IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ZIP KOMBUCHA LLC, *et al.*, Plaintiffs, v. KEVIN RICHARD, *et al.*, Defendants.	Case No. 3AN-24-04842CI

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IN PART AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Zip Kombucha LLC, Sweetgale Meadworks & Cider House LLC, and Grace Ridge Brewing Company hold brewery and winery retail licenses and do business in the State of Alaska.[1] Defendants are the Alaska Alcoholic Beverage Control Board ("ABC Board") and Kevin Richard, Director of the Alcohol and Marijuana Control Office ("AMCO").

On February 1, 2024, Plaintiffs filed a Complaint against Defendants claiming that the restrictions on live music, entertainment, and other activities imposed on brewery and winery retail licensees enacted by Senate Bill ("SB") 9 violate their 1st Amendment rights to free speech pursuant to the Alaska and United States Constitutions.[2] On June 17, 2025,

[1] Compl. for Declaratory and Injunctive Relief, ¶ 7-9, 38, 46, 49 (Zip Kombucha LLC holds manufacturing and retail licenses as both a brewery and a winery, Sweetgale Meadworks & Cider House LLC holds both winery manufacturing and retail licenses, and Grace Ridge Brewing Co. holds only a brewery retail license).
[2] Compl. for Declaratory and Injunctive Relief ¶ 56-96; Pls.' Opp'n to Defs.' Mot. for Summ. J. at 1, n. 1 (Plaintiffs' Complaint also claimed that the restrictions violated the equal protection clause of the Alaska Constitution, however, that claim was withdrawn, leaving only the issue of the First Amendment challenge before this Court).

Defendants filed a Motion for Summary Judgment claiming that the speech restrictions are content-neutral and pass intermediate scrutiny.[3] On June 18, 2025, Plaintiffs filed a Motion for Summary Judgment claiming that the speech regulations are content-based and fail under strict scrutiny.

For the following reasons, Plaintiffs' Motion for Summary Judgment is **GRANTED** in part and Defendants' Motion for Summary Judgment is **DENIED.**

Background

The State's regulation of the alcohol industry largely depends on whether the licensee falls under the category of manufacturer, wholesaler, or retailer.[4] Historically, as manufacturers, brewery and winery licensees were allowed to give small, free samples of their product to patrons, but were not permitted to hold a retail license or sell product for consumption on the premises.[5] Over time, the Legislature loosened the distinctions between manufacturers and retailers, while prohibiting some manufacturers from having onsite entertainment, including televisions, dancing, and games.[6]

Prior to the passage of SB 9 in 2022,[7] a holder of one license type generally could not simultaneously hold another license type, thereby maintaining a three-tiered system with distinct roles for industry actors.[8] SB 9 largely left in place existing limitations on

[3] Def.'s Mot. for Summ. J.
[4] *Id.* at 3.
[5] *Id.* at 4.
[6] In 1988, the Legislature permitted brewpubs to serve their own beer. In 2006, the Legislature permitted some manufacturers to sell limited amounts of product during limited hours, but prohibited "live entertainment, televisions, pool tables, dart games, dancing, electronic or other games, game tables, or other recreational or gaming opportunities." In 2017, the Legislature included winery license holders in the latter reform. *Id.* at 4-5.
[7] SB 9 went into effect January 1, 2024. Pls.' Opp'n to Defs.' Mot. for Summ. J. at 2.
[8] Defs.' Mot. for Summ. J. at 4-5.

operating hours,[9] quantity of product sold for consumption, and live entertainment imposed on brewery and winery licensees, but allowed them to obtain a "manufacturer sampling endorsement" or overlap their brewery or winery retail license with another retail license.[10] Brewery and winery retail licensees that obtain a sampling endorsement or hold an additional, qualifying license are not subject to the limitations for onsite entertainment.[11]

Brewery and winery retail licensees in Alaska are subject to strict regulation of onsite entertainment, including a prohibition on "live music or performances, disc jockeys, karaoke, televisions, pool tables, dart games, or organized games or tournaments on the premises," except for "activities, presentations, television or video displays, or other displays that directly promote or educate customers about the [licensee's] products, processes, or establishment" (herein "activities and displays").[12] These restrictions are unique to brewery and winery retail licensees.[13]

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[9] *Id.* at 6-7 (SB 9 extended allowable operating hours by one hour, until 9:00pm).

[10] Licenses that can be held simultaneously with a brewery or winery license include a beverage dispensary license, restaurant license, seasonal restaurant license, or beverage dispensary tourism license.

[11] Defs.' Mot. for Summ. J. at 6-9.

[12] AS 04.09.320(e) provides, "Except as provided under (g) of this section and AS 04.09.700, the holder of a brewery retail license may not (1) allow live music or performances, disc jockeys, karaoke, televisions, pool tables, dart games, or organized games or tournaments on the premises where the consumption occurs"; AS 04.09.320(g) provides:

> The holder of a brewery retail license may allow on the premises where the consumption occurs (1) activities, presentations, television or video displays, or other displays that directly promote or educate customers about the brewery's products, processes, or establishment; and (2) other community organizations or businesses to provide presentations, classes, or product displays or host fundraisers;

AS 04.09.330(e) and (g) apply the exact same speech restrictions under 320(e) and (g) to winery retail licensees.

[13] Compl. for Declaratory and Injunctive Relief at ¶ 21, 32-34.

Brewery and winery retail licensees without a sampling endorsement or non-restrictive overlapping license are otherwise permitted to host live entertainment events up to four times a year if they obtain a Live Music or Entertainment ("LME") Permit from the ABC Board.[14] AMCO does not consider the content of the entertainment when considering the application.[15]

The Director of AMCO has authority to enforce Alaska law governing the control of alcoholic beverages, including regulations promulgated by the ABC board.[16] The ABC board enforces alcohol commerce laws through its licensure regime.[17] Failure to comply with the terms of an alcoholic beverage retailer license constitutes a violation.[18] The ABC Board may respond to violations by issuing fines, revoking or suspending a license, denying license renewal, placing a license on probation, and placing conditions or restrictions on a license or future permit.[19]

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[14] AS 04.09.700 provides:

> (a) A live music or entertainment permit authorizes the holder of a brewery retail license, winery retail license, or distillery retail license to allow live music or other entertainment on the licensed premises where consumption occurs. (b) The director may not issue more than four live music or entertainment permits to a licensee in a calendar year. The director may issue a live music or entertainment permit only for designated premises for a specific occasion and for a limited period during a single day between the hours of 9:00 a.m. and 9:00 p.m., as specified in the application;

The ABC Board delegated authority to act on permit applications to the AMCO Director but retains ultimate authority on LME Permit decisions. The permit application must be submitted at least three days before the event with a $100 fee. Applications that are submitted within three days of the event that are approved are subject to a $200 fee. There is no limit for events under a separate, non-profit special event permit. The annual event limit is stackable per license, so an establishment with both a brewery and a winery license may apply for up to eight LME permits annually. Compl. for Declaratory and Injunctive Relief at ¶ 23-27, 43-44.

[15] Aff. of Kevin Richard in Supp. of Defs.' Mot. for Summ. J. ¶ 11.

[16] Compl. for Declaratory and Injunctive Relief ¶ 10-11.

[17] *Id.*

[18] *Id.* at ¶ 35.

[19] *Id.* at ¶ 35-36.

Legal Standard

1. Motions for summary judgment

Summary judgment is appropriate when "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law."[20] The non-moving party is only required to show "that a genuine issue of material fact exists to be litigated"[21] and that "the party could produce admissible evidence that reasonably would demonstrate to the court that a triable issue of fact exists."[22]

Summary judgment must rely upon admissible evidence.[23] Assertions of fact in pleadings and memoranda are not admissible and cannot be relied upon for purposes of summary judgment.[24] All reasonable inferences must be drawn in favor of the non-moving party, and facts must be viewed in the light most favorable to the non-prevailing party.[25]

2. Government restrictions on speech

The First Amendment of the United States Constitution and Article I, Section 5 of the Alaska Constitution prohibit laws that abridge the freedom of speech.[26] "The free speech clause of the Alaska Constitution…was meant to be *at least* as protective of expression as the First Amendment to the United States Constitution[,]" and protects

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[20] AK. R. CIV. P. 56.
[21] *Id.*
[22] *Burnett v. Covell*, 191 P.3d 985, 991 (Alaska 2008).
[23] *Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447 (Alaska 1974); *Brock v. Rogers & Babler, Inc.*, 536 P.2d 778 (Alaska 1975).
[24] *Concerned Citizens of South Kenai Peninsula*, 527 P.2d at 450.
[25] *Lewis v. State, Dep't of Corr.*, 139 P.3d 1266, 1268-69 (Alaska 2006).
[26] U.S. CONST. AMEND. I provides that "Congress shall make no law…abridging the freedom of speech"; ALASKA CONST. ART. I, § 5 provides that "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."

speech "in a more explicit and direct manner."[27] Regarding the Alaska Constitution, this Court "[is] not bound by decisions of the United States Supreme Court on similar federal provisions but may determine that Alaska provides greater protection for individual rights."[28]

First Amendment jurisprudence extends beyond written and spoken word to include other mediums of expression including music, video, and live performances.[29] Entertainment, broadly speaking, "fall[s] within the First Amendment guarantee."[30] Hosts, promoters, and vendors of such expressive activities are entitled to First Amendment protections as "clearinghouse[s]" of expression that "ensure public access to live musical entertainment."[31]

a. Strict scrutiny

Content-based government restrictions on speech "are presumptively unconstitutional and may be justified only if the government proves that they are *narrowly tailored* to serve *compelling state interests*."[32] The narrow tailoring requirement requires the "least-restrictive-means" of serving the interest and that there be no available

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[27] *Mickens v. City of Kodiak*, 640 P.2d 818, 820 (Alaska 1982) (emphasis added); *Messerli v. State*, 626 P.2d 1, 3 (Alaska 1982).
[28] *Club SinRock, LLC v. Municipality of Anchorage, Office of the Municipal Clerk*, 445 P.3d 1031, 1036-37 (Alaska 2019).
[29] Mem. in Supp. of Pls.' Mot. for Summ. J. at 16 (citing *Green v. Miss United States of America, LLC*, 52 F.4th 773, 780 (9th Cir. 2022)); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65-66 (1981).
[30] *Mickens v. City of Kodiak*, 640 P.2d 818, 820 (Alaska 1982) (including "motion pictures," "programs broadcast by radio and television," and "live entertainment, such as musical and dramatic works" as examples of entertainment protected by the First Amendment).
[31] *Id.* at 16-17 (quoting *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 567-68 (9th Cir. 1984)).
[32] *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (emphasis added).

alternatives that would not infringe on speech.[33] A narrowly tailored regulation of speech must be "actually necessary to the solution."[34]

A law is content-based when it applies "because of the topic discussed or the idea or message expressed."[35] Restrictions that are not facially content-based may nevertheless be content-based when they: (1) "define[] regulated speech by its function or purpose"; (2) cannot be "justified without reference to the content of the regulated speech"; or (3) when they were adopted "because of disagreement with the message [the speech] conveys" or another "impermissible purpose or justification."[36] The fact that a law makes a distinction based on the speaker does not "automatically render the distinction content neutral."[37] Restrictions based on the identity of the speaker are nevertheless content-based when "laws favoring some speakers over others" reflect an underlying content preference by the legislature.[38] The ultimate question is whether the restrictions are "based on the message a speaker conveys…"[39]

b. Intermediate scrutiny

Content neutral, i.e., time, place, and manner government restrictions on speech are subject to intermediate scrutiny.[40] Speech restrictions pass intermediate scrutiny when

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[33] *Meinecke v. City of Seattle*, 99 F.4th 514, 524-525 (9th Cir. 2024) (internal citations omitted).
[34] *Twitter, Inc. v. Garland*, 61 F.4th 686, 698 (9th Cir. 2023) (quoting *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011)).
[35] Defs.' Mot. for Summ. J. at 18 (quoting *City of Austin v. Reagan National Advertising of Texas, Inc.*, 596 U.S. 61, 69 (2022) (quoting *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015))).
[36] *Reed v. Town of Gilbert, Ariz.*, 576 U.S. at 163-64 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *City of Austin, Texas v. Reagan Nat'l Advertising of Austin, LLC*, 596 U.S. 61, 76 (2022)).
[37] *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 170 (2015).
[38] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 658 (1994).
[39] *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).
[40] Defs.' Mot. for Summ. J. at 16-17 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

"[they] are justified without reference to the content of the regulated speech, [] [they] are narrowly tailored to serve a significant governmental interest, and [] they leave open ample alternative channels for communication of the information."[41] Intermediate scrutiny does not require the government choose the least restrictive means of achieving their interest.[42] Content neutral restrictions on speech need only "promote[] a substantial government interest that would be achieved less effectively absent the regulation."[43]

Discussion

Because the restrictions imposed on brewery and winery licensees differ depending on the form of speech or conduct, this Court addresses them in three parts: (1) the speech restrictions on activities and displays; (2) the speech restrictions on live music and entertainment, and; (3) restrictions on conduct not protected under the First Amendment.

1. *The speech restrictions on activities and displays are facially unconstitutional because they violate the State and Federal Constitution as a matter of law.*

    a. *Speech restrictions on activities and displays are content-based regulation of speech and subject to strict scrutiny.*

"[The] commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys.'"[44] Under the statute in question, breweries and wineries are free to use activities and displays so long as they do so for the purposes of promoting

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[41] *Id.* (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).
[42] *Id.* at 782-83.
[43] *Id.*
[44] *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011)).

their product or educating patrons on their process or establishment.[45] This is facial content-based regulation of speech because it applies when the content of the message is for any purpose other than promoting their product. For example, a brewery or winery is prohibited from playing a documentary on WWII for its patrons, but it is permitted to play a documentary about the history of the brewery or winery.

Even if a court found that the speech restrictions on activities and displays are not facially content-based, strict scrutiny should still apply because the regulated speech cannot be justified without referencing the content of the speech.[46] Following the above example, to justify its use of audio-visual displays, a licensee would have to show how the video is in fact a documentary about the history of the brewery or winery, not WWII (or any other topic). Similarly, if the licensee participated in a promotional pub-crawl activity, they would need to reference the content of bingo-like stamp cards to prove it was not an organized game or tournament subject to the speech restrictions.[47] Therefore, the restrictions on activities and displays are subject to strict scrutiny.

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[45] AS 04.09.320(g)(1); AS 04.09.330(g)(1).

[46] *Supra*, note 36.

[47] Defendants are correct in citing *City of Austin, Texas v. Reagan National Advertising of Austin, LLC* and asserting that not every law that requires referencing the content of the speech is subject to strict scrutiny, but the speech restrictions in *City of Austin* are distinct from those imposed here on brewery and winery retail licensees. In *City of Austin*, the Supreme Court held that regulation of outdoor signs advertising a business, person, activity, goods, or services not located on the site where the sign is installed was not subject to strict scrutiny despite the fact that the content and the speaker must be identified to determine whether the regulations apply. However, in *City of Austin*, the speakers were not also prohibited from using displays for purposes other than promotion of their product, which is commercial speech and de facto subject to intermediate scrutiny. For example, the Plaintiffs in *City of Austin* may not be permitted to use signs to advertise their products if the signs are not located where the products are sold, but they are, however, permitted to use signs on their property to indicate support for a given political candidate. Here, the opposite is true. The regulations on activities and displays *permits* commercial speech and *prohibits* non-commercial speech. Allowing an establishment to use various forms of speech only to advertise their product but not to convey another message is content-based regulation of speech and subject to strict scrutiny. *City of Austin, Texas v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61, 64-65, 73-74 (2022) (citing *Metromedia, Inc. v. San Diego*, 493 U.S. 490 507-512 (1981)).

b. The speech restrictions on activities and displays fail strict scrutiny.

Defendants claim the speech restrictions are intended to serve two state interests: (1) promoting the health and safety of the people in the state by protecting them from "grave and harmful effects" posed by the alcohol industry, and (2) "regulating the market conditions regarding the consumption of alcohol on licensed premises."[48] Defendants apply intermediate scrutiny in their pleadings and assert that these are "significant" state interests.[49] Defendants state that the purpose of the speech restrictions is to "prevent[] alcoholic beverage manufacturers from encroaching into the market for retail sale for onsite consumption," "limit the ways in which the manufacturer may compete," and achieve political compromise.[50]

In their motion for summary judgment, Defendants stress the legislative history of the speech restrictions, noting they were enacted not exclusively for public safety reasons, but also as a part of a grand compromise in a years-long turf war waged amongst the various alcoholic beverage retailer licensees.[51] Defendants further explain that SB 9 emerged from "friction with traditional retail license holders who saw the development

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[48] Defs.' Mot. for Summ. J. at 2 (citing legislative declaration of policy for title 4, which provides that "controlling the manufacture, distribution, barter, possessions, and sale of alcoholic beverages in the state is *necessary to promote the health and safety of the people in the state*") (emphasis added); *Id.* at 21.
[49] *Id.* at 20-21.
[50] *Id.* at 2-3, 21-22 (quoting the Sponsor Statement for SB 9, which described the legislation as "the product of a nine-year, unprecedented collaboration of over 100 stakeholders…"); Pls.' Mot. for Summ. J., Ex. F ("Defs.' Resp. to Interrogatories") at 35.
[51] Defs.' Mot. for Summ. J. at 2-6.

[(growth of "tasting rooms")] as the encroachment of manufacturers into the retail market with no benefit to traditional retailers."[52] Due to the rising success of tasting rooms:

> [s]kirmishes flared over the boundaries of products offered for sale and activities allowed where consumption occurred, including bar-lodged complaints about drinks served at manufacturers' tasting rooms and strong opposition to an attempt to limit by regulation the activities allowed at tasting rooms. This conflict between the established and the emerging was part of the background against which SB 9 developed and was passed. And SB 9 frequently was referred to as a compromise.[53]

i. The restrictions on activities and displays are not narrowly tailored to serve public health and safety.

In enacting the challenged speech restrictions through the passage of SB 9, the Legislature issued the following legislative findings:

> It is the policy of the state that controlling the manufacture, distribution, barter, possession, and sale of alcoholic beverages in the state is necessary to promote the health and safety of the people of the state. It is the purpose of this title to carry out the state's policy in the public interest. The legislature finds that observance of this title, regulations adopted by the board, and other applicable laws, local ordinances, and regulations is in the interest of the public, people holding license of permits under this title, and the alcoholic beverage industry in general.[54]

Public health and safety are compelling state interests.[55] However, the government does not pass strict scrutiny merely by declaring a compelling state interest is at play – it must establish some connection between the regulation of speech itself and the compelling interest.[56] Defendants fail to present evidence establishing a connection

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[52] *Id.* at 5-6.
[53] *Id.* at 6.
[54] Sec. 1, ch. 8, SLA 2022 (adding AS 04.06.005).
[55] *Meinecke v. City of Seattle*, 99 F.4th 514, 524 (9th Cir. 2024); Public health may also constitute a compelling state interest. *Hoye v. City of Oakland*, 653 F.3d 835, 853 (9th Cir. 2011) (holding that "ensuring access to women's health care may well be a sufficiently compelling state interest for purposes of strict scrutiny").
[56] *Club SinRock, LLC v. Municipality of Anchorage, Office of the Municipal Clerk*, 445 P.3d 1031, 1038-39 (Alaska 2019) (declaring a content-based restriction on speech unconstitutional because the government presented "no

between the restrictions on use of activities and displays in breweries and wineries and public health and safety. Instead, Defendants assert that the restrictions were necessary to achieve a grand "compromise" for market regulation in a highly competitive and quickly evolving industry, and that their purpose is to limit the competitiveness of brewery and winery retail spaces.[57]

No mention is made of the influence curtailing entertainment in breweries and wineries where alcohol is consumed has on public health or safety. Concerning public safety, Defendants merely cite legislative findings for the entirety of title 4 and conclude that restricting the speech rights of breweries and wineries serves those interests. At best, Defendants imply that increased on-site (public) consumption of alcohol may result in an increase in activity that threatens public safety. However, "it is not permissible to suppress constitutionally protected forms of expression in order to curb the lawless conduct of some of those who are reacting to it, unless other law enforcement techniques which do not infringe first amendment freedoms are unavailable or likely to be ineffective."[58]

Furthermore, the speech restrictions fail strict scrutiny because they are not "actually necessary" for furthering those interests and many alternatives that would not

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evidence, direct or indirect, connecting" the restrictions with a compelling interest); *Mickens v. City of Kodiak*, 640 P.2d 818, 822 (1982) (declaring restrictions on nude dancing unconstitutional because while enacted in response to public concerns of criminal activity, "[t]he City has not demonstrated that the increase in police calls originating at Tony's Place has been caused by anything other than an increase in the volume of business there. While this, in turn, may well be the result of nude dancing, there is no reason to suppose that other forms of entertainment, not involving nudity, would not also increase business and therefore police calls").

[57] Defs.' Mot. for Summ. J. at 6, n. 21 (citing minutes from the House Legislative Finance Committee) (describing SB 9 as "emerging" from "the encroachment of manufacturers into the retail market with no benefit to traditional retailers").

[58] *Mickens v. City of Kodiak*, 640 P.2d 818, 822 (Alaska 1982).

infringe on speech exist.[59] The Legislature can protect the public from the threats to health and safety posed by consumption at breweries and wineries, but limiting entertainment and suppressing free speech in these spaces is by no means necessary to achieving that goal, nor has there been any showing as to how limiting these activities protects public health or safety. The Legislature has, and can further address public health and safety risks associated with alcohol consumption in breweries and wineries by limiting the amount of product that can be served, the hours during which they can operate, or by reducing the cap for the number of brewery or winery licenses allowed in a given community.[60] Additionally, the legislature could, as it has in the past, prohibit manufacturers from serving anything beyond small, free samples of their product for on-site consumption.

ii. Regulation of activities and displays fail strict scrutiny because market protectionism is not a compelling state interest.

Citing *North Dakota v. U.S.*, Defendants claim that the speech restrictions serve "the significant government interest in regulating the market conditions regarding the consumption of alcohol on licensed premises," an integral part of the state's "three-tier system of licensing" alcohol retailers which is "unquestionably legitimate."[61] They claim that the restrictions fall under the State's 21st Amendment powers to regulate the alcohol industry because they act to "recalibrate[e] the balance" of interests between holders of

[59] *Twitter, Inc. v. Garland*, 61 F.4th 686, 698 (9th Cir. 2023) (quoting *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011)).
[60] *See generally* AS 04.09.320 and AS 04.09.330 (prohibiting bar seating, limiting tasting room hours to 9:00am – 9:00pm, and limiting the volume of product that can be served to an individual patron daily).
[61] Def.'s Mot. for Summ. J. at 21 (quoting *North Dakota v. U.S.*, 495 U.S. 423, 432 (1990)).

manufacturer licenses and retail licenses" with those of the public and the industry at large.[62] Defendants claim that the speech restrictions are narrowly tailored to achieve this interest because without them "tasting rooms could become largely indistinguishable from a traditional bar."[63]Plaintiffs assert that the legislature enacted the speech restrictions on purely economic protectionist grounds, which is an impermissible purpose and therefore requires the application of strict scrutiny.[64]

Maintaining a tiered-market system that ensures separation between the production, handling, and final sale of alcoholic beverages is a substantial, but not a compelling state interest.[65] Additionally, this substantial interest is distinct from that of promoting temperance, public health or public safety.[66] As both parties claim, the State's general interest in regulating the alcohol industry does not rise to the level of being a "compelling" state interest, and therefore fails under strict scrutiny.

Furthermore, this Court addresses Defendants' argument that the speech restrictions are in part justified under the 21st amendment. The Alaska Constitution affords its people greater 1st Amendment protections than the United States Constitution in this arena. The State constitution prohibits "restricting, in places where liquor is sold,

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[62] *Id.*
[63] *Id.* at 21-22.
[64] Pls.' Opp'n to Defs.' Mot. for Summ. J. at 9-10.
[65] *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 844-44 (9th Cir. 2017).
[66] *Id.* at 851 (holding that California law reducing the quantity of advertising from manufacturers and wholesalers seen in retail establishments indirectly advanced temperance, but failed to meet the narrow tailoring requirements under intermediate scrutiny).

forms of expression which would otherwise be protected under the First Amendment."[67]

As explained in *Mickens v. City of Kodiak*:

> The Alaska constitution contains no clause similar to the twenty-first amendment which might be said to justify prohibiting otherwise protected forms of expression where liquor is sold. Our state constitution, like that of Massachusetts, "draws no distinction between free speech in a bar and free speech on a stage, and no provision of our Constitution gives a preferred position to regulation of alcoholic beverages."[68]

Therefore, while the State has a substantial government interest in regulating the alcohol industry, this Court treats the regulation of speech on the premises where alcohol is consumed the same as it would in any other private forum.

c. Even if the speech restrictions on activities and displays are subject to intermediate scrutiny, they still violate the First Amendment.

Even if the restrictions on activities and displays were subject to intermediate scrutiny, they would nevertheless be unconstitutional under the 1st Amendment. To pass intermediate scrutiny, Defendants need only show that the interest "would be achieved less effectively" absent the regulation.[69] Defendants claim this standard is met because the speech restrictions effectively distinguish breweries and wineries from other licensees, thereby furthering its interest in maintaining the structure of a three-tied industry.[70] However, Defendants fail to show that speech restrictions serve any purpose

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[67] *Mickens v. City of Kodiak*, 640 P.2d 818, 821 (Alaska 1982).
[68] *Id.* (quoting *Commonwealth v. Sees*, 374 Mass. 532, 536-37 (1978)).
[69] *Rock Against Racism*, 491 U.S. 781, 782-83 (1989).
[70] Defs.' Mot. for Summ. J. at 22 (arguing that the prevention of manufacturers' "encroachment" on the retail market is more effectively achieved by limiting live music and entertainment because without the regulation "tasting rooms could become largely indistinguishable from a traditional retail bar").

beyond their utility as a political bargaining chip to ease industry tensions or their effect in reducing the competitiveness of breweries and wineries in the retail market.

While market regulation of the alcohol industry may constitute a significant government interest under intermediate scrutiny, Defendants openly indicate that their interest in these speech restrictions is for the purpose of controlling the retail market to explicitly favor traditional alcohol retailers and disadvantage brewery and winery retail licensees. The state does not have a substantial government interest in so burdening inter-state commerce.[71]

2. *The speech restrictions on live music and entertainment are facially unconstitutional because they violate the State and Federal Constitution as a matter of law.*

    a. *The Act's regulation of live music and entertainment is content neutral and subject to intermediate scrutiny.*

Unlike the restrictions on activities and displays, the challenged restrictions on live music and entertainment imposed by the LWE permit structure are facially content-neutral. While they restrict specific *kinds* of expressive speech and entertainment in breweries and wineries without endorsement or additional license, they apply regardless of the message conveyed.

Plaintiffs claim that because the speech restrictions "target[] these specific activities based on their entertainment *function* or *purpose*," they are content-based and subject to

[71] *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 528 (2019) (citing *Railroad Co. v. Husen*, 95 U.S. 465, 472 (1878)).

strict scrutiny.[72] However, Plaintiffs' argument overlooks precedent that allows the state to regulate live entertainment in a content-neutral manner.[73] Time, place, and manner restrictions that apply only to live music and entertainment are still content-neutral despite only applying to live music and entertainment.[74]

Plaintiffs further argue that strict scrutiny should apply because the statutes "also discriminate[] based on *who* is speaking," and "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference."[75] Speaker-based speech restrictions are subject to strict scrutiny when they cross the threshold from regulating the speaker to regulating a viewpoint itself.[76] Here, while evidence suggests the Legislature enacted the speech restrictions to enforce an *economic* preference for one industry actor over another, neither the language in the act nor the legislative history indicates a preference for the actual *content* of the entertainment regulated by the LME permit structure.[77]

Therefore, the speech restrictions on live music and entertainment under the act are content neutral and intermediate scrutiny applies. Although they codify a clear speaker-preference for other alcohol retailers over brewery and winery licenses, it does not effectively favor one viewpoint over another.

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[72] Pls.' Opp'n to Defs.' Mot. for Summ. J. at 5 (relying on *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163-64 (2015) (providing that government regulation of speech is content-based even when it is not facially apparent if the regulated speech is defined "by its function or purpose").
[73] *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 572 (9th Cir. 1984).
[74] *Id.*
[75] Pls.' Opp'n to Defs.' Mot. for Summ. J. at 6 (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 658 (1994)).
[76] *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)).
[77] Aff. of Kevin Richard in Supp. of Mot. for Summ. J. ¶ 11 (content of entertainment is not considered when AMCO issues decisions on LME permit applications).

b. The regulations of live music and entertainment fail intermediate scrutiny because Defendants fail to show they are narrowly tailored to serve a significant government interest.

For the same reasons described with respect to the Act's regulation of activities and displays, the speech restrictions on live music and entertainment fail intermediate scrutiny and are therefore unconstitutional. The restrictions on live music and entertainment fail intermediate scrutiny because they are not narrowly tailored to serve a significant government interest. Defendants claim that the restrictions are narrowly tailored to the interests of public health and safety, and regulating conditions of the alcohol industry. Defendants' argument fails with respect to public health and safety because the restrictions are not significantly tailored. Defendants' argument fails with respect to its interest in regulating the alcohol industry because "bare economic protectionism" and "granting favors to politically important actors" are not legitimate state interests.[78]

Defendants fail to establishing how the speech restrictions on live music and entertainment in brewery and winery retail spaces impact public health and safety concerns. This is insufficient under intermediate scrutiny to show that public health and safety goals would be achieved less effectively without limiting live entertainment in breweries in wineries, as is required under intermediate scrutiny.

Lastly, this Court disagrees with Defendants' claims that the restrictions on live music and entertainment further the State's substantial interest in regulating the alcohol

[78] *Allied Concrete and Supply Co. v. Baker*, 904 F.3d 1053, 1064 (9th Cir. 2018).

industry under the 21st amendment. Both the legislative history and Defendants' pleadings reflect an unapologetic motivation of pure protectionism – each time there is mention of a "three-tiered system" or "orderly market conditions," it is for the ultimate purpose of establishing a market preference for traditional retailers over brewery and winery retailers. This is not a legitimate interest which justifies so restricting creative expression protected under the First Amendment.

3. *The Act contains conduct that is not protected by the First Amendment and therefore survives Plaintiffs' First Amendment challenge.*

Only speech and conduct that is "inherently expressive" is protected under the First Amendment.[79] Here, the Act restricts breweries and wineries from engaging in or facilitating speech in the form of "live music or performance, disc jockeys, karaoke, [and] televisions" and prohibits "presentations…or other displays" that do not "directly promote or educate customers about the [licensee's] products, processes, or establishment."[80] However, the Act also restricts breweries and wineries from engaging in conduct that may or may not qualify as speech, such as general "activities" and "organized games or tournaments."[81] The Act additionally restricts conduct clearly not protected by the 1st Amendment, including use of pool tables and dart games.[82]

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[79] *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47. 63-66 (2006) (holding that a law school's decision to invite or prohibit recruiters from a given organization was not "inherently expressive" conduct, unlike flag burning, parades or protest marches, or compelled publication in a newsletter or newspaper. all of which were found to be "inherently expressive" conduct protected under the First Amendment) (internal citations omitted); *see also Wong v. Bush*, 542 F.3d 732, 736 (9th Cir. 2008).

[80] AS 04.09.320(e)(1); AS 04.09.330(e)(1); AS 04.09.320(g)(1); AS 04.09.330(g)(1).

[81] *Id.*

[82] AS 04.09.320(e)(1); AS 04.09.330(e)(1).

Because Plaintiffs withdrew their equal protection claim, only their First Amendment claims remain before this Court.[83] While this Court holds that several provisions of the challenged statute are unconstitutional on First Amendment grounds, it also holds that the provision prohibiting pool tables and dart games survive Plaintiffs' First Amendment claims because they are not speech, and the provisions prohibiting "activities" that do not "directly promote or educate customer about the brewery's products, processes, or establishment" as well as "organized games or tournaments" survive the First Amendment challenge to the extent that they do not regulate actual speech or purely expressive conduct. Plaintiffs have failed to establish the remaining restrictions fall under the category of protected speech.

a. The unconstitutional provisions of SB 9 are severable from the constitutional provisions of the Act.

Since the speech and conduct restrictions under the challenged statutes are unconstitutional in part, but not in their entirety, this Court is limited in its ability to reconstrue the challenged laws because of "the constitutionally decreed separation of powers which prohibit[] this court from enacting legislation or redrafting defective statutes."[84] Title 4 does not have a severability clause, however, AS 01.10.030 provides for a presumption in favor of severability in all Alaska statutes.[85] Before striking down

[83] Pls.' Opp'n to Defs.' Mot. for Summ. J. at 1, n. 1.
[84] *State v. Campbell*, 536 P.2d 105, 111 (Alaska 1975), *overruled on other grounds by Kimoktoak v. State*, 584 P.2d 25, 31 (Alaska 1978).
[85] AS 01.10.030 provides that "[a]ny law heretofore or hereafter enacted by the Alaska legislature which lacks a severability clause shall be construed as though it contained the clause in the following language: 'If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby'" (effective 2024).

the offending provisions, this Court applies the severability test provided in *Lynden Transport* which has two parts: (1) whether "legal effect can be given" to the remaining provisions, and (2) if the remaining provisions are "independent and complete in itself so that it may be presumed that the Legislature would have enacted the valid parts without the invalid part."[86]

Whether legal effect can be given to a severed statute hinges on whether the remaining provisions "require[] action" or are "merely a statement of public policy."[87] For example, this Court could not strike all of title 4 except for the legislative findings.[88] "This is a relative low threshold test that merely requires an enforceable command to implement the law."[89] Striking only the offending provisions of the challenged statute leaves enforceable law on the books prohibiting pool tables and dart games, as well as some "activities" and "organized games or tournaments" that do not qualify as protected free speech. Therefore, the first part of the *Lynden Transport* test is satisfied.

The presumption in favor of severability established by the blanket severability clause under AS 01.10.030 is overcome when there is a "clear probability" that after striking the offending statute "the Legislature would not have been satisfied with what remains."[90] A presumption of severability does not give this Court authority to give the

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[86] *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 211-12 (Alaska 2007).
[87] *Id.*
[88] *Id.*
[89] *Id.* at 211.
[90] *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936).

remaining statute "an effect altogether different from that sought by the measure viewed as a whole."[91]

While much of the legislative intent to distinguish brewery and winery licensees from traditional alcohol retailers is thwarted by this Court finding many of its provisions invalid as unconstitutional regulation of speech, striking only the offending provisions would allow several of these distinctions to stand, protecting legislative intent to the greatest extent allowable under our State Constitution. The Legislature may be unhappy with this result, however, it should not be dissatisfied with a decision that permits restricting entertainment in breweries and wineries, as was their intent, to the full extent possible under SB 9 and our constitution. Neither does this Court give the remaining provisions an altogether different effect from that sought by the provisions as a whole – it merely narrows the scope of "entertainment" governed under the Act.

Therefore, having passed the test for severability, this Court finds that it may declare the challenged statutes unconstitutional in part, pursuant to its findings above. Accordingly, in line with both constitutional protections on free speech and the legislative intent of the challenged statutes enacted by SB 9, the following language of subsection (c)(1) of AS 04.09.320 and AS 04.09.330 is void: "…allow live music or performances, disc jockeys, karaoke, televisions…" The provisions restricting "organized games or tournaments" are permissible to the extent that they do not include speech and expressive conduct protected by the First Amendment. The following language of

[91] *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330, 362 (1935).

subsection (g)(1) of AS 04.09.320 and AS 04.09.330 is void: "…presentations, television or video displays, or other displays…" The provisions regarding "activities" under this subsection are permissible to the extent that they do not include speech and expressive conduct protected by the First Amendment. Again, Plaintiffs failed to demonstrate that the remaining restrictions fall within protected speech, and so these restrictions must survive. Lastly, AS 04.09.700 is stricken in its entirety because it only regulates live music and entertainment, which clearly qualify as constitutionally protected speech.[92]

This Court notes that given the Legislature's choice of including the broad term of promotional "activities" in conduct exempt from the restrictions, there may be some "organized games or tournaments" that remain valid under the act because they are not speech or expressive conduct, but qualify as an "activities that directly promote or educate customers about the [licensee's] products, processes, or establishment."[93] Additionally, the exemptions under 320(g)(2) and 330(g)(2) remain.

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[92] AS 04.09.320(e)(1) and AS 04.09.330(e)(1) now reads:

> (e) Except as provided under (g) of this section ~~and AS 04.09.700~~, the holder of a [brewery/winery] retail license may not
>
> (1) allow ~~live music or performances, disc jockeys, karaoke, televisions,~~ pool tables, dart games, or organized games or tournaments on the premises where the consumption occurs;

AS 04.09.320(g) and AS 04.09.330(g) now reads:

> (g) the holder of a [brewery/winery] retail license may allow on the premises where the consumption occurs
>
> (1) activities~~, presentations, television or video displays, or other displays~~ that directly promote or educate customers about the brewery's products, processes, or establishment; and
>
> (2) other community organizations or businesses to provide presentations, classes, or product displays or host fundraisers.

[93] *Id.*

Conclusion

The parties do not dispute any material facts. The Defendants fail to present sufficient evidence demonstrating a connection between the challenged speech restrictions and a substantial government interest. The speech restrictions fail the tests of strict and intermediate scrutiny, and such suppression of speech by the state cannot stand.

This Court recognizes that the challenged speech restrictions were once a critical piece of a grand compromise achieved in the passage of broad reform to our state's alcohol industry. Additionally, this Court appreciates that in negotiating this compromise, "the legislature aimed to balance 'the interest of the public, people holding licenses or permits under this title, and the alcoholic beverage industry in general.'"[94] However, political compromise is not recognized as a substantial government interest for the purposes of restricting speech under the First Amendment. Neither is the codification of preference for one industry actor over another.[95] Accordingly, this Court declares AS 04.09.320(e)(1), 04.09.320(g)(1), AS 04.09.330(e)(1), and AS 04.09.330(g)(1) unconstitutional in part, and AS 04.09.700 as unconstitutional in entirety pursuant to the First Amendment of the United States Constitution and Article 1, Section 5 of the Alaska Constitution.

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[94] Defs.' Mot. for Summ. J. at 21 (quoting AS 04.06.005).
[95] *Id.* at 21-22; *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 528 (2019) (citing *Railroad Co. v. Husen*, 95 U.S. 465, 472 (1878)).

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment is **GRANTED** in part and Defendants' Motion for Summary Judgment is **DENIED.**

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 14th day of January, 2026.

ADOLF V. ZEMAN
Superior Court Judge

Alaska Trial Courts

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