

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

KAMBIS ANVAR  
and MICHELLE DRUM,  
*Plaintiffs*

v.

C.A. No. 1:19-cv-00523

ELIZABETH TANNER, Director of the  
Department of Business Regulation, and  
PETER NERONHA, Attorney General  
of Rhode Island,  
*Defendants*

RHODE ISLAND RESPONSIBLE BEVERAGE  
ALCOHOL COALITION, Inc.,  
*Intervening Defendant*

**MEMORANDUM SUBMITTED ON BEHALF OF AMICUS, RHODE ISLAND LIQUOR  
STORES ASSOCIATION, IN SUPPORT OF DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

**INTEREST OF THE AMICUS**

Amicus, Rhode Island Liquor Stores Association (“the Association”), is a domestic non-profit corporation first incorporated in Rhode Island in 1971. Since its inception, the Association has represented the interests of independent retail liquor stores within Rhode Island. The Association exists to improve service to the public, to educate and communicate with its members for the betterment of their business, and to improve working conditions for all involved in liquor retail within the State. Declaration of Frank Fede, Exhibit A.

**BACKGROUND**

On October 3, 2019 several individuals filed the instant action against the Director of the Rhode Island Department of Business Regulation and the Attorney General for the State of Rhode Island. This Court allowed the Rhode Island Responsible Beverage Coalition to Intervene as a

Defendant. Distilled to its purest form, the action seeks to allow the individual plaintiffs to order alcoholic beverages (wine, in particular) from outside of Rhode Island to be shipped to them in their homes in this State. Plaintiffs seek to have this Court nullify certain state laws and administrative regulations so that they can have wine shipped directly to their home from unlicensed and unregulated sellers.

Plaintiffs refer to a handful of state statutes and administrative regulations that they claim when blended together result in a violation of the Commerce Clause. The Association, by submitting this memorandum, hopes to aid the Court's understanding of the comprehensive and intricate mix of statutes and regulations that the Plaintiffs seek to have nullified. An overview of the entire system leads to the inescapable conclusion that the State's regulatory scheme is constitutional, and what Plaintiffs seek would actually result in discrimination against Rhode Island entities in favor of out of state businesses (to the detriment of the State, other members of the three tier system, retailers and the consumer)—not at all the result that the Commerce Clause requires.

## **ARGUMENT**

Rhode Island's requirement that all sales, shipment and delivery of alcoholic beverages comply with state law and occur within the unquestionably legitimate three-tier system does not violate the Commerce Clause. A judicially created exception in favor of Plaintiff's selected out of state sellers would unfairly and improperly discriminate against Rhode Island retailers (and others).

According to their Complaint, Plaintiffs' Commerce Clause challenge is aimed at the following:

- R.I. Gen. L § 3-4-8(a) and 230 R.I. Admin. Code 30-10-1.4.19(B)(1)
- R.I. Gen. L. §§ 3-5-10, 3-5-11, 3-5-15, 3-5-17, 3-5-18 and 230 R.I. Admin. Code 30-10-1.4.10(B) and 30-10-1.4.27

Complaint, ECF 1, pages 1, 6.

Plaintiffs’ statement that these provisions have the “practical effect of preventing out-of-state wine retailers from lawfully selling and delivering to Rhode Island consumers.” Complaint, p.1, is simply not accurate and tells only a part of the tale. Rhode Island’s liquor regulatory framework does not allow unlicensed wine sellers from remotely selling their product and delivering to a residence via common carrier. It does *not* prevent out of state wine retailers or manufacturers from selling their product to Rhode Island consumers. On any given day, a Rhode Island consumer can go to any retail store and purchase alcoholic beverages from all over the country and around the world. Rhode Island retailers can assist in finding and obtaining more obscure labels that they may not have in stock. Exhibit A. The fact that all those in the stream of commerce must abide by the same rules does not result in a Commerce Clause violation.

### **The Commerce Clause**

This is not the first time that a Commerce Clause challenge has been mounted against portions of Rhode Island’s “regulatory mosaic” applicable to “the intrastate channels through which alcoholic beverages may be manufactured, imported, and sold.” *Wine & Spirits Retailers, Inc. v. State of Rhode Island*, 418 F.3d 36 (1<sup>st</sup> Cir. 2005)(affirming the District Court’s denial of preliminary injunctive relief to the operation of a statutory ban on chain store/franchise operations as to retail liquor stores). In affirming the substance of the chain store ban after a trial, the First Circuit issued a primer for application of the Commerce Clause to Rhode Island’s regulation of

the alcoholic beverage industry. First, the appeals court explained the purpose of the constitutional provisions at issue:

The Constitution grants to Congress the power “[t]o regulate Commerce...among the several states.” *U.S. Const. art I, § 8 cl. 3*. Within this grant of power, what has come to be known as the dormant commerce clause prohibits “protectionist state regulation designed to benefit in-state economic interests by burdening out-of-state competitors.” *Grant’s Dairy—Me., LLC v. Comm’r of Me. De[‘t of Agric., Food & Rural Res.*, 232 F.3d 8, 18 (1<sup>st</sup> Cir. 2000). State regulation of the sale of alcoholic beverages is, however, unique; while such regulation is subject to the nondiscrimination principles of the dormant commerce clause, the Twenty-first Amendment confers upon the several states wide-ranging control over the structure of local liquor distribution systems. *See Granholm v. Heald*, 544 U.S. 460 (2005).

*Wine & Spirits Retailers, Inc. v. State of Rhode Island*, 481 F.3d 1, 10 (1<sup>st</sup> Cir. 2007).

The First Circuit then explained the difference between a statute that is facially invalid and one that imposes only incidental (and therefore permissible) impact on interstate commerce:

A statute that discriminates on its face against interstate commerce, whether in purpose or effect, demands heightened scrutiny. Under this rigorous form of review, a statute is invalid unless it furthers a legitimate local objective that cannot be served by reasonable non-discriminatory means. Relatedly, the Supreme Court has explained that legislation purporting to regulate commerce that occurs wholly beyond a state’s borders “is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature.”

481 F.3d. at 10-11(citations omitted).

In concluding its tutorial on the Commerce Clause as it relates to regulation of alcoholic beverages, the First Circuit wrote:

A statute that “regulates evenhandedly and has only incidental effects on interstate commerce engenders a lower level of scrutiny.” In those circumstances, courts employ the balancing test limned in *Pike v. Bruce Church, Inc.* 397 U.S. 137...(1970). That test is straightforward: assuming that the statute operates evenhandedly to achieve a legitimate local interest and that its effects on interstate commerce are incidental, it will stand ‘unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.’ *Id. at 142*.

481 F.3d at 11.

In rejecting claims that the State’s ban on chain retail liquor stores violated the Commerce Clause, the First Circuit instructed that “a state regulation that burdens some interstate firms ‘does not, by itself, establish a claim of discrimination against interstate commerce.’” 481 F.3d at 14-15 (citation omitted). The First Circuit affirmed the District Court’s rejection of the Commerce Clause claim, finding that the plaintiffs had only showed “that the neutral, evenhanded requirements [of the chain store ban in Title 3] incidentally burden interstate commerce by precluding various methods of distribution in the retail liquor market. That is not enough. In order to invalidate the requirements, any such burden would have to be ‘clearly excessive in relation to the putative local benefits.’” 481 F.3d at 15. After recognizing that “the Supreme Court has previously rejected the notion that the dormant commerce clause protects particular business structures or methods of operation in retail markets,” *Id.* at 15-16, the First Circuit upheld the chain store restriction.

### **State And Local Regulation**

“Rhode Island, like many states, regulates the intrastate channels through which alcoholic beverages may be manufactured, imported and sold.” *Wine and Spirits Retailers, Inc. v. State of Rhode Island*, 418 F.3d 36, 41 (1<sup>st</sup> Cir. 2005). Under Rhode Island law, “any individual or entity engaged in the manufacture, sale, or importation of alcoholic beverages must hold a valid license issued by the Department of Business Regulation.” *Id.* at 42, citing R.I. Gen. Laws §3-5-1. A Class A retail license “entitles the holder to obtain alcoholic beverages from licensed wholesalers and to operate a retail package store, from which the beverages may be sold in sealed containers.” *Id.*, citing R.I. Gen. Laws §§ 3-7-1, 3-7-3. Rhode Island’s state and municipal regulatory system, endorsed and allowed by the Twenty-First Amendment, has a direct and supportive effect on the authority of the state to regulate alcoholic beverages. The interplay of state and local regulation is

not designed to exclude out of state sellers of alcoholic beverages and cannot be characterized as prohibited economic protectionism. These laws are designed to further important state interests (the promotion of temperance and the control of the traffic of alcoholic beverages)<sup>1</sup> and to ensure accountability and responsibility in the sale of alcoholic beverages. A review of the entire “regulatory mosaic,” *Wine and Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1 (1<sup>st</sup> Cir. 2007), makes it clear that Rhode Island’s three tier system is unquestionably valid, and that Plaintiffs’ position, which would dismantle the legitimate checks put in place by state and local regulators, is directly contrary to those permissible interests.

The First Circuit has made it clear that “a state regulation that burdens some interstate firms ‘does not, by itself, establish a claim of discrimination against interstate commerce.’” *Wine and Spirits Retailers*, 481 F.3d at 14-15 (citation omitted). The fact that the “mosaic of state laws enacted by the General Assembly may have had a negative impact on [Plaintiffs and non-party out of state retailers] in itself, insufficient to show discriminatory effect.” *Id.* As in *Wine and Spirits*, “the most that the plaintiffs have shown is that the neutral, evenhanded requirements [imposed by the State] incidentally burden interstate commerce by precluding various methods of distribution in the retail liquor market. That is not enough. In order to invalidate the requirements, any such burden would have to be ‘clearly excessive in relation to the putative local benefits.’” *Id.* (citation omitted). The only burden that these Plaintiffs have offered is their inability to purchase a certain variety of wine directly from an out of state seller, bypassing the wholesalers and retailers licensed and heavily regulated by this State and Rhode Island municipalities. They have not shown why the constitutionally sound method set out in state law should be ignored, nor have they shown any

---

<sup>11</sup> R.I. Gen. Laws § 3-1-5.

“home field advantage” that Title 3, local ordinances and administrative regulations give to in-state interests. *Wine and Spirits Retailers*, 481 F.3d at 14.

On a Constitutional level, the Twenty-First Amendment<sup>2</sup> allows Rhode Island—and many other states—to regulate the importation and distribution of alcoholic beverages (to the point of absolute prohibition) through a three-tier system composed of suppliers/manufacturers who sell to wholesalers who then sell to licensed retailers in the state. *Granholm v. Heald*, citing *North Dakota v. United States*, 495 U.S. 423, 432 (1990); *id.*, at 447 (Scalia, J., concurring). Rhode Island has tapped the State’s Department of Business Regulation to be its administrative arm in liquor regulation, and municipalities also have authority to regulate the sales of liquor within their borders, as will be outlined below.

The declared purpose of Title 3 is “the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages.” R.I. Gen. Laws § 3-1-5. A review of the three-tier system and state and local government’s role in regulating the various levels emphasizes that it is designed to provide oversight, accountability and responsibility in the sales of alcoholic beverages to consumers, and not to provide some sort of benefit to Rhode Island entities to the exclusion of out of state sellers. To the contrary, the Association’s members must comply with a wide variety of state and local statutes, ordinances and regulations in order to open their doors each day<sup>3</sup>—requirements not applicable to out of state businesses. To begin, Title 3 of the Rhode Island

---

<sup>2</sup> Section 2 of the Twenty-First Amendment is an explicit *grant* of power to the individual states, as opposed to most provisions in the Constitution that begin with “no state shall...”. The Amendment provides “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”

<sup>3</sup> Even the times of day that the doors can be open are regulated by state law. R.I. Gen. Laws 3-7-23 “Closing hours for Class A licenses;” § 3-8-1, setting Sunday operating hours.

General Laws establishes that initially voters in a city or town must approve the sale of alcoholic beverages in the town. R.I. Gen. Laws § 3-5-2. Title 3 allows for the importation and sale of alcoholic beverages, with retail licenses<sup>4</sup> being issued by individual municipalities. R.I. Gen. Laws § 3-5-15. Holders of a manufacturers or wholesalers licenses are prohibited from having any direct or indirect interest in any retailer's license or in the business carried on under a retailer's license. R.I. Gen. Laws § 3-7-22. The Association's members must obtain a policy of commercial, general liability, liquor liability and property damage insurance coverage in a minimum amount of \$300,000. R.I. Gen. Laws § 3-7-29.

Although State law requires retailers to obtain a license to sell alcoholic beverages, retail licenses are actually issued by the individual cities and towns.<sup>5</sup> Each municipality has adopted a complex, detailed regulatory scheme setting forth the requirements for obtaining a liquor license and numerous conditions a license holder must satisfy in order to sell alcoholic beverages to consumers. While the process for obtaining a retail sales license varies slightly among municipalities, they commonly require license holders to comply with local building, electrical, plumbing, and fire codes, zoning regulations, sell only a certain distance from schools and/or churches, maintain liability insurance (often in excess of the minimum established by state law), provide alcohol server training to their employees, and myriad other conditions. A license holder's failure to comply with these conditions and requirements may result in fines and the suspension or revocation of its liquor license. The Town of South Kingstown's liquor licensing rules and

---

<sup>4</sup> Retail licenses are designated "Class A" licenses by the DBR. R.I. Gen. Laws 3-7-1, et seq. For ease of reference, the Association has attached a chart listing the various classes of licenses authorized under Title 3. *See*, Exhibit B, "Courtesy Information Sheet," downloaded from [https://dbr.ri.gov/documents/divisions/commlicensing/liquor/Info\\_RIRetailLicenses.pdf](https://dbr.ri.gov/documents/divisions/commlicensing/liquor/Info_RIRetailLicenses.pdf), last visited on March 3, 2022.

<sup>5</sup> Again, for ease of reference a table of municipalities with links to their websites, ordinances and zoning regulations is attached. *See* Exhibit C.



regulations, attached hereto as Exhibit D, is representative of the typical municipal liquor licensing scheme.

Title 3 provides that “a retailer’s Class A license authorizes the holder to keep for sale and to sell, at the place described, beverages at retail and to deliver the beverages in a sealed package or container, which package or container shall not be opened nor its contents consumed on the premises where sold.” R.I. Gen. Laws § 3-7-3. Realistically, this means that retailers must police not only their building, but their parking lots to discourage “on-premises” consumption. Even the brick and mortar buildings must be specifically described in the licensing process. DBR’s administrative regulation 1.4.27 requires that “all licenses granted or issued must identify a premise for operation under the license. The license premises is that portion of the licensee’s property owned leased or controlled by the licensee, on which or from which the alcoholic beverage may be sold, served or stored. It shall be defined by the licensee at the time the application (new or renewal) is filed and finally determined by the approval of the local licensing board.” Every applicant is “required to submit to the local licensing board and keep current an accurate drawing of the licensed premises outlining and giving dimensions of the area which is actually the subject of the license. Any sale, service or storage of alcoholic beverages outside the licensed premises is a violation.” *Id.* Any proposed expansion of a retail premises must be the subject of notice, hearing, and approval of the local licensing board, and the filing of a revised drawing. *Id.*

State law makes clear that, except as provided in Title 3, “no person shall import or suffer to be imported beverages into [Rhode Island].” R.I. Gen. § Laws 3-5-1. When a retail business is ready to stock its shelves, it can only purchase from a licensed wholesaler. R.I. Gen. Laws § 3-7-18.

Retailers are prohibited from selling or delivering “to any underaged person . . . for purposes of sale, possession and consumption of alcoholic beverages, either for his or her own use or for the use of his or her parents, or of any other person; or the sale of beverages to any intoxicated persons or to any person of notoriously intemperate habits.” R.I. Gen. Laws § 3-8-1. Sales and/or delivery of alcoholic beverages to underage citizens is a major focus of Title 3 and the administrative regulations, and many safeguards must be enforced by the retailers. For example, there are specific provisions, including the requirement that a log be kept, applicable to sales of keg beer. R.I. Gen. Laws § 3-8-15. DBR’s administrative Rule 1.4.43 of 230-RICR-30-10-1 provides an exhaustive process and strict requirements for training of retail employees, including supervisory employees.

The State’s Department of Business Regulation has promulgated administrative regulations that impose accountability and responsibility on retailers in the limited instance they are allowed to deliver. Rule 1.4.10 of 230-RICR-30-10-1 entitled “Deliveries-Retail” builds on § 3-7-3 as follows:

- A. A Class A alcoholic beverage licensee may deliver alcoholic beverages to the residence of a customer. In making a permissible delivery, a licensee must be sure that the alcoholic beverage is not delivered into the possession of a person under the age of twenty-one (21). No identification documents shall be accepted unless they bear a photographic representation of the person accepting the delivery.
- B. Sale and delivery shall be made only during the legal hours of business for a Class A license by an employee and/or owner of the licensed establishment.
- C. Each delivery must be accompanied by an invoice which shall state at a minimum:
  1. Name of licensed establishment or person making delivery;
  2. Name and address of purchaser;
  3. Date of delivery;
  4. List of products being delivered;
  5. Signature of consignee.

Even the cost of the beverage charged by the retailer is strictly regulated by the State. Rule 1.4.28(A) provides that the “price (cost) of the retail licensee’s alcoholic beverage is determined

by the actual total price shown on the invoice from the wholesaler, including all taxes and fees. The cost of a bottle or drink is then determined by dividing the total price by the number of bottles or single drinks included in the total figure. If the “price” figure works out to a fractional cent, the lowest amount at which the bottle or drink may be sold by the retailer is the next highest cent.” Not surprisingly, there are specific taxes that go along with retail sales of alcohol—one tied to the amount of inventory. R.I. Gen. Laws § 3-10-1.1 “Alcoholic beverage floor stock tax.” Each retailer must file an annual report with the Division of Taxation regarding collection of these taxes and must submit to an audit of its books upon request. R.I. Gen. Laws § 3-10-5 (a), (b). Failure to allow examination of the books will be taken up by the State’s District and possibly Supreme Courts. R.I. Gen. Laws § 3-10-6. The State’s Liquor Control Administrator deploys investigators to licensed retail premises, and failure to allow those investigators access is a basis for revocation of the license. R.I. Gen. Laws § 3-2-6 “Suspension or revocation of license for refusing official’s access to licensed premises.”

This review of laws and ordinances governing the sale and delivery of alcoholic beverages makes it crystal clear that Rhode Island’s interest is not in prohibiting out of state products to be shipped and sold here—that is done every single day. The question presented in this case is whether some consumers can cause a seller in another state to bypass the three-tier system, and the answer should be a resounding “NO.” The simple fact is that “the statutory scheme at issue here does not favor in-state interests at all.” *Wine and Spirits Retailers*, 481 F.3d at 14. As in the final look at the franchise prohibition at issue in *Wine and Spirits Retailers*, the “most that plaintiffs have shown is that the neutral, evenhanded requirements [of Title 3] incidentally burden interstate commerce by precluding various methods of distribution in the retail liquor market.” As in *Wine and Spirits Retailers*, *id.* at 15, “[t]hat is not enough. In order to invalidate the requirements, any

such burden would have to be ‘clearly excessive in relation to the putative local benefits.’” *Id.*,  
*citation omitted.*

The Association therefore respectfully requests that this court reject Plaintiffs’ position and  
grant Defendants’ Motion for Summary Judgment.

Rhode Island Liquor Stores Association

/s/ Marc DeSisto

Marc DeSisto, Esq. (#2757)

/s/ Rebecca Tedford Partington

Rebecca Tedford Partington, Esq. (#3890)

DeSisto Law LLC

60 Ship Street

Providence, RI 02903

(401) 272-4442

[marc@desistolaw.com](mailto:marc@desistolaw.com)

[rebecca@desistolaw.com](mailto:rebecca@desistolaw.com)

CERTIFICATION OF SERVICE

I hereby certify that the within document has been electronically filed with the Court on  
this 4<sup>th</sup> day of March 2022 and is available for viewing and downloading from the ECF system.

Service on the counsel of record, as listed below, will be effectuated by electronic means:

Scott J. Summer, Esq. (#4127)

[sjl@lawyerscollaborative.com](mailto:sjl@lawyerscollaborative.com)

Ryan M. Gainor, Esq. (#9353)

[rgainor@hinckleyallen.com](mailto:rgainor@hinckleyallen.com)

Gerald J. Petros, Esq. (#2931)

[gepetros@hinckleyallen.com](mailto:gepetros@hinckleyallen.com)

Andrea M. Shea, Esq. (#9702)

[ashea@riag.ri.gov](mailto:ashea@riag.ri.gov)

Lauren E. Hill, Esq. (#9830)

[lhill@riag.ri.gov](mailto:lhill@riag.ri.gov)

James A. Tanford, Pro Hac Vice.

[tanford@indiana.edu](mailto:tanford@indiana.edu)

Joseph Beutel, Pro Hac Vice.

[joe@beutellaw.com](mailto:joe@beutellaw.com)

Robert D. Epstein, Pro Hac Vice.

[rdepstein@aol.com](mailto:rdepstein@aol.com)

Deborah A. Skakel, Pro Hac Vice.

[diskakel@blankrome.com](mailto:diskakel@blankrome.com)

/s/ Marc DeSisto