SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-000212-22T1

IN RE 2019 SPECIAL RULING AUTHORIZING CERTAIN ACTIVITIES BY HOLDERS OF LIMITED BREWERY LICENSES AND 2022 LIMITED BREWERY SPECIAL CONDITIONS	CIVIL ACTION On Appeal from State Agency Action by Division of Alcoholic Beverage Control

BRIEF ON BEHALF OF RESPONDENT NEW JERSEY DIVISION OF ALCOHOLIC BEVERAGE CONTROL

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MATTHEW J. PLATKIN
ATTORNEY GENERAL
OF NEW JERSEY
R.J. Hughes Justice Complex
P.O. Box 093
Trenton, New Jersey 08625
Attorney for Respondent New Jersey
Division of Alcoholic Beverage Control
(609) 376-2950
Kristina.Miles@law.njoag.gov

Donna Arons
Assistant Attorney General
Of Counsel

Kristina Miles (ID: 003282011)
Nicolas Seminoff
(ID: 029632011)
Charlie Stegner-Freitag
(ID: 327702021)
Deputy Attorneys General
On the Brief

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PRELIMINARY STATEMENT

The 2019 Special Ruling Authorizing Certain Activities by Holders of Limited Brewery Licenses (Special Ruling) at issue here serves to guide limited breweries, like Appellant Death of the Fox Brewing (DOTF), on how to act consistent with certain statutory privileges they enjoy under the current version of the Alcoholic Beverage Control Act, N.J.S.A. 33:1-1 to -103 (Act). Through this Ruling, the New Jersey Division of Alcoholic Beverage Control (ABC) explains how these breweries can enjoy the privileges without running afoul of the current Act's express terms and Legislature's plainly expressed purpose: to encourage economic competitiveness within the industry while also preventing the recurrence of historic societal alcohol abuses. Because the Ruling merely clarifies the parameters of how limited breweries can walk the line between manufacturing and selling their product—something unique to this specific type of license-holder—it does not amount to rulemaking and it thus need not have been promulgated in accordance with the Administrative Procedure Act. Nor do its advertising provisions violate Appellant's First Amendment rights. The 2019 Special Ruling is permissible agency guidance and should be upheld.

Prior to 2012, these limited breweries (colloquially known as "microbreweries") received a Class A manufacturers' license, which prohibited them from engaging in any degree of retail activities. But in 2012, the

Legislature amended the Act to provide a small exception to the tier separations (manufacturers, distributers, and retailers) by allowing microbreweries to engage in highly restricted retail activities to create demand for their products. In an effort to assist the breweries in understanding how these new retail activities could be undertaken consistent with the underlying statute and amendment, ABC issued the Special Ruling. The Ruling explained, for example, how the breweries could adhere to statutory requirements like offering tours of their facilities, holding a limited number of events, and ensuring that food is not offered on site. Without the Ruling, breweries were faced with—and would continue to be faced with—uncertainty in a tightly regulated industry as to how they could safely take advantage of these authorized activities. And although DOTF claims it is aggrieved by the Special Ruling, it is really challenging the Legislature's requirements in the Act itself—which have long distinguished between manufacturers and retailers of alcoholic beverages and have placed substantially different limitations on each.

And because the Special Ruling advises the limited breweries as to their conduct regarding the events they hold, not their speech, it also passes constitutional muster. Adhering to the governing constitutional framework, the Special Ruling's guidance on the advertising of events furthers the substantial governmental interest in maintaining a competitive market while also regulating

an area affecting issues of public health and safety. And a reasonable fit exists between the advertising provision of the Special Ruling and the State's interest.

Accordingly, the Special Ruling should be upheld.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

The Act's express and longstanding statutory terms charge ABC with uniquely broad authority to supervise the alcoholic beverage industry to ensure public health, safety, and welfare, foster moderation, protect consumer interests, maintain trade stability, and encourage industry competition. N.J.S.A. 33:1-3.1(b). Following the Twenty-First Amendment's enactment, which returned to the States the power to establish their own systems to regulate the alcoholic beverage industry, the New Jersey Legislature retained private operation of businesses while surrounding their operation with comprehensive safeguards designed to promote temperance and fair competition. See Grand Union Co. v. Sills, 43 N.J. 390, 399 (1964). After Prohibition, the Act "expressly outlawed the tied house system," wherein alcohol manufacturers acted as distributers and retailers that ultimately promoted "practices unduly designed to increase consumption[.]" Ibid. See also Affiliated Distillers Brands Corp. v. Sills, 56 N.J. 251, 258 (1970) ("tied-houses inevitably result in excessive sales

[1] Because they are closely related, the procedural and factual histories are combined for efficiency and the court's convenience.

stimulation at the retail level, creating a direct conflict with the promotion of temperance."); Heir v. Degnan, 82 N.J. 109, 114 (1980) (alcohol is "subject to intense State regulation" to curb practices that "improperly stimulates sales and thereby impair the State's policy favoring trade stability and the promotion of temperance.").

ABC regulates the manufacture, distribution, and sale of alcohol under a three-tier system that ensures fair competition by separating the privileges of alcohol manufacturers, wholesalers, and retailers from one another. N.J.S.A. 33:1-3, -3.1, -26, -43. Each tier operates under a separate and distinct license: manufacturers have Class A licenses (N.J.S.A. 33:1-10), wholesalers hold Class B licenses (N.J.S.A. 33:1-11), and retailers possess Class C licenses (N.J.S.A. 33:1-12). See Affiliated Distillers, 56 N.J. at 258. The fundamental functioning of this system requires the tiers to be kept separate: "[n]o retail license of any class shall be issued to any holder of a manufacturer's or wholesaler's license, and no manufacturer's or wholesaler's license shall be issued to the holder of a retail license of any class." N.J.S.A. 33:1-26. New Jersey statutes thus reflect a "strong public policy . . . [t]o strictly regulate alcoholic beverages to protect the health, safety[,] and welfare of the people of this State." Zagami, LLC v. Cottrell, 403 N.J. Super. 98, 109 (App. Div. 2008) (quoting N.J.S.A. 33:1-3.1(b)(1)).

A. Limited Brewery Licenses

DOTF is one of approximately 140 limited breweries that manufactures alcoholic beverages under a Class A manufacturing license under N.J.S.A. 33:1-10(1b) (Section 10(1b)). ABC issued DOTF's current limited brewery license with conditions incorporating the 2019 Special Ruling's provisions on July 1, 2022. DOTF bills itself as "New Jersey's first and only craft brewery, coffeehouse and coffee roastery[,]" and its homepage lists prices for each of its sixteen beers by the glass, sixtel, and half keg sold in its tasting room.[2] Its business model focuses upon selling pints of beer on premises, see (Ab7, n7) (calculating lost profits if retailers, rather than a brewery, sells brewery's product by the pint), rather than building its brand to "entice others to distribute its product." Id. at 11.[3] And on July 19, 2019, at DOTF's request due to its asserted business model and expenditures, ABC issued a Special Ruling allowing DOTF to brew and sell coffee on its premises. (Ra1-4). DOTF has not challenged that Special Ruling.

However, DOTF's manufacturing license is separate and distinct from a full retail license, which is issued to, for example, sports bars. N.J.S.A. 33:1-12. Courts strictly construe an alcoholic beverage license because it is

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[2] *Available at* www.deathofthefoxbrewing.com/#streaming-menu.

[3] "Aa" refers to DOTF's corrected appendix, "Ab" refers to its corrected brief, and "Ra" refers to ABC's appendix.

"essentially a permit to pursue there an occupation otherwise illegal." Hickey v. Div. of Alcoholic Beverage Control, 31 N.J. Super. 114, 116 (App. Div. 1954). "The whole machinery of the" Act "is designed to control and keep within limits a traffic which, unless tightly restrained, tends toward abuse and debasement." In re Appeal of Schneider, 12 N.J. Super. 449, 455-56 (App. Div. 1951). Thus, "it is in [the] public interest" that liquor license holders "will abide by the myriad rules and regulations governing their business operations." Zagami, 403 N.J. Super. at 111-12. N.J.S.A. 33:1-32 captures this and authorizes local issuing authorities—and by extension ABC—to "impose any condition or conditions to the issuance of any license," including DOTF's annually renewed license.

A limited brewery licensee has the privilege to brew any malt alcoholic beverages up to a certain quantity; to sell and distribute that product to wholesalers, retailers, and the public; and to maintain a warehouse in the State. N.J.S.A. 33:1-10(1b). This differs from other licenses available. For instance, a plenary brewery licensee—the classic Class A manufacturer—can produce an unlimited amount of product but cannot engage in any retail activities, N.J.S.A. 33:1-10(1a), while a restricted brewery licensee (more commonly known as a brewpub) can brew less product than a limited brewery, but must own a restaurant and hold a plenary retail consumption license. N.J.S.A. 33:1-10(1c).

And to complete the picture, Class C retailers cover a variety of entities, including plenary retail consumption licensees, who can sell any alcohol for on-premises consumption by the glass such as a bar, N.J.S.A. 33:1-12(1), plenary retail distribution licensees who can sell alcohol for off-premises consumption (such as a liquor store), N.J.S.A. 33:1-12(3a), transit vehicles like trains and boats, N.J.S.A. 33:1-12(4), and sporting facility licensees, N.J.S.A. 33;1-12(6). Class A limited brewery licenses are thus not stand-ins for full retail consumption privileges, and licensees are strictly prohibited from operating an establishment with all of the same retail privileges as a Class C licensee. N.J.S.A. 33:1-26; N.J.S.A. 33:1-43.

B. 2012 Act Amendments and 2019 Special Ruling Formation

The Act was amended in 2012 to allow limited breweries a small degree of on-premises consumption—a privilege normally reserved only for retail license holders.[4] Section 10(1b) permits limited breweries to "sell [their products] at retail to consumers on the licensed premises of the brewery for consumption on the premises, but only in connection with a tour of the brewery, or for consumption off the premises in a quantity of not more than 15.5 fluid

[4] Notably, a bill is currently pending in both legislative houses that, if adopted, would likely make this case moot. See S. 3675 (introduced Feb. 28, 2023) (permitting food sales and an unlimited number of on and off-premises events, and eliminating tour requirement).

gallons per person;" and "to offer samples." The statute also prohibits a licensee from selling "food or operat[ing] a restaurant on the licensed premises." N.J.S.A. 33:1-10(1b).

A bill sponsor explained that in enacting the 2012 amendments, the Legislature sought to create an opportunity for "people [to] come, they'll do the tour, they'll try the beer, and if they like it . . . they'll buy a case or a six pack." Revises Privileges of Limited and Restricted Breweries: Hearing on A. 1277 Before the A. Comm. of Law & Pub. Safety, 2012 Leg., 215th Sess. (N.J. 2012) (statement of Sponsor).[5] Moreover, "[p]eople aren't going to go there as a drinking establishment." Id. at 1:23. The Legislature created only a narrow retail exception. Indeed, language proposing a carve out for limited breweries from N.J.S.A. 33:1-43's tied house prohibition (which would have allowed them to operate restaurants) was ultimately deleted in the final bill. Compare A. 1277 (2012) (introduced January 10, 2012) with S. 641 (adopted).

Following the change to allow these manufacturers to have a small degree of on-premises retail consumption, ABC became aware that the "activities and practices of limited breweries" had grown varied, sometimes "exceed[ing] the privileges of the limited brewery license" under the terms of the statute. (Aa5).

[5] A. Hearing at 1:20, ibid., https://www.njleg.state.nj.us/archived-media/2012/ALP-meeting-list/media-player?committee=ALP&agendaDate=2012-06-07-14:00:00&agendaType=M&av=A.

In keeping with its duty to maintain the three-tier division and trade stability, see Grand Union Co., 43 N.J. at 399 and N.J.S.A. 33:1-3.1 (emphasizing role of tiers in ensuring Legislature's statutory policies regarding reducing consumption and promoting fair competition), ABC began gathering information about the limited brewery industry. Its goal was to help the industry successfully navigate the statutory privileges that the Legislature had granted limited breweries without exceeding those limited privileges or more broadly violating the "tied house" prohibition that the Legislature chose to keep in effect.

For months, ABC discussed these issues with the industry, including how industry could remain compliant with the statutory structure. (Aa5). In 2015, ABC received a list of best practices identified by the Garden State Craft Brewers Guild, a group of New Jersey microbreweries, to ensure limited breweries' compliance with the Act. (Ra5-7). These industry-conceived provisions included prohibiting on-premises food vendors, limiting live sporting events, and allowing de minimis snacks as the Guild recognized a "brewery tasting room is not a bar and should avoid 'bar like' activities[.]" (Ra5, Ra7). ABC subsequently sought additional information and attended several meetings with industry members while drafting the Special Ruling, (Ra8-21), including a meeting with DOTF. (Ra18).

On September 21, 2018, pursuant to N.J.S.A. 33:1-39 ABC issued the "Special Ruling Authorizing Certain Activities By Holders of Limited Brewery Licenses," (2018 Special Ruling) to help guide limited breweries regarding compliance with the 2012 amendments and the rest of the Act.[6] (Aa61-76). The industry then provided more feedback and ABC suspended that Special Ruling on October 2, 2018, for further evaluation. (Aa77-81).

ABC then conducted additional outreach by meeting with microbrewery industry representatives, including the Brewers Guild of New Jersey and the New Jersey Brewers Association, as well as the New Jersey Licensed Beverage Association, the New Jersey Restaurant Association, and the New Jersey Liquor Store Alliance. (Aa6; Ra23-29). ABC also visited many limited breweries to discuss the 2018 Special Ruling. (Aa6; Ra23-26). Industry members continued to provide comments, such as a comment from the New Jersey Licensed Beverage Association supporting the 2018 Special Ruling as a way of maintaining fair competition within the industry. (Ra22).

Then, on May 28, 2019, ABC released the 2019 Special Ruling at issue here that superseded the prior 2018 Special Ruling. ABC continued its industry outreach, answering questions about the Special Ruling and meeting with

[6] N.J.S.A. 33:1-39 authorizes ABC to issue "such special rulings and findings as may be necessary" to oversee "the manufacture, sale and distribution of alcoholic beverages[.]"

businesses. (Ra30-43). The Brewers Guild of New Jersey provided ABC with more comments, including proposed changes and suggestions. (Ra44-53).

C. The 2019 Special Ruling's Provisions

Like the 2018 Special ruling, the May 28, 2019, Special Ruling provides guidance to limited brewery licensees. Its provisions were placed into all limited brewery licenses in 2022, including DOTF's 2022 license, to effectuate the privileges provided under Section 10(1b) and serve as a reminder to the industry about statutory requirements, after the COVID-19 pandemic disrupted normal industry operations. (Aa31-33). The Special Ruling's goal is to "balance" the privileges of the limited brewery sector and to establish uniform guidelines "applicable to all limited brewery licenses" so the limited brewery licensees can "compete with each other on a level playing field." (Aa8). ABC explained that Section 10(1b)'s purpose is to promote craft beer manufacturing by "creating a demand for these products through limited consumption privileges on the brewery premises." Id. at 6. But ABC noted that some limited breweries "desire to focus more on promoting on-premises consumption in tasting rooms, rather than on creating products intended for widespread wholesaling." Id. at 7 n.2. Given the Act's divide between manufacturing and retail privileges, guidance was necessary to ensure continued compliance with the statutory scheme.

To help stabilize the microbrewery industry and ensure compliance with current state statutes, among other goals, the Special Ruling explains the current statutory and regulatory limits governing the limited breweries' privileges, giving particular attention to the minimal retail exceptions provided with these particular manufacturing license privileges.

The Special Ruling contains several provisions related to the operation of limited breweries consistent with their statutory privileges as a manufacturer with limited retail privileges. It confirms that a licensed limited brewery may sell its product produced on the licensed premises for consumption on premises, or offer samples of these products, but only in connection with a tour of the brewery. (Aa20). The Special Ruling also clarifies and explains the term "tour" in N.J.S.A. 33:1-10(1b) and confirms that the statutory tour requirement applies for any event held on the premises. (Aa16, Aa20). It also provides that servers and pourers must receive nationally recognized server training on the prevention of over-service to patrons and over-consumption by patrons. (Aa17).

The Special Ruling further explains that limited breweries are statutorily prohibited from selling or offering any food on the licensed premises, except for certain "de minimis" types of food such as packaged pretzels. Id. at 24. Likewise, the Special Ruling clarifies other specific restrictions related to food, such as on-premises food truck limitations, as that, ABC explained, was akin to

selling food on the licensed premises and would usurp the Legislature's policy judgment. See e.g., id. at 23-25. The Special Ruling also explained that brewing and sale of coffee on the limited brewery premises could not proceed due to the Act's food restriction.

While Section 10(1b) does not provide a privilege to hold events on or off limited brewery premises, the Special Ruling explains that a limited number of events may be held without over-stepping the statutory license privileges, including the express statutory prohibition against limited breweries operating any restaurants. On-premises Special Events are defined as a "one-day event that is open to the public and is promoted or advertised."[7] Id. at 18. A brewery can hold up to twenty-five Special Events per calendar year, and the licensee must report each event to ABC at least ten days prior to the event, inform local law enforcement, and maintain event-related records. The licensee is also prevented from discounting its products based on cover charges paid or other incentives. Id. at 19. Further, certain events are defined as de-facto Special Events, whether advertised or not, such as showing any live-televised championship sporting event and live music. Id. at 18.

[7] Examples given include "Trivia/quizzo/game night; open microphone; games of skill" and similar events. (Aa15).

The 2019 Special Ruling explains licensees' privileges for private parties, social affairs, and off-premises events. Licensees may hold fifty-two private parties per calendar year in an "area clearly separated from the tasting room." Id. at 19. For social affairs events, a brewery can hold up to twenty-five per calendar year, subject to similar restrictions as private parties. Id. at 21-23. Off-premises events may be held up to twelve times per year, but ABC must approve them in advance, and they have reporting requirements, food limitations, and other requirements. Id. at 8, 25-26.

Because the Special Ruling was aimed at promoting greater compliance with already-extant statutory provisions, including the longstanding licensing structure and the new tour requirements and food limitations, the Special Ruling affirmed that all existing statutory and regulatory requirements were immediately enforceable. Id. at 12. As to the remaining Schedule A provisions, ABC explained that they "should be viewed as guidance, and absent flagrant or repeated violations, will not be strictly enforced." Ibid. To date, ABC has not enforced or sought to enforce any Special Ruling provisions that was not already present in the Act or in the agency's own separate regulations.

As ABC explained, the Schedule A provisions that are not already explicitly present in the Act or its regulations were the agency's "reasonable interpretation of permissible and impermissible activities" for licensees, and

ABC indicated it will propose these "guidelines" as regulations in the near future to be "fully enforceable against all limited brewery licensees." Ibid. ABC advised limited breweries to view the Schedule A items as notice of what future regulations will likely require. Id. at 13. As part of this notice, the Special Ruling explains that these restrictions will be placed in licenses as "special conditions" until regulations are adopted, which "shall be fully enforceable." Ibid. The COVID-19 pandemic arose less than a year later and gave rise to unprecedented circumstances impacting all society, including the alcohol industry. Thus, ABC incorporated the Special Ruling's provisions as conditions in the 2022-2023 limited brewery licenses in June, 2022. (Aa29-30).

On October 6, 2022, over three years after the Special Ruling was issued and over three months after DOTF received its 2022-2023 limited brewery license which included the special conditions from the Special Ruling, DOTF filed its amended Notice of Appeal beginning this case. (Aa1-4).

ARGUMENT

POINT I

THE SPECIAL RULING IS PERMISSIBLE AGENCY GUIDANCE AND DOES NOT SATISFY THE METROMEDIA TEST FOR AGENCY RULEMAKING (Responds to DOTF's Point I).

The Special Ruling is an agency guidance document based on significant engagement with numerous microbreweries and designed to inform the limited

brewery industry of the existing statutory and regulatory framework that governs it. ABC has not used the Special Ruling as an independent basis for any enforcement. Furthermore, the Special Ruling does not meet the Metromedia test for agency rulemaking as it is obviously inferable from the statutory scheme and does not express any new agency policies beyond the statute.

A. The Special Ruling is Agency Guidance

Agencies are accorded "wide latitude in improvising appropriate procedures to effectuate their regulatory jurisdiction." Metromedia, Inc. v. Dir., Div. of Tax'n, 97 N.J. 313, 333 (1984). "Administrative agencies possess the ability to be flexible and responsive to changing conditions." In re Pub. Serv. Elec. & Gas Co.'s Rate Unbundling, 167 N.J. 377, 385 (2001) (citation omitted). "This flexibility includes the ability to select those procedures most appropriate to enable the agency to implement legislative policy." Ibid. Thus, "[a]n agency has discretion to choose between rulemaking, adjudication, or an informal disposition in discharging its statutory duty . . . ." Nw. Covenant Med. Ctr. v. Fishman, 167 N.J. 123, 137 (2001).

Deference to an administrative agency is especially appropriate when new legislation is being put into practice or when the agency has been delegated discretion to determine the specialized procedures for its tasks. Ibid. See also Div. of Alcoholic Beverage Control v. Maynards, Inc., 192 N.J. 158, 177 (2007).

This is true for the alcoholic beverage industry: "[t]he right, most extensive in nature, to regulate the field of intoxicating liquors is within the police power of the State, and this power is practically limitless." Blanck v. Mayor & Borough Council of Magnolia, 38 N.J. 484, 490 (1962). "[O]ur courts have held that, in interpreting statutes in this field, meticulous technicalities should not be permitted to thwart the Legislature's effort to keep a public convenience from becoming a social evil and therefore state authorities should be given every opportunity to work out the mandate of the Legislature." Id. at 491.

In 2011, the Legislature expressly recognized agencies' discretion in determining the most effective and appropriate implementation of a legislative action when it codified and explained the use of regulatory guidance documents. N.J.S.A. 52:14B-3a. This 2011 addition to the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -32 (APA), recognizes the long-standing tenet that "administrative agencies may act informally," which can include supervising a regulated industry. In re Request for Solid Waste Util. Customer Lists, 106 N.J. 508, 518-19 (1987). Numerous informal agency documents have been upheld as "guidance" that did not need to go through formal rulemaking processes. See, e.g. Coal. for Quality Health Care v. N.J. Dep't of Banking & Ins., 348 N.J. Super. 272, 300 (App. Div. 2002) (finding an agency-created sample policy constituted guidance); B.C. ex rel. C.C. v. Cumberland Reg'l Sch. Dist., 220

N.J. Super. 214, 234 (App. Div. 1987) (athletic association's document describing responses to various factual scenarios constituted guidance); In re 2019-2020 Emergency Aid Submitted by the Bd. of Educ. of the N. Warren Reg'l Sch. Dist., 2022 N.J. Super. Unpub. LEXIS 627 (App. Div. Apr. 18, 2022) (slip. op. at 16-17) (agency memo explaining application process constituted guidance).[8] (Ra69-70).

As this court explained recently, "[s]ince the statutory definition of a regulatory guidance document conflicts to an extent with the Metromedia test, regulatory guidance documents are less likely to constitute impermissible de facto rulemaking." N. Warren Reg'l Sch. Dist., 2022 N.J. Super. Unpub. LEXIS 627 (slip. op. at 15). (Ra68). Conversely, however, agency documents characterized as guidance can be de facto rulemaking if they establish standards not articulated in the enabling legislation. In re N.J.A.C. 7:1B-1.1, et seq., 431 N.J. Super. 100, 137 (App. Div. 2013) (agency information "prescrib[ing] procedures, agency policies, and directives concerning application submissions and evaluations" deemed a rulemaking), In re Highlands Master Plan, 421 N.J. Super. 614, 629 (App. Div. 2011) (agency resolution waiving prior rules and creating "procedures and standards" for substantive certification affordable

[8] A copy of this opinion is included in Respondent's Appendix pursuant to R. 1:36-3. No contrary unpublished opinions are known to counsel.

housing petitions), In re Adoption of Reg'l Affordable Housing Dev. Program Guidelines, 418 N.J. Super. 387, 395 (App. Div. 2011) (agency resolution setting "specific standards and conditions for regional planning" that COAH will approve is rulemaking).

When agencies issue guidance documents to merely explain or clarify a state or federal law, they need not undertake formal rulemaking. N.J.S.A. 52:14B-2(e), -3a. Guidance documents are permissible if they do not "(1) 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;" or are not (2) "used by the State agency as a substitute for the State or federal law or rule for enforcement purposes." N.J.S.A. 52:14B-3a(c).

Here, the Special Ruling is guidance and satisfies N.J.S.A. 52:14B-3a because it neither seeks to impose on the alcoholic beverage industry any new or additional requirements other than those already in existing statutes and regulations, nor acts as a substitute rule for enforcement purposes. The Special Ruling instead guides the burgeoning limited brewery sector so that it may implement the small degree of on-premises consumption permitted by Section 10(1b), without exceeding the other statutory privileges and restrictions laid out by the current statute's terms and structure and thereby intruding on the statutory rights of industry participants with full retail privileges. (See Aa5). Indeed, the

limited brewery industry itself sought guidance after the 2012 Act amendments to avoid unintentional statutory violations and enforcement. (Ra8-10).

To understand how the Special Ruling guides limited breweries through their licensed privileges, it is vital to reiterate the Act's regulatory scheme and where limited breweries fit in as manufacturers. Through the Act, the Legislature placed a unique mandate upon ABC to supervise the alcoholic beverage industry, N.J.S.A. 33:1-3, and "maintain a three-tier (manufacturer, wholesaler, retailer) distribution system[,]" N.J.S.A. 33:1-3.1(b)(8), as well as maintain competition and trade stability in the industry. N.J.S.A. 33:1-3.1(b)(6), (7). This system upholds the "policy favoring trade stability and the promotion of temperance." Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 11 (2009) (quoting Grand Union Co., 43 N.J. at 404).

As explained above, limited breweries receive a Class A manufacturing license under Section 10(1b) for the privilege to brew their own malt alcoholic beverages in certain limited quantities. They can sell their manufactured product on-premises, provided they give patrons tours and do not sell food or operate a restaurant. Ibid. This manufacturing license costs between $1,250 to $7,500 depending on how much product the limited brewery intends to produce. Class A manufacturing licenses are distinct from Class C retail licenses under N.J.S.A. 33:1-12, which are given to bars, sporting facilities, clubs, liquor

stores, and restaurants. See N.J.S.A. 33:1-26. To preserve the three-tier structure, manufacturing licensees generally cannot hold a retailer license. N.J.S.A. 33:1-26 ("No retail license of any class shall be issued to any holder of a manufacturer's or wholesaler's license"). In passing Section 10(1b) in 2012, the Legislature relaxed the three-tier model to a limited degree by permitting limited breweries to offer a small amount of on-premises consumption (a privilege generally reserved for retail license holders). But the 2012 amendments were the narrow exception to the general rule that manufacturers cannot act as retailers. DOTF thus overreads these exceptions in arguing Section 10(1b) imposes "only two limitations" upon on-site consumption sales and complaining that if it cannot "attract customers to its tap room" then it "will likely be forced to attempt to entice others to distribute its products[.]" (Ab4, 11.) In short, the point of DOTF's manufacturer's license is to manufacture the product and create demand for it for further sale at retail establishments.

Against this backdrop, the Special Ruling explains how limited breweries may implement the 2012 amendment, (Aa6-7), without running afoul of the Act and the myriad restrictions the Legislature left in place at that time. N.J.S.A. 33:1-10(1b). It not only clarifies the three-tier industry division boundaries, but also informs the industry of ABC's expectations under current law, with a view towards future rulemaking. (Aa12-13). Indeed, the Special Ruling expressly

notes that Schedule A's provisions "should be viewed as guidance" that "represent the Division's reasonable interpretation" of the activities the limited breweries could undertake. Ibid.

The Schedule A provisions meet the APA guidance definition as they describe existing statutory and regulatory provisions that already govern limited breweries. N.J.S.A. 52:14B-3a(c)(1). For example, the Special Ruling explains that a limited brewery may sell its product for "consumption on the licensed premises of the brewery, but only in connection with a tour[.]" (Aa16) (emphasis in original). This is explicitly required by Section 10(1b), which says that the licensee may sell its product for on-premises consumption "but only in connection with a tour of the brewery" and the Special Ruling simply explains to the industry what a "tour" is and how its logistics can work in practice.

In a similar vein, the Special Ruling provides guidance regarding how to comply with the Act's plain food sales restrictions. The Special Ruling explains that a limited brewery "shall not sell food . . . or operate a restaurant" on-premises other than for specific and limited exceptions. (Aa23-24). This is explicitly required by Section 10(1b), which says that "[t]he holder of this license shall not sell food or operate a restaurant on the licensed premises," and the Special Ruling clarifies that limited breweries can still provide restaurant menus, sell their own soda, and provide de minimis snacks.

So too for events. The Special Ruling provides that limited breweries, like all other licensees, cannot be the designated host premise for more than twenty-five social affair permittees per year. (Aa10). N.J.A.C. 13:2-5.1(d) explicitly requires this: no "permit [shall] be granted for premises at which 25 prior social affair permits have been issued within the same calendar year."

And the Special Ruling's explanations as to how limited breweries may hold or attend events that are not held on their business premises are also firmly grounded in the Act. Limited breweries may obtain up to twelve "Limited Brewery Off-Premises Event" permits per year. (Aa11). N.J.S.A. 33:1-74(a) permits ABC to issue "temporary permits," such as these, "authorizing the sale of alcoholic beverages for consumption on a designated premises" where the Act is otherwise silent but "it would be appropriate and consonant with the spirit of this chapter to issue a license," ibid., such as an off-premises event. The Special Ruling gives examples of possible permissible off-premises events, including "civic or community events . . . athletic events, anniversary events or holiday celebrations[.]" (Aa11). These permits allow sale and sampling of malt alcoholic beverages off the licensed premises—consistent with Section 74—but do not allow food service, consistent with Section 10(1b). (Aa27-28).[9] And

[9] The off-premises permit fee is $200, which is within the range of fees Section 74 allows, and matches the agency's existing regulations. N.J.A.C. 13:2-5.5.

twelve permits per year incorporates N.J.A.C. 13:2-5.1's analogous limit for civic organizations. The Special Ruling also reminds the industry that these temporary permits require a permit from ABC and local law enforcement endorsement. See N.J.A.C. 13:2-5.1, -5.5 (containing the same requirements). In these varied respects, which DOTF challenges on appeal, the Special Ruling simply explains how limited breweries can readily navigate pre-existing statutory and regulatory provisions.

The Special Ruling contains provisions covering on-premises, social affair events, and private events. DOTF complains specifically that two provisions violated the APA, namely: (1) holding twenty-five on-premises Special Events, defined as a "one-day event that is open to the public and is promoted or advertised" (Aa18), and (2) holding fifty-two private parties per year. As explained above, Special Events include any live music performance or DJ, and any live-televised championship sporting event regardless of whether they are advertised or not, and require advance notice to ABC. Id. at 18-19.

These provisions do not violate the APA because they are permissible guidance. N.J.S.A. 52:14b-3a. First, they are firmly anchored in the sharp distinctions the Legislature has drawn and retained between manufacturers and retailers in the alcoholic beverage industry, even in the limited 2012 amendments' exceptions, as set forth above. The Special Ruling simply gives

effect to the statutory mandate that limited breweries cannot operate restaurants or full-scale retail facilities like bars (N.J.S.A. 33:1-10(1b) and -26) by placing a limit on the number of live-televised championship sporting events, live music and DJ performances, and other similar events typically seen at restaurants and bars. As the industry itself recognized early on, "a brewery tasting room is not a bar[.]" (Ra7). To illustrate, a typical Class A liquor manufacturer would not host live music for the public—advertised or not—as that is a classic event intended to draw customers into a retail facility to remain, which makes little sense for the typical Class A manufacturer that cannot sell liquor on-premises like a Class C retailer. See N.J.S.A. 33:1-26 (manufacturers cannot hold retailer licenses); Grand Union Co., 43 N.J. at 398-99 (retail license restrictions tied to three tier system and historic "abuses in the liquor industry"). A Class A manufacturer cannot claim all the rights and privileges of a Class C retailer, yet reject the financial obligation and regulatory requirements of same without upending the Legislature's policy lines set in the Act.

Second, and independently, these final on-premises event provisions continue to be guidance because ABC has not enforced them. Critically, in keeping with the confines of N.J.S.A. 52:14B-3a(c)(2), the Special Ruling was never meant to constitute anything more than permissible agency guidance and ABC has never relied on it in any agency enforcement action. (Aa12). That

ABC listed the guidance parameters as special conditions in limited breweries' 2022-2023 licenses does not change the guidance's nature, as ABC has never enforced the conditions. The Special Ruling was introduced in May 2019, only a few months before most breweries' licenses would be renewed. However, less than a year later, the COVID-19 pandemic gave rise to unprecedented circumstances, including Executive Orders imposing additional restrictions on breweries. Consequently, ABC added these guidelines to limited breweries' 2022-2023 licenses as additional notice regarding the Act and how limited breweries could comply with it.

The Special Ruling is a guidance document, as ABC neither created any new standards beyond what industry must follow under the statutes and regulations and their structure, nor has the agency used it as a substitute for enforcement of the Act or its regulations. N.J.S.A. 52:14B-3a. Guidance aids the industry in complying with the law, and did not require APA rulemaking.

B. The Special Ruling Also Passes Muster Under Metromedia

While the Special Ruling meets the definition of a guidance document and should be upheld, DOTF asserts that it nonetheless constitutes agency rulemaking under Metromedia. It does not. Distinct from agency guidance, an administrative rule goes beyond clarification and affirmatively regulates some portion of the general public. A rule is an "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(e). Agency action constitutes rulemaking when it:

> (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.
>
> [Metromedia, 97 N.J. at 331-32.]

In considering whether agency action constitutes rulemaking, each factor need not be present, but rather can "either singly or in combination" determine

"whether the essential agency action must be rendered through rule-making or adjudication." Id. at 332. However, factors four and five are afforded the most weight in the analysis. See Coal. for Quality Health Care, 348 N.J. Super. at 297. These criteria apply equally "whenever the authority of an agency to act without conforming to the formal rulemaking requirements is questioned." In re N.J.A.C. 7:1B-1.1, et. seq., 431 N.J. Super. at 135 (quoting Doe v. Poritz, 142 N.J. 1, 97 (1995)).

Given its advisory purpose, the Special Ruling meets the first three Metromedia factors. It prospectively and uniformly guides the limited brewery industry and explains the existing statutory and regulatory privileges and restraints governing the industry. Meeting these three factors, however, does not make the Special Ruling a rule. See Doe, 142 N.J. at 98 (agency action satisfied the first three Metromedia factors, "however, the remaining factors point strongly in the other direction and, in this case, deserve the most weight."). The Special Ruling does not impose any new requirements not already present or obviously inferable from the Act and its regulations, and thus does not meet Metromedia factors four and five. Additionally, as to Metromedia factor six, many Special Ruling provisions do not interpret law or policy, but merely restate existing statutory and regulatory constraints that already exist.

1. The Special Ruling does not meet Metromedia factor four

To meet the fourth Metromedia factor, an agency action must (1) prescribe a legal standard or directive that (2) is not otherwise expressly provided by or clearly and obviously inferable from the enabling statute. Metromedia, 97 N.J. at 332. Here, the Special Ruling does not mandate specific courses of conduct, and is obviously inferable from the Act and its regulations. Thus, the Special Ruling does not meet the fourth Metromedia factor and is not rulemaking.

i. The Special Ruling does not prescribe a legal standard or directive

The Special Ruling's provisions are guidance, have not been enforced, and do not mandate a certain course of conduct. The Special Ruling thus does not meet the fourth Metromedia factor and is not rulemaking. See Coal. for Quality Health Care, 348 N.J. Super. at 298 (non-binding sample insurance policy was not rulemaking because it did not prescribe a legal standard or directive, or set minimum acceptable standards); Cumberland Reg'l Sch. Dist., 220 N.J. Super. at 234 (guidelines in the form of questions and answers to illustrate suggestive solutions to hypothetical factual situations constituted informal action, not rule-making). While limited breweries are bound by the Act and its regulations, the Special Ruling does not mandate or restrict any specific action separate from what is already statutorily and regulatorily required. For example, the Act requires limited breweries to give a tour before

selling their products for on-premises consumption and prohibits them from selling food or operating a restaurant. N.J.S.A. 33:1-10(1b). Limited breweries must comply with existing temporary permits requirements for events, including off-premises events, and social affair permits, N.J.S.A. 33:1-74; N.J.A.C. 13:2-5.1 to -5.5, and the overarching three tier system. N.J.S.A. 33:1-26.

Though DOTF specifically criticizes the Special Ruling's Special Events and private party elements, these provisions do not meet the first prong of the fourth Metromedia factor because they are merely guidance and have not been independently enforced. Additionally, the Special Ruling does not mandate that limited breweries host or participate in any types of events and does not require any permits for these types of events. Rather, the Special Ruling simply effectuates the statutory mandate that, as manufacturing licenses, limited breweries cannot operate as consumption venues like bars and restaurants (N.J.S.A. 33:1-10(1b) and -26) by placing a limit on the number of live music and DJ performances, and other similar events typically seen at restaurants and bars. See supra at 8. Should a business like DOTF's want to undertake more events to promote the sale and consumption of their products on-premises, other types of licenses are available, such as a restricted brewery license.[10] (Aa7 n.2).

[10] DOTF's complaints about the Special Ruling's alleged impact upon its business ring hollow when one considers that DOTF already has a separate

In keeping with the overarching three tier system and its longstanding purposes, however, Section 10(1b) explicitly restricts the limited brewery license, and both ABC and the industry must abide by those restrictions. See Zagami, LLC, 403 N.J. Super. at 109-10 ("N.J.S.A. 33:1-23 requires the stringent and comprehensive administration of the alcoholic beverage laws[.]"). DOTF can complain to the Legislature, but it cannot justify overturning a guidance document that merely explains how the industry can comply with the sweeping differences between limited brewery and Class C licenses.

ii. The provisions of the Special Ruling are not rulemaking because they are obviously inferable from the Act.

The Special Ruling's provisions are obviously inferable from the enabling statute. Agency directives that are "merely a formalization of the classification requirements explicitly set forth in the statute" do not constitute rulemaking. Doe, 142 N.J. at 97. Those directives are only rulemaking when they "deviate substantially from the explicit or implied standards of the statute[.]" Ibid. (citing A. A. Mastrangelo, Inc. v. Dep't of Env't Prot., 90 N.J. 666 (1982)).

The requirements that limited breweries cannot serve food and must give a tour before any on-premises consumption sales, (Aa6, Aa16), match existing statutory provisions containing the very same standards. Compare ibid. with

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Special Ruling allowing coffee sales on premises, but never sought any other type of relief—Special Rulings or different licenses—from ABC. (Ra1-4).

N.J.S.A. 33:1-10(1b). While the Special Ruling expresses a more relaxed reading of these statutory mandates (the very opposite of what DOTF complains of here) by offering logistic and non-burdensome options to limited breweries, the Special Ruling does not deviate substantially from the statutory tour requirement or restaurant ban. (See Aa16) (a limited brewery need only give repeat customers a tour once a year); (Aa10) (food deliveries from restaurants to a patron are allowed, as are de minimis types of food such as pre-packaged crackers, chips and nuts).

The Special Ruling's provisions guiding events are likewise designed to enumerate the Act and its regulations' already-existing limits. These limitations are obviously inferable from the Act's structure, history, and legislative purpose described above. For instance, the Special Ruling provides that limited breweries may hold up to twenty-five on-premises Special Events and fifty-two private parties per year. (Aa18). These provisions are obviously inferable from the Act because limited breweries can neither operate a restaurant nor hold a full retail license. N.J.S.A. 33:1-10(1b), -26. However, limited breweries are given a small degree of on-premises consumption privileges. Thus, Section 10(1b) provides a limited exception of retail rights to these Class A manufacturers while the Act's general retail limitations apply, and the Special Event and private parties limitations outline how limited breweries may navigate between these

two statutory pillars and ensure coherence of the manufacturing and retail tiers. For the off-premises events, the provision that limited breweries may obtain up to twelve off-premises event permits per year, (Aa11), is obviously inferable from N.J.S.A. 33:1-74(a) (temporary permits), and N.J.A.C. 13:2-5.1 to -5.5 (twelve permits per year). These provisions are closely tailored to the Act and regulations and do not "deviate substantially" from them. Doe, 142 N.J. at 97.

Thus, the Special Ruling does not meet the fourth Metromedia factor.

2. The Special Ruling does not meet Metromedia factor five.

To meet Metromedia factor five, an agency action must reflect 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. Metromedia, 97 N.J. at 332. Here, the Special Ruling explains the existing Act's statutory and regulatory framework so limited breweries can better understand their license and accompanying privileges. The policies set forth in the Special Ruling are based largely on N.J.S.A. 33:1-10(1b), and certain aspects of the Special Ruling explaining the three-tier industry segmentation and industry balancing are long-standing policies. N.J.S.A. 33:1-3.1(b). The Special Ruling thus does not meet Metromedia factor five and is not rulemaking.

Generally, for a directive to declare a new policy, it must not be obviously inferable from statutory or regulatory authority. For example, in In re Request for Solid Waste Utility Customer Lists, 106 N.J. at 512, the Board of Public Utilities (Board) issued an order later challenged as improper agency rulemaking that directed certain solid waste utilities to provide customer lists to the agency. While the Court found that the Board's order met the first three prongs of the Metromedia test and was a general policy intended to cover all solid waste utilities, the order was not rulemaking because it was clearly inferable from the enabling statute and did not change existing agency policy or regulations. Id. at 518 (the directive "neither changes nor interprets Board policy concerning solid waste utilities.").

Here, and as already explained in more detail above, several Special Ruling provisions closely track existing regulations. For example, per the Special Ruling, a limited brewery may host up to twenty-five social affair events on its licensed premises per year. (Aa10). This is closely related to N.J.A.C. 13:2-5.1, which limits the number of social affairs events that any premise can host per year. See also N.J.S.A. 33:1-74 (discussed above). The requirements that limited breweries cannot serve food and must give a tour of the brewery before any on-premises consumption sales, (Aa9, Aa16), are consistent with the existing statutory tour and food standards. See N.J.S.A. 33:1-10(1b).

The on-premises Special Event restrictions are similarly not new expressions of agency policy. The alcoholic beverage industry's three-tier separation is a long-standing State policy. See N.J.S.A. 33:1-3, -3.1, -26. By limiting the number of events that a limited brewery may hold, the Special Ruling gives effect to Section 10(1b), permitting a limited degree of on-premises consumption, while acting consistent with the Legislature's separation between the manufacturing and retail tiers.

Accordingly, the Special Ruling does not meet Metromedia factor five.

3. As a whole, the Special Ruling is a guidance document and thus does not meet Metromedia factor six.

To meet Metromedia factor six, the agency action must reflect "a decision on administrative regulatory policy in the nature of the interpretation of law or general policy." Metromedia, 97 N.J. at 332. Agency action that does not change or interpret its policies is not rulemaking. See In re Request for Solid Waste Util. Customer Lists, 106 N.J. at 518 (the Board's order was not rulemaking because it "neither changes nor interprets Board policy concerning solid waste utilities."). Here, as a guidance document, the Special Ruling's purpose is to effectuate the policies underlying the existing legislative and regulatory requirements governing limited breweries.

The expressions of agency policy are consistent with the well-established policy of maintaining the three-tier industry division the Act requires to assure

both "trade stability and the promotion of temperance." Heir v. Degnan, 82 N.J. 109, 114 (1980). N.J.S.A. 33:1-10(1b) furthers this policy by prohibiting limited breweries from selling food on-premises like restricted breweries and requiring a tour prior to on-premises consumption. See, supra 8. Limited breweries remain bound by the statute and the regulations concerning temporary permits for events, including off-premises events, and social affairs permits, N.J.S.A. 33:1-74; N.J.A.C. 13:2-5.1 to -5.5, and must avoid disrupting the three-tier system. Read as a whole, the Special Ruling simply incorporates all of these requirements into one guidance document and does not meet the sixth factor.

The Special Ruling is not rulemaking because its provisions are obviously inferable from the Act and its implementing regulations, and its policies are firmly rooted in Section 10(1b)'s express language and the three-tier industry division mandated by the Act. While the Special Ruling may meet the first three Metromedia factors, like other permissible agency guidance documents naturally would, the Special Ruling as a whole does not meet the other Metromedia factors and complies with the APA.

Finally, even if the court were to find that specific provisions or portions of the Special Ruling meet enough Metromedia factors to constitute rulemaking, it need not vacate the entire Special Ruling. N.J. Dep't of Envtl. Prot. v. Radiation Data, Inc., 2018 N.J. Super. Unpub. LEXIS 2445, at *42-43 (Super.

Ct. App. Div. Nov. 2, 2018) (noting that "legal determinations that DEP deviated from the APA and Metromedia . . . does not mean that all of the [agency's actions] must be vacated [as] [s]ome of the violations are unaffected" by the Metromedia issue.).[11] (Ra44). Rather, the court may address the provisions separately and vacate only those that it determines constitute rulemaking.

POINT II

THE SPECIAL RULING DOES NOT VIOLATE THE NEW JERSEY OR U.S. CONSTITUTIONS (Responds to DOTF's Point II).

The Special Ruling advises the regulated community about industry conduct, and to the extent it addresses speech, it readily passes constitutional muster. First Amendment protections address speech, not conduct, focusing on restrictions on an existing speech right. Relevant here, the Special Ruling explains limited breweries may hold twenty-five Special Events, which need not be advertised to count toward the limit. This addresses commercial sellers' conduct and to the extent it mentions speech, it provides a venue to engage in commercial speech where none previously existed. Thus, DOTF's free speech claim fails to meet the requirements for establishing a First Amendment claim.

[11] A copy of this opinion is included in Respondent's Appendix pursuant to R. 1:36-3. No contrary unpublished opinions are known to counsel.

Under the U.S. Constitution the government "shall make no law . . . abridging the freedom of speech[.]" U.S. Const., amend. I. The New Jersey Constitution similarly states, "[e]very person may freely speak, write[,] and publish [their] sentiments on all subjects," and bars any law from being "passed to restrain or abridge the liberty of speech or of the press." N.J. Const., art. I, § 6. New Jersey analyzes free speech cases according to federal case law as the two are substantially similar. Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 264 (1998).

While both Constitutions protect speech and expressive conduct, non-expressive conduct is not protected. See generally Spence v. Wash., 418 U.S. 405, 410-11 (1974) (discussing when conduct is expressive enough to have First Amendment protections). Non-expressive conduct, like commercial activities, is an area traditionally left to government control. Expressions Hair Design v. Schneiderman, 581 U.S. 37, 47 (2017).

Commercial speech is only protected if it (1) concerns underlying conduct that is lawful and (2) is itself not misleading or fraudulent. Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980). If the speech meets both prongs, the government must prove (1) it has a substantial government interest in restricting the speech; (2) the restriction directly and materially advances the interest asserted; and (3) the restriction is narrowly drawn so there

is a reasonable "fit between the legislature's ends and the means chosen to accomplish those ends." Bd. of Tr. v. Fox, 492 U.S. 469, 480-81 (1989); Cent. Hudson, 447 U.S. at 566. As the final two prongs require substantially the same analysis, they are often combined into a single "reasonable fit" or "proportionality" prong. See Fox, 492 U.S. at 480; Rubin v. Coors Brewing Co., 514 U.S. 476, 486 (1995).

Here, ABC provided guidance on non-expressive conduct by limited breweries within the three-tier alcoholic beverage industry. DOTF's argument that the Special Ruling restricts limited breweries' existing right to advertise Special Events and is contrary to the 2012 Act amendments (Ab24-25) misunderstands the Act, the Special Ruling's purpose, the legislative intent, and the limited brewery licensee's position as a manufacturer.

A. The Special Ruling Addresses the Conduct, Rather than the Speech, of Manufacturers in the Alcoholic Beverage Industry.

The Special Ruling addresses the limited breweries' conduct and thus is not First Amendment protected commercial speech. To the extent ABC's oversight touches on otherwise protected commercial speech, it is incidental to addressing manufacturers' non-expressive conduct. The Special Ruling provides guidance to limited breweries on what conduct and speech follows the legislative intent behind the amended Act to ensure their compliance within a highly regulated industry.

The Act established ABC and its authority to regulate the alcoholic beverage industry, N.J.S.A. 33:1-3, which includes overseeing the industry's conduct. N.J.S.A. 33:1-39. A holistic review of the Special Ruling shows it continues ABC's role of overseeing conduct. See generally McCann v. Clerk of Jersey City, 167 N.J. 311, 320 (2001) (rules should be read as a whole, with the purpose of effectuating the objectives sought to be achieved by the Legislature). Relevant here, the Special Ruling addresses how limited breweries host Special Events, including, among other things live music, game or trivia nights, and animal adoption events. (Aa15).

The Special Ruling's focus on conduct rather than speech is evidenced in two provisions. First, limited breweries may undertake unlimited event promotions for new product releases, thereby engaging in unlimited commercial speech. Ibid. Second and more relevant here, the Special Ruling focuses not on twenty-five advertisements, but twenty-five Special Events, which need not be advertised to count toward the limit. (See Aa18) (limiting live-televised championship sports events and live music or DJ performances regardless of advertising). (Cf. Aa24). Thus, if a limited brewery decided to host, but not advertise any of the Special Events as defined in the Special Ruling—as, for instance, if the limited brewery hosted twenty-five championship sporting events—the limit would still apply. Likewise, if the limited brewery held a 26th

Special Event, such as a championship sporting event, they would exceed the Special Event limit. Thus, the Special Ruling addresses the conduct of hosting the Special Event, rather than the incidental issue of whether that event happens to be advertised.

The "Special Event" definition combined with the Special Ruling's purpose of overseeing the non-expressive conduct of breweries means any impact on protected commercial speech is incidental. See e.g., Arcara v. Cloud Books, Inc., 478 U.S. 697, 703 (1986) (even when "'speech' and 'nonspeech' elements are combined in the same course of conduct . . . the governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."). The conduct of sellers is an area traditionally subject to governmental control, even if in so doing there can be an incidental effect on speech. Expressions Hair, 581 U.S. at 47. "This is especially true in the case of alcoholic beverages, the regulation of which is within the nearly absolute control of the Legislature." Café Gallery, Inc. v. New Jersey, 189 N.J. Super. 468, 474 (Cty. Ct. 1983) (citing Mazza v. Cavicchia, 15 N.J. 498 (1954). See also Meehan v. Bd. of Excise Comm'rs, 73 N.J.L. 382, 386 (1906) ("The right to regulate the sale of intoxicating liquors. . .is within the police power of the state, and is practically limitless.").

Ultimately, the Special Ruling addresses not the breweries' protected commercial speech, but rather their non-expressive conduct, advising limited breweries about the Act's permitted conduct. Pittsburgh Press Co. v. Comm'n on Hum. Rel., 413 U.S. 376, 385, 389 (1973); Cent. Hudson, 447 U.S. at 563-64. Prior to the Special Ruling, neither the Act nor its rules addressed limited breweries hosting or advertising any Special Events. (Ab25). This makes sense, as the license at issue is a manufacturer's license, where before the 2012 Act amendments, there would be no cause to consider having a Special Event as the public could not consume the product on-premises. So the Class A limited brewery licensees had no right to engage in conduct which is geared towards Class C retail behavior, particularly in light of statutory silence. The Special Ruling clarifies that a limited amount of this conduct is now lawful with the attendant limited amount of speech. Pittsburgh Press, 413 U.S. at 385, 389 (1973); Cent. Hudson, 447 U.S. at 563-64.

Therefore, it is more accurate to say that the Special Ruling advises that limited breweries have increased limited commercial speech privileges, not a reduction in them. Consequently, the Special Ruling is beyond First Amendment commercial speech protection. The Special Ruling limits non-expressive conduct, with only an incidental impact on commercial speech about

said conduct, while expanding the privilege for limited breweries to engage in protected commercial speech.

B. The Special Ruling, to the Extent it Limits Protected Commercial Speech, is Valid under Central Hudson.

Even if provision of the Special Ruling addressing Special Event promotion is entitled to some First Amendment protection, it can be independently upheld under Central Hudson.

The nature of commercial speech makes it less likely to be chilled compared to other forms of speech and is analyzed under a lower level of scrutiny. Va. State Bd. of Pharmacy v. Va. Citizens Council, Inc., 425 U.S. 748, 771-72 n. 24 (1976). See also Cent. Hudson, 447 U.S. at 566. The test is that

> [f]or commercial speech to come within [the First Amendment's protection], it at least must concern lawful activity and not be misleading. Next, [the court] ask[s] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [the court] must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.
>
> [Id. at 566.]

Commercial speech itself is "linked inextricably" with the commercial transaction proposed, so the state's "interest in regulating the underlying transaction may give it a concomitant interest in the expression itself." Edenfield v. Fane, 507 U.S. 761, 767 (1993) (citing Friedman v. Rogers, 440

U.S. 1, 10, n. 9 (1979); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 477, 457 (1978)). After all, the "entire commercial speech doctrine . . . represents an accommodation between the right to speak and hear expression about goods and services and the right of government to regulate the sales of such goods and services." Edenfield, 507 U.S. at 767 (quoting L. Tribe, American Constitutional Law § 12-15, p. 903 (2d ed. 1988)).

ABC has a substantial interest in providing necessary clarity to the limited brewery industry and ensuring the entire alcoholic beverage industry operates in accordance with the Act, including the three-tier system. See N.J.S.A. 33:1-3.1(b). Even presuming that the Ruling impacts protected speech, it meets all the Central Hudson prongs for a valid limitation on commercial speech.

1. ABC has a substantial government interest in furthering its statutory mandate and the goals contained therein.

Upon meeting the initial threshold prong, the government must assert that it has a substantial interest in limiting the commercial speech. See, Thompson v. Western States Med. Ctr., 535 U.S. 357, 373-74 (2002); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 187 (1999). Here, ABC has a substantial interest in explaining its existing policy and upholding its statutory mandate to ensure industry participants adhere to their statutory limitations, including their limited retail privileges. See N.J.S.A. 33:1-3.1(b)(1), (6)-(8).

Further, the Special Ruling clarifies the amendments to ABC's enabling act. In re Pub. Serv. Elec. & Gas Co.'s Rate Unbundling, 167 N.J. at 384.

The Legislature did not intend the limited brewery licensees to become full-scale licensed retailers, but rather to provide only limited retail privileges. (Aa7, n.2); supra 20-21. Consequently, ABC issued the Special Ruling clarifying the breweries' limited retailer privileges. Also in keeping with ABC's statutory obligation regarding the three-tier system, the Special Ruling provides guidance for all limited breweries, fosters competition among the limited breweries, and helps breweries promote their brands and expand their businesses. (Aa8). See also N.J.S.A. 33:1-3.1(b)(6)-(8). Finally, ABC has an interest in protecting consumers from the historic societal harms that occur when the three tiers merge. Grand Union Co., 43 N.J. at 398-9.

While DOTF argues that the Special Ruling does not further a substantial interest because the Ruling allegedly intended (1) to restrict a non-existent right for limited breweries to engage in commercial speech about a prohibited activity, and (2) to balance the industry at the expense of limited breweries, by engaging in economic protectionism of Class C retailers over Class A limited breweries, (Ab24-25) this reflects a misunderstanding of the Special Ruling and the limited breweries' minimal retail privileges per the 2012 Act amendments.

As previously discussed, prior to the Special Ruling's clarification, the Act did not state limited breweries could host Special Events, and consequently there was no pre-existing right to engage in commercial speech about the same. Further, while ABC statutorily must consider and "balance" the interests of the entire alcoholic beverage industry (see Aa7), ABC was concerned about "balancing" and stabilizing the interests within the limited brewery industry to ensure that all participants were competing on an even playing field. Id. at 4. As this ties back to the three-tier system and the Legislature's grant of minimal retail privileges to limited breweries, it fits directly into ABC's overarching substantial governmental interest. N.J.S.A. 33:1-3.1(b)(2).

2. The Special Ruling's impact on limited breweries' commercial speech is proportional to ABC's substantial interest, as it directly and materially advances the interest and is no more extensive than necessary.

Central Hudson's "reasonable fit" prong considers whether a restriction on commercial speech is proportional to the interest served. Edenfield, 507 U.S. at 767; Sorrell v. IMS Health, Inc., 564 U.S. 552, 572 (2011) (citing Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 662-63 (1994) (the test ensures that "the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message"). The "narrowly tailored" aspect of this prong requires a "fit" between the legislature's goals and the means chosen to accomplish these goals. Fox,

492 U.S. at 480. This fit need not be perfect, nor the least restrictive means, only a "means narrowly tailored to achieve the desired objective," representing "not necessarily the single best disposition but one whose scope is in proportion to the interest served . . . ." Ibid. See also N.J. Dep't of Labor & Workforce Dev. v. Crest Ultrasonics, 434 N.J. Super. 34, 57 (App. Div. 2014) (applying the "narrowly tailored" test)). Cf. Sorrell, 564 U.S. 552; 44 Liquormart, Inc. v. R.I., 517 U.S. 484 (1996). This level of scrutiny recognizes both the deference afforded governmental decisionmakers on what policies will best achieve their goals and that commerce is traditionally subject to government control. Fox, 492 U.S. at 480-81. See also Expressions Hair, 581 U.S. at 47.

Prior decisions offer guideposts for this test. For instance, laws that leave open alternative means of communication, even if some speech is restricted, are upheld. See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 569-70 (2001) (upholding restriction on self-service tobacco displays and requiring tobacco products be placed in a location only accessible to salespersons). Courts also uphold restrictions uniformly applied and consistent with governmental policy. C.f. Greater New Orleans, 527 U.S. at 190 (overturning regulation with extensive exemptions and inconsistent with other state and federal laws that allowed gambling). On the other hand, complete bans on speech are rarely upheld, especially when the underlying conduct could reasonably be addressed

instead. See Rubin, 514 U.S. at 490-91 (limiting alcohol content or using certain advertising language could achieve same effect as limiting promotional language on beer labels).

Here, the Special Ruling is narrowly tailored, clarifying only breweries' conduct and their license scope. It is not a complete ban on commercial speech, as a limited brewery's product speech is unrestricted and the brewery can promote an unlimited number of certain Special Events (as defined) on-premises, as well as promote through outside advertising up to twenty-five Special Events. (Aa15 at (1)(i)). The Special Ruling thus addresses underlying conduct that only incidentally impacts commercial speech. And the Special Ruling is consistent with ABC's long-standing statutory obligation to manage the three-tier system in a manner consistent with Section 10(1b)'s limited retail privileges. It is "simple common sense" that ABC's interest in providing clarity to licensees on permissible conduct will be directly and materially advanced by providing a list of such permitted conduct. Fla. Bar v. Went for It, 515 U.S. 618, 628 (1995) (citing Burson v. Freeman, 504 U.S. 191, 211 (1992)).

Ultimately, Special Events are the types of activities that a typical Class C retailer would undertake, rather than a typical Class A manufacturer. Though the Legislature granted limited breweries minor retail privileges, it did not completely erase the line between manufacturers and retailers. Reducing the

Special Event off-premises advertising, therefore, likely reduces the number of these bar-like activities limited breweries undertake. Further, restricting Special Event advertisements, but not product advertisements, decreases the likelihood that limited breweries induce new customers for reasons unrelated to their manufacturer's license. Consumers interested in trying and later purchasing limited breweries' products will still visit these breweries, but those who only come for retailer events like pub trivia will not. Thus, the Special Ruling makes it less likely that limited breweries will act contrary to their licenses. Rubin, 514 U.S. at 489; United States v. Edge Broad. Co., 509 U.S. 418, 434 (1993).

ABC's interest in protecting against improper inducement has long-standing precedent as a substantial interest which the State may control. See generally Grand Union Co, 43 N.J. 390 (New Jersey addresses the tied house system via conduct). The Legislative policy furthering moderation via the three-tier system is not necessarily to reduce the number of alcoholic beverages consumed, but to prevent consumption induced by industry conduct. The State has a substantial interest in preventing conduct that is more likely than not to induce excess consumption, and it has long been recognized that ABC can limit industry participants' conduct accordingly. Id. at 399.

The Special Ruling addresses non-expressive conduct rather than incidentally related commercial speech. The Special Ruling is narrowly tailored

to balance these interests by expressly permitting unlimited product advertisements and allowing a reasonable number of off-premises advertisements about conduct which may induce customers for Class C retailer activities. See N.J.S.A. 33:1-10(1b), -12; Affiliated Distillers, 56 N.J. at 258.

DOTF's argument as to this combined prong is premised on the incorrect idea that the State's substantial interest was economic protectionism of Class C retailers and promoting temperance by reducing the overall amount of alcohol consumed. (Ab27, 31-32). However, those are not the substantial interests actually asserted here. Edenfield, 507 U.S. at 768; Greater New Orleans, 527 U.S. at 187 ("Enacted congressional policy and 'governmental interests' are not necessarily equivalents for purposes of commercial speech analysis."). The Special Ruling guides limited breweries about their new limited retail privileges, thereby balancing the industry to provide fair competition amongst the limited breweries and ensuring the limited breweries comply with existing law. Thus, DOTF's interpretation of ABC's substantial interests is ultimately irrelevant.

Thus, Special Ruling comports with Central Hudson.

CONCLUSION

For all of the foregoing reasons, ABC's Special ruling should be affirmed.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: */s/ Kristina Miles*
Kristina Miles
Deputy Attorney General

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