STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 1, 2016

Opinion No. 16-08

Constitutionality of different operating hours for retail sales at liquor stores and distilleries

Question 1

Does Tennessee's disparate treatment of liquor stores and distilleries with regard to the days on which retail sales of closed bottles of alcohol are permitted violate the Commerce Clause of the United States Constitution?

Opinion 1

No. The statutory provisions that prohibit retail sales by Tennessee liquor stores on Sundays and holidays but permit Tennessee distilleries to make retail sales on Sundays and holidays do not violate the Commerce Clause because the restrictions do not apply to out-of-state entities or affect interstate commerce.

Question 2

Does Tennessee's disparate treatment of liquor stores and distilleries with regard to the days on which retail sales of closed bottles of alcohol are permitted violate the equal protection guarantees of the United States or Tennessee Constitutions?

Opinion 2

No. The statutes likely do not violate the equal protection guarantees of the United States or Tennessee Constitutions because distillers and retailers are not similarly situated, and even if they are deemed to be similarly situated, different days of retail operation are rationally related to conceivable, legitimate state interests.

ANALYSIS

The General Assembly has prohibited retail liquor stores in Tennessee from selling liquor on Sundays and certain specified holidays but has allowed Tennessee liquor manufacturers and distillers to make retail sales of their products on those days. In particular, a retail liquor store may sell to the general public between 8:00 a.m. and 11:00 p.m. Monday through Saturday. No retail sales by liquor stores are permitted on Sunday, and the retail stores must be closed on Christmas, Thanksgiving, Labor Day, New Year's Day, and the Fourth of July. Tenn. Code Ann. § 57-3-406(e), (h). On the other hand, manufacturers and distillers of alcoholic beverages are permitted to retail their products not only between 8:00 a.m. and 11:00 p.m. Monday through Saturday, but

also on Sunday between noon and 7:00 p.m., and face no restrictions on holiday sales. *See* Tenn. Code Ann. § 57-3-202(i)(1).

While states generally possess, in addition to their inherent police powers, 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, they cannot do so in violation of a person's federal constitutional rights. *37712, Inc. v. Ohio Dept. of Liquor Control*, 113 F.3d 614, 618 (6th Cir. 1997). You have asked whether the stricter days-of-operation limitation placed on Tennessee retailers of alcoholic beverages compared to the limitation placed on Tennessee distillers and manufacturers violates any right guaranteed under the Commerce Clause or the Equal Protection Clauses of the United States and Tennessee Constitutions.

1. Commerce Clause Analysis

The Commerce Clause of the United States Constitution gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys. v. Dep't Envtl. Quality*, 511 U.S. 93, 98 (1994). Often referred to as the "dormant" Commerce Clause, this limitation on the authority of state and local governments applies "even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). It is designed to protect against "economic Balkanization" of the United States. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577-78 (1997).

State regulations that discriminate against interstate commerce are subject to a "virtually per se rule of invalidity." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Discrimination in this context means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys.*, 511 U.S. at 99. For example, when Hawaii imposed a 20% tax on sales of liquor at wholesale but exempted certain locally distilled liquor from the tax, the tax was held to violate the Commerce Clause because it discriminated in favor of products manufactured in Hawaii and against competing products manufactured in other states. *See Bacchus Imports, Ltd. V. Dias*, 468 U.S. 263 (1984).[1]

The Commerce Clause is simply not applicable here because the statutory limits on days of operation apply solely to in-state liquor stores and in-state manufacturers and distilleries. Although the statutes may "discriminate" against in-state retail stores and in favor of in-state

[1]*Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which you specifically asked us to consider, is distinguishable from and inapplicable to the situation here. Because of the tax exemption for local products, the local products could be sold for less than comparable out-of-state products, which encouraged consumers to select local products to the detriment of interstate commerce. The state regulation discriminated between in-state and out-of-state businesses. Here, however, there is no discrimination between in-state and out-of-state business; the Tennessee statutes discriminate only between in-state businesses—Tennessee liquor retailers and Tennessee distillers.

distilleries, there is no discrimination against any out-of-state retailer or distiller and, therefore, there is no Commerce Clause problem.[2]

2. Equal Protection Analysis

The federal Equal Protection Clause provides that "no State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Likewise, article I, section 8, and article XI, section 8, of the Tennessee Constitution "guarantee equal privileges and immunities for all those similarly situated." *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993). Tennessee's equal protection guarantee is coextensive with the equal protection provisions of the United States Constitution. *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 518 (Tenn. 2005).

In essence, the equal protection guarantee "protects against arbitrary classifications, and requires that similarly situated persons be treated equally." *Northville Downs v. Granholm*, 622 F.3d 579, 586 (6th Cir. 2010) (citation and internal quotation marks omitted). The entities likely to launch an equal protection challenge here are, if any, in-state liquor stores that claim they are entitled to the same retail operating days as in-state distilleries. But a court is highly likely find that these potential challengers are not "similarly situated" to liquor manufacturers or distilleries, in which case the equal protection guarantees do not apply.

It would appear that a retail liquor store is not similarly situated to a distillery in function or customer base. There is a material difference between local distillers who sell their own products merely as an incident to their manufacturing operations and retail stores whose only business is to sell alcohol produced by various manufacturers for off-premises consumption. *See, e.g.*, *37712, Inc.*, 113 F.3d at 621 (finding manufacturer and carry-out retail stores are not similarly situated).[3]

Moreover, common sense and experience dictate that customers do not perceive distilleries to be reasonable substitutes for local liquor stores. People generally do not drive to a distant distillery to make the kind of regular alcohol purchases they make at a local liquor store. Distilleries are open to the public primarily as a marketing tool to promote goodwill by giving tourists an opportunity to learn about the distilling process and the distillery's products.[4] Sale of those products at the distillery is far from the distillery's primary business. The distillery offers only its own products for sale, and a limited number of visitors may actually purchase those

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[2] A nondiscriminatory statute might nevertheless have an adverse impact on interstate commerce, but it will be upheld as long as it only incidentally burdens interstate commerce. *Maine v. Taylor*, 477 U.S. 131, 138 (1986). Out-of-state distillers might claim that they are adversely affected because their products—which can only be sold in Tennessee by retail liquor stores—cannot be sold in Tennessee on Sundays and holidays while the in-state distilleries can sell their own products on Sundays and holidays. But any such burden on interstate commerce would be minimal and incidental and is, therefore, highly unlikely to be viewed as a Commerce Clause violation.

[3] Indeed, manufacturers and retailers are treated as different classes of vendors throughout Tennessee's three-tier alcohol regulatory scheme. *See, e.g.*, *Jelovsek v. Bredesen*, 545 F.3d 431, 433-34 (6th Cir. 2008).

[4] *See, e.g.*, Jack Daniels Distillery tour information at http://www.jackdaniels.com/visit and Prichard's Distillery tour information at http://prichardsdistillery.com/tours/kelso.

products incident to a tour, much as they would purchase a souvenir. Any future purchases of the distiller's product by the tourists will likely occur at a retail liquor store, where the vast majority of these products are sold.

In short, equal protection guarantees are not implicated unless there is discrimination between similarly situated persons. Thus, to the extent that retailers and distilleries are not "similarly situated," disparate restrictions on their respective days of operation with regard to the sale of closed bottles of alcohol would not be viewed as an equal protection violation.

Even if liquor retailers and distillers are viewed as similarly situated so as to trigger equal protection concerns, the disparate treatment imposed by the statutes would almost certainly survive an equal protection challenge, because it should pass constitutional muster under the "rational basis" test. Depending on the nature of the right asserted, both the United States Supreme Court and the Tennessee Supreme Court apply one of three levels of scrutiny when analyzing equal protection claims: strict scrutiny; intermediate scrutiny; or "rational basis" scrutiny. *Tenn. Small Sch. Sys.*, 851 S.W.2d at 153. Equal protection "requires strict scrutiny of a legislative classification only when the classification interferes with the exercise of a 'fundamental right' (e.g., right to vote, right of privacy), or operates to the peculiar disadvantage of a 'suspect class' (e.g., age or race)." *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994). Rights "are fundamental when they are either implicitly or explicitly protected by a constitutional provision." *Tenn. Small Sch. Sys.*, 851 S.W.2d at 152. Intermediate scrutiny only applies when the classification involves a quasi-suspect class, such as gender or illegitimacy. *Craig v. Boren*, 429 U.S. 190, 198–99 (1976). If the classification does not interfere with the exercise of a fundamental right or does not disadvantage a suspect or quasi-suspect class, "judicial inquiry into the legislative choice is limited to whether the classifications have a reasonable relationship to a legitimate state interest." *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988). "Under this standard, 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.

Thus, when disparate treatment between similarly situated persons is shown, social or economic legislation that does not target a suspect class or burden a fundamental right will withstand an equal protection challenge if the classification or disparate treatment is rationally related to a legitimate state interest. This "rational basis" analysis presumes the challenged statute to be valid "if any conceivable basis rationally supports it." *Northville Downs*, 622 F.3d at 586; *37712, Inc.*, 113 F.3d at 622.

Because the statutes in question here are social or economic legislation and do not involve fundamental rights or suspect classes, a court would apply the rational basis standard of review. There are conceivable, legitimate state interests that could justify the disparate treatment. A legislative decision to encourage and protect private investment in local alcohol manufacturing facilities, or a policy to promote domestic production of alcohol, each provide a rational basis for treating Tennessee liquor manufacturers and distilleries more favorably than liquor retailers. *See, e.g., 37712, Inc.*, 113 F.3d at 621 (finding that legislative policy to promote local investment and production of beer was rationally related to Ohio statute exempting breweries from local option allowing a ban on retail sales). The State also has a legitimate interest in encouraging and facilitating tourism, which brings with it economic benefits for the State in the form of increased

revenues and job opportunities. Allowing retail sales at popular tourist destinations like distilleries on Sundays and holidays when tourists are especially likely to visit is rationally related to the State's interest in fostering tourism.

In sum, the statutory scheme that favors Tennessee distilleries over Tennessee retail liquor stores with respect to the permitted days of operation would almost certainly survive an equal protection challenge under both the federal and the Tennessee Constitutions.

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