STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

June 17, 2014

Opinion No. 14-61

Constitutionality of Payment Requirement for Liquor-by-the-Drink Licensees

QUESTION

Does Senate Bill 2415/House Bill 2027 of the 108th General Assembly (2014), as passed (hereinafter "SB2415"),[1] which requires liquor-by-the-drink licensees to make payment to wholesalers upon delivery of the product, violate equal protection under the United States or Tennessee Constitutions?

OPINION

No. SB2415 does not run afoul of equal-protection principles.

ANALYSIS

The Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Two provisions of the Tennessee Constitution—art. I, § 8, and art. XI, § 8—encompass the equal-protection guarantee. *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994). These two provisions of the Tennessee Constitution confer "essentially the same protection" as the Equal Protection Clause of the Fourteenth Amendment. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993).

The Tennessee Supreme Court has followed the framework developed by the United States Supreme Court for analyzing equal-protection claims. *Id.* at 153. Under this framework, an equal-protection analysis requires strict scrutiny of a legislative classification only when the classification interferes with the exercise of a "fundamental right"—*e.g.*, the right to vote or right to privacy—or makes distinctions based on suspect classifications, such as race or national origin. *See Tester*, 879 S.W.2d at 828. On the other hand, if a law neither burdens a fundamental right nor targets a suspect class, the law will be upheld so long as it

[1] SB2415 was signed by the speakers of the House and Senate and transmitted to the Governor on May 13, 2014. It was returned without the Governor's signature and has now become law pursuant to Tenn. Const. art. III, § 18. *See* 2014 Tenn. Pub. Acts, ch. 1015.

bears a rational relation to some legitimate end. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

On rational-basis review, a statute creating a classification bears a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negate every conceivable basis that might support it. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993). A legislature is never required to articulate at any time the purpose or rationale supporting its classification. *Id.* at 315 (citing *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992)). Under the rational-basis test, "if some reasonable basis can be found for the classification, or if any state of facts may reasonably be conceived to justify it, the classification will be upheld." *Tenn. Small Sch. Sys.*, 851 S.W.2d at 153 (quoting *Harrison v. Schrader*, 569 S.W.2d 822, 825-26 (Tenn. 1978)). Where social or economic legislation is at issue, the Equal Protection Clause affords States wide latitude, *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); the States legislate in these areas pursuant to "their police powers, and rational distinctions may be made with substantially less than mathematical exactitude," *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). "In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *Id.* at 303-04 (internal citations omitted).

States also possess broad powers under the Twenty-first Amendment to the United States Constitution to regulate, restrict, or ban the sale of alcoholic beverages within their borders. *Granholm v. Heald*, 544 U.S. 460, 488 (2005); *37712, Inc. v. Ohio Dept. of Liquor Control*, 113 F.3d 614, 618 (6th Cir. 1997). To regulate the alcoholic-beverage trade in Tennessee, the General Assembly has adopted a three-tier regulatory system consisting generally of licensed manufacturers, wholesalers, and retailers. *See* Tenn. Code Ann. §§ 57-3-202, -203, -204; *see also id.* §§ 57-3-401 to -413 (regulating liquor traffic generally). Under Tenn. Code Ann. § 57-3-404(b), "[n]o retailer shall purchase any alcoholic beverages from anyone other than a licensed wholesaler, nor shall any wholesaler sell any alcoholic beverages to anyone other than a licensed retailer, or a licensed wholesaler."

Tenn. Code Ann. § 57-3-404(g) generally prohibits licensed retailers and wholesalers from selling alcoholic beverages on credit but creates an exception that allows wholesalers to sell "on not more than ten (10) days' credit." This 10-day credit allowance formerly applied to sales by wholesalers both to retailers who are licensed to sell packaged liquor for consumption off the premises, *see id.* § 57-3-204(a), and to retailers who are licensed to sell liquor by the drink for consumption on the premises, *see id.* § 57-4-201.

But SB2415 amended Tenn. Code Ann. § 57-4-203, which regulates liquor-by-the-drink licensees, by adding the following subsection:

> (n) In order to facilitate the prompt payment of state taxes imposed upon wholesalers, payment for all sales to any licensee holding a license under this chapter by a wholesaler shall be made upon delivery of the product and shall be made by electronic funds transfer, credit card, debit card, or such other method as approved by the commission that will facilitate full payment at or near the time of delivery.

SB2415, § 10. It also added similar language to newly enacted Tenn. Code Ann. § 57-3-813, which prohibits wholesalers from selling any product to a retail food store wine licensee on credit. SB2415, § 7; *see* 2014 Tenn. Pub. Acts, ch. 554, § 1. Thus, Tennessee law now allows wholesalers to sell to package retail licensees on 10-days' credit, while liquor-by-the-drink licensees and retail food store wine licensees are required to provide payment upon delivery.

Nevertheless, SB2415 does not offend equal-protection principles. Because statutes that regulate payment requirements to liquor wholesalers do not involve the exercise of a fundamental right[2] or make distinctions based upon race or national origin, a strict-scrutiny analysis is not required. *See Tester*, 879 S.W.2d at 828. Instead, an equal-protection challenge to the payment classification created by SB2415 would be governed by the more deferential rational-basis test. And it cannot be said that SB2415 lacks a conceivable rational basis.

The stated purpose of the amendment to § 57-4-203 is "to facilitate the prompt payment of state taxes imposed upon wholesalers," SB2415, §10,[3] and the stated purpose of the amendment to § 57-3-813 is "to facilitate the implementation of this section," *id.* § 7.[4] Although the bill requires payment on delivery by liquor-by-the-drink licensees and by retail food store wine licensees but not by package retail licensees, "mere underinclusiveness is not fatal to the validity of a law" for equal-protection purposes. *Nixon v. Adm'r of Gen. Serv.*, 433 U.S. 425, 471 n.33

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[2] Selling alcoholic beverages is a privilege, not a fundamental right. *See Medley v. Maryville City Beer Bd.*, 726 S.W.2d 891, 892 (Tenn. 1987); *Martin v. Beer Bd. for City of Dickson*, 908 S.W.2d 941, 945 (Tenn. Ct. App. 1995).

[3] Licensed wholesalers in Tennessee are required to pay a per-gallon tax on wine and spirits based upon the wholesalers' adjusted gross sales of alcoholic beverages for the purposes of retail sale or distribution. *See* Tenn. Code Ann. §§ 57-3-302, -303(a), (b)(1). This wholesalers' tax becomes due at the first of every month and applies to all taxable transactions from the previous month. *Id.* § 57-3-303(b)(1).

[4] Tenn. Code Ann. § 57-6-108 similarly requires payment on delivery for wholesale beer sales "[i]n order to effectively collect the tax levied by [the Wholesale Beer Tax Act]." This provision, though, exempts sales within military installations but otherwise applies to sales to all retailers.

(1977) (referring to the equal-protection component of the Fifth Amendment); *see Roschen v. Ward*, 279 U.S. 337, 339 (1929) ("[a] statute is not invalid under the Constitution because it might have gone farther than it did"). If the General Assembly wishes to ensure immediate payment upon the sale of alcoholic beverages by wholesalers—in order to facilitate the prompt payment of taxes or for its own sake—it "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Beach Commc'ns*, 508 U.S. at 316 (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)); *see id.* (quoting *Williamson)* ("The legislature may select one phase of one field and apply a remedy there, neglecting the others.").[5] Equal protection principles thus do not require the General Assembly to apply its payment-on-delivery measures equally to all classes of liquor license holders. *See, e.g.*, *37712, Inc.*, 113 F.3d at 620-22 (the differences between various types of alcohol-permit holders justify drawing statutory distinctions between these permit holders).

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[5] The legislature was certainly aware of the credit allowance in § 57-3-404(g) when it passed SB2415. In 2014 Tenn. Pub. Acts, ch. 554, § 14, which was enacted on March 20, 2014, the legislature amended -404(g) to add specific provisions regarding the 10-day credit allowance.