UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CG4, LLC, dba CHEF GEOFF'S-TYSONS CORNER, and GEOFF TRACY,

Case No. 1:18-cv-00360-AJT-IDD

Plaintiffs,

v.

TRAVIS HILL, in his official capacity as the Chief Executive Officer of the Alcoholic Beverage Control Authority, et al.,

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF

MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Virginia permits businesses to offer happy hour, but it limits the ways that they may advertise it. State law prohibits establishments from advertising truthful happy hour prices, from using creative terms for "happy hour" in their ads, or—depending on how you phrase it—from offering two-for-one specials. *See* 3 VA. Code §4.1-111(B)(15); 3 VAC 5-50-160 (B)(4) & (8). The Virginia Alcoholic Beverage Control Authority (ABC)[1] contends that these regulations advance its interest in deterring people from drinking alcohol. But the First Amendment requires that if it's legal to offer or purchase discounted drinks, it must also be legal to truthfully talk about it. The government may not censor truthful, non-misleading speech to deter consumers from behaving in ways the government considers unwise.

Plaintiffs Geoff Tracy and his restaurant Chef Geoff's-Tysons Corner[2] seek to advertise the prices of their drink specials and to publish creative ads using puns, wordplay, and synonyms for happy hour. They have therefore brought this civil rights lawsuit under 42 U.S.C. § 1983 seeking prospective injunctive and declaratory relief, which will permit them to speak truthfully without fear of prosecution.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiff Geoff Tracy

1) Geoff Tracy is a chef, cookbook author, and the founder of various D.C.-area restaurants, including Plaintiff Chef Geoff's-Tysons Corner. Tracy Dec. ¶ 2.

[1] Defendants are sued in their official capacity pursuant to *Ex Parte Young*, 209 U.S. 123 (1908), but are referred to collectively as "ABC."

[2] Plaintiff CG4, LLC, dba Chef Geoff's-Tysons Corner is referred to as "Chef Geoff's-Tysons Corner."

2) Tracy started in the restaurant industry in 1990 as a busboy. Boden Dec., Ex. 1 (Tracy Depo.), at 17-21. He worked in various positions in several D.C.-Area restaurants, alternating shifts between host, server, and cook, until he decided to attend culinary school. *Id.* at 17:24-20:25.

3) Tracy graduated from Georgetown University in 1995 with a degree in theology, and went on to graduate first in his class from the Culinary Institute of America. Tracy Dec. ¶ 3. He opened his first restaurant, the eponymous Chef Geoff's, in Washington, D.C., in 2000. *Id*. He opened LIA's, in Maryland, in 2006, and Chef Geoff's-Tysons Corner in 2009.

4) Tracy has won numerous awards as a chef and restaurant owner, including *Washingtonian Magazine*'s "Best Local Chef," and The Best Neighbor Award for his contributions to the community. *Id.* ¶ 4. He is a former member of the executive board of the Restaurant Association of Metropolitan Washington. *Id.* ¶ 5.

5) Tracy is currently managing partner of Chef Geoff's-Tysons Corner, and President and shareholder of the corporation that owns the restaurant. *Id.* ¶ 6. As managing partner, Tracy is responsible for the restaurant's day-to-day operations. *Id.* ¶ 7. The restaurant does not have a marketing department; instead, Tracy, with the input of others, is responsible for all advertising decisions. *Id*. Tracy often advertises for these restaurants on his personal Twitter account (@chefgeoffs) and Instagram and Facebook pages. *Id.* ¶ 8.

Plaintiff CG4, LLC dba Chef Geoff's-Tysons Corner

6) Chef Geoff's-Tysons Corner is a restaurant located in Vienna, Virginia, which has a wine and beer on-premises license and a mixed beverage license with ABC. Since opening in 2009, the restaurant has employed hundreds of people and served thousands of guests. *Id.* ¶ 6.

7) In 2011, Chef Geoff's-Tysons Corner won the RAMMY award for "Hottest Restaurant Bar Scene." *Id*. ¶ 4.

8) Chef Geoff's-Tysons Corner engages in both paid and unpaid advertising. Historically, the restaurant has advertised in various mediums, including paid e-letters, direct mailings, bus advertising, paid social media advertising, and unpaid social media advertising. *Id*. ¶¶ 7-9.

9) Tracy often uses puns and wordplay to describe his restaurants' offerings. *Id.* ¶ 10. A sample of his many tweets about bacon is illustrative. *Id.*, Ex. 1.

10) Plaintiffs would like to truthfully advertise the prices of their happy hour specials and use creative and descriptive terms to describe those offerings, like "Wednesday Wine Night," but are prohibited from doing so by Virginia law. They are also barred from offering "two-for-one" specials. *Id*. ¶ 11.

Defendants

11) Travis Hill is the Chief Executive Officer of the Authority. Jeffrey Painter is the Chair of the Authority. Maria Everett, Beth Hungate-Noland, and Mark Rubin are board members of the Authority.[3] Together, Defendants are responsible for enforcing the happy hour restrictions and disciplining those who do not comply. VA. Code § 4.1-101.

The Challenged Laws

12) Virginia permits businesses to offer happy hour, but restricts the way they may advertise it. For example, licensees of ABC may not advertise the price of any alcoholic happy hour drink special. 3 VA. Code § 4.1-111(B)(15). Nor may licensees use creative terms for happy hour, other

[3] *See* Virginia ABC, *Leadership*, https://www.abc.virginia.gov/about/agency-overview/leadership (last visited December 14, 2018).

than "happy hour" and "drink specials." 3 VAC 5-50-160(B)(8). This means they are barred from advertising specials like "Wednesday Wine Night," or "Thirsty Thursday."

13) Moreover, they may not offer "two-for-one" specials. 3 VAC 5-50-160(B)(4). Restaurants may, however, offer other types of "bundled" specials, like requiring a "two drink minimum," in order to receive a discount. *See* Boden Dec., Ex. 8 (Def. Resp. to Plaintiffs' Requests for Admission), at RFA 9; *id.* at Ex. 12 (Curtis Depo.), at 24:9-13.[4]

14) These restrictions are specific to specials offered during happy hour; they do not apply to regularly priced alcoholic beverages. The restrictions also apply only to licensees. *See* 3 VA. Code §4.1-111(B)(15); 3 VAC 5-50-160 (B)(4) & (8).

Defendants' enforcement of the challenged laws

15) ABC regularly enforces its happy hour advertising restrictions. *See* Boden Dec., Ex. 2 (ABC Bureau of Law Enforcement Stats Report-CMS).

16) In 2009, ABC wrote Plaintiffs a citation for violating a previous iteration of the advertising restrictions. *Id.* at Ex. 3.

17) Any licensee who violates the advertising restrictions is subject to a penalty or potential suspension of its license. Violators often face a choice between paying $500 or forfeiting their liquor license for 7 days. Boden Dec., Ex. 6 at ABC001110.

18) Historically, ABC has interpreted the restrictions as applying to both paid and unpaid advertising. *Id.* at ABC000943 (warning issued for happy hour advertisement on Facebook); *id.* at ABC000980 (warning issued for happy hour advertisement on website); *id.* at ABC000958 (asking licensee to take down sandwich board advertising happy hour prices).

[4] Curtis testified as the ABC's person most knowledgeable, and thus his responses must be taken as those of the Commission's. Boden Dec., Ex. 12 (Curtis Depo.) at 9:4-6.

19) ABC contends that due to recent administrative decisions, the advertising restrictions now apply only to *paid* advertising, not unpaid advertising. Boden Dec., Ex. 12 (Curtis Depo.) at 19:21-20:1; *see also id.* at Ex. 4 (administrative decisions interpreting unpaid advertisements as exempt). However, ABC has continued to enforce the advertising restrictions against unpaid advertisements on social media even after those administrative opinions. *See* Boden Dec., Ex. 6. Indeed, Defendants enforced the restrictions against unpaid advertisements up until May of 2018, just after this lawsuit was filed.[5] *Id.* at ABC000942.

STANDARD OF REVIEW

Summary judgment is appropriate where "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To show a dispute of material fact, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986); it must identify specific facts in evidentiary materials revealing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986) (the "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment," because the dispute must be material).

[5] This does not present an issue of material fact for purposes of summary judgment because even assuming that ABC no longer enforces the regulations against unpaid advertising, the laws still violate the First Amendment with regard to paid advertising. Moreover, because there's been no formal change to the language, leaving the laws in place would allow ABC to enforce them against unpaid advertising in the future.

ARGUMENT

I. VIRGINIA'S BAN ON ADVERTISING HAPPY HOUR PRICES VIOLATES THE FIRST AMENDMENT

Under *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the state must show that any law restricting truthful, non-misleading commercial speech is related to a substantial government interest, directly advances that interest, and is not more extensive than necessary. Failing any one of the *Central Hudson* factors renders a law unconstitutional; Virginia's ban on advertising happy hour prices fails all of them.[6]

A. Both on Its Face and As Applied, the Ban on Advertising Happy Hour Prices Restricts Protected Speech

Virginia's ban on advertising happy hour prices restricts protected commercial speech because it prohibits restaurants from advertising truthful, non-misleading information about the prices that they may lawfully offer, and there is no allegation that Plaintiffs seek to advertise false or misleading prices. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) ("[T]here is no question that [the state's] price advertising ban constitutes a blanket prohibition against truthful, non-misleading speech about a lawful product."). As such, *Central Hudson* scrutiny applies. 447 U.S. at 566.

B. The Ban on Advertising Happy Hour Prices Is not Related to Any Substantial Government Interest

Under *Central Hudson*'s second prong, ABC must show that the challenged law is related to a substantial government interest. 447 U.S. at 566. ABC contends that the ban on advertising prices furthers its interest in deterring the consumption of alcohol. *See* Boden Dec., Ex. 7 (Def.

[6] Because the ban on advertising happy hour prices is a content- and speaker-based restriction on speech, it is subject to heightened scrutiny under *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015) and *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011). But the ban fails even the more lax *Central Hudson* test.

Supp. Answers to Plaintiffs' Interrogatories), at 4 ("Primarily, the [challenged] laws and regulations curb overconsumption of alcohol"); *id.* (contending that the restrictions further "interrelated safety interests" associated with alcohol consumption). But keeping the public in the dark about truthful information to manipulate their choices is not a legitimate, let alone substantial, government interest under the First Amendment.

In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 752 (1976), a consumer group challenged a law that banned pharmacists from advertising pharmaceutical prices. The state contended that by censoring prices, the law prevented aggressive price competition, which in turn prevented pharmacists from engaging in substandard behavior. *Id.* at 766. While the censorship itself did not directly regulate that behavior, the state assumed that pharmacists would react to the free flow of information in a way that would undercut the professionalism of the trade.

The Court explicitly rejected the argument that regulating behavior constituted a substantial interest under the First Amendment. *Id.* at 769. While Virginia could impose professional standards on pharmacists or other direct regulations of conduct, it could not protect the public by "keeping [it] in ignorance of the entirely lawful terms that competing pharmacists are offering." *Id.*; *see also id.* (The choice "between the dangers of suppressing information, and the dangers of its misuse if it is freely available," is one that "the First Amendment makes for us.").

Similarly, in *Sorrell*, 564 U.S. 552, the Supreme Court struck down a law that restricted the dissemination of information related to physician prescribing practices. The state argued that the ban was aimed, in part, at lowering the costs of medical services. Again, the Court held that while limiting health care costs might be a legitimate interest under other provisions of the Constitution, the state could not attempt to change people's behavior by regulating speech. *Id.*

at 577–78. Several other Supreme Court opinions affirm that the state may not use censorship to try to control citizens' behavior. *See, e.g., 44 Liquormart*, 517 U.S. at 507 (ban on advertising liquor prices failed *Central Hudson* because "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance"); *Linmark Associates, Inc. v. Willingboro Twp.*, 431 U.S. 85, 96 (1977) (city council could not "restrict the free flow of [data] because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest"); *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 374 (2002) (the government may not censor speech merely because it's afraid "that people would make bad decisions if given truthful information").

Where the government seeks to encourage citizens to make wise decisions, it must "open the channels of communication rather than [] close them." *Virginia State Bd. of Pharmacy*, 425 U.S. at 770. Because ABC's only stated interest in banning price advertisements is the illegitimate interest of curbing consumption, the ban on advertising happy hour prices fails *Central Hudson*.

C. The Ban on Advertising Happy Hour Prices Does Not Materially Advance the Government's Asserted Interest

Even if attempting to reduce alcohol consumption could justify censorship, the ban on advertising happy hour prices fails *Central Hudson*'s third prong because ABC cannot show that it materially advances that goal. 447 U.S. at 564 (a law fails third prong where it provides "only ineffective or remote support for the government's purpose").[7] To show that the law materially advances the state's interest, ABC cannot rely on "mere speculation or conjecture." *Edenfield v.*

[7] Under Fourth Circuit precedent, the distinction between facial and as-applied "is immaterial under *Central Hudson*'s third prong." *See Educ. Media Co. at Virginia Tech, Inc. v. Insley*, 731 F.3d 291, 300 (4th Cir. 2013).

Fane, 507 U.S. 761, 770-71 (1993). It must show that its speech restriction "will in fact alleviate [the alleged harm] to a material degree." *Id.* at 761.

In *44 Liquormart*, the Supreme Court held that, even assuming that promoting temperance was a substantial state interest, the state could not show that that the ban "*significantly* reduce[d] marketwide consumption." *44 Liquormart*, 517 U.S. at 506. Even if the Court accepted the state's argument that prohibitions on price advertising would maintain prices at a higher level, and even if it further assumed that higher prices have some impact on demand, the state could not identify "what price level would lead to a significant reduction in alcohol consumption" or identify "the amount that it believe[d] prices would decrease without the ban." *Id.* at 507. Moreover, the evidence suggested that abusive drinkers were not deterred by price increases. Without any firm evidence that the ban would lead to a significant reduction marketwide, the Court was left with only "speculation or conjecture," which cannot sustain a ban on entirely truthful information. *Id.*; *see also Missouri Broad. Ass'n v. Lacy*, 846 F.3d 295 (8th Cir. 2017) (state must prove not only that a ban on advertising prices lowers alcohol consumption, but also that it significantly reduces irresponsible consumption).

As in *44 Liquormart*, there is nothing but "speculation and conjecture" underlying ABC's contentions. There is no evidence that advertising alcohol prices stimulates alcohol consumption, because all of ABC's evidence relates to the effect of reduced prices—which businesses may freely offer in Virginia—not to the effect of *advertising* those prices. Nor is there any evidence that price advertising causes businesses to reduce prices (which supposedly, in turn, will significantly increase consumption). Instead, the evidence shows that price advertising bans like Virginia's have little effect on prices, and prices have almost no effect on alcoholic and under-age drinkers—the most problematic drinking populations. The ban therefore fails *Central Hudson*'s third prong.

1. There Is No Evidence That Happy Hour Price Advertisements Stimulate Consumption

ABC relies on an expert report authored by Dr. Derek Reed for the proposition that its advertising ban reduces consumption. But Dr. Reed's report relates only to the effect of prices, and has nothing to say about the effect of advertising those prices.

The report is based on an experiment called the "Alcohol Purchase Task," which studies the relationship of alcohol prices to demand. The Task asks participants to *imagine* that they are in a bar, and then to *estimate* how many alcoholic beverages they might purchase at various prices. Boden Dec., Ex 9 (Reed Depo.), at 43:10-13. At no time does the experiment expose participants to advertisements, or ask participants to imagine how they might respond to such advertisements.[8] It considers only how participants might respond to learning the cost of an alcoholic beverage *once they are already inside the bar*. *See id.* at 47:10-17 (Q: So the subjects being captured by the experiment are [asked to imagine themselves as] already present at the bar? A: They're asked to imagine themselves being so, correct. Q: So they haven't been privy to any advertisement outside the bar? A: Not in our vignette.); *id.* at 54:20-22 (confirming that the effect of communications "received outside of the bar," *i.e.*, advertisements, is "not programmed into" the Alcohol Purchase Task).

Even if this experiment were not done through pure imagination, informing consumers of happy hour prices once they are *already inside the bar* is not an advertisement. Nor is it illegal. Virginia businesses are perfectly free to tell consumers the price of a happy hour drink once they are already inside. The Alcohol Purchase Task therefore only measures the impact of something

[8] For that matter, at no time does the experiment expose the participants to actual alcohol.

Plaintiffs are permitted to do in Virginia, and has absolutely nothing to say about the effect of the law challenged in this case.

Dr. Reed not only admitted that the Alcohol Purchase Task has no bearing on advertising, he admitted that he personally doesn't have any knowledge about the effects of advertising. *Id.* at 103:24-104:1 ("Q: [Does] happy hour advertising . . . have the same effect [of increasing consumption]? A: I don't study advertising; I study the pricing that goes into advertising."). Speaking of advertising, he stated that he is "not familiar with that field of work." *Id.* at 104:4-5. When asked if he was aware of any "field studies or natural studies relating specifically to happy hour advertising" he responded that he "imagine[d] there are some out there." *Id.* at 102:12-17. When asked if he was "aware of observational studies on bans on price advertising," he responded that he was "not aware." *Id.* at 18-21. Nor was he aware of "any iterations of the Alcohol Purchase Task [that] have isolated the effects of advertising." *Id.* at 82:25-83:4. His report and testimony therefore do not, and cannot, show that price *advertising* affects consumption. Stated differently, his report and testimony do not, and cannot, offer any testimony relevant to the laws that Plaintiffs challenge.

While ABC's expert introduces evidence that is entirely irrelevant to the advertising restrictions, Dr. Jon Nelson's Expert Rebuttal Report demonstrates that advertising has little to no effect on consumption. Boden Dec., Ex. 11 (Nelson Report), at 4 ("Bans [on] price advertising," like Virginia's, "do not reduce alcohol consumption."). Given his experience studying real-world policy changes involving alcohol advertising,[9] Dr. Nelson concludes that these bans fail at

[9] Dr. Nelson has extensive experience studying the effects of not just alcohol prices, but alcohol advertisements. Boden Dec., Ex. 11 (Nelson Report), at 1-2. He predominantly studies policy changes in various locations to determine the real-world effect on consumption. These studies provide natural experiments for policy interventions—in contrast to the experimental methods used by ABC's expert. Dr. Nelson has authored several reports detailing the effects of alcohol

decreasing consumption, in part, because consumers have access to pricing information from past purchases. *Id.* at 7. Moreover, such bans often result in beverage substitution. For example, bans on advertising the price of spirits and wine may reduce consumption of spirits and wine but result in consumers substituting those beverages for beer. *Id.* By the same token, banning advertisements of happy hour prices might result in consumers purchasing alcoholic beverages at non-happy hour times, or from retail establishments that are not subject to the ban. Dr. Reed's report is consistent with several cases that have found that price advertisements do not affect consumption. *See 44 Liquormart*, 517 U.S. at 505 (ban on advertising prices of alcoholic beverages does not significantly reduce marketwide consumption); *see also Michigan Beer & Wine Wholesalers Ass'n v. Attorney General*, 370 N.W.2d 328, 336 (Mich. App. 1985) (same).

Tracy's belief that advertising will allow him to better compete with other restaurants is not inconsistent with Dr. Nelson's findings. [10] Even if one assumes that price advertisements are successful at getting people to attend happy hour, that assumption does not prove that happy hour advertisements increase consumption. *See 44 Liquormart*, 517 U.S. at 506 n.16 ("[P]laintiffs' expectation of realizing additional profits through price advertising has no necessary relationship to increased overall consumption."). An advertisement may simply persuade a consumer to frequent a restaurant at happy hour rather than another time of day. Or, it may persuade a person to attend one restaurant's happy hour over another's. *Id.*; *see also New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 189 (1999) (even assuming that "more [gambling] advertising would have some impact on overall demand for gambling, it is also reasonable to assume that

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advertising and has testified before various legislative bodies on the subject. His work was cited in the district court's opinion in *44 Liquormart*, which struck down Rhode Island's ban on advertising liquor prices, and which was ultimately upheld by the Supreme Court. *Id.*

[10] Plaintiff Tracy's desire to advertise is also based on his desire to express himself freely and creatively. Tracy Decl. ¶¶ 10, 11.

much of that advertising would merely channel gamblers to one casino rather than another"). There's simply no evidence that price advertisements cause people to attend happy hour at an increased frequency, to drink more at happy hour than they had planned, or to otherwise consume more alcoholic beverages than they would have absent a happy hour advertisement.

2. There Is No Evidence That Price Advertising Results in Decreased Prices

Nor can ABC show that price advertising causes businesses to reduce their prices, which in turn significantly increases alcohol consumption. Dr. Reed's report contains a single, unsupported statement that price competition in advertising "could push the market to reduce prices to low values associated with excessive demand and consumption." Boden Dec., Ex. 10 (Reed Report), at 4. But when asked at deposition "whether [his] study demonstrate[s]" that "competition in advertising can push the market to reduce prices," Dr. Reed responded that "standing alone, that study does not directly speak to that," and "[none] of the work" that he cited was "about competition in advertising." Boden Dec., Ex. 9 (Reed Depo.), at 56:20-58:8. Indeed, Dr. Reed admitted that he has no familiarity with the field at all, and that his report does not contemplate advertising outside of a bar. Even if Dr. Reed contended that he was an expert on the effects of advertising—which he does not—his unsupported statement that price advertising could cause businesses to reduce prices, which in turn could cause consumption to increase, finds no support in the record (or history).

The evidence actually tends to contradict the claim that price advertising results in significantly lower prices. Dr. Nelson's rebuttal report, based on natural experiments in various countries, demonstrates that price advertising alone is unlikely to result in a significant bidding war. As an example, Dr. Nelson cites a study of consumption in Rhode Island after the state lifted its price advertising ban pursuant to *44 Liquormart*. The report found that, because "different

stores service different types of customers," they "appeal to different buyer groups in terms of pricing and promotion practices." Boden Dec., Ex. 11 (Nelson Report), at 8. After the ban on price advertising was lifted, "liquor stores responded differently, with some emphasizing their lower prices through advertising" and others choosing not to. *Id.* Thus, it can "be expected generally that a relaxation of the current restrictions on advertising will not cause all alcohol sellers in Virginia to promote discount prices or offer happy hour," or result in a massive bidding war. *Id.*

Likewise, Tracy testified at deposition that he bases his prices on a host of factors, and that the prices of his competitors plays only a small part in that decision. When asked how he decides to price his happy hour menu, Tracy responded "it is a combination of gut instinct and costing out the particular item," "how busy the restaurant is at certain points," "general experience," "guest reaction," and making sure that "food costs and beverage costs [are] on budget." Boden Dec., Ex. 1 (Tracy Depo.), at 38:2-39:12. He explained, "It's a complex formula because we have to cost the item out, estimate . . . how much of that we're going to sell, balance it out with the purchases of the full-price cocktails, and then . . . at the end of the financial period, we're trying to get it so that it's on budget." *Id.* at 42:4-17.

Ultimately Tracy believes that competitive pricing is not dependent on raw prices so much as it is on value—considering a restaurant's menu and its "service, ambience…quality, [and] creativity." *Id.* at 44:19-45:14. He also views prices as constrained by a restaurant's particular costs. It is therefore not only simplistic for ABC to argue that restaurants will engage in a race to the bottom if permitted to advertise prices, it's contradicted by the record.

3. There Is No Evidence That Reduced Prices Significantly Increase Alcohol Consumption

Even assuming that price advertising causes businesses to reduce their prices, ABC cannot establish that lifting the ban will reduce prices to a point that will significantly affect alcohol consumption. Dr. Reed's Expert Report, which is based on the Alcohol Purchase Task, does not support that conclusion.

First, it is unreliable evidence for what will happen in Virginia because the experimental method Dr. Reed uses does not replicate conditions in Virginia. For example, it instructs individuals to imagine that

> you and your friends are at a bar on a weekend night from 9:00 pm until 2:00 am to see a band. Imagine that you do not have any obligations the next day (i.e. no work or classes). The following questions ask how many drinks you would purchase at various prices. The available drinks are standard size domestic beers (12 oz.), wine (5 oz.), shots of hard liquor (1.5 oz.), or mixed drinks containing one shot of liquor.

It further tells participants that they cannot "give [the drinks] to anyone else," and asks them to pretend that they "have no other alcohol at home." Boden Dec., Ex. 10 (Reed Report), at 8-9. After imposing these parameters, it asks the respondents, sitting at their computers across the United States, to imagine how many drinks they would purchase.

However, it is illegal to offer happy hour in Virginia from 9 p.m. until 2 a.m. 3 VAC 5-50-160(B)(1). This means that the experiment asks participants to envision happy hour during a time that they will never actually encounter it. It also asks participants to imagine that it's a "weekend night" and that they do not have "any obligations the next day," even though happy hour typically occurs on weekdays at the end of the workday—meaning that happy hour attendees will often have obligations the following morning. It's no secret that most problem drinking occurs

late at night and on the weekends. Placing the "experimental" happy hour during those times on those days skews the results toward increased drinking.

The experiment also requires participants to imagine that they cannot give beverages away, and that they have no other alcohol at home. But there's no evidence that Virginia consumers are stuck with these limitations. In the real world, they may take advantage of a special and share whatever they don't drink with a friend. Or, they may drink less at a bar because they know have drinks available at home. This setting is simply not realistic, and in some ways is actually prohibited by Virginia law.

Even apart from these specific problems with Dr. Reed's experiment, experimental studies in general are not a reliable indicator of how people behave in real life, and thus serve as a poor model for public policy. Boden Dec., Ex 12 (Nelson Report), at 6. Dr. Nelson notes in his Rebuttal Expert Report that participants in the Task never actually engaged in any of the behavior studied; instead they only imagined they did. Participants never actually consumed a drink, nor spent money to drink, nor even had to "forgo money or time to [pretend to] drink." *Id.* at 19. Respondents spent on average just 11.38 minutes at their computer completing the questionnaire, which purports to simulate over *five hours* of constant late night drinking.

As Dr. Nelson notes, one of the experimental studies cited by Dr. Reed himself contains a disclaimer that, whatever value experimental research might have, "it is of little value for population-level interventions."[11] *Id.* at 24. Perhaps for this reason, "experimental and field studies have not enjoyed wide-spread use in the area of alcohol policy research." *Id.* at 16. And

[11] That study goes on to "express doubts about the body of evidence on happy hour." Boden Dec., Ex. 11 (Nelson Report), at 24.

even where they have, the results are "mixed and inconclusive," making them a "weak basis for current public policy toward happy hour pricing and promotion." *Id.* at 17.

As Dr. Nelson states, observational studies (which observe behavior under conditions outside of the investigators' control), and, in particular, natural experiments, provide much stronger evidence for the effect of stimuli like advertising, or prices, on behavior. Studies using this type of methodology show that prices do not significantly affect marketwide consumption, in part because the groups of biggest concern (heavy drinkers and young-adults) demonstrate less demand elasticity. *Id.* at 4. The price sensitivity of heavy and binge drinkers, for example, "approaches zero, regardless of gender or age." *Id.* It is only moderate or light drinkers who respond to changes in prices. *Id.* at 10. Because "the success of policies depends on the price responsiveness of [heavy drinking] populations," prices are largely ineffectual at influencing the most problematic type of drinking. *Id.* at 4; *see also 44 Liquormart*, 517 U.S. at 506 ("[T]he evidence suggests that the abusive drinker will probably not be deterred by a marginal price increase, and that the true alcoholic may simply reduce his purchases of other necessities.").

After examining 29 observational studies across five countries that permitted businesses to lower alcohol prices, Dr. Nelson found that prices had little effect on binge drinking, youth and young-adult consumption, and heavy-consuming adults. *Id.* at 5. Similarly, after considering 45 observational studies across nine countries, Dr. Nelson found that reduced prices had "mostly null" results on alcohol related outcomes like "alcohol-related mortality and hospitalizations; assaults and other crime; [drunk]-driving; intoxication, and alcohol dependency." *Id.* Dr. Nelson even demonstrates that Dr. Reed's own results sometimes support Dr. Nelson's conclusions. *Id.* at 21. Dr. Nelson's studies, (at times) Dr. Reed's own results, and several court cases across the country refute Dr. Reed's claim that lower prices result in significantly higher level of

consumption. *See also Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 39 (1966) ("[P]rice maintenance" had "no significant effect upon the consumption of alcoholic beverages, upon temperance or upon the incidence of social problems related to alcohol."); *Rice v. Alcoholic Bev. Control Appeals Bd.*, 579 P.2d 476, 494 (Cal. 1978) ("There is little compelling evidence to suggest that" regulating prices "promote(s) temperance or contribute(s) in any significant way to the minimization of the current problem of alcohol abuse."); *Michigan Beer & Wine Wholesalers Association*, 370 N.W.2d at 336 ("[T]he assumed favorable relation of high-priced liquor to temperance" is "chimerical.").

4. Virginia's Price Advertising Ban Also Fails *Central Hudson's* Third Prong Because It Does Not Directly Advance Its goal

The Court need not even resolve whether the ban materially advances a substantial state interest because it is "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *Greater New Orleans Broad. Ass'n, Inc.*, 527 U.S. at 190. Where, as here, a ban on speech contains exemptions that undercut the government's stated interest, the law does not "directly advance" its goal and fails *Central Hudson*'s third prong.

In *Greater New Orleans Broadcasters Ass'n*, 527 U.S. at 190, the plaintiffs challenged a law that restricted advertisements for legal gambling. The Supreme Court held that the law failed *Central Hudson's* third prong because it contained several exemptions that were "squarely at odds" with the state's purported interests. Because the ban pertained to certain—but not all—information related to casinos and gambling, "and then only when conveyed over certain forms of media and for certain types of gambling—indeed, for only certain brands of *casino* gambling—and despite the fact that messages about the availability of such gambling [was] being conveyed over the airwaves by other speakers," the law did not directly advance its goal and failed *Central Hudson*'s third prong. *Id. See also Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (law banning alcohol

content on beer labels did not directly advance the state's asserted interest where it permitted alcohol content on wine and liquor labels and allowed alcohol content in advertising generally); *Michigan Beer & Wine Wholesalers Ass'n*, 370 N.W.2d at 336 (given that brand advertising was legal, "it is difficult to perceive how the addition of the element of price could have any measurable impact upon the level of alcohol consumption"); *Missouri Broad. Ass'n*, 846 F.3d at 302 (law banning happy hour advertising did not directly advance the asserted interest where it permitted advertising once inside the establishment and therefore permitted retailers to "bait[] consumers to drink excessively once they arrive").

As in *Greater New Orleans Broadcasters Ass'n*, Virginia's happy hour advertising restrictions are riddled with loopholes that render it ineffectual, if not nonsensical. First, the restrictions apply only to licensees; they do not apply to third parties like price aggregators, consumer reviews, blogs, or any other parties who may publish happy hour prices. This leaves a segment of the population free to publish happy hour prices. Second, the restrictions do not apply to all information related to happy hour—just prices and puns. Licensees are still free to induce consumers to drink happy hour beverages, so long as they omit the price and the pun. Third, the law applies only to alcoholic beverages offered during happy hour. Given that happy hour is a small fraction of the day, it permits a great deal of advertising about alcohol prices offered at every single other hour of the day. Fourth, the restrictions do not apply to unpaid advertisements,[12]

[12] Evidence obtained during discovery raises serious questions about when and why ABC stopped enforcing its happy hour advertising restrictions as applied to unpaid advertisements. There has been no formal change to the regulatory language. Instead, ABC contends that the policy changed due to administrative decisions adjudicating happy hour violations. *See* Boden Dec., Ex. 4 (decisions interpreting restrictions on unpaid advertising). However, ABC has continued to enforce the restrictions against unpaid ads even after those decisions. *Id.*, Ex. 6. It also articulates a new policy not supported by those decisions. *Compare* Boden Dec., Ex. 8 at RFA No. 1 (claiming the new policy does not impose any restrictions on unpaid advertising "so long as the phrasing of the advertisement does not influence overconsumption") *with id.* at Ex. 6

leaving licensees free to advertise prices (and puns) on social media, or on sandwich boards, or on their websites, so long as they do not pay for it. Last, the ban does not apply to communications made to consumers once they are already inside, leaving restaurants free to bombard their patrons with price advertisements so long as they are already there (or even so long as someone merely calls and asks).

These exemptions are "squarely at odds" with the state's purported interest in curbing consumption, and mean that the restrictions cannot possibly reduce marketwide consumption in a "direct" or "significant" way. The ban on advertising prices therefore fails *Central Hudson*'s third prong on this basis, as well.

D. The Ban on Advertising Happy Hour Prices Is More Extensive Than Necessary

The ban on price advertising fails *Central Hudson*'s fourth prong because it is more extensive than necessary to achieve its goal. In *44 Liquormart*, 517 U.S. at 507, the Supreme Court held that laws are more extensive than necessary if the government has non-speech related means to achieve its stated interest. *See also Rubin v. Coors Brewing Co.*, 514 U.S. at 491(striking down ban on advertising beer alcohol content because of the "availability of alternatives," like limiting alcohol content directly, "that would prove less intrusive to the First Amendment"); *Linmark*, 431 U.S. at 97 (state could use financial incentives or counter-speech, rather than speech restrictions, to advance its interests); *Thompson*, 535 U.S. at 371 ("[I]f the Government could

(administrative decisions exempting unpaid advertising from *all* restrictions on advertising). Despite these inconsistencies, this does not present a dispute of material fact. Plaintiffs believe they are entitled to a declaratory judgment that the policy is unconstitutional with regard to both types of advertising. But even taking ABC at its word that it will no longer enforce the regulations against unpaid advertisements, the law still fails *Central Hudson*.

achieve its interest in a manner that does not restrict speech, or that restricts less speech, the Government must do so.").

Here, ABC has several non-speech related means to achieve its purported goals. As in *44 Liquormart*, it could regulate prices directly or impose a minimum markup law. It could artificially increase the price of drinks by imposing a tax. It could also limit how many drinks a consumer can purchase per hour. Or, it could engage in an educational campaign aimed at reducing overconsumption.[13] The First Amendment requires that the states utilize these measures rather than resorting to censorship.

II. VIRGINIA'S PROHIBITION ON USING CREATIVE TERMS FOR HAPPY HOUR VIOLATES THE FIRST AMENDMENT

In addition to banning licensees from advertising happy hour prices, Virginia bans restaurants from using descriptive terms for happy hour other than the generic phrases, "happy hour," or "drink specials." 3 VAC 5-50-160(B)(8). This means that licensees may not use amusing, and often effective, terms like "Sunday Funday," or clever puns like "Wednesday *Wine*down" to describe their offers. Like the ban on advertising prices, this restriction is a content-based burden on speech subject to heightened scrutiny—but it cannot even meet the laxer *Central Hudson* standard.

A. The Ban on Creative Terms Concerns Truthful, Non-Misleading Speech

The ban on creative terms restricts truthful, non-misleading speech because it is a blanket prohibition that prevents licensees from using any synonym for happy hour apart from "drink

[13] Direct regulation—like taxation—is often felt keenly by consumers, while censorship "obscure[s]" the "underlying governmental policy." *44 Liquormart Inc.*, 517 U.S. at 502–03; *id.* at 509 (noting that the advertising ban in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), served to "shield the State's antigambling policy from the public scrutiny that more direct, nonspeech regulation would draw").

specials," regardless of whether those terms are truthful or non-misleading. Even if some terms for happy hour are misleading, or present some other danger to the public, the vast scope of the ban is sufficient to render it facially unconstitutional under *Central Hudson*. *See United States v. Stevens*, 559 U.S. 460, 472 (2010) (plaintiff can demonstrate facial invalidity by showing "that the law lacks any plainly legitimate sweep"). Moreover, there is no allegation that Plaintiffs seek to use untruthful or misleading terms. Therefore both on its face and as-applied to Plaintiffs, the ban restricts protected speech under *Central Hudson*.

B. The Ban on Creative Terms Is Not Related to Any Substantial Government Interest

While ABC contends that its ban on advertising happy hour prices is aimed at curbing consumption, it does not argue the same for its ban on creative terms. ABC has specifically disclaimed that the use of creative happy hour terms causes any threat to the public welfare. *See* Boden Dec., Ex. 7 (Def. Supp. Responses to Plaintiffs' Interrogatories), at 15 ("Defendants do not contend that the use of terms other than 'happy hour' and 'drink specials' cause a threat to the public welfare."), *see also id.* at Ex. 8 (Def. Resp. to Reqs. for Admission), at RFA 8 (admitting that the use of terms other than "happy hour" or "drink specials" in happy hour advertisements do not threaten the public welfare" to the extent that the "phrasing of the happy hour advertisements [does not] influence[] overconsumption"). Instead, ABC contends that the regulation "arose out of a comprehensive regulatory proposal that caused multiple comments from the general public and [stake] holders." Boden Dec., Ex. 12 (Curtis Depo.), at 35:14-16. When the Authority "[found] itself in a position of trying to balance the various responses," it chose this middle ground, *i.e.*, allowing the use of some happy hour advertising and terms, but not others. *Id.* at 35:18-20, 36:7-9.

Appeasing members of the public is not a substantial—let alone legitimate—state interest that can justify censorship. Under the First Amendment, the state must show that the speech presents a threat of harm, and that "those harms are real"—not merely imagined to exist by some segment of the population. *Edenfield*, 507 U.S. at 771. Irrational fears cannot support a ban on wholly truthful and non-misleading expression.[14]

C. The Ban on Creative Terms Does Not Directly or Materially Advances Any State Substantial Governmental Interest

Because 3 VAC 5-50-160 is not related to any substantial government interest, the law cannot directly advance any substantial government interest to a material degree. But even if ABC had alleged some substantial state interest, the ban would not "directly advance" that goal because it is riddled with exemptions which render it unconstitutional. *See supra,* Sec. I.C.4. If there is any harm presented by catchy jingles or clever puns, there is no reason for the state to permit those puns in the context of unpaid advertising, or when published on third-party websites not owned by a licensee, or if applied to specials outside of "happy hour."[15] The ban therefore fails *Central Hudson*'s third prong.

D. The Ban on Creative Terms Is More Extensive Than Necessary

Finally, 3 VAC 5-50-160 fails the last *Central Hudson* prong because it is more extensive than necessary to advance any substantial state interest. Again, ABC admits that the regulation was aimed at satisfying interest groups rather than protecting the public. But even assuming that

[14] Even if ABC contended that the ban on creative terms served an interest in reducing consumption, that still would not satisfy *Central Hudson*'s second prong. *See Sorrell*, 564 U.S. at 577–78 ("[T]he State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles.").

[15] Notably, the phrases "happy hour" and "drink specials" themselves may induce people to drink. *Missouri Broad. Ass'n*, 846 F.3d at 302.

some creative terms present some sort of threat to the public, the ban is overly broad with regard to its purpose. If ABC contends that some terms might be misleading, it must craft a regulation limited to prohibiting misleading terms. If ABC contends that some tend to induce interdicted individuals or minors to drink, it must craft a regulation limited to prohibiting those types of advertisements. It may not, however, impose a blanket prohibition on *all creativity*. *See Insley*, 731 F.3d at 301 (law that banned alcoholic beverage advertisements was more extensive than necessary because it "prohibit[ed] large numbers of adults who are 21 years of age or older from receiving truthful information about a product that they are legally allowed to consume").

Moreover, the state has adequate non-speech means to address problems with overconsumption or consumption by people who are under-age. Most directly, the state could (and in fact, does) directly prohibit licensees from over-serving patrons or from providing alcohol to minors. A wholesale ban on creative terms is plainly more extensive than necessary to achieve any interest the state has in curbing over- or underage-drinking.

E. The Ban on Creative Terms Is Unconstitutionally Overbroad

A law is unconstitutionally overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473. Here, the ban on creative terms is overbroad because it applies to a vast amount of innocuous, protected speech, even if the regulation could be constitutionally applied to a narrower scope of speech encouraging illegal behavior.

In *Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 570 (1987), the Supreme Court struck down a ban on all "First Amendment activities" within a terminal area at Los Angeles International Airport. The Court held that the law was overbroad because rather than regulating expressive activity that might create problems like congestion, or disruption

of airport users' activities, it prohibited even innocuous activities like wearing symbolic clothing. *See also Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 259 (4th. Cir. 2003) (law prohibiting students from wearing clothing with messages related to weapons was overbroad where there was no evidence that clothing involving weapons, nonviolent, nonthreatening, or otherwise, had ever disrupted school operations and ban reached symbols of even laudatory organizations).

Like the ban on airport activity, Virginia's ban on all creative terms for happy hour prohibits a swath of innocuous expression. On its face, it would prevent licensees from making harmless jokes, from using memorable slogans, or even from making political statements related to happy hour. A licensee may not, for example, call his happy hour "60 minutes of fun." Nor may he call it, "60 minutes of toasting to free expression." While the state may be able to craft a regulation aimed at prohibiting statements that are shown to endanger public health or safety, it cannot prohibit the use of *all* creative terms for such a limited purpose. Given that the statute substantially chills the protected speech of individuals engaged in harmless, creative expression, and because ABC cannot prohibit that speech, 3 VAC 5-50-160(B)(8) is overbroad.

III. VIRGINIA'S BAN ON TWO-FOR-ONE SPECIALS VIOLATES THE FIRST AMENDMENT

A. The Ban on Two-for-One Specials Is a Regulation of Speech, Not Conduct

The ban on two-for-one specials is a regulation of speech because it treats identical transactions differently depending on how they are phrased. Where a law's application is triggered by speech, the law is subject to First Amendment scrutiny, regardless of whether it purports to regulate conduct rather than speech. *See Expressions Hair v. Schneiderman*, 137 S. Ct. 1144 (2017) (ban on "differential pricing" regulated speech, not conduct); *Holder v. Humanitarian Law*

Project, 561 U.S. 1, 28 (2010) ("The law here may be described as directed at conduct," but "the conduct triggering coverage under the statute consists of communicating a message.").

In *Expressions Hair*, 137 S. Ct. 1144, the Supreme Court held that a law banning merchants from imposing a "surcharge" for credit card payments, but permitting a "discount" for cash payments, regulated speech rather than conduct. There, a merchant could charge $10 for cash and $10.30 for credit card, but "he [could] not convey that price any way he please[d]." *Id.* at 1151. While he was free to say "$10.30, with a .30 discount for cash payers," he could not say, "$10, with a .30 surcharge for credit card users." The Court reasoned that a price regulation "would simply regulate the amount a store could collect." *Id.* at 1150. The ban on surcharges, by contrast, told merchants "nothing about the amount they [were] allowed to collect from a cash or credit payer," and instead regulated "*how* sellers may communicate their prices." *Id.* at 1151.

Here, ABC contends that the ban on two-for-one specials prohibits a certain type of transaction (a "bundled offer"), which requires patrons to purchase more than one drink in order to obtain a discount. But in fact, the ban does not regulate bundling, price, or any other sort of conduct. Instead, it merely prevents licensees from describing one specific type of bundled offer in a certain way.

Licensees are free to offer "bundled" specials in the form of a "two drink minimum." Boden Dec., Ex. 8, at RFA 8. They can also offer bundled food and beverage specials like "$50 for dinner, including two drinks," which requires patrons to purchase more than one drink in order to obtain a discounted rate. *Id.*, Ex. 5, at ABC0004. They may also offer the first drink at a certain price, and then offer subsequent drinks for a second price, (*i.e.*, buy one for $10, get one for $5). *Id.*, Ex. 7, at 23. Most strikingly, licensees may even offer "half price drinks," with a "two drink

minimum," which is *functionally equivalent* to "two drinks for the price of one." *Id.*, Ex. 12 (Curtis Depo.), at 24:14-23. They may not, however, phrase the offer as a "two-for-one" special.

In sum, licensees are free to sell multiple drinks for one price; they are even free to sell two drinks for the price of one. They are merely prohibited from describing the offer as a "two-for-one." The law therefore regulates speech, not conduct, and is subject to commercial speech scrutiny.

B. The Ban on "Two-for-One" Specials Restricts Truthful, Non-Misleading Speech

The ban on two-for-one specials is a ban on truthful, non-misleading speech because it bans a truthful and legal offer if phrased in a certain way. It therefore restricts protected speech under *Central Hudson*.

C. The Ban on Two-for-One Specials Is Not Related to Any Substantial Government Interest

ABC contends that the ban on "two-for-ones" is aimed at reducing consumption because "[v]olume pricing of this sort encourages increased on-premises alcohol consumption." Boden Dec., Ex. 7, at 20. But again, the government may not seek to regulate conduct through censorship. It's legal to sell, purchase, or consume beverages at reduced prices during happy hour. It's even legal to sell, purchase, or consume two beverages at once. Indeed, it's even legal to sell, purchase, or to consume two or more beverages where each is offered at half-price (*i.e.*, two beverages for the price of one). It therefore must be legal to truthfully describe such an offer.

D. The Ban on Two-for-One Specials Does Not Materially Advance Any Substantial Government Interest

Assuming ABC may pursue temperance through censorship, the ban still fails because there's no evidence that it substantially reduces consumption marketwide. As explained above,

Dr. Reed's report is not reliable for the proposition that "two-for-ones" increase consumption,[16] but even it were, it would not show that the ban significantly reduces consumption marketwide. A ban on *one* type of special can hardly be said to "significantly" reduce consumption, given that the same or substantially similar offers are legal, and that ABC cannot prove that an across the board ban on happy hour prices does not achieve the same result. The ban therefore fails Central Hudson's third prong.

E. The ban on Two-for-One Specials Does Not Directly Advance Its Goal

The ban also fails *Central Hudson*'s third prong because it is riddled with exemptions that undercut the rule. While it purports to ban "bundling," it permits a vast amount of bundling. And to the extent it purports to ban a particular type of bundling (buy one get one free, or two for the price of one), it permits similar, or in some cases functionally identical, transactions. It therefore does not directly advance its goal.

F. The Ban on "Two-for-Ones" Is More Extensive Than Necessary

As with the ban on advertising prices or using creative terms for happy hour, the ban on two-for-one specials is more extensive than necessary because the state could regulate the underlying conduct rather than resorting to censorship of truthful speech. *See supra*, Sec. I. D. If the state seeks to discourage consumers from purchasing more than one drink at a time, it could ban consumers from purchasing more than one drink at a time (in fact, the state already bans consumers from possessing more than two drinks at a time, 3 VAC 5-50-150 (B)(2))). Most obviously, if the state is specifically concerned with "bundling" or "volume pricing," it could ban

[16] A further flaw with Dr. Reed's report is that he only studies the effect of "buy one get one free," which he concludes has a special impact because of the use of the word "free." But the regulation also prohibits the phrase "two-for-one," which does not use the same purportedly dangerous terminology.

bundling or volume pricing. It has not; instead it has tried to achieve that result by banning speech. ABC may not, under the First Amendment, make a silly semantic distinction to subtly further its paternalistic goals.

CONCLUSION

Because there is no dispute of material fact, and because ABC has not met its burden under *Central Hudson*, Plaintiffs respectfully request that the Court grant this motion for summary judgment.

DATED: December 17, 2018.

Respectfully Submitted,

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**Pro Hac Vice*

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on December 17, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which also served all parties electronically.

DATED: December 17, 2018.

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