



www.bellottilaw.com

Peter V. Bellotti
Karen A. Colucci (MA, RI)
Karen Piso Nadeau
Sara Gens Birenbaum
Daniel C. Roache, Of Counsel
Leslie S. Harkavy (MA, CT)
John Sofis Scheft, Of Counsel
Julia M. Hogan
Alexander T. Asermely (MA, RI)

Boston Office

The Schrafft Center, Suite 128
529 Main Street
Boston, MA 02129-1125
T 617.225.2100
F 617.494.0043

Quincy Office

1250 Hancock Street
Suite 127 North
Quincy, MA 02169
T 617.328.2300
F 617.471.7708

AMICUS BRIEF PROPOSAL IN OPPOSITION TO CUMBERLAND FARMS BALLOT INITIATIVE PETITION 19-14

CONTEXT

Cumberland Farms, Inc. is the driving force behind Initiative Petition 19-14, which was certified by the Attorney General, and proposes: (1) unlimited licenses for beer and wine sales (not spirits) by retail establishments that sell food; (2) unlimited licenses by a single entity for beer, wine, and spirit sales in any municipality and across the Commonwealth; (3) a point-of-sale ID checking requirement for all off-premises alcohol retailers (not on-premises bars and restaurants); and (4) diversion of alcohol excise taxes to fund the Alcoholic Beverages Control Commission (ABCC) and a ratio of one inspector for every 250 licenses.

INTEREST OF AMICUS

The Massachusetts Prevention Alliance (MAPA) is a coalition of prevention professionals, clinical specialists, educators, public officials, law enforcement officers, parents, and community members dedicated to the health and wellness of youth, especially as it relates to alcohol and drug consumption. Leaving aside the economic and market implications of Petition 19-14, MAPA's concern relates solely to its potential impact on the health of our communities due to the increased sales of the addictive substances of alcohol and marijuana after its passage.

OUTLINE OF ARGUMENT

I. DIRECT HARMFUL EFFECT ON PUBLIC SAFETY

- A. Alcohol is an addictive substance, which is why it is closely regulated at the state and federal level. Any petition deserves strict scrutiny by the court so that it does not compromise public safety in service of a naked economic agenda.

- B. Unlimited retail sales of beer and wine at all food stores will increase outlet density – i.e., the number of available locations to get these products.
 - a. This directly contributes to alcoholism and greater youth diversion.
 - b. It also disproportionately burdens socioeconomically disadvantaged communities.
 - c. Food stores should not be encouraged to participate in alcohol sales because this product demands a more focused and trained sales staff. Food stores are generally staffed by a larger, younger, and more transient work force.¹
- C. A significant (perhaps unintended) consequence of Petition 19-14 is that it will, simultaneously, increase retail marijuana outlets that cater to off-premises consumption. Currently, available marijuana licenses are calibrated to the number of off-premises alcohol licenses in a municipality. See 94G, § 3. The current approach to the emerging adult use marijuana market was linked to the limited licensing approach embodied in the current alcohol regulatory framework.
- D. Developments in federal law threaten to weaken promised local control of alcohol in the wake of Petition 19-14. The supposed moderating force of local control, which is trumpeted as a hedge against the public health consequences of unlimited licenses authorized by 19-14, is less secure following the Supreme Court’s decision in *Tennessee Retailers Assn. v. Tennessee Alcoholic Beverage Commission*, Slip Opinion 18-96 (June 26, 2019).²

II. NOT A “UNIFIED STATEMENT OF PUBLIC POLICY” IN VIOLATION OF ART. 48

- A. The primary purpose of Petition 19-14 – secure and expand an in-state market for a national corporation – is deliberately tethered to two artificial “public safety” provisions. This type of misdirection was labelled “log rolling” by the framers of Art. 48 and specifically prohibited.
 - a. Petitioners know that a ballot initiative solely for unlimited retail licenses at food stores would be dead on arrival, so they bootstrapped it to stricter ID procedures at the point of sale and steady stream funding for the ABCC.
 - b. *Carney v. Attorney General*, 451 Mass. 803 (2008) involved the same strategy. Opponents of dog racing, who had previously lost, added a provision increasing penalties for animal cruelty. The SJC saw through the

¹ Although convinced of the truth of this assertion, not sure we can support it with sufficient research findings to make it acceptable appellate argument.

² This argument needs to be developed. The SJC has said, in prior cases, that federal preemption arguments must be made after passage of a ballot initiative. However, I do think, in an amicus, the court might be swayed, even if they don’t admit it, if they see prolonged litigation and an erosion of local control if the initiative passes.

artifice of linking an unequivocally popular proposal (increase penalties for animal cruelty) to a more controversial and specific initiative.

- c. The *Carney* court stated that the subjects must not only be dependent (i.e., dealing with the same general subject matter), they must also form a “unified statement of public policy.” In short, it’s not enough that Petition 19-14 falls under the banner of alcohol regulation.
- B. The enhanced identification procedures are the first fig leaf designed to obscure the economic agenda and public safety compromise.
- a. The political calculation is apparent when one realizes that the point-of-sale enhanced ID procedure applies only to off-premises licensees (like package stores and the food stores it envisions adding to this category) and *not* to on-premises consumption licensees (like restaurants and bars). There is no rational basis – if public safety is the goal -- to differentiate between off-premises and on-premises outlets when it comes to ID checking.
 - b. In fact, fake IDs are just as prevalent at on-premises establishments as they are at off-premises. So why does Petition 19-14 make such a distinction? Leaving bars and restaurants out of the ID requirements avoids creating a powerful political antagonist who would align with off-premises licensees in opposition. Such unwarranted triangulation is evidence that this petition is anything but a unified statement of public policy.
- C. The steady stream funding mechanism is the second fig leaf employed.
- a. Hijacking the appropriations process is forbidden by Article 63 because the framers saw the necessity of a stable, professional budget process in which the myriad of competing interests of the state are dealt with in one proceeding. Here, Petition 19-14 essentially promises voters: “Don’t worry, it won’t cost anything. We’ve got it covered.” This presents another reason why the ballot referendum process forbids appropriations. It allows the electorate to be bought or, more subtly, to be assuaged from examining the merits of the underlying proposal because it is supposedly revenue neutral.
 - b. In addition, Petition 19-14 arranges enhanced funding and increased staffing (one inspector mandated for every 250 licensees) for the very regulatory agency in charge of this new category of licensee. This proposal, at a minimum, presents an appearance of impropriety where the regulatory agency becomes beholden to this new category of licensee for its infusion of funding.

BACKGROUND OF LEAD ATTORNEY

A member of the bar for 32 years, John Sofis Scheft, Esq. has appeared before the SJC on behalf of MAPA, successfully arguing before the Single Justice for a change in the ballot initiative “yes” statement concerning medical marijuana. *Heilman v. Attorney General*, SJ-2012-0211 (Cordy, J., April 2012).

Scheft later mounted a challenge concerning the marijuana legalization referendum before the full bench in the landmark decision of *Hensley v. Attorney General*, 474 Mass. 651 (2016).

He also represented the Massachusetts Chiefs of Police Association (MCOPA) when the agency filed an *amicus brief* in *Commonwealth v. Smeaton*, 465 Mass. 752 (2013). The arguments presented in this brief, which were different from the ones advanced by the parties, were adopted by the SJC and became the basis of its decision concerning the extent of campus police jurisdiction.