession is fatal to their claim of standing. *See Lujan*, 504 U.S. at 564 ("'[S]ome day' intentions—without any description of concrete plans, or indeed any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."); *id.* (no injury in fact where plaintiffs intended to travel to Sri Lanka but did not know when they would do so).

Moreover, whether and when Plaintiffs would be able to sell to retailers depends on the decisions of the retailers themselves—third parties over which Plaintiffs have no control. In *Thomas*, for example, the Ninth Circuit found plaintiffs had failed to demonstrate a concrete plan where their expressed intent to rent to unmarried couples—conduct prohibited by the challenged laws at issue—was "wholly contingent upon the occurrence of unforeseeable events," including "whether an unmarried couple [would] seek to lease available property." 220 F.3d at 1140–41 ("The landlords' expressed 'intent' to violate the law on some uncertain day in the future—if and when an unmarried couple attempts to lease one of their rental properties—can hardly qualify as a concrete plan."); *cf. Lujan*, 504 U.S. at 592–93 (Blackmun, J., dissenting) (collecting Supreme Court authority finding no injury where "the imminence of harm turned largely on the affirmative actions of third parties beyond a plaintiff's control"). Here, Plaintiffs' intent to sell to retailers is similarly contingent on unforeseeable actions by third-party retailers.[8]

[8] Nor have Plaintiffs concretely demonstrated that they will be able to contract with California retailers because of pre-existing demand for their wine in California. Both Plaintiffs testified they do not sell their wines to California importers or wholesalers. JAE at 43, 129. Though Buckel testified that it sells directly to California consumers, it has not pointed to any evidence of the volume of its sales to California consumers, or that any demand for wine by consumers would translate into demand by retailers to stock their wines. *See* JAE at 101 ("We hold

Plaintiffs primarily rely on two distinguishable Ninth Circuit cases to argue that they need not have spent time and resources in a futile effort to arrange sales to specific retailers. Dkt. No. 83 at 14–15; Dkt. No. 89 at 3 (citing *Isaacson v. Mayes*, 84 F.4th 1089 (9th Cir. 2023) and *Italian Colors Restaurant v. Becerra* 878 F.3d 1165, 1168 (9th Cir. 2018)). In *Isaacson*, physician plaintiffs demonstrated an economic loss where they had stopped performing certain medical services in response to the challenged Arizona abortion law. 84 F.4th at 1094, 1097. In contrast, Plaintiffs here have presented no evidence that they sold to California retailers in the past or have ceased any sales due to the challenged provisions of the ABC Act. Plaintiffs also point to *Italian Colors Restaurant*, which involved a First Amendment challenge to a California statute that prohibited imposing a surcharge on customers who made payments with credit cards. 878 F.3d at 1168. The court held that the plaintiffs had demonstrated a concrete plan to impose credit card surcharges because they had plans to impose those surcharges "at their stores, on their customers, when credit card surcharges are legal." *Id.* at 1174. Unlike Plaintiffs here, who have never sold wine to California retailers and whose plan to do so depends on retailers' willingness to purchase their wines, the plaintiffs in *Italian Colors* had full control over how and when they would impose the surcharges. *See id.* at 1168–69 (pointing to representations from plaintiff businesses about the prices they would charge and how they would label price differences). Plaintiffs here have not demonstrated that they would be able to sell to California retailers, let alone that they would do so at any specific time, if permitted by law.

In sum, Plaintiffs have failed to provide sufficient evidence about whether, how, and when they would be able to sell their wines to retailers were the Court to grant the requested relief. Plaintiffs have failed to establish Article III standing, and summary judgment is granted for Defendants on these limited grounds.[9]

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a . . . license to sell to [consumers] in California. So we already do that within the state of California."); JAF 89 ("Buckel . . . is *allowed* to sell its wine directly to California consumers.") (emphasis added).

[9] Plaintiffs also briefly argue that they have standing because "[l]oss of a constitutional right in itself is a concrete injury." Dkt. No. 83 at 11. However, none of the cases they cite reflects a constitutional right to engage in interstate commerce that would permit them to bring a pre-enforcement lawsuit without any further showing. *E.g.*, *GMC v. Tracy*, 519 U.S. 278, 286 (1997) (finding injury where customers paid more for a product due to challenged laws discriminating against interstate commerce); *Legal Aid Soc. of Alameda Cnty. v. Brennan*, 608

III.

Because Plaintiffs have failed to establish an injury in fact, the Court grants summary judgment for Defendants.[10]

A final judgment will be entered separately.

Date: April 7, 2025

Stanley Blumenfeld, Jr.
United States District Judge

F.2d 1319, 1333–34 (9th Cir. 1979) (finding denial of *employment* opportunities adequate for standing).

[10] As stated on the record, the Court does not issue any Rule 11(b) order to show cause.