

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

FEB 25 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ORION WINE IMPORTS, LLC; PETER E.
CREIGHTON,

Plaintiffs-Appellants,

v.

JACOB A. APPELSMITH, in his official
capacity as Director of the California Dept.
of Alcoholic Beverage Control,

Defendant-Appellee.

No. 20-15447

D.C. No.

2:18-cv-01721-KJM-DB

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, Chief District Judge, Presiding

Argued and Submitted February 11, 2021
San Francisco, California

Before: WARDLAW and BEA, Circuit Judges, and CAIN,** District Judge.

Plaintiffs, Florida wine importers that would like to ship wine directly from
their Florida distribution facility to California retailers of alcoholic beverages,

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable James David Cain, Jr., United States District Judge for
the Western District of Louisiana, sitting by designation.

appeal the district court's order dismissing their complaint for lack of standing.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. We review the district court's decision dismissing Plaintiffs' complaint for lack of standing de novo, construing all factual allegations in favor of the plaintiffs. *Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 979 (9th Cir. 2013). The "irreducible constitutional minimum" for Article III standing requires that any plaintiff seeking to invoke federal jurisdiction must demonstrate he has "(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*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Even assuming Plaintiffs have adequately alleged an injury in fact,¹ we nonetheless conclude that Plaintiffs' strictly limited challenge to Section 23661 of California's Alcoholic Beverage Control Act ("ABC Act")² under the Dormant

¹ Specifically, Plaintiffs allege that Section 23661 prevents Plaintiffs from completing a proposed agreement to supply wine directly from Plaintiffs' Florida distribution facilities via common carrier to The Pour House, a licensed California wine retailer.

² The relevant statutory text of Section 23661 provides:

[A]lcoholic beverages shall be brought into this state from without this state for delivery or use within the state only by common carriers and only when the alcoholic beverages are consigned to a licensed importer, and only when consigned to the premises of the licensed importer or to a licensed importer

Commerce Clause fails to establish both the causation and redressability necessary for Article III standing. As the district court correctly found, the fatal flaw for Plaintiffs' challenge under both requirements is that other independent provisions of the ABC Act, which Plaintiffs do not challenge, would still prohibit Plaintiffs' proposed transaction with The Pour House even if Section 23661 were invalidated. Thus, given that other provisions of the ABC Act that Plaintiffs do not challenge would inflict the same "injury" by barring the proposed transaction with The Pour House, the connection between Plaintiffs' alleged injury and the challenged provision, Section 23661, is too "attenuated" for Article III standing. *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011). Furthermore, because Plaintiffs' proposed transaction would still be prohibited by the ABC Act even if we were to strike down Section 23661 as unconstitutional, a favorable ruling would not remedy Plaintiffs' alleged injury, the cornerstone of redressability. *See Nuclear Info. & Res. Serv. v. Nuclear Reg. Comm'n*, 457 F.3d 941, 955 (9th Cir. 2006); *see also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 228 (2003).

2. On appeal, Plaintiffs have raised additional challenges to other

or customs broker at the premises of a public warehouse licensed under this division.

Cal. Bus. & Prof. Code § 23661. The district court noted that Plaintiffs explicitly disavowed challenges to other provisions and "clarified they did not intend to seek further amendment of their complaint if the court dismissed it."

provisions of the ABC Act, such as Sections 23017(b) and 23405.2, that would also bar Plaintiffs' proposed transaction. However, Plaintiffs did not raise these challenges below, and "an appellate court will not hear an issue raised for the first time on appeal." *Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290, 1293 (9th Cir. 2015) (internal citation omitted). None of the four exceptions to this rule that we identified in *Kaass* are present here. 799 F.3d at 1293. Moreover, while federal courts may consider standing as a general matter even if raised for the first time on appeal, we are not obligated to consider every possible argument Plaintiffs could have made but did not, particularly where, as here, standing was raised, briefed, and argued below. *See Maricopa-Stanfield Irr. and Drainage Dist. v. United States*, 158 F.3d 428, 433 (9th Cir. 1999). Lastly, Plaintiffs' broad, generic request for any injunctive relief necessary "to allow Plaintiffs to sell and deliver wine directly to California retailers" cannot suffice to preserve these additional challenges and overcome our ordinary rule against hearing issues raised for the first time on appeal. *Kaass*, 799 F.3d at 1293.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

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Principal Brief(s) (<i>Opening Brief; Answering Brief; 1st, 2nd, and/or 3rd Brief on Cross-Appeal; Intervenor Brief</i>)	<input style="width: 60px; height: 20px;" type="text"/>	<input style="width: 60px; height: 20px;" type="text"/>	\$ <input style="width: 60px; height: 20px;" type="text"/>	\$ <input style="width: 60px; height: 20px;" type="text"/>
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