In the

Supreme Court of the United States

Roy Den Hollander,

Petitioner on behalf of himself and all others similarly situated,

v.

Copacabana Nightclub, China Club, Lotus, Sol, A.E.R. Lounge, Jane Doe Promoters,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There are two types of "Ladies' Nights" operated by nightclubs opened to the public that serve alcohol for consumption on their premises: (1) those that charge males more for entering a nightclub than females, for example, males pay $20 to walk through the door, ladies $0; and (2) those that charge males more for drinks than females, for example, a male will pay $12 for a vodka gimlet and a lady $8.

1. Is there a conflict between the Eighth Circuit Court of Appeals decision, *Comiskey v. JFTI Corp.*, 989 F.2d 1007 (8th Cir. 1993), which holds there is no state action when a public accommodation nightclub hands over an alcoholic drink to a customer, and the Second Circuit Court of Appeals decision, the subject of this petition, which supports the proposition that state action does exist when alcoholic drinks are served customers by a nightclub opened to the public?

2. Did the Second Circuit improperly extend the reach of the state action analysis in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), to all public accommodations serving alcohol even though *Moose Lodge* only concerned a private membership organization?

3. Is the production, distribution, and sale of alcohol an exclusively traditional state function; that is, a public function?

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PETITION FOR WRIT OF CERTIORARI

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The opinion of the United States Court of Appeals for the Second Circuit (App. 1a) can be found at 2010 U.S. App. LEXIS 18229 and 2010 WL 3419954. The opinion of the United States District Court for the Southern District of New York (App. 8a) is reported at 580 F. Supp. 2d 335 (S.D.N.Y. 2008).

The Southern District Court of New York ("S.D.N.Y.") dismissed under Fed. R. Civ. P. 12(b)(6) plaintiff Den Hollander's 42 U.S.C. § 1983 action. The Second Circuit affirmed the dismissal.

JURISDICTION

The Court of Appeals judgment was entered on September 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 because the action arose under

the Fourteenth Amendment to the U.S. Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection clause of the Fourteenth Amendment (App. 25a) requires "state action," *United States v. Harris*, 106 U.S. 629, 638-39 (1883)(lynching of black man by private white citizens constitutional because no state action), and is enforced by 42 U.S.C. § 1983 (App. 26a), which requires that the discriminatory conduct occur "under color of state law." "If a defendant's conduct satisfies the state action requirement of the Fourteenth Amendment, the conduct also constitutes action 'under color of state law' for § 1983 purposes." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 n. 2 (2001)(citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982)).

The Twenty-first Amendment (App. 25a) "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure [their] liquor distribution system," which includes the retail sale of alcohol in nightclubs, bar, and stores. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 110 (1980).

STATEMENT OF THE CASE

During "Ladies' Nights," a number of New York City nightclubs ("Nightclubs") charge males

more for admission than females.

The Nightclubs are public accommodations and not private membership clubs, ABC Law § 3 (9), as was the club in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972)(no state action by private membership club discriminating against African-Americans).

The New York State Liquor Authority ("SLA"), pursuant to the Twenty-first Amendment and New York's Alcoholic Beverage Control ("ABC") Law enacted under the State's police power, delegates to the Nightclubs the State's power to serve alcohol for on premise consumption to the public.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's opinion conflicts with the Eighth Circuit's ruling in *Comiskey v. JFTI Corp.*, 989 F.2d 1007 (8th Cir. 1993), where the Eighth Circuit held that state action does not exist when public accommodation nightclubs charge males more for drinks than females.

The Eighth Circuit in *Comiskey v. JFTI Corp.*, 989 F.2d 1007, 1008-09, 1011 (8th Cir. 1993), holds there is no state action in charging males higher prices for alcohol in nightclubs opened to the public. The Second Circuit and S.D.N.Y.'s decisions, however, support the proposition that state action is involved when public accommodation nightclubs charge males more for drinks.

The Second Circuit and S.D.N.Y. courts held that when nightclubs charge males more for admission, but not drinks, there is no state action because nightclubs are only licensed to sell alcohol and no alcohol is sold in charging males to enter a nightclub. *Second Circuit Opinion*, p.5, App. 7a; *S.D.N.Y. Opinion*, pp. 7, 8, 11, App. 16a, 17a, 22a. So while state action does not exist when entering a nightclub, it does, under the Second Circuit and S.D.N.Y.'s opinions, exist at the bar when a nightclub serves an alcoholic drink because that is the very activity New York State delegates nightclubs the power to carry out.

The Second Circuit and S.D.N.Y.'s legal analyzes finding no state action at the entrance to a nightclub rely on the reasoning that state action exists when alcoholic drinks are sold. Both courts distinguished between charging different admission prices and different prices for drinks in determining whether state action existed.

The Second Circuit reasoned, "The alleged deprivation here is discriminatory admission prices …and the alleged grant by the state is the privilege to sell alcohol." (*Second Circuit Opinion*, p. 5, App. 7a).

The S.D.N.Y.'s reasoning, which the Second Circuit followed, stated:

> When defendants sell alcohol, they are exercising a privilege created by the State. But when they reduce the cover charge to women on certain nights,

> they are not acting under any right or privilege created by the State because neither the ABC Law nor the SLA regulates the admission prices set by the defendants. In other words, [plaintiff] Den Hollander's alleged deprivation was not caused by defendants' sale of alcohol but by their pricing of admission to the entertainment provided by their nightclubs.

(*S.D.N.Y. Opini*on, p. 7, App. 16a);

> Ladies' Night promotions[ ] and defendants do not discriminate against men in their right to purchase and be served liquor.

(*S.D.N.Y. Opini*on, p. 8, App. 17a (citing *see Moose Lodge*, 407 U.S. at 175-76)).

> The state actor analysis in [*Seidenberg v. McSorleys' Old Ale House, Inc.*, 308 F. Supp. 1253, 1259 (S.D.N.Y. 1969)(state action found)] was undertaken in light of the fact that the discrimination alleged, refusal to serve alcohol, resulted from McSorleys' possession of a license to sell alcohol.

(*S.D.N.Y. Opini*on, p. 11, App. 22a).

While both the Second Circuit and S.D.N.Y.'s rulings do not directly state the proposition that state action exists in the selling of alcoholic drinks, they clearly support it. There is an inferential step between the opinions' analyzes and the proposition

which allow for a "*see*" signal when citing the two rulings. *The Bluebook*, pp. 22-23, 17th ed. (2000). It is this proposition that conflicts with the Eighth Circuit decision in *Comiskey* that found no state action when a public accommodation nightclub held Ladies' Nights "during which time all of the female patrons receive free drinks while males pay full price." *Comiskey* at 1008-09, 1011.

II. The Second Circuit improperly extended the reach of the state action analysis in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), to all public accommodations serving alcohol even though *Moose Lodge* only concerned a private membership organization.

The Second Circuit relied solely on *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972), to find that a state regime controlling alcohol does not "form a basis for state action" by nominally private entities. *Second Circuit Opinion*, pp. 5-6, App. 7a, 8a ("The Supreme Court specifically held that a liquor license is insufficient to establish state action."). The problem with relying on *Moose Lodge* is that in doing so the Second Circuit expanded *Moose Lodge's* state action analysis to include entities that are open to the public.

Moose Lodge was not about a public accommodation, which the Nightclubs are in this case. *Moose Lodge* concerned only a private membership club that was closed to the general public. "Far from apparently holding itself out as a place of public accommodation, Moose Lodge quite ostenta-

tiously proclaims the fact that it is not open to the public at large." *Moose Lodge*, 407 U.S. at 175.

Such private membership organizations only admit their members and guests. So it is no surprise that *Moose Lodge* did not find state action because the very purpose of such clubs is to allow individuals to associate with whom they wish as though they were in their own home. *See Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Marsh v. Alabama*, 326 U.S. 501, 505-06 (1946).

The *Moose Lodge* decision of no state action was necessary to preserve "an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). Otherwise, the proverbial right of a homeowner to decide in choosing whom he shall invite to dinner would be threatened. *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593, 604 (S.D.N.Y. 1970); *see Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991)("One great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law.").

The Second Circuit's use of *Moose Lodge*, however, found that public accommodation nightclubs have a right coextensive with a private membership club and by implication with a homeowner to decide who frequents their establishments. This conflicts with *Edmonson*, *Lugar*, *Marsh*, and *Shelley* cited above.

The Second Circuit stated that it relied on *Moose Lodge* "with great reluctance … but until the Supreme Court revisits [it], we are required to follow its holding." *Second Circuit Opinion*, p. 6, App. 8a. Apparently, the Second Circuit is requesting this Court to specifically limit the holding of *Moose Lodge* to only private membership organizations and homeowners.

III. The production, distribution, and sale of alcohol is a power exclusively and traditionally reserved to the states, which makes it a public function.

The Second Circuit's state action analysis failed to first determine whether the Nightclubs exercised an exclusively traditional state function, or public function, in providing alcohol for on premise consumption.

Prior to the 1980s, the Supreme Court did not use the two-prong analysis of *Lugar* for determining whether a nominally private party was acting with state action. "Rather the [Supreme] Court merely determined whether: (1) the private actor who caused the harm to another individual was performing a traditional government function (so that the private actor would automatically be acting with state action) or (2) the totality of facts and circumstances … made it fair to say that the private actor had acted with state action." Rotunda, Nowak, *Treatise on Constitutional Law*, § 16.1, p. 1002, 4th ed. (2007).

The Supreme Court's subsequent decisions that did use the two-prong approach "did not change any of the Court's earlier state action rulings," so it is important to understand the two-prong inquiry "in terms of all of the Court's state action decisions." *Id.* For this reason, the public function cases need to be separated from all other types. *Id.* In making a state action decision, a court should "first decide whether the private actor was engaging in a[n] [exclusively] traditional public function." *Id.* at pp. 1002-03. The Second Circuit did not make such a finding, or even consider whether providing alcohol is a public function.

When a public function is involved, both prongs of the *Lugar* test are also satisfied, Rotunda & Nowak, *Treatise on Constitutional Law*, § 16.1, p. 1003, since the two prongs, which are related, "collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to [its] decisions." *Lugar*, 457 U.S. at 937; *Second Circuit Opinion*, p. 4, App. 6a. In other words, the deprivation was caused by a party acting with the "apparent authority" of the State. *See Lugar*, 457 U.S. at 937.

The Second Circuit wrongly held that the two prongs did not collapse by ruling the Nightclubs' operations lacked the "apparent authority" of the State. *Second Circuit Opinion*, p. 4, App. 6a. In reaching that holding, the Second Circuit ignored the historical fact that the trafficking in alcohol is and has been since Colonial times the exclusive prerogative of the states, providing the states do

not violate the U.S. Constitution, *Granholm v. Heald*, 544 U.S. 460, 486-87 (2005). "[T]he regulation of the liquor traffic is one of the oldest and most untrammeled of legislative powers." *Goesart v. Cleary*, 335 U.S. 464, 465 (1948)(Frankfurter, J.), *overruled on different grounds*, *Craig v. Boren*, 429 U.S. 190, 210 n. 23 (1976).

"The Twenty-first Amendment grant[ed] the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 110 (1980). "A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation …. States may also assume direct control of liquor distribution through state-run outlets or funnel sales through" manufacturers, wholesalers, and retailers. *Granholm*, 544 U.S. at 488-89.

Prior to the Twenty-first Amendment, "[t]he police power of the States over intoxicating liquors was extremely broad ….." *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971)(citing *Crane v. Campbell*, 245 U.S. 304, 307 (1917)). The Supreme Court in *Crane* in 1917 held that "it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no state may abridge." *Crane*, 245 U.S. at 308. States had the power to ban alcohol completely and did so.

New York State banned alcohol completely with the passage of the Mullen-Gage Law when it accepted Prohibition. *Report of the N.Y. State Liquor Authority: The Modern Liquor Control System of New York State*, p. 5, April 12, 1933 to December 31, 1934, App. 28a. Then in ratifying the Twenty-first Amendment, New York rejected Prohibition, and in doing so it confirmed that the retail sale of alcohol was not a private activity, but one reserved to the State. *See Calvary Presbyterian Church v. SLA*, 245 A.D. 176, 178, 281 N.Y.S. 81, 85 (4th Dep't 1935), *aff'd*, 270 N.Y. 497, 200 N.E. 288 (1936)(the alcohol industry in New York is a creature of state sovereign police power).

Following Prohibition, New York State could have decided to set up and operate on-premise retailers itself in which any discrimination in admission policies or in employee hiring or in supplier contracting or any other activity would constitute state action. New York, however, chose a mechanism to control alcohol consumption by establishing through the ABC Law and the SLA a system of agents strictly overseen and limited by the State. ABC Law § 2; *N.Y. State Moreland Commission on the Alcoholic Beverage Control Law ("Moreland Commission")*, Study Paper No. 5, Preface, October 28, 1963, App. 30a.

Under this system, New York delegated part of its traditionally exclusive power over alcohol to nominally private parties, but retained the power "to alter: (a) the industry's structure …; (b) the industry's behavior, by prescribing and proscribing specific dimensions of business conduct." *Moreland*

Commission, Study Paper No. 4, p. 6, October 27, 1963, App. 29a. The State can at any time change the arrangement and take unto itself the functions of all its surrogates. *McSorleys*, 317 F. Supp. at 599 -600; *Moreland Commission*, Study Paper No. 4, pp. 39, App. 29a ("Should all options consistent with a private system [of alcohol vendors] be rejected, a full-fledged state monopoly would remain as a final solution.").

The State's delegating of its exclusive power over alcohol "to a private party … make[s] that party a state actor," *Nat'l Collegiate Ath. Ass'n v. Tarkanian*, 488 U.S. 179, 195 (1988), who is carrying on a public function; therefore, the private party is subject to the Constitution, *see Jackson v. Metro. Ed. Co.*, 419 U.S. 345, 352-53 (1974). "When private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans v. Newton*, 382 U.S. 296, 299, 301 (1960)(private operators of park were city agents, and just as the city could not discriminate in admission or in sweeping, manicuring, watering, patrolling, and maintaining the park, neither could the city's agents); *Marsh,* 326 U.S. at 509 ("Had the title to [the company town] belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company town it would have been clear" that the Constitution was violated.).

Since New York State uses the Nightclubs, and other such establishments, to serve alcohol for on premise consumption rather than carrying out that function itself, or banning it, the Nightclubs are standing in the shoes of the State. "It is the [Nightclubs'] function within the state system … that determines whether [their] actions can fairly be attributed to the State, *West v. Atkins*, 487 U.S. 42, 55-56 (1988)(citation omitted); *see Evans*, 382 U.S. at 302, and "[i]t is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State," *West*, 487 U.S. at 49-50.

New York State chose to bear the affirmative obligation of providing alcohol to its citizens, it delegated part of that function to the Nightclubs, and the Nightclubs voluntarily assumed that obligation. The State's delegation did not relieve it of its duty under the Twenty-first Amendment and the ABC Law, nor did it deprive the Nightclubs' male customers of the means to vindicate their Equal Protection rights. *Cf. West*, 487 U.S. at 56.

> The state cannot free itself from the limitations of the Constitution in the operation of its governmental functions merely by delegating certain functions to otherwise private individuals. If private actors assume the role of the state by engaging in these governmental functions then they subject themselves to the same limitations on their freedom of action as

> would be imposed upon the state itself.

Rotunda, Nowak, *Treatise on Constitutional Law*, § 16.2, p. 1010.

In doing the State's work in an area of an exclusively traditional state function, the Nightclubs discriminatory admission policies involve state action under the public function test.

CONCLUSION

The impact of the Second Circuit and S.D.N.Y.'s decisions is that under the Equal Protection Clause of the Fourteenth Amendment, any establishment opened to the public that serves alcohol can effectively ban members of the male sex by simply charging them so much that none other than Wall Street Moguls could afford the admission price. Group identification based on sex is now germane to exercising the fundamental right of association in places of public accommodation that serve alcohol.

The Second Circuit and S.D.N.Y. courts have resurrected the political versus social rights theory of the 18th century. In the *Civil Rights Cases*, 109 U.S. 3 (1883)(Harlan, J., dissenting), and *Plessy v. Ferguson*, 163 U.S. 537 (1896)(Harlan, J., dissenting), the U.S. Supreme Court justified discrimination against people of a darker skin complexion on the theory that the Constitution only guarantees political or civic equality, which is the purview of government, but not equality in social rights, the area of action and choices by public premises. The

two lower courts' opinions parallel this bankrupt theory in the realm of sexual distinctions rather than color.

Today, males can be effectively barred from the social mingling in a public accommodation serving alcohol while females walk in for free because such establishments can constitutionally choose to charge males more than females. These establishments would not dare charge females more because of the social climate in America today.

The *Civil Rights* and *Plessy* decisions provided the legal basis for 70 years of ignorance and prejudice that institutionalized itself in every area of society where people interacted with each other. The Second Circuit and S.D.N.Y. courts have laid the same foundation for discriminating against males in every area of society that is not directly under the control of government, or in which state laws do not explicitly prohibit discrimination, or where the states refuse to enforce their laws against sex discrimination.

Ironically, it was the failure of state laws and state enforcement to provide equal protection for their residents following the Civil War that resulted in the passage of the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983. The Second Circuit and S.D.N.Y. courts' narrow reading of the 1871 Act once again effectively leaves to the states the responsibility of protecting their citizens from discrimination. The two courts have opened the door for states, if they so choose, as does New York, to

stand idly by while nominally private persons involved in the liquor industry deprive the rights and privileges of others—this time men.

Plaintiff Den Hollander requests this Court grant certiorari.

Dated: October 14, 2010

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APPENDIX

Page

A. Opinion of the U.S. Court of Appeals for the Second Circuit (Sept. 1, 2010)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: August 24, 2009
Decided: September 1, 2010)

Docket No. 08- 5547 - cv

Roy Den Hollander

Plaintiff-Appellant,

v.

Copacabana Nightclub, China Club, Lotus, Sol, Jane Doe Promoters and A.E.R. Lounge,

Defendants-Appellees,

Guest House and A.E.R. Nightclub,

Defendants.

Before: POOLER and WINTER, Circuit Judges, Judge MAUSKOPF*, District Judge.

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* The Honorable Roslynn R. Mauskopf, United States District Court for the Eastern District of New York, sitting by designation.

Plaintiff-appellant Roy Den Hollander, individually and on behalf of a putative class of similarly situated men, appeals the Rule 12(b)(6) dis-

missal of his Section 1983 action brought against several New York City nightclubs for discriminating against men on "Ladies' Nights." See Hollander v. Copacabana Nightclub, 580 F. Supp. 2d 335 (S.D.N.Y. 2008) (Cedarbaum, J.).

Upon review, we agree with the district court that the Nightclubs were not state actors.

Accordingly, we AFFIRM.

Roy Den Hollander, New York, N.Y., for Plaintiff-Appellant.

Joseph Salvo, Gordon & Rees LLP, New York, N.Y. (Christopher B.

Block, Thomas B. Coppola, on the brief), for Defendants-Appellees

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Per Curiam:

The facts of the case are straightforward. During "Ladies' Nights," several New York City nightclubs ("Nightclubs") charge males more for admission than females or give males less time than females to enter the Nightclubs for a reduced price or for free. Den Hollander, who was admitted to the Nightclubs under this admission regime, attributes these pernicious "Ladies' Nights" to "40 years of lobbying and intimidation, [by] the special interest group called 'Feminism' [which] has succeed in creating a customary practice . . . of invidious discrimination of men." Den Hollander filed suit, on behalf of himself and others like him, alleg-

ing violation of his equal protection rights pursuant to 42 U.S.C. § 1983.

Den Hollander alleges that the Nightclubs engage in state action by selling alcohol on their premises under an extensive regulatory system. According to the amended complaint, the Nightclubs operate in New York and are licensed to sell alcohol on their premises. The New York Alcoholic Beverage Control Law (the "ABC Law") closely regulates the distribution and sale of alcoholic beverages in New York, and the New York State Liquor Authority (the "SLA") issues licenses in accordance with and oversees the implementation of the ABC Law.

The district court dismissed Den Hollander's Section 1983 claim after concluding that the Nightclubs were not state actors. Without action on our part, Den Hollander paints a picture of a bleak future, where "none other than what's left of the Wall Street Moguls" will be able to afford to attend Nightclubs. Because, however, we agree with the district court that Den Hollander has failed to sufficiently allege state action, we must affirm.

I. Discussion

We review de novo a district court's decision to grant a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(b)(6). *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 89 (2d Cir. 2006). To survive a motion to dismiss, the complaint must set out only enough facts to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). This standard "is not akin to a 'probability requirement,'

but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id. (quoting *Twombly*, 550 U.S. at 557).

The only question before us is whether Den Hollander has adequately alleged that the Nightclubs' admission polices constituted state action. To assert a Section 1983 claim, Den Hollander must plead that the Nightclubs' conduct was done under the color of state law. *Sybalski v. Independent Group Home Living Program, Inc.*, 546 F.3d 255, 257 (2d Cir. 2008)(per curiam). State action "occurs where the challenged action of a private party is 'fairly attributable' to the state," *Logan v. Bennington Coll. Corp.*, 72 F.3d 1017, 1027 (2d Cir. 1995) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)), which is achieved when a two-prong test is met:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

Lugar, 457 U.S. at 937.

1. Standard of Review

Before applying this test to the allegations in the complaint, however, we must address Den Hol-

lander's argument that in gender discrimination cases, state action can be established by a showing of a lesser degree of government involvement than in non-discrimination cases. He argues that because "constitutional scrutiny for sex discrimination approaches that for color discrimination," and "it follows that the state action determination in sex cases should also require a lesser degree of government involvement."

We find Den Hollander's pleadings so lacking that even under a lesser standard, he has failed to allege state action. Therefore, it is unnecessary for us to decide if a lesser standard is appropriate for gender discrimination cases. See *Weise v. Syracuse University*, 522 F.2d 397, 405 (2d Cir. 1975).

2. State Action

We analyze this case under both Lugar prongs, which are related, but not redundant. Where the defendant's "official character is such as to lend the weight of the state to his decisions," the two prongs collapse into a single inquiry. *Lugar*, 457 U.S. at 937. But where, as here, the defendants are "without such apparent authority, i.e., . . . private part[ies]," the prongs diverge. *Id.*

To prevail under either prong, Den Hollander must allege that the decision to adopt discriminatory admission fees and rules is fairly attributed to the state. We have made clear that a causal link between the harm and the state action is required: "[i]t is not enough . . . for a plaintiff to plead state involvement in some activity of the institution alleged to have inflicted injury upon a plaintiff; rather, the plaintiff must allege that the state was involved

with the activity that caused the injury giving rise to the action." *Syblanski* [sic], 546 F.3d at 257-58 (quotation marks omitted). Under both prongs, this requisite link is lacking.

The causal connection is obviously missing under the first prong, which requires that the deprivation be caused by a privilege or right granted by the state. The alleged deprivation here is discriminatory admission prices, ("The deprivation is males paying more than females or investing more of their time to gain admission."), and the alleged grant by the state is the privilege to sell alcohol. The link Den Hollander suggests is too attenuated to be causal: he argues that the Nightclubs may only charge discriminatory prices because they sell alcohol – without the draw of alcohol, his argument goes, the Nightclubs would not be popular destinations and accordingly, would not be able to charge for admission. Regardless of the veracity of this statement, we cannot agree that the state's liquor licensing laws have caused the Nightclubs to hold "Ladies' Nights;" liquor licenses are not directly related to the pricing scheme.

To plead the second prong, Den Hollander must allege that the Nightclubs are state actors. The actions of nominally private entities are attributable to the state when those actions meet one of three tests: 1. The "compulsion test:" "the entity acts pursuant to the 'coercive power' of the state or is 'controlled' by the state," 2. The "public function test:" "the entity 'has been delegated a public function by the [s]tate,'" or, 3. The "joint action test" or "close nexus test:" "the state provides 'significant encouragement' to the entity, the entity is a 'willful participant in joint activity with the [s]tate,' or the

entity's functions are 'entwined' with state policies." Sybalski, 546 F.3d at 257(emphasis added) (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 296 (2001) (citations and internal quotation marks omitted)).

Den Hollander's amended complaint fails under all three tests because *Moose Lodge No. 107 v. Irvis* directly refutes that a liquor license by itself may form a basis for state action. 407 U.S. 163, 177 (1972). It is with great reluctance that we call attention to a case upholding the constitutionality of discrimination against African Americans, but until the Supreme Court revisits Moose Lodge, we are required to follow its holding. In Moose Lodge, the Supreme Court found no state action in race discrimination in the serving of food and beverages at a private club (i.e. a club only open to its members and their guests). The Supreme Court specifically held that a liquor license is insufficient to establish state action. Den Hollander alleges no basis for state action other than the Nightclubs' liquor licenses, therefore, his complaint is insufficient.

Accordingly we affirm the district court's dismissal of his Section 1983 action against the Nightclubs for gender discrimination.

B. Opinion of the U.S. District Court for the Southern District of New York (Sept. 29, 2008)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROY DEN HOLLANDER, on behalf of himself and all others similarly situated,

Plaintiff, OPINION

-against- 07 Civ. 5873 (MGC)

COPACABANA NIGHTCLUB, et al.

Defendants.
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Cedarbaum, J.

Roy Den Hollander, individually and on behalf of a putative class of similarly situated men, sues River Watch Restaurant, Inc. d/b/a the Copacabana Nightclub ("Copacabana"), Nightlife Enterprises L.P. d/b/a China Club ("China Club"), AER Lounge LLC d/b/a AER Lounge ("AER"), Lulu's LLC d/b/a Lotus ("Lotus"), Ruby Falls Partners LLC d/b/a Sol ("Sol"), and "Jane Doe promoters" pursuant to 42 U.S.C. § 1983 for sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Den Hollander, an attorney pro se, alleges that defendant nightclubs regularly hold discriminatory "Ladies' Night" promotions. On certain nights, they charge women less for admission than men and/or give women more time to enter the nightclubs at the discounted admission price than they give to men.

Defendants AER, Lotus, and Sol move to dismiss the First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that they do not act under color of state law in offering the Ladies' Night promotion. Den Hollander moves to strike defendants' motion papers for various reasons, and moves for an

order directing counsel for Lotus to disclose the source of certain essays attached as exhibits to her opposition to Den Hollander's motion for recusal. For the following reasons, defendants' motions are granted, and Den Hollander's motions are denied.

BACKGROUND

According to the Amended Complaint, defendants operate nightclubs in New York and are licensed to sell alcohol on their premises. The Amended Complaint describes a number of provisions of the New York Alcoholic Beverage Control Law (the "ABC Law") that closely regulate the distribution and sale of alcoholic beverages in New York. The New York State Liquor Authority (the "SLA") issues licenses in accordance with and oversees the implementation of the ABC Law. Den Hollander alleges that defendants engage in state action by selling alcohol on their premises under that extensive regulatory system.

On various nights, defendants offer Ladies' Night promotions, under which women receive free or discounted admission or cover charges and/or are allowed more time than men to take advantage of reduced cover charges. Den Hollander claims that this type of promotional offering is a form of "invidious discrimination against men." He was the victim of this form of discrimination on at least one occasion at each of the defendant nightclubs in 2007. Den Hollander sues under 42 U.S.C. § 1983 for deprivation of his right to equal protection of the law.

DISCUSSION

On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), factual allegations in the complaint are accepted as true and all reasonable inferences are drawn in the plaintiff's favor. *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008). "To survive a motion to dismiss, a complaint must plead 'enough facts to state a claim to relief that is plausible on its face.'" Id. (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007)).

I. State Action

Under § 1983, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...." 42 U.S.C. § 1983. Plaintiff must demonstrate that defendants were acting under color of state law at the time of the alleged discrimination. *Washington v. County of Rockland*, 373 F.3d 310, 315 (2d Cir. 2004). "If a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, the conduct also constitutes action 'under color of state law' for § 1983 purposes." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 n.2 (2001).

"[S]tate action may be found ... only if [ ] there is such a 'close nexus between the State and

the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Id.* at 295 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). "The purpose of this [close nexus] requirement is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis in original).

The state-action inquiry has two parts:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. ... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). These two principles are related, but not redundant. Where the defendant's "official character is such as to lend the weight of the State to his decisions," these two principles collapse into a single inquiry. *Id.* But where, as here, the defendants are "without such apparent authority, i.e., ... private part[ies]," the principles diverge. *Id.*

The Supreme Court has identified a number of facts that can bear on the deprivation aspect of state action:

> a challenged activity may be state action when it results from the State's exercise of coercive power, ... when the State provides significant encouragement, either overt or covert, ... or when a private actor operates as a willful participant in joint activity with the State or its agents....

Brentwood, 531 U.S. at 296 (internal quotation marks and citations omitted). As to the state-actor portion of the inquiry, the Court has:

> treated a nominally private entity as a state actor when it is controlled by an agency of the State, ... when it has been delegated a public function by the State, ... when it is entwined with governmental policies or when government is entwined in [its] management or control....

Id. (internal quotation marks and citations omitted).

A. Deprivation Through Governmental Decision

The specific conduct at issue here is the offer of discounted cover charges to women. To meet this part of the Lugar state-action test, the plaintiff must show that defendants' decisions to discriminate have a close nexus with or can be fairly ascribed to a governmental decision. *Lugar*, 457 U.S. at 937-38. As noted above, this can be shown when: 1) the deprivation "results from the State's exercise of coercive power," 2) "the State provides significant

encouragement, either overt or covert," or 3) "a private actor operates as a willful participant in joint activity with the State." *Brentwood*, 531 U.S. at 296 (internal quotation marks omitted).

1. The State's Exercise of Coercive Power

Den Hollander argues that his deprivation resulted from New York's regulation of the sale of alcohol because defendants "could not exercise their admission practices without the direct and indispensable participation of the SLA." He speculates that without alcohol licenses from the SLA, customers would not
patronize nightclubs or invest in their businesses.

Den Hollander cites *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), to support his state action claim. In *Edmonson*, Leesville used peremptory challenges to remove black persons from a prospective jury without having to provide a race-neutral explanation when its conduct was challenged for being racially discriminatory. 500 U.S at 616. The Court held that Leesville's use of the peremptory challenges constituted state action and that exclusion of a prospective juror on account of race in a civil trial violates that prospective juror's equal protection rights. *Id.* at 620-28. The first part of the *Lugar* state-action inquiry was met because the peremptory challenges were authorized by federal statute, 28 U.S.C. § 1870. *Id.* at 620-21.

Den Hollander argues that the ABC Law and SLA rules form the regulatory framework governing alcohol sale and consumption in New York in the same way that federal statutes and rules govern the jury trial system discussed in *Edmonson*. Thus, he

asserts that he is deprived of equal protection of the law by defendants' exercise of the privilege of serving alcohol as created and enforced by the laws of New York. In fact, his deprivation is the reduction to women of the cover charge for admission on some nights.

Defendants' decisions to hold Ladies' Nights are not state action. The ABC Law establishes an alcohol licensing system administered by the SLA. When defendants sell alcohol, they are exercising a privilege created by the State. But when they reduce the cover charge to women on certain nights, they are not acting under any right or privilege created by the State because neither the ABC Law nor the SLA regulates the admission prices set by the defendants. In other words, Den Hollander's alleged deprivation was not caused by defendants' sale of alcohol but by their pricing of admission to the entertainment provided by their nightclubs. Thus, it cannot be said that the State is responsible for defendants' Ladies' Nights.

In *Edmonson*, a federal statute specifically provided for the right to use peremptory challenges to assist the court in selecting a jury, and the exercise of that statutory right constituted state action. In this case, defendants hold Ladies' Night promotions without any specific approval or endorsement from the State. The existence of the ABC Law and SLA rules does not transform all conduct by nightclubs into state action any more than the laws regarding jury trials transform every litigant in a jury trial into a state actor. *See, e.g., Polk County v. Dodson*, 454 U.S. 312, 325 (1981) ("[A] public defender does not act under color of state law when performing a lawyer's traditional functions as coun-

sel to a defendant in a criminal proceeding."); *Jackson*, 419 U.S. at 350 ("The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. ... Nor does the fact that the regulation is extensive and detailed ....") (citation omitted); *Cranley v. Nat'l Life Ins. Co.*, 318 F.3d 105, 112 (2d Cir. 2003) ("A finding of state action may not be premised solely on the private entity's ... licensing, or regulation by the government.").

The Supreme Court has held that a heavily regulated utility company's decision to terminate services to an individual is not state action because that decision is not "sufficiently connected ... to the State for purposes of the Fourteenth Amendment." *Jackson*, 419 U.S. at 358-59. It has also held that the acts of physicians and nursing home administrators in discharging or transferring Medicaid patients to lower levels of care is not state action because their decisions were not dictated by the State, despite significant Medicaid regulation. *Blum*, 457 U.S. at 1008-09.

As in *Jackson* and *Blum*, defendants' decisions to hold Ladies' Nights are insufficiently connected to the SLA to constitute state action. The SLA plays no role in establishing or enforcing defendants' Ladies' Night promotions, and defendants do not discriminate against men in their right to purchase and be served liquor. See also *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175-76 (1972) (private club's discriminatory guest policy not attributable to Pennsylvania or its regulation of alcohol); *Hadges v. Yonkers Racing Corp.*, 918 F.2d 1079, 1083 (2d Cir. 1990) (heavily regulated, state-

licensed racetrack's decision to deny plaintiff's application to work at the racetrack lacked close nexus to the State).

2. Encouragement from the State

Den Hollander argues that the SLA encourages defendants' discriminatory practices by renewing their licenses and by benefitting financially from the revenue received from the licenses. Even if the SLA renews defendants' licenses without challenging or questioning their practices, defendants' actions do not amount to state action because the State has not significantly encouraged or endorsed the specific action in question. "State approval of an action by a regulated entity does not constitute state action 'where the initiative comes from [the private entity] and not from the State' and the state 'has not put its own weight on the side of the proposed practice by ordering it.'" *Tancredi v. Metro. Life Ins. Co.*, 316 F.3d 308, 313 (2d Cir. 2003) (quoting *Jackson*, 419 U.S. at 357) (brackets in *Tancredi*). Indeed, "[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action." *Am. Mfrs. Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999).

The SLA collects fees for alcohol licenses, but does not collect any revenue from defendants' cover charges. See ABC Law § 17; SLA Schedule of Retail License Fees. The license fee for each license category is uniform across all licensees within those categories, regardless of whether they use the Ladies' Night promotion. *Id.* Thus, the revenue from the alcohol license does not encourage or discourage

the use by nightclubs of Ladies' Nights. *See also Yonkers Racing Corp.*, 918 F.2d at 1082 (no state action found even though defendant received a tax credit from the state and the State benefited from revenue from defendant).

Den Hollander also asserts that "the special interest group called 'Feminism' has succeeded in creating a customary practice in many governmental institutions ... in which the invidious discrimination of men is the accepted and preferred mode of behavior." He lists various examples of such purported discrimination and asserts that the SLA has engaged in this customary practice. These extraneous pronouncements do not demonstrate that the SLA has any relationship with defendants' choices to hold Ladies' Nights.

3. Joint Activity with the State

Den Hollander argues that the State is engaged in joint activity with defendants because the alcohol license gives defendants an economic benefit or franchise. He compares the benefits received by defendants to those present in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 724 (1961). In *Burton*, the Court held that defendant restaurant's refusal to serve plaintiff on account of his race constituted state action because the restaurant leased its space from the government, was operating in a public parking lot on land owned by the government, and benefitted from state funds supporting the parking lot. 365 U.S. at 724-25. The Parking Authority's failure to correct the restaurant's discriminatory policies made the Parking Authority "a party to the refusal of service,"

thereby placing "its power, property and prestige behind the admitted discrimination." *Id.* at 725.

The State's involvement in defendants' businesses is not analogous to the facts of *Burton*. Defendants do not lease their property from the government and are not obtaining any unique benefits from government funds. See *Yonkers Racing Corp.*, 918 F.2d at 1082 ("[T]he State in the instant case does not have a proprietary interest in [defendant's business]."). *Burton* was limited to cases where "a State leases public property in the manner and for the purpose shown to have been the case here." *Id.* at 726. The Supreme Court has distanced itself from the "vague 'joint participation' test embodied in [Burton]." *Sullivan*, 526 U.S. at 57. "[P]rivately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Burton*." *Blum*, 457 U.S. at 1011.

Furthermore, in *Moose Lodge No. 107 v. Irvis*, the Supreme Court found that the competitive effect of having a set number of alcohol licenses was "limited" and fell "far short of conferring ... a monopoly in the dispensing of liquor." 407 U.S. at 177. In *Yonkers Racing Corporation*, the Second Circuit did not find state action even though the Yonkers Racing Corporation ("YRC"), which operates a racetrack pursuant to a State license, receives tax credits from the State and "the State gains greater revenues if YRC prospers." 918 F.2d at 1082. Even if defendants did benefit in some way from a franchise or monopoly, there would still be an "insufficient relationship between the challenged actions of the [defendants] and their monopoly status." *Jackson*, 419 U.S. at 352. The ABC

Law and SLA regulations cannot "be said to make the State in any realistic sense a partner or even a joint venturer in the [defendants'] enterprise[s]." *Moose Lodge*, 407 U.S. at 177.

Den Hollander also argues that the requirement that defendants display their alcohol licenses in their establishments, ABC Law § 114(6), creates the appearance of state authorization of their practices. That display requirement, which relates to the privilege of selling alcohol, has no bearing on defendants' admission policies, the only issue here.

B. State Actor

Den Hollander has failed to show that his deprivation was caused by defendants' "exercise of some right or privilege created by the State or by a rule of conduct imposed by the State." *Lugar*, 457 U.S. at 937. Nevertheless, he argues that
New York's regulatory scheme regarding alcohol "dominates the on premise[s] consumption of alcohol to such a degree" that defendants' "every move evinces State authority and control" and that the State and defendants "have overlapping identities." As noted above, the two-part *Lugar* state action test collapses into a single inquiry only when the defendant's "official character is such as to lend the weight of the State to his decisions." *Id.* Defendants lack such an official character.

Den Hollander's argument that defendants possess the official character of the State is taken primarily from his misreading of *Seidenberg v. McSorleys' Old Ale House, Inc.*, 308 F. Supp. 1253 (S.D.N.Y. 1969) ("*McSorleys I*") and *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593

(S.D.N.Y. 1970) ("*McSorleys II*"). McSorleys was a public bar which only served men. Two women sought service in the bar and sued for discrimination when they were refused alcohol. A motion to dismiss was denied in *McSorleys I*, and summary judgment was granted in favor of plaintiffs in *McSorleys II*. The court found state action in both opinions.

Den Hollander argues that *McSorleys I* & *McSorleys II* held that New York's regulatory scheme is so pervasive that any entity open to the public with an alcohol license is an agent or instrumentality of the State, such that any and all of its actions can be fairly treated as state actions. Such a reading is erroneous. *McSorleys I* focused primarily on the question of whether McSorleys was a state actor, but it also answered the first part of the Lugar test by assessing "whether the State has ... significantly involved itself in actions alleged to amount to invidious discrimination." 308 F. Supp. at 1259. The state actor analysis in *McSorleys I* was undertaken in light of the fact that the discrimination alleged, refusal to serve alcohol, resulted from McSorleys' possession of a license to sell alcohol. The court in *McSorleys II* understood that the test for state action requires that there exist "some causal relation ... between the state activity and the discrimination alleged." 317 F. Supp. at 597. That causal relation is missing in this case.

Defendants are private entities that set their own policies for admission. Their compliance with state regulations for alcohol does not convert them into all-purpose state actors. *See Tancredi*, 316 F.3d at 313 ("[A] regulatory agency's performance of routine oversight functions to ensure that a com-

pany's conduct complies with state law does not so entwine the agency in corporate management as to constitute state action."). Furthermore, Den Hollander cannot show state action through entwinement because defendants are not entwined with state officials or state funds. *Cf. Brentwood*, 531 U.S. at 299-300 (entwinement with state officials); *Horvath v. Westport Library Ass'n*, 362 F.3d 147, 153 (2d Cir. 2004) (entwinement with state funds).

Den Hollander also argues that the sale of alcohol is a public function that has been delegated by the State to entities possessing alcohol licenses. State action has been found under the public function test in cases challenging discrimination in primary elections, *Nixon v. Condon*, 286 U.S. 73, 89 (1932), free speech restrictions in a company town, *Marsh v. Alabama*, 326 U.S. 501, 509 (1946), and segregation in a municipal park, *Evans v. Newton*, 382 U.S. 296, 302 (1966). The public function relevant here is the regulation of the alcohol industry. New York State's decision to allow alcohol sales through the provision of licenses is not a delegation of that public function. Defendants do not have the power or authority to alter state regulation in the field, and they must abide by all regulations related to the alcohol license. Accordingly, defendants do not exercise a public function.

C. Remaining Defendants

The motions to dismiss filed by AER, Lotus, and Sol are granted because Den Hollander cannot show that private nightclubs are state actors in setting cover charges for admission to their facilities. Copacabana and China Club have not moved to dis-

miss, but the claims against them are similarly defective. There are no separate facts alleged against Copacabana and China Club that would alter the state action inquiry, and plaintiff has had an opportunity to be heard on the issues. Accordingly, in the interest of judicial economy, the claims against Copacabana and China Club will be dismissed sua sponte for failure to state a claim. *See Perez v. Ortiz*, 849 F.2d 793, 797 (2d Cir. 1988); *Leonhard v. United States*, 633 F.2d 599, 609 n.11 (2d Cir. 1980) ("The district court has the power to dismiss a complaint sua sponte for failure to state a claim.").

II. Plaintiff's Motions

Den Hollander moves to strike certain motion papers filed by defendants for being late; to deny the motions to dismiss filed by Sol and AER for failure to file memoranda of law separate from their supplemental affirmations; to strike certain portions of Lotus' memorandum of law for not providing citations; and to compel counsel for Lotus to disclose the source of certain essays attached to her opposition to Den Hollander's motion for recusal. Any technical defects in defendants' motion papers were insubstantial and did not prejudice Den Hollander. The issues relevant to the motions to dismiss were clear to all parties, and the motions were re-filed in light of the filing of the Amended Complaint, giving all litigants more time to respond. The essays submitted by Lotus as exhibits in opposition to Den Hollander's motion for recusal are irrelevant to this case, and any claim that Den Hollander may seek to pursue in relation to the submission of those essays is beyond the scope of this action.

CONCLUSION

For the foregoing reasons, the motions to dismiss filed by AER, Lotus, and Sol are granted, and the complaint is dismissed as to all defendants. Den Hollander's motions are denied. The Clerk is directed to close this case.

SO ORDERED.
Date: New York, New York
September 29, 2008
MIRIAM GOLDMAN CEDARBAUM
United States District Judge

C. Fourteenth and Twenty-first Amendments of the U.S. Constitution

Fourteenth Amendment to the U.S. Constitution, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Twenty-first Amendment to the U.S. Constitution, Section 2

The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

D. United States and New York State statutes

42 U.S.C. § 1983, Civil action for the deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

N.Y. Alcoholic Beverage Control Law § 2

It is hereby declared as the policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and re-

spect for and obedience to law. It is hereby declared that such policy will best be carried out by empowering the liquor authority of the state to determine whether public convenience and advantage will be promoted by the issuance of licenses to traffic in alcoholic beverages, the increase or decrease in the number thereof and the location of premises licensed thereby, subject only to the right of judicial review hereinafter provided for. It is the purpose of this chapter to carry out that policy in the public interest. The restrictions, regulations and provisions contained in this chapter are enacted by the legislature for the protection, health, welfare and safety of the people of the state.

N.Y. Alcoholic Beverage Control Law § 3(9)

"Club" shall mean an organization of persons incorporated pursuant to the provisions of the not-for-profit corporation law or the benevolent orders law, which is the owner, lessee or occupant of a building used exclusively for club purposes, and which does not traffic in alcoholic beverages for profit and is operated solely for a recreational, social, patriotic, political, benevolent or athletic purpose but not for pecuniary gain; except that where such club is located in an office or business building, or state armory, it may be licensed as such provided it otherwise qualifies as a "club" within the meaning of this subdivision.

E. Report of the N.Y. State Liquor Authority: The Modern Liquor Control System of New York State, April 12, 1933 to December 31, 1934 (excerpt)

Page 5:

THE MODERN LIQUOR CONTROL SYSTEM OF NEW YORK

A report of the Liquor Authority of New York State for the Period since the Legislation of Beer and Light Wines on April 12, 1933, to December 31, 1934.

The Twenty-first Amendment to Constitution of the United States went into effect on December 5, 1933. It repealed the Eighteenth Amendment and gave to New York the opportunity and the responsibility of handling its liquor problems.

After the adoption of the Eighteenth Amendment, on January 16, 1920, and the enactment of the Volstead Act by The Congress, the Legislature of the State of New York passed the Mullen-Gage Law, which, in effect, charged all law-enforcement officers in the State with the specific duty of enforcing Prohibition.

F. N.Y. State Moreland Commission on the Alcoholic Beverage Control Law, Study Paper No. 4, October 27, 1963 (excerpt)

Page 4:

PART I—THE PHILOSOPHY BEHIND ALCOHOLIC BEVERAGE CONTROL

B. The Regulatory Technique

Page 6:

In short, the [State] Licensing Authority theoretically has the power to alter: (a) the [alcohol] industry's structure, by limiting the number of sellers in each relevant market; (b) the industry's behavior, by prescribing and proscribing specific dimensions of business conduct. Within broad statutory bounds the Authority possesses considerable discretion in formulating criteria and policies to further the ultimate goals of the law. Although most of the aforementioned regulatory powers formally apply to each level of industry, regulation at the retail level is of greatest concern today and will be scrutinized most intensively here. [Footnote omitted].

Page 39:

CONCLUSION

The remedial alternatives reviewed here do not exhaust the logical possibilities. Should all options consistent with a private system be rejected, a full-fledged state monopoly would remain as a final solution. Such systems are familiar in the retail liquor business in the United States today and have long had strong appeal to investigators. [Footnote omitted].

G. N.Y. State Moreland Commission on the Alcoholic Beverage Control Law, Study Paper No. 5, October 28, 1963 (excerpt)

PREFACE

The New York State Moreland Commission on the Alcoholic Beverage Control Law commissioned this study in July of this year as one part of a broad examination of the efficacy and desirability of maintaining stringent government supervision and protection of New York's alcoholic beverage industry and the consumers of its products.