

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:21-CV-343-BO

FLYING DOG BREWERY, LLC,)
Plaintiff,)
v.)
THE NORTH CAROLINA ALCOHOLIC)
BEVERAGE CONTROL COMMISSION,)
ALEXANDER DUKE "ZANDER" GUY)
JR., NORMAN A. MITCHELL SR.,)
KAREN L. STOUT, TERRANCE L.)
MERRIWEATHER, and CINDY MESINO,)
Defendants.)

ORDER

This cause comes before the Court on defendants' motion to dismiss, plaintiff's motion for summary judgment, and defendants' motion for summary judgment. The appropriate responses and replies have been filed, or the time for doing so has expired, and a hearing on the matters was held before the undersigned on April 19, 2022, at Raleigh, North Carolina. In this posture, the matters are ripe for disposition.

BACKGROUND

Plaintiff commenced this action by filing a complaint on August 26, 2021. [DE 1]. Plaintiff alleged that its First Amendment rights were violated when defendants denied plaintiff's application to approve its Freezin' Season Winter Ale label. Specifically, plaintiff's complaint challenged 14B N.C. Admin. Code 15B.1003(a)(2) both on its face and as applied to plaintiff as a prior restraint on protected expression and as inherently vague and ambiguous, implicating both due process and speech concerns.

Plaintiff also sought a temporary restraining order and a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. The Court denied plaintiff's motion for temporary restraining order, finding that plaintiff had failed to sufficiently demonstrate that *ex parte* relief was warranted. [DE 7]. After a hearing, the Court denied plaintiff's motion for preliminary injunction in light of the ABC Commission having approved plaintiff's Freezin' Season Winter Ale label after plaintiff initiated this action. [DE 20]. The Court further concluded that although there were no longer grounds on which to grant preliminary injunctive relief, plaintiff's case was not moot as it had raised both an as-applied and a facial challenge to the subject regulation.

Defendants then moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. [DE 22]. Plaintiff filed an amended complaint [DE 24] and its motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. [DE 27]. In its amended complaint, plaintiff alleges a single claim that 14B N.C. Admin. Code 15B.1003(a)(2) violates the First Amendment because it is invalid on its face as an unconstitutional prior restraint on protected expression, is invalid on its face as inherently vague and ambiguous, and is invalid as applied to bar the advertisement and sale of Freezin' Season Winter Ale where defendants lack any valid interest which would justify censorship of plaintiff's Freezin' Season label.

Defendants answered the amended complaint and filed a cross-motion for summary judgment. [DE 28 & 33]. Defendants' motion provides that the parties have agreed to focus their pre-discovery summary judgment motions on the core issue in the case, namely the constitutionality of the challenged regulation, but that by doing so defendants do not waive any defenses not raised. Plaintiff's motion provides that it has conditionally stipulated that each defendant is liable for \$1 in damages and that if, and only if, its motion is granted it will seek no additional actual damages, without waiving any right to attorney fees.

DISCUSSION

At the outset, the Court denies as moot defendants' motion to dismiss the original complaint in light of the filing of an amended complaint. *See Fawzy v. Wauquiez Boats SNC*, 873 F.3d 451, 455 (4th Cir. 2017). Remaining for the Court's consideration are the cross-motions for summary judgment regarding the constitutionality of the challenged regulation.

A motion for summary judgment may not be granted unless there are no genuine issues of material fact for trial and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If that burden has been met, the non-moving party must then come forward and establish the specific material facts in dispute to survive summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). In determining whether a genuine issue of material fact exists for trial, a trial court views the evidence and the inferences in the light most favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). However, "[t]he mere existence of a scintilla of evidence" in support of the nonmoving party's position is not sufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

"A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party. . . and [a] fact is material if it might affect the outcome of the suit under the governing law." *Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013) (internal quotations and citations omitted). Speculative or conclusory allegations will not suffice. *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002). When deciding cross-motions for summary judgment, a court considers each motion separately and resolves all factual disputes and competing inferences in the light most favorable to the opposing party. *Rossignol v. Voorhaar*, 316 F.3d 516,

523 (4th Cir. 2003). The court must ask “whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 251.

A. *Statement of the facts*

The following material facts appear to be undisputed. [DE 27-1; 41]. Plaintiff is a brewery with its headquarters and principal place of business in Frederick, Maryland. Plaintiff creates, brews, and sells craft beer, shipping over 1.3 million cases of beer annually for distribution to corporate customers in the retail, bar, and restaurant business. Plaintiff currently distributes its beer for sale in North Carolina.

Plaintiff has collaborated with the artist Ralph Stedman who produces, under license, illustrations for plaintiff’s corporate imaging, including beer labels, beer packaging, posters, and clothing. Mr. Stedman created the image at issue in this case which appears on plaintiff’s Freezin’ Season Winter Ale twelve-ounce beer bottle label. The image on the label consists of a nude cartoon figure standing next to a campfire. *See* [DE 24 p. 5].

North Carolina state laws governs “the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages in North Carolina.” N.C. Gen. Stat. § 18B-100. All advertising of alcoholic beverages must comply with the North Carolina Alcoholic Beverage Control Commission’s (hereinafter “ABC Commission”) rules, which may include rules prohibiting or regulating advertising of alcoholic beverages contrary to the public interest. *Id.* § 18B-105(a)-(b). The ABC Commission adopted the challenged rule, 14B N.C. Admin. Code 15B.1003, in 1982 and it was readopted effective July 1, 2018. The rule provides that “An advertisement or product label on any alcoholic product sold or distributed in this State shall not contain any statement, design, device, or representation” which “depicts the use of alcoholic

beverages in a scene that is determined by the [ABC] Commission to be undignified, immodest, or in bad taste”. 14B N.C. Admin. Code 15B.1003(a)(2) (hereinafter “challenged regulation”).

In June 2021, plaintiff sent samples of beer labels and keg collars to the ABC Commission, including its label for its Freezin’ Season Winter Ale. On July 23, 2021, an ABC Commission employee, defendant Mesino, sent an email informing plaintiff that its Freezin’ Season Winter Ale beer label would not be approved. In response to plaintiff’s inquiry as to why, the employee cited the challenged regulation, highlighting the words “bad taste” in yellow and stating “[a]s you can see below the image below is seen as inappropriate to many here.” [DE 32 pp. 8-11].

Plaintiff then filed this First Amendment challenge to the regulation at issue. On September 7, 2021, the ABC Commission sent a letter to plaintiff approving its Freezin’ Season Winter Ale beer label. Since 1993, the ABC Commission has rendered administrative denials of 318 alcoholic beverage labels. Since 2009, 19 labels have been formally rejected as being undignified, immodest, or in bad taste.

B. *Analysis*

(1) Plaintiff’s beer label is commercial speech.

Whether speech is commercial or non-commercial impacts the degree of protection provided by the First Amendment. *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 65 (1983). Commercial speech is that expression which is “related solely to the economic interests of the speaker and its audience.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 561 (1980) (Central Hudson).

The only case of which the Court is aware that has squarely considered whether beer labels constitute commercial or non-commercial speech is *Bad Frog Brewery, Inc. v. New York State Liquor Authority*, 134 F.3d 87, 97 (2d Cir. 1998). The court in *Bad Frog Brewery* held that the

beer label at issue was commercial speech. This Court has considered plaintiff's argument that the Ralph Stedman artwork on its labels should be considered non-commercial speech. However, the Court agrees with defendants and the *Bad Frog Brewery* court that the label is ultimately designed to advertise and sell plaintiff's beer, and the label in its entirety is properly considered to be commercial speech.

The "mere fact that" something is an "advertisement[]" clearly does not compel the conclusion that [it is] commercial speech." *Bolger*, 463 U.S. at 66. "From *Bolger*, courts of appeals have gleaned 'three factors to consider in deciding whether speech is commercial: (1) is the speech an advertisement; (2) does the speech refer to a specific product or service; and (3) does the speaker have an economic motivation for the speech.'" *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 285 (4th Cir. 2013).

All three of these factors are satisfied here. The beer label is an advertisement. The speech is economically motivated, namely in order to sell beer. The second factor is less clear cut, but still weighs in favor of finding that the entire beer label, including Stedman's artwork, is commercial speech. Plaintiff admits that the design of its labels is meant entice customers to buy its beer. [DE 24] Amd. Compl. ¶ 36. Similarly, the Fourth Circuit concluded in *Wag More Dogs, LLC v. Cozart* that a mural on the wall of a doggy daycare business, which the business owner admitted was designed to attract customers, was properly considered commercial speech. 680 F.3d 359, 370 (4th Cir. 2012). This Court discerns no meaningful difference between the artwork on plaintiff's beer labels and the mural on the doggy daycare business at issue in *Wag More Dogs*. Accordingly, it concludes that the speech at issue is commercial. *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995) (parties agree that information on beer label is commercial speech); *Flying Dog Brewery, LLLP v. Michigan Liquor Control Comm'n*, 597 F. App'x 342, 354 (6th Cir. 2015)

(“Rubin resolved any doubt that First Amendment commercial speech principles apply to the content of beer labels.”).

(2) The challenged regulation is not a prior restraint on protected expression.

Plaintiff in its amended complaint and motion for summary judgment refers to the challenged regulation as a prior restraint, although it does not engage in a detailed analysis of the applicability of the prior restraint doctrine to this case. “Because traditional prior restraint principles do not fully apply to commercial speech, a State may require ‘a system of previewing advertising campaigns to insure that they will not defeat’ state restrictions.” *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 668 n.13 (1985) (quoting *Central Hudson*, 447 U.S. at 571 n.13).

As plaintiff has not advanced an argument that the challenged regulation is a prior restraint, and in light of the foregoing authority, the Court concludes that the challenged regulation is not a prior restraint.

(3) The challenged regulation fails the *Central Hudson* test.

Commercial speech is nonetheless protected from “unwarranted governmental regulation.” *Cent. Hudson*, 447 U.S. at 561. Although the Court agrees with plaintiff that the prohibition appears to be content-based, because the prohibition concerns commercial speech the intermediate scrutiny articulated in *Central Hudson* controls. See *Greater Philadelphia Chamber of Com. v. City of Philadelphia*, 949 F.3d 116, 138 (3d Cir. 2020) (noting that “the Supreme Court has consistently applied intermediate scrutiny to commercial speech restrictions, even those that were content- and speaker-based”).

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted

governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Cent. Hudson, 447 U.S. at 566. The *Central Hudson* analysis is applicable to both facial and as-applied challenges. *Educ. Media Co. at Virginia Tech v. Insley*, 731 F.3d 291, 298 (4th Cir. 2013).

It is undisputed that plaintiff's beer label concerns lawful activity and is not misleading. The questions which remain then are whether (a) defendants have asserted a substantial government interest which is (b) directly advanced by the challenged regulation and whether (c) the regulation is more extensive than is necessary to serve the state's interest.

(a) *Substantial government interest*

Defendants have advanced as North Carolina's substantial interest "preventing parents¹ and children from being surprised by sexually explicit and vulgar modes of advertising on ubiquitous beer labels" and "protecting children from exposure to vulgar language and speech that is sexually profane." [DE 34 pp. 1, 9]. Although plaintiff takes issue with defendants' asserted interest, the Court finds that "protecting the physical and psychological well-being of minors" is a substantial government interest. *Bad Frog Brewery*, 134 F.3d at 98.

(b) *Whether the interest is directly advanced*

In *Bad Frog Brewery*, the Second Circuit held that a similar regulation failed to directly advance the substantial government interest of protecting minors from vulgar and profane images. That court specifically addressed the same arguments made by defendants here – that the prohibition of distasteful and immodest beer labels would keep such labels from being seen by children. In rejecting that reasoning, the *Bad Frog* court held that such an "approach takes too narrow a view of the third criterion." *Bad Frog Brewery*, 134 F.3d at 100. The *Bad Frog* court

¹ "[A]dults have a First Amendment right to view and hear speech that is profane and scandalous." *In re Brunetti*, 877 F.3d 1330, 1353 (Fed. Cir. 2017).

further relied on its conclusion that prohibiting vulgar and profane beer labels would not materially advance any state interest because it could not “realistically be expected to reduce children’s exposure to such displays to any significant degree.” *Id.* at 99.

The *Bad Frog* court’s conclusion is persuasive, especially where the labels at issue are present on alcoholic beverages, which children are prohibited from purchasing. Defendants’ argument that, absent the challenged regulation, children will be ambushed by vulgar and sexually explicit alcoholic beverage labels while “shopping for the necessities of life” with their parents rings somewhat hollow in this day and age. However, the Court agrees with plaintiff in this case that, whatever North Carolina’s interest is in protecting minors from vulgar and profane images, as is discussed more fully below, the challenged regulation sweeps far too broadly in attempting to further that interest. Accordingly, even assuming, without deciding, that the regulation satisfies the third prong of the *Central Hudson* test, it plainly fails on the fourth. *See Recht v. Morrisey*, 32 F.4th 398 (4th Cir. 2022) (*Central Hudson* prongs are interrelated to an extent and answer to one may inform a judgment concerning others) (quoting *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 183-84 (1999)).

(c) *The regulation is more extensive than necessary*

Under the fourth prong of the *Central Hudson* analysis, “the party defending the regulation ‘must demonstrate narrow tailoring of the challenged regulation to the asserted interest—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.’” *Insley*, 731 F.3d at 300 (quoting *Greater New Orleans Broad. Ass’n*, 527 U.S. at 188).

The fit here is far from reasonable. The regulation prohibits speech determined by the ABC Commission to be undignified, immodest, or in bad taste, and the range of material that could be

determined to violate the regulation is vast. Defendants argue that the regulation is narrowly tailored to prevent alcohol labels which would ambush shoppers with “harmful vulgarity” [DE 34 p. 11] and is sufficiently flexible to “target[] certain vulgar words and images of a sexual, violent, or illegal nature”. [*Id.* p. 3]. But the regulation is not narrowly drawn to prohibit vulgar words or images of a sexual, violent, or illegal nature. It prohibits speech determined to be immodest, undignified, and in bad taste. These words and their common meanings, *see* [DE 38-2 pp. 6-13], cover a broad range of words and images which could include both explicit sexual images as well as images which are merely undignified, a term that is defined as “appearing foolish and unseemly” by Oxford Dictionaries online,² and as lacking honor or esteem by Merriam Webster. [DE 38-2 p. 6]. But to satisfy the *Central Hudson* test, the regulation must “be no more extensive than necessary to serve [the stated] interest.” *Rubin*, 514 U.S. at 486.

Plaintiff’s evidence demonstrating the inconsistency of the ABC Commission’s approval and rejections of alcoholic beverage labels as immodest, undignified, and in bad taste further supports that the regulation is not sufficiently tailored. *See In re Brunetti*, 877 F.3d 1330, 1353 (Fed. Cir. 2017). While defendants’ briefing raises concerns about sexually explicit content, none of the labels they identified as having been previously rejected as violating the challenged regulation contain sexually explicit depictions. Rather, they contain sexualized words, violent depictions, and swear words. *See* [DE 32 pp. 25 (“BeerGasm” label depicting clothed woman; 38 (“Columbian Necktie” label depicting violence); 48 (“The F Bomb” label depicting clothed paratrooper dropping beer bottles). However, defendants also *approved* labels containing sexual words, violent depictions, and swear words, as well as plaintiff’s Freezin’ Season label which defendants contend depicts a human penis. *See* [DE 38-2 pp. 85 (“Eff 2020” label depicting two

² https://premium.oxforddictionaries.com/us/definition/american_english/undignified (last visited May 11, 2022).

hands with only middle fingers raised); 91 (“Orgasm” label without image); 95 (“Ling Chi” label depicting violence).

Indeed, the Supreme Court has recently reaffirmed “the bedrock First Amendment principle [that] Speech may not be banned on the ground that it expresses ideas that offend.” *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017). There, in considering a challenge to the Lanham Act’s disparagement clause, Justice Alito noted that, even assuming using the *Central Hudson* test was appropriate in the context of the Lanham Act, the disparagement clause was not narrowly tailored to achieve any substantial government interest. *Id.* at 1764-65. Specifically, Justice Alito determined that when the government’s substantial interest is framed as “preventing speech expressing ideas that offend,” such an idea “strikes at the heart of the First Amendment.” *Id.* at 1764. Here, defendants have framed the state’s substantial interest more narrowly than simply preventing offensive speech, focusing instead on protecting “unwitting” minors. However, the Court is mindful that “the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense.” *Cohen v. California*, 403 U.S. 15, 21 (1971). In any event, the Court need only determine the question presented in this case – whether the challenged regulation prohibiting alcoholic beverage labels determined to be immodest, undignified, or in bad taste is sufficiently tailored to achieve the state’s articulated interest. It simply is not.

Plaintiff raises both a facial and as-applied challenge to the regulation. To the extent that plaintiff’s as-applied challenge to the regulation was not mooted when defendants approved plaintiff’s Freezin’ Season Winter Ale label after the commencement of this action, defendants have failed to “justify the challenged regulation with regard to its impact on the plaintiff[.]” *Insley*, 731 F.3d at 298. A facial challenge requires a plaintiff to, among other things, demonstrate that

the “law lacks any legitimate sweep” or that it is “overbroad because a substantial number of its applications are unconstitutional[.]” *Id.* n. 5 (quotations and citations omitted).

Plaintiff has made a sufficient showing that the challenged regulation is facially unconstitutional because it is overbroad and otherwise not narrowly tailored to achieve North Carolina’s proffered substantial interest. While the ABC Commission may regulate alcoholic beverage labeling beyond the limits of the definition of obscenity, it must do so in a manner that comports with *Central Hudson*. See also *Flying Dog Brewery*, 597 F. App’x at 355 (Supreme Court, Sixth Circuit precedent and persuasive opinion in “*Bad Frog Brewery* [] should have placed any reasonable state liquor commissioner on notice that banning a beer label based on its content would violate the First Amendment unless the *Central Hudson* test was satisfied.”).

CONCLUSION

Accordingly, for the foregoing reasons, defendants’ motion to dismiss the original complaint [DE 22] is DENIED AS MOOT, plaintiff’s motion for summary judgment [DE 27] is GRANTED and defendants’ motion for summary judgment [DE 33] is DENIED. Although plaintiff has discussed its stipulation concerning damages in its briefing, the Court DIRECTS the plaintiff to file a separate motion or stipulation as to damages. Once the issue of damages is resolved by separate order, the clerk will enter judgment and close the file.

SO ORDERED, this 13 day of May 2022.


TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA**

FLYING DOG BREWERY, LLC,

Plaintiff,

v.

THE NORTH CAROLINA ALCOHOLIC
BEVERAGE CONTROL COMMISSION,
A.D. “ZANDER” GUY, NORMAN A.
MITCHELL, SR., KAREN L. STOUT,
TERRANCE MERRIWEATHER, CINDY
MESINO,

Defendants.

Case No. 5:21-cv-00343-BO

**PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT**

Plaintiff Flying Dog Brewery, LLC (“Flying Dog Brewery”) hereby moves for summary judgment as to all Defendants.¹ The provision of the North Carolina Administrative Code used by Defendants to deny Plaintiff a permit to sell its “Freezin’ Season” beer, 14B NCAC 15B.1003(a)(2), is obviously unconstitutional, and no factual development in discovery could possibly change this. The Court can, and must, find as a matter of law that the provision is unconstitutional. Furthermore, there is no question that Defendants sued in their individual capacity are liable to Plaintiff, as they are not entitled to qualified immunity.

¹ Normally, Plaintiff would move for summary judgment only on liability, and then seek further discovery and trial on the issue of damages. However, as Plaintiff’s primary goal in this litigation is to remove the unconstitutional prior restraint created by 14B NCAC 15B.1003(a)(2) so that it (and other brewers) can design labels without the constant pall of censorship hanging over them, and its secondary goal is to be compensated for the damages suffered, Plaintiff will conditionally stipulate that each defendant is liable for \$1 in damages to Plaintiff. If, and only if, this Motion is granted, Plaintiff will seek no additional actual damages above that amount, without prejudice to any other relief permitted under 42 U.S.C. § 1988. Plaintiff does not waive its right to attorneys’ fees.

MEMORANDUM OF POINTS AND AUTHORITIES

1.0 INTRODUCTION

North Carolina imposes a prior restraint on artistic expression in the form of a regulation that requires any alcoholic beverage labels to be pre-approved by the government. Prior restraints are rarely, if ever, constitutionally permitted. However, this prior restraint grants the government the authority to censor expression if the government thinks that the expression is “undignified, immodest, or in bad taste.” *See* 14B NCAC 15B.1003(a)(2). This is clearly unconstitutional on its face. Plaintiff Flying Dog was censored under this regulation.

In a vain attempt to moot the case, Defendants changed direction and lifted the particular censorship that led to this case. Nevertheless, the unconstitutional regulation remains in force, and causes Plaintiff to need to commission its next label, while trying to predict how the State will use this regulation – an impossibility given the vagueness of the regulation. Accordingly, this regulation *reaches directly into the artist’s studio at Flying Dog Brewery*, and casts an unconstitutional chilling effect over any future art that Flying Dog (or any other alcohol producer) may wish to commission.

Flying Dog Brewery submitted its proposed label for its Freezin’ Season Winter Ale. It needed to do so in order to market, sell, and distribute the beer in the State of North Carolina and to do so with a label that permitted it to express itself in the manner which it chooses. The label featured the silhouette of a vaguely humanoid cartoon figure standing next to a campfire. Shortly after submitting its label to Defendants, they informed Flying Dog Brewery that the label was rejected. Defendants informed Flying Dog Brewery that its label violated the “in bad taste” portion of the regulation, and that it was additionally “inappropriate.”

This regulation violated Flying Dog Brewery’s First Amendment rights, as well as the First Amendment rights of any and all distributors or manufacturers of alcoholic beverages. Defendants were not constitutionally permitted to reject the label as “in bad taste.” It is a “bedrock principle” of the First Amendment that “*[s]peech may not be banned on the ground that it expresses ideas that offend.*” *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (emphasis added).

In opposing a motion for a preliminary injunction in this case, Defendants claimed that the regulation and their application thereof was required in order to “protect the children.” This explanation was inexplicable, as a review of the label reveals nothing that would tend to harm children. Nevertheless, let us presume that the ABC was being candid when it made this claim. Two days before the preliminary injunction hearing, the ABC decided, on its own, to *approve* the label. The children of North Carolina were either never in any danger, or they are now sacrificial lambs, burned at the altar of voluntary cessation.

In any event, the regulation must be swept away – for these very children – because those children have First Amendment rights, and as Americans, most will grow up to appreciate those rights, exercise those rights, and hopefully uphold and defend those rights. Therefore, if this Honorable Court wishes to entertain any “protect the children” argument in this matter, it should protect the First Amendment rights that make those children citizens in a free society.

The regulation violates the First Amendment by authorizing the application of an unconstitutional viewpoint-based regulation on speech – authority that the state wielded for decades without any restraint – only belatedly finding its Constitutional conscience when it was expedient for them to do so. It is appropriate for the Court to rule that this regulation is unconstitutional. No discovery is necessary, as no fact will change the Constitution or the fact that the unconstitutionality of the regulation at issue was well-established by 2021.

2.0 STATEMENT OF RELEVANT FACTS

2.1 Plaintiff Flying Dog Brewery, LLC

Plaintiff Flying Dog Brewery is a Delaware limited liability company with its headquarters and principal place of business in Frederick, Maryland. (*See* Statement of Undisputed Facts [“SUF”] at ¶ 1.) It creates, brews, and sells craft beers and is one of the top 50 craft breweries in the United States. (*See id.* at ¶ 2.) Annually, it ships over 1.3 million cases of beer worldwide to its network of wholesalers, who in turn distribute Flying Dog Brewery beers to its corporate customers in the retail, bar, and restaurant businesses. (*See id.* at ¶ 3.)

Flying Dog Brewery took its name from a painting of what appeared to be a flying dog hanging in a Pakistani hotel, at which brewery founder George Stranahan stayed after a Himalayan climbing expedition. (*See id.* at ¶ 4.) Appreciating the artwork’s can-do spirit, Stranahan later adopted this mascot and moniker for his brewery because it represents the idea that “it is amazing what you can achieve if nobody tells you that you can’t.” (*See id.* at ¶ 5.)

Stranahan and Flying Dog Brewery were influenced by Stranahan’s longtime friend and neighbor, the iconoclastic journalist and literary figure Hunter S. Thompson. (*See Id.* at ¶ 6.) Flying Dog Brewery’s identity, and that of its products, is imbued with and promotes the irreverent “Gonzo” spirit and outlook for which Thompson is noted. (*See id.* at ¶ 7.) Thompson often collaborated with the artist Ralph Steadman, most notably on their book “Fear and Loathing in Las Vegas,” to which Steadman contributed illustration. (*See id.* at ¶ 8.) Steadman is renowned for expressing social and political commentary through his art. Steadman has won numerous awards, including the Francis Williams Book Illustration Award for “Alice in Wonderland,” the American Society of Illustrators’ Certificate of Merit, the WH Smith Illustration Award for “I Leonardo,” the Dutch Silver Paintbrush Award for “Inspector Mouse,” the Italian Critica in Erba Prize for “That’s My Dad,” the BBC Design Award for postage stamps, the Black Humour Award in France, and several Designers and Art Directors Association Awards. (*See id.* at ¶ 9.) He was voted Illustrator of the Year by the American Institute of Graphic Arts in 1979. (*See id.*) As well as writing and illustrating his own books and Thompson’s, Steadman has worked with writers including Ted Hughes, Adrian Mitchell, and Brian Patten, and also illustrated editions of “Treasure Island,” “Animal Farm,” and “Fahrenheit 451.” (*See id.*) Steadman’s work has appeared in the New York Times, the Daily Telegraph, Rolling Stone, Punch, and Private Eye. (*Id.*)

Thompson introduced Flying Dog Brewery to Steadman and, 25 years ago, Plaintiff began a partnership under which Steadman produces, under license, illustration for Flying Dog Brewery’s corporate imaging. (*See id.* at ¶ 10.) Steadman’s illustrations grace the labels of Flying Dog Brewery’s beers and beer packaging and are also sold and otherwise distributed by Flying Dog Brewery on other merchandise, including posters and clothing. (*See id.* at ¶ 11.) Appreciation

of art, both the art of beer-craft and the visual arts, lies at the core of Flying Dog Brewery’s philosophy. (*See id.* at ¶ 12.) As Stranahan has noted, “Art is our first language and we like and agree with what Ralph Steadman chooses to say through his art on our labels; that this is a wonderful world on a wacky path.” (*See id.* at ¶ 13.) The dogs depicted on Flying Dog Brewery’s labels “are a reflection of the people we strive to be, carefree and spontaneous, rough around the edges but with real charm.” (*See id.* at ¶ 14.)

Flying Dog Brewery’s beers include Chesapeake Wheat American Wheat Ale, Vicious Hook Fruit Punch Sour, Raging Bitch Belgian IPA, Thunderpeel Hazy IPA, Snake Dog IPA, Gonzo Imperial Porter, Bloodline Blood Orange Ales, and Deep Fake, a non-alcoholic beer. (*See id.* at ¶ 15.) One of Flying Dog Brewery’s beers is a winter ale called Freezin’ Season. (*See id.* at ¶ 16.) The beer’s label contains the silhouette of a cartoon figure standing next to a campfire, along with a narrative description, as depicted below:



(*Id.* at ¶ 17.)

2.2 Defendant ABC Commission’s Tasks and Duties

In North Carolina, the ABC is tasked with providing uniform control over the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages in the state. It is an independent state agency housed in the North Carolina Department of Public Safety

directly reporting to the Governor’s office. The members of the Commission meet monthly to hear and take action on permit violations, requests for approval of new ABC store locations, and other matters within its regulatory authority.

North Carolina’s ABC laws are found in Chapter 18B of the North Carolina General Statutes, and the ABC Commission’s Rules are found in Title 14B, Chapter 15 of the North Carolina Administrative Code. The ABC Commission has the authority to regulate the advertising of alcoholic beverages, including the ability to “prohibit or regulate any advertising of alcoholic beverages which is contrary to the public interest.” NCGS § 18B-105(b)(11). No one is permitted to advertise or sell alcoholic beverages in North Carolina without complying with the ABC rules. *See* NCGS § 18B-105(a). There are administrative penalties for not complying with the ABC Commissions’ guidelines, including suspensions of permits for up to three years, revocation of a permit, and fines of up to \$5,000. *See* NCGS § 18B-104(a).

At issue in this case is the ABC Commission’s duty, pursuant to regulation, to determine whether an advertisement or product label on any alcoholic beverage sold or distributed in North Carolina is appropriate. *See* 14B NCAC 15B.1003. That regulation operates as an unlawful prior restraint because it provides, in pertinent part: “*An advertisement or product label on any alcoholic product sold or distributed in this State shall not contain any statement, design, device, or representation that depicts the use of alcoholic beverages in a scene that is determined by the Commission to be **undignified, immodest, or in bad taste.***” *See* 14B NCAC 15B.1003(a)(2) (emphasis added). Therefore, there is a prior restraint before anyone can engage in this kind of speech in the state, and that prior restraint is only lifted once the government decides that the label meets its level of “dignity,” “modesty,” or “good taste.” This prior restraint also acts as a chilling effect on anyone seeking to create a label or ad for an alcoholic product in North Carolina, as a person of ordinary intelligence could never guess what the ABC would consider to be “undignified,

immodest, or in bad taste.”² “[O]ne man’s vulgarity is another’s lyric.” *Cohen v. California*, 403 U.S. 15, 25 (1971).

The regulation is, on its face, in “constitutional bad taste,” as it clearly violates the First Amendment. To the extent that Defendants would even be able to argue that the regulation is not facially unconstitutional, Defendants’ application of the regulation was clearly arbitrary, capricious, and in violation of the First Amendment.

2.3 The Present Dispute

On or about July 16, 2021, Flying Dog Brewery sent various samples of beer labels and keg collars to the ABC Commission. (*See* SUF at ¶ 20.) Among the labels and keg collars submitted was the aforementioned label for Freezin’ Season Winter Ale. (*See id.* at ¶ 21.) On July 23, 2021, Cindy Mesino, an ABC Commission employee, sent an email to Flying Dog Brewery, informing it that the ABC Commission, and the individual commissioner Defendants named herein, did not approve the label for the twelve ounce Freezin’ Season bottle. (*See id.* at ¶ 22.) When Flying Dog Brewery asked why the label was not approved, ABC said, in writing, that it was denied under “Rule 15b 1003-3(2).” (*See* Dkt. No. 5-4.) The reason given was: “... *we were going by the following regulation: As you can see below the image below is seen as inappropriate to many here.*” The ABC then cited the applicable rule, which allows the Commission to disapprove labels that are determined by the Commission to be “*undignified, immodest, or in bad taste.*” (*Id.*) (Highlight and double underlines appear in original).

In their Response to the Motion for Injunctive Relief, Defendants *now* claim that the label was rejected because it was “*immodest.*” (*See* Dkt. No. 17, at 1-2.) Given that the ABC both highlighted and double-underlined the “*bad taste*” portion of the regulation, the ABC’s revised explanation should not be credited. Nevertheless, whether the rejection was due to

² One might wonder if there could simply be alternate labels created. First, this would not alleviate the Constitutional concerns. Further, such analysis ignores the realities of supply chains and shelf-space considerations.

it being “in bad taste,” or “immodest,” or because it is “inappropriate to many here,” the analysis is the same – the regulation itself is unconstitutional and must be struck down.

Due to the regulation itself, and its application, Flying Dog Brewery was restrained from advertising and making commitments to sell Freezin’ Season in North Carolina. Had it not bent the knee to this regulation, subjecting itself to the prior restraint therein, it would have suffered from even greater penalties. Flying Dog Brewery’s inability to advertise and commit to sell Freezin’ Season in North Carolina damaged Flying Dog Brewery by unlawfully depriving it of its right to free expression and costing it significant sales of Freezin’ Season beer and ancillary Freezin’ Season products, as well as generally damaging Flying Dog Brewery’s goodwill in North Carolina and thus hurting the sales of Flying Dog Brewery’s other beers and products that may legally be sold in North Carolina. (*See* SUF at ¶ 23.)

Flying Dog Brewery designs its labels for approval by federal and state authorities in order to ensure that it can meet its commitments to its distributors and to ensure that its beers are on retail shelves throughout its distribution area. (*See id.* at ¶ 24.) The label for Freezin’ Season Winter Ale received a Certificate of Label Approval from the Alcohol and Tobacco Tax and Trade Bureau, which is part of the U.S. Department of the Treasury, and approval from every state within its distribution network with one exception: North Carolina. (*See id.*)

On September 7, 2021, shortly after Flying Dog Brewery filed suit, the Commission sent a letter to Flying Dog Brewery’s attorneys stating that the Freezin’ Season label had all of a sudden been approved. (*Id.* at ¶ 25.) This was a transparent attempt to evade judicial review of an unconstitutional regulation. As the Court observed in its Order denying Flying Dog Brewery’s Motion for a Preliminary Injunction, the continuing existence of this regulation creates an ongoing controversy. (Dkt. No. 20 at 5.) The Court should waste no further time nor judicial or party resources in striking down the regulation. This is particularly so given that of the 318 label denials it has rendered under this regulation since 1993, the Commission has only heard 5 appeals, and

after hearing such administrative appeals, has reversed itself zero times. (SUF at ¶ 27.)³ It is an unconstitutional regulation, applied unconstitutionally, and has no saving graces.

3.0 LEGAL ARGUMENT

3.1 Standard of Review

Summary judgment is appropriate where “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). In assessing a motion for summary judgment, the evidence, together with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to show specific facts demonstrating a dispute of material fact for trial. *Matsushita*, 475 U.S. at 587. A “material fact” is a fact “that might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the non-moving party makes evidentiary arguments that are merely colorable or not significantly probative, summary judgment is appropriate. *Id.* at 249-50.

3.2 14B NCAC 15B.1003(a)(2) is Unconstitutional and Defendants Violated Flying Dog Brewery’s First Amendment Rights by Applying it

Defendants rejected the Freezin’ Season Winter Ale label under a regulation that gives them the power to censor any label they find in “bad taste” or believe to be “inappropriate.”

³ Counsel for Plaintiff has only surveyed all administrative decisions back to 2013, because that is as far back as decisions are published without Plaintiff needing to resort to a Public Records Act request. (*See id.* at ¶ 26.) However, it should be safe to assume that an eight-year sampling showing precisely zero administrative reviews concerning this regulation resulting in a change of heart to demonstrate that appeals are neither necessary, proper, given any semblance of due process, nor are anything short of futile. And more importantly for the analysis of the voluntary cessation doctrine, are so rare that this reversal stands as the first one in accessible, if not recorded, history. What ennobled this label to such an exalted position? The instant lawsuit and the pang of fear that they finally got caught by someone with the wherewithal to file a lawsuit out of patriotic duty. This act should be seen for what it is, and not rewarded.

Defendants’ position “offends a bedrock First Amendment principle: *Speech may not be banned on the ground that it expresses ideas that offend.*” *Tam*, 137 S. Ct. at 1751 (emphasis added).

Flying Dog Brewery’s labels have expressive components with detailed and humorous artwork that are not limited solely to promoting its products. The Supreme Court in *Tam* did not decide the question of whether trademarks, i.e., speech comparable to beer label art, is commercial speech or expressive speech entitled to full First Amendment protections. *Tam*, 137 S. Ct. at 1764. However, Defendants’ regulations are unconstitutional even if Flying Dog Brewery’s labels are deemed to be mere commercial speech, which is “expression solely related to the economic interests of the speaker and its audience.” *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 561 (1980). The First Amendment, as applied to individual states through the Fourteenth Amendment, protects “commercial speech from unwanted governmental regulation.” *Id.* (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761-62(1976)); see also *Davenport v. Alexandria*, 710 F.2d 148, 148 n.1 (4th Cir. 1983). The expression of commercial speech “not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.” *Cent. Hudson*, 447 U.S. at 561-62.

In order to regulate commercial speech that is “neither misleading nor related to unlawful activity,” the “State must assert a substantial interest to be achieved by restrictions on commercial speech.” *Id.* at 564. The “regulatory technique must be in proportion to that interest,” and the “limitation on expression must be carefully designed to achieve the state’s goal.” *Id.* In other words, to survive, a restriction on commercial speech must serve a “substantial interest,” and it must be “narrowly drawn.” *Matal*, 137 S. Ct. at 1764. Among other things, this means that the “regulatory technique may only extend as far as the interest it serves.” *Id.* (quoting *Cent. Hudson*, 447 U.S. at 565.) And it is no solution to state that Flying Dog can just change its label or not sell beer in this state – as this violates the doctrine of unconstitutional conditions as articulated clearly in the *Tam* decision. See *In re Tam*, 808 F.3d 1321, 1349 (Fed. Cir. 2015).

In this instance, this regulation permits the ABC to reject speech that it determines is “undignified, immodest, or in bad taste.” *See* 14B NCAC 15B.1003(a)(2). In rejecting Flying Dog Brewery’s label, Defendants’ representative specifically stated that Defendants found the label “in bad taste” and “inappropriate.” Thus, the point of the regulation could not be more clear: The ABC and its Defendant members claim to have a substantial “interest in preventing speech expressing ideas that offend.” *Matal*, 137 S. Ct. at 1764.

Setting aside whether Plaintiff’s label is explicit, which it is not,⁴ the regulation facially discriminates against speech that some⁵ may find distasteful, which “strikes at the heart of the First Amendment.” *Id.* Regulations, such as the one enforced by Defendants at issue in this case conflict with the “proudest boast of our free speech jurisprudence”: that the First Amendment to the United States Constitution “protect[s] the freedom to express ‘the thought that we hate.’” *Id.* (quoting *U.S. v. Schwimmer*, 279 U.S. 644, 655 (Holmes, J., dissenting)). Not that anyone hates the Freezin’ Season label, but if truly hateful speech is protected, certainly a whimsical and inoffensive figure by a beloved artist is protected.

Defendants’ bar on labels that are “inappropriate” or “in bad taste” are content-based restrictions on speech. A restriction on speech is content-based when it either seeks to restrict, or on its face restricts, a particular subject matter. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). Restrictions on speech based on the message conveyed are presumptively unconstitutional. *See Turner Broadcasting System, Inc., v. FCC*, 512 U.S. 622, 641-43 (1994). This presumption is stronger when a restriction is based not just on subject matter, but on a particular viewpoint about that subject. *See R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992). Restrictions on speech where the rationale is the opinion or viewpoint of the speaker are impermissible. *See Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 46 (1983).

⁴ In opposing Flying Dog Brewery’s Motion for a Preliminary Injunction, Defendants argued that the Freezin’ Season label contained a sexually explicit depiction of an uncovered penis that *children* could see in stores. (Dkt. No. 17 at 3-4.) It is inconceivable that anyone of any age could be scandalized by the mere *suggestion* of a penis with no discernible features.

⁵ Specifically, “some” in this instance refers to the four members of the ABC Commission.

Defendants' restrictions here are virtually indistinguishable from the Lanham Act's prior bars on registrability of "disparaging" and "immoral or scandalous" trademarks. The Supreme Court found that these categories of restrictions are unconstitutional viewpoint-based restrictions on speech. *See Tam*, 137 S. Ct. at 1763 (in finding "disparagement" bar unconstitutional, noting that "in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint"); *see also Iancu v. Brunetti*, 139 S. Ct. 2294, 2299-2301 (2019) (in finding "immoral or scandalous" bar unconstitutional, noting that these terms were interpreted to mean "shocking," "offensive," and "disreputable," and thus constituted viewpoint-based discrimination). There is no daylight between Defendants' restrictions and what the Supreme Court has already found unconstitutional. On their face, these restrictions are viewpoint-based. Defendants cannot have a substantial interest in regulating commercial speech that they believe is "in bad taste" or "inappropriate." The First Amendment explicitly protects such speech.

Moreover, even if Defendants could show that the regulation furthers a substantial government interest, which it does not, the regulation is not "narrowly tailored" to further that interest. According to the ABC Commission's regulations, their purpose is to "provide regulation and control of the manufacture, distribution, advertisement, sale, possession and consumption of alcoholic beverages to serve the public health, safety and welfare." 14B NCAC 15A.0101.

The regulation does not define what it means by "undignified, immodest, or in bad taste." *See* 14B NCAC 15B.1003(a)(2). It leaves that determination to the subjective whims of the ABC Commission and its members. The determination that this is a license to engage in censorship on mere personal whims is highlighted by the fact that in trying to moot the case, the ABC simply reversed itself, for the first time in its history. What interest could the initial censorship have served, then? Defendants argued that it was to "protect the children." (Dkt. No. 17 at 3-4.)

However, once the Defendants wanted to try to moot a lawsuit, these same children were appropriate to use as child-sacrifice at the altar of the ABC’s desire to avoid a loss at a hearing.⁶

The regulation at issue can never be narrowly tailored to serve a compelling government interest because it is specifically drafted to violate a bedrock principle of First Amendment jurisprudence, namely that speech cannot be prohibited because it expresses ideas that offend.

The regulation prohibits anything that some or all of the members of the ABC Commission find “distasteful.” Prohibiting speech for being distasteful already runs afoul of First Amendment principles. However, the regulation in question here depends upon what the individual members of the ABC Commission find distasteful or inappropriate. In other words, the exact same Freezin’ Season Winter Ale label that Defendants found inappropriate in 2021 might be found wholly appropriate and approved if the ABC Commission has new members in the future – or if they wish to cynically try to evade judicial review – a hypothetical that has come to pass in this record.

3.3 The Commission and its Members are Liable for the Actions of Their Staff

In their Motion to Dismiss (Dkt. No. 23)⁷, Defendants took the position that they are not liable for Flying Dog Brewery’s injuries because they did not refuse approval of the Freezin’ Season label, but rather a staff member, Defendant Mesino, did. Defendants cannot hide behind their subordinates. Their position is that the Commission did nothing wrong, because Ms. Mesino was responsible, and Ms. Mesino is not responsible because she was just following orders. And just like that, *poof!* Liability disappears! Not so fast.

As to the Commission itself, there is no *respondeat superior* liability under 42 U.S.C. § 1983. However, liability may be imposed upon a municipality or other political subdivision where the constitutional deprivation is a result of an unconstitutional custom, policy, or practice. *Monell v. Department of Social Services*, 436 U.S. 658, (1978). Such liability may be imposed (1) where

⁶ Perhaps Flying Dog’s next beer could be “Sacrificial Lambs” dedicated to the children of North Carolina. This would certainly, and intentionally, be “undignified” in its portrayal of the ABC.

⁷ Which is now moot, due to the Amended Complaint filed on October 29, 2021. (Dkt. No. 24.)

there is an express policy, such as an ordinance, regulation, or policy statement; (2) a widespread practice that, although not authorized by written law or express policy, is “so permanent and well settled as to constitute custom or usage with the force of law”; or (3) the decision of the person with “final policymaking authority.” *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988). Likewise, “acquiescence in a long-standing practice or custom which constitutes the ‘standard operating procedure’ of the local government entity” is sufficient to impose liability.” *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989). Where a government’s authorized decision maker adopts a particular course of action, “the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly.” *Pembaur v. City of Cincinnati*, 45 U.S. 469, 481 (1986).

The standard is different for government officials with supervisory authority over those who actually cause a constitutional injury. In such circumstances, a plaintiff must show:

- (1) That the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to . . . the plaintiff; (2) that the supervisor’s response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices; and (3) that there was an affirmative causal link between the supervisor’s inaction and the particular constitutional injury suffered by the plaintiff.

Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994).

As a factual matter, the Commission and its members’ argument is unsound. They place significance on Mesino stating that “[t]he 12oz label will not be approved but I can approve the keg collar,” but completely ignore that in the same email chain, Mesino states “[y]es, we were going by the following regulation.” (Dkt. No. 5-4 at 2) (emphasis added.) It is apparent from the text of Mesino’s email itself that this was a decision of the Commission and its members, not some rogue government employee.

The Commission’s position is also legally unsound. There is no question that the Commissioners were aware of Mesino’s actions in applying 14B NCAC 15B.1003(a)(2) to reject

beer labels that were “undignified, immodest, or in bad taste.” As a Commission employee, she was required to make such determinations, and the Commissioners actively encouraged her to do so. To assert ignorance of an employee’s actions in applying an official regulation the Commission was tasked with enforcing is simply not credible. To the extent the Commissioners may assert that they are not liable because they were unaware of Mesino’s actions in this specific case, this misses the point. 14B NCAC 15B.1003(a)(2) is unconstitutional on its face and in its entirety; *any* refusal based on this regulation is a constitutional violation. Knowing that an employee may make a refusal based on this regulation constitutes knowledge that the employees were “engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to” Flying Dog Brewery. *Stroud*, 13 F.3d at 799. Despite having actual knowledge of this, the Commissioners did nothing to stop the enforcement of 14B NCAC 15B.1003(a)(2). This inaction shows a causal link to Flying Dog Brewery’s injuries, as Mesino used this regulation to refuse the Freezin’ Season label. The Commissioners are liable for Mesino’s actions.

There is also no question that the Commission itself is subject to *Monell* liability. Mesino’s actions, for which the individual Commissioners are liable, were taken pursuant to an official, codified, policy, 14B NCAC 15B.1003(a)(2). This was not a lone employee going off the reservation to deny permission for use of a label for reasons of her own. Rather, Mesino was an employee doing her job, with the full knowledge and permission of the Commission, in applying an unconstitutional regulation. The Commission is also liable.

3.4 Flying Dog Brewery’s Claim is Not Moot

Flying Dog Brewery has already provided briefing in response to Defendants’ contention that this case is moot because of its voluntary cessation of its unconstitutional conduct. It incorporates that briefing by reference here to avoid repetition. (*See* Dkt. No. 18 at 3-7.) Furthermore, the Court has agreed with Plaintiff’s position and found in its order granting Plaintiff’s motion for a preliminary injunction that there is still an active case or controversy here because Defendants are free to change their minds at any time regarding the Freezin’ Season label. (Dkt. No. 20 at 5) (stating that “the fact that defendants have now approved its Freezin’ Season

Winter Ale label does not prevent them from reversing their decision in the future, and indeed there is no evidence or argument which would suggest that the commissioners would be prevented from reversing their September 7, 2021 decision after a period of time.”) This case is not moot.

3.5 Summary Judgment as to the Individual Defendants is also Appropriate

There is no dispute that 14B NCAC 15B.1003(a)(2) is unconstitutional. The only question remaining, then, is whether the Commission members named as defendants in their individual capacities are liable to Flying Dog Brewery for their unconstitutional actions in denying a permit to sell beers with the Freezin’ Season label. They are.

The Eleventh Amendment does not provide any immunity to state officials sued in their individual capacity, but such defendants may be protected under the common-law doctrine of qualified immunity. This doctrine “shields government officials from liability for civil damages, provided that their conduct does not violate clearly established statutory or constitutional rights within the knowledge of a reasonable person.” *Meyers v. Baltimore County, Md.*, 713 F.3d 723, 731 (4th Cir. 2013). In the Fourth Circuit, a defendant state official bears the burden of proof and persuasion to show that qualified immunity applies. *Id.* This immunity does not apply in § 1983 claims if “(1) the allegations, if true, substantiate a violation of a federal statutory or constitutional right and (2) the right was ‘clearly established’ such that a reasonable person would have known his actors or omissions violated that right.” *York v. City of Burlington*, 225 F. Supp. 3d 341, 346 (M.D.N.C. 2016). Although “[the] caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.” *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam).

As explained above, the Supreme Court made it crystal clear that a regulation on commercial speech was unconstitutional if it restricted speech based on whether it offends others. *See Matal*, 137 S. Ct. at 1751; *see also Brunetti*, 139 S. Ct. at 2299-2301. These cases were decided years before Defendants’ decision not to allow the sale of beer with the Freezin’ Season label.

Further, this was hardly some obscure case. The *Matal* case is quite famous, and was at the time of its decision.⁸

Defendants knew this; *immediately* after being sued for rejection of the Freezin’ Season label, Defendants did an abrupt about-face with no explanation and approved it. This action lights up the marquee announcing the claims against the commissioners in their individual capacities – it shows that no reasonable commissioner would have supported the use of the regulation at issue. Before *Matal* and *Brunetti*, other federal circuits made it clear that it was plainly unconstitutional for state liquor licensing boards to make content-based restrictions on labels. *See Flying Dog Brewery, LLLP v. Mich. Liquor Control Comm’n*, 597 F. App’x 342, 355 (6th Cir. 2015) (reversing a grant of qualified immunity in an identical case and noting that by 2009, there was a clear line of Supreme Court commercial speech precedent as well as multiple Circuit decisions that “*should have placed any reasonable state liquor commissioner on notice that banning a beer label based on its content would violate the First Amendment unless the Central Hudson test was satisfied*”); *Sambo’s Rest., Inc. v. City of Ann Arbor*, 663 F.2d 686, 695 (6th Cir. 1981) (finding that revocation

⁸ *See* Marc Randazza, “Rock band The Slants’ victory in court secures your rights,” CNN (June 20, 2017) (available at: <https://edition.cnn.com/2017/06/19/opinions/free-speech-scotus-randazza-opinion/index.html>);

Bill Chappell, “The Slants Win Supreme Court Battle Over Band’s Name In Trademark Dispute,” NPR (June 19, 2017) (available at: <https://www.npr.org/sections/thetwo-way/2017/06/19/533514196/the-slants-win-supreme-court-battle-over-bands-name-in-trademark-dispute>);

David G. Savage, “Supreme Court rules the Slants may trademark their name, striking down law banning offensive terms,” LOS ANGELES TIMES (June 19, 2017) (available at: <https://www.latimes.com/politics/la-na-pol-court-slants-disparate-trademark-20170619-story.html>);

Joe Coscarelli, “Why the Slants Took a Fight Over Their Band Name to the Supreme Court,” NEW YORK TIMES (June 19, 2017) (available at: <https://www.nytimes.com/2017/06/19/arts/music/slants-name-supreme-court-ruling.html>);

Kory Grow, “Inside Asian-American Group the Slants’ Supreme Court Free-Speech Win,” ROLLING STONE (June 20, 2017) (available at: <https://www.rollingstone.com/music/music-news/inside-asian-american-group-the-slants-supreme-court-free-speech-win-194267/>);

Charles Lam, “The Slants founder Simon Tam details Supreme Court case in new memoir,” ABC (Apr. 19, 2019) (available at: <https://www.nbcnews.com/news/asian-america/slants-founder-simon-tam-details-supreme-court-case-new-memoir-n995616>).

of restaurant’s permit to display name “Sambo” violated plaintiff’s First Amendment rights because there was no evidence use of the name harmed government interested in furthering racial equality); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (finding that total government ban on placing alcohol content on beer labels violated the First Amendment); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996) (finding ban on advertisements displaying information about prices of alcoholic beverages violated First Amendment).

Of course, even without this clarity, the commissioners could have even been willfully blind as to the law that the Sixth Circuit found to be crystal clear by 2009 – as they clearly had to reference their own regulation. That regulation is annotated with a reference to a decades-old decision, *Daniel W. Shelton t/a Shelton Broers v. NC Alcoholic Beverage Control Commission* (99 ABC 1641) (Dkt. No. 18-3). That decision recommends that the Commission “reconsider the constitutionality of a regulation creating an absolute blanket prohibition on any nudity of any type on beer bottle labels, without regard to whether that nudity is obscene.” *Id.*

Given that the Commission itself was on notice that regulations like 14B NCAC 15B.1003(a)(2) were unconstitutional, and both federal circuit courts and the Supreme Court found that content and viewpoint-based restrictions on alcohol labeling and trademarks are unconstitutional, the right of a seller of alcohol to sell beer with expressive labels, whether or not they were “offensive” to someone, was clearly established by 2021. Any reasonable person in Defendants’ situation would be aware of this, and it is inconceivable that Defendants were ignorant of this line of caselaw. They had actual knowledge they were violating the well-established constitutional rights of Flying Dog Brewery when they refused to permit the sale of beer with the Freezin’ Season label, yet they did so anyway. Defendants’ immediate reversal of their decision upon Flying Dog Brewery filing suit, as well as their shifting justifications for their initial refusal,

is only further evidence that they knew what they were doing was wrong. There is no need for factual development on this issue; the individual Defendants are not entitled to qualified immunity.

3.6 Damages

Although Flying Dog Brewery has suffered significant damages as a result of Defendants’ unconstitutional actions, its main purpose in this litigation is to strike down 14B NCAC 15B.1003(a)(2). In the interest of resolving this matter in a more expedient manner, Flying Dog Brewery is willing to stipulate, solely for purposes of this Motion, to \$1 in damages from each individual Defendant in lieu of an award of actual damages. *See Webb v. Cent. Fla. Invs., Inc.*, No. 5:18-cv-01304, 2020 U.S. Dist. LEXIS 220977, *10-11 (S.D. W.Va. Nov. 25, 2020) (finding stipulation to limit damages for jurisdictional purposes binding on plaintiff). Should summary judgment be denied, Flying Dog Brewery reserves the right to provide evidence of and seek an award of full damages. Flying Dog Brewery does not offer any stipulations regarding other forms of relief allowed for under 42 U.S.C. § 1988. *See Doe v. Rector & Visitors of George Mason Univ.*, No. 1:15-cv-2019, 2016 U.S. Dist. LEXIS 80947, *4-5 (E.D. Va. June 21, 2016) (awarding attorneys’ fees after granting summary judgment, awarding only injunctive relief).

4.0 CONCLUSION

The Court should enter summary judgment in Flying Dog Brewery’s favor.

Dated: October 29, 2021.

Respectfully Submitted,

/s/ Marc J. Randazza

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 29, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I further certify that a true and correct copy of the foregoing document being served via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Marc J. Randazza

Marc J. Randazza

RANDAZZA | LEGAL GROUP

**THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
CASE NO. 5:21-cv-343**

FLYING DOG BREWERY, LLC,)
Plaintiff,)

v.)

THE NORTH CAROLINA ALCOHOLIC)
BEVERAGE CONTROL COMMISSION,)
ALEXANDER DUKE “ZANDER” GUY)
JR., NORMAN A. MITCHELL SR.,)
KAREN L. STOUT, TERRANCE L.)
MERRIWEATHER, and CINDY)
MESINO,)
Defendants.)

**DEFENDANTS’ RESPONSE TO
PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT**

Defendants respectfully submit the following response to Plaintiff’s Motion for Summary Judgment.

Statement of the Facts

Producers and distributors of alcohol are required to submit labels and certain other advertisements for preapproval to the Commission to ensure their compliance with the regulations of the Commission. 14B NCAC 15C .201. Labels must have certain critical product information, and 14B NCAC 15B 1003 prohibits label content such as certain misleading information, health-related claims, and appeals to underage persons. The challenged regulation in this case, 14B NCAC 15B 1003(a)(2) (“the regulation”), requires that labels for alcoholic beverages not be undignified, immodest, or in bad taste. It has been in place and enforced by the Commission since 1982.

In 2014, the Commission began a legally required periodic review of its administrative rules. (Exh. 3, ¶ 5). In 2015, the Commission preliminarily determined the regulation was a necessary rule and of public interest and therefore solicited public comment. The Commission

received only one comment, which was from NC Beer and Wine Wholesalers stating the regulations in the subchapter were “necessary.” (underlined in the original) (Exh. 3, ¶ 6; Exh. 3.1). Necessary rules with potential public interest are required to be readopted through the rulemaking process. (Exh. 3, ¶ 7). The regulation was published in the North Carolina Register – no comments were received. (Exh. 4, ¶ 6). The regulation then went before the Rules Review Commission, which can reject rules if they are unnecessary, not within an agency’s delegated authority, or not clear and unambiguous. The Rules Review Commission received no comment and approved the rule. (Exh. 4, ¶ 7).

There are currently over 101,131 active wine products and 39,074 active beer products in North Carolina, which must comply with the regulation. (Exh. 1, ¶ 12). The Commission has reviewed approximately 21,561 labels so far this year, around 1,800 to 2100 a month. (Exh. 2, ¶ 4). “The Defendants have found 118 labels that have been formally disapproved since 2013 under 14B NCAC 15B 1003. The majority of these labels have been disapproved due to a failure to provide complete information, with items missing or incomplete items like required information on the label or a distributor’s agreement. Other common reasons for denial include its appeal to persons under the age of 21, the use of flags or other government emblems, misleading information, and cooperative advertising.” (Exh. 2, ¶ 5). The Defendants have found 19 prior instances going back to 2009 when labels have been rejected under the “undignified, immodest, or bad taste” clause. (Exh. 1, ¶ 13); (Exh. 2, ¶ 6); (Exh. 3, ¶¶ 12-15). Only two of these determinations have been appealed to the Commission, both of which have been denied. (Exh. 3, ¶ 13).

While having a necessarily flexible meaning, a review of the applications of the regulation shows it has a clear meaning – targeting certain vulgar words and images of a sexual,

violent, or illegal nature not because of the ideas they express but the mode of their expression will ambush unsuspecting shoppers around the State. The good people of the State of North Carolina have been deprived of such fine labels as MILF Cream, Nasty Naughty Slut Dog Wine, and a depiction of a person with their throat slit with their tongue pulled through the hole in what is known as a Columbian Necktie. (Exh. 1, ¶ 13a); (Exh. 2, ¶¶ 7a and 7b).

It typically takes two to three weeks for a label to be reviewed, although this may vary somewhat depending upon the caseload of the staff. (Exh. 1, ¶ 6). If the staff does not initially approve the label, they will notify the applicant, and the common practice is for the applicant to reach back out to Commission staff to try to resolve the issue, make modifications, or withdraw the application. If the situation cannot be resolved at the staff level, the applicant may appeal the initial denial to the Commission. (Exh. 1, ¶¶ 9–10). The matter will be placed on the agenda for the next monthly meeting of the Commission unless it is within less than two weeks, in which case it will be heard at the next month's meeting. (Exh. 3, ¶ 10). If the application is rejected, the applicant is entitled to a de novo hearing on the issue by commencing an action in the Office of Administrative Hearings under the North Carolina Administrative Procedure Act. N.C.G.S. § 150B-23. It is also worth noting that an aggrieved applicant may seek a declaratory ruling from the Commission on either the continuing validity of a regulation or the application of the regulation to a factual situation and that this ruling is immediately subject to judicial review. 14B NCAC 15A .0601 and .0608.

On July 16, 2021, Jlynn Yamrus of Offit Kurman Attorneys at Law, on behalf of the Plaintiff, sent the Commission the labels and keg collars for the Freezin' Season Ale for approval under 14B NCAC 15C .0201. The label depicts a masked nude human figure outdoors in a snowy mountainous scene by a fire. (Docket No. 1, ¶ 5). His penis can be clearly seen dangling

between his legs, and the line going up the front of his right thigh to his pelvis removes any doubt it is depicting a penis. Cindy Mesino, an ABC Administrative Specialist, assigned to product review, reviewed the label and determined it violated the regulation. (Exh. 1, ¶¶ 2–3). After consulting with other Administrative Specialists assigned to product review, Jennifer Carabajal, Stone Pegram, and KRhonda Atwater, she engaged in an email exchange on July 23, 2021 with Yamrus contained below:

Mesino: The following products have been approved:

Dark Berry Sour Ale Brewed w/Blueberry/Vanilla/Lactose/Raspberry Natural Flavor - 00193925B

Freezin Season Winter Ale - The 12oz label will not be approved, but I can approve the keg collar.

Yamrus: What do I need to do to have the 12 oz label approved? Thank you for your patience while I learn what is acceptable and what isn't.

Mesino: Yes, we were going by the following regulation: As you can see below the image below is seen as inappropriate to many here.

Rule 15b 1003 – 3

(2) depicts the use of alcoholic beverages in a scene that is determined by the Commission to be undignified, immodest, or in bad taste; (highlighted and underlined in the original)

(Docket No. 5-4); (Exh. 1.1)¹.

In composing the email, Mesino sent a screenshot of the regulation from her personal notes she drafted on a Microsoft Word document. She searched the document for the term bad taste using Word Navigator (Ctrl+F) as a means of finding the regulation, not with an intent to highlight it. The search highlighted only bad taste, and taste was double-underlined by an

¹ In Defendant's Appendix to Local Civil Rule 56.1 Statement of Material Facts, five declarations are attached as exhibits and labeled as Exhibits 1 through 5. These declarations cite to numbered exhibits that are attached to them. Attachments to the declarations are cited as the Exhibit number of the declaration, period, the exhibit number cited in the declaration. For example, this cite is to Exhibit 1 within the declaration of Mesino, which is Exhibit 1. It is therefore cited as Exh. 1.1. The second exhibit in Mesino's declaration would be cited as Exh. 1.2.

autocorrect program due to the semicolon at the end of the sentence. (Exh. 1, ¶ 7). The effect is recreated in Exhibit 1.2. (Exh. 1, ¶ 8). She then placed the file into a pending status and did not send out a formal rejection letter, expecting the brewery to reach back out to her. (Exh. 1, ¶ 9).

Instead of attempting to resolve the issue with the staff or raising the issue before the Commission for an agency decision at the August 11, 2021, monthly meeting, the Plaintiff decided to preserve their putative cause of action. Over two weeks after the Commission meeting, the Plaintiff filed an “urgent” complaint on August 26, 2011. On September 7, 2021, the Commission sent a letter approving the label. They have since filed an amended complaint and immediately moved for summary judgment.

Standard of Review

Summary judgment is appropriate when there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material if it would affect the disposition of the case, and an issue of material fact is genuine if a reasonable juror could find in favor of the nonmoving party. *Wai Man Tom v. Hospitality Ventures, LLC*. 980 F.3d 1027, 1037 (4th Cir. 2020) (citations omitted). Factual disputes that could not affect the outcome of the case will not preclude summary judgment. *Id.* at 1037. However, all reasonable inferences and ambiguities must be made in favor of the nonmoving party. *Id.* at 1037.

Argument

I. As further detailed in the Memorandum Supporting Defendants’ Motion for Summary Judgment, the regulation at issue in this case is a constitutional limitation on commercial speech

Beer labels are commercial speech. *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (analyzing a federal statute prohibiting beer manufacturers from printing alcohol content on beer

labels under the commercial speech doctrine). Commercial speech is subject to greater regulation than non-commercial speech; limitations on commercial speech are analyzed under the test established in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562-64 (1980) (noting that “[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression”). The key inquiry under *Central Hudson* is whether the regulation serves a substantial State interest and is sufficiently tailored to promote that interest. *Id.*

The regulation at issue in this case, 14B NCAC 15B .1003(a)(2), serves the State interest in protecting children and other unsuspecting shoppers from being bombarded with sexually explicit and profane beer labels. The regulation is necessarily flexible, but has been applied narrowly and to only a small number of labels. In short, the regulation satisfies *Central Hudson* and therefore is constitutional, and Defendants are entitled to summary judgment.

This argument is further developed and detailed in the Memorandum in Support of Defendants’ Motion for Summary Judgment. The arguments made in that document are incorporated herein by reference.

The remainder of this filing focuses on the arguments presented in Plaintiff’s Motion for Summary Judgment.² The portion of Plaintiff’s motion dedicated to addressing the constitutionality of the regulation – section 3.2, beginning on page 9 – lacks subheadings that clearly delineate the arguments the Plaintiff is advancing. But there are three potential arguments lurking in the motion: that the regulation is an unconstitutional prior restraint on speech; that the regulation is unconstitutionally vague; and that the regulation discriminates against speech based

² Although Local Civil Rule 7.1(e) requires that “all motions made, other than in a hearing or trial, shall be filed with an accompanying supporting memorandum,” Plaintiffs filed a single document that appears to comprise both its motion for summary judgment and the required memorandum.

on viewpoint. None of these arguments is meritorious, for the reasons given below.

II. The regulation is not an unconstitutional prior restraint

Plaintiff's Amended Complaint asserts that 14B NCAC 15B .1003(a)(2) is "is invalid on its face as an unconstitutional prior restraint." (Am. Compl., Docket No. 24, ¶ 40.) Plaintiff is not entitled to summary judgment on this basis for three reasons. First, Plaintiff did not properly move for summary judgment on this ground. Second, the prior restraint doctrine does not apply to commercial speech. And third, even if it did, the Commission's process for reviewing label submissions would pass constitutional muster.

A. Plaintiff did not move for summary judgment on this basis

A party must "identify[] each claim or defense — or the part of each claim or defense — on which summary judgment is sought." Fed. R. Civ. P. 56(a). The burden is on the movant, as "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Plaintiff's Motion for Summary Judgment does not seek summary judgment on the basis that the regulation at issue is an unlawful prior restraint. At various points, the Motion uses the phrase "prior restraint" as a pejorative description of the regulation. (MSJ, Docket No. 27, pp. 1 n.1, 2, 6, 7). But in the section of the Motion captioned "Legal Argument" – section 3.0, beginning on page 9 – Plaintiff does not argue that the regulation is a prior restraint as that term has been defined in the relevant precedents. Plaintiff cites no case law, or any other authority, regarding what constitutes a prior restraint. Indeed, the phrase "prior restraint" does not even appear in Plaintiff's legal argument. Plaintiff's occasional references to "prior restraint" in other sections of its motion are not sufficient to request summary judgment on the basis that the regulation is an unlawful prior restraint.

B. The prior restraint doctrine does not apply to commercial speech, especially alcohol-related speech

Even if Plaintiff had sought summary judgment on this ground, it would not be successful, as “it seems reasonably clear that the prior-restraint doctrine does not even apply to commercial speech.” *Bellion Spirits, LLC v. United States*, 393 F. Supp. 3d 5, 28 (D.D.C. 2019), *aff’d*, 7 F.4th 1201 (D.C. Cir. 2021). *See also Kleiner v. First Nat’l Bank*, 751 F.2d 1193, 1204 (11th Cir. 1985) (noting that “commercial speech seldom implicates the traditional concerns underlying the prior restraint doctrine”). The Supreme Court has stated that “commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it.” *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 570 n.13 (1980). *See also Zauderer v. Off. Of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 668 n. 13 (1985).

Central Hudson is particularly instructive. It was a case about the New York Public Service Commission’s prohibition on advertisements by electric utilities. The ban was intended to serve the state’s interest in energy conservation. The Court did not reject the ban as a prior restraint. Instead, it ruled that the complete prohibition was not sufficiently tailored to serve the governmental interest – as it prohibited utility advertisements even for energy-efficient appliances that would reduce, not increase, total energy consumption. As a solution, the Court specifically suggested “a system of previewing advertising campaigns” – to ensure that advertisements comported with public policy. *Cent. Hudson*, 447 U.S. at 571 n. 13. Here, the Commission has implemented exactly what *Central Hudson* proposed: a system of previewing beer labels to ensure compliance with the regulation and other prohibitions like those upon misleading or deceptive advertising, certain health claims, and appeals to underage persons. *See*

14B NCAC 15B 1003. The federal government has a similar process for approving the labels of alcoholic beverages. *See* 27 U.S.C. § 205; 27 C.F.R. § 7.41.

These procedures underscore the fact that prior restraint analysis is a particularly poor fit for examining the regulation of alcohol. Alcohol is a dangerous and addictive product that is illegal for persons under 21 years old to consume. Manufacturing and distributing alcoholic beverages is, therefore, a highly regulated industry, with multiple layers of federal and state regulations in place. *See generally Beskind v. Easley*, 325 F.3d 506, 509 (4th Cir. 2003) (“Following the repeal of Prohibition . . . many states, including North Carolina, enacted laws to prohibit the importation of alcoholic beverages except through a highly regulated structure created by ABC laws.”); *Heffner v. Murphy*, 745 F.3d 56, 86 n.23 (3rd Cir. 2014) (stating that “the authority of states to regulate and tightly restrict the availability of alcohol is far too evident to require either citation or discussion”); *Eby-Brown Co. v. Wis. Dep't of Agric.*, 295 F.3d 749, 755 (7th Cir. 2002) (“[T]obacco, alcohol and gasoline are products that are heavily regulated, costly to insure, and generally considered dangerous.”). Those who choose to engage in the industry cannot reasonably expect to market their wares without administrative approval.

C. If analyzed under prior restraint doctrine, the regulation would pass muster

Finally, if this Court were to analyze the regulation under the prior restraint doctrine, it should still find the regulation constitutional. A prior restraint is constitutional if it is narrowly tailored, leaves open sufficient alternative avenues for communication, and contains concrete and definite standards to guide the licensing authority. *See generally Green v. City of Raleigh*, 523 F.3d 293, 300–01 (4th Cir. 2008) (holding that a Raleigh ordinance requiring picketers to notify the city before picketing on sidewalks was not an unconstitutional prior restraint).

Turning to the first criterion, 14B NCAC 15B .1003(a)(2) is narrowly tailored. It applies only to advertisements and product labels, i.e., to material that may be seen by unconsenting members of the public, including children looking for products located near beer or accompanying their parents while the parents are buying alcohol. It is limited in its application, as illustrated by the fact that, although tens of thousands of labels per year are processed, only 19 labels have been rejected under the regulation in the past eight years. (Exh. 1 ¶ 13; Exh. 2 ¶ 6; Exh. 3 ¶¶ 12-14). This approval rate of more than 99.9% is evidence that the regulation is applied in narrow circumstances.

As to alternative avenues of communication, 14B NCAC 15B .1003(a)(2) leaves nearly infinite options. To start with, it regulates only product labels and advertisements. Plaintiff's filings reveal that Mr. Steadman has disseminated his works through the *New York Times*, *Rolling Stone*, and other outlets, has published several books, and maintains an active website. (Levenson Decl., Docket No. 27-1, ¶¶ 8-9). The regulation does not reach these activities. Furthermore, to the extent that Plaintiff is attempting to convey any particular message about winter (for example, that winter is cold and can be unpleasant) or its beer (for example, that it tastes good and can lift one's spirits), it can do so in ways other than showing a naked cartoon figure with a naked cartoon penis. In fact, it has done so already with the text on the label in question, which refers to the challenges of winter weather and states that Plaintiff's "warming winter ale always keeps the bonfire burning." (Am. Compl., Docket No. 24, ¶ 17).

Whether the regulation provides a concrete and definite standard is addressed in detail below in connection with Plaintiff's vagueness argument. In practice, the regulation is readily administrable, with no one criticizing the regulation during the public comment period; only 19 labels denied under the regulation in the past eight years; and only two failed appeals to the

Commission under the regulation. One would expect much more controversy and uncertainty if the regulation were not sufficiently definite.

A last consideration relates to the procedure in place for appealing label denials. In a case involving non-commercial speech, the Supreme Court required content-based prior restraints to have certain procedural safeguards in place, including a prompt review process. *See Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (explaining that a “process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system”). The regulation at issue here is directed at inappropriate modes of expression, not at any particular viewpoint, so even if analyzed as a prior restraint, the *Freedman* requirements do not apply. *See Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 435 (4th Cir. 2007) (considering a municipal sign regulation and stating that because it “was content neutral, it did not need time limitations on decisionmaking to be constitutional”). Nonetheless, there is a clear and timely review process in place. Commission staff normally reviews label applications within two to three weeks. (Exh. 1 ¶ 6). When Commission staff disapproves a label, the manufacturer may appeal the denial to the Commission at the Commission’s next monthly meeting. (Exh. 3 ¶ 10). The Commission renders a decision immediately after hearing the appeal. (*Id.*). Thus, affected parties have rapid recourse to challenge any “restraint.” See generally *Bellion Spirits, LLC v. United States*, 7 F.4th 1201, 1213 (D.C. Cir. 2021) (assuming arguendo that the prior restraint doctrine applies to commercial speech, the court found no violation of that doctrine by federal regulations that require pre-approval before a manufacturer may put health claims on the label of an alcoholic beverage; the court noted that there are “adequately strict deadlines” for the timing

of regulators' response to applications, generally meaning within 90 days, or up to 180 days if extended).

Summing up, the Plaintiff is not entitled to summary judgment on the basis that the regulation is a "prior restraint." It did not submit any legal argument seeking summary judgment under prior restraint doctrine; the doctrine does not apply to commercial speech; and even if it did, the regulation satisfies constitutional standards.

III. The regulation is not unconstitutionally vague

Plaintiff alleged in its Amended Complaint that the regulation is "inherently vague and ambiguous." (Am. Compl., Docket No. 24, ¶41.) It is not entitled to summary judgment on that basis because it again failed to present any pertinent legal argument, and because the regulation meets constitutional standards.

A. Plaintiff did not move for summary judgment on this basis

Plaintiff references the alleged "vagueness of the regulation" in the introduction to its motion. (MSJ, Docket No. 27, p. 2.) But the word "vague" does not appear in the legal argument section of the motion, nor is there any discussion of the legal standard for vagueness, or any citation to the relevant caselaw. Perhaps the Court could attempt to assemble a vagueness argument on Plaintiff's behalf based on its assertion that the meaning of the regulation is left to the "whims" of the Commissioners. (*Id.* p. 12.) But it is the responsibility of counsel, not the Court, to construct the parties' arguments. Here, Plaintiff did not argue vagueness as a legal basis for its motion.

B. The regulation is not vague

A law is unconstitutionally vague if it fails to provide a person of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited, or if it authorizes or encourages arbitrary and discriminatory enforcement. *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 370–71

(4th Cir. 2012), citing *Hill v. Colorado*, 530 U.S 703 (2000). Vagueness challenges are severely limited in the context of commercial speech, *Stover v. Fingerhut Direct Mktg.*, 709 F.Supp.2d 473, 481-82 (S.D. W.Va. 2009), because its subject is narrower and commercial enterprises are better-positioned to ensure legal compliance, *Hoffman Estates v. The Flipside, Hoffman Estates*, 455 U.S. 489, 498 (1982).

Regulators have never been held to unobtainable standards of perfect clarity or mathematical certainty. *Wag More Dogs*, 680 F.3d at 370–71. A regulation is not impermissibly vague when it is marked by flexibility and reasonable breadth rather than meticulous specificity. *Bellion Spirits, LLC v. United States*, 7 F.4th 1201, 1214 (D.C. Cir. 2021) (citations omitted). The terms used in 14B NCAC 15B .1003(a)(2) – “undignified, immodest, or in bad taste” – are flexible but not unduly vague.

The *Bad Frog* litigation is instructive on this issue. In that case, a New York regulation forbade beer labels that were “obscene or indecent or . . . obnoxious or offensive to the commonly and generally accepted standard of fitness and good taste.” *Bad Frog Brewery v. New York State Liquor Auth.*, 973 F. Supp. 280, 287 (N.D.N.Y. 1997) (quoting N.Y.C.R.R. § 83.3), rev’d in part on other grounds, *Bad Frog Brewery v. New York State Liquor Auth.*, 134 F.3d 87 (2d Cir. 1998). The language was held to put a reasonable beer distributor on notice that vulgar and profane advertising would not be acceptable, and the decision was not disturbed on appeal. *Id.* at 288. Similarly, here “undignified, immodest, or in bad taste” was sufficient the Plaintiff on notice that a beer label displaying a penis might not be approved.

Furthermore, a robust body of interpretations can reduce the vagueness of a flexible legal definition. *Capital Associated Industries Inc.*, 922 F.3d at 210. A manufacturer looking at the prior applications of the regulation to proposed labels such as MILF Cream, Colombian Necktie, Fuck

2020, and Naughty Nasty Slut Dog Wine, would have little trouble seeing what sorts of labels run afoul of the regulation – and would know that a drawing of a naked man with an exposed penis was likely to draw some scrutiny.

The ability to clarify the meaning of the regulation through the administrative process reduces concerns about regulatory vagueness even further. *Bellion Spirits*, 7 F.4th at 1214, citing *Hoffman Estates* 455 U.S. at 498. Commission staff regularly work with manufacturers to address manufacturers’ concerns regarding label disapprovals and to find ways to get the labels approved labels. (Exh. 1 ¶¶9-10.) Plaintiff chose not to avail itself of this opportunity.

If the regulation were vague, it would generate controversy and uncertainty. *Cf. United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) (finding it evidence of a statute’s vagueness that many “conflicting results [arose] from the painstaking attempts of enlightened judges in seeking to carry out the statute”). But tens of thousands of labels are reviewed each year, with a handful or less being rejected – and no flurry of litigation surrounding those. (Exh. 1 ¶¶12-13.) The regulation’s readoption inspired no objections from the innumerable alcohol producers and distributors, including the Plaintiff, who has a long history of sales in North Carolina. (Exh. 3 ¶¶6-7, Exh. 4 ¶7.) In short, the regulation is not unconstitutionally vague.

IV. The regulation targets inappropriate modes of expression, not disfavored viewpoints

Plaintiff argues in its motion that the regulation constitutes an impermissible viewpoint-based restriction on speech. (MSJ, Docket No. 27, p. 12 [“On their face, these restrictions are viewpoint-based.”]). In fact, the regulation does not forbid the expression of any viewpoint. It simply targets modes of expression that are not appropriate for a product that will be placed on a grocery store shelf for all to see.

Plaintiff's argument relies on two recent Supreme Court decisions. The first is *Matal v. Tam*, ___ U.S. ___, 137 S. Ct. 1744 (2017), where the Court invalidated a federal statute that prohibited the registration of trademarks that were "disparaging." The second is *Iancu v. Brunetti*, ___ U.S. ___, 139 S. Ct. 2294 (2019), where the Court struck down a federal statute that prohibited the registration of "immoral or scandalous" trademarks. *Iancu* resulted in five separate opinions, but the majority opinion relied on *Tam* for the proposition that viewpoint discrimination in trademark registration violates the First Amendment. It found that the "immoral or scandalous" bar was viewpoint-based because it "permits registration of marks that champion society's sense of rectitude and morality, but not marks that denigrate those concepts." *Iancu*, 139 S. Ct. at 2299.

The regulation at issue here differs substantially from the anti-disparagement rule struck down in *Tam* and the "immoral or scandalous" provision considered in *Iancu*. The regulation prohibits labels that portray scenes that are "undignified, immodest, or in bad taste." These limitations address modes of expression, not viewpoints. Most of the labels rejected under this provision have been rejected because they contain vulgar words (such as the "Fuck 2020" hard seltzer or the "F Bomb" wine), nudity or sexual content (such as the "MILF Cream" beer), or graphic depictions of illegal violence (such as the "Colombian necktie" beer). (Exh. 3 ¶6). In rejecting these labels, the Commission was not taking a position on whether 2020 was a good year or how to address cartel violence in Colombia. It was simply requiring that labels that will be displayed in retail outlets be appropriate for display to unwitting members of the public.

Notably, in *Iancu*, the federal government advanced a limiting construction. It suggested that the bar on "immoral or scandalous" trademarks could be read to prohibit only modes of expression that are offensive or shocking, independent of the content of the ideas expressed. 139

S. Ct. at 2301. The majority did not accept that limiting interpretation because “the statute says something markedly different.” *Id.* The term “immoral,” in particular, is inherently viewpoint-based. Several of the dissenting Justices would have found “scandalous” susceptible to exactly the construction offered by the government. *Id.* at 2303-17 (opinions of Roberts, C.J., Breyer, J., and Sotomayor, J.). The sort of construction that was just too great a stretch in *Iancu* is much more readily reached here. “[U]ndignified, immodest, or in bad taste” are far more clearly targeted at modes of expression than at viewpoints. Indeed, it is hard even to imagine a viewpoint that is “undignified” or “immodest,” while it is easy to imagine base and vulgar modes of expression that qualify.

Regulations addressing modes of expression comport with a long line of precedent allowing limitations on vulgar and profane speech that may be received by minors. Perhaps most famously, in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court ruled that the FCC may prohibit the broadcasting of “indecent” speech – including “patently offensive words dealing with sex and excretion.” *Id.* at 745. The Court relied heavily on the fact that broadcast speech is “accessible to children, even those too young to read.” *Id.* at 749. Similarly, beer labels are accessible to children. Practically every grocery store and gas station sells beer. Retailers display beer in stores aisles and coolers that are accessible to children. Beer is often merchandised near sodas and other products that appeal to children. Parents bring their children shopping with them and thereby expose them to beer labels. (Exh. 6, ¶¶ 5-6.)

The Supreme Court also recognized the government’s right to protect children from vulgar and profane speech in *Bethel School Dist. v. Frasier*, 478 U.S. 675 (1986). There, the Court ruled that a school could properly discipline a student for giving a sexually graphic speech to other students. The Court found that it was compatible with the First Amendment “to prohibit

the use of vulgar and offensive terms in public discourse,” especially in a school setting. *Id.* at 683. The Court concluded that “[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions.” *Id.*; *see also Upper Midwest Booksellers Assoc. v. Minneapolis*, 780 F.2d 1389 (8th Cir. 1985) (“In the instant case, we discern no harm to First Amendment values that could result from the requirement that sexually explicit covers of books and magazines be shielded from view by an opaque cover.”).

Reasonable minds could differ about the label at issue in this case. Some might find it inappropriate, while others might find it amusing. It was a close case under the regulation, as reflected in the fact that the Commission reversed its staff’s determination regarding the label. But Plaintiff is not focused on its borderline label alone. It is asking this Court to declare that the regulation is unconstitutional on its face. It contends, in effect, that the State is powerless to prohibit beer labels, no matter how explicit the profanity they contain, no matter how disturbing the nudity, and no matter how graphic the violence, because prohibiting such content discriminates against a “viewpoint.” As noted above, a correct reading of the relevant precedents does not require the State to subject its citizenry to that.

V. Plaintiff has agreed not to seek summary judgment at this time on arguments related to the liability of the individual Defendants

Plaintiff’s motion addresses issues beyond the constitutionality of the regulation, including whether the individual Defendants are protected in their personal capacities by qualified immunity. (MSJ, Docket No. 27, pp. 16-19.) However, at a conference between the parties after Plaintiff filed the motion, the parties agreed to focus these pre-discovery cross motions for summary judgment on the constitutionality of the regulation – the central legal issue in the case – with other issues to be addressed later if the case survives this stage. In effect, Plaintiff has agreed not to seek summary judgment at this time against the individual Defendants

in their personal capacities, reserving the right to do so later if the Court's ruling on the present motions does not effectively resolve the case. As a result, Defendants are not responding in detail to Plaintiff's briefing on those issues. (Defendants will, of course, do so if the Court directs.) Similarly, in Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment, Defendants are not seeking summary judgment on several potential grounds beyond the constitutionality of the regulation, including but not limited to qualified immunity and quasi-judicial immunity. Defendants equally reserve the right to pursue those arguments later if the Court's ruling on the present motions does not effectively resolve the case. The parties agree that the only claims ripe for summary judgment and not barred by the Eleventh Amendment are official capacity claims that would support only declaratory or injunctive relief.

Conclusion

For the reasons given above, Defendants ask this Court to deny Plaintiff's Motion for Summary Judgment.

Respectfully submitted this the 23rd day of November, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed the **DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** Clerk of the Court utilizing the CM/ECF system; this also constitutes service of the document under Local Civil Rule 5.1(e). I further certify that I have on this day, emailed said document to Plaintiff's counsel, addressed as follows:

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This the 23rd day of November, 2021.

/s/ Jeffrey B. Welty
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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA**

FLYING DOG BREWERY, LLC,

Plaintiff,

v.

THE NORTH CAROLINA ALCOHOLIC
BEVERAGE CONTROL COMMISSION,
A.D. “ZANDER” GUY JR., NORMAN A.
MITCHELL, SR., KAREN L. STOUT,
TERRANCE MERRIWEATHER, and
CINDY MESINO,

Defendants.

Case No. 5:21-cv-00343-BO

**PLAINTIFF’S REPLY IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT**

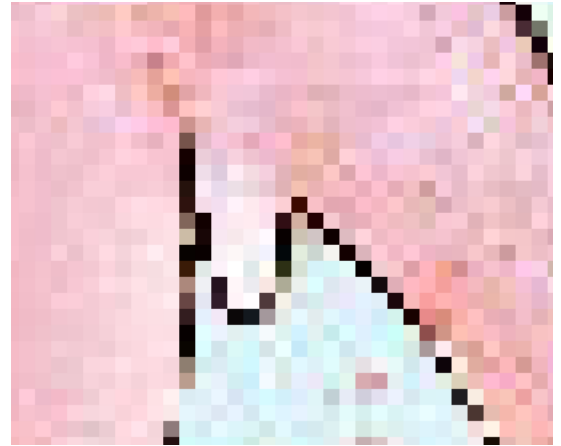
Plaintiff Flying Dog Brewery, LLC (“Flying Dog Brewery”) hereby files its Reply in support of its Motion for Summary Judgment (Dkt. No. 27).

1.0 INTRODUCTION

14B NCAC 15B.1003(a)(2) is facially unconstitutional, as it burdens protected speech that the state deems “undignified, immodest, or in bad taste.” That is all this case is about. The Defense tries to shift the narrative to justify this regulation as the only thing that stands between the children of North Carolina and an onslaught of erotic images on beer bottles. The state is doing its best, but its arguments fail. The Constitution demands the regulation be struck down. The amount of case law supporting this position is legion. In *Reno v. ACLU*, the Supreme Court struck down a regulation intended to keep “indecent” material out of the hands of minors. 521 U.S. 844 (1997), and in *Matal v. Tam* and its companion *Iancu v. Brunetti*, the Supreme Court made it clear that regulations such as this one are unconstitutional.

Defendant North Carolina Alcoholic Beverage Control Commission (the “Commission”) rejected approval of Flying Dog Brewery’s Freezin’ Season Winter Ale because the Commission

found it to be “undignified, immodest, or in bad taste” per 14B NCAC 15B.1003(a)(2).¹ After Plaintiff filed suit, Defendants argued that their basis for this rejection was that Plaintiff’s label contained a “sexually explicit” depiction of a male penis and that rejecting the label was proper because children could have been exposed to this depiction. This alleged rationale was poor from the start. “Sexually explicit” is not mentioned in the regulation, but a fair definition of that term would include “graphic intercourse” or “lascivious display of the genitals.” *See, e.g.*, 18 U.S.C. § 2256. Clearly, this is not present here. A super zoom in of the “penis” is shown above. Could any reasonable viewer see that as “lascivious?”



“Sexually Explicit” depiction of a penis?

And if the regulation were truly to prevent *sexually explicit* beer labels, and it were so narrowly tailored as to fit the definition in that statute, this case might turn out differently. However, the regulation is not there to regulate sexually explicit labels – it goes much further than that. And the state’s argument that this is what they had in mind when rejecting the label rotted like a two-week old avocado when Defendants belatedly approved the label in order to evade a decision by this Court on Plaintiff’s motion for a preliminary injunction.

The parties’ cross-motions for summary judgment and Plaintiff’s Opposition to Defendants’ motion for summary judgment lay out this case’s factual background, which discussions are incorporated herein by reference, rather than re-repeat it yet again on the docket. 14B NCAC 15B.1003(a)(2) is a viewpoint-based restriction on speech, as the plain language of this regulation allows, and even *requires*, the government to reject alcohol labels for viewpoint-based reasons by making subjective moral judgments. Furthermore, there is at best only a loose fit

¹ Defendants argue that this was only a “preliminary” rejection, rather than a final one, and the decision was made by a member of the Commission’s staff, not the Commission itself, but it is undisputed that this employee, using authority granted to her by the Commission, impeded Plaintiff’s ability to sell and distribute beers with its Freezin’ Season label.

between Defendants’ alleged state interest and the breadth of the regulation at issue. Whether alcohol labels, including Plaintiff’s Freezin’ Season label, are commercial speech or not, 14B NCAC 15B.1003(a)(2) does not pass constitutional muster.

2.0 ARGUMENT

2.1 The *Central Hudson* Test

Plaintiff takes the position that the artwork in this label is *not* commercial speech. (See Dkt. No. 38 at 8-10.) Nevertheless, even if it is commercial speech, the First Amendment protects “commercial speech from unwanted governmental regulation.” *Id.* (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761-62(1976)); see also *Davenport v. Alexandria*, 710 F.2d 148, 148 n.1 (4th Cir. 1983). In order to regulate commercial speech that is “neither misleading nor related to unlawful activity,”² the “State must assert a *substantial* interest to be achieved by restrictions on commercial speech.” *Id.* at 564 (emphasis added). The “regulatory technique must be in proportion to that interest,” and the “limitation on expression must be carefully designed to achieve the state’s goal.” *Id.* In other words a restriction on commercial speech must serve a “substantial interest,” and it must be “narrowly drawn.” *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017). *Inter alia*, this means that the “regulatory technique may only extend as far as the interest it serves.” *Id.* (quoting *Cent. Hudson*, 447 U.S. at 565).

2.2 Defendants’ Regulation is Viewpoint-Based

A restriction on speech is content-based when it either seeks to restrict, or on its face restricts, a particular subject matter. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). Restrictions on speech based on the message conveyed are presumptively unconstitutional. See *Turner Broadcasting System, Inc., v. FCC*, 512 U.S. 622, 641-43 (1994). This presumption is stronger when a restriction is based not just on subject matter, but on a particular viewpoint about the subject. See *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992).

² Defendants do not assert that Plaintiff’s Freezin’ Season label is misleading or related to unlawful activity.

Restrictions on speech where the rationale is the speaker’s opinion or viewpoint are impermissible. *See Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 46 (1983).

Defendants’ restrictions here are virtually indistinguishable from the Lanham Act’s prior restrictions prohibiting registration of “disparaging” and “immoral or scandalous” trademarks. The Supreme Court found that these categories of restrictions are unconstitutional viewpoint-based restrictions on speech. *See Tam*, 137 S. Ct. at 1763 (in finding “disparagement” bar unconstitutional, noting that “in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint”); *see also Iancu v. Brunetti*, 139 S. Ct. 2294, 2299-2301 (2019) (in finding “immoral or scandalous” bar unconstitutional, noting that these terms were interpreted to mean “shocking,” “offensive,” and “disreputable,” and thus constituted viewpoint-based discrimination). On their face, the ABC’s restrictions are viewpoint-based. The terms “undignified, immodest, or in bad taste” are inherently subjective, and any application of these standards, by necessity, requires the government to make a subjective moral determination based on the decisionmaker’s personal taste.

Similar terms have been deemed to be unconstitutionally vague when applied to speech. If a label is “obscene,” then the *Miller* test would permit the state to ban the label and even to criminally prosecute the distributor. *Miller v. California*, 413 U.S. 15, 24 (1973). Of course, that is far from where we are. Even “indecent” as a term is “wholly subjective ... without settled legal meaning.” *United States v. Williams*, 553 U.S. 285, 306 (2008). The terms in this regulation are even looser and more vague than “indecentcy.”

There is no way to apply this regulation objectively, as attempting to prevent beer-consuming children or other consumers from being shocked or offended is itself a viewpoint-based rationale. *See Tam*, 137 S. Ct. at 1751 (identifying “a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend”). Contrary to Defendants’ assertions, their regulation is concerned with the content and viewpoint of beer labels, not merely the “mode of expression.” And like in *Brunetti*, the regulation at issue is not susceptible to a

limiting instruction that would only bar sexually explicit labels, as doing so would rewrite the regulation entirely.

2.3 14B NCAC 15B.1003(a)(2) is Not Narrowly Drawn to Achieve a Substantial State Interest

Defendants assert that 14B NCAC 15B.1003(a)(2) serves “the State interest in protecting children and other unsuspecting shoppers from being bombarded with explicit and profane beer labels.”³ (Dkt. No. 30 at 6.) As an initial matter, this assertion is suspect. The Commission’s stated purpose is to “provide regulation and control of the manufacture, distribution, advertisement, sale, possession and consumption of alcoholic beverages to serve the public health, safety and welfare.” 14B NCAC 15A.0101. A state agency tasked with regulating the sale of a product that children cannot legally purchase or consume does not obviously have a substantial interest in protecting children from “explicit” or “profane” beer labels.

Assuming, *arguendo*, that Defendants are properly tasked with protecting children from such content, this interest does not allow unfettered discretion to restrict the content of beer labels. The regulation on its face sweeps far more broadly than this asserted interest, and thus is not “carefully designed to achieve the state’s goal.” *Cent. Hudson*, 447 U.S. at 564. Nothing in the terms “undignified, immodest, or in bad taste” even suggests that the regulation is limited to sexually explicit content. These terms may very well *include* sexual content, but the universe of labels that may be “undignified, immodest, or in bad taste” without being overtly sexual is vast. Indeed, none of the labels previously rejected under the regulation cited by Defendants contain sexually explicit depictions, but instead consist of swear words, sexual terms, or cartoon violence. (See Dkt. No. 32 at 17 (rejecting “Naughty Nasty Slut Dog” label with no explicit imagery); at 24 (same for “BeerGasm”); at 31 (same for “Milf Cream,” which contains no visual depictions of anything vaguely humanoid); at 37-43 (rejection of “Colombian Necktie” label, only one version of which identifiably shows cartoon violence); at 48 (rejection of “F Bomb” label showing fully

³ Defendants only cite authority regarding the state’s ability to regulate sexually explicit content that children may view, though they insinuate other interests may exist as well.

clothed paratrooper dropping bottles of beer); at 55 (rejection of “G Spot” label displaying two fully clothed figures looking at a spotlight displaying the letter “G”); at 63 (rejection of “Fuck 2020” label with the word “fuck” partially obscured); at 86 (rejection of “Bitch” label with no visual depictions of any figures); and at 66-96 (rejections of several labels for which Defendants have not provided any artwork, including “Filth Sucks,” “No Future Sucks,” “Rotten Sucks,” “Steal This Wine Sucks,” “Stench Sucks,” “Vacant for Humans,” “Banned in the U K for Humans,” “I’m with Stupid for Humans,” “Cheated for Humans,” and “Destroy for Humans”).⁴

Given the history of rejections under 14B NCAC 15B.1003(a)(2), it appears that Plaintiff’s Freezin’ Season label is the first one ever to be rejected for containing an allegedly sexually explicit image.⁵ This is a strange factual posture for a regulation that is allegedly there for the very purpose of prohibiting such labels. It is also apparent there is little rhyme, reason, or predictability to these rejections, as they are focused mostly on either inoffensive content, swear words, or textual references to a sexual concept. It is a stretch to say that this pattern of enforcement is closely related to the asserted interest of protecting children from sexually explicit content.

Defendants’ recitation of rejected labels also does not paint the full picture of how inconsistent their pattern of enforcement is. A review of Defendants’ official website using its standard product information search function reveals products such as “EFF 2020,” “Blue Mother Fuc*er Flavored MB,” “Cocky Motherf*cker Reserve,” “Orgasm,” and “Ling Chi,” which have all been approved for distribution and retail sale in North Carolina. (*See* Plaintiff’s Statement of Additional Facts [“PSoF”], Dkt. No. 38-1, at ¶ 34.)⁶ “EFF 2020,” submitted by Sweetwater

⁴ This last batch of rejected labels is especially perplexing. It appears they were rejected for containing the words “sucks” or “humans,” which are obviously not sexually explicit and are also not obviously “undignified, immodest, or in bad taste” by any reasonable interpretation of these words.

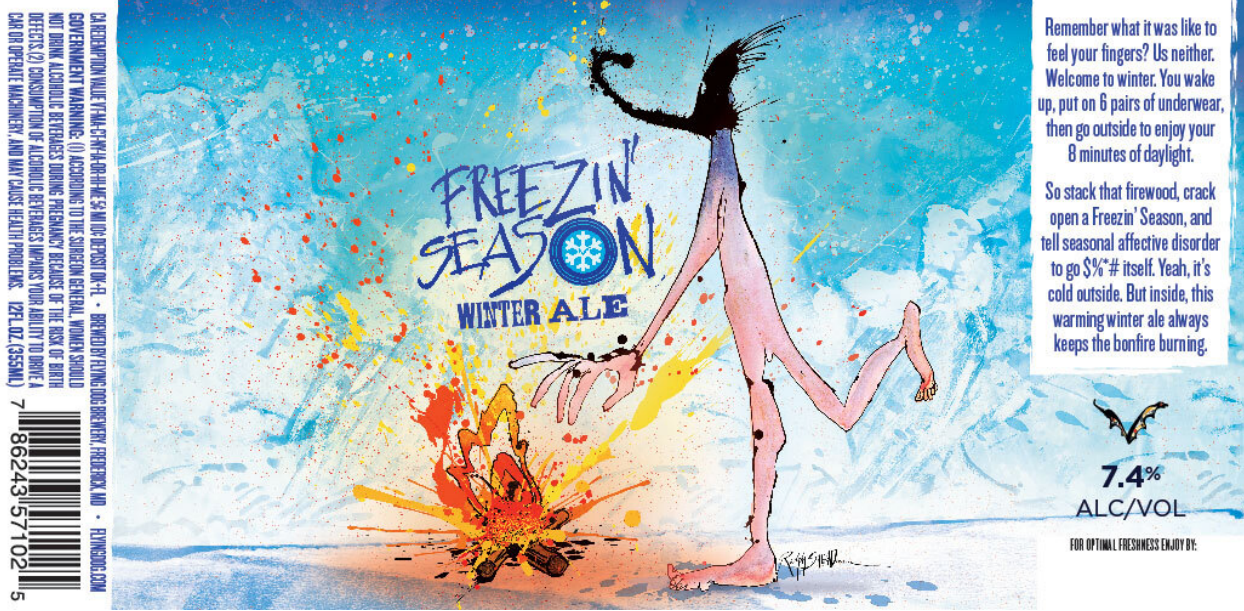
⁵ No reasonable person could call the Freezin’ Season label “sexually explicit.” In fact, it takes quite a bit of imagination, and a sharp set of eyes, to even see a penis on the vaguely humanoid cartoon figure.

⁶ Flying Dog Brewery discovered the label images shown in the attached Certificates of Label Approval (“COLA”) by searching the Alcohol and Tobacco Tax Trade Bureau (“TTB”) online registry, which allows the public to search for COLAS. For reasons unknown, Defendants

Brewing Company, an out-of-state manufacturer, not only has a fanciful name that is an obvious profane euphemism but is combined on a product label with an illustration of two hands holding up only middle fingers. (*Id.* at ¶ 35.) From another out-of-state manufacturer, Drink Four Brewing Company, the label “Blue Mother Fuc*er Flavored MB” displays an asterisk over a single letter of a common profanity while also showing an inverted hand holding up only the middle finger. (*Id.* at ¶ 36.) Yet another out-of-state manufacturer, Twelve Percent, was approved for its label, “Ling Chi,” which illustrates a naked man bound in rope while having his body cut open and apart by a group of people brandishing knives. (*Id.* at ¶ 37.) By the standards articulated in Defendants’ briefing, all three of these labels should have been rejected, yet they were not. This kind of inconsistency is the hallmark of an unconstitutionally vague regulation, as the Court in *Tam* and *Brunetti* found. On its face, the regulation fails to pass the *Central Hudson* test.

The regulation also fails to pass this test as applied to Plaintiff’s Freezin’ Season label. Defendants assert that the following image contains a sexually explicit depiction of the male penis from which children should be protected:

do not upload images of labels they approve for distribution and sale in North Carolina on their website. In the absence of a Public Records Act request, Flying Dog Brewery cannot guarantee the label images attached are exactly the same as those Defendants have approved for sale in North Carolina. As a matter of North Carolina law, Defendants must approve every product label before a product may be lawfully marketed, distributed, or sold in North Carolina. Moreover, Defendants require every out-of-state manufacturer to submit a COLA to accompany each application for label approval. Thus, every label Defendants approve pursuant to an out-of-state manufacturer’s application therefore should be readily found on the TTB’s online registry.



First, this does not show a penis. The label depicts a malformed caricature of a human with oversized feet, apparently a single arm and hand, and no discernible facial features. It also shows a small protrusion that is where one would expect to find a penis on most male humans, but is otherwise not at all identifiable as one. There are no constituent parts of a penis, no testicles, and it is not engorged. It is a small nub that merely *suggests* a penis. It is certainly not sexually explicit.⁷

Second, it is extremely unlikely the average child would even notice the alleged penis on the label, as it is extremely small compared to the rest of the figure. As a digital .jpeg file, the label is 1,030x504 pixels (519,120 pixels total), while the alleged penis is approximately 8x14 pixels (112 pixels total), or just over 2 one hundredths of one percent of the total label size ($112 \div 519,120 = 0.0002157497$). Defendants’ asserted interest in protecting children is not meaningfully advanced by banning a beer label containing an alleged penis that a child would only be able to notice upon close inspection of a product their parents should be keeping them away from, and

⁷ Flying Dog Brewery previously prevailed against an alcohol licensing board that rejected a label which appears to have been arguably more sexually explicit than the one here. *See Flying Dog Brewery, LLLP v. Mich. Liquor Control Comm’n*, 597 Fed. App’x 342, 354 (6th Cir. 2015) (denying qualified immunity to licensing officials who rejected “Raging Bitch” beer label alleged offensiveness, which label “depicts a wild dog presenting human female genitalia as well as possessing semblances of human breasts”).

then applying quite a bit of imagination to it. Further, there is no state interest in keeping children, nor anyone else, from seeing non-sexualized images of penises. If there is, the North Carolina Museum of Art in Raleigh, North Carolina should be raided and shut down immediately. (See Dkt. No. 38-1 at ¶¶ 31-33) (discussing various depictions of penises available to children at the North Carolina Museum of Art in Raleigh, North Carolina.)

Finally, the asserted interest in protecting children is not plausible in light of Defendants' actions after this suit was filed. Plaintiff filed this suit on August 26, 2021 and Defendants reversed their rejection of the label (the only time this has happened since the regulation was enacted) on September 7, 2021. It is apparent that Defendants did this in the hope of avoiding a decision on the constitutionality of their regulation. Such an abrupt and unprecedented about-face when confronted with a judicial challenge shows that Defendants did not possess a strong belief that the Freezin' Season label could actually harm children.

3.0 CONCLUSION

14B NCAC 15B.1003(a)(2) is unconstitutional. On its face, it is a viewpoint-based restriction on speech that is not narrowly drawn to further the state interests that Defendants assert. By its very terms, the regulation is vague and enforcement of it requires subjective judgments from government officials as to issues of personal morality. It also sweeps far more broadly than protecting children from sexually explicit content. 14B NCAC 15B.1003(a)(2) must be struck down in its entirety.

As applied to Plaintiff's Freezin' Season label, Defendants' actions are unconstitutional because the label does not show a penis and the alleged penis is so small that only an especially attentive child with very good vision and an active imagination would notice it. Even then, there is no appeal to any prurient interest, nor is the tiny nub arousing, nor sexual in any way.

These outcomes are reached regardless of whether the Freezin' Season label is commercial or purely expressive speech. Under any applicable legal standard, there is no proper justification for the regulation or Defendants' enforcement of it.

Dated: December 13, 2021.

Respectfully Submitted,

/s/ Marc J. Randazza

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 13, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I further certify that a true and correct copy of the foregoing document being served via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Marc J. Randazza
Marc J. Randazza

RANDAZZA | LEGAL GROUP

**THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
CASE NO. 5:21-cv-343**

FLYING DOG BREWERY, LLC,)
Plaintiff,)
)
v.)
)
THE NORTH CAROLINA ALCOHOLIC)
BEVERAGE CONTROL COMMISSION,)
ALEXANDER DUKE “ZANDER” GUY)
JR., NORMAN A. MITCHELL SR.,)
KAREN L. STOUT, TERRANCE L.)
MERRIWEATHER, and CINDY)
MESINO,)
Defendants.)

**DEFENDANTS’ MOTION FOR
SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56, Defendants, The North Carolina Alcoholic Beverage Control Commission, Alexander Duke “Zander” Guy Jr., Norman A. Mitchell, Karen L. Stout, Terrance L. Merriweather, and Cindy Mesino, respectfully submit this Motion for Summary Judgment. The administrative regulation at issue in this case, 14B NCAC 15B .1003(a)(2), is a constitutional regulation of commercial speech both facially and as applied to Plaintiff’s beer label. Defendants are entitled to judgment as a matter of law and dismissal of the cause of action. This motion is accompanied and supported by a memorandum of law, statements of disputed and undisputed material facts, supporting declarations, and exhibits.

Respectfully submitted this the 23rd day of November, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court utilizing the CM/ECF system; this also constitutes service of the document under Local Civil Rule 5.1(e). I further certify that I have on this day, emailed said document to Plaintiff's counsel, addressed as follows:

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This the 23rd day of November, 2021.

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**THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
CASE NO. 5:21-cv-343**

FLYING DOG BREWERY, LLC,)
Plaintiff,)

v.)

THE NORTH CAROLINA)
ALCOHOLIC BEVERAGE CONTROL)
COMMISSION, ALEXANDER DUKE)
“ZANDER” GUY JR., NORMAN A.)
MITCHELL SR., KAREN L. STOUT,)
TERRANCE L. MERRIWEATHER, and)
CINDY MESINO,)
Defendants.)

DEFENDANTS’ MEMORANDUM IN
SUPPORT OF DEFENDANTS’
MOTION FOR SUMMARY
JUDGMENT

Introduction

Defendants are moving for summary judgment on the basis that 14B NCAC 15B .1003(a)(2), which prohibits beer labels that are “undignified, immodest, or bad taste,” is constitutional and was constitutionally applied to the Plaintiff’s beer label that depicted a cartoon figure with an exposed penis. The regulation and action are properly analyzed under the *Central Hudson* test for regulations of commercial speech. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557 (1980). The State has a substantial interest in preventing parents and children from being surprised by sexually explicit and vulgar modes of advertising on ubiquitous beer labels, and the regulation is narrowly tailored to further that interest.

At a conference between the parties after Plaintiff filed its motion for summary judgment, the parties agreed to focus their pre-discovery cross motions for summary judgment on the constitutionality of the regulation – the central legal issue in the case – with other issues to be addressed later if the case survives this stage. Therefore, the Defendants are not moving for

summary judgment at this time on issues including but not limited to qualified immunity and quasi-judicial immunity. The Defendants do not, of course, waive their right to seek summary judgment on those issues at a later time.

Statement of the Facts

Producers and distributors of alcohol are required to submit labels and certain other advertisements for preapproval to the North Carolina Alcoholic Beverage Control Commission to ensure their compliance with the regulations of the Commission. 14B NCAC 15C .201. Labels must have certain critical product information, and 14B NCAC 15B .1003 prohibits label content such as certain misleading information, health-related claims, and appeals to underage persons. The subdivision challenged in this case, 14B NCAC 15B .1003(a)(2) (“the regulation”), requires that labels for alcoholic beverages not be undignified, immodest, or in bad taste. It has been in place and enforced by the Commission since 1982.

In 2014, the Commission began a legally required periodic review of its administrative rules. (Exh. 3, ¶ 5). In 2015, the Commission preliminarily determined the regulation was a necessary rule and of public interest and therefore solicited public comment. The Commission received only one comment, which was from the North Carolina Beer and Wine Wholesalers Association stating that the regulations in the subchapter were “necessary.” (underlined in the original) (Exh. 3, ¶ 6; Exh. 3.1).¹ Necessary rules with potential public interest are required to be readopted through the rulemaking process. (Exh. 3, ¶ 7). The regulation was published in the North Carolina Register, and no criticisms or other comments were received. (Exh. 4, ¶ 6). The

¹ In Defendant’s Appendix to Local Civil Rule 56.1 Statement of Material Facts, five declarations are attached as exhibits and labeled as Exhibits 1 through 5. These declarations cite to numbered exhibits that are attached to them. Attachments to the declarations are cited as the Exhibit number of the declaration, period, the exhibit number cited in the declaration. For example, this cite is to Exhibit 1 within the declaration of Renee Metz, which is Exhibit 3. It is therefore cited as Exh. 3.1.

regulation then went before the Rules Review Commission, which can reject rules if they are unnecessary, not within an agency's delegated authority, or not clear and unambiguous. The Rules Review Commission received no comment and approved the rule. (Exh. 4, ¶ 7).

There are currently over 101,131 active wine products and 39,074 active beer products in North Carolina, which must comply with the regulation. (Exh. 1, ¶ 12). The Commission has reviewed approximately 21,561 labels so far this year, around 1,800 to 2,100 a month. (Exh. 2, ¶ 4). The Defendants have found 118 labels that have been formally disapproved since 2013 under 14B NCAC 15B .1003. The majority of these labels have been disapproved due to a failure to provide complete information, with items missing or incomplete items like required information on the label or a distributor's agreement. Other common reasons for denial include a label's appeal to persons under the age of 21, the use of flags or other government emblems, misleading information, and cooperative advertising. (Exh. 2, ¶ 5). The Defendants have found just 19 prior instances going back to 2009 when labels have been rejected under the "undignified, immodest, or bad taste" clause. (Exh. 1, ¶ 13); (Exh. 2, ¶ 6); (Exh. 3, ¶¶ 12-15). Only two of these determinations have been appealed to the Commission, both of which have been denied. (Exh. 3, ¶ 13).

While having a necessarily flexible meaning, a review of the applications of the regulation shows it has a clear meaning – targeting certain vulgar words and images of a sexual, violent, or illegal nature not because of the ideas they express but because the mode of their expression will ambush unsuspecting shoppers around the State. The regulation has been applied to block such notable labels as MILF Cream, Nasty Naughty Slut Dog Wine, and a depiction of a person with their throat slit with their tongue pulled through the hole in what is known as a Columbian Necktie. (Exh. 1, ¶ 13a); (Exh. 2, ¶¶ 7a and 7b).

It typically takes two to three weeks for a label to be reviewed, although this may vary somewhat depending upon the caseload of the staff. (Exh. 1, ¶ 6). If the staff does not initially approve the label, they will notify the applicant, and the common practice is for the applicant to reach back out to Commission staff to try to resolve the issue, make modifications, or withdraw the application. If the situation cannot be resolved at the staff level, the applicant may appeal the initial denial to the Commission. (Exh. 1, ¶¶ 9–10). The matter will be placed on the agenda for the next monthly meeting of the Commission unless it is within less than two weeks, in which case it will be heard at the next month's meeting. (Exh. 3, ¶ 10). If the application is rejected, the applicant is entitled to a de novo hearing on the issue by commencing an action in the Office of Administrative Hearings under the North Carolina Administrative Procedure Act. N.C. Gen. Stat. § 150B-23. It is also worth noting that an aggrieved applicant may seek a declaratory ruling from the Commission on either the continuing validity of a regulation or the application of the regulation to a factual situation and that this ruling is immediately subject to judicial review. 14B NCAC 15A .0601 and .0608.

On July 16, 2021, Jlynn Yamrus of Offit Kurman Attorneys at Law, on behalf of the Plaintiff, sent the Commission the labels and keg collars for the Freezin' Season Ale for approval under 14B NCAC 15C .0201. The label depicts a masked nude human figure outdoors in a snowy mountainous scene by a fire. (Doc. 1, ¶ 5). His penis can be clearly seen dangling between his legs, and the line going up the front of his right thigh to his pelvis removes any doubt it is depicting a penis. Cindy Mesino, an ABC Administrative Specialist, assigned to product review, reviewed the label and determined it violated the regulation. (Exh. 1, ¶¶ 2–3). After consulting with other Administrative Specialists assigned to product review, Jennifer

Carabajal, Stone Pegram, and KRhonda Atwater, she engaged in an email exchange on July 23, 2021 with Yamrus contained below:

Mesino: The following products have been approved:

Dark Berry Sour Ale Brewed w/Blueberry/Vanilla/Lactose/Raspberry Natural Flavor - 00193925B

Freezin Season Winter Ale - The 12oz label will not be approved, but I can approve the keg collar.

Yamrus: What do I need to do to have the 12 oz label approved? Thank you for your patience while I learn what is acceptable and what isn't.

Mesino: Yes, we were going by the following regulation: As you can see below the image below is seen as inappropriate to many here.

Rule 15b 1003 – 3

(2) depicts the use of alcoholic beverages in a scene that is determined by the Commission to be undignified, immodest, or in bad taste; (highlighted and underlined in the original)

(Doc. 5-4); (Exh. 1.1).

In composing the email, Mesino sent a screenshot of the regulation from her personal notes she drafted on a Microsoft Word document. She searched the document for the term bad taste using Word Navigator (Ctrl+F) as a means of finding the regulation, not with an intent to highlight it. The search highlighted only bad taste, and taste was double-underlined by an autocorrect program due to the semicolon at the end of the sentence. (Exh. 1, ¶ 7). The effect is recreated in Exhibit 1.2. (Exh. 1, ¶ 8). She then placed the file into a pending status and did not send out a formal rejection letter, expecting the brewery to reach back out to her. (Exh. 1, ¶ 9).

Instead of attempting to resolve the issue with the staff or raising the issue before the Commission for an agency decision at the August 11, 2021, monthly meeting, the Plaintiff decided to preserve their putative cause of action. Over two weeks after the Commission meeting, the Plaintiff filed an “urgent” complaint on August 26, 2011. On September 7, 2021,

the Commission sent a letter approving the label. They have since filed an amended complaint and immediately moved for summary judgment.

Standard of Review

Summary judgment is appropriate when there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material if it would affect the disposition of the case, and an issue of material fact is genuine if a reasonable juror could find in favor of the nonmoving party. *Wai Man Tom v. Hospitality Ventures, LLC*. 980 F. 3d 1027, 1037 (4th Cir. 2020) (citations omitted). Factual disputes that could not affect the outcome of the case will not preclude summary judgment. *Id.* at 1037. However, all reasonable inferences and ambiguities must be made in favor of the nonmoving party. *Id.* at 1037.

Argument

- I. 14B NCAC 15B 1003(a)(2) is a constitutional regulation of commercial speech that furthers an important State interest of preventing unwilling persons, especially those with children, from being ambushed by inappropriate modes of communication while shopping for the necessities of life.**

Under the *Central Hudson* test, the State must show it has a substantial interest in the regulation of non-misleading or illegal commercial speech and that its regulations are narrowly tailored to that interest. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980). The protections offered to commercial speech are less than those offered other speech. The State need not use the least restrictive means and only needs to have a close fit whose scope is in proportion to the interest served. *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 257 U.S. 173, 188 (1999) (citations and quotations omitted). Plaintiff hints that there may be questions about the continuing validity of the commercial speech doctrine

without explicitly arguing it, but the commercial speech doctrine remains good law and has not been abrogated. See *Capital Associated Industries, Inc. v. Stein*, 922 F.3d 198 (4th Cir. 2019); *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 700 Fed.Appx. 251 (4th Cir. 2017) (unpublished).

A. Beer labels are commercial speech intended to entice shoppers to buy beer.

The content on beer labels is commercial speech. *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995). The Plaintiff knows this from its previous litigation. *Flying Dog Brewing, LLLP v. Michigan Liquor Control Com'n*, 597 Fed.Appx 342, 354 (6th Cir. 2015) (unpublished). This is so even if there is some element of social commentary in a label.

The Plaintiff attempts to drape itself in the Gonzo flag of Hunter S. Thompson in an effort to church up a marketing strategy into noncommercial expressive speech. See Doc. 24, ¶¶ 11-15; Doc. 27, p. 3-5. However, the character of the speech is determined by considering the context and the speech taken as a whole. *Adventure Communications, Inc. v. Kentucky Registry of Election Finance*, 191 F.3d 429 (4th Cir. 1999). Three factors guide courts in categorizing the speech: “1) is the speech an advertisement; 2) does the speech refer to a specific product or service; and 3) does the speaker have an economic motivation for the speech.” *Greater Baltimore Cent. for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 721 F.3d 264, 284-85 (4th Cir. 2013) (en banc) (citations omitted). The presence of all three factors strongly supports categorizing the speech as commercial. *Id.* at 285.

Here, the label is an advertisement; it identifies the product as Flying Dog Freezin’ Season Ale; and the Plaintiff’s motive is to get customers to pay money for the beer. The Plaintiff admits that bottle retail sales make up 90% of the Plaintiff’s business, and “the design of its labels is particularly important to entice customers into buying its beer[.]” Doc. 24, ¶ 35. The reasonable

inference to draw from the evidence is that due to a personal relationship, a talented artist agreed to act as the Plaintiff's overqualified ad man – a long tradition including the likes of Norman Rockwell and Salvador Dali. At the end of the day, the beer label is commercial speech because it identifies the product and encourages the consumer to buy it so the Plaintiff can make money.

It is indistinguishable from another dog advertisement case. In *Wag More Dogs, LLC v. Cozart*, the Fourth Circuit ruled that a mural on the back of a doggy daycare building was commercial speech because it was an advertisement designed to attract customers from a neighboring dog park, it displayed the company's logo referencing a specific product, and the desire to attract customers gave it a financial motive. 680 F.3d 359, 363, 369–70 (4th Cir. 2012). In both cases, only the lesser protections afforded commercial speech are implicated.

B. The regulation furthers a substantial State interest in protecting children from the harm of vulgar modes of advertising on beer labels that fall under the category of “undignified, immodest, or in bad taste.”

In recent years, manufacturers have sought approval for alcoholic beverages named MILF Cream, G Spot, and Naughty Nasty Slut Dog, among others. While these terms are vulgar enough by themselves to justify regulation, a child searching Google to better understand their meaning would likely encounter wildly inappropriate content, including photographs and videos.

As one commentator has noted, beer companies are running out of names in a crowded, ultra-competitive market, and low-brow branding is largely untapped only because of State regulations like the one in this case. Stacy Hostetter, *The Privilege of Obscenity: The Slant on Bad Frogs and Flying Dogs*, 12 Buffalo Intell. Prop. Law Journal, 99, 99–101 (2018).

Removing the regulation will result in a race to the bottom.

The Supreme Court has recognized “a compelling interest in protecting minors from exposure to sexually explicit materials.” *Ashcroft v. ACLU*, 542 U.S. 656, 674 (2004) (Stevens,

J., concurring). Specifically, there is a substantial governmental interest in protecting children from exposure to vulgar language and speech that is sexually profane. *Bethel School Dist.*, 478 U.S. at 684; *Pacifica Foundation*, 438 U.S. at 750; see also *Crawford v. Lungren*, 96 F.3d 380, 386 (9th Cir. 1996) cert. denied 520 U.S. 1117 (1997).

The State interest extends beyond protecting children from physical and psychic injury to preventing the coarsening of impressionable minds with non-obscene sexual material. No “scientific demonstration of psychological harm” is required to justify limitations on such expression. *Action for the Children’s Television v. FCC*, 58 F.3d 654, 662 (D.C. Cir. 1995) (en banc) cert. denied 516 U.S. 1043 (1996) (citations omitted). Additionally, the State has an interest in facilitating parental authority to control to what speech their children are exposed. *Id.*

In short, the State is entitled to protect children from being bombarded with age-inappropriate material on beer labels. “A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection.” *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944); see also *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 98 (2nd Cir. 1998).

C. The regulation is narrowly tailored and advances the substantial State interest.

The tailoring prong of the *Central Hudson* test involves examining the fit between the law’s purpose and the means chosen to accomplish those ends. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995) (citations omitted). The State must show the harm is real and that the regulation advances the interest in a real and substantial way. *Id.* at 487. “Underinclusiveness will not necessarily defeat a claim that a state interest has been materially advanced.” *Bad Frog Brewery, Inc.*, 134 F.3d at 98–99 (citations omitted).

In *Bad Frog*, the Second Circuit found an insufficient fit between a New York regulation, somewhat similar to the one at issue in this case, and the purported interest of protecting children from vulgarity and the regulation on the grounds that society is now inundated with vulgarity so that the regulation made no significant difference. *Id.* at 99–100. However, this is to take too broad of a view of the issue. Parents are aware of the widespread indecency throughout popular culture and can take steps like restricting access to media, the internet, and mobile phones if they see fit, especially with younger, more vulnerable children. The regulation’s goal is not to eliminate all vulgar images from the world, but to protect children and their parents from being ambushed by vulgar modes of advertising while shopping for the necessities of life. Alcoholic beverages have a distinctive combination of ubiquitousness, prominent display, and history and bright future of vulgar, sexualized advertisement.

A government can ban harmful modes of commercial advertising that subject the public to involuntary and unavoidable solicitation, so long as the regulations are narrowly tailored and leave other sufficient avenues of communication. See *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 327 fn. *, 329–30 (4th Cir. 1996), readopting the vacated opinion, 63 F.3d 1305, 1314 (4th Cir. 1995). Given the ubiquity of beer and its intermingling with other products in grocery and convenience stores, it is a matter of if, not when, children will see the beer labels. (Exh. 6, ¶¶ 4–5). The regulation effectively prevents their children from being waylaid by penises, MILF cream, and “slutty” dogs.

The tailoring of the regulation is illustrated by its application. The Commission has only found 19 labels that were formally rejected under the regulation going back to 2009. (Exh. 1, ¶ 13); (Exh. 2, ¶ 6); (Exh. 3, ¶¶ 12–14). Most were far beyond the bounds of propriety. Meanwhile, the regulation leaves open almost infinite avenues to distribute Gonzo speech, including

anywhere other than on alcoholic beverage labels, and on the Plaintiff's other approved beers. See (Doc. 27-1, ¶¶ 8–9).

It is important to remember the status of this application. The Plaintiff had only received the preliminary denial of the label from a staff member. This is normally an invitation to work with the Commission staff to figure out what needs to be done to get the label approved. (Exh. 1, ¶¶ 9–10). Senior staff and the Commission could also become involved in this process eventually. This is where much of the tailoring of the regulation in practice occurred; it was an opportunity to resolve differences over borderline labels like the one at issue here. While not the normal practice, it would be appropriate at this time for an applicant to request some compromise short of a denial or altering the label like placing an outer covering for the bottles without the problematic portion. See 14B NCAC 15B .1002(c) (allowing the Commission to approve advertising not otherwise authorized upon request and a showing of good cause); see also *Bad Frog*, 134 F.3d at 101. That was not done here because the Plaintiff filed suit.

While necessarily flexible in its terms, the regulation at issue here is narrowly tailored – and conservatively applied – to protect unsuspecting shoppers and children from being ambushed by harmful vulgarity. Additionally, as argued in the Defendants' Reply to the Plaintiff's Motion for Summary Judgment the regulation is not an unlawful prior restraint, is not unconstitutionally vague, and does not engage in viewpoint discrimination. The regulation and the application of it to the Plaintiff's label should be upheld as constitutional.

CONCLUSION

For the reasons demonstrated above, the Court should grant the Defendants' motion for summary judgment.

Respectfully submitted this the 23rd day of November, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed the **DEFENDANTS' MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court utilizing the CM/ECF system; this also constitutes service of the document under Local Civil Rule 5.1(e). I further certify that I have on this day, emailed said document to Plaintiff's counsel, addressed as follows:

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This the 23rd day of November, 2021.

/s/ Jeffrey B. Welty _____
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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA**

FLYING DOG BREWERY, LLC,

Plaintiff,

v.

THE NORTH CAROLINA ALCOHOLIC
BEVERAGE CONTROL COMMISSION,
A.D. “ZANDER” GUY JR., NORMAN A.
MITCHELL, SR., KAREN L. STOUT,
TERRANCE MERRIWEATHER, and
CINDY MESINO,

Defendants.

Case No. 5:21-cv-00343-BO

**OPPOSITION TO DEFENDANTS’
MOTION FOR SUMMARY
JUDGMENT**

Plaintiff Flying Dog Brewery, LLC (“Flying Dog Brewery”) hereby files its Opposition to Defendants The North Carolina Alcoholic Beverage Control Commission (the “Commission”), A.D. “Zander” Guy Jr., Norman A. Mitchell, Sr., Karen L. Stout, Terrance Merriweather, and Cindy Mesino’s (collectively, “Defendants”) Motion for Summary Judgment (Dkt. No. 33).

1.0 INTRODUCTION

This is a very simple case. In part, it is simple because the parties agree that the sole issue for this Court to determine is whether 14B NCAC 15B.1003(a)(2) is unconstitutional or not. There are subplots and interesting twists, but ultimately all this Court really needs to do is read this regulation and determine its constitutionality. Fortunately, that analysis is easy, too. Even if it ever was constitutional, it could not have remained so after *Matal v. Tam*, 137 S. Ct. 1744 (2017), *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), and *Flying Dog Brewery, LLLP v. Mich. Liquor Control Comm’n*, 597 Fed. App’x 342, 354 (6th Cir. 2015).

The regulation is this:

An advertisement or product label on any alcoholic product sold or distributed in this State shall not contain any statement, design, device, or representation that

*depicts the use of alcoholic beverages in a scene that is determined by the Commission to be **undignified, immodest, or in bad taste.***

14B NCAC 15B.1003(a)(2) (emphasis added).

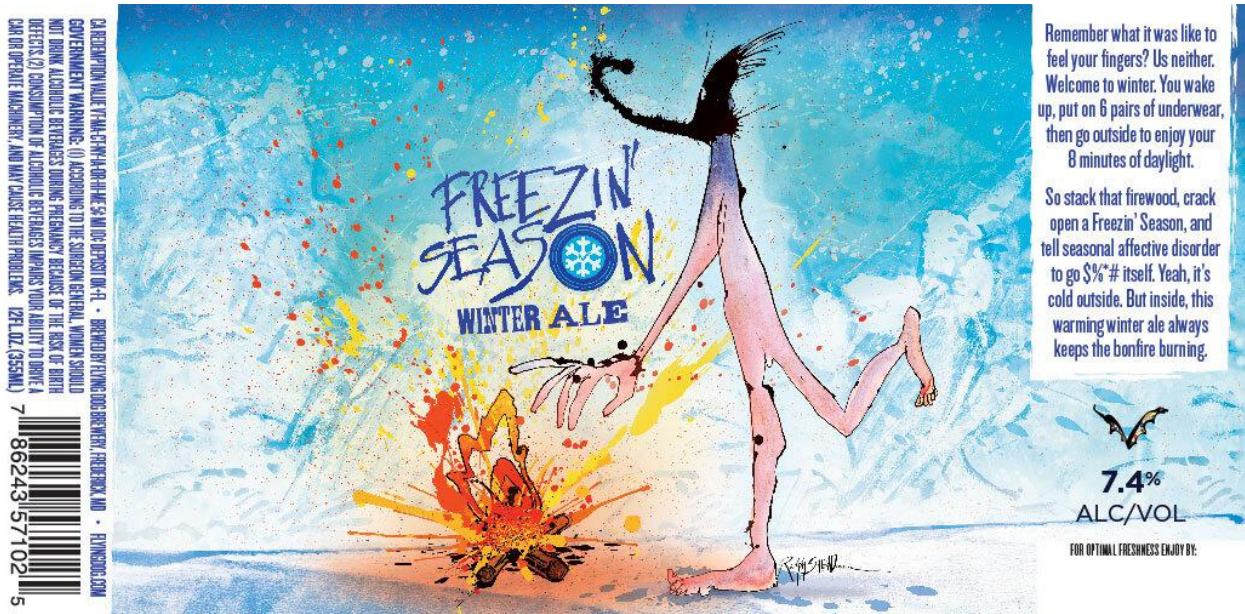
In their Motion for Summary Judgment, Defendants seem to mis-read the regulation. They argue that an alcohol licensing board, regulating products that cannot legally be sold to minors, is tasked with preserving the moral purity of North Carolina’s children, who would be somehow harmed if they grabbed Plaintiff’s Freezin’ Season beer bottle, looked at it *very* closely, and saw a small nub with no discernible features. Defendants also argue that a regulation which can reject beer labels for being “undignified, immodest, or in bad taste” does not allow for subjective judgments by government employees. Defendants’ arguments are illogical and show that there is no plausible justification for this obviously unconstitutional regulation. “[A]ny reasonable state liquor commissioner is on notice that banning a beer label based on its content would violate the First Amendment unless the *Central Hudson* test was satisfied.” *Flying Dog Brewery*, 597 F. App’x at 355. 14B NCAC 15B.1003(a)(2) is unconstitutional on its face and as it was applied to reject the Freezin’ Season beer label. The Court should deny Defendants’ Motion for Summary Judgment and should instead grant summary judgment in Plaintiff’s favor.

2.0 STATEMENT OF RELEVANT FACTS

2.1 Plaintiff Flying Dog Brewery, LLC

Plaintiff Flying Dog Brewery creates, brews, and sells craft beers and is one of the top 50 craft breweries in the United States. (*See* Plaintiff’s Statement of Additional Facts (“PSoF”) at ¶ 2.) Annually, it ships over 1.3 million cases of beer worldwide to its network of wholesalers, who in turn distribute Flying Dog Brewery beers to its corporate customers in the retail, bar, and restaurant businesses. (*See id.* at ¶ 3.) One of Flying Dog Brewery’s beers is a winter ale called Freezin’

Season. (*See id.* at ¶ 16.) The beer’s label contains the silhouette of a cartoon figure standing next to a campfire, along with a narrative description, as depicted below: (*Id.* at ¶ 17.)



2.2 Defendant ABC Commission’s Tasks and Duties

In North Carolina, the ABC is tasked with providing uniform control over the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages in the state. It is an independent state agency housed in the North Carolina Department of Public Safety directly reporting to the Governor’s office. The members of the Commission meet monthly to hear and take action matters within its regulatory authority.

North Carolina’s ABC laws are found in Chapter 18B of the North Carolina General Statutes, and the ABC Commission’s Rules are found in Title 14B, Chapter 15 of the North Carolina Administrative Code. The ABC Commission has the authority to regulate the advertising of alcoholic beverages, including the ability to “prohibit or regulate any advertising of alcoholic beverages which is contrary to the public interest.” NCGS § 18B-105(b)(11). No one is permitted to advertise or sell alcoholic beverages in North Carolina without first complying with the ABC

regulations. *See* NCGS § 18B-105(a). There are penalties for not complying with the ABC Commissions’ guidelines, including suspensions of permits for up to three years, revocation of a permit, and fines of up to \$5,000. *See* NCGS § 18B-104(a).

At issue in this case is the ABC Commission’s regulation and its use thereof, to determine whether an advertisement or product label on any alcoholic beverage sold or distributed in North Carolina is permitted. *See* 14B NCAC 15B.1003. That regulation operates as a prior restraint because it requires pre-approval of all labels and advertisements of alcoholic beverages. (PSoF at ¶¶ 18-19.) The regulation bans any “*representation that depicts the use of alcoholic beverages in a scene that is determined by the Commission to be **undignified, immodest, or in bad taste.***” *See* 14B NCAC 15B.1003(a)(2) (emphasis added). Therefore, there is a prior restraint before anyone can engage in this kind of speech in the state, and that prior restraint is only lifted once the government decides that the label meets *someone’s* level of “dignity,” “modesty,” or “good taste.” This prior restraint acts as a chilling effect on anyone seeking to create a label or ad for an alcoholic product in North Carolina, as a person of ordinary intelligence could never guess what the ABC would consider to be “undignified, immodest, or in bad taste.”¹ “[O]ne man’s vulgarity is another’s lyric.” *Cohen v. California*, 403 U.S. 15, 25 (1971). “A statute is impermissibly vague if it either (1) ‘fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits’ or (2) ‘authorizes or even encourages arbitrary and discriminatory enforcement.’” *Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1079 (4th Cir. 2006) (quoting *Hill v. Colorado*, 530 U.S. 703, 732, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000)); *see also FCC v. Fox Stations, Inc.*, 567 U.S. 239, 253 (2012). No matter which term we consider, “undignified,”

¹ One might wonder if there could simply be alternate labels created. First, this would not alleviate the Constitutional concerns. Further, such analysis ignores the realities of supply chains and shelf-space considerations.

“immodest,” or “in bad taste,” or any combination thereof, this regulation gives the government unfettered discretion, a result of the vague terminology, that the First Amendment will not tolerate.

The regulation is, on its face, in “constitutional bad taste.” The First Amendment and its interpretive case law does give a person of ordinary intelligence a reasonable opportunity to know that this regulation runs afoul of it. Even if reasonable persons of ordinary intelligence could have disagreed at some point, in the wake of *Matal v. Tam*, all doubt is resolved. To the extent that the Court would entertain the notion that the regulation is not facially unconstitutional, Defendants’ application of the regulation was arbitrary, capricious, and in violation of the First Amendment.

2.3 The Present Dispute

Flying Dog Brewery desired to produce beer labels and ads containing the Ralph Steadman work shown above. Mindful of the prior restraint the state mandated through the ABC regulations, it dutifully sent in the artwork for pre-publication approval. (*See* SUF at ¶ 20-21.) On July 23, 2021, Cindy Mesino, an ABC Commission employee, informed Flying Dog Brewery that the ABC Commission, and the individual commissioner Defendants named herein, rejected the label for the twelve ounce Freezin’ Season bottle. (*See id.* at ¶ 22.) When Flying Dog Brewery asked why the label was not approved, ABC said, in writing, that it was denied under “Rule 15b 1003-3(2).” (*See* Dkt. No. 5-4.) The reason given was: “... *we were going by the following regulation: As you can see below the image below is seen as inappropriate to many here.*” The ABC then cited the applicable rule, which allows the Commission to disapprove labels that are determined by the Commission to be “undignified, immodest, or in bad taste.” (*Id.*) (Highlight and double underlines appear in original).

Defendants *now* claim that the label was rejected because it was “*immodest*.”² Given that the ABC both highlighted and double-underlined the “*bad taste*” portion of the regulation, the ABC’s revised explanation should not be credited.³ Nevertheless, Plaintiff can be a good sport and assume, *arguendo*, that this after-the-fact shift could be credited. This does not change the analysis. Whether the rejection was due to the label being “in bad taste,” or “immodest,” or because it is “inappropriate to many here,” the analysis is the same – the regulation itself is unconstitutional and must be struck down. Each one of these terms, or all in conjunction with each other, all add up to a subjective determination, which burdens First Amendment protected expression, without any meaningful or articulable standard at all. “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943). How can “bad taste” or “undignified” or “immodest” ever be anything *but* a matter of opinion?

Through this attempt at mandating orthodoxy of opinion, the ABC restrained Flying Dog Brewery from advertising and making commitments to sell Freezin’ Season in North Carolina. Had Plaintiff not bent the knee to this regulation, subjecting itself to the prior restraint therein, it would have suffered from even greater penalties. Flying Dog Brewery’s inability to advertise and commit to sell Freezin’ Season in North Carolina damaged Flying Dog Brewery by unlawfully

² Defendants also seem to claim that Ms. Mesino was acting alone. This claim is belied by the fact that no one has claimed that Ms. Mesino was exceeding her authority, and her communications to Plaintiff use the plural “we” and refer to “many here.” (Dkt. No. 5-4.)

³ Defendants attempt to provide a benign explanation for so strongly emphasizing the “bad taste” portion of the regulation. For purposes of Defendants’ motion for summary judgment, this requires a determination as to Defendant Cindy Mesino’s credibility and creates a factual dispute, but this is an immaterial one because each portion of the regulation is unconstitutional. It does not matter which one of the unconstitutionally vague terms was the justification –the entire regulation must be struck down.

depriving it of its right to free expression and costing it significant sales of Freezin’ Season beer and ancillary Freezin’ Season products. (*See* PSoF at ¶ 23.)⁴

On September 7, 2021, shortly after Flying Dog Brewery sought a preliminary injunction, the Commission sent a letter to Flying Dog Brewery’s attorneys stating that the Freezin’ Season label had all of a sudden been approved. (*Id.* at ¶ 25.) This was a transparent attempt to evade judicial review of the unconstitutional regulation. As the Court observed in its Order denying Flying Dog Brewery’s Motion for a Preliminary Injunction, the continuing existence of this regulation creates an ongoing controversy. (Dkt. No. 20 at 5.) The Court should waste no further time nor judicial or party resources, and should strike down the regulation. This is particularly so given that of the 318 label denials it has rendered under this regulation since 1993, the Commission has only heard 5 appeals, and after hearing such administrative appeals, has reversed itself zero times. (SUF at ¶ 27.)⁵ It is an unconstitutional regulation, applied unconstitutionally, and has no saving graces. Nobody should be subject to it again.

3.0 LEGAL ARGUMENT

3.1 Standard of Review

Summary judgment is appropriate where “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). The parties have agreed that the only issue to be resolved is the Constitutionality of the regulation. Accordingly, there are no factual disputes to resolve and no credibility determinations to make. The Court is left with constitutional review of the regulation.

⁴ However, by agreement with Defendants, if summary judgment is granted striking down the regulation, Plaintiff has agreed to seek only nominal damages, relieving the parties and the Court from any need to engage in the analysis of how significant these damages were.

⁵ In opposing Plaintiff’s Motion for Summary Judgment, Defendants did not dispute that the Commission has never reversed itself. (Dkt. No. 31 at 4.)

3.2 14B NCAC 15B.1003(a)(2) is Unconstitutional and Defendants Violated Flying Dog Brewery’s First Amendment Rights by Applying it

Defendants rejected the Freezin’ Season Winter Ale label under a regulation that gives them the power to censor any label they find in “bad taste” or believe to be “inappropriate.” Defendants’ position “offends a bedrock First Amendment principle: “Speech may not be banned on the ground that it expresses ideas that offend.” *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

3.2.1 Beer Labels are Not Purely Commercial Speech

Defendants argue that they have nearly unfettered authority to regulate beer labels because they are purely commercial speech, citing *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).⁶ However, that case merely noted that the “parties agree that the *information on beer labels* constitutes commercial speech” in a challenge to a statute prohibiting alcohol content from being displayed on beer labels. *Id.* at 481 (emphasis added). There is no authority establishing that creative, expressive art found on beer labels is *categorically* commercial speech.⁷

Plaintiff takes the position that courts should engage in a bifurcated review of product labels. Portions of a label are truly commercial. The *information* on a beer label, such as price, ingredients, alcohol content, and the like would be properly analyzed as “commercial speech,” which is “expression **solely** related to the economic interests of the speaker and its audience.” *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 561 (1980) (emphasis added).

⁶ Defendants also cite *Flying Dog Brewery, LLLP v. Mich. Liquor Control Comm’n*, 597 Fed. App’x 342, 354 (6th Cir. 2015), which inaccurately cited *Rubin* for the proposition that “commercial speech principles apply to the content [as opposed to the information] of beer labels.” But this citation is of no help to Defendants because the Sixth Circuit there found that it was so clearly established that an alcohol commission could not forbid the sale of Plaintiff’s “Raging Bitch” beer label, which “depicts a wild dog presenting human female genitalia as well as possessing semblances of human breasts,” based on its alleged offensiveness that the commission members were not entitled to qualified immunity. *Id.* at 355. In this case, Flying Dog Brewery has graciously agreed to waive the issue of individual liability if this regulation is resolved at this stage.

⁷ Admittedly, the most on-point case, *Bad Frog Brewery*, would tend to support this notion.

But sometimes, as in this case, a brewer could intentionally engage in artistic expression and distribution, with beer as the vehicle. Flying Dog Brewery’s beer labels do more than say “drink this beer.” (See Dkt. No. 27-1 at ¶¶ 4-14) (explaining that artwork on Flying Dog Brewery’s labels communicate Plaintiff’s philosophy in the spirit of Hunter S. Thompson).

There is no doubt that there is commercial speech on the labels. However, the Ralph Steadman painting itself is pure artistic expression. The figure proposes no transaction. It is a work of art communicating Flying Dog’s philosophical message.⁸ As the Ninth Circuit found in *One World One Family Now v. City & County of Honolulu*, 76 F.3d 1009, 1011-12 (9th Cir. 1996), the sales of “T-shirts imprinted with various philosophical messages” were “within the ambit of the First Amendment.” Elements of the label that “serve a predominantly expressive purpose” are entitled to full First Amendment protection. *Mastrovincenzo v. City of New York*, 435 F.3d 78, 97 (2d Cir. 2006). In *Rogers v. Grimaldi*, the Second Circuit recognized that a movie title can be commercial speech, but the commercial elements of the title can be “inextricably intertwined” with the film-maker’s freedom of expression. Thus, “the expressive element of titles requires more protection than the labeling of ordinary commercial products.” *Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989). Accordingly, while there is support for the notion that the label is “commercial speech,” the proper way to analyze it is in a hybrid manner. The elements on the label that propose a commercial transaction are commercial speech. But, the purely expressive and artistic elements of the label should be reviewed as pure artistic expression. *Contra, Bad Frog Brewery v. New York*

⁸ This message is “it is amazing what you can achieve if nobody tells you that you can’t,” inspired by a painting George Stranahan saw in a Pakistani hotel. (Dkt. No. 27-1 at ¶ 4.) Flying Dog Brewery’s labels also “are a reflection of the people we strive to be, carefree and spontaneous, rough around the edges but with real charm.” (*Id.* at ¶ 14.)

State Liquor Auth., 134 F.3d 87, 97 (2d Cir. 1998) (disagreeing with the notion that the artistic elements of a beer label should be analyzed separately from the purely commercial elements).

3.2.2 Even if Purely Commercial Speech, Beer Labels are Still First Amendment Protected Expression

Even if the Court declines to bifurcate the label, and considers the entire thing to be commercial speech, the speech is not without significant First Amendment protection. The First Amendment protects “commercial speech from unwanted governmental regulation.” *Cent. Hudson*, 447 U.S. at 561 (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761-62(1976)); see also *Davenport v. Alexandria*, 710 F.2d 148, 148 n.1 (4th Cir. 1983). Commercial speech “not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.” *Cent. Hudson*, 447 U.S. at 561-62. Even purely commercial speech is First Amendment protected. See *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 480-81, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421-23, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993); *Va. Bd. of Pharmacy*, 425 U.S. at 762. Although the State does not make this argument, it is worth noting that the 21st Amendment does not shield government action from First Amendment scrutiny. See, e.g., *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors*, 415 US 476 (1995).

In order to regulate commercial speech that is “neither misleading nor related to unlawful activity,” the “State must assert a substantial interest to be achieved by restrictions on commercial speech.” *Cent. Hudson*, 447 U.S. at 564. The “regulatory technique must be in proportion to that interest,” and the “limitation on expression must be carefully designed to achieve the state’s goal.” *Id.* In other words, to survive, a restriction on commercial speech must serve a “substantial interest,” and it must be “narrowly drawn.” *Tam*, 137 S. Ct. at 1764. Among other things, this

means that the “regulatory technique may only extend as far as the interest it serves.” *Id.* (quoting *Cent. Hudson*, 447 U.S. at 565.) And it is no solution to state that Flying Dog can just change its label or not sell beer in this state – as this violates the doctrine of unconstitutional conditions as articulated clearly in the *Tam* decision. *See In re Tam*, 808 F.3d 1321, 1349 (Fed. Cir. 2015).

3.2.3 Defendants’ Regulation is Viewpoint-Based

Defendants’ bar on labels that are “inappropriate,” “immodest,” or “in bad taste” is a content-based restriction on speech. A restriction on speech is content-based when it either seeks to restrict, or on its face restricts, a particular subject matter. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). Restrictions on speech based on the message conveyed are presumptively unconstitutional. *See Turner Broadcasting System, Inc., v. FCC*, 512 U.S. 622, 641-43 (1994). This presumption is stronger when a restriction is based not just on subject matter, but on a particular viewpoint about the subject. *See R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992). Restrictions on speech where the rationale is the speaker’s opinion or viewpoint are impermissible. *See Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 46 (1983).

Defendants’ restrictions here are virtually indistinguishable from the Lanham Act’s prior bars, now struck down, on registrability of “disparaging” and “immoral or scandalous” trademarks. The Supreme Court found that these categories of restrictions are unconstitutional viewpoint-based restrictions on speech. *See Tam*, 137 S. Ct. at 1763 (in finding “disparagement” bar unconstitutional, noting that “in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint”); *see also Iancu v. Brunetti*, 139 S. Ct. 2294, 2299-2301 (2019) (in finding “immoral or scandalous” bar unconstitutional, noting that these terms were interpreted to mean “shocking,” “offensive,” and “disreputable,” and thus constituted viewpoint-based discrimination). There is no daylight between Defendants’ restrictions and what the Supreme Court

has already found unconstitutional.⁹ On their face, these restrictions are viewpoint-based. Defendants cannot have a substantial interest in regulating commercial speech that they believe is “in bad taste” or “inappropriate.” The First Amendment explicitly protects such speech.

Defendants argue in their opposition to Flying Dog Brewery’s Motion for Summary Judgment that the “undignified, immodest, or in bad taste” bar of 14B NCAC 15B.1003(a)(2) differs substantially from the bars to registration in *Tam* and *Brunetti*. They argue that their regulation “address[es] modes of expression, not viewpoints,” with “Fuck 2020” and “F bomb” allegedly being modes of expression. (Dkt. No. 30 at 15.) But this ignores the very trademark at issue in the *Brunetti* case: “FUCT” in connection with clothing. These are not distinguishable, and the reasoning in *Tam* and *Brunetti* applies with equal force to Defendants’ regulation.

The Court in *Brunetti* viewed dictionary definitions of the terms at issue to arrive at their conclusion, which is a helpful exercise for Defendants’ regulation as well. Merriam-Webster’s defines “dignified” and “undignified” as merely the presence or absence of “dignity,” which is defined as “a way of appearing or behaving that suggests seriousness and self-control” and “the quality of being worthy of honor and respect.” (See PSof at ¶ 28.) Presumably it is a government employee deciding whether the content of a beer label is “worthy of honor and respect,” an inherently subjective determination. The dictionary defines “immodest” as “not modest, specifically: not conforming to the sexual mores of a particular time or place.” (*Id.* At ¶ 29.) By definition, what is “immodest” will change depending on time and place, making it inherently subjective. Though Merriam-Webster’s does not have a definition of “bad taste,” it defines “taste,”

⁹ Indeed, Defendants assert their interest in “protect[ing] children from being bombarded with age-inappropriate material on beer labels” as justification for their regulation. (Dkt. No. 34 at 9.) This is indistinguishable from the Government’s asserted interest in *Tam* of “preventing ‘underrepresented groups’ from being ‘bombarded with demeaning messages in commercial advertising.’” The result should be the same.

in relevant part, as “individual preference: inclination” and “critical judgment, discernment, or appreciation; manner or aesthetic quality indicative of such discernment or appreciation.” (*See id.* At ¶ 30.) It hardly requires an explanation as to why this term cannot hope to set forth objective standards and thus it is unconstitutionally vague.

Defendants also argue in their opposition that the Supreme Court in *Brunetti* considered a limiting instruction for the Lanham Act’s “immoral” or “scandalous” bars as being limited to “modes of expression that are offensive or shocking, independent of the content of the ideas expressed.” (Dkt. No. 34 at 15.) But the reason this limiting instruction was rejected is because the terms “immoral” and “scandalous” were nebulous and so inherently viewpoint-based, the exact same problems Defendants’ regulation has. Contrary to Defendants’ unsupported assertion, there is no meaningful difference between “immoral” or “scandalous” and “undignified, immodest, or in bad taste.” Each term is just as subjective and loaded with implicit moral judgments as the other. It is absurd to claim otherwise.

3.2.4 Defendants’ Alleged Interest in Protecting Children, if it Exists at All, is Limited

In this instance, Defendants’ regulation permits the ABC to reject speech that it determines is “undignified, immodest, or in bad taste.” *See* 14B NCAC 15B.1003(a)(2). In rejecting Flying Dog Brewery’s label, Defendants’ representative specifically stated that Defendants found the label “in bad taste” and “inappropriate.” Thus, the point of the regulation could not be more clear: The ABC and its Defendant members claim to have a substantial “interest in preventing speech expressing ideas that offend.” *Tam*, 137 S. Ct. at 1764.

Defendants argue that their regulation is constitutional because it allows the Commission to “serve[] the State interest in protecting children and other unsuspecting shoppers from being bombarded with explicit and profane beer labels.” (Dkt. No. 30 at 6.) Defendants provide multiple

examples of alcohol labels that were denied under their unconstitutional regulation to show that there is a legitimate purpose behind it.¹³ But this only proves Flying Dog Brewery's point. Labels like "The F Bomb"¹⁴ (Dkt. No. 32 at 48) and "The G Spot" (*id.* At 55) do not have conceivably objectionable visual content, instead containing only textual references to an implied vulgarity and a scientific sexual term, the exact kind of content that the Supreme Court in *Tam* and *Brunetti* found was protected and could not be impaired under the sort of vague "immoral or scandalous" standard that Defendants' regulation uses. There is nothing in any of these unconstitutionally rejected labels that is more offensive or graphic than cartoon violence or a joke intended for adults in a PG-13 movie. Defendants' claim that they are trying to protect the children from the corrupting influence of content they are already inundated with. This is unconvincing. Indeed, the court in *Bad Frog Brewery* agreed with this reasoning *over 20 years ago*. 134 F.3d at 99-100. The Court may take judicial notice that American society has not become less accepting of "vulgar" content over the past two decades.

¹³ Defendants also argue that only 19 labels have been rejected for being "undignified, immodest, or in bad taste" since 2009, which somehow makes the regulation narrowly tailored. But even a single rejection on unconstitutional grounds is sufficient to strike down the regulation, and admitting to violating the First Amendment rights of 19 applicants in the past does not help Defendants now.

Furthermore, this assertion appears to be highly misleading based on what Defendants claim a formal rejection is. They assert that their rejection of the Freezin' Season label was merely a "preliminary denial" and "an invitation to work with the Commission staff to figure out what needs to be done to get the label approved." (Dkt. No. 34 at 11.) Presumably, their rejection of the Freezin' Season label was not included in their tabulation of rejections, nor would any "preliminary" rejections of other labels found objectionable. Whether by outright rejecting a label or forcing an applicant to water down the message on their beer labels for the benefit of children (or whatever other demographic is opportunistically cited for a rejection), Defendants are violating the First Amendment rights of applicants.

¹⁴ It is especially inadvisable for Defendants to cite rejection of this label in support of their position. The trademark at issue in *Brunetti*, which resulted in striking down the "immoral and scandalous" bar on registration of trademarks, was "FUCTION" in connection with clothing. Trademarks containing the word "fuck" have since been registered with the USPTO. *See, e.g.*, "Maine Fucks," USPTO Reg. No. 6450707, in connection with apparel.

Defendants argue that many of the labels found problematic in the past contain no offensive visual content and children would have no idea what they are referencing, but that a curious youngster might go to *the internet* and search for terms on the labeling that would then result in potentially inappropriate search results. (Dkt. No. 34 at 8.) Defendants apparently believe that their obligation to protect children extends not only to liquor stores and supermarkets, but also the homes of families and children’s internet browsing. This is silly. They also claim, relying solely on a law review article, that there will be a “race to the bottom” of offensive beer labels if their regulation is removed. (*Id.*) But their only evidence is inadmissible hearsay, and the parade of horrors they predict consists of nothing more than more protected speech.¹⁵

Defendants’ entire rationale is premised on a single asserted interest: protecting children from sexually explicit content. They correctly note that the Supreme Court has recognized “a compelling interest in protecting minors from exposure to sexually explicit materials,” citing *Ashcroft v. ACLU*, 542 U.S. 656, 674 (Stevens, J., concurring). But they leave out the portion of Stevens’s concurrence in which he wrote “[a]s a judge, however, I must confess to a growing sense of unease when the interest in protecting children from prurient materials is invoked as a justification for using criminal regulation of speech as a substitute for, or a simple backup to, adult oversight of children’s viewing habits.” *Id.* This invocation of “think of the children” as a proxy for parental responsibility is *exactly* what Defendants are doing when they argue that “the State has an interest in facilitating parental authority to control to what speech their children are exposed.” (Dkt. No. 34 at 9.) Of course, the notion that kids will look at beer labels, and then go research “Urban Dictionary” to find out what a hypothetical term means is just bizarre.

¹⁵ Such a parade of horrors was predicted if the “disparaging” and “immoral” or “scandalous” bars of Section 2(a) of the Lanham Act fell. Indeed, these bars fell 4 and 2 years ago, respectively, yet the sky remains above us.

Defendants’ citation to *FCC v. Pacifica Found.*, 438 U.S. 726, 730 (1978) for this proposition is inapposite because the Court there based its reasoning on the conclusion that cable “broadcasting is uniquely accessible to children, even those too young to read.” Beer labels at a liquor store, where no child would be present without being accompanied by a parent or guardian, is easily distinguishable from network broadcasting. And while the court in *Crawford v. Lungren*, 96 F.3d 380, 386 (9th Cir. 1996) cert. denied 520 U.S. 1117 (1997), acknowledged this general state interest, the regulation in that case was limited to **obscene** materials as defined by the *Miller* test, rather than the undefined “undignified, immodest, or in bad taste” speech barred by Defendants’ regulation.

According to the ABC Commission’s regulations, their purpose is to “provide regulation and control of the manufacture, distribution, advertisement, sale, possession and consumption of alcoholic beverages to serve the public health, safety and welfare.” 14B NCAC 15A.0101. It is not a general morality board tasked with protecting minors from naughty words or artistic expression of which the Commission disapproves. The ABC does not have an overriding interest in protecting minors from sexually explicit beer labels, yet that is the only interest they assert as justifying their regulation or their rejection of the Freezin’ Season label. Even if the ABC were tasked with such a responsibility, Defendants’ regulation plainly sweeps well beyond this asserted interest and cannot possibly satisfy *Central Hudson’s* intermediate scrutiny test.

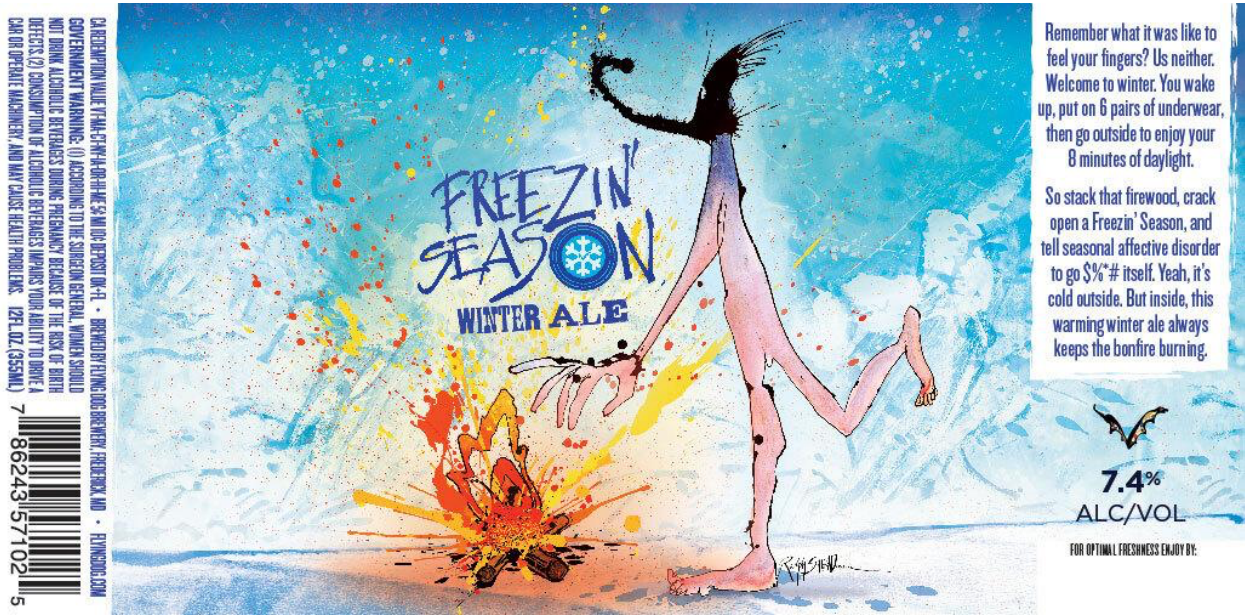
3.2.5 14B NCAC 15B.1003(a)(2) is Not Narrowly Drawn

As a defense to Flying Dog Brewery’s facial challenge, Defendants’ position that its regulation is meant to protect children from sexually explicit materials is misguided – after all, if that were its purpose, then it would say so. It plainly does not. It seems to pretend that the regulation is limited only to *sexually explicit* materials, when it plainly is not. A gigantic engorged

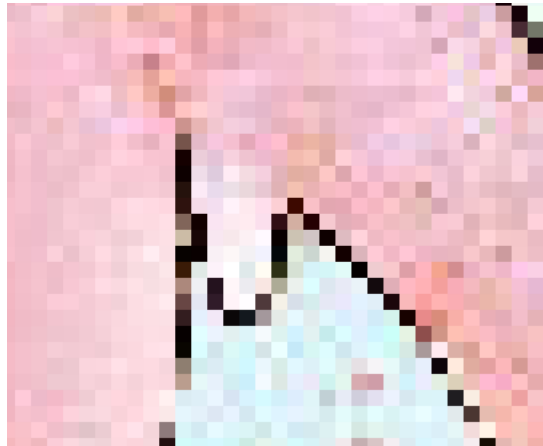
penis may indeed constitute an “immodest” beer label, but so could a wide variety of other graphic or textual content which is not sexual in nature. This is entirely apart from labels which are “undignified . . . or in bad taste,” which terms have meanings only the Commission knows. Indeed, a review of Defendants’ official website using its standard product information search function reveals products such as “EFF 2020,” “Blue Mother Fuc*er Flavored MB,” “Cocky Motherf*cker Reserve,” “Orgasm,” and “Ling Chi,” which have all been approved for distribution and retail sale in North Carolina. (*See* PSoF at ¶ 34.)¹⁶ “EFF 2020,” submitted by Sweetwater Brewing Company, an out-of-state manufacturer, not only has a fanciful name that is an obvious profane euphemism but is combined on a product label with an illustration of two hands holding up only middle fingers. (*Id.* at ¶ 35.) From another out-of-state manufacturer, Drink Four Brewing Company, the label “Blue Mother Fuc*er Flavored MB” displays an asterisk over a single letter of a common profanity while also showing an inverted hand holding up only the middle finger. (*Id.* at ¶ 36.) Yet another out-of-state manufacturer, Twelve Percent, was approved for its label, “Ling Chi,” which illustrates a naked man bound in rope while having his body cut open and apart by a group of people brandishing knives. (*Id.* at ¶ 37.)

¹⁶ Flying Dog Brewery discovered the label images shown in the attached Certificates of Label Approval (“COLA”) by searching the Alcohol and Tobacco Tax Trade Bureau (“TTB”) online registry, which allows the public to search for COLAS. For reasons unknown, Defendants do not upload images of labels they approve for distribution and sale in North Carolina on their website. In the absence of a Public Records Act request, Flying Dog Brewery cannot guarantee the label images attached are exactly the same as those Defendants have approved for sale in North Carolina. As a matter of North Carolina law, Defendants must approve every product label before a product may be lawfully marketed, distributed, or sold in North Carolina. Moreover, Defendants require every out-of-state manufacturer to submit a COLA to accompany each application for label approval. Thus, every label Defendants approve pursuant to an out-of-state manufacturer’s application therefore should be readily found on the TTB’s online registry.

As a defense to Flying Dog Brewery’s as-applied challenge, Defendants’ position is suspect. Their entire argument rests on the assertion that the Freezin’ Season label is sexually explicit. The Court can take notice that the label is hardly a substitute for Hustler magazine. In fact, it must have taken quite some effort to find the “penis” in this rendition at all. If the image below is “sexually explicit” the undersigned will simply stand, dumbfounded and speechless.



The label depicts a malformed caricature of a human with oversized feet, apparently a single arm and hand, and no discernible facial features. It also shows a small protrusion that is where one would expect to find a penis on a male human, but is otherwise not at all identifiable as one. There are no constituent parts of a penis, no testicles, it is not engorged, and it is microscopically small compared to the rest of the figure. In case it is difficult to tell this lack of detail due to how small the alleged penis is, let us zoom in:



If Defendants truly believe that this figure is so sexually immodest that it will psychically scar children, then it should commit itself to closing down the North Carolina Museum of Art in Raleigh, North Carolina to spare the children of North Carolina the trauma of *potentially* witnessing a legion of uncovered penises, displayed in much greater detail. This art museum contains depictions of uncovered penises all in places where children are far more likely to be than in a liquor store. (PSoF at ¶ 31.) The museum displays sculptures such as the following:

- Figures with removed penises with clearly visible testicles sitting at child-height. (*Id.* at ¶ 32, Decl. ¶¶ 19-21.)
- Cherubic angels with identifiable male genital bulges and shapes. (*Id.* at Decl. ¶ 22.)
- Satyrs with clearly visible uncircumcised penises. (*Id.* at Decl. ¶ 23.)
- A funerary mourner and a servant with clearly visible penises. (*Id.* at Decl. ¶¶ 24-25.)
- A child’s penis and testicles shown with extreme clarity. (*Id.* at Decl. ¶ 29.)
- Two children playing while naked, with clearly visible testicles and penises, and with one child urinating. (*Id.* at Decl. ¶ 30.)
- The penises and testicles of several children and/or angels. (*Id.* at Decl. ¶¶ 31-37, 43.)
- The genital bulge of a child. (*Id.* at Decl. ¶¶ 38-39.)

- The genitals of infants. (*Id.* at Decl. ¶¶ 40-42.)
- A satyr with visibly turgid exposed male genitals chasing a young woman through the woods. (*Id.* at Decl. ¶ 44.)
- Male genital bulges in states of action. (*Id.* at Decl. ¶¶ 47-48.)

The museum also contains an interactive “workshop” style area for children and families, containing a mural of a naked male penis and testicles immediately next to a children’s work station. (PSoF at ¶ 33.)

It goes without saying that children and other members of the general public can be exposed to actual graphic depictions of penises, even those with great realistic detail, without suffering mental or emotional trauma. For Defendants to claim that they are helping to prevent harm to children by banning a beer label that, at most, shows an infinitesimally small *suggestion* of a penis makes little sense. It is also not a position that Defendants actually believe, given that they so quickly allowed the sale of beers with such an allegedly harmful label immediately after being sued. They cannot plausibly argue that the Freezin’ Season label had any tendency to harm anyone when they permitted distribution of the label the moment it seemed helpful to avoid an injunction. Defendants are merely trying to come up with an *ex post facto* justification for their unconstitutional viewpoint-based discrimination.

The regulation is unconstitutionally vague as well. It does not define what it means by “undignified, immodest, or in bad taste.” *See* 14B NCAC 15B.1003(a)(2). It leaves that determination to the subjective whims of the ABC Commission and its members. The determination that this is a license to engage in censorship on mere personal whims is highlighted by the fact that in trying to moot the case, the ABC simply reversed itself, for the first time in its history. What interest could the initial censorship have served, then? Defendants argue that it was

to “protect the children,” but as explained above, this excuse cannot justify the Commission’s actions. Indeed, once Defendants wanted to try to moot a lawsuit, these same children were appropriate to use as child-sacrifice at the altar of the ABC’s desire to avoid a loss at a hearing.¹⁷

Defendants argue that there is “a robust body of interpretations” of their regulation that should have put Flying Dog Brewery on notice that its Freezin’ Season label would be rejected (Dkt. No. 34 at 13-14), but the rejected applications cited are not even vaguely similar to Freezin’ Season and do not show any alleged exhibition of genitals. There is no way a reasonable applicant would be able to view this history of rejections and conclude that a label with a caricature of a person with no sexually explicit content would be rejected. Further, the only party who should have been on notice here is the Commission, which has been warned that its regulations must pass First Amendment muster.

In the appeal of the rejection of the label application for “Polygamy Porter,” Defendants were explicitly put on notice of the potential for First Amendment scrutiny. In the Commission’s August 14, 2019, monthly meeting in which the out-of-state manufacturer and label applicant, CANarchy, appealed the rejection of its label, “Polygamy Beer,” pursuant to Administrative Code 14B NCAC 15B .1003(a)(2), counsel for CANarchy explicitly expressed to the Commissioner her belief that, “the standard in question was overly broad and . . . affected [CANarchy’s] First Amendment right of freedom of speech.” (*See* PSoF at ¶ 38.) Counsel for CANarchy also expressed concern over the regulation’s vagueness, referencing “examples of other labels in the binders . . . provided” while reiterating to the Commission that “the rejection was a potential First Amendment issue.” (*Id.* at ¶ 39).

¹⁷ Perhaps Flying Dog Brewery’s next beer could be “Sacrificial Lambs,” dedicated to the children of North Carolina. This would certainly, and intentionally, be “undignified” in its portrayal of the ABC.

Defendants were also warned of First Amendment issues in the appeal of the “FUCK 2020” label. In the Commission’s monthly meeting on March 10, 2021, where the manufacturer and label applicant, Sycamore Brewing, appealed the denial of its label “FUCK 2020” pursuant to Administrative Code 14B NCAC 15B .1003(a)(2), Sycamore Brewing’s counsel stated that he, “did not believe the Commission intended to create an unpredictable speech environment for the in-state products; however, the approvals appeared to be in contradiction.” (*See* PSoF at ¶ 40.) Counsel for Sycamore Brewing stated further that, “consumer sentiment is an important barometer for what businesses understand to be acceptable speech in the private marketplace.” (*Id.* at ¶ 41.)

The regulation at issue can never be narrowly tailored to serve a compelling government interest because it is specifically drafted to violate a bedrock principle of First Amendment jurisprudence, namely that speech cannot be prohibited because it expresses ideas that offend. The regulation prohibits anything that some or all of the members of the ABC Commission find “distasteful.” Prohibiting speech for being *distasteful* already runs afoul of First Amendment principles. However, the regulation in question here depends upon what the individual members of the ABC Commission find distasteful or inappropriate. In other words, the exact same Freezin’ Season Winter Ale label that Defendants found inappropriate in 2021 might be found wholly appropriate and approved if the ABC Commission has new members in the future – or if they wish to cynically try to evade judicial review – a hypothetical that has come to pass in this record.

Defendants claim that their regulation is narrowly drawn because beer sellers still have “almost infinite avenues to distribute Gonzo speech, including anywhere other than on alcoholic beverage labels.” (Dkt. No. 34 at 10-11.) This argument of “you can still speak, you just can’t make money off of it,” applies with equal force to *Tam* and *Brunetti*, yet the Supreme Court in both cases found that denying a government benefit based on the content of one’s speech violates

the First Amendment.¹⁸ In fact, the argument was stronger in those cases, as a trademark applicant could still sell products bearing a non-registrable trademark, they just wouldn't be entitled to the benefits of trademark registration. Defendants' regulation here entirely bars the sale of beers with labels they find objectionable, and beers are the primary (if not exclusive) method of displaying these labels. Allowing the distribution of speech, but not in the only way that distributing it is profitable, creates an obvious chilling effect.

3.3 Flying Dog Brewery's Decision to Forego Available Administrative Remedies is Legally Sound and Reflects That This Cause of Action Does Not Arise in a Vacuum

In the Memorandum in Support of Defendants' Motion for Summary Judgment, Defendants make an attempt to persuade this Court that, in bringing this case, Flying Dog Brewery has not acted in good faith, or that Flying Dog Brewery's decision to do so is not informed by Defendants' own assessment as to the relative adequacy of the available administrative processes. In the interest of complete candor toward this Court, Flying Dog Brewery cites two (2) reasons for its decision to initiate the instant cause of action before this Court without exhausting the available administrative remedies: (i) it has a clear legal basis for doing so; and (ii) it has sincerely held doubt as to the adequacy of those administrative remedies.

First, Flying Dog Brewery had a clear legal basis to forgo available administrative remedies in its pursuit to invalidate 14B NCAC 15B .1003(a)(2) as an unconstitutional curtailment of its First Amendment rights. A plaintiff is not required to exhaust state administrative remedies as a prerequisite to bringing an action pursuant to 42 U.S.C.S. § 1983. *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496 (1982). Period.

¹⁸ The Federal Circuit went into detail about how conditioning the benefit of trademark registration on surrendering one's First Amendment rights was a violation of the unconstitutional conditions doctrine. *See In re Tam*, 808 F.3d at 1349. That same reasoning applies here.

Further, there was no indication from anything in the ABC’s history that it would have finally decided to change direction in applying an unconstitutional regulation. Certain of Defendants’ arguments suggest that Flying Dog Brewery’s decision to bring this case somehow dishonors *Patsy v. Board*, or that this matter otherwise arises in a circumstantial vacuum. In their Statement of Facts, Defendants seem to mock Flying Dog Brewery’s urgency in filing its original complaint, complaining that “[i]nstead of attempting to resolve the issue with the staff or raising the issue before the Commission for an agency decision . . .” because Flying Dog Brewery did so, “[o]ver two weeks after” the previous Commission meeting took place. (Dkt. No. 34 at 5.) Defendants raise other curious arguments, including a qualification that the rejection of the Freezin’ Season label was merely “preliminary” in nature, an assurance to the Court that “[s]enior staff and the Commission could also become involved . . . eventually,” and a suggestion that Flying Dog Brewery be burdened with conjuring a compromise acceptable to the Commission despite their admission that such is, “not the normal practice.” (Dkt. No. 34 at 11.)

These arguments ignore that Defendants revealed their discrete objection to the label only after Flying Dog Brewery filed suit. (*Compare* Dkt. No. 5-4 and Dkt. No. 17 at 4.) Moreover, and without diluting this Court’s focus on the question of 14B NCAC 15B .1003(a)(2)’s constitutionality, Defendants also illustrate that, but for analyzing for itself the nature and adequacy of the administrative remedies referenced by Defendants, Flying Dog Brewery would have had to learn the proverbial hard way that exhaustion of those remedies was not in its best interest.

As reflected in Defendants’ Reply to Flying Dog Brewery’s Statement of Undisputed Facts, there are exactly zero (0) documented instances of a product registration application rejection being overturned pursuant to an appeal made at a monthly Commission Meeting. (Dkt. No. 31 at

6, ¶¶ 8-10.) Indeed, prior to initiating this cause of action, Flying Dog Brewery undertook to review every published Commission Meeting Agenda and every published Commission Meeting Minutes available through Defendants’ official website. It determined as a result that, since 2013, every application for product approval rejection brought before the Commission on appeal at its regular monthly meeting has been upheld; no appeal has succeeded. (Dkt. No. 27-1 at ¶ 26; Dkt. No. 18-1.) To be clear, this revelation includes all appeals of product registration application rejections made pursuant to 14B NCAC 15B .1003(a) generally, not merely those made pursuant to the subject subsection of Flying Dog Brewery’s lawsuit, (a)(2). *Id.*

3.4 The State’s Gloomy Outlook is a Poor Forecast

The State attempts to create fear that “unsuspecting shoppers and children [will be] ambushed by harmful vulgarity” in the absence of this regulation. (Dkt. No. 34 at 11). If the State believes this, nobody tell them about the museum, as discussed above. However, once this regulation is struck down, nothing Constitutional will be lost. Nothing suggests that any catastrophe befell New York after *Bad Frog Brewery*, nor Michigan after *Flying Dog*. *See also Hornell Brewing Co. v. Minnesota Dep’t of Pub. Safety, Liquor Control Div.*, 553 N.W.2d 713, 719 (Minn. Ct. App. 1996) (striking down regulation prohibiting misleading associations with American Indian names on malt beverages, with no known ill effects on Minnesota society).

Flying Dog Brewery designs its labels for approval by federal and state authorities throughout its distribution area. (*See* PSoF at ¶ 24.) The federal government regulates alcohol

labeling as well, through the Alcohol & Tobacco Tax and Trade Bureau (“TTB”) and 27 C.F.R. § 7.29, and this regulation banning “obscene” labels would remain intact.¹⁹

Even in the absence of any specific regulation regarding beverage labels, North Carolina has a general prohibition on obscenity. *See* N.C. Gen. Stat. § 14-190.1 (providing “[i]t shall be unlawful for any person, firm or corporation to intentionally disseminate obscenity”). “Harmful vulgarity,” as the state calls it, has no legal meaning, nor could it. “[O]ne man’s vulgarity is another’s lyric.” *Cohen*, 403 U.S. at 25. However, “obscenity” has a more focused meaning. *See Miller v. California*, 413 U.S. 15 (1973); *State v. Mayes*, 323 N.C. 159, 163 (1988) (noting that North Carolina’s obscenity statute is modeled on the test set forth in *Miller*). If anyone even so much as sought to present an art exhibit, and not a beer label, that contained *obscene* material, the State of North Carolina possesses the ability not only to censor such material, but could go so far as to criminally prosecute the artist.

Moreover, if the State of North Carolina is concerned about the children and their exposure to alcoholic beverage communication, in general, it is free to enact regulations that do not violate the First Amendment. For example, it has the power to simply ban children from entering any alcoholic beverage store or aisle where alcohol is sold. It could even ban communicative activity by banning advertisements for alcohol anywhere children are likely to see them while walking to school or playing. *See Anheuser-Busch v. Schmoke*, 101 F.3d 325, 327 (4th Cir. 1996) (upholding a Baltimore ordinance banning alcohol advertising in areas frequented by children). However, any such ban would need to be content-neutral. It could not favor a Sam Adams label over that of Freezin’ Season, lest it offend the memory of that Brewer and Patriot, who believed (like Flying

¹⁹ The label for Freezin’ Season Winter Ale received a Certificate of Label Approval from the TTB and approval from every state within its distribution network with one exception: North Carolina. (*See* PSoF at ¶ 24.)

Dog’s management) that the people should fiercely guard against infringements on their Constitutional rights. John K. Alexander, “Samuel Adams: America's Revolutionary Politician,” Lanham, Maryland: Rowman & Littlefield. at 249 (2002).

4.0 CONCLUSION

For the foregoing reasons, the Court should deny Defendants’ Motion for Summary Judgment and should grant Plaintiff’s cross-motion for Summary Judgment and strike down 14B NCAC 15B.1003(a)(2).

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 13, 2021 I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I further certify that a true and correct copy of the foregoing document being served via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Marc J. Randazza

Marc J. Randazza

**THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
CASE NO. 5:21-cv-343**

FLYING DOG BREWERY, LLC,)
Plaintiff,)
)
v.)
)
THE NORTH CAROLINA ALCOHOLIC)
BEVERAGE CONTROL COMMISSION,)
ALEXANDER DUKE “ZANDER” GUY)
JR., NORMAN A. MITCHELL SR.,)
KAREN L. STOUT, TERRANCE L.)
MERRIWEATHER, and CINDY)
MESINO,)
Defendants.)

**DEFENDANTS’ REPLY TO THE
PLAINTIFF’S RESPONSE TO
DEFENDANTS’ MOTION FOR
SUMMARY JUDGMENT**

Pursuant to Local Rule 7.1(g)(1) the Defendants file this Reply to the Plaintiff’s Response to Defendants’ Motion for Summary Judgment. Additionally, the Defendants submit a reply statement of undisputed facts pursuant Local Rule 56.1(a)(3) with the attached Appendix.

I. Introduction

The Defendants have agreed with the Plaintiff to focus these cross-motions for summary judgment on the core issue of whether 14B NCAC 15B .1003(a)(2) is constitutional. The Defendants strongly believe the regulation is constitutional and necessary to protect the interests of the State and People of North Carolina. It seeks to vigorously defend it. By agreeing to only seek nominal damages at this stage, the Plaintiff provides the Defendants with an opportunity to vindicate this defense while minimizing the cost and risk associated with litigation, making it advantageous to address the constitutional question promptly. The Defendants do not waive additional defenses but will only pursue them if the case is unable to be resolved in light of the ruling on these motions. This Reply to the Plaintiff’s Response to the Defendants’ Motion for

Summary Judgment will briefly address a number of errors in the Plaintiff's filings. Before answering the constitutional question, it is necessary to have the right question.

II. The Court should reject the Plaintiff's proposed bifurcated analysis of beer labels and analyze the full label as commercial speech in line with *Bad Frog* and Fourth Circuit precedent.

The Plaintiff admits, in a footnote, that *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87 (2nd Cir. 1998) is the most applicable persuasive authority and supports the proposition that the entire content of the label should be analyzed as commercial speech. Dkt. No. 38, p. 8 fn. 7. This is in line with the binding Fourth Circuit precedent of *Wag More Dogs, LLC v. Cozart*, which instructs how to analyze artistic advertisements that may blend expressive and commercial elements. 680 F.3d 359 (4th Cir. 2012). The presence of the three following factors strongly support categorizing such speech as commercial: 1) the speech is an advertisement; 2) the speech refers to a specific product or service; and 3) the speaker has an economic motivation for the speech. *Greater Baltimore Cent. for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 721 F.3d 264, 284–85 (4th Cir. 2013) (en banc) (citations omitted).

The Plaintiff admits that bottle retail sales make up 90% of the Plaintiff's business, and “the design of its labels is particularly important to entice customers into buying its beer[.]” Dkt. No. 24, ¶ 35. It strains credulity to believe they are relying upon the price, ingredients, and alcohol content, See Dkt. No. 38, p. 8, to attract these customers. However great the merits of Ralph Steadman's work, in this case, it is being used primarily to sell beer and should be analyzed as commercial speech.

The persuasive authority that Plaintiff cites to support this bifurcated analysis fails in its mission. It does not attempt to reconcile its approach with Fourth Circuit authority on blended

speech and proposes a novel test unsuited to the context of this case. A close reading of the cases does not even support it.

In *One World One Family Now v. City and County of Honolulu*, the Ninth Circuit, with little to no reasoning, extended expressive speech protections to the sale of t-shirts that had political slogans on them by non-profit corporations when the speech was directly related to the non-profits' missions. 76 F.3d 1009, 1011–12 (9th Cir. 1996). The Court does not mention the commercial speech doctrine, presumably because the primary purpose of selling the t-shirts was to disseminate the groups' message. The credibility of their claim to be about the message, not the money, was heavily bolstered by the fact they were **non-profit** corporations. The t-shirts were primarily bought and sold to communicate messages; the money was incidental. Ralph Steadman's art on Flying Dog's labels, no matter the personal significance to the founder or other employees, is primarily a means of selling beer to make money by a for-profit global business. *One World* is inapplicable and does not serve as grounds to deviate from Fourth Circuit analysis.

The Plaintiff next says, "Elements of the label that 'serve a predominantly expressive purpose' are entitled to full First Amendment protection," Dkt. 38, p. 9. quoting *Mastrovincenzo v. City of New York*, 435 F.3d 78, 97 (2d Cir. 2006) – ripping the quote horribly out of context. This is the sole reference to the case for good reason. The case involved the attempt to prevent the sale on the streets of New York of hand-graffitied hats and clothing by the trained artists who made them. *Mastrovincenzo*, 435 F.3d at 86, 97. In determining if expressive speech rights applied to the apparel, the Second Circuit first asked whether the painted hats had expressive elements and then asked whether the expressive elements were dominant in the single, undivided article of apparel. *Id.* at 95. The proper inquiry in determining if the commercial speech

doctrine was to determine the nature of the whole article, not to unnaturally vivisect it like some Dr. Moreau. The court determined that the apparel were works of art that were used to sell nothing but themselves, whereas here, the Steadman graphic is an artistic representation in the service of selling something else, beer.

Plaintiff's last case, *Rogers v. Grimaldi*, is even less convincing. 875 F.2d 994, 998 (2d Cir. 1989). This case pre-dates *Bad Frog*, which was also decided by the Second Circuit. It did not even convince the Second Circuit, where it was mandatory authority, to bifurcate the elements of beer labels. Furthermore, the Second Circuit in *Rogers* was attempting to ascertain the effect on the public of the whole title of the movie, which was a blend of artistic and commercial elements. *Id.* at 998. The Plaintiff's persuasive authority fails to persuade and should be rejected in favor *Bad Frog* and well-established Fourth Circuit precedent.

III. The Plaintiff improperly narrows the Commission's mandate and falsely claims the federal government can guarantee the State's sovereign interest.

N.C.G.S. § 18B-105(11) empowers the Commission to “[p]rohibit or regulate any advertising of alcoholic beverages which is contrary to the public interest.” This is a broad invocation of the State police power and authority under the Twenty-First Amendment to protect the community, including children and their parents, from the harms of alcohol advertising, whether related directly to consumption or not. See *Jacobsen v. Massachusetts*, 197 U.S. 11, 26–27 (1905); *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum*, 445 U.S. 97 (1980).

With the regulation, the Commission is not attempting to usurp the role of parents as the Plaintiff claims, Dkt. No. 38, pp. 2, 15. It is merely trying to protect children and empower parents by giving them the autonomy to decide when their kids see depictions of penises or learn about MILF Cream. Parents, not Gonzo beer hawkers, should make this decision.

This is why the Plaintiff's parade of penises from the North Carolina Museum of Art is completely irrelevant to the case at hand. Dkt. No. 38, pp. 19-20. People choose to go there and know what they are getting into. It is a practical necessity of life to go to stores that happen to sell beer. People should be able to do that without having their children drygulched by slutty dogs and cartoon penises.

The Plaintiff's assurances that the federal government's program can protect any legitimate state interest are false and disingenuous. Dkt. No. 38, p. 25-26. First, the State is a separate sovereign entitled to enforce its own interests using the general police power and Twenty-First Amendment. No federal program can vindicate this interest. Second, the federal government has no general police power and must rely upon more limited enumerated powers like the Commerce Clause, significantly reducing the areas it can regulate. See *United States v. Lopez*, 514 U.S. 549 (1995). It is the Commission's position that there is constitutional room for some regulation of labels beyond the scope of obscenity by a well-crafted regulation. The Commission believes it has such a regulation. If the Court disagrees, then it should at least recognize this area exists at the State level.

Aside from the practical deficiencies of the Plaintiff's leave it to the feds approach, there remains the glaring fact that this lawsuit is, in fact, a backdoor attack on the very federal regulatory program it claims will protect us. The Plaintiff argues that a system of label pre-approvals is an unconstitutional prior restraint. Dkt. No. 38, p. 4. The federal system also requires pre-approval. See 27 U.S.C. § 205; 27 C.F.R. § 7.41. Undoubtedly, the Plaintiff would be suing tomorrow to destroy the very federal program they comfort us with today, citing a favorable opinion from this Court.

IV. The Plaintiff mischaracterizes the history of enforcement several times.

The Plaintiff begins these mischaracterizations by continuing to cite the 318 label denial number, Dkt. No. 38, p. 6, even though this has been shown to include rejections under other undisputed regulatory provisions. Dkt. No. 32, Exh. 2 ¶ 5. Further, the Plaintiff continues to harp on the fact that the Commission has never reversed itself on any of the five heard on this issue, Dkt. No. 38, p. 7 fn. 5, despite it being an insufficient number to establish any clear pattern.

False accusations follow by stating that the figure of 19 formal denials is misleading. Dkt. No. 38 p. 14 fn 13. This is not so. They are provided because they are officially tracked and have supporting records. Appx. to Reply to Resp. to Def. MSJ, Exh. 1, ¶ 3. While the Commission does not track preliminary denials, the products section estimates that 99% of applications are approved with no problem, while some remaining portion has a problem with one of the various regulations. *Id.* at ¶ 4. Only approximately five to seven applications a year run into trouble with the regulation at issue in this case. *Id.* at ¶ 4. Approximately half of these reach a resolution and are approved, while approximately half are denied or withdraw the application. *Id.* at ¶ 4. The total comes out to approximately 40 to 56 since 2013, which out of approximately 160,000 applications during the time frame is a small number. The Plaintiff's denial was not included in the official denials because it was put in a pending status. An official denial would have been sent at some point, but it was approved before that happened. *Id.* at ¶ 5.

V. The additional labels the Plaintiff brings up show the proper tailoring of the regulation in some cases and three questionable approvals that may have just slipped through the cracks.

The Plaintiff waves five new labels, EFF 2020, Blue Mother Fuc*er Flavored MB, Cocky Motherf*cker Reserve, Orgasm, and Ling Chi, as the bloody shirt showing the supposed

deficiencies of the regulation. Dkt. No. 38, p. 17. The two labels lightly censored with an asterisk for one letter show the narrow tailoring of the regulation in action. The message is clearly communicated to anyone who already knows the word, while those who do not are left to guess which of the 26 letters goes there—something hard to catch in passing, unlike a penis picture.

The other three have admitted similarities to disapproved labels and could have potentially been disapproved under the regulation but appear to have slipped through the cracks with the other tens of thousands of processed applications. Regulations do not need to be perfectly tailored, *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 454 (2015), nor do they need to be perfectly applied in every case to prevent them from being thrown out for being unconstitutional. See *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019).

VI. It's a penis.

A court should disregard the alleged factual disputes raised by a party at summary judgment when it plainly contradicts reliable photographic evidence. *Scott v. Harris*, 550 U.S. 372, 379–81 (2007). For all of the Plaintiff's measuring and talk of nubs hanging between the legs, Dkt. No. 38, pp. 2, 18–19, there is a single thing hanging between the character's legs – a penis. It may not have all the bells and whistles, but it's a penis. The Court can see it; there is no real dispute over this fact.

VII. The Plaintiff's requested relief is overbroad.

Assuming *arguendo* that all or a severable portion of the “undignified, immodest, or in bad taste” clause is unconstitutional, the Plaintiff's request to dismantle North Carolina's label review scheme and implicit request to undermine the legal basis for the federal label review

program goes far beyond what would be legally justified. Only the offending language should be excised from the regulatory scheme if it is unconstitutional.

In such an outcome, the Defendants would also ask the Court to make the three additional rulings. First, that the regulatory framework of pre-approval is not an unconstitutional prior restraint. Second, that the whole beer label is properly analyzed under the commercial speech doctrine in a non-bifurcated manner. And third, that regulation of beer labels beyond the limits of the definition of obscenity is permissible in line with what the Commission attempts to do with its present regulation so long as the regulation is properly crafted.

VII. Conclusion

The Defendants ask that the Court rule that the regulation was constitutionally applied to the Plaintiff's beer label, grant summary judgment for the Defendants, and deny the Plaintiff's motion.

Respectfully submitted this the 27th day of December 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed the Defendants' Reply to Plaintiff's Response to the Defendants' Motion for Summary Judgment with the Clerk of the Court utilizing the CM/ECF system; this also constitutes service of the document under Local Civil Rule 5.1(e). I further certify that I have on this day, emailed said document to Plaintiff's counsel, addressed as follows:

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This the 27th day of December 2021.

/s/ Robert J. Pickett
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Assistant Attorney General