

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

INDIANA FINE WINE & SPIRITS, LLC,

Plaintiff,

v.

DAVID COOK, Chairman, Indiana Alcohol and Tobacco Commission; JOHN KRAUSS, Vice Chairman, Indiana Alcohol and Tobacco Commission; DALE GRUBB, Commissioner, Indiana Alcohol and Tobacco Commission; and MARJORIE MAGINN, Commissioner, Indiana Alcohol and Tobacco Commission,

Defendants.

Case No. _____

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF CHALLENGING
THE CONSTITUTIONALITY OF STATE STATUTE**

Plaintiff, Indiana Fine Wine & Spirits, LLC d/b/a Total Wine & More (hereinafter “IFWS” or “Plaintiff”), hereby sues defendants David Cook, John Krauss, Dale Grubb, and Marjorie Maginn in their official capacities as members of the Indiana Alcohol and Tobacco Commission (“ATC”) for declaratory relief and a preliminary and permanent injunction, and states:

PARTIES AND JURISDICTION

1. Plaintiff IFWS is an Indiana limited liability company with a principal place of business in Bethesda, Maryland. The voting members of IFWS, who collectively hold 10 percent of the ownership interest, are two individual United States citizens who reside in Maryland. The nonvoting members of IFWS, who collectively hold 90 percent of the ownership interest, are five trusts whose ultimate beneficiaries (children of the voting members) are United States citizens but not residents of Indiana.

2. Defendant David Cook is the Chairman of the ATC.

3. Defendant John Krauss is the Vice Chairman of the ATC.

4. Defendant Dale Grubb is a Commissioner of the ATC.

5. Defendant Marjorie Maginn is a Commissioner of the ATC.

6. The four defendants, acting as the ATC, have authority to issue, deny, suspend, revoke, or not renew all alcoholic beverage permits, including the transfer permit sought by IFWS. Ind. Code § 7.1-2-3-9.

7. This action arises under Article I, Section 8, Clause 3 of the United States Constitution, as well as 42 U.S.C. §§ 1983 and 1988 and 28 U.S.C. §§ 2201 and 2202.

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3).

9. This Court has authority to issue declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.

10. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because all defendants are residents of this State and one or more reside in this district, and because a substantial part of the events or omissions giving rise to the claim occurred in this district.

FACTS COMMON TO ALL COUNTS

11. IFWS has entered into a purchase agreement (Purchase Agreement) with MH Nora HG, LLC, for the purchase and transfer of Indiana Beer, Wine, and Liquor Package Store Dealer Permit No. DL49-31841 (the "Package Store Permit") to IFWS. IFWS has paid into escrow for the benefit of the seller the full purchase price of the Package Store Permit.

12. The Package Store Permit authorizes its owner to operate a 26,000 square foot retail package store in the Nora Corners Shopping Center at 1460 E. 86th Street in Indianapolis, Indiana,

pursuant to a 10-year lease with the owner effective January 6, 2020 (the “Lease”). In contemplation of the transfer of the Package Store Permit, and to ensure that IFWS can open its contemplated package store in time for the critical holiday season, IFWS has incurred approximately \$40,000 in costs to design the site for a retail package store. IFWS has also incurred substantial, unrecoverable administrative and legal costs in contemplation of the transfer of the Package Store Permit in excess of \$60,000.

13. The Purchase Agreement and the Lease are both subject to IFWS successfully obtaining the approval of the Alcoholic Beverage Board of Marion County (“Local Board”) and the ATC for transfer of the permit. The Purchase Agreement automatically terminates if IFWS cannot obtain approval for the permit within 120 days after January 7, 2020. The Lease is terminable at the election of IFWS if the transfer is not approved by April 5, 2020.

14. IFWS applied with the ATC to transfer the Package Store Permit to IFWS. The ATC then assigned the transfer application to the Local Board to conduct a public hearing and recommend approval or denial. The Local Board’s duties are advisory only; authority to approve the transfer resides with the ATC. Ind. Code §§ 7.1-3-19-1 and -11(a); Ind. Code § 7.1-3-24-3.5(d).

15. IFWS’s application includes all information required by Indiana law for approval of the transfer. In addition, IFWS has the experience, knowledge, skill, good moral character, and other credentials to satisfy all valid requirements of Indiana law for owning and operating a retail liquor store. The individual owners of IFWS have vast experience in operating retail alcoholic beverage stores. IFWS is affiliated through common ownership with other entities that together own and operate 206 alcoholic beverage stores in 24 states other than Indiana, all trading under the Total Wine & More name.

16. Stores that operate under the Total Wine & More name are committed to offering the nation's best selection of alcoholic beverages, and to having the lowest prices on wine, spirits, and beer. IFWS desires to bring the Total Wine & More concept to Indiana consumers.

17. Finding a suitable location to open a business, particularly in a new state, is a time-intensive and costly process. IFWS has devoted hundreds of hours of time over the last 12 months studying the laws applicable to retail package store businesses in Indiana, evaluating the needs and desires of the residents in the state, identifying suitable real estate for its first flagship store, negotiating a lease, and acquiring a license that will allow it to operate its proposed package store business. These efforts lead to only one viable choice at this time: the Nora Corners Shopping Center, at 1460 E. 86th Street, in Indianapolis. The Nora Corners Center is optimal for an alcoholic beverage store using the Total Wine & More business model. It has outstanding road visibility, an ample parking field, easy ingress and egress, and a co-tenancy mix, including several national retailers, that will complement one another and provide the typical Total Wine customer an outstanding, one-stop shopping experience. Finding another location as suitable for IFWS is not feasible at this time.

18. IFWS has appointed a resident agent in the state of Indiana to accept service of process for IFWS. It has entered into a commercial lease at 1460 E. 86th Street in Indianapolis to serve as the premises for a package store. It expects to hire dozens of Indiana residents as management and staff employees to operate its first retail store in Marion County.

COUNT I: COMMERCE CLAUSE VIOLATION

19. Plaintiff alleges and incorporates by reference all allegations in the paragraphs above.

20. Section 7.1-3-21-5.4(b) of the Indiana Code (“Section 5.4(b)”) prohibits the ATC from issuing a dealer’s¹ permit for a package liquor store to a limited liability company unless “(1) at least sixty percent (60%) of the outstanding membership interest in the limited liability company is owned by persons who have been continuous and bona fide residents of Indiana for five (5) years,” and “(2) the membership interest described in subdivision (1) constitutes a controlling interest in the limited liability company.” Other provisions of the Code impose similar in-state requirements on corporate, individual, and partnership applicants. *See* Ind. Code § 7.1-3-21-5 (corporations); § 7.1-3-21-3 (individuals); § 7.1-3-21-4 (partnerships); § 7.1-3-21-5.2 (limited partnerships).

21. Section 5.4(b) and the related in-state residency requirements violate the Dormant Commerce Clause in the U.S. Constitution and are therefore void and unenforceable. In 2009, the Indiana Attorney General reached that conclusion with respect to the materially identical corporate-residency requirement in § 7.1-3-21-5. A true and accurate copy of the Attorney General’s letter is attached hereto as **Exhibit A** (Greg Zoeller letter to Hon. P. Thomas Snow, Sep. 14, 2009). An Indiana appellate court reached the same conclusion, *Indiana Wholesale Wine & Liquor Co. v. State*, 662 N.E.2d 950 (Ind. Ct. App. 1996), although that decision was later vacated under the doctrine of constitutional avoidance. *Indiana Wholesale Wine & Liquor Co. v. State*, 695 N.E.2d 99 (Ind. 1998).

22. The unconstitutionality of Indiana’s in-state residency requirements was reinforced by the United States Supreme Court’s recent decision in *Tennessee Wine & Spirits Retailers Ass’n*

¹ Indiana law classifies alcohol permits for the sale of alcohol for off-premises consumption as “dealer’s permits” – e.g., package liquor stores, grocery stores, and drug stores. “Retailer’s permits” refers to alcohol permits for on-premises consumption – e.g., restaurants. *See e.g.*, Ind. Code § 7.1-3-9-9 (liquor retailer); § 7.1-3-10-7 (liquor dealer).

v. *Thomas*, 139 S. Ct. 2449 (2019). In *Tennessee Wine*, the Court struck down Tennessee's two-year in-state residency requirement for a retail license to sell alcoholic beverages. The Court made clear that the nondiscrimination requirement in the Dormant Commerce Clause applies to applicants for retail licenses (or permits) to sell alcoholic beverages, and that a state law discriminating against out-of-state ownership of alcoholic-beverage permits cannot be saved by the Twenty-First Amendment if the predominant effect of the law is economic protectionism.

23. The predominant effect of Indiana's in-state residency requirements is economic protectionism within the meaning of *Tennessee Wine*. This is demonstrated in part by the absence of any consistent or rational Indiana public policy. Indiana's residency requirements for alcoholic beverage permits do not apply to permits issued to dining cars, boats, drug stores, grocery stores, hotels, airplanes, gaming sites, horse tracks, satellite facilities, and certain large restaurants. Ind. Code. § 7.1-3-21-6(a)(1) to -6(a)(10). The drug store and grocery store exceptions allow large out-of-state corporations like Walmart to sell alcoholic beverages in Indiana at some locations.

24. In 2006 the Indiana legislature eliminated the in-state residency requirements for permits issued to farm wineries and to wine and beer wholesalers. *See* Pub. L. No. 165-2006 (H.E.A. 1016). In 2004, it eliminated residency requirements for microbreweries. *See* Pub. L. No. 72-2004 (H.E.A. 1207).

25. In-state residency requirements for Indiana alcoholic beverage permits now apply only to owners of liquor stores and certain restaurant establishments selling less than \$100,000 in food per year. There is no rational basis to argue that the in-state residency requirement is necessary for these two classes of permittees, and no others. The remaining in-state residency requirements continue in effect solely to advance the protectionist interests of the local package store industry.

26. The intent and purpose of Indiana's in-state residency requirements is to protect in-state owners of package stores from economic competition by out-of-state owners. As recently as 2016, for instance, a Chicago-based retailer was planning to expand into Indiana through a corporation that met the in-state residency requirement at the time but gave an out-of-state person control over the corporation. The lobbyists of the in-state retail package store association and its members convinced the legislature to require that the in-state ownership interest in corporations, partnerships, and limited liability companies be a "controlling" interest in the corporation. *See* Pub. L. No. 214-2016, § 24 (HEA 1386) (amending Ind. Code §§ 7.1-3-21-5(b), 7.1-3-21-5.2(b), and 7.1-3-21-5.4(b)). The obvious purpose of the amendment, and the law itself, was economic protectionism.

27. The ATC considered Plaintiff IFWS's application during an open hearing on March 3, 2020. Notwithstanding controlling principles of federal law, as recently reaffirmed by the United States Supreme Court, all four defendants voted to deny IFWS's application on the ground that its owners do not satisfy the in-state residency requirements of Section 5.4(b). Vice Chairman Krauss commented at the hearing that the ATC was in a legal quagmire until a court or the Indiana General Assembly addresses the constitutionality of Section 5.4(b). A letter from Chairman Cook to IFWS the next day stated, as the sole ground for denying the application, that IFWS "does not meet the eligibility requirements as set out in IC 7.1-3-21-5.4 (b)(1) and is, therefore, deemed ineligible to hold a dealer's permit for a package liquor store in Indiana." A true and accurate copy of Chairman Cook's letter is attached hereto as **Exhibit B**.

28. There is an actual controversy between the parties because IFWS has applied for a transfer of the Package Store Permit to operate a package store business in Indiana and the ATC

has refused to approve the transfer solely because IFWS does not satisfy the residency requirements of Section 5.4(b).

29. The residency requirements of Section 5.4(b) violate the Dormant Commerce Clause of the United States Constitution and are not protected by the Twenty-First Amendment of the U.S. Constitution.

30. Defendants have not, and cannot, justify the burden on interstate commerce imposed by Section 5.4(b).

31. Defendants, acting under color of state law, have denied IFWS its rights, privileges, or immunities secured by the Constitution and laws of the United States, in particular the Dormant Commerce Clause. See 42 U.S.C. §§ 1983 and 1988.

COUNT II: INJUNCTIVE RELIEF

32. Plaintiff IFWS alleges and incorporates by reference all allegations in the paragraphs above.

33. IFWS has been harmed by the ATC's decision because Section 5.4(b) is being interpreted to prevent IFWS from entering the Indiana market for the retail sale of alcoholic beverages.

34. The statute is inconsistent with the Dormant Commerce Clause of the U.S. Constitution and is therefore unenforceable and void.

35. IFWS is likely to succeed on the merits of their challenge to Section 5.4(b) given that it is inconsistent with and violates the Dormant Commerce Clause of the U.S. Constitution.

36. Section 5.4(b) has, and will continue to, cause harm to IFWS.

37. Specifically, absent preliminary injunctive relief, IFWS will be irreparably harmed by the ATC's ruling because, among other things:

- a. IFWS has incurred over \$100,000 in architectural design and other costs in preparing to open a store at the 1460 E. 86th Street location and it cannot recoup those costs;
- b. The purchase and sale agreement automatically terminates if IFWS cannot obtain approval for the permit within 120 days after January 7, 2020;
- c. IFWS cannot replace the 1460 E. 86th Street location with an equally suitable site without substantial additional cost and delay;
- d. If IFWS does not obtain a permit by approximately May 1, 2020, it will be unable to open the store in time for the 2020 holiday season (November through early January), when alcoholic beverage retailers earn roughly 40 percent of their annual revenues; and
- e. A damages remedy is not available against the defendants because of the State's Eleventh Amendment immunity.

38. IFWS has no adequate remedy at law and faces irreparable harm unless this Court enjoins Section 5.4(b).

39. The balance of harms weighs in favor of IFWS in that the ATC has no legitimate interest in enforcing an unconstitutional state law.

40. An injunction is in the public's interests, as the ATC is not permitted to discriminate against out-of-state ownership of alcoholic-beverage permits in violation of federal law.

41. Additionally, Indiana residents will benefit when IFWS opens a new, clean, efficient, well-managed, and well-stocked store; and Indiana consumers will benefit from increased competition in the alcoholic beverage sector.

42. IFWS is entitled to a preliminary injunction, later to be made permanent, with respect to the residency requirements in Section 5.4(b).

Count III – Declaratory Judgment

43. Plaintiff IFWS alleges and incorporates by reference all allegations in the paragraphs above.

44. An actual and justiciable controversy exists between IFWS and the ATC regarding the constitutionality of Section 5.4(b) and enforceability of its residency requirements.

45. Pursuant to 28 U.S.C. §§ 2201 and 2202, and Rule 57 of the Federal Rules of Civil Procedure, IFWS requests that the Court declare the residency requirements of Section 5.4(b) as null and void because they violate the United States Constitution.

Prayer for Relief

WHEREFORE, Plaintiff IFWS respectfully requests that the Court:

- a. Set this matter for a prompt hearing on Plaintiff's request for preliminary injunctive relief;
- b. Enter a judgment in Plaintiff's favor and against the defendants prohibiting the enforcement of the residency requirements of Indiana Code § 7.1-3-21-5.4(b);
- c. Issue a judgment in Plaintiff's favor declaring, pursuant to the Declaratory Judgments Act, that Indiana Code § 7.1-3-21-5.4(b) is void and of no force and effect and that IFWS is not disqualified for ownership of an Indiana package store permit by reason of its out-of-state ownership;
- d. Issue a preliminary injunction, later to be made permanent, enjoining the defendants from enforcing the residency requirements of Indiana Code § 7.1-3-21-5.4(b);

- e. Award Plaintiff its costs and attorney's fees pursuant to 42 U.S.C. §§ 1983 and 1988;
and;
- f. Grant such other relief as the Court deems just.

March 6, 2020

Respectfully submitted,

Of counsel (to apply for pro hac admission): /s/ **Bryan H. Babb

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GREG ZOELLER
INDIANA ATTORNEY GENERAL

September 14, 2009

Privileged and Confidential
Attorney-Client Communication
ADVISORY LETTER

The Honorable P. Thomas Snow
Alcohol and Tobacco Commission
302 W. Washington St.
Indianapolis, IN 46204-2786

RE: Southern Wine & Spirits of Indiana, Inc.
Advisory Opinion 09-40

Dear Judge Snow:

By letter of September 10, 2009, you posed a question regarding the constitutionality of certain portions of Indiana's regulatory regime covering alcohol and tobacco, Ind. Code § 7.1-3-21 *et seq.* Specifically, your question was:

Whether or not Indiana Code § 7.1-3-21-5, requiring that at least 60% of the common stock of a corporate applicant for an alcoholic beverage retailer's or liquor wholesaler's permit be owned by Indiana residents who have been Indiana residents for at least five years immediately preceding the date of application, is constitutional on its face?

BRIEF ANSWER

It is our opinion that, on its face, Indiana Code § 7.1-3-21-5 discriminates between in-state and out-of-state economic interests in violation of the Commerce Clause of the United States Constitution. Section 2 of the Twenty-First Amendment notwithstanding, state regulation of alcohol remains "limited by the nondiscrimination principle of the Commerce Clause." *Granholm v. Heald*, 544 U.S. 460, 487 (2005). No facially discriminatory law can survive without some "legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives," *id.* at 489, and we can discern no such conceivable purpose supporting Indiana Code § 7.1-3-21-5.



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LEGAL ANALYSIS

Indiana Code section 7.1-3-21-5 requires that at least 60% of the common stock of a corporate applicant for an alcohol beverage retailer's or a liquor wholesaler's permit be owned by Indiana residents who have been Indiana residents for at least five years immediately preceding the date of application. Ind. Code § 7.1-3-21-5. On its face, this statute bars any corporation not controlled by Indiana residents from obtaining a liquor wholesaler's permit pursuant to Indiana Code section 7.1-3-8-1.

The Commerce Clause of the United States Constitution provides Congress the power "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8, cl. 3. This has long been held to be not only an affirmative grant of power, but also a limit on the power of the States to discriminate against interstate commerce. *See, e.g., Dennis v. Higgins*, 498 U.S. 439, 447 (1991); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988). State laws violate the Commerce Clause when they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Ore. Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore.*, 511 U.S. 93, 99 (1994); *see also Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42 (1980) (statute is unconstitutional under the commerce clause when it "discriminates among affected business entities [banks, bank holding companies, and trust companies] according to the extent of their contacts with the local economy.")

Furthermore, under controlling precedent, requiring that firms be controlled by residents of a regulating state to sell their goods in that state constitutes differential treatment of in-state and out-of-state economic interests. *Alliant Energy Corp. v. Bie*, 330 F.3d 904 (7th Cir. 2003) (finding that because "[a]n investment opportunity in a Wisconsin utility is [] an article of interstate commerce[, if] ownership of a Wisconsin utility company must lie with a Wisconsin Corporation, a potential article of interstate commerce, *i.e.*, the investment in the utility, is stopped at the border.") (internal citation omitted).

Accordingly, both past litigation of this statute and contemporary Commerce Clause doctrine create insurmountable problems for section 7.1-3-21-5.

1. Indiana previously litigated the validity of Indiana Code section 7.1-3-21-5 in the 1990s when the Indiana Alcoholic Beverage Commission sought a declaratory judgment seeking "judicial guidance on the meaning and application of [Ind. Code § 7.1-3-21-5] with respect to [Indiana Wholesale Wine and Liquor Co.]," naming as defendants Indiana Wholesale Wine and Liquor Co., National Wine & Spirits Corporation, and Olinger Distributing Company, Inc. *See Ind. Wholesale Wine & Liquor Co. v. State ex rel Ind. Alcoholic Beverage Comm'n*, 695 N.E.2d 99, 101 (Ind. 1998) [hereinafter *Ind. Wholesale II*]. Indiana Wholesale argued that the statute required residents to own 60% of an applicant's common stock, and that if the statute instead required 60% native ownership of controlling stock it was unconstitutional under the Commerce Clause. *Id.* at

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101, 102 n.4. Olinger and National argued that the statute required 60% native ownership of controlling stock and that, owing to Section 2 of the Twenty-First Amendment, this requirement did not violate the Commerce Clause. *Id.* IABC took no position on whether the statute required 60% native ownership of common stock or controlling stock, but did assert that the statute advanced something besides economic protectionism and was therefore constitutional. *Id.* at 102 n.4.

The Indiana Court of Appeals declared that both interpretations suffered the same constitutional defects and addressed the constitutional question in lieu of the interpretative question. *See Ind. Wholesale Wine & Liquor Co. v. State ex rel Ind. Alcoholic Beverage Comm'n*, 662 N.E.2d 950, 959 (Ind. Ct. App. 1996), *aff'd in part, vacated in part*, 695 N.E.2d 99 (Ind. 1998) [hereinafter *Ind. Wholesale I*]. The Court of Appeals stated that “there can be no doubt” the statute mandates differential treatment of in-state and out-of-state corporations. *Id.* at 960. Furthermore, the court referred to the regulatory regime’s general purposes of “protect[ing] the economic welfare, health, peace and morals of the people of this state,” “regulat[ing] and limit[ing] the manufacture, sale, possession, and use of alcohol and alcoholic beverages,” and “provid[ing] for the raising of revenue” as “mere boilerplate,” and refused to credit them as “legitimate purposes” under the Commerce Clause. *Id.* at 961. Ensuring that license-holders were qualified and that they were accountable in Indiana were raised as purposes by National and Olinger, and likewise rejected. *Id.* at 961-62. In response to the argument that the Twenty-First Amendment authorized the General Assembly to enact section 7.1-3-21-5, the Court of Appeals declared that the statute did not advance a “core concern” of the Twenty-First Amendment, which the Court defined as combating the “perceived evils in an unrestricted traffic in liquor.” *Id.* at 969 (quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984)).

On transfer, the Indiana Supreme Court focused on the statutory interpretation question and determined that the “common stock” interpretation used by the IABC before the declaratory judgment was “reasonable.” *Ind. Wholesale II*, 695 N.E.2d at 104-05. As a consequence, the circumstances of the case did not permit the Court to reach the constitutional issue. *Id.* at 108. The Court did, however, refer to the Indiana Court of Appeals decision as an “in-depth analysis” and “well reasoned,” suggesting that had it reached the constitutional question, it might well have held the same way. *Id.* at 106-107.

2. The U.S. Supreme Court’s most recent holding on the interaction of the Commerce Clause and the Twenty-First Amendment makes manifest the unconstitutionality of Indiana Code section 7.1-3-21-5. Analyzing Michigan and New York statutes precluding out-of-state wineries from selling directly to consumers while permitting in-state wineries to do so, Justice Kennedy, writing for the majority, stated that “state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause.” *See Granholm v. Heald*, 544 U.S. 460, 487 (2005). The Court observed that the statutes discriminated against out-of-state commerce, *id.* at 476, and held that the Twenty-First Amendment did not allow states to “give a discriminatory preference to their own consumers.” *Id.* at 486. This being the case, the Court looked to

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whether either state's regime "advance[d] a legitimate local purpose that [could not] be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 489 (quoting *New Energy Co. of Ind.*, 486 U.S. at 278). The Court rejected Michigan's stated purpose of preventing alcohol from reaching minors and New York's purpose of facilitating taxation. *Id.* at 489-92. The Court thus found, as discriminatory laws that did not advance a legitimate local purpose, that the Michigan and New York statutes were unconstitutional violations of the Commerce Clause.

3. *Granholm* rejected discriminatory regulation of alcohol producers; Indiana Code section 7.1-3-21-5, in contrast, regulates alcohol wholesalers. The question arises whether this is a constitutionally significant distinction.

The rule and rationale of *Granholm* leave no room for discriminatory regulation of other tiers of the alcohol distribution system. The Court observed that, "when [a state statute's] effect is to favor in-state economic interests over out-of-state economic interests, we have generally struck down the statute without further inquiry," and that "[t]he central purpose of [the Twenty-First Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.* at 488 (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *Bacchus*, 468 U.S. at 276). This doctrine by its terms prohibits discrimination at any tier of alcohol distribution, not merely the production stage.

Other states have failed in their attempts to limit *Granholm* to the context of alcohol production regulation. In *Southern Wine & Spirits of Texas, Inc. v. Steen*, 486 F.Supp.2d 626, 632-33 (W.D. Tex. 2007), the court invalidated a one-year residency and citizenship prerequisite for a wholesaler license. And in *People's Super Liquor Stores, Inc. v. Jenkins*, 432 F.Supp.2d 200, 221 (D. Mass. 2006), the court rejected discriminatory regulations of wholesale license applicants and expressly stated that "*Granholm* cannot be held to sanction protectionist policies at any of the tiers." And while the Second Circuit's recent decision in *Arnold Wines, Inc. v. Boyle*, 571 F.3d 185, 190-91 (2d Cir. 2009), upheld New York's requirement that licensed retailers have a physical presence in New York, that court did not distinguish *Granholm* as a "producer" case rather than a "retailer" case, and more fundamentally the *Arnold Wines* case did not occasion review of a law requiring in-state residency of the majority owners of a licensed retailer.

Accordingly, we find no basis for inferring that states may rely on the Twenty-First Amendment to discriminate against out-of-state owners of alcohol wholesalers any more than they may rely on that Amendment to discriminate against out-of-state alcohol producers.

4. The remaining question is whether section 7.1-3-21-5 "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm*, 544 U.S. at 489 (quoting *New Energy Co. of Ind.*, 486 at 278). To begin, when invalidating residency requirements and discriminatory

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treatment of out-of-state alcohol producers and sellers, courts have considered and rejected the following rationales:

- protecting the economic welfare, health, peace and morals of the people;
- regulating and limiting the manufacture, sale, possession, and use of alcohol;
- raising revenue;
- ensuring that license-holders are qualified;
- conducting background checks of license applicants;
- ensuring license-holders are accountable to the state;
- ensuring that alcohol distributors have a stake in the communities they sell to;
- minimizing organized crime;
- keeping alcohol out of the hands of minors.

See Granholm, 544 U.S. at 489-93; *Southern Wine & Spirits of Tex., Inc.*, 486 F.Supp.2d at 630, 632; *Glazer's Wholesale Drug Co. v. Kan.*, 145 F.Supp.2d 1234, 1242 (D. Kan. 2001); *Ind. Wholesale I*, 662 N.E.2d at 961-62, 970, *aff'd in part, vacated in part*, 695 N.E.2d 99 (Ind. 1998).

Unsurprisingly, therefore, courts in other jurisdictions have consistently invalidated statutes limiting the ability of non-resident corporations to participate in the three-tier alcohol distribution market. *See Southern Wine & Spirits of Texas, Inc.*, 486 F.Supp.2d 626 (one year residency and citizenship requirement to receive wholesaler license facially unconstitutional); *People's Super Liquor Stores, Inc. v. Jenkins*, 432 F.Supp.2d 200 (requirement that corporations be solely composed of Massachusetts residents and citizens to receive license unconstitutional); *Glazer's Wholesale Drug Co.*, 145 F.Supp.2d 1234 (statute requiring that each officer, director and stockholder must be current Kansas resident and have resided in Kansas for 10 years immediately preceding application unconstitutional); *see also* Kan. Atty. Gen. Op. No. 06-12 (2006) (opining that a statute requiring 50% of stockholders be Kansas residents for 4 years prior to application for microbrewery license probably would be declared unconstitutional).

There is nothing about section 7.1-3-21-5 that makes it more constitutional than other discriminatory alcohol distribution laws. Indeed, we can conceive of no legitimate rationale for this statute. Requiring 60% of a wholesaler's owners to have resided in Indiana for five years has no apparent relationship to collecting revenue, inspecting inventory, monitoring sales practices, or preventing underage drinking. Advancing those objectives might provide a rationale for a hypothetical requirement that, for example, licensed wholesalers distribute to retailers from facilities located in the state, but not for imposing upon a wholesaler's owners a durational, or even forward-looking, residency requirement.

Nor does section 7.1-3-21-5 somehow undergird the State's special interest in preserving the traditional "three-tier system" of alcohol distribution, which the Court in *Granholm* emphasized is "unquestionably legitimate." *Granholm*, 544 U.S. at 488 (quoting *N.D. v. U.S.*, 495 U.S. 423, 432 (1990)). Permitting out-of-state residents to

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own majority stakes in Indiana liquor wholesalers would not itself deconstruct the barriers between (1) producers and wholesalers, or (2) wholesalers and retailers. In other words, a wholesale licensee owner's residency in another state would not somehow imply the wholesaler's right to (1) produce the alcohol it distributes or (2) to sell directly to consumers.

CONCLUSION

On its face, section 7.1-3-21-5 discriminates between in-state and out-of-state economic interests, and appears to do so based entirely on the erroneous assumption that the Twenty-First Amendment permits discriminatory alcohol regulation. The Supreme Court in *Granholm v. Heald*, 544 U.S. 460, 487 (2005), rejected that notion and held that state regulation of alcohol remains "limited by the nondiscrimination principle of the Commerce Clause." We can discern no "legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives" to section 7.1-3-21-5, so the statute is therefore unconstitutional on its face.

We hope this opinion letter addresses your concerns. Should you require anything additional in this regard, please advise.

Sincerely,



Richard M. Bramer
Chief Counsel
Advisory & ADR Services



STATE OF INDIANA
ALCOHOL AND TOBACCO COMMISSION

302 West Washington Street
IGCS Room E114
Indianapolis, IN 46204
Telephone 317 / 232-2430
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March 4, 2020

Indiana Fine Wine & Spirits, LLC
Attn: Thomas Haubenstricker
6600 Rockledge Drive, Suite 150
Bethesda, Maryland 20817

Re: Application to Transfer Dealer Permit
DL 4932005

Mr. Haubenstricker,

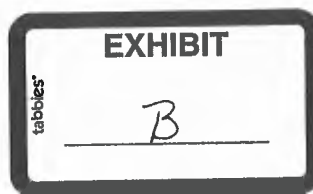
The Indiana Alcohol & Tobacco Commission has received your application dated 1/27/20 to transfer an alcohol dealer permit DL4931841 from MH Nora HG, LLC, to Indiana Fine Wine & Spirits, LLC under permit # DL4932005.

In Step three page 2 of the application and you answered no to the question “Is at least sixty percent (60%) of the partnership interest or sixty percent (60%) of the membership interest in the limited liability company owned by persons who have been bona fide residents of Indiana for five (5) years?”

Indiana Code 7.1-3-21-5.4 in its pertinent parts says;

- (b) The commission shall not issue an alcoholic beverage dealer’s permit of any type for the premises of a package liquor to a limited liability company unless:
 - (1) at least sixty percent (60%) of the outstanding membership interest in the limited liability company is owned by persons who have been continuous and bona fide residents of Indiana for five (5) years, and.....

The response in Step Three on your application indicate that Indiana Fine Wine & Spirits LLC does not meet the eligibility requirements as set out in IC 7.1-3-21-5.4 (b)(1) and is, therefore, deemed ineligible to hold a dealer’s permit for a package



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liquor store in Indiana. Pursuant to Indiana law and the unanimous vote of the commission at its regularly scheduled meeting held on Tuesday March 3, 2020 the application to transfer as captioned above is denied.

David Cook, Chairman

Indiana Alcohol & Tobacco Commission
(317) 232-2462
dcook@atc.IN.gov

Cc: Alex Intermill Attorney
Jeffery McKean, Attorney
Lindsay Hyer, ATC Counsel
Kim, Chew. ATC Paralegal