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December 10, 2020

ATTORNEY GENERAL OPINION NO. 2020- 11

The Honorable Julia Lynn
State Senator, Ninth District
18837 West 115th Terrace
Olathe, KS 66061

Re: Intoxicating Liquors and Beverages—Licensing and Related Provisions; City Option—Persons and Entities Ineligible for Licensure; Licensure of Nonresidents

Intoxicating Liquors and Beverages—Licensure and Sale of Liquor by the Drink—Persons and Entities Ineligible for Licensure; Licensure of Nonresidents

Synopsis: The Kansas statutes imposing residency requirements on persons seeking a license to sell liquor as a retailer or to sell liquor by the drink, K.S.A. 2020 Supp. 41-311 and 41-2623, facially discriminate against nonresidents. It is unlikely that the State could advance a legitimate local purpose for the requirements. Thus, the residency requirements in K.S.A. 2020 Supp. 41-311 and K.S.A. 2020 Supp. 41-2623 would likely be found unconstitutional under the dormant Commerce Clause of the U.S. Constitution and are therefore unenforceable. Cited herein: K.S.A. 2020 Supp. 41-311; 41-311b; 41-2623; U.S. Const., Art. I, § 8.

* * *

Dear Senator Lynn:

As State Senator for the Ninth District, you request our opinion on the constitutionality of residency requirements in two Kansas liquor licensing statutes in light of the decision of the United States Supreme Court in *Tennessee Wine and Spirits Retailers Association v. Thomas*.[1] Specifically, you ask the following:

[1] 588 U.S. ___, 139 S. Ct. 2449 (2019).

> Are the residency requirements for applicants for a liquor retailer license in K.S.A. 41-311(b)(1) and (2) unconstitutional under the dormant Commerce Clause?
>
> Is the durational residency requirement for applicants for a license to sell liquor by the drink in K.S.A. 41-2623(a)(3) unconstitutional under the dormant Commerce Clause?

Applying the reasoning of the United States Supreme Court in *Tennessee Wine*, we conclude that the answer to both of your questions is yes — a challenge to the constitutionality of the residency requirements in these statutes would likely be successful.[2]

We begin by examining the statutes themselves. Both statutes have durational residency requirements, and K.S.A. 2020 Supp. 41-311 has a complete prohibition on licensure of nonresidents. K.S.A. 2020 Supp. 41-311(b) states in relevant part:

> No retailer's license shall be issued to:
>
> (1) A person who is not a resident of this state; [or]
>
> (2) a person who has not been a resident of this state for at least four years immediately preceding the date of application.

Concerning licenses to sell liquor by the drink, K.S.A. 2020 Supp. 41-2623(a) states in relevant part:

> No license shall be issued under the provisions of this act to:
>
> . . . .
>
> (3) A person who has not been a resident of this state for a period of at least one year immediately preceding the date of application.

[2] The constitutionality of residency requirements for licensure under the Kansas Liquor Control Act have been in question since at least 2000, when suit was filed challenging the residency requirement for a distributor's license. The requirement was found unconstitutional by a federal district court in *Glazer's Wholesale Drug Co., Inc. v. Kansas*, 145 F. Supp. 2d 1234, 1247 (D. Kan. 2001). The State appealed the decision, but before the appeal was heard, the Legislature amended the then-current K.S.A. 41-311(d) to remove the residency requirement. Further, the Legislature enacted K.S.A. 41-311b, which requires, *inter alia*, national criminal history records checks for nonresident applicants for licensure. *See* Kan. Atty. Gen. Op. No. 2006-12. That Attorney General Opinion concluded that when the Legislature removed the residency requirement from K.S.A. 41-311(d), "the State's ability to argue the constitutionality of residency requirements for other license applicants under the Liquor Control Act [was] significantly weakened."

The Tennessee statute considered by the Supreme Court is strikingly similar. It states in relevant part:

> No retail license under this section may be issued or transferred to or held by, to any individual:
>
> (A) Who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon which application is made to the commission.[3]

Applying long-standing dormant Commerce Clause principles, the United States Supreme Court held this statute unconstitutional.[4] The dormant Commerce Clause has been termed the "negative implication" of the Commerce Clause: while the Commerce Clause explicitly grants Congress the power to "regulate interstate commerce … among the several States,"[5] it also implicitly limits the power of the states to adopt laws unduly restricting interstate commerce.[6] The Supreme Court has explained that the dormant Commerce Clause prevents states from "adopting protectionist measures" that "discriminat[e] 'against citizens and products of other States.'"[7] A discriminatory state law will survive a dormant Commerce Clause challenge "only upon a showing that it is narrowly tailored to 'advanc[e] a legitimate local purpose'"[8] that "cannot be adequately served by reasonable nondiscriminatory alternatives."[9] In *Tennessee Wine*, the Court rejected arguments that the durational residency requirement served public health and safety, finding that any relationship to such purposes was "at best … highly attenuated."[10] It held that because the durational residency requirement in the statute "blatantly favors the State's residents" and "has little relationship to public health and safety," it violates the dormant Commerce Clause.[11]

The durational residency requirements in the Kansas statutes at issue are legally indistinguishable from the requirement in the Tennessee statute for purposes of dormant Commerce Clause analysis. The statutes facially discriminate against citizens of other states. Although it is beyond the scope of an Attorney General Opinion to identify every possible local purpose for the statutes, we do not consider it likely that the State could make a showing of a legitimate local purpose that would satisfy constitutional muster, given the Supreme Court's unsympathetic attitude toward the public health and safety

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[3] Tenn. Code Ann. § 57-3-204(b)(2).

[4] *Tenn. Wine*, 139 S. Ct. at 2457.

[5] U.S. Const. art. I, § 8.

[6] *Dept. of Rev. of Ky. v. Davis*, 553 U.S. 328, 337 (2008) (citations omitted).

[7] *Tenn. Wine*, 139 S. Ct. at 2459, 2464, *quoting Walling v. Michigan*, 116 U.S. 446, 460 (1886).

[8] *Id.* at 2461, *quoting Dept. of Rev. of Ky.*, 553 U.S. at 338 (citations omitted).

[9] *Dept. of Rev. of Ky.*, 553 U.S. at 338.

[10] *Tenn. Wine*, 139 S. Ct. at 2474.

[11] *Id.* at 2457. The fact that the Tennessee statute concerned alcohol, and thus implicated the Twenty-first Amendment, did not save the statute. The Court stated that, although § 2 of the Twenty-first Amendment "allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests," it does not give the States "license … to adopt protectionist measures with no demonstrable connection to those interests." *Id.* at 2474.

justifications put forth by Tennessee. Thus, we conclude that a challenge to the constitutionality of the durational residency requirements in K.S.A. 2019 Supp. 41-311(b)(2) and K.S.A. 2020 Supp. 41-2623(a)(3) would likely be successful.[12]

Further, we opine that a constitutional challenge to the outright prohibition of licensure of any nonresident in K.S.A. 2020 Supp. 41-311(b)(1), a "non-durational" residency requirement, would also likely be successful. The holding in *Tennessee Wine* referred to Tennessee's "two-year residency requirement" because that was the only question before the Court, but much of the Court's analysis did not refer to the *duration* of residency requirements. Instead, the Court focused on the statute's blatant discrimination between residents and nonresidents in the granting of licenses. In its analysis, the Court applied broad principles of constitutional law, and we find no grounds to suspect that those principles would apply differently to a non-durational residency requirement.[13]

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Kansas Attorney General

/s/AnnLouise Fitzgerald

AnnLouise Fitzgerald
Assistant Attorney General

DS:AA:AF:sb

[12] We note that, if these provisions were held unconstitutional or were removed from the statutes by the Legislature, the requirements for licensure of nonresidents found in K.S.A. 2020 Supp. 41-311b, which include national criminal background checks, would then apply to applicants for licenses under these statutes.

[13] This conclusion was also reached by the Attorney General of Oklahoma. *See* Okla. Atty. Gen. Op. No. 2019-13 (Dec. 31, 2019).