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ATTORNEY GENERAL OPINION NO. 2018- 13

The Honorable Ty Masterson
State Senator, 16th District
P.O. Box 424
Andover, KS 67002

The Honorable Anita Judd-Jenkins
State Representative, 80th District
225 N. "C" Street
Arkansas City, KS 67005

Re: Intoxicating Liquors and Beverages—Licensing and Related Provisions; City Option—Farm Winery License; Authority of Licensee, Percentage of Kansas Products

Synopsis: Unless the State identifies a legitimate local purpose not adequately served by reasonable, nondiscriminatory means, the domestic grape content requirement in the Kansas farm winery licensing scheme violates the dormant Commerce Clause of the United States Constitution.

A reviewing court will strike only the constitutionally offensive portion of a law if it finds find the intention of the legislature can be carried out without the offensive provision. The State must identify the legislative intent in providing for farm winery licenses and whether that intent can be carried out without the minimum domestic product requirement in order to prevent K.S.A. 41-308a from being found unconstitutional in its entirety. Cited herein: K.S.A. 41-101; 41-102; 2018 Supp. 41-308; 41-308a; U.S. Const. Art. 1, § 8, Cl. 3; U.S. Const. Amend. XVIII; U.S. Const. Amend. XXI; Kan. Const., Art. 15, Sec. 10.

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Dear Sen. Masterson and Rep. Judd-Jenkins:

As State Senator for the 16th District and State Representative for the 80th District respectively, you ask our opinion on a matter related to the Kansas farm winery licensing scheme within the Kansas Liquor Control Act.[1] As background, you describe the statutory requirement that "[n]ot less than 30% of the products utilized in the manufacture of domestic table wine and domestic fortified wine by a farm winery shall be grown in Kansas."[2] You suggest this requirement has the result of "burdening in-state farm wineries, to the advantage of out-of-state wineries, while also discriminating against interstate grape growers."[3] Specifically, you ask: "Does holding in-state and out-of-state wineries by a different legal standard violate the dormant Commerce Clause of the United States Constitution?"[4]

For the reasons discussed below, we conclude that the answer to your question is yes.

The Twenty-first Amendment to the United States Constitution repealed the Eighteenth Amendment,[5] which had been enacted to prohibit the "manufacture, sale, or transportation of intoxicating liquors" in the United States.[6] The Twenty-first Amendment brought "nationwide Prohibition . . . to an end"[7] and granted states the power to "maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use."[8] Kansas exercised this power in 1948 when the voters approved an amendment to article 15, section 10 of the state constitution.[9] The following year, the legislature passed the Kansas Liquor Control Act (the "Act").[10]

The Act provides for a three-tier system under which manufacturers (whether in-state or out-of-state) sell product to state-licensed distributors, who may sell to other state-licensed distributors or to state-licensed retailers. The farm winery license was added to the Act in 1983.[11] It essentially allows the licensee to manufacture, distribute, and engage in the retail sale of wine, combining some features of each of the other license classes.[12] However, the wine produced by the farm winery must be produced using not less than 30% grapes grown in Kansas, unless the Director of the Division of Alcoholic Beverage Control authorizes a lesser proportion,[13] for example during a year with poor harvests.

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[1] K.S.A. 41-101, *et seq.*
[2] K.S.A. 2018 Supp. 41-308a(c).
[3] Senator Ty Masterson and Representative Anita Judd-Jenkins, Correspondence, January 22, 2018.
[4] *Id.*
[5] U.S. Const. Amend. XXI.
[6] U.S. Const. Amend. XVIII (repealed 1933).
[7] *Granholm v. Heald*, 544 U.S. 460, 484 (2005).
[8] *Id.*
[9] Kan. Const., Art. 15, Sec. 10. *See also State ex rel. Schneider v. Kennedy*, 255 Kan. 13, 16-17 (1978).
[10] K.S.A. 41-101, *et seq.*
[11] L. 1983, Ch. 161, § 3.
[12] K.S.A. 2018 Supp. 41-308(a).
[13] K.S.A. 41-102(g), K.S.A. 2018 Supp. 41-308a(c).

The United States Constitution grants Congress the power "to regulate Commerce … among the several States."[14] Because this power belongs to Congress, courts have long recognized that states may not "discriminate against interstate commerce."[15] This "negative aspect" of the Commerce Clause "prohibits economic protectionism" and is referred to as the dormant Commerce Clause.[16] Legislation aimed only at in-state activity is not immune from scrutiny.[17]

We recognize the conflict between the Twenty-first Amendment, which grants states the power to regulate the importation of alcoholic beverages, and the Dormant Commerce Clause, which prohibits economic protectionism. The United States Supreme Court resolved this conflict in *Granholm v. Heald*,[18] holding that the Twenty-first Amendment did not grant Michigan and New York the power to prohibit out-of-state wineries to make direct sales to their citizens. In short, the Court concluded "the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers."[19] We thus proceed with the understanding that the Twenty-first Amendment does not shield from commerce clause scrutiny a state law requiring the manufacture in Kansas of wine using a minimum amount of Kansas-grown grapes.

If the farm winery licensing scheme were to be challenged, a reviewing court would first determine whether the law discriminates against interstate commerce by treating in-state and out-of-state economic interests in a way that benefits the in-state interest and burdens the out-of-state interest.[20] A law that discriminates against out-of-state interests in this way is "virtually per se invalid," unless it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[21]

In *Maine v. Taylor*,[22] the United States Supreme Court considered whether a state prohibition on importing the golden shiner minnow violated the dormant Commerce Clause. Maine intervened in Taylor's federal prosecution for importing wildlife in violation of state law in order to defend the constitutionality of its import ban, asserting that the law protected the state's fisheries from disease and invasive species that could be included in shipments of the baitfish.[23] Taylor challenged his indictment by arguing the import ban was unconstitutional because the threats identified by the state were not legitimate.[24] The Court upheld the law, affirming the district court's finding that Maine's import ban served

[14] U.S. Const. Art. 1, Sec. 8, Cl. 3.
[15] *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988).
[16] *Id.; Zimmerman v. Bd. of County Comm'rs of Wabaunsee County*, 293 Kan. 332, 357 (2011).
[17] *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615 (1981).
[18] 544 U.S. 460.
[19] *Id.* at 486.
[20] *Zimmerman* at 357.
[21] *Id.* (citations omitted).
[22] 477 U.S. 131 (1986).
[23] *Id.* at 133.
[24] *Id.* at 142.

a legitimate local purpose[25] and rejecting Taylor's argument on appeal that the state should have developed a way to test imported baitfish for safety.[26] Although Maine had an export market for the golden shiner minnow that was functionally protected by the law, the majority concluded "Maine has legitimate reasons, 'apart from their origin, to treat [out-of-state baitfish] differently.'"[27]

In contrast, the Court overturned a state law requiring minimum domestic content in coal-fired power plants. In *Wyoming v. Oklahoma*,[28] Wyoming challenged Oklahoma's requirement that coal-fired electric generating plants selling electricity within Oklahoma burn at least 10% coal mined in Oklahoma. The Court observed that Oklahoma's exclusion was based solely on the origin of the coal, and that Oklahoma failed to provide a legitimate local purpose for the exclusion.[29] The Court also rejected Oklahoma's argument that augmenting domestic production would reduce the state's reliance on a single coal provider that used a single rail line to deliver coal, describing as "illegitimate" an effort to "isolat[e] the state from the national economy."[30]

Turning back to your question, we believe the farm winery license requirement to grow on the premises or purchase from elsewhere in Kansas at least 30% of the grapes used to produce wine discriminates against out-of-state grape producers in two ways. First, the law benefits domestic grape producers by reserving a portion of the market for their production. Second, farm winery license holders are given privileges relating to the retail sale of their wine that out-of-state producers are not afforded. The minimum domestic product requirement also burdens out-of-state grape producers by reducing the market for them to sell their grapes to Kansas wine producers. This is true even though the farm winery license is an optional means of producing or selling wine within the state.[31] As a result, we cannot meaningfully distinguish the minimum domestic product requirement in the Kansas farm winery licensing scheme from the minimum domestic content required of Oklahoma coal-fired electric generating plants.

In a suit or other proceeding challenging the validity of the farm winery license scheme, the State would be compelled to provide a legitimate local purpose for the discriminatory law that could not be adequately served by reasonable nondiscriminatory alternatives.[32] Although it is beyond the scope of an Attorney General Opinion to identify every possible local purpose behind the law, let alone to devise reasonable alternatives for each, we

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[25] *Id.* at 148.
[26] *Id.* at 147.
[27] *Id.* at 152, *citing Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978).
[28] 502 U.S. 437 (1992).
[29] *Id.* at 456.
[30] *Id.* at 457, *citing Philadelphia v. New Jersey*, 437 U.S. at 627.
[31] In *Wyoming v. Oklahoma*, the United States Supreme Court rejected Oklahoma's argument that the impact on Wyoming was negligible, concluding that the extent of discrimination was not relevant to the constitutional analysis. 502 U.S. at 455-56.
[32] *Cf. New Energy Co. of Indiana v. Limbach*, 486 U.S. at 278.

note the United States Supreme Court has warned the "standards for . . . justification [of a protectionist enactment] are high."[33]

A reviewing court would likely also ask the parties to brief whether the Kansas farm winery licensing scheme can remain in place in the absence of the minimum domestic product requirement. K.S.A. 2018 Supp. 41-308a does not have a severability clause, but the presence of such a clause does not appear to be a prerequisite,[34] and a court may nevertheless ignore one.[35] The parties would need to identify the legislative intent in passing the law and argue whether "the act would have been passed without the objectionable portion and if the statute would operate effectively to carry out the intention of the legislature with such portion stricken."[36]

The original version of the farm winery license applied only to the "manufacture, storage, and sale of domestic table wine,"[37] which was defined as "wine which contains not more than 14% alcohol by volume and which is manufactured . . . from agricultural products grown in this state."[38] This 100% domestic content requirement was reduced to 60% in 1985.[39] The same year, the legislature added the ability to sell domestic table wine to retailers and established a production threshold before imposing certain manufacturing requirements. Two years later, the legislature allowed farm wineries to serve samples.[40] The license currently allows for samples to be provided and sales to be made at other locations, such as trade shows, conventions, or other gatherings.[41] As a result, the farm winery license serves a variety of agricultural and tourism purposes. We believe a court should consider this evolving history in determining the legislative intent of the current law and whether K.S.A. 2018 Supp. 41-308a can carry out that legislative intent without the minimum domestic product requirement.[42] By way of example, the Kansas farm winery licensing scheme has many features in common with other states' versions of a farm winery license. Colorado, for example, removed its minimum domestic product requirement in 2005 but still has a maximum production limit.[43] Maine does not appear to have ever had a minimum domestic product requirement.[44] These states provide unique privileges to farm wineries in an effort to support the domestic wine industry and promote tourism without discriminating against out-of-state wine producers.[45] A reviewing court

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[33] *Id.*, *citing Philadelphia v. New Jersey*, 437 U.S. at 624.
[34] *See State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 913 (2008).
[35] *Id.* at 916-17; *Felten Truck Line, Inc. v. State Bd. of Tax Appeals*, 183 Kan. 287, 300 (1958) ("Whether the legislature had provided for a severability clause is of no importance.")
[36] *Felten Truck Line*, 183 Kan. at 300.
[37] L. 1983, Ch. 161, § 3.
[38] L. 1983, Ch. 161, § 2.
[39] L. 1985, Ch. 170, § 25.
[40] L. 1987, Ch. 182, § 141.
[41] K.S.A. 2018 Supp. 41-308a; *see* Kansas Farm Winery Handbook (2016), *available at* https://www.ksrevenue.org/pdf/hbfarmwineries.pdf, *accessed on* September 13, 2018.
[42] *Cf. Bd. of County Comm'rs of Johnson County v. Jordan*, 303 Kan. 844, 870-71 (2016).
[43] *Compare* Colo. Rev. Stat. Ann. § 12-47-403 *and* K.S.A. 2018 Supp. 41-308a.
[44] Me. Rev. Stat. Title 28-A, § 1355.
[45] *E.g.* Farm Wineries Information Brief, Minnesota House of Representative Research Department (2012), *available at* http://www.house.leg.state.mn.us/hrd/pubs/farmwine.pdf, *accessed on* September 13, 2018.

must determine whether the Kansas farm winery licensing scheme, in the absence of a minimum domestic content requirement, can effectively carry out legislative intent through the table testing events, additional retail sales opportunities, and other features provided by K.S.A. 41-308a.

In summary, we opine that the Kansas farm winery licensing scheme is facially discriminatory against interstate commerce. In order to survive a challenge, the State must identify a legitimate local purpose not adequately served by reasonable nondiscriminatory means. If a reviewing court were not to be persuaded by those arguments, the State must identify the legislative intent behind the current farm winery licensing scheme so that the reviewing court can determine whether it may sever only the offending clause requiring a minimum domestic content instead of striking the entire licensing scheme.

Sincerely,

Derek Schmidt
Kansas Attorney General

Craig Paschang
Assistant Attorney General

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