UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

PHOENIX VINTNERS, LLC, d/b/a TRAVELING VINEYARD, a Massachusetts Limited Liability Company, and MICHAELA ROBINSON, a Wyoming resident, Plaintiffs, v. DAN NOBLE, in his official capacity as Director of the Wyoming Department of Revenue, GREG COOK, in his official capacity as Administrator for the Wyoming Department of Revenue Liquor Division, THOMAS MONTOYA, in his official capacity as Chief of Enforcement for the Wyoming Department of Revenue Liquor Division, KELLY HUNT, in his official capacity as Senior Compliance Agent for the Wyoming Department of Revenue Liquor Division, and JASON ALLEN, in his official capacity as Compliance Agent for the Wyoming Department of Revenue Liquor Division, Defendants.	Case No. 17-CV-51-SWS

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

This matter comes before the Court on the Defendants' Motion to Dismiss and Motion for Summary Judgment (Doc. 66) and Plaintiffs' competing Motion for Summary Judgment (Doc. 68). Each side filed oppositions to the other's motion (Docs. 70, 71), and the Court held a hearing on the motions on June 26, 2019 (Doc. 72). Having considered the parties' arguments, reviewed the record herein, and being otherwise fully advised, the Court finds and concludes as set forth herein.

FACTS

The parties and Court agree there are no genuine disputes of material fact that would preclude judgment as a matter of law.

Plaintiff Phoenix Vintners, LLC, d/b/a Traveling Vineyard ("Traveling Vineyard"), is a Massachusetts Limited Liability Company that manufactures and sells wine via direct shipping from three different wineries. Plaintiff Michaela Robinson is a Wyoming resident and one of Traveling Vineyard's independent contractors, known as Independent Wine Guides ("IWGs"), who earns compensation for educating guests and promoting products at in-home wine tastings. Ms. Robinson holds a Class A Industry Representative License and serves as the Wyoming representative for Traveling Vineyard.

Defendants are employees of the Wyoming Department of Revenue, Liquor Division ("the Liquor Division"). They are sued solely in their official capacities under 42 U.S.C. § 1983.

The IWGs offer third-party social hosts (residential homeowners) the opportunity to hold educational, private, invitation-only in-home wine tasting Events for their friends, relatives, and neighbors at the social host's personal residence to learn about Traveling Vineyard's wines and wine-related accessories. Traveling Vineyard sells five bottles of wine to the IWG or the social host before the wine tasting Event, which are delivered via direct shipping. The IWG is present at the Event to educate the attendees about Traveling Vineyard's wines and accessories. The social host pours each guest a two-ounce sample from each of the

five wines featured at the Event. The Events are free for the guests to attend with no obligation to purchase anything. These private residences are not licensed to sell alcoholic beverages.

The IWGs are marketing agents for Traveling Vineyard and their functions include finding interested social hosts; being familiar with Traveling Vineyard's wines and products; attending the events to answer questions regarding the nature, history, characteristics, and values of Traveling Vineyard's wines and accessories; and promoting Traveling Vineyard's products by generating leads that Traveling Vineyard must then convert into sales. At the conclusion of each Event, attendees interested in hosting a future Event, joining the Traveling Vineyard Wine Club, or purchasing wine are encouraged to contact Traveling Vineyard directly. Some attendees may also choose to fill out a "Survey & Interest Form," which is very similar to a traditional order form and then gets returned to Traveling Vineyard. The IWGs do not have authority to take or accept wine purchase orders, and they have no inventory available for sale at any time.

In 2016, the Liquor Division became concerned that Traveling Vineyard was violating Wyoming law and requested information from Traveling Vineyard regarding its business model. On October 25, 2016, Traveling Vineyard sent a letter detailing its operations in Wyoming. On November 3, 2016, the Liquor Division responded with a letter asserting some aspects of Traveling Vineyard's business model and some of its IWGs' activities "are in conflict with Wyoming State Statutes, Title 12, Alcoholic Beverage Control Laws and the Wyoming Liquor

Division (WLD) Rules and policies." On December 29, 2016, representatives from Traveling Vineyard met with representatives from the Liquor Division to discuss and review the issues, but the meeting did not resolve the parties' disagreements.

On March 20, 2017, Plaintiffs filed a complaint in this Court, setting forth a two-pronged attack. First, Plaintiffs sought a declaration that the Liquor Division incorrectly interpreted the definition of "sale" from Wyoming Statute § 12-1-101(a)(xvi) to apply to the marketing activities of Traveling Vineyard and its IWGs. Second, Plaintiffs asserted the challenged Wyoming Statutes, as applied, violate Plaintiffs' constitutional rights of commercial speech.

The Court determined that due to the threshold issue of state law, it would "submit to the Wyoming Supreme Court a certified question over whether Wyo. Stat. § 12-1-101(a)(xvi) applies to the conduct of Traveling Vineyard and its IWGs." (Doc. 29 at p. 11.) The Wyoming Supreme Court answered that question in *Phoenix Vintners, LLC v. Noble*, 2018 WY 87, 423 P.3d 309 (Wyo. 2018), concluding the "statutory definition of 'sell' or 'sale' in Wyo. Stat. Ann. § 12-1-101(a)(xvi) applies to the conduct of Traveling Vineyard and its Independent Wine Guides." *Id.*, ¶ 24, 423 P.3d at 316. That is, the Wyoming Supreme Court said pouring the wine samples at a wine tasting Event constitutes the "sale" of alcohol because it is "pouring for value" that is not purely gratuitous because Plaintiffs "receive a return benefit from the guests at the wine tasting events" in the form of contact information and potential sales leads. *Id.*, ¶¶ 16-18, 423 P.3d at 314.

In light of that determination, Plaintiffs amended their complaint to focus on the second prong of their attack (commercial free speech) and added a claim of equal protection. (Doc. 50.) These claims form the core of the issues before the Court.

STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine "if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way," and it is material "if under the substantive law it is essential to the proper disposition of the claim." *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013) (internal quotation marks omitted).

> The district court must draw all reasonable inferences in favor of the nonmoving party. *Hornady Mfg. Co. v. Doubletap, Inc.*, 746 F.3d 995, 1004 (10th Cir. 2014). But an inference is unreasonable if it requires "a degree of speculation and conjecture that renders [the factfinder's] findings a guess or mere possibility." *United States v. Bowen*, 527 F.3d 1065, 1076 (10th Cir. 2008) (internal quotation marks omitted).

Pioneer Centres Holding Co. Employee Stock Ownership Plan & Tr. v. Alerus Fin., N.A., 858 F.3d 1324, 1334 (10th Cir. 2017). "The movant bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law." *Adler v. Wal-Marl Stores, In c.,* 144 F.3d 664, 670-71 (10th Cir. 1998). The burden then shifts to the nonmoving party to set forth specific facts showing that there is a genuine dispute ripe for trial. *Id.*

"The mere filing of cross motions for summary judgment does not establish that there is no issue of material fact or obligate the trial court to render summary judgment; the trial court must independently determine whether there is a genuine issue of material fact, perusing the record through the standard summary judgment prism, and applying the standard of review to each motion separately." 73 Am. Jur. 2d *Summary Judgment* § 45. "The denial of one does not require the grant of the other" and "in considering cross motions, the court should draw all inferences against each movant in turn." *Id.* "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986).

ANALYSIS

The Liquor Division first argues Plaintiffs' constitutional claims are not ripe for judicial review, which is where the Court's analysis begins.

1. Plaintiffs' Claims are Ripe

The Liquor Division asserts the constitutional claims should be dismissed as unripe because the Liquor Division "has never taken any enforcement action or threatened to take enforcement action against Plaintiffs" and the Liquor Division "lacks authority to directly or indirectly enforce any of the statutes Plaintiffs challenge ...." (Doc. 67 at p. 8.) The Liquor Division contends, "Rather, local code

officials and law enforcement are the entities authorized to penalize individuals who violate local ordinances and Wyoming law by selling alcohol at unlicensed events in private homes." (*Id.*)

> Ripeness doctrine prevents courts from "entangling themselves in abstract disagreements" and interfering in agency policy until "an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

Farrell-Cooper Min. Co. v. U.S. Dep't of the Interior, 728 F.3d 1229, 1234 (10th Cir. 2013) (quoting *Abbott Labs v. Gardner*, 387 U.S. 136, 148-49 (1967)). To determine ripeness, the Court considers several factors:

(1) whether the issues involved are purely legal,
(2) whether the agency's action is final,
(3) whether the action has or will have an immediate impact on the petitioner, and
(4) whether resolution of the issue will assist the agency in effective enforcement and administration.

Los Alamos Study Grp. v. U.S. Dep't of Energy, 692 F.3d 1057, 1065 (10th Cir. 2012) (quoting *Qwest Comms. Int'l., Inc. v. FCC*, 398 F.3d 1222, 1231-32 (10th Cir. 2005)). "Agency action is final when it marks the consummation of the agency's decisionmaking process and is one by which rights or obligations have been determined, or from which legal consequences will flow." *Farrell-Cooper Min. Co.*, 728 F.3d at 1235 (internal quotation marks omitted).

The issues presented in this case are ripe for judicial consideration. First, the parties and the Court agree the material facts are undisputed, leaving only legal questions to be resolved.

Second, the Liquor Division's actions have had an immediate, and negative, impact on Traveling Vineyard's business in Wyoming. Since the November 2016 letter (Doc. 69-2 at pp. 49-52) and subsequent December 2016 meeting (*see* Doc. 69-2 at pp. 53-56), Traveling Vineyard has not held a single wine tasting Event in Wyoming. (Doc. 69-3 at p. 20, Aff. of Richard Libby ¶ 7.) Consequently, Traveling Vineyard's wine sales in Wyoming plummeted thereafter, ostensibly due to the ceased promotional efforts. (Doc. 67-6 at pp. 8-10.) Indeed, in the last six months of 2016, Traveling Vineyard's IWGs held almost 200 wine tasting Events in Wyoming, but none since. (*Id.* at p. 12.) Moreover, Traveling Vineyard's decision to forego wine tasting Events in Wyoming was a reasoned response to the Liquor Division's November 2016 letter, which alleged multiple violations of Wyoming's Statutes based on Traveling Vineyard's business model and noted the Liquor Division "ha[s] the authority to seize (confiscate) alcohol that has been unlawfully imported into the state of Wyoming." (Doc. 69-2 at p. 50.) It's also worth noting the Liquor Division is the entity that governs Traveling Vineyard's direct shipper's license, and it has the authority, subject to any applicable due process procedures, to suspend or revoke that license if it deems Traveling Vineyard has violated any Wyoming Statutes. Wyo. Stat. Ann. § 12-2-204(f); Wyo. Dep't of Rev. Liquor Div. Rules, Chap. 20, § 6 ("A license or permit issued by the Division may be suspended or revoked for violation of the Wyoming Alcoholic Beverage Statutes or for violation of the Rules and Regulations of the Division."). And as the Court previously noted in its prior Order Denying Defendants' Motion for Partial Dismissal, Plaintiffs "face a credible

threat of prosecution if they undertake their alleged commercial speech" and "have shown they have suffered and continue to suffer an ongoing injury resulting from the state law's chilling effect on their desire to engage in alleged commercial speech because they have been forced to refrain from their intended marketing activities in Wyoming." (Doc. 56 at p. 6.)

Third, resolution of the issues raised in this case will assist the Liquor Division in effective enforcement and administration. Indeed, during the deposition of Jason Allen, an agent and the 30(b)(6) deposition representative for the Liquor Division, he explained that the Liquor Division had begun but not pursued investigations into at least two other companies with business models identical or substantially similar to Traveling Vineyard's business model "[b]ecause we wanted to wait until the conclusion of this particular review that we are doing right now." (Doc. 69-1 at p. 60, Depo. of Jason Allen 86:24-25.)[1] Accordingly, resolution of the issues raised here will help to guide the Liquor Division in its investigations of other similar businesses, at least two of which are currently suspended in light of this litigation.

That leaves only the question of whether the agency's action is final. The Court concludes it is final because the Liquor Division, after investigation, decided Traveling Vineyard was in violation of multiple Wyoming Statutes and informed Traveling Vineyard of such, thus signaling the conclusion of the Liquor Division's

[1] The incongruity between the Liquor Division's argument that this case is unripe and its decision to suspend other investigations pending the outcome of this litigation is not lost on this Court. It is only one of several examples where the Liquor Division's statements in its legal briefing fail to accurately reflect the facts or the Liquor Division's own actions. *See generally* Plaintiffs' oral argument at June 26, 2019 summary judgment hearing and Exhibit A to Summary Judgment Hearing.

decision-making process. Further, as noted above, the Liquor Division's action has determined the legal rights and obligations with respect to Traveling Vineyard's use of in-home wine tasting Events, from which legal consequences will flow in the form of requiring Traveling Vineyard to comply with certain additional licensing/permitting requirements before it will be legally authorized to pursue its established business model in Wyoming. The Liquor Division's actions in relation to Traveling Vineyard are final for purposes of judicial consideration.

This litigation is ripe for determination, and the Court has subject matter jurisdiction over the case.

2. Commercial Free Speech

Plaintiffs argue the Wyoming Alcohol Control Statutes, as applied to their in-home wine tasting Events, improperly infringe upon their First Amendment right of commercial free speech. In practical effect, the challenged statutes prohibit the social hosts (private residence owners) or anyone else from pouring wine out of the original container for the guests to taste at the in-home wine tasting Events because such constitutes a "sale" of alcohol, and an appropriate license or permit is required to sell alcohol in Wyoming. However, Traveling Vineyard, its IWGs, and the social hosts are all unable to obtain an appropriate license or permit. As the Liquor Division avers, "Because Traveling Vineyard's conduct constitutes a sale, Wyoming law requires that it occur (1) at licensed establishments, or (2) subject to a local catering permit granted by the local licensing authority." (Doc. 67 at p. 12 (citing Wyo. Stat. Ann. §§ 12-4-502(b), 12-5-201(a)).) There is no dispute that the

wine tasting Events are held at private residences, not at licensed establishments. Additionally, local catering permits are only available to those persons or entities already possessing a retail-level liquor license in Wyoming. *See* Wyo. Stat. Ann. § 12-4-502(b) (allowing a catering permit to be issued "to any person holding a retail or resort retail liquor license"). Wyoming retail-level liquor licenses are limited in quantity, *see* Wyo. Stat. Ann. § 12-4-201(d) (providing the formula for number of retail liquor licenses available to a community based on population), and, in communities where all available liquor licenses have been issued, can sell for hundreds of thousands of dollars on the secondary market. This renders it extremely unlikely for an individual IWG or social host (private residence owner) to hold a retail liquor license, consequently preventing them from being able to obtain a catering permit for Plaintiffs' in-home wine tasting Events.

Plaintiffs contend Wyoming's alcohol regulations are unconstitutional for having the practical effect of preventing their intended commercial speech. The Liquor Division says the statutes regulate conduct, not speech.

2.1 Wyoming's Alcohol Control Statutes are Not Aimed at or Related to Speech or Expression, and they Satisfy *O'Brien's* Intermediate Scrutiny.

Plaintiffs contend all facets of their wine tasting Events are commercial speech because it is all intended to promote and procure a commercial transaction. It is significant, though, that only a very specific portion of each wine tasting Event is actually subject to the regulations at issue. Gathering a group of people inside a private residence to discuss wine and wine-related products and even an IWG's

attempts to convince the guests to order Traveling Vineyard's wines and accessories through pure speech are unaffected by Wyoming's Alcohol Control Statutes. The social host's act of pouring the wine out of its original container so that guests can taste it is the primary act that is regulated by the statutes, as concluded by the Wyoming Supreme Court. This poses the question of whether the regulation affects speech or conduct. Is the pouring of wine properly considered "speech" in this case?

The U.S. Supreme Court has cautioned that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570 (1991). "If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls." *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

The Wyoming Statutes in question here are not aimed at or related to expression; they are related to the conduct of "selling" (here, "pouring for value") alcohol without an appropriate license or permit. It's an uphill climb for Plaintiffs to establish that pouring alcohol at a wine tasting Event expresses a message. *See Nicopure Labs, LLC v. Food & Drug Admin.*, 266 F. Supp. 3d 360, 410 (D.D.C. 2017)

("It is questionable whether the mere distribution of a product sample rises to the level of constitutionally protected expression at all."). Moreover, "[e]ven if the Court were to view the distribution of free samples as inherently expressive—'try this!'—that limited message is not a 'significant element' of the conduct being regulated." *Id.* at 413 (referencing *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07 (1986) (observing that an activity affected by a generally-applicable regulation must have "a significant expressive element" before it can trigger First Amendment protection)). Here, any limiting effect the statutes have on Plaintiffs' commercial speech is incidental and secondary to the statutes' intended regulatory effects on actual conduct. These statutes are prototypical content-neutral regulations because they do not seek to limit any speech or viewpoint.

In *O'Brien*, the Supreme Court applied "'intermediate scrutiny,' under which a 'content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.'" *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–27 (2010) (quoting *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997)). This is the applicable test where, as here, the challenged regulation is focused on conduct and only incidentally affects speech.

The parties agree the regulation of alcohol sales in general concerns important or substantial governmental interests, extensively recognized throughout case law. Among others, those interests include "(1) protecting health, safety, and

welfare; (2) preventing underage drinking; (3) preventing alcohol-impaired driving; and (4) curbing negative secondary effects [from] the consumption of alcohol." (Doc. 69 at p. 19; *see also* Doc. 67 at p. 18.) These important governmental interests are unrelated to and undirected at the suppression of free speech.

And the challenged statutory scheme advances those important governmental interests by limiting and cataloging who may manufacture or serve alcohol (through the licensing and permitting requirements) and by putting local authorities on notice of places and times when alcohol may be sold or served (through local licensing and permitting, such as catering permits). These licensing and permitting requirements enable governmental authorities, at both the statewide and local levels, to limit and monitor the sale of alcohol, effectively advancing the governmental interests. More specific to this case, applying these licensing and permitting requirements to Plaintiffs' wine pouring, such as by requiring a catering permit, allows local law enforcement to monitor the area through direct patrols around the Event to prevent or interrupt underage drinking and to discourage or halt impaired driving, both of which in turn help to protect health, safety, and welfare as well as curb other secondary effects of alcohol consumption. But appropriate advance notice is the predicate for such monitoring to be successful, and Wyoming's alcohol control statutes create a functional scheme that requires and provides for such advance notice.

Finally, the challenged statutes do not burden substantially more speech than necessary to further the important governmental interests. Indeed, it burdens

little speech; Plaintiffs remain free to speak or write anything they wish on any topic concerning alcohol. The challenged statutes prohibit the unregulated sales of alcohol, "which most often does not take the form of speech at all." *Humanitarian Law Project*, 561 U.S. at 26. The means chosen by Wyoming to advance its important governmental interests in this matter "are not substantially broader than necessary to achieve the government's interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989). The State's substantial interests in regulating the sales of alcohol are directly and effectively served through the license and permit scheme created, and it does not unnecessarily burden other expression.

The challenged alcohol-control regulations easily satisfy the *O'Brien* test for content-neutral regulations incidentally affecting speech.

2.2 Even Assuming Wyoming's Alcohol Control Statutes are Not Content-Neutral, they Satisfy *Central Hudson's* Intermediate Scrutiny.

As noted earlier, Plaintiffs assert the challenged statutes are not content-neutral because they inhibit Traveling Vineyard's commercial speech. (Doc. 69 at p. 16.) The Court continues to disagree. Plaintiffs have been unable to identify a single point of authority holding that the act of dispensing alcohol constitutes commercial speech. Of course, the U.S. Supreme Court has long recognized the First Amendment's speech protection "does not end at the spoken or written word," *Texas v. Johnson*, 491 U.S. 397, 404 (1989), but conduct must be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," *Spence v. Washington*, 418 U.S. 405, 409 (1974). Here, pouring Traveling Vineyard's wine is the act that is regulated, and Plaintiffs fail to

convince the Court that pouring an alcohol beverage is sufficiently imbued with communicative elements to bring the act under the First Amendment umbrella.

Nonetheless, liberally construing Plaintiffs' wine pouring as "propos[ing] a commercial transaction," which is "the test for identifying commercial speech," *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 473 (1989), the Court finds Wyoming's alcohol-control statutes also satisfy the standard first set out in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557, 566 (1980). The Tenth Circuit has described the *Central Hudson* commercial speech test as follows:

> First, the government must assert a substantial interest to be achieved by the regulation. *Central Hudson*, 447 U.S. at 564, 100 S.Ct. 2343. Second, the regulation must directly advance that governmental interest, meaning that it must do more than provide "only ineffective or remote support for the government's purpose." *Id.* Third, although the regulation need not be the least restrictive measure available, it must be narrowly tailored not to restrict more speech than necessary. *See id.*; *Board of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). Together, these final two factors require that there be a reasonable fit between the government's objectives and the means it chooses to accomplish those ends. *United States v. Edge Broad. Co.*, 509 U.S. 418, 427–28, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993).

United States v. Wenger, 427 F.3d 840, 849 (10th Cir. 2005) (quoting *Mainstream Mktg. Servs. v. FTC*, 358 F.3d 1228, 1237 (10th Cir. 2004)).

This test is very similar to the *O'Brien* test discussed above. *See S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 535–537, 537 n.16, (1987) (evaluating the challenged law under *O'Brien* and *Central Hudson* together because "their application ... is substantially similar"). The result is the same, as well.

First, the parties agree the Liquor Division has advanced multiple substantial interests to be achieved by the challenged regulations. Second, as discussed above, the challenged statutes directly advance those important governmental interests. Finally, the challenged regulatory scheme reasonably fits the stated governmental goals without restricting more speech than is reasonably necessary (if any). Even assuming commercial speech is implicated by the Wyoming Statutes at issue here, the *Central Hudson* test is easily met and the statutes do not violate Plaintiffs' free speech rights.

Under either the *O'Brien* test or the *Central Hudson* test, the challenged Wyoming Statutes meet the First Amendment's requirements and are not unconstitutional as applied to Plaintiffs.

3. **Equal Protection / Selective Enforcement**

In their equal-protection/selective-enforcement claim, Plaintiffs contend the Liquor Division has treated them differently by the "intentional, selective, arbitrary, and vigorous application of" the challenged Wyoming Statutes against Plaintiffs but not against other similarly-situated companies with identical or substantially similar business models. (Am. Compl. ¶¶ 64-70.) The Liquor Division says it has treated the other similarly-situated companies in a similar fashion, and any differences are largely due to Plaintiffs' own actions and this ongoing litigation as opposed to any discriminatory motive. (Doc. 67 at pp. 21-25.)

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying "any person within its jurisdiction the equal protection of the laws."

U.S. Const. Amend. XIV, § 1. Plaintiffs assert, "When the right to commercial free speech is at stake in an equal protection claim, regulation is subject to intermediate scrutiny, similar to the scrutiny applied in the *Central Hudson* test." (Doc. 69 at p. 21 (citing *Kiser v. Kamdar*, 831 F.3d 784, 792 (6th Cir. 2016).) As already discussed, the Court concludes the challenged alcohol-control laws do not regulate protected First Amendment speech, but rather the act of distributing alcohol. And "if the regulated activity is not speech protected by the First Amendment, a court 'need go no further.'" *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1193–94 (10th Cir. 2017) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985)). Indulging Plaintiffs' theory that the challenged statutes infringe upon their commercial free speech rights, though, the Sixth Circuit has said that "[b]ecause regulation of commercial speech is subject to intermediate scrutiny in a First Amendment challenge, it follows that equal protection claims involving commercial speech also are subject to the same level of review." *Kiser*, 831 F.3d at 792 (quoting *Chambers v. Stengel*, 256 F.3d 397, 401 (6th Cir. 2001)). Despite finding no Tenth Circuit law that says the same, analysis under *Central Hudson's* intermediate scrutiny test renders the same result as set forth above. Indeed, Plaintiffs say their equal-protection claim "is co-extensive with their First Amendment claim." (Doc. 69 at p. 21.) Consequently, the outcome is the same. The challenged statutes satisfy *Central Hudson's* intermediate scrutiny, as analyzed in detail above.

More accurately, Plaintiffs also describe their equal-protection/selective enforcement claim as a "class-of-one" theory. (Doc. 69 at pp. 21-22.) The U.S. Supreme Court has recognized "equal protection claims brought by a 'class of one,'" where, as here, a plaintiff does not allege membership in a certain class or group. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *see also Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (noting the Equal Protection Clause "protect[s] persons, not groups"). Such a claim exists "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Olech*, 528 U.S. at 564.

> To prevail on this theory, a plaintiff must first establish that others, "similarly situated in every material respect" were treated differently. *Jicarilla Apache Nation v. Rio Arriba County,* 440 F.3d 1202, 1210 (10th Cir.2006). A plaintiff must then show this difference in treatment was without rational basis, that is, the government action was "irrational and abusive," *id.* at 1211, and "wholly unrelated to any legitimate state activity," *Mimics, Inc.,* 394 F.3d at 849 (quotation omitted). This standard is objective—if there is a reasonable justification for the challenged action, we do not inquire into the government actor's actual motivations. *Jicarilla Apache Nation,* 440 F.3d at 1211.

Kansas Penn Gaming, LLC v. Collins, 656 F.3d 1210, 1216 (10th Cir. 2011).

Plaintiffs say they were selectively prosecuted because the Liquor Division "singled out Traveling Vineyard" for enforcement despite knowing that "various other similarly situated businesses continue to operate materially indistinguishable business models in Wyoming." (Doc. 69 at p. 22.) Plaintiffs refer to two other businesses allegedly operating in-home wine tastings in Wyoming—WineShop at

Home (WSAH) and Wines for Humanity. (Doc. 69 at pp. 4-12, 22.) The Liquor Division asserts it has treated the other entities nearly identical to how it has treated Traveling Vineyard, including investigating all three entities for possible violations of Wyoming law. (Doc. 67 at pp. 24-25; Doc. 71 at pp. 25-26.) The evidence in the record demonstrates the Liquor Division indeed took nearly identical steps when investigating all three entities. (*Compare* Doc. 69-2 at pp. 49-52 (Liquor Division's letter to Traveling Vineyard identifying possible Wyoming Statute violations) *with* Doc. 69-2 at pp. 76-77, 81-82 (Liquor Division's letters to WSAH requesting information and identifying possible Wyoming Statute violations) *and* Doc. 69-2 at pp. 57 (Liquor Division's letter to Wines for Humanity requesting information). Plaintiffs have not shown they were treated differently than the other similarly-situated entities.

Even assuming Traveling Vineyard was treated in a disparate manner, though, the Liquor Division has established a rational basis for any difference in treatment. For example, the Liquor Division met with Traveling Vineyard's representatives in December 2016 (and has not met with the other entities' representatives) because Traveling Vineyard requested the meeting. (Doc. 67-1 at p. 7, Montoya Aff. ¶ 15 (noting that "[b]y contrast, the other two similar commercial entities of which the Division is aware, Wineshop At Home and Wines for Humanity, never requested an in-person meeting with the Division").) Relatedly, Traveling Vineyard supplied far more detail about its business model to the Liquor Division than the other entities did, thereby allowing the Liquor Division to more

closely examine whether Plaintiffs' conduct complied with Wyoming law. (*Compare* Doc. 69-2 at pp. 17-41 (a four-page letter plus several attachments from Traveling Vineyard in response to the Liquor Division's inquiries) *with* Doc. 69-2 at pp. 58-59 (a one-paragraph email from Wines for Humanity in response to the Liquor Division's inquiries).) "In essence, because Traveling Vineyard was the first entity with the in-home multi-level marking business structure for whom the Division obtained detailed information to evaluate its business model, the Division had greater contact with Traveling Vineyard." (Doc. 71 at p. 24.) Finally, and most compelling, the Liquor Division had not pursued further investigation into the other businesses "[b]ecause we wanted to wait until the conclusion of this particular [litigation] that we are doing right now." (Doc. 69-1 at p. 60, Depo. of Jason Allen 86:24-25.) "Selective enforcement without malicious intent may be justified when a test case is needed to clarify a doubtful law[.]" *Cook v. City of Price, Carbon Cty., Utah*, 566 F.2d 699, 701 (10th Cir. 1977) (citing *Mackay Telegraph Co. v. Little Rock*, 250 U.S. 94, 100 (1919)). These reasons advanced by the Liquor Division establish a rational basis justifying any difference in treatment between Traveling Vineyard and the other similarly-situated businesses.

The undisputed facts in this case reveal no violation of Plaintiffs' equal protection rights.

4. <u>Wyoming Constitutional Claims</u>

Plaintiffs clarified that they "do not seek any additional relief related to the allegations pertaining to the Wyoming Constitution," that they "simply seek[] a

declaration" that the challenged statutes are unconstitutional as applied to them. (Doc. 70 at pp. 7-8.) The Court understands this to mean that their Wyoming Constitutional claims (Counts II and IV) live and die alongside their federal claims (Counts I and III). If Plaintiffs see their claims of Wyoming Constitution violations as stand-alone claims, though, those claims must "fail because of no implementing legislation." *May v. Southeast Wyoming Mental Health Ctr.*, 866 P.2d 732, 737 (Wyo. 1993); *see also Worthington v. State*, 598 P.2d 796, 801 (Wyo. 1979) (explaining the civil rights provisions of the Wyoming Constitution are "not self-executing; that no suit can be maintained against the State until the legislature makes provision for such filing; and, that absent such consent, no suit or claim could be made against the State").

CONCLUSION AND ORDER

This litigation is ripe for judicial determination, and the undisputed evidence in this case establishes no violations of Plaintiffs' commercial free speech or equal protection rights. Wyoming's alcohol-regulation statutes are not unconstitutional as applied to Plaintiffs' business activities. Consequently, Defendants are entitled to judgment as a matter of law on all claims, and Plaintiffs' competing motion for summary judgment must be denied.

IT IS THEREFORE ORDERED that the Defendants' Motion to Dismiss and Motion for Summary Judgment (Doc. 66) is **GRANTED IN PART AND DENIED IN PART**. Defendants' request for dismissal based on ripeness is **DENIED**. Defendants' request for summary judgment on all claims is **GRANTED**.

IT IS FURTHER ORDERED that the Plaintiffs' Motion for Summary Judgment (Doc. 68) is hereby **DENIED**.

DATED: July 12th, 2019.

Scott W. Skavdahl
United States District Court Judge