



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

February 21, 1978

ATTORNEY GENERAL OPINION NO. 78- 83

The Honorable Ardena Matlack
State Representative
3rd Floor - State Capitol
Topeka, Kansas 66612

Re: Cereal Malt Beverages--Conduct--Licensed Premises

Synopsis: The provisions of House Bill No. 3050 are supported by the decision of the U.S. Supreme Court in *California v. LaRue*, 409 U.S. 109, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972).

* * *

Dear Representative Matlack:

You inquire concerning House Bill No. 3050, which proposes to prohibit certain conduct on premises which are licensed for the sale of cereal malt beverages.

You raise no particular question concerning this bill. I assume, however, that your inquiry extends to the obvious First Amendment questions posed by this bill. The prohibited conduct is defined in language which is substantially identical to regulations which were adopted in 1970 by the director of the California Department of Alcohol Beverage Control, regulating the type of entertainment that might be presented in bars and nightclubs which it licensed. Challenged by claims that the regulations unconstitutionally abridged the freedom of expression guaranteed by the First and Fourteenth Amendments of the United States Constitutions, the United States Supreme Court upheld their constitutionality in *California v. LaRue*, 409 U.S. 109, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972). The Court acknowledged that the regulations "on their face would proscribe some forms of visual presentation that would not be found obscene" under its prior decisions. However, it concluded that

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"we do not believe that the state regulatory authority in this case was limited to either dealing with the problem it confronted within the limits of our decisions as to obscenity, or in accordance with the limits prescribed for dealing with some forms of communicative conduct"

The Court emphasizes that the

"state regulations here challenged come to us, not in the context of censuring a dramatic performance in a theater, but rather in a context of licensing bars and nightclubs to sell liquor by the drink."

The Court found the enhanced police power of the state to prohibit conduct, some of which concededly would not fall within the prescriptions of obscenity found in its previous decisions, to rest in the Twenty-first Amendment:

"While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals." 409 U.S. at 114.

It pointedly emphasized that "the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment" 409 U.S. at 115.
It stated further:

"While we agree that at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of

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expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." 409 U.S. at 118.

Concluding that the regulations were reasonable, and "[g]iven the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires," the Court upheld them.

Under K.S.A. 41-102, alcoholic liquor is defined so as to exclude cereal malt beverages containing not more than 3.2% of alcohol by weight, and its sale is not regulated by the Kansas Liquor Control Act. The question is presented whether this statutory classification of cereal malt beverages as other than an alcoholic liquor removes the Twenty-first Amendment from consideration as supporting the validity of these provisions. In *Craig v. Boren*, 429 U.S. 190, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976), the Court considered a claim of sex discrimination based upon an Oklahoma statute prohibiting the sale of 3.2 beer to males under the age of 21 and to females under the age of 18 years. The state sought to invoke the Twenty-first Amendment in support of the statutory discrimination, on the ground that its powers of police regulation had been "strengthened" by that Amendment, relying upon *California v. LaRue*, *supra*. The Court discussed the argument at some length, and held it provided no basis upon which to uphold the claim:

"It is true that *California v. LaRue* . . . relied upon the Twenty-first Amendment to 'strengthen' the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performances 'partake more of gross sexuality than of communication,' . . . Nevertheless, the Court has never recognized sufficient 'strength' in the Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause." 50 L. Ed. 2d at 413.

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Implicitly, the Court regarded the Twenty-first Amendment as applicable to the state regulation of 3.2 beer, even though it was classified as alcoholic liquor under the state's regulatory scheme. Presumptively, then, the Twenty-first Amendment is applicable to the state's regulation of conduct on premises licensed for 3.2 cereal malt beverages. If that is correct, as I believe it to be, *California v. LaRue, supra*, stands as direct precedent for the validity of the prohibitions and restrictions contained in this bill.

Yours truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj