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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GARDEN PATH FERMENTATION, LLC and PETER WRIGHT, PLAINTIFFS, V. UNITED STATES OF AMERICA; SCOTT BESSENT, in his official capacity as Secretary of the Treasury; MARY G. RYAN, in her official capacity as Administrator of the Alcohol and Tobacco Tax and Trade Bureau; and the ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, DEFENDANTS.	**No. 1:26-cv-03002-TOR** **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT**

I. INTRODUCTION

Plaintiffs Garden Path Fermentation, LLC ("Garden Path") and Peter Wright ("Wright") (collectively, the "Plaintiffs") respectfully submit this

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response in opposition to Defendants' Motion to Dismiss the First Amended and Supplemental Complaint (ECF 11). The motion should be denied. It rests entirely on a single theory—that Plaintiffs failed to exhaust an Alcohol and Tobacco Tax and Trade Bureau ("TTB") administrative appeal before suing—and that theory is foreclosed by the very statute and regulations on which it depends.

Under the Administrative Procedure Act (the "APA"), a court may not require a plaintiff to pursue an administrative appeal before seeking judicial review unless a statute expressly commands it, or an agency rule both requires the appeal and provides that the challenged action is inoperative while the appeal is pending. *Darby v. Cisneros*, 509 U.S. 137, 154 (1993); 5 U.S.C. § 704. That standard is conjunctive, and TTB's regulations satisfy neither branch. No statute requires a Certificate of Label Approval ("COLA") applicant to exhaust. And while TTB's rules require an appeal before judicial review, see 27 C.F.R. §§ 13.26(c), 13.27(c), no provision anywhere in Part 13 makes a denial inoperative pending appeal. To the contrary, the denial takes effect immediately: without an approved COLA, Garden Path may not lawfully introduce its labeled product into interstate commerce[1]. 27 U.S.C. § 205(e); 27 C.F.R. § 4.50(a). The May 12, 2026

[1] Title 314 of the Washington Administrative Code (WAC), administered by the Washington State Liquor and Cannabis Board, independently bars sale of the unapproved label in this state. WAC 314-24-040 requires wineries (including cider producers) and importers to submit TTB's federal COLA to the Board before sale, and to resubmit upon any label change requiring a new COLA. See WAC 314-24-040(2).

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denial is therefore final agency action reviewable now, and the Court may not graft an exhaustion requirement onto it. Tellingly, the Government's motion never cites *Darby* or the second sentence of § 704—the controlling framework—and instead relies on general, common-law exhaustion decisions that *Darby* displaced in APA cases.

Even if some exhaustion requirement applied, it would reach at most one item of requested relief. The Government asks only to dismiss "any claim directly challenging" TTB's May 12, 2026 denial. ECF 11 at 2, 11. It does not, and cannot, touch Count I's First Amendment challenge to 27 C.F.R. §§ 4.27 and 4.39, or the facial and as-applied APA challenge to that regulation in Count II. Those claims seek prospective relief against an ongoing prohibition; they do not depend on record review of a single label decision. The core of this case survives regardless of how the Court resolves the exhaustion question. The motion should be denied; in the alternative, any dismissal should be limited to Prayer ¶ D and entered without prejudice.

II. BACKGROUND

This is a First Amendment and APA challenge to TTB's vintage-labeling regime. Garden Path produces cider, mead, and fruit wine—non-grape "wine" within TTB's labeling jurisdiction at 7% alcohol by volume or higher. The operative First Amended and Supplemental Complaint ("FAC") pleads two

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counts, both directed at the regulation. Count I alleges that the prohibition on truthful vintage statements for non-grape wine in 27 C.F.R. §§ 4.27 and 4.39(b)(1) is an unconstitutional, content- and product-category-based restriction on truthful commercial speech, "both on its face and as applied." FAC ¶ 50. Count II alleges that the same prohibition, and TTB's denial applying it, exceed TTB's statutory authority under the Federal Alcohol Administration Act ("AAA") and are arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A)–(C). FAC ¶¶ 56–58.

The Prayer for Relief tracks that regulatory focus. Plaintiffs ask the Court to declare the prohibition unconstitutional (¶ A); to declare that the prohibition and the denial exceed TTB's authority and are arbitrary and capricious under 5 U.S.C. § 706(2) (¶ B); to permanently enjoin enforcement of the prohibition against Garden Path's truthful vintage labeling (¶ C); to set aside the May 12, 2026 denial and remand it (¶ D); and to award fees and other relief (¶¶ E–F). FAC, Prayer ¶¶ A–F. Only Prayer ¶ D—and the denial-specific slice of ¶ B—seeks review of the denial as such.

The May 12, 2026 COLA denial anchors the pleading's timeliness. TTB denied Garden Path's application for its "2024 Heirloom Blend" apple cider on May 12, 2026, applying the vintage-date restriction in 27 C.F.R. § 4.27. FAC ¶¶ 10–11 & Ex. A. Plaintiffs plead that denial as the concrete, adverse application

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of the challenged prohibition—the injury that cured the accrual and limitations defect the Court identified when it dismissed the original Complaint with leave to amend. ECF 9; FAC ¶¶ 4, 12. The application's correct TTB ID is 25317001000461; the transposed digit appearing in the pleading (25327001000461) is a scrivener's error, as the Declaration of Nicole C. Candelora notes. ECF 12 ¶ 3 & n.1.

The Government's motion concedes that this amendment "remedies Plaintiffs' prior statute of limitations problem." ECF 11 at 2. It raises a single new ground: that Plaintiffs did not pursue TTB's two-level administrative appeal within the 45-day window of 27 C.F.R. § 13.25(a), which the Government says closed June 26, 2026. ECF 11 at 2, 9. Supported by the Declaration of Nicole C. Candelora (ECF 12), which attests only that TTB has no record of an appeal, the Government moves under Rule 12(b)(1) and, in the alternative, Rule 12(b)(6), to dismiss "with prejudice any claim directly challenging" the denial. ECF 11 at 2, 11.

III. LEGAL STANDARD

The Government styles its motion under Federal Rule of Civil Procedure 12(b)(1) and, in the alternative, Rule 12(b)(6). On a factual attack under Rule 12(b)(1), the Government contends the Court may consider the Declaration of Nicole C. Candelora without converting the motion to summary judgment. *Safe*

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Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). Plaintiffs do not dispute that they did not file an administrative appeal, so the declaration presents no factual conflict. The questions that matter are legal: whether any exhaustion requirement may be imposed here, and, if so, how far it reaches.

Exhaustion is not a free-standing doctrine a court may invoke at will. In suits governed by the APA, the availability and scope of an exhaustion requirement are fixed by statute—5 U.S.C. § 704—as construed in *Darby v. Cisneros*, 509 U.S. 137 (1993). Where § 704 deems agency action final, a court has no discretion to require further resort to the agency as a rule of judicial administration. The Government's contrary premise—that general exhaustion principles bar review—cannot be squared with the statute that governs APA suits.

IV. ARGUMENT

The motion fails on the law. *Darby* and § 704 foreclose court-imposed exhaustion here (Part A). Even if exhaustion applied, it reaches only Prayer ¶ D—not the constitutional and facial challenges (Part B). The denial is final and reviewable now (Part C). Requiring a COLA appeal as to the constitutional and facial claims would be futile (Part D). And any dismissal must be without prejudice and narrowly limited (Part E).

A. *DARBY* AND 5 U.S.C. § 704 BAR COURT-IMPOSED EXHAUSTION

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The APA supplies the exclusive rule for when a plaintiff must appeal within an agency before seeking judicial review. Under *Darby*, an administrative appeal is a prerequisite to judicial review "only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Darby v. Cisneros*, 509 U.S. 137, 154 (1993). Where neither condition is met and the agency action is otherwise final, courts "are not free to impose an exhaustion requirement as a rule of judicial administration." *Id.* at 154.

That rule comes directly from the second sentence of § 704, which provides that "agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for . . . any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. § 704. The exception to finality is conjunctive: the agency must (i) require the appeal by rule ***and*** (ii) provide that the action is "meanwhile . . . inoperative" pending that appeal. If either element is missing, the action is final, review is available now, and no exhaustion may be imposed. *Darby*, 509 U.S. at 146–47, 152–54.

The first *Darby* pathway—exhaustion "expressly required by statute"—is not in play. The COLA appeal scheme is entirely regulatory; it appears in 27

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C.F.R. Part 13, not in the Federal Alcohol Administration Act. No provision of Title 27 of the United States Code requires a COLA applicant to exhaust an administrative appeal before seeking judicial review. The Government identifies none. Indeed, § 205(e) itself frames judicial review around finality, granting the district courts jurisdiction over "suits to enjoin, annul, or suspend in whole or in part any final action by the Secretary upon any application under this subsection"—with no exhaustion condition. 27 U.S.C. § 205(e).

TTB's rules do require an appeal before judicial review, satisfying the first half of *Darby*'s regulatory pathway. Section 13.26(c) provides that, "[p]rior to applying to the Federal courts for review, an applicant must first exhaust his or her administrative remedies, including the appeal rights set forth in this section and § 13.27." 27 C.F.R. § 13.26(c). Section 13.27(c) likewise makes a second-level appeal "required prior to application to the Federal courts for review of any denial." 27 C.F.R. § 13.27(c).

But TTB's rules do not satisfy the second, indispensable half: nothing in §§ 13.23, 13.25, 13.26, or 13.27 provides that a denial is inoperative—stayed, suspended, or of no effect—while an appeal is pending. Just the opposite. The appeal is optional: an applicant "***may*** file a written appeal . . . within 45 days." 27 C.F.R. § 13.25(a) (emphasis added). And the denial takes effect at once, not after the appeal window closes: "[i]f no appeal is filed within 45 days after the

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date of the notice of qualification or denial, the notice will be the final decision of TTB." *Id.* Nothing suspends the denial's operative effect in the interim. When TTB intends to preserve the status quo pending an appeal, it says so expressly: a certificate holder who timely appeals a revocation "may continue to use the certificate at issue until the effective date of a final decision." 27 C.F.R. § 13.72(b). Part 13 contains no comparable provision for denials. During the appeal period and after, Garden Path may not lawfully introduce its vintage-labeled cider into interstate commerce without an approved COLA. 27 U.S.C. § 205(e); 27 C.F.R. § 4.50(a). Because the denial is not "inoperative" pending appeal, § 704's exception does not apply, the denial is final, and *Darby* forbids the Court from requiring exhaustion.

The Government's motion never confronts this framework. It does not cite *Darby* or the second sentence of § 704. Instead it invokes general exhaustion decisions that do not control an APA suit. *McCarthy v. Madigan*, 503 U.S. 140 (1992), applied judge-made, common-law exhaustion to a *Bivens* claim—precisely the discretionary exhaustion *Darby* held courts may no longer impose in APA cases. *Woodford v. Ngo*, 548 U.S. 81 (2006), construed the Prison Litigation Reform Act's statutory exhaustion command, 42 U.S.C. § 1997e(a)—a statute-specific rule with no bearing on § 704. And *Buckingham v. Sec'y of USDA*, 603 F.3d 1073 (9th Cir. 2010), involved a statutory exhaustion scheme, 7

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U.S.C. § 6912(e), that satisfied *Darby*'s first pathway; here, by contrast, exhaustion is purely regulatory and fails the inoperative-pending-appeal condition. The Government's reliance on *Sisley v. U.S. Drug Enforcement Administration*, 11 F.4th 1029 (9th Cir. 2021), for the meaning of "proper exhaustion" assumes the very point in dispute—that exhaustion is required at all. *Darby* answers that antecedent question in Plaintiffs' favor. *Sisley*, moreover, arose under the Controlled Substances Act's specialized direct-review scheme, 21 U.S.C. § 877—not a suit governed by § 704's finality rule—and nowhere cites *Darby*.

B. EXHAUSTION REACHES PRAYER ¶ D AT MOST

Even if the Court were to find some exhaustion requirement, the Government's own motion cabins its reach. The Government asks only to dismiss "any claim directly challenging" the May 12, 2026 denial and "claims specifically challenging" TTB's denial of Garden Path's COLA application. ECF 11 at 2, 11. By its terms, that request does not reach the heart of the case.

Count I is a First Amendment challenge to the vintage-labeling prohibition in 27 C.F.R. §§ 4.27 and 4.39, "both on its face and as applied." FAC ¶ 50. It seeks a declaration that the prohibition is unconstitutional and an injunction against its ongoing enforcement. FAC ¶ 52; Prayer ¶¶ A, C. That prospective relief does not depend on record review of any single COLA decision; it

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challenges the regulation itself. Exhaustion of a label-specific appeal has nothing to say about it.

The facial and as-applied APA challenge in Count II is the same. Plaintiffs allege that §§ 4.27 and 4.39 exceed TTB's statutory authority and are arbitrary and capricious. FAC ¶¶ 56–57. To the extent Count II also asks the Court to set aside the specific denial (FAC ¶ 58; Prayer ¶ D), that denial-specific relief is the only part of the case the Government's theory could touch. The regulation-directed portions of Count II—like all of Count I—remain regardless.

The Government does not argue otherwise. Its scope concession means that even a complete victory on exhaustion would leave Count I and the facial and as-applied regulatory challenge fully intact. The most the motion could accomplish is trimming Prayer ¶ D.

C. <u>MAY 12 DENIAL = FINAL AGENCY ACTION REVIEWABLE NOW</u>

The denial is final agency action under 5 U.S.C. § 704 and *Bennett v. Spear*, 520 U.S. 154 (1997). Final agency action must (1) "mark the consummation of the agency's decisionmaking process" and (2) be action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Both are satisfied.

First, the denial consummated TTB's decisionmaking. By rule, the un-appealed denial "will be the final decision of TTB." 27 C.F.R. § 13.25(a).

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Because no appeal was filed, the denial became TTB's final decision when the 45-day window closed. Second, legal consequences flow from it: Garden Path may not lawfully introduce its vintage-labeled cider in interstate commerce without the COLA the denial withheld. 27 U.S.C. § 205(e); 27 C.F.R. § 4.50(a).

The availability of an optional two-level appeal does not defeat finality. Section 704 deems otherwise-final action final "whether or not" a permitted appeal to superior agency authority is taken—unless the action is inoperative pending appeal, which, as shown, it is not. 5 U.S.C. § 704; *Darby*, 509 U.S. at 143, 147. The Government's own emphasis on the missed 45-day window cuts against it: § 13.25(a) makes the un-appealed denial TTB's "final decision," confirming—not defeating—finality and present reviewability.

D. <u>COLA APPEAL TO CON LAW AND FACIAL CLAIMS = FUTILE</u>

If the Court were to reach exhaustion as a discretionary matter, it should not require it as to the constitutional and facial claims, because doing so would be futile. A § 13.26 or § 13.27 appeal asks a TTB officer to decide whether a label complies with applicable laws and regulations—that is, to apply §§ 4.27 and 4.39. 27 C.F.R. §§ 13.21(a), 13.26, 13.27. The appellate officer has no authority to declare the regulation unconstitutional or ultra vires, or to award the prospective declaratory and injunctive relief Plaintiffs seek. An appeal thus could

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not provide the remedy sought and could not develop a record material to a facial constitutional challenge.

Plaintiffs present futility as an alternative only. The cleaner ground is Part A: because § 704 never required exhaustion here, no judge-made exception is needed. If the Court nonetheless reaches the question, the Ninth Circuit recognizes—after *Darby*—that exhaustion is excused where the agency's position on the question "appears already set" and it is "very likely" what the result of administrative recourse would be. *Clouser v. Espy*, 42 F.3d 1522 (9th Cir. 1994) (quoting *El Rescate Legal Servs., Inc. v. EOIR*, 959 F.2d 742, 747 (9th Cir. 1992)). Exhaustion is likewise unwarranted where the agency "lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute." *McCarthy*, 503 U.S. at 147–48.

E. <u>DISMISSAL: WITHOUT PREJUDICE; LIMITED TO PRAYER ¶ D</u>

Should the Court dismiss anything, two limits follow. First, the dismissal must be without prejudice. The Government moved under Rule 12(b)(1) on the theory that exhaustion goes to the Court's subject-matter jurisdiction and the United States' waiver of sovereign immunity. ECF 11 at 6, 9. A dismissal for lack of subject-matter jurisdiction is not an adjudication on the merits and cannot be entered with prejudice; a court that lacks jurisdiction cannot enter a merits-preclusive judgment. *Hampton v. Pacific Investment Management Co.*, 869 F.3d

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844, 846 (9th Cir. 2017) (dismissals for lack of subject-matter jurisdiction "must be without prejudice, because a lack of jurisdiction deprives the dismissing court of any power to adjudicate the merits of the case"); *Wages v. IRS*, 915 F.2d 1230, 1234 (9th Cir. 1990). The Government cannot simultaneously assert that the Court lacks jurisdiction and ask it to bar Plaintiffs' claims on the merits forever.

Second, any dismissal must be limited to the denial-specific relief—Prayer ¶ D and, at most, the denial slice of ¶ B. As Part B shows, and as the Government concedes, exhaustion cannot reach Count I or the facial and as-applied regulatory challenge. A "with prejudice" bar keyed to a single un-appealed label decision would also improperly foreclose relief the law otherwise permits, because each future COLA denial is a fresh adverse application. See *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991) (a substantive challenge that agency action exceeds constitutional or statutory authority "may be brought within six years of the agency's application of that decision to the specific challenger").

If the Court is inclined to dismiss, Plaintiffs respectfully ask that it do so only as to Prayer ¶ D, without prejudice, leaving the First Amendment count and the facial and as-applied APA challenge to proceed.

V. CONCLUSION

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The Government's motion rests on a common-law exhaustion theory that *Darby v. Cisneros* and 5 U.S.C. § 704 foreclose. TTB's regulations require a COLA appeal but nowhere make the denial inoperative pending appeal, and § 13.25(a) confirms that the un-appealed denial is TTB's "final decision." The denial is therefore final agency action reviewable now, and the Court may not impose exhaustion. Even if it could, the Government's own scope concession leaves the First Amendment count and the facial and as-applied regulatory challenge untouched, and any dismissal could reach only Prayer ¶ D—and only without prejudice. Plaintiffs respectfully request that the Court deny the motion in full.

DATED this 13th day of July, 2026

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CERTIFICATE OF SERVICE

I certify that on July 13, 2026, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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