

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

September 12, 2014

Opinion No. 14-83

Constitutionality of 2014 Residency Requirement for Retailer's Liquor License

QUESTION

Do the residency requirements for a retail liquor license set forth in Tenn. Code Ann. § 57-3-204(b)(2)(A), as amended by 2014 Tenn. Pub. Acts, ch. 554, § 27, violate the Commerce Clause of the United States Constitution?

OPINION

Yes. The residency requirements facially discriminate against nonresidents, and the intent expressed in Tenn. Code Ann. § 57-3-204(b)(4) does not establish a local purpose sufficient to justify the discriminatory licensing provisions.

ANALYSIS

State laws that “mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter” discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution. *Granholm v. Heald*, 544 U.S. 460, 472 (2005). In Tenn. Att’y Gen. Op. 12-59 (June 6, 2012), this Office examined the residency requirements for a retail liquor license in the 2012 version of Tenn. Code Ann. § 57-3-204(b)(2), which allowed for the issuance of a retail license to those “who are residents of the state of Tennessee and either have been bona fide residents of the state for at least two (2) years next preceding or who have at any time been residents of the state of Tennessee for at least ten (10) consecutive years.” Tenn. Att’y Gen. Op. 12-59, at 1 (quoting Tenn. Code Ann. § 57-3-204(b)(2) (2012)). The Office opined that those requirements were unconstitutional under the Commerce Clause in light of the decision in *Jelovsek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008). In *Jelovsek*, the Sixth Circuit concluded that Tennessee’s two-year-residency requirement for a winery license discriminated against out-of-state wineries in violation of the Commerce Clause, 545 F.3d at 438, 440, and the residency requirements for a retail liquor license were essentially the same as those found unconstitutional in *Jelovsek*. See Tenn. Att’y Gen. Op. 12-59, at 6.

Tenn. Code Ann. § 57-3-204(b)(2) was recently amended, see 2014 Tenn. Pub. Acts, ch. 554, § 27, but both the two-year and the consecutive-ten-year-“at any time”

residency requirements were retained. *See* Tenn. Code Ann. § 57-3-204(b)(2)(A).¹ For the same reasons expressed in Tenn. Att’y Gen. Op. 12-59, therefore, the residency requirements in Tenn. Code Ann. § 57-3-204(b)(2)(A) continue to impermissibly discriminate against out-of-state retailers in violation of the Commerce Clause.

Residency requirements for a retailer’s license may, however, be justified under the Commerce Clause if they serve a legitimate local purpose that cannot be achieved by less discriminatory means. *See Granholm*, 544 U.S. at 489; *see also Jelousek*, 545 F.3d at 435 (discriminatory provisions may be sustained if they advance “a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives”). Subdivision (b)(4) of § 57-3-204, which was also recently amended, purports to identify such a purpose:

It is the intent of the general assembly to distinguish between licenses authorized generally under title 57 and those specifically authorized under this Section 57-3-204. Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained in wine or beer, as defined in Section 57-5-101(b), it is in the interest of the state of Tennessee to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons, it is in the best interest of the health, safety and welfare of the state of Tennessee to require all licensees to be residents of the state of Tennessee as provided herein and the commission is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to insure that the laws, rules and regulations governing such licensees are observed.

But this stated purpose is not enough to save the residency requirements in subsection (b)(2)(A) from violating the Commerce Clause; those requirements will survive constitutional challenge only if Tennessee’s goal of maintaining a higher degree of oversight, control, and accountability for retail liquor sales cannot otherwise be achieved by less discriminatory means. A number of courts, including the United States Supreme Court, have rejected the argument that a state’s need for greater oversight with alcohol-related licenses can be served only by favoring residents over nonresidents. *See Granholm*, 544 U.S. at 492 (holding state laws that favored in-state wineries did not overcome a Commerce Clause violation when the local purpose of protecting public health and safety and ensuring regulatory accountability could be achieved through alternative even-handed licensing requirements); *see also Cooper v. McBeath*, 11 F.3d 547, 554 (5th Cir. 1994) (holding that protecting the safety and welfare of citizens did not justify Texas’ discriminatory residency and citizenship

¹ The ten-year requirement now applies only “with respect to renewal of any license issued pursuant to this § 57-3-204.” *Id.*

requirement for obtaining a liquor permit because those goals can be achieved through reasonable nondiscriminatory measures); *Anheuser-Busch, Inc. v. Schnorf*, 738 F. Supp. 2d 793, 809, 811 (N.D. Ill. 2010) (ruling that Illinois' residency requirement for distributors violated the Commerce Clause and that the state's need for local regulatory control, protection of the public against unsafe alcoholic liquor, and promoting temperance could be addressed through alternative nondiscriminatory means); *Glazer's Wholesale Drug Co. v. Kansas*, 145 F. Supp. 2d 1234, 1242-44 (D. Kan. 2001) (ruling that Kansas' residency requirement for a distributor's license was unconstitutional and that the state's local purposes of promoting temperance and protecting the general welfare, health, and safety of the citizens did not overcome a Commerce Clause violation when they could be served by nondiscriminatory alternatives).

Notwithstanding the statement in § 57-3-204(b)(4) that "it is in the best interest of the health, safety and welfare of the state of Tennessee to require all licensees to be residents of the state," the statute's distinction between residents and nonresidents appears unnecessary to achieve a "higher degree of oversight, control and accountability" of retail liquor sales. Indeed, the two-year residency requirement for an initial license cannot be related to any kind of regulatory or public-safety concern.² The potential applicant will not have a license to sell liquor during that two-year period, so he or she will not be required to be educated about liquor sales, submit to inspections, or report to the State. The State, likewise, will have no sales to monitor or control during that period, so its regulatory needs and the public welfare will not be affected.

At the same time, as the Supreme Court observed in *Granholm*, advances in technology have eased the burden of monitoring out-of-state liquor licensees: "Background checks can be done electronically. Financial records and sales data can be mailed, faxed, or submitted via e-mail." 544 U.S. at 492. And retail sales for both types of retailers could be monitored locally where the sales are actually taking place. For these reasons, it cannot be said that the stated goal of maintaining a higher degree of oversight, control, and accountability for retail liquor sales cannot otherwise be achieved by less discriminatory means. *See id.* at 493 (noting that the Supreme Court has upheld state regulations that discriminate against interstate commerce "only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable").

² Applicants for a renewal license must meet not only this two-year residency requirement for an initial license, Tenn. Code Ann. § 57-3-204(b)(2)(H), but also the consecutive-ten-year requirement of subdivision (b)(2)(A). These requirements effectively prevent retailers from other states from entering the liquor retail market by favoring long-term Tennessee residents.

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