SUPERIOR COURT OF THE STATE OF NEW JERSEY

APPELLATE DIVISION

IN RE 2019 SPECIAL RULING AUTHORIZING CERTAIN ACTIVITIES BY HOLDERS OF LIMITED BREWERY LICENSES AND 2022 LIMITED BREWERY SPECIAL CONDITIONS	Docket No: A-000212-22 CIVIL ACTION Appeal from State Agency Action by Division of Alcoholic Beverage Control

CORRECTED OPENING BRIEF OF APPELLANT DEATH OF THE FOX BREWING COMPANY

JONATHAN M. HOUGHTON
N.J. Bar No. 369652021
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
Tel: (202) 888-6881

CALEB R. TROTTER*
Cal. Bar No. 305195
PHV043318
LUKE A. WAKE*
Cal. Bar No. 264647
PHV043319
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Tel: (916) 419-7111

* *pro hac vice*

Attorneys for Appellant Death of the Fox Brewing Co.

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PRELIMINARY STATEMENT

Chuck Garrity first started brewing beer at home in the mid-1990s, which grew to a passion. He soon formed a dream of combining his brewing hobby with his love of coffee to open a unique brewery and coffeeshop. In 2017, with the help of his wife, Kat, and neighbor, Dan Natkin, Chuck took the leap and left a successful professional career to launch Plaintiff-Appellant Death of the Fox Brewing Company in Clarksboro, New Jersey. This appeal challenges regulatory changes that have recently turned Chuck's dream into a nightmare.

Defendant-Appellee the New Jersey Division of Alcoholic Beverage Control has taken steps to severely constrain the growth of the craft brewing industry in the state. In 2019, the Division issued a "Special Ruling Authorizing Certain Activities by Holders of Limited Brewery Licenses," which imposed restrictions on "limited breweries" like Death of the Fox not contemplated by the New Jersey legislature. The Division has begun enforcing these new and controversial restrictions through licensing conditions, which took effect July 1, 2022. The restrictions favor bars, restaurants, and liquor stores by threatening the viability of the craft brewery business model.

The challenged restrictions were not only promulgated without legislative authorization, but they are imposed without any relation to concerns over public health, safety, or welfare. Moreover, the Division failed to comply with the New

Jersey Administrative Procedure Act. As a result, the entire Special Ruling and license conditions are void. Alternatively, one restriction—a ban on advertising more than 25 events per year—violates the New Jersey and U.S. Constitutions.

PROCEDURAL HISTORY

On May 28, 2019, the Acting Director of the New Jersey Division of Alcoholic Beverage Control issued a "Special Ruling Authorizing Certain Activities by Holders of Limited Brewery Licenses." App. 005a–028a. Purporting to interpret N.J.S.A. § 33:1-10(1b), the Special Ruling created multiple—and in several cases, severe—restrictions on the permissible activities of limited breweries. Unsurprisingly, the restrictions announced in the Special Ruling were met with outrage by limited breweries and their supporters. But the Division did not take steps to enforce the Special Ruling's restrictions until June 2022, when all of the restrictions were imposed as 18 enumerated "special conditions" on the licenses of limited breweries. Compare App. 029a–033a, with App. 041a–048a. These newly imposed conditions made clear that the Division would expect compliance with its new restrictions beginning on July 1, 2022. See App. 031a–033a. The Division also published the "special conditions" on its website as an "Other Notice" to all licensees

and the general public.[1] This appeal challenges the validity of these license conditions and the restrictions pronounced in the Special Ruling.

STATEMENT OF FACTS

A. History of New Jersey Breweries

Breweries have a long tradition in New Jersey. The first commercial brewery and pub in New Jersey is believed to have opened in Hoboken in 1641. Michael Pellegrino, Jersey Brew: The Story of Beer in New Jersey at 10 (2009). By 1879, there were as many as 58 commercial breweries, and as of 1900 brewing was the seventh-largest industry in the state. Id. at 10–11. But things changed dramatically with Prohibition and its immediate aftermath. By 1985 Anheuser Busch was the only remaining brewery in New Jersey, and as recently as 2009 only five additional breweries were operating in the state. Id. at 121, 124–134.

Nationally, there were fewer than 100 breweries throughout the United States in 1983. United States Dep't of the Treasury, Competition in the Markets for Beer, Wine, and Spirits at 20 (Feb. 2022).[2] By the end of 2020, however, operating breweries numbered 6,406. Ibid. Like Death of the Fox, 90 percent of those companies brew less than 15,000 barrels per year. Ibid.; see also App. 091a.

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[1] Available at https://www.nj.gov/oag/abc/downloads/LimitedBrewerySpecialConditionsFinalText-6-30-22.pdf.

[2] Available at https://home.treasury.gov/system/files/136/Competition-Report.pdf.

Considering market share, the two largest breweries in the U.S., Anheuser-Busch InBev and Molson Coors, account for about 65 percent of the U.S. beer market. Ibid. Thus, while most breweries are small businesses, the U.S. beer market remains dominated by mass-produced products like Budweiser and Miller Lite, and large regional breweries like Yuengling and Boston Beer. See ibid.

B. The Legislature Liberalizes State Law to Foster Growth in Craft Brewing

In 2012, the New Jersey legislature amended the Alcoholic Beverage Control Act to encourage the growth of craft breweries. N.J.S.A. § 33:1-10(1b) (expanding permissible activities of "limited breweries"). The Act now authorizes limited breweries to brew and sell up to 300,000 barrels of 31-fluid gallons per year and to operate tap rooms or tasting rooms on the grounds of the brewery to sell their products directly to consumers for on-site consumption.[3] Ibid. The Act imposes only two limitations for on-site consumption sales by limited breweries: (1) sales for on-site consumption must be done "in connection with a tour of the brewery;" and (2) the brewery "shall not sell food or operate a restaurant on the licensed premises." Ibid. In addition, should a limited brewery choose to sell its products for off-site

[3] In contrast, "plenary breweries" have no limits on the volume of malt beverages that can be produced and sold but they cannot operate tap rooms and must sell through the typical three-tier distribution system, N.J.S.A. § 33:1-10(1a), and "restricted breweries" (brewpub restaurants) may produce and sell much smaller volumes of malt beverages directly to consumers for on-site consumption in addition to food, § 33:1-10(1c).

consumption directly to consumers, then it is limited to selling no "more than 15.5 fluid gallons per person." Ibid.

As intended, the legislature's 2012 enactment helped to spur growth in craft brewing in New Jersey. With the legislature's support and growing popular demand, more than 100 limited breweries were operating throughout the state by 2019. In some cases, limited breweries revitalized industrial areas or otherwise neglected corridors once they opened their doors. See, e.g., Alex Biese, NJ beer: Why craft beer brewing boomed across New Jersey in the 2010s, Asbury Park Press (Dec. 30, 2019);[4] Patrick Sisson, Craft beer's big impact on small towns and forgotten neighborhoods, Curbed (June 13, 2017).[5]

C. The Division of Alcoholic Beverage Control Imposes Various Restrictions to Inhibit Growth of Limited Breweries

Not all are happy with the legislature's choice to encourage growth in the craft brewery industry in New Jersey, or with the recent success of businesses like Death of the Fox. At the urging of bars, restaurants, and liquor stores with New Jersey liquor licenses, the Division issued the 2019 Special Ruling and subsequent license conditions to restrict limited brewery operations. The Division claims that it wants

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[4] Available at https://www.app.com/story/entertainment/dining/happy-hour/2019/12/30/nj-beer-why-craft-brewing-boomed-across-new-jersey-2010-s/2734234001/.

[5] Available at https://archive.curbed.com/2017/6/13/15788960/brewing-economic-development-craft-beer.

to make consumers "more interested in" limited breweries' products and spur them to "want to buy [those products] at licensed retail consumption [(bars and restaurants)] and distribution [(liquor stores)] premises." App. 006a (emphasis added). In other words, the Division's new rules seek to redirect consumers from buying craft beer directly from the source (as expressly permitted by statute) by channeling breweries to sell their product through others. According to the Division's Special Ruling, such a scheme "encourages the beneficial aspects of competition" while "balanc[ing] the concerns of the growing limited brewery sector comprised of 100 licensees against the issues and concerns facing the bars and restaurants that collectively hold approximately 6,000" licenses. App. 007a. As a result, the Special Ruling contemplates it "will lead to expanded marketing and exposure of a limited brewery's products, with the expectation that there will be wider availability of these products at the State's restaurants, bars and liquor stores."[6] Ibid. But at bottom, the Division's rules run counter to the legislature's 2012 liberalization of limited breweries which authorizes sales for on-site

[6] It is questionable whether the Division's expectation is even possible. With a cap on the number of available licenses for bars and restaurants in the State, there are roughly 6,000 theoretical potential outlets for limited breweries to sell to. However, estimates suggest only 800 actually buy beer from New Jersey breweries. What the Hell is Happening in New Jersey?, Beervana Blog (July 21, 2022), available at https://www.beervanablog.com/beervana/2022/7/21/what-the-hell-is-happening-in-new-jersey. Thus, if tap rooms cease to become a viable outlet for sales, most limited breweries are unlikely to find sufficient alternatives and will fail.

consumption at limited breweries, because the Special Ruling seeks to force limited breweries to give up a significant portion of their profits to others.[7]

The Division created new rules and license conditions found nowhere in statute to dampen the demand for malt beverages purchased directly from limited breweries on-site. For example, the Special Ruling and license conditions prohibit limited breweries from: "collaborat[ing] or coordinat[ing] with any food vendors, including food trucks" to provide food on the licensed premises; holding "happy hours" or similar special-price events; offering a free drink to a patron "as a gesture of good will"; or allowing any "pop up" shops of other businesses to occur at the brewery. App. 025a. The Special Ruling permits, however, a limited brewery to "provide restaurant menus" of local restaurants and to allow food deliveries to patrons. App. 023a.

Still other provisions of the Special Ruling create severe impediments to the typical business model for many limited breweries. For instance, while appearing nowhere in the statute, the Special Ruling restricts limited breweries from holding

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[7] By way of example, a standard half barrel keg produces 124 16-ounce pints. See Guide to Beer Keg Sizes and Dimensions, KegWorks (Oct. 25, 2022), available at https://content.kegworks.com/blog/guide-to-beer-keg-sizes. If a limited brewery can sell a particular keg by the pint in its tap room for $5 a pint, it stands to earn $620 in gross revenue for that keg. If, however, that same keg is sold to a bar or restaurant, the customer will still expect to pay the same $5 per pint, meaning the bar or restaurant will necessarily agree to pay the brewery much less than the $620 the brewery could receive for selling it directly to consumers.

more than 25 "on-premises special events" per year. App. 018a. No such limit applies to bars or restaurants, and no statute or regulation reserves the ability to host such events exclusively to bars or restaurants. This arbitrary 25-event limit—applicable only to limited breweries—is a restraint on the right of limited breweries to advertise and grow their businesses. The Special Ruling defines "on-premises special events" as:

> a one-day event that is open to the public and is promoted or advertised by a Limited Brewery licensee . . . by way of any type of media, including social media. Events that are promoted or advertised only by signs posted inside a Limited Brewery and events announcing the availability of a new release of a malt alcoholic beverage for on-premises or off-premises consumption shall not be considered an "on-premises special event" . . . .

App. 015a. Importantly, an "event" is generally only subject to the 25-event restriction if it is advertised outside the four walls of the brewery and tap room. As examples of "events," the Special Ruling includes trivia/quizzo/game night, arts and crafts/paint and sip, live music/DJs/open mic, games of skill, educational events and seminars, political fundraisers that are not organized by a not-for-profit, movie or theatrical events, animal adoption events, and yoga or other similar types of classes.[8] Ibid.

[8] Further, "[a]ny live, amplified music performance or DJ appearing" at a limited brewery counts toward the 25-event limit "whether or not it is advertised by way of any media, including social media." App. 018a. And "[a]ny live-televised

In addition, while the statute merely requires that sales for on-site consumption be made only "in connection with a tour of the brewery," N.J.S.A. § 33:1-10(1b), the Special Ruling requires a tour to be completed prior to any consumption and defines a "tour" as "a material interaction between a patron and brewery staff," App. 016a. While repeat patrons of a limited brewery only need to participate in a tour once a year, the brewery must retain documentation for three years for the Division to review upon request. Ibid. Taken in their entirety, the rules and restrictions of the Special Ruling and license conditions are designed to make limited breweries' tasting rooms less inviting and less likely to sustain a limited brewery's business.

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championship sporting event displayed or shown" at the limited brewery also counts toward the 25-event limit "whether or not it is advertised by way of any media, including social media." Ibid. The restriction on live sporting events has already affected the bottom line for Death of the Fox and other limited breweries with the local Philadelphia Phillies making it to the World Series in 2022. Even though brewery customers desired to watch Phillies playoff games in limited brewery tap rooms, showing all of the Phillies' playoff games would have counted for 17, or 68%, of a limited brewery's annual limit for events. See 2022 Special Ruling Granting the Relaxation of Schedule A, Paragraph 3(a)(6) of the Special Ruling Authorizing Certain Activities by Holders of Limited Brewery Licenses and Special Condition No. 12 of the Special Conditions at 2, available at https://www.nj.gov/oag/abc/downloads/SR%202022-17%20Special-Ruling-Granting-the-Relaxation-of-Schedule-A.pdf; Complete 2022 MLB Postseason Results, available at https://www.mlb.com/news/2022-mlb-playoff-and-world-series-schedule. Thus, it is likely that limited breweries were forced to forgo showing many of the games and likely lost out on potential customers as a result.

Notably, recognizing that the Special Ruling creates new rules for limited breweries, the Division stated that it intends to "engage in formal notice and comment rulemaking pursuant to the Administrative Procedure Act" to propose the restrictions as regulations. App. 012a. But it has not done so. Instead, the Division simply imposed all of the Special Ruling's restrictions as license conditions effective July 1, 2022, enforceable against limited breweries right away. App. 029a–033a.

D. Death of the Fox Brewing Company

Death of the Fox Brewing Company takes its name from the Death of the Fox Inn, originally built in Clarksboro in 1727. See History, The Death of the Fox, available at https://www.deathofthefoxbrewing.com/history. The original Inn hosted members of the Gloucester Fox Hunting Club—a group formed in a coffeehouse in 1766 by a group of Philadelphia gentlemen as the first organized hunting club in the New World. Ibid. The Inn would go on to serve as an important recruiting and gathering spot in the Revolutionary War era. Ibid. With that historical inspiration, in 2017 Chuck Garrity, his wife Kathryn, and their neighbor Daniel Natkin, opened Death of the Fox Brewing Company in Clarksboro—New Jersey's only combined brewery and coffeeshop. App. 092a, 095a; Death of the Fox Brewing Company homepage, available at https://www.deathofthefoxbrewing.com/#perfectcombo.

The restrictions announced in the Division's Special Ruling and enforced by way of license conditions as of July 1, 2022, put the continued success of Death of

the Fox at risk. By restricting the ability for Death of the Fox to attract customers to its tap room—and by making visits to tap rooms less inviting for customers that do go—Death of the Fox will likely be forced to attempt to entice others to distribute its products (bars, restaurants, and liquor stores) or eventually close. Either way, Death of the Fox and its customers stand to lose while bars, restaurants, and liquor stores will gain. Indeed, fewer tap room patrons means that breweries will earn fewer profits, see supra n.7, and by having to seek out their preferred beer elsewhere, customers will possibly pay more while having fewer options as there is limited shelf and tap space in existing liquor stores and bars. Death of the Fox therefore brings this appeal challenging the validity and constitutionality of the Special Ruling and license conditions.

ARGUMENT

I. THE SPECIAL RULING AND LICENSE CONDITIONS DO NOT CONFORM WITH THE NEW JERSEY ADMINISTRATIVE PROCEDURE ACT (Not Raised Below)

A. Standard of Review

"In this State, the right to seek judicial review of administrative action is of constitutional dimension." Hirth v. City of Hoboken, 337 N.J. Super. 149, 160 (App. Div. 2001). "The 'core value[] of judicial review of administrative action is the furtherance of accountability.'" In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 386 (2013) (alteration in original) (citations

omitted). New Jersey courts are "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue." Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973).

B. Rules Subject to the Requirements of the Administrative Procedure Act

The New Jersey Administrative Procedure Act (APA) mandates that state agencies "shall only implement rules that have been adopted in accordance with [the APA's] rule-making requirements." N.J.S.A. § 52:14B-3a(a). The APA's rulemaking procedures are designed "to give those affected by the proposed rule an opportunity to participate in the process, both to ensure fairness and also to inform regulators of consequences which they may not have anticipated." In re Adoption of 2003 Low Income Housing Tax Credit Qualified Allocation Plan, 369 N.J. Super. 2, 43 (App. Div. 2004). Accordingly, the APA's procedural requirements are vital not only to ensure transparency, but to ensure better rules.

The APA's rulemaking requirements include: (1) at least 30-days formal notice of a proposed rule that contains "a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, and the time when, the place where, and the manner in which interested persons may present their views thereon," § 52:14B-4(a)(1); (2) a public "statement setting forth a summary of the proposed rule, as well as a clear and concise explanation of the purpose and effect of the rule, the specific legal authority under which its adoption

is authorized," and various reports required by law, § 52:14B-4(a)(2); (3) the opportunity for all interested persons "to submit data, views, comments, or arguments, orally or in writing," and the corresponding requirement that the agency "shall consider fully all" such submissions, § 52:14B-4(a)(3); and (4) "a report listing all parties offering written or oral submissions concerning the rule, summarizing the content of the submissions and providing the agency's response to the data, views, comments, and arguments contained in the submissions," § 52:14B-4(a)(4). In addition, each proposed agency rule "shall be submitted by the Office of Administrative Law to the Senate and General Assembly within two business days of its receipt by the office." § 52:14B-4.1. Here, the Division complied with none of these requirements before issuing the Special Ruling or imposing license conditions incorporating its requirements and restrictions on all limited breweries. For this reason, the Special Ruling and license conditions are void. See Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313, 337 (1984).

C. The Special Ruling and Special License Conditions Are Improper Agency Guidance

Unless a regulatory guidance document has been adopted as a rule pursuant to the APA, it "shall not . . . impose any new or additional requirements that are not included in the State or federal law or rule that the regulatory guidance document is intended to clarify or explain." N.J.S.A. § 52:14B-3a(c). The APA defines a

"regulatory guidance document" as "any policy memorandum or other similar document used by a State agency to provide technical or regulatory assistance or direction to the regulated community to facilitate compliance with a State or federal law . . . ." 52:14B-3a(d).

In Shearn v. Bd. of Review, Nos. A-2910-12T1, A-3704-13T1, 2015 WL 6473168, at *3 (N.J. Super. Ct. App. Div. 2015) (unpublished, included in the appendix at App. 034a), this Court held that the Board of Review's Unemployment Handbook was a "regulatory guidance document" under N.J.S.A. § 52:14B-3a. There, the Handbook did not "substitute for State law, or impose any new or additional requirements," it merely "clarifie[d] statutory requirements to provide guidance to the general public on the Division's interpretation of the statute for which it is responsible." Id. at *4. Specifically, the Handbook clarified the statute's express requirement that those claiming unemployment benefits "actively seek[] work" in the week they claim benefits as being met when claimants make at least three employment contacts that week. Ibid.

Conversely, in In re Adoption of Regional Affordable Housing Development Program Guidelines, 418 N.J. Super. 387, 389, 395 (App. Div. 2011), this Court ruled that "guidelines" implementing portions of the New Jersey Fair Housing Act were rules requiring formal notice and comment because they "set forth specific standards and conditions for regional planning" in administration of the Act that

were not included on the face of the Act itself. These standards and conditions would affect development projects, and thus the Council on Affordable Housing had improperly imposed new rules—notwithstanding its choice to label the document in question as "guidelines." As with the Division's adoption of the Special Ruling, the agency stated an aspirational intent to "adopt rules governing implementation of the [statute]," and yet a year and a half had passed since the adoption of the "guidelines" without the agency doing so.[9] Ibid.

Here, at multiple points the Special Ruling declares that it is guidance for regulated parties as to their permitted activities under the Division's interpretation of N.J.S.A. § 33:1-10(1)(b). App. 008a, 012a. ("With respect to the remaining provisions set forth in Schedule A, they should be viewed as guidance . . . ."; "In the near future, the Division intends to engage in formal notice and comment rulemaking pursuant to the Administrative Procedure Act at N.J.S.A. 52:14B-4, and will propose these guidelines as regulations . . . ."; "In the interim, however, until such time as the regulatory process is completed and regulations are adopted, the Division intends to impose the guidelines contained in Schedule A as special conditions on each limited brewery licensee . . . .") (emphasis added). See also 2022 Special Ruling

[9] The "guidelines" were circulated for a brief comment period of only one week. 418 N.J. Super. at 390. But the APA demands that the public be given at least 30 days to comment. § 52:14B-4(a)(3).

Granting the Relaxation of Schedule A, Paragraph 3(a)(6) of the Special Ruling Authorizing Certain Activities by Holders of Limited Brewery Licenses and Special Condition No. 12 of the Special Conditions at n.2 ("The Special Ruling serves . . . to provide to limited breweries 'guidance' . . . of its terms."). The Special Ruling is thus properly considered a "regulatory guidance document" under N.J.S.A. § 52:14B-3a.

The Special Ruling is an unlawful regulatory guidance document because it imposes a multitude of new and additional requirements and prohibitions not contained in the limited brewery authorizing statute, and therefore goes beyond merely clarifying or explaining regulatory standards established by statute. See N.J.S.A. § 52:14B-3a(c). These new requirements and prohibitions were issued without following the procedures of the APA, and, therefore, the Special Ruling is invalid and void ab initio. For example, the authorizing statute is silent regarding any events and parties held on the premises of limited breweries, N.J.S.A. § 33:1-10(1b), whereas the Special Ruling sets out an intricate framework for "on-site special events," private parties, etc., App. 018a–022a. Likewise, the statute does not restrict breweries from offering happy hours and occasional free drinks as a gesture of goodwill and it does not address breweries selling non-alcoholic beverages, whereas the Special Ruling bans all of that except for soda manufactured by an individual brewery. App. 023a, 025a. Further, while the statute does not restrict

breweries from having televisions, the Special Ruling limits them to having only two of no more than 65 inches each. App. 017a.

The Division has added rules and prohibitions even regarding those requirements bearing a nexus to the statutory text. For example, the statute requires that sales for on-site consumption be connected to brewery tours, N.J.S.A. § 33:1-10(1b), but it does not require limited breweries to maintain a log of visitors, *see* App. 012a. Likewise, while the statute prohibits limited breweries from selling food to patrons, N.J.S.A. § 33:1-10(1b), it is silent as to whether they may (or may not) work out arrangements with independent food trucks or other external businesses to provide on-site food for patrons. In all of this the Division has added restrictions not addressed by the legislature, and in contravention of the legislature's general goal of liberalizing restrictions on limited breweries. The Division's guidance is thus void. See GE Solid State, Inc. v. Director, Div. of Taxation, 132 N.J. 298, 306 (1993) ("[A]n administrative agency may not, under the guise of interpretation, extend a statute to give it a greater effect than its language permits."); Service Armament Co. v. Hyland, 70 N.J. 550, 563 (1976) ("[A]n administrative interpretation which attempts to add to a statute something which is not there can furnish no sustenance to the enactment.").

D. The Special Ruling and Special License Conditions Are Rules Requiring APA Compliance

Regardless of whether the Special Ruling and license conditions are void as regulatory guidance documents that impose new and additional requirements in violation of N.J.S.A. § 52:14B-3a(c), they are rules that were required to be adopted through the APA's formal notice and comment rulemaking process. Because the Special Ruling and license conditions were not adopted through formal rulemaking, they are invalid.

The APA defines an "administrative rule" or "rule" as "each agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." N.J.S.A. § 52:14B-2. In Metromedia, 97 N.J. at 331–32, the Supreme Court interpreted the APA's definition for "rule" and "administrative rule" and established a six-part test for resolving whether an agency statement constitutes an administrative rule. The six-part test considers whether the agency statement:

> "(1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii)

> constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy."

Ibid. Courts are to consider the factors "singly or in combination" to "determine in a given case whether the essential agency action must be rendered through rule-making or adjudication." Id. at 332. Further, "the factors should not be merely tabulated, but weighed." Matter of Request for Solid Waste Utility Customer Lists, 106 N.J. 508, 518 (1987).

Here, the Special Ruling and special license conditions satisfy all of the Metromedia factors. First, the Special Ruling's title notes its applicability to all holders of limited brewery licenses. Beyond the title, the Special Ruling is also written to apply to all limited breweries, and this is confirmed by the Division's inclusion of the Special Ruling's restrictions as conditions on the licenses of all limited breweries effective July 1, 2022. Compare App. 029a–033a, with App. 041a-048a. Thus, the Special Ruling and license conditions are "intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group." See Metromedia, 97 N.J. at 331.

Second, and for the same reasons, the Special Ruling and license conditions apply "generally and uniformly to all similarly situated persons." See ibid. Because the Ruling and license conditions are a product of quasi-legislative rulemaking

applicable to an entire industry, the Ruling's requirements and the license conditions do not differ for each individual limited brewery; they are uniform as to all limited breweries. See also In re Provision of Basic Generation Serv. for Period Beginning June 1, 2008, 205 N.J. 339, 346, 351 (2011) (Board of Public Utilities order allowing a cost "pass through to ratepayers" "applied generally and uniformly to all similarly situated persons.").

Third, on their face, the Special Ruling and license conditions purport to announce new requirements and prohibitions that are forward-looking, rather than retroactive. Indeed, the Special Ruling declares that its terms are to be considered guidance going forward until adopted via formal APA rulemaking or imposed as license conditions. App. 012a–013a.

Fourth, as discussed above, the Special Ruling, as enforced through license conditions, creates multiple new standards and directives not "expressly provided by or clearly and obviously inferable from" N.J.S.A. § 33:1-10(1b), which merely requires limited breweries to give tours, prohibits breweries from selling food, and limits the amount of product that can be produced and sold. See Metromedia, 97 N.J. at 331. In contrast, the Division on its own accord created the multitude of detailed rules and prohibitions as a result of its interpretation of the statute. See App. 006a.

Fifth, prior to the Special Ruling, the new rules and prohibitions had not been "previously expressed in any official and explicit agency determination, adjudication

or rule."[10] As the Special Ruling makes clear, its 2019 issuance resulted from the Division's new interpretation of N.J.S.A. § 33:1-10(1b). App. 006a–007a.

Sixth, the Special Ruling also clarifies that it sets forth the Division's interpretation of N.J.S.A. § 33:1-10(1b) and sets new regulatory policy that the Division intends to enact via formal rulemaking at some later date. App. 006a–007a, 012a. The Special Ruling and license conditions thus satisfy all the *Metromedia* factors and are properly considered administrative rules. Because the Division failed to comply with the APA's rulemaking requirements discussed above, supra at 12–13, the Special Ruling and license conditions are invalid. See Metromedia, 97 N.J. at 337.

II. THE ANNUAL LIMIT ON ADVERTISING ON-PREMISES SPECIAL EVENTS RESTRICTS SPEECH IN VIOLATION OF THE NEW JERSEY AND U.S. CONSTITUTIONS (Not Raised Below).

Regardless of whether the Special Ruling and special license conditions were issued in violation of the APA, the provisions restricting limited breweries to advertising only 25 "on-premises special events" per year fail constitutional scrutiny. Specifically, they impermissibly limit free speech rights.

[10] A previous version of the Special Ruling was issued on September 21, 2018, but the operative Ruling—which vacated the 2018 version—"is substantially similar to the [2018] Special Ruling, with some changes that are intended to help limited breweries promote their brands and build their businesses." App. 008a.

As noted above, on-premises special events—such as trivia night, open mic, etc.—are defined as those which are promoted or advertised outside of a limited brewery by way of any media. App. 015a. Similarly, while limited breweries "may display or show regularly scheduled television programs, news, movies, or regular season sporting events" without it counting against the 25-event limit, "if these broadcasts are advertised in any media, including social media," then they will count toward the limit. App. 024a. The ability to hold on-premises events but not advertise more than 25 of them per year implicates the commercial speech doctrine under the New Jersey and U.S. Constitutions. The advertising limitation fails scrutiny under both constitutional provisions.

The New Jersey Civil Rights Act provides that "[a]ny person who has been deprived of … privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State … may bring a civil action for damages and for injunctive or other appropriate relief." N.J.S.A. § 10:6-2(c). Article I, ¶ 6, of the New Jersey Constitution declares that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." Similarly, the First Amendment to the U.S. Constitution states that "Congress shall make no law . . . abridging the freedom of speech . . . ." The First Amendment is applicable

to the states via the Fourteenth Amendment. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015). "Because our State Constitution's free speech clause is generally interpreted as co-extensive with the First Amendment, federal constitutional principles guide the Court's analysis." Twp. of Pennsauken v. Schad, 160 N.J. 156, 176 (1999) (citing Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 264–65 (1998)); see also N.J. Dep't of Labor and Workforce Dev. v. Crest Ultrasonics, 434 N.J. Super. 34, 48 n.14 (App. Div. 2014) ("The federal Central Hudson test has traditionally guided the commercial speech cases litigated in our State.").

The legal test for restrictions on commercial speech set out in Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 566–67 (1980), establishes that when government restricts commercial speech that "concern[s] lawful activity and [is] not . . . misleading," then courts must consider: (1) "whether the asserted governmental interest is . . . substantial;" (2) "whether the regulation directly advances the governmental interest asserted;" and (3) "whether it is not more extensive than is necessary to serve that interest." Ibid.

As the limit on advertising no more than 25 on-premises events per year applies only to on-premises events "advertised in any media, including social media," but does not prohibit the events themselves, such events are lawful activity and advertising them is protected speech because advertising events is not misleading. See GJJM Enterprises, LLC v. City of Atlantic City, 352 F.Supp.3d 402,

408 (D. N.J. 2018) (ban on "BYOB" advertising concerned lawful activity and was not misleading). The threshold of Central Hudson is thus satisfied.

A. The Advertising Restriction Does Not Further a Substantial Governmental Interest

In considering whether limiting media advertising to no more than 25 events per year was done to further a substantial governmental interest, "[t]he burden is on the State to establish the existence of the substantial governmental interest it sought to advance." Hamilton Amusement Ctr., 156 N.J., at 269; see also GJJM Enterprises, 352 F.Supp.3d at 408. In turn, the Court must consider only the "precise interests put forward by the State." Edenfield v. Fane, 507 U.S. 761, 768 (1993).

Here, the Division justified the Special Ruling and subsequent license conditions, including the advertising limit, as necessary to "balance" the interests of the nascent New Jersey craft brewery industry with those of the established bar, restaurant, and liquor store license holders. App. 007a–008a. In other words, the Division sought to limit the ability of limited breweries to compete with other alcohol sellers by constraining breweries' ability to attract customers to their licensed tap rooms. But the Division's desire to "balance" competition runs counter to the legislature's express authorization for limited breweries to operate tasting rooms and sell directly to the public and cannot be a substantial governmental interest as a result. See N.J.S.A. § 33:1-10(1b). Indeed, the statute expressly permits

limited breweries to sell to consumers for on-site consumption subject only to a tour requirement and prohibition on selling food. Ibid. Other than general production limits, the statute contemplates no restriction on advertising events, or on the number of events or customers visiting limited breweries. See ibid.

Further, limiting competition and "balancing" competing competitive interests is not a substantial governmental interest as a matter of law. In In re Xanadu Project at Meadowlands Complex, 415 N.J. Super. 179, 201 (App. Div. 2010), this Court reaffirmed that "in deciding to issue a liquor license, the focus must be on the impact that the license will have on the 'public health, safety, morals and general welfare[,]' and that a desire to protect other businesses from economic competition is an impermissible consideration."[11] See also N.J.S.A. § 33:1-3.1(b)(1); Great Atlantic & Pacific Tea Co., Inc. v. Mayor and Council of Borough of Point Pleasant Beach, 220 N.J. Super 119, 128–29 (App. Div. 1987) ("the desire to provide other

[11] A federal circuit split exists on the question of whether economic protectionism is a legitimate governmental interest. See Merrifield v. Lockyer, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review."); Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002) ("protecting a discrete interest group from economic competition is not a legitimate governmental purpose."); St. Joseph Abbey v. Castille, 712 F.3d 215, 222 (5th Cir. 2013) ("neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose"); but see Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004) ("absent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest."); Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 286 (2d Cir. 2015).

liquor establishments with protection against economic competition" is an improper basis to deny license transfer application). As economic protectionism is thus insufficient to support the regulatory decision of whether to grant a liquor license (a privilege), it cannot provide the substantial interest required when limiting protected speech (a right), see 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996) (bans on commercial speech "often serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech" and "only hinder consumer choice" rather than protect the public from commercial harms). Because the advertising restriction does not further any interest in preventing commercial harms to consumers, this Court must scrutinize it with "special care," see Central Hudson, 447 U.S. at 566 n.9, and be "mindful that speech prohibitions of this type rarely survive constitutional review," 44 Liquormart, 517 U.S. at 504.

B. The Advertising Restriction Does Not Directly Advance a Substantial Governmental Interest

Should this Court find that balancing competitive interests is a substantial governmental interest here, the restriction on advertising no more than 25 events per year still does not directly advance any interest in "balancing" competition between the roughly 140 limited breweries and the 6,000-plus bars, restaurants, and liquor stores in New Jersey with Division licenses.

To satisfy Central Hudson's requirement that a speech restriction directly advance a substantial interest, the Division must show that restricting limited breweries to advertising no more than 25 on-premises events per year "alleviate[s] . . . to a material degree" the supposed harm of unbalanced competition that allegedly would occur should limited breweries be permitted to advertise more than 25 events. Edenfield, 507 U.S. at 770–71. The Division's burden "is not satisfied by mere speculation or conjecture," and the Division must also show the harm it seeks to avoid is "real." Ibid. Should the speech restriction "provide[] only ineffective or remote support" for the Division's rationale, "or if there is 'little chance' that the law will advance" it, then the restriction cannot be sustained. Central Hudson, 447 U.S. at 564; Pitt News v. Pappert, 379 F.3d 96, 107 (3d Cir. 2004) (opinion of Alito, J.) (quoting Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 589 (2001)).

In Pitt News v. Pappert, a Pennsylvania law banned alcohol advertisements in "media affiliated with a university, college, or other 'educational institution.'" 379 F.3d at 101. Upon being challenged by a University of Pittsburgh student newspaper, the Third Circuit held that even though the law furthered a substantial governmental interest in "preventing underage drinking and alcohol abuse," it did not directly advance those interests. Id. at 106–07. As the law only applied to school-affiliated media, while leaving all other publications—as well as television and radio ads—unrestricted, the government could not show any evidence that eliminating such few

ads "will do any good." Id. at 107. In fact, students would still be exposed to alcohol advertisements from a litany of other sources, including other publications available on campus. Ibid. There was also no evidence that the slight decrease in permissible advertising would in any way lessen demand for alcohol. Ibid. According to the court, "[c]ommon sense suggests that would-be drinkers will have no difficulty finding" drinking establishments, and any government claims to the contrary were mere "speculation" and "conjecture." Id. at 107–08.

The Division's advertising restriction suffers from similar flaws. The advertising restriction applies only to advertising done "by way of any type of media, including social media." App. 015a. Advertising by way of signs posted inside of a limited brewery or by word of mouth is not restricted, nor is any advertising that promotes a brewery's new release of a malt beverage. Ibid. Even with the Division's limit to 25 media-advertised events, it does not limit the scope of any media campaign. As a result, there is no evidence that the Division's restriction of media advertising to only 25 events "will do any good" in balancing competition, see Pitt News, 379 F.3d at 107, and much less that it will do so "to a material degree," Florida Bar v. Went For It, Inc., 515 U.S. 618, 626 (1995).

Fundamentally, aside from failing to explain how the Division measures the "balance" of competition (assuming this is possible), the Division's claimed interest in balancing competition stems from the faulty premise that limited breweries would

unfairly compete with bars, restaurants, and liquor stores in the absence of the advertising limit. It is simply not persuasive that a fledgling industry of roughly 140 limited breweries could unfairly outcompete 6,000-plus bars, restaurants, and liquor stores throughout the state but for the limit on advertising on-premises events. Indeed, the Division cites no evidence in the Special Ruling or special license conditions to support any need to balance competition or to show that limiting the breweries' ability to advertise events would cause customers to visit bars, restaurants, and liquor stores instead of breweries. If anything, bars, restaurants, and liquor stores already enjoy a leg up in competing with limited breweries even before the advertising restriction.

Each licensed limited brewery is authorized to brew no more than 300,000 barrels of 31 fluid gallons capacity per year. N.J.S.A. § 33:1-10(1b). But for smaller breweries like Death of the Fox, their license caps them at 50,000 barrels per year. See ibid.; App. 031a. The statute also limits sales for off-site consumption to no more than 15.5 fluid gallons per person, and all on-site consumption must be done in connection with a tour of the brewery. N.J.S.A. § 33:1-10(1b). Bars, restaurants, and liquor stores do not have similar restrictions placed on their ability to sell. Therefore, even if a limited brewery achieved widespread popularity due to media advertising of an unlimited number of events, it is still restricted by law in the amount it can produce and sell. Stated differently, no matter how popular a limited

brewery becomes through advertising on-premises events, it cannot sell more than its license allows—and that limitation represents the legislature's judgment as to what sort of competition limited breweries may engage in.

Rather than "balance" competition between limited breweries, bars, restaurants, and liquor stores, the advertising limit is an effective throttle on the ability of limited breweries to independently succeed in their already-restricted market. After all, should limited breweries be unable to consistently attract customers to buy their products year-round in their tap rooms, then they will have no choice but to distribute more of their product through bars, restaurants, and liquor stores who are not limited in how much they can sell.[12] Further, whereas limited breweries can only sell their own malt beverage products (and sodas), bars, restaurants, and liquor stores can sell the products of any manufacturer that are distributed in New Jersey, including beer, wine, and liquor. Therefore, even if it were true that limited breweries somehow needed to have their competitive abilities "balanced" lest they out-compete others, it is the unchallenged statutory restrictions

[12] Assuming a brewery would successfully find willing partners to sell its product in New Jersey bars, restaurants, and liquor stores—after all, there is limited tap and shelf space—such a move would be less profitable for breweries as they will earn less revenue by selling through others than they would by selling for on-site consumption. See supra n.7.

on manufacturing and sales volumes that directly advance that interest, not limiting breweries to advertising no more than 25 on-premises events per year.

Nor is any interest in promoting temperance, *see* N.J.S.A. § 33:1-3.1(b)(2), directly advanced by the advertising limit. See GJJM Enterprises, 352 F.Supp.3d at 408 ("While the State may, and does, regulate conduct regarding alcoholic beverages, it has not shown that regulating the speech concerning that conduct furthers a governmental interest sufficient to override [] constitutional rights"). As in Pitt News, because limited breweries can hold more than 25 on-premises events per year so long as they do not advertise them through media outside of the brewery, and because the Division's primary aim of balancing competition would merely shift the consumption of alcohol from limited brewery tap rooms to bars, restaurants, and homes rather than reduce the amount consumed, any interest in promoting temperance is not directly advanced by the advertising limit. See also 44 Liquormart, 517 U.S. at 505 (State must show advertising ban "will significantly reduce alcohol consumption.") (emphasis in original). Importantly, the Division has also failed to offer any evidence that patrons are less temperate when drinking at limited breweries than at bars and restaurants.

C. The Advertising Restriction Is More Extensive Than Necessary to Advance Any Substantial Governmental Interest

Should this Court hold that the advertising limit directly advances an interest in balancing competition or promoting temperance, it still is more extensive than necessary to do so.

As before, the Division bears the burden to show that the advertising limit is no more extensive than necessary to further the government's claimed interest in balancing competition or promoting temperance. See Rubin v. Coors Brewing Co., 514 U.S. 476, 486–87 (1995). If the Division can "achieve its interests in a manner that does not restrict speech, or that restricts less speech, [it] must do so." Thompson v. W. States Med. Ctr., 535 U.S. 357, 371 (2002). "The Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest—'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.'" Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 188 (1999) (quoting Bd. of Trustees of St. Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)). And while it is true that anecdotes, history, and "simple common sense" can be used to support some speech restrictions, see Florida Bar, 515 U.S. at 628, courts have stricken speech restrictions where advertisers proposed alternatives "which could advance

the Government's asserted interest in a manner less intrusive to [the advertiser's] First Amendment rights." Rubin, 514 U.S. at 491. In addition, as part of the Division's burden, it must "show that it carefully calculated costs and benefits of burdening speech."[13] Greater New Orleans Broad. Ass'n, 527 U.S. at 188 (cleaned up). And a speech regulation cannot "unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." Lorillard Tobacco, 533 U.S. at 565.

Nothing in the Special Ruling or special license conditions explains why the Division restricted media advertising and how it expected the restriction to "balance" competition or promote temperance. Nor is there any explanation as to how the Division arrived at a limit of 25 advertised events instead of 50 or 100, for example. There is thus no evidence that the Division "carefully calculated costs and benefits of burdening speech." Greater New Orleans Broad. Ass'n, 527 U.S. at 188. Further, as discussed above, the non-speech related statutory limitations on the operations and manufacturing of limited breweries are far more likely to "balance" competition between limited breweries and bars, restaurants, and liquor stores than an annual

[13] As the Division has failed to conduct formal notice-and-comment rulemaking where it would have been required to receive comments from limited breweries critical of the Special Ruling's restrictions and respond to those comments, see supra at 13, it cannot show any careful calculation of costs and benefits of the advertising restriction.

limit of 25 advertised events. After all, it is hard to imagine a limited brewery successfully competing with a restaurant if it cannot sell food or competing with a liquor store or bar if it can only sell its own malt beverage products and no more than 15.5 gallons per person (that's less than seven standard cases of beer). And if promoting temperance were truly an aim, restricting demand rather than scheming to transfer it from breweries to bars, restaurants, and liquor stores "would be more likely to achieve the State's goal of promoting temperance." 44 Liquormart, 517 U.S. at 507. Therefore, because the operational restrictions "advance the Government's asserted interest in a manner less intrusive to First Amendment rights," Rubin, 514 U.S. at 491, and in fact do so without intruding on Death of the Fox's speech rights at all, the Division's 25-advertised-event limit is more extensive than necessary.

CONCLUSION

Because the Division promulgated the Special Ruling and license conditions without complying with the requirements of the New Jersey Administrative Procedure Act, this Court should declare the entirety of the Special Ruling and license conditions void and permanently enjoin their enforcement. In the alternative, this Court should declare the restriction on advertising more than 25 on-site special events per year violative of the New Jersey Constitution and the First Amendment to the U.S. Constitution and permanently enjoin it.

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Respectfully submitted,

/s/ Jonathan M. Houghton
JONATHAN M. HOUGHTON
N.J. Bar No. 369652021
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
Tel: (202) 888-6881
JHoughton@pacificlegal.org

CALEB R. TROTTER*
Cal. Bar No. 305195
PHV043318

LUKE A. WAKE*
Cal. Bar No. 264647
PHV043319
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Tel: (916) 419-7111

Attorneys for Appellant
Death of the Fox Brewing Co.

* *pro hac vice*

CERTIFICATE OF SERVICE

I certify that I directed the foregoing document to be served electronically on this date to the following:

JOHN R. RENELLA
Deputy Attorney General
New Jersey Division of Law
Hughes Justice Complex
7th Floor, P.O. Box 093
Trenton, NJ 08625
Tel: (609) 376-08625
john.renella@law.njoag.gov

DATED: December 22, 2022.

/s/ Jonathan M. Houghton
JONATHAN M. HOUGHTON
N.J. Bar No. 369652021
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
Tel: (202) 888-6881
JHoughton@pacificlegal.org

Attorney for Appellant
Death of the Fox Brewing Co.