

**STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202**

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Opinion No. 12-59

Tennessee Residency Requirements for
Alcoholic Beverages Wholesalers and Retailers

QUESTION

Do the residency and corporate asset location requirements of Tenn. Code Ann. §§ 57-3-203 and 57-3-204 violate the Commerce Clause of the United States Constitution?

OPINION

Yes, these residency and corporate asset location requirements for applicants seeking a license as an alcoholic beverage wholesaler or package retailer violate the Commerce Clause of the United States Constitution.

ANALYSIS

In Tennessee, no person may lawfully engage in the business of selling alcoholic beverages¹ as a

¹ “Alcoholic beverage” is defined to include “alcohol, spirits, liquor, wine, high alcohol content beer, and every liquid containing

wholesaler or as a retailer selling sealed packages without a license. *See* Tenn. Code Ann. § 57-3-201 to -219.² Tenn. Code Ann. §§ 57-3-203 and § 57-3-204 set forth the requirements for obtaining licenses to sell alcohol as a wholesaler or package retailer. Both require applicants to satisfy certain defined Tennessee residency requirements.

Individual applicants for a wholesaler's license must be "citizens of the state of Tennessee and either have been for at least the two (2) years next preceding citizens of the state of Tennessee or have been citizens of the state of Tennessee at any time for at least fifteen (15) consecutive years." Tenn. Code Ann. § 57-3-203(b). Individual applicants for a retail package license must be "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. Code Ann. § 57-3-204(b)(2).

To qualify for a corporate wholesaler's license, the corporation's officers and stockholders must meet defined Tennessee residency requirements and the corporation's assets must meet certain in-state requirements, which are as follows:

alcohol, spirits, wine and high alcohol content beer and capable of being consumed by a human being, other than patent medicine or beer, as defined in § 57-5-104(b)." Tenn. Code Ann. § 57-3-101(a)(1)(A).

² The licensing of retail sales of alcoholic beverages for on-premise consumption is regulated by a different chapter. *See* Tenn. Code Ann. §§ 57-4-201 to -205.

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(f) . . . no license shall be issued to any corporation unless such corporation meets the following requirements:

(1) All of its capital stock must be owned by individuals who have been residents of Tennessee for not less than five (5) years next preceding or who at any time have been residents of the state of Tennessee for at least fifteen (15) consecutive years . . .

. . . .

(3) No stock of any corporation licensed under this subsection shall be transferred to any person who has not been a resident of Tennessee for at least five (5) years next preceding or who at any time has not been a resident of Tennessee for at least fifteen (15) consecutive years.

. . . .

(g) Notwithstanding any language contained in subsection (f), the commission, in its discretion, may issue a wholesale license to any corporation which has been domiciled in the state of Tennessee for twenty-five (25) years, and the majority of whose assets are located in the state of Tennessee and all of whose active officers shall be residents of Tennessee . . .

(h) If at any time subsequent to the granting of a wholesale liquor license to any such corporation, the majority of its assets shall cease to remain and be located in the state of Tennessee, and if any of its active officers shall

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cease to be residents of Tennessee, then the commission, within its discretion, shall have the right to revoke such license. The commission is further granted the right to make investigations at any time to ascertain if the majority of the assets of such corporation are located within the state of Tennessee and whether all of its active officers are residents of Tennessee, as above set out, and should its findings be in the negative, it may revoke such license. The foregoing shall apply irrespective of the provisions contained in § 57-3-404(d).

Tenn. Code Ann. § 57-3-203 (f), (g) & (h).

Similarly, the ABC may issue a retail package license to a corporation, provided that a corporation satisfies the following defined Tennessee residency requirements:

(3) The commission may, in its discretion, issue such a retail license to a corporation; provided, that no such license shall be issued to any corporation unless such corporation meets the following requirements:

(A) All of its capital stock must be owned by individuals who are residents of the state of Tennessee and either have been 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;

....

(C) No stock of any corporation licensed under this section shall be transferred to any person who is not a resident of the state of Tennessee and either has not been a resident of the state for at least two (2) years next preceding or who at any time has not been a resident of Tennessee for at least ten (10) consecutive years.

Tenn. Code Ann. § 57-3-204(b)(3).

The question posed is whether the foregoing in-state residency and corporate asset location requirements are vulnerable to constitutional challenge. In light of the recent decision by the United States Court of Appeals for the Sixth Circuit in *Jelovsek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008), *cert. denied*, ___ U.S. ___, 130 S. Ct. 199 (2009), these requirements are constitutionally infirm. In that case, the plaintiffs challenged the constitutionality of residency requirements in Tennessee's Wine and Grape Law, codified at Tenn. Code Ann. § 57-3-207(d) (2002). *Id.* at 432, 438. The requirements for a Tennessee winery license at that time were that an applicant must be a two-year Tennessee resident. *Id.* at 438. If the applicant was a corporation, the capital stock of such corporation was required to be owned by two-year Tennessee residents. *Id.* The plaintiffs argued these requirements discriminated against out-of-state wine producers and therefore violated the Commerce Clause of the United States Constitution. In striking down the requirements, the Sixth Circuit first quoted the United States Supreme Court's

summary of the scope of the Commerce Clause, which grants the exclusive power to Congress to regulate interstate commerce, stating:

The Commerce Clause empowers Congress “[t]o regulate Commerce . . . among the several States,” Art. I, § 8, cl. 3, and although its terms do not expressly restrain “the several States” in any way, we have sensed a negative implication in the provision since the early days, *see, e.g., Cooley v. Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 53 U.S. 299, 12 How. 299, 318-319, 13 L.Ed. 996 (1851); *cf. Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 209, 6 L.Ed. 23 (1824) (Marshall, C.J.) (dictum). The modern law of what has come to be called the dormant Commerce Clause is driven by concern about “economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988).

....

Under the resulting protocol for dormant Commerce Clause analysis, we ask whether a challenged law discriminates against interstate commerce. *See Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). A discriminatory law is “virtually per se invalid,” *ibid.*; *see also Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98

S.Ct. 2531, 57 L.Ed.2d 475 (1978), and will survive only if it “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives,” *Oregon Waste Systems, supra*, at 101, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (internal quotation marks omitted); *see also Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986).

Jelousek, 545 F.3d at 435 (quoting *Dep’t of Revenue v. Davis*, 553 U.S. 328, 337-38 (2008)).

Jelousek further confirmed that the Twenty-first Amendment to the United States Constitution³ does not allow states to erect trade barriers or engage in other forms of economic protectionism in contravention of the dormant Commerce Clause. *Id.* at 435. As the United States Supreme Court stated in *Granholm v. Heald*, 544 U.S. 460, 484 (2005), the Twenty-first Amendment does not “give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods.” In *Bacchus v. Dias*, 468 U.S. 263, 276 (1984), the Court reiterated that the “central purpose of [the Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition.”

In adopting the Wine and Grape Law, the Legislature’s stated purpose, as set forth in the Act’s

³ Section 2 of the Twenty-first Amendment states that “[t]he transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. Const. amend. XXI, § 2.

preamble, was to benefit Tennessee's rural areas and general economy and to provide a market for mature grapes. In light of controlling Commerce Clause principles, the court in *Jelousek* held that residency requirements imposed on applicants for a Tennessee winery license to promote local economic interests were trade barriers that impermissibly favored Tennessee interests at the expense of interstate commerce. *Jelousek*, 545 F.3d at 438-39.

Accordingly, under the principles enunciated in *Jelousek* we must review the legislative purpose for adopting the residency requirements for wholesale and package retail alcoholic beverage licenses to determine whether such purposes are sufficient to protect these requirements from Commerce Clause scrutiny. The legislative history of Tenn. Code Ann. §§ 57-3-203 and 57-3-204 does not provide any evidence of public policy concerns that could overcome a constitutional challenge. Nor can this Office conceive of a legitimate local purpose, such as promoting the health and safety of Tennesseans, that could be served solely by enforcement of these residency requirements.

The residency requirements for a wholesaler's license contained in Tenn. Code Ann. § 57-3-203 were added in 1947. 1947 Tenn. Pub. Acts 73. The introduction to Chapter 73 states that it was enacted to amend certain public acts "so as to regulate the issuance of wholesaler's licenses to corporations." *Id.* The remaining amendments to Tenn. Code Ann. § 57-3-203 did not offer any additional insight into any justifications for

the residency requirements for those seeking wholesaler's licenses.

The statute governing the issuance of a retailer's license to corporations was amended in 1984 to include the residency requirements. 1984 Tenn. Pub. Acts 746. The following exchange on the House Floor on April 4, 1984 reveals no valid public policy concerns to support those requirements:

Speaker Naifeh: What if, just say we did get whiskey in drug stores and say then – then with this bill Walgreens wouldn't only – they would only be able to have one store with whiskey in it in the state of Tennessee.”

Rep. Rhinehart: Yes sir.

Rep. Bragg: Mr. Speaker, ladies and gentlemen of the house, I don't see anything wrong with this bill. This chamber just voted for interstate bank – I mean, to kill interstate banking. I think all this does is kill interstate whiskey. I don't see anything wrong with this bill.

. . . .

Rep. Covington: Actually this might cut down on the sale of liquor in the state of Tennessee and prevent more people from getting drunk, more drunks on the streets. Is that what you're trying to do in effect?

Rep. Rhinehart: I'm trying to restrict the sale of it [liquor], yes sir.

Rep. Covington: I think that's a fine approach.

Rep. Bragg: Mr. Speaker I think we ought to go on and pass this and give our local stores time to get ready for interstate whiskey.

Remarks in the Tennessee House of Representatives on House Bill 1576, 93rd General Assembly, 2nd Sess., Legislative Tape H-21 (April 4, 1984).

The statute's residency requirements were again amended in 1990. 1990 Tenn. Pub. Acts 794. The following discussion occurred on the House Floor, again evidencing no valid public policy concerns to support these residency requirements:

Rep. Stulce: Would you explain this bill? Does what this means now – doesthis [sic] say that someone who grew up here as a child for ten years and moved away and is now 60 years old living in Nevada could have a license in the state of Tennessee?

Rep. Tindell: In a technical sense yes, but from a practical stance the goal is to have an alternative for people who have lived here in the past, or someone who is a present owner that could keep their license, for instance, if they were going to retire and they wouldn't have to sell their business they could retire to another state if they had maintained residency for ten consecutive years.

Rep. Stulce: Why would we want to have people who are not residents have licenses in the state of Tennessee?

Rep. Tindell: Well someone who wanted to retire, for instance, that didn't want to have to

sell and liquidate their assets into say Florida, or another state, they would be able to keep their business if they had a good record here for ten years. But also it's going to put stronger than the current law that says you have to be a resident for two years prior to applying for a license. This would let the TBI and Alcohol[ic] Beverage Commission and others have a really strong window of ten years to understand the background of someone in terms of their residency before giving them a license when they apply; and so in some ways it's actually stronger requirement for residency than the current law.

Remarks in the House of Representatives on House Bill 1836, 96th General Assembly, 2nd Sess., Legislative Tape H-90 (May 28, 1990).

In short, the aforementioned legislative history reveals no legitimate public policy to support these residency requirements and indeed provides some evidence that the legislative intent for the residency requirement for retailers was to deter the sale of alcoholic beverages from outside Tennessee, which intent would violate the federal Commerce Clause. Accordingly, based on the legal principles cited above and the analysis of the applicable law by the court in *Jelovsek* as it related to Tennessee law and residency requirements, the current residency and corporate asset location requirements of Tenn. Code Ann. §§ 57-3-203 and 57-3-204 would be invalid under the Commerce Clause. These requirements constitute trade restraints and barriers that impermissibly discriminate against interstate commerce, and cannot be sustained unless

they advance “a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Jelousek*, 545 F.3d at 435 (quoting *Dep’t. of Revenue v. Davis*, 553 U.S. at 337-38)). See also *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 431-35 (6th Cir. 2008) (concluding that Kentucky’s statutory requirement that direct-shipment purchases of wine from small farm wineries must be made in person discriminated against interstate commerce in practical effect); *Cooper v. McBeath*, 11 F.3d 547, 552-56 (5th Cir.), *cert. denied*, 512 U.S. 1205 (1994) (finding provisions of Texas Alcoholic Beverage Code that imposed residency requirements on permit holders discriminated against nonresidents and that the state of Texas could not articulate any legitimate public policy ground to justify such discrimination); *Anheuser-Busch, Inc. v. Schnorf*, 738 F.Supp.2d 793, 802-16 (N.D. Ill. 2010) (holding that Illinois’ prohibition against out-of-state brewers holding licenses necessary to distribute beer in Illinois violated the Commerce Clause).

ROBERT E. COOPER, JR.
Attorney General and Reporter
WILLIAM E. YOUNG
Solicitor General
LYNDSAY F. SANDERS
Senior Counsel

Requested by:

The Honorable Jon Lundberg
State Representative
20 Legislative Plaza
Nashville, TN 37243

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

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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

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

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 Jelovsek*, 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 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.

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.

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”).

ROBERT E. COOPER, JR.
Attorney General and Reporter

JOSEPH F. WHALEN
Acting Solicitor General

LINDA D. KIRKLEN
Assistant Attorney General

Requested by:

The Honorable Ken Yager
State Senator
G19 War Memorial Building
Nashville, Tennessee 37243
