Spencer Wilson, ASB 2006046
Wilson Law Office PC
691 Seventh Avenue
Bethel, AK 99559
(907) 545-1277
spencer@wilsonlawofficepc.com

Donna G. Matias, Cal. SB 154268*
David Hoffa, Ariz. SB 038052*
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
(916) 419-7111
dmatias@pacificlegal.org
dhoffa@pacificlegal.org
* *pro hac vice*

Attorneys for Plaintiffs

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION

All citizens of Alaska have constitutionally protected rights to speech and expression under the First Amendment to the United States Constitution and Article I, § 5 of the Alaska Constitution. This includes allowing live music, entertainment, and organized games on their private property. But under Alaska's Alcohol Code, Title 4, only some alcohol licensees—like bars and restaurants—can exercise those rights freely. Others, including breweries and wineries, face a different standard: they must first get approval from local law enforcement, then apply for a state permit through the Alcohol and Marijuana Control Office (AMCO)—and even then, they may do so only four times a year.

By the State's own admission, the laws that create this discriminatory treatment are the result of politicians and industry players negotiating for their own interests. Plaintiffs' constitutional rights were treated as bargaining chips. Now, the State tells Plaintiffs they can either apply for a bar license or stop serving alcohol altogether. Neither option cures the constitutional harm. The rights at stake here are not policy preferences; they are foundational limits on government power. The State cannot rewrite the Constitution through a regulatory workaround.

The parties have filed cross-motions for summary judgment.[1] At issue is whether AS 04.09.320(e)(1), AS 04.09.330(e)(1), and AS 04.09.700 (collectively, the Entertainment Restrictions) violate Plaintiffs' constitutional rights.

[1] Plaintiffs note in their Motion for Summary Judgment that they have abandoned the Third Claim for Relief in their Complaint (Equal Protection under Art. I, § 1 of the Alaska Constitution), so they do not address the State's arguments as to that claim. Also, while Defendants do not contest the plaintiff Taprooms' standing to bring this suit, Plaintiffs have briefed this issue in their Motion for Summary Judgment and incorporate those arguments here. Pls.' MSJ at 14–16.

Because the State has not met its burden to justify these restrictions, its motion should be denied in full.

LEGAL AND FACTUAL BACKGROUND

The parties do not dispute any material facts.[2] Prior to the passage of Senate Bill 9 (SB 9), breweries and wineries licensed to sell their products at retail for consumption on their premises were flatly prohibited from hosting any live music, entertainment, games, or contests of any sort. Former AS 04.11.130(e)(1); former 3 AAC 304.380(1). After SB 9, which went into effect January 1, 2024, these retail licensees may host up to four such events—lasting no longer than a single day—per year. AS 04.09.320(e)(1), AS 04.09.330(e)(1), AS 04.09.700. However, they must get advance permission, first from local law enforcement, AS 04.11.260(c)(3)(D), and then from Defendants, the Director of AMCO and the Alaska Alcoholic Beverage Control Board. AS 04.09.700, 3 AAC 305.380. Defendant Kevin Richard, AMCO's Director, is responsible for deciding whether to grant or deny a Live Music or Entertainment Permit. 3 AAC 305.135(d). He does so based on what he determines to be in "the best interests of the public," AS 04.11.320(b)(1), with no written criteria or uniform standards to guide the meaning of that term. Pls.' Mem. ISO MSJ (hereafter "Pls.' MSJ") at 26; Exh. O to Pls.' MSJ at 6–8.

Hosting live music, entertainment, organized games, and the like without a permit constitutes a violation of Title 4. AS 04.09.320(h)–(i), AS 04.09.330(h)–(i), AS 04.09.720(a)–(b). This can result in a variety of actions against the offender, including denial of a license application; denial of a

[2] For a more thorough treatment of the legal and factual background, Plaintiffs incorporate the legal and factual background set forth in their Memorandum of Points and Authorities in Support of their Motion for Summary Judgment, pp. 2–14, filed concurrently with Defendants' Motion for Summary Judgment.

license renewal application; suspension or revocation of a license; one-year suspension of the ability to apply for a license; and license probation. AS 04.11.320(a)(1), 3 AAC 305.045(c)(1), 3 AAC 305.110(a)(2)(A), (10)–(11), (b)(1), (5); AS 04.11.270(a)(2), 3 AAC 305.050(c)(1); AS 04.11.330(a)(1), (6), 3 AAC 305.870(e); AS 04.11.370(a)(2)–(4), (10); AS 04.16.180(b)–(c), 3 AAC 305.875(a); 3 AAC 305.895; 3 AAC 305.890(a). Municipalities can also use violations to support any protest against the issuance, renewal, relocation, or transfer of licenses or endorsements. *See* AS 04.11.480; 3 AAC 305.110(e).

None of these restrictions apply to bars, which also hold an alcohol retail license. AS 04.09.200. Likewise, restaurants also have far greater freedom to host entertainment. AS 04.09.210(f).

LEGAL STANDARD

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." ARCP 56(c). "[A] material fact is one upon which resolution of an issue turns." *Christensen v. Alaska Sales & Service, Inc.*, 335 P.3d 514, 519 (Alaska 2014). The Court draws all reasonable inferences in favor of the non-moving party. *Espeland v. OneWest Bank, FSB*, 323 P.3d 2, 8 (Alaska 2014). Summary judgment is merited "only when no reasonable person could discern a genuine factual dispute on a material issue," *Christensen*, 335 P.3d at 520, and when the moving party is entitled to judgment as a matter of law under "the rule of law most persuasive in light of precedent, reason, and policy." *Industrial Commercial Elec., Inc. v. McLees*, 101 P.3d 593, 597 (Alaska 2004).

ARGUMENT

I. The Entertainment Restrictions Violate the First Amendment to the U.S. Constitution and Article I, Section 5 of the Alaska Constitution

The government may not discriminate against a protected form of expression "because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). *See also Club SinRock, LLC v. Municipality of Anchorage, Off. of the Mun. Clerk*, 445 P.3d 1031, 1038 (Alaska 2019); *Mickens v. City of Kodiak*, 640 P.2d 818, 821–22 (Alaska 1982). Content-based restrictions on such expression are subject to strict scrutiny. *Reed*, 576 U.S. at 163; *Club SinRock*, 445 P.3d at 1038. Content-neutral restrictions, however, merit intermediate scrutiny. *Ward v. Rock Against Racism*, 491 U.S, 781, 798 (1989); *Trask v. Ketchikan Gateway Borough*, 253 P.3d 616, 621 (Alaska 2011).

The State claims that the Entertainment Restrictions survive because they are content-neutral and pass intermediate scrutiny. Defs.' MSJ at 20–21. Yet, the Entertainment Restrictions draw impermissible distinctions based on the type of expression involved and the speaker—precisely the kind of content-based and speaker-based regulation the U.S. and Alaska Supreme Courts have repeatedly held must satisfy strict scrutiny.

A. The Entertainment Restrictions Are Content-Based and Speaker-Based

To determine whether a challenged law is content-based, the U.S. Supreme Court has laid out a two-step inquiry, starting with the face of the statute. *Reed*, 576 U.S. at 163. If it discriminates against particular content—the message, the subject matter, the function or purpose, the speaker—it is content-based. *Id.* at 163–64. Some content-based restrictions are obvious—

those that target specific topics or messages. Others are "more subtle, defining regulated speech by its function or purpose." *Id.* at 163.

If the law on its face appears content-neutral, the court then looks to the justification for the law. If it is supported by an impermissible purpose, the law is content-based. *City of Austin v. Reagan Nat'l Advertising of Austin, LLC*, 596 U.S. 61, 76 (2022) (citing *Reed*, 576 U.S. at 164). *See also Barber v. Municipality of Anchorage*, 776 P.2d 1035, 1037 (Alaska 1989) (noting a lack of evidence that a content-neutral sign ordinance was enacted on account of "bias or censorship"). In both instances, strict scrutiny applies.

Here, the Entertainment Restrictions target specific types of expressive activity and ban them without a permit. Those activities include "live music or performances, disc jockeys, karaoke, televisions, pool tables, dart games, or organized games or tournaments." AS 04.09.320(e)(1) and AS 04.09.330(e)(1).[3] The Legislature targeted these specific activities based on their entertainment *function* or *purpose*. As the State concedes, allowing breweries and wineries to host them "would put them in more direct competition with traditional retail licenses," Defs. MSJ at 26, because these are "activities that occur at traditional retail licensed premises." *Id.* at 22. *See also id.* at 21 (noting the purpose of the law is to "limit the ways in which a manufacturer [with a brewery or winery retail license][4] may compete with a business operating under a traditional retail license"). That is textbook content-based regulation.

---

[3] At the same time, other expressive activities are freely allowed, such as "activities, presentations, or displays that directly promote or educate customers" about a brewery's or winery's "products, processes, or establishment." AS 04.09.320(g)(1); AS 04.09.330(g)(1).

[4] Throughout its brief, the State frames this case as manufacturers v. retailers, referring to breweries and wineries as "manufacturers." In fact, the Taprooms and other breweries and wineries to which the Entertainment Restrictions apply are all retail licensees, just as bars and restaurants are.

The law disfavors expressive activity based not just on its subject matter, but also its *purpose*—precisely the sort of distinction that triggers strict scrutiny. *See Reed*, 576 U.S. at 163–64.

The statute also discriminates based on *who* is speaking. Restrictions that burden expression based on the identity of the speaker likewise merit strict scrutiny. *Id.* at 170; *see also Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 658 (1994) ("[L]aws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference."). Under the Entertainment Restrictions, brewery and winery licensees must obtain a permit to host expressive activities, while restaurants and "traditional retail licensees"—bars—may do so freely on their premises. Other entities, including nonprofits, community organizations, and businesses, may also host such events at breweries and wineries without restriction. AS 04.09.320(g)(2); AS 04.09.330(g)(2).

Only one class of speaker is singled out for prior restraint: brewery and winery retail licensees. But "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," and "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Reed*, 576 U.S. at 170 (quoting *Citizens United v. F.E.C.*, 558 U.S. 310, 340 (2010), and *Turner*, 512 U.S. at 658).

The State disagrees. It argues that the law is content neutral simply because it "applies to forms of expression but not the topic discussed or the idea expressed." Defs.' MSJ at 21. But that misunderstands the First Amendment. Even restrictions targeting a particular *form* of expression—regardless of message—can violate constitutional protections. Imagine a law that allowed protestors to speak their message aloud in public but prohibited them from

carrying signs or wearing symbolic clothing. Or a law that permitted authors to speak but banned them from publishing their work in print. These would plainly be unconstitutional. The First Amendment protects not just the content of speech, but also the manner in which individuals choose to express themselves. As the Supreme Court has made clear, laws "that target speech based on its communicative content . . . are presumptively unconstitutional." *Reed*, 576 U.S. at 163.

Indeed, in arriving at content-neutrality, the State largely sidesteps *Reed*. It neither wrestles with the Entertainment Restrictions' facial infirmity nor with its plainly impermissible motivation. "Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question *before* it concludes that the law is content neutral and thus subject to a lower level of scrutiny." 576 U.S. at 166 (emphasis added). Here, as discussed above, the statute is facially content-based: it permits some expressive activities while prohibiting others, and grants speech rights to certain speakers while denying them to others.

But even beyond the facial infirmity, the evidence of impermissible motivations is overwhelming. "If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction . . . that restriction may be content based." *Reagan Nat'l*, 596 U.S. at 76 (citing *Reed*, 576 U.S. at 164). Here, the legislative history confirms that the Entertainment Restrictions were enacted as a political compromise to appease bar licensees worried about competition from breweries and wineries. Pls.' MSJ at 9–10 (citing publicly available videos of legislative committee hearings). And the State openly admits that the law's purpose is to shield traditional retail licensees—bars—from economic competition by taprooms. Defs.' MSJ at 4, 21–

22, 26. But using regulatory power to handicap one class of speakers for the benefit of another is textbook protectionism, which courts have long held to be an impermissible legislative purpose. *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008); *State, By and Through Dep'ts of Transp. & Labor v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 634 (Alaska 1989). Thus, even if the Entertainment Restrictions were facially content-neutral (they are not), the protectionist purpose renders them content-based under *Reed* and triggers strict scrutiny.

The State's reliance on *City of Austin v. Reagan National Advertising* to defend the Entertainment Restrictions as content-neutral is unavailing. *See* Defs.' MSJ at 21. In *Reagan National*, billboard companies challenged an ordinance that applied different rules to on-premises and off-premises signs. 596 U.S. at 65. They argued the ordinance was a content-based restriction and therefore subject to strict scrutiny. The Supreme Court disagreed, finding "a location-based and content-agnostic on-/off-premises distinction does not, *on its face*, 'singl[e] out specific subject matter for differential treatment.'"[5] *Id.* at 76 (emphasis added). But the Court expressly limited its holding to the facial neutrality of that specific ordinance and remanded for further analysis of whether an impermissible *purpose* nonetheless rendered the law content-based. *Id.*

Put another way, *Reagan National* did not hold that a law requiring an official to examine a sign can *never* be content-based, only that such laws are

[5] Not only is the holding in *Reagan National* narrow with respect to the question of whether *Reed* requires strict scrutiny whenever an official has to read a sign to determine whether it is an on-premises or off-premises sign, but Justice Sotomayor's discussion of the long history of billboard regulations throughout the country suggests that these regulations are unique to the signage industry in a way not applicable to the case at bar. *See* 596 U.S. at 65–66.

not *necessarily* content-based. The decision left intact *Reed*'s central rule, which remains fully applicable here: laws that target specific content, purposes, or speakers—or that are enacted for a content-based purpose—are subject to strict scrutiny. *Reagan National* also reaffirmed *Reed*'s two-step framework: courts must first examine the face of the challenged law and then turn to its justification. That framework remains controlling in this case.

B. The Entertainment Restrictions Fail Strict Scrutiny

Strict scrutiny requires that the government demonstrate, with specific evidence, that the law is narrowly tailored to achieving a compelling governmental interest. *United States v. Playboy Enter. Grp., Inc.*, 529 U.S. 803, 817 (2000); *Club SinRock*, 445 P.3d at 1039. In its brief, the State identifies only one interest—economic protectionism. Defs.' MSJ at 4, 21–22, 26. But protectionism is not a legitimate government interest under either the First Amendment or Article I, § 5 of the Alaska Constitution. And even if it were, the State has not shown that the Entertainment Restrictions are narrowly tailored to achieve that goal. For both reasons, the law fails strict scrutiny.

1. Protectionism is not a compelling government interest

The State asserts an interest in protectionism, variously worded as "regulating the market conditions regarding the consumption of alcohol on the licensed premises"[6] in order to "limit the ways in which the manufacturer [breweries and wineries as retail license holders] may compete with a business operating under a traditional retail license [i.e., bars]." Defs.' MSJ at 21. The State explains its goal is to "prohibit[ ] the manufacturer [brewery or winery] from creating a licensed premises . . . that is indistinguishable from the

[6] As set out in Section III, *infra*, the 21st Amendment does not save an otherwise unconstitutional law, particularly here where the restrictions on expression are unrelated to the consumption of alcohol.

premises of a traditional retail license [bar]."[7] *Id.* at 22. Or as they put it more bluntly in an interrogatory response, "Alaska also has an interest in not undercutting the business of a person that holds an existing alcoholic beverage license [i.e., bars]." Exh. F to Pls.' MSJ at 7, 38. *See also* Exh. B to Pls' MSJ at 15–21.

Favoring one category of licensee over another for competitive reasons is not a legitimate government interest—let alone a compelling one. It has nothing to do with public health, safety, or welfare. The Supreme Court has repeatedly rejected economic protectionism as a constitutional justification. *See Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 531 (2019); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984) (rejecting a state law's "mere economic protectionism" where it did not promote any legitimate 21st Amendment concerns). *See also Merrifield*, 547 F.3d at 991 n.15 ("[E]conomic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest."); *Enserch*, 787 P.2d at 634 ("[E]conomically assisting one class [of residents] over another . . . is illegitimate.").

[7] Based on Defendants' discovery responses, the Taprooms anticipated in their Motion for Summary Judgment that the State would invoke interests in temperance and support for the alcoholic beverage industry. *See* Pls.' MSJ. at 18–19. Having failed to raise them, the State has effectively abandoned those interests—and cannot now rely on them to justify the Entertainment Restrictions. *Werba v. Ass'n of Village Council Presidents*, 480 P.3d 1200, 1206 (Alaska 2021) (movant may not raise new argument in reply brief); *Alaska State Employees Ass'n v. Alaska Pub. Employees Ass'n*, 813 P.2d 669, 671 n.6 (Alaska 1991) (issue not raised in initial motion papers is abandoned).

2. The State has failed to provide evidence that the Entertainment Restrictions further its protectionist goal

But simply invoking the interest does not suffice for narrow tailoring; the State must demonstrate with evidence that the law will advance that interest, at the very least, "to a material degree." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996); *see also Edenfield v. Fane*, 507 U.S. 761, 771 (1993).[8] General fears about a particular harm do not suffice. *See Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 572 (9th Cir. 1984); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 577 (2011) ("Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the fear that people would make bad decisions if [the challenged speech were allowed] cannot justify content-based burdens on speech.").

Here, while the State asserts an (illegitimate) interest in protecting bars' economic interests, it offers no actual evidence that the harm it seeks to prevent—economic competition—is caused by breweries and wineries hosting entertainment. *See Edenfield*, 507 U.S. at 771. *See also Club SinRock*, 445 P.3d at 1039 (requiring specific evidence connecting the challenged law to reducing the problem identified by the state). Nothing in the State's briefing or discovery responses ties diminution of a bar license's value or a bar's inability to attract customers to allowing breweries and wineries to host entertainment on their premises. And critically, when the Entertainment Restrictions were enacted, there was no such evidence available: live music and entertainment in taprooms were not even conditionally permitted until January 2024, after SB 9's passage. The State cannot justify a speech restriction with speculative

[8] *44 Liquormart* and *Edenfield* were both First Amendment cases decided under intermediate scrutiny, yet still required a strong evidentiary showing. Under strict scrutiny, as applies here, the State has an even greater evidentiary burden.

harms that had not materialized—and could not have—at the time of enactment.

And even assuming the State could meet its evidentiary burden—which it has not—the Entertainment Restrictions still fail strict scrutiny because they are not the least restrictive means available to achieve the State's interest. *See Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 207–08 (Alaska 2007) (citing *Playboy*, 529 U.S. at 813). The legislature has already instituted less restrictive measures by: restricting breweries and wineries to selling only their own manufactured products; prohibiting seating at the bar where drinks are served; instituting volume serving restrictions; and allowing shorter hours for service. AS 04.09.320(c); AS 04.09.330(c); AS 04.09.320(e)(2); AS 04.09.330(e)(2); AS 04.09.320(d)(1)–(2); AS 04.09.330(d)(1)–(3); AS 04.09.320(e)(4); AS 04.09.330(e)(4). None of these interfere with the Taprooms' freedom of speech and expression. The State cannot justify sweeping restrictions on expressive activity when less speech-restrictive alternatives are already in place.

C. The Permit Scheme Constitutes a Prior Restraint Subject to Strict Scrutiny

Although the State acknowledges the Taprooms' prior restraint claim, Defs.' MSJ at 12, it fails to address or defend against it in any substantive way. That silence amounts to a waiver. *Werba*, 480 P.3d at 1206 (movant may not raise new argument in reply brief); *Alaska State Employees*, 813 P.2d at 671 n.6 (issue not raised in initial motion papers is abandoned). The Taprooms argued in their Motion for Summary Judgment that the law sets up an unconstitutional prior restraint; they hereby incorporate those arguments here by reference. Pls.' MSJ at 24–27. To the extent the State's brief describes the permitting process, Plaintiffs address those descriptions only insofar as they

further illustrate the constitutional defects of the scheme—namely, its impermissible prior restraint on protected expression.

The State notes that the Director has denied only one live music permit application, and that this was due to a nondescript "administrative oversight." Defs.' MSJ at 10. But that misses the point. To withstand constitutional scrutiny, a prior restraint must include clear, substantive standards to cabin official discretion and prevent arbitrary enforcement. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969). Permit requirements that lack objective standards "present a 'threat of content-based, discriminatory enforcement'"—regardless of how often that discretion is abused. *Epona v. Cnty. of Ventura*, 876 F.3d 1214, 1222 (9th Cir. 2017) (quoting *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1082 (9th Cir. 2006)).

That threat is present here. The only standard the State identifies is that the Director may issue a permit if doing so is in the "best interests of the public." Defs.' MSJ at 10. But the Supreme Court has already rejected such vague formulations. In *City of Lakewood v. Plain Dealer Publishing Co.*, the Court struck down a permitting scheme that allowed a mayor to deny newspaper rack permits simply by declaring them contrary to the "public interest." 486 U.S. 750, 769 (1988). The Court held that such unbounded discretion invites censorship and chills speech, rendering the law unconstitutional on its face. *Id.* at 769–70. The same flaw infects Alaska's Permit Scheme.

Here, the standards for decision-making are even more illusory than those rejected in *Lakewood*. The State identifies no provision of the law that: (1) requires a written explanation for an adverse permitting decision, *see Epona*, 876 F.3d at 1224 (written explanation facilitates effective review and ensures proper limits in scope of review); (2) provides for judicial review of the

Board's permitting decisions, *see* Pls.' MSJ at 7 n.5; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559–60 (1975); *Freedman v. Maryland*, 380 U.S. 51, 54–55 (1965); or (3) requires a determination on a permit application to be made within a specified period of time. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990). Without these core procedural protections, the Permit Scheme grants unchecked discretion, invites arbitrary enforcement, and fails as a prior restraint.

II. The Entertainment Restrictions Also Fail Intermediate Scrutiny under the First Amendment

If, after engaging in *Reed*'s content-based inquiry (above) the court deems the Entertainment Restrictions content-neutral, they would still fail intermediate scrutiny. *Ward*, 491 U.S. at 798. That standard requires the State to show that the law is narrowly tailored to serve a substantial government interest and leaves open ample alternative channels for communication. *Id.* at 791, 798–800. The State has done neither. It has offered no evidence that the Restrictions directly advance any substantial interest—much less in a narrowly tailored way—and it has failed to demonstrate that the Taprooms retain meaningful alternative avenues for expressive activity. The law therefore cannot withstand even intermediate scrutiny.

A. Less Restrictive Alternatives That Do Not Implicate Speech Are Available

The State declares that the Entertainment Restrictions are sufficiently narrowly tailored to its interest in restraining competition by breweries and wineries. To prove this, the State must show that it considered alternatives to advance its interest that are less restrictive of speech than the challenged law, but that these alternatives are ineffective. *McCullen v. Coakley*, 573 U.S. 464, 495 (2014) ("[T]he government must demonstrate that alternative measures

that burden substantially less speech would *fail* to achieve the government's interests.") (emphasis added). It has not done so.

The State asserts that the Entertainment Restrictions are narrowly tailored because: (1) they prevent the Taprooms from "encroaching into the market for retail sales" by creating an environment that could become "indistinguishable" from a bar, Defs.' MSJ at 21–22; (2) brewery and winery licensees can still speak about their own products, *id.* at 22–23; (3) community organizations and others can still provide presentations, classes, product displays, or host fundraisers, *id.*; and (4) breweries and wineries can obtain a traditional retail license that would allow them to host entertainment. *Id.* Each of these claims fails.

First, under intermediate scrutiny, the State carries the burden to establish that it "seriously undertook to address the problem with less intrusive tools readily available to it." *McCullen*, 573 U.S. at 494. Where the harm the State seeks to address is not inherent in the protected speech itself, it must favor alternatives that do not restrict protected speech or expression. *Compare Ward*, 491 U.S. at 784–87, 796–802 (amplification guideline to prevent excessively loud music was narrowly tailored) *with McCullen*, 573 U.S. at 474, 486, 490–96 (buffer zone around abortion clinic entrances to promote public safety, healthcare access, and unobstructed pathways was not narrowly tailored where alternatives restricted speech less directly).

Here, the State has offered no evidence that the Entertainment Restrictions are necessary to prevent encroachment into the bars' retail sales market. Nor can they, because, as noted in Section I.B.2., a world where Alaska breweries and wineries can host entertainment never existed before the challenged law went into effect. *See* Sec. 2, ch. 106 SLA 2006 (legislation authorizing first taprooms and prohibit entertainment). Indeed, in most states

breweries and wineries that host entertainment co-exist quite well.[9] *See McCullen*, 573 U.S. at 494 (noting that state had not "shown that it considered different methods that other jurisdictions have found effective").

As to preventing breweries and wineries from becoming "indistinguishable" from bars, that argument collapses under scrutiny. Bars are already distinguishable from breweries and wineries, and striking down the Entertainment Restrictions will not change that. Unlike bars, Taprooms (1) must close earlier, (2) may serve only the alcohol they manufacture, (3) face strict volume limits on daily sales to a single patron, and (4) cannot have seating at the bar. AS 04.09.320(c); AS 04.09.330(c); AS 04.09.320(e)(2); AS 04.09.330(e)(2); AS 04.09.320(d)(1)–(2); AS 04.09.330(d)(1)–(3); AS 04.09.320(e)(4); AS 04.09.330(e)(4). These restrictions distinguish taprooms from bars without burdening protected speech and expression.

Second, the State's remaining justifications miss the mark entirely. That Taprooms may still engage in other types of speech, or that third parties may host events on Taprooms' premises, does nothing to show that alternative restrictions would be ineffective.. Nor does the suggestion that Taprooms could apply for a traditional retail license. Constitutional rights cannot be conditioned on a different regulatory classification. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). The State's justifications reflect a preference for certain

[9] For example, according to a 2019 U.S. Census Bureau report, Montana had the second highest number of bars per 100,000 adults 21 or older. *See* https://247wallst.com/special-report/2022/06/24/states-with-the-most-bars-per-person/. Montana ranks 3rd in number of breweries per 100,000 adults 21 or older. *See* https://www.brewersassociation.org/statistics-and-data/state-craft-beer-stats/. Notably, Montana allows breweries to host live music.*See* https://jollypint.com/breweries-with-live-music-in-montana.

speakers and formats—not a narrowly tailored effort to further a substantial interest.

B. There Are No Ample Alternative Channels for the Taprooms to Host Protected Expression[10]

The State argues that the Entertainment Restrictions leave open ample alternative channels of communication, suggesting several. But assuming these are even intended to apply to the Taprooms, none qualifies as a meaningful alternative.[11] When considering whether a speech restriction allows for ample alternative channels, courts look to whether the speaker can reach its intended audience; whether the location of the expressive activity is part of the expressive message; and whether the alternatives are costly or convenient. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1025 (9th Cir. 2009). On each front, the State's alternatives fail.

The Taprooms seek to host entertainment on *their own premises*, in the very space where they lawfully serve customers—just as bars and restaurants are allowed to do. That location is not incidental; it is essential to the message and experience they wish to convey. Their intended audience is their own retail

---

[10] Because the State has not shown that the Entertainment Restrictions are narrowly tailored, the Court need not reach the question of whether there are ample alternative channels for speech and expression. *McCullen*, 573 U.S. at 496, n.9.

[11] The State's suggested alternatives are directed at "a person wishing to engage in the live music, entertainment, or organized game activities that are restricted by the laws at issue." Defs.' MSJ at 23. This framing appears to refer to performers or patrons—not to Taprooms, who seek to host expressive activity and whose First Amendment rights are directly burdened. *Epona*, 876 F.3d at 1220. But it is the Taprooms' rights that matter for purposes of the alternative channels analysis. Alternatives available to performers or audiences do not address whether Taprooms themselves retain adequate avenues for protected expression.

patrons, and the venue is part of the expressive context. *See Long Beach*, 574 F.3d at 1025. Requiring Taprooms to host expressive activity elsewhere, under different license types or in disconnected venues, severs that connection entirely.

Further, any alternative that requires the Taprooms to obtain another license (here, a bar or eating place license) to exercise their constitutional rights fails from the start. Plaintiffs cannot be required to purchase their rights in order to exercise them. *Murdock v. Penn.*, 319 U.S. 105, 111–13 (1943). Forcing Plaintiffs to "purchase" their right to host music, games, or performances by upgrading to a bar or restaurant license is no meaningful alternative—it is the very burden the First Amendment forbids.

III. The 21st Amendment Cannot Save the Entertainment Restrictions

Finally, to the extent that the State suggests that Alaska's broad powers under § 2 of the 21st Amendment authorize it to violate the free speech rights of its citizens, s*ee* Defs.' MSJ at 14,[12] both the U.S. Supreme Court and the Alaska Supreme Court have consistently rejected this notion. States maintain an obligation to protect other constitutional rights while exercising authority under the 21st Amendment, and this means laws cannot be backed by an illegitimate purpose such as protectionism.

In *44 Liquormart v. Rhode Island*, a liquor licensee brought a First Amendment challenge to a ban on advertising prices. 517 U.S. at 489–93. The state argued that its inherent powers under the 21st Amendment entitled it to

[12] Section III.B. of the State's motion is entitled "Brief summary of applicable alcohol laws" and includes references to the 21st Amendment. However, the State makes no reference to the 21st Amendment in the "Argument" section of its motion. Regardless, the 21st Amendment cannot save the Entertainment Restrictions.

a favorable presumption over the First Amendment. *Id.* at 515. The Supreme Court rejected the idea that the 21st Amendment held favor over any other constitutional provision, citing a long line of cases in support. *Id.* at 514–16. *See also id.* at 516 ("[T]he Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment.") (citations omitted).

Moreover, the State's authority under the 21st Amendment extends to regulations aimed at protecting public health and safety; it does not authorize the State to insulate favored businesses from competition through protectionist restrictions. *Tennessee Wine & Spirits*, 588 U.S. at 538. Indeed, "[w]here the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by § 2." *Id.* at 539–40. Here, where the State has offered no evidence to show that protecting bar licensees from competition with breweries and wineries has "at best a highly attenuated relationship to public health or safety," *id.* at 540, the Entertainment Restrictions cannot be saved by the 21st Amendment.

Alaska's own courts agree. In *Mickens v. City of Kodiak*, the Alaska Supreme Court made clear that the Alaska Constitution contains no provision similar to the 21st Amendment and therefore "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." 640 P.2d at 821 (quoting *Commonwealth v. Sees*, 373 N.E.2d 1151, 1155 (Mass. 1978)). Thus, to the extent the State relies on its 21st Amendment powers to infringe on the Taprooms' free speech rights under Article I, § 5 of the Alaska Constitution, Alaska precedent precludes it.

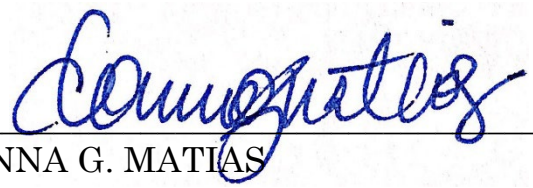
CONCLUSION

For the foregoing reasons, this Court should deny the State's motion for summary judgment in its entirety.

Date: July 2, 2025

SPENCER WILSON
ASB No. 2006046

Date: July 2, 2025



DONNA G. MATIAS
Cal. Bar No. 154268

Date: July 2, 2025

DAVID J. HOFFA
Ariz. Bar No. 038052

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 2, 2025, a true and correct copy of the foregoing document, and all attachments, was served by email on the following attorney of record:

Kevin A. Higgins, assistant attorney general for the State of Alaska, Department of Law
kevin.higgins@alaska.gov
tj.duffy@alaska.gov,
law.oah.ecf@alaska.gov

Attorney for Defendants

By: _____
Brien Bartels, Sr. Legal Secretary