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Joseph E. Brion, Chairman
Liquor Control Board
517 Northwest Office Building
Harrisburg, PA 17124

Re: Request for Legal Advice Concerning the Citizenship and Residency Requirements for Licensure under the Liquor Code

Dear Chairman Brion:

On behalf of the Pennsylvanian Liquor Control Board ("Board"), you have requested an opinion regarding the Board's enforcement responsibility for the citizenship and residency prerequisites to licensure contained in the Liquor Code ("Code"), 47 P.S. §1-101 *et. seq.*

With regard to those sections of the Code which require an applicant for licensure be a United States citizen, this office has rendered two previous opinions on the subject. Official Opinion No. 23 of 1974 advised the Board not to take any action to enforce the citizenship requirement for corporate licensees with resident alien officers contained in section 4-403 of the Code, as it was unconstitutional under the Fourteenth Amendment of the United States Constitution. In rendering the opinion, the office relied upon United States Supreme Court jurisprudence, which establishes that classifications based on alienage are inherently suspect and the subject of close judicial scrutiny. See Graham v. Richardson, 403 U.S. 365 (1971) (striking down a Pennsylvania statute which conditioned state welfare benefits on United States citizenship). Only when a state can demonstrate a compelling interest will a citizenship requirement be upheld. Id. The Fourteenth Amendment requires that "all persons lawfully in this country possess an equality of legal privileges with all citizens under non-discriminatory laws." Takahashi v. Fish and Game Commission, 334 U.S. 410, 420 (1948) (holding that California could not refuse to issue commercial fishing licenses to resident aliens which were otherwise available to non-alien state residents). As a result, this office concluded that "discrimination against alien residents is obviously irrational and invidious" and ultimately unenforceable. O.O. No. 23 at pg. 83, Op. Pa. Atty. Gen. (April 30, 1974).

Also in 1974, this office issued Official Opinion No. 48, which clarified whether the ruling in Official Opinion No. 23 applied to foreign corporations having nonresident alien officers or stockholders. While we acknowledged that nonresident aliens are not expressly protected by the United States Constitution or Federal Civil Rights Acts, there was "no need to require that the citizenship provisions of the Liquor Code be treated as unconstitutional when

independently applied to nonresident aliens." O.O. No. 48 at pg. 191, Op. Pa. Atty. Gen. (Sept. 18, 1974). Rather, section 4-403 had already been found unconstitutional as applied to resident aliens, and "the language unconstitutionally infirm against resident aliens is so inseparable and intertwined with that as applied against nonresidents that it cannot continue to stand." Id. As support for this conclusion, we noted there was no evidence the Legislature intended section 4-403 to separately apply to nonresident aliens. Id. The section referred only to "citizen" and we declined to construe "citizen" to mean "resident." Id. Doing so, in our view, would have amended, rather than interpreted, the Code. Id. Therefore, we advised the Board that "all applications of this section referring to residency and citizenship" were so connected that its unconstitutionality in the one instance meant its demise in all cases, and no license should be revoked or application denied "on the basis of the residency requirements of Section 4-403(c)." O.O. No. 48 at pg. 192.

Although the term "residency" was used in Official Opinion No. 48, the purpose of the opinion was to alleviate any confusion regarding the applicability of Official Opinion No. 23 to nonresident alien officers of foreign corporations. As a result, Official Opinion No. 48 stands only for the proposition that section 4-403(c) cannot be enforced against aliens, irrespective of their residency, for the reasons stated therein. The purpose of Official Opinion No. 48 was not to address the in-state residency requirements contained in the Code, and should not be construed as such.

At the time Official Opinions Nos. 23 and 48 were issued, we examined only the constitutionality of section 4-403(c). Presently, the Board has requested this office also review the citizenship requirements for licensure contained throughout the Code. Such a review indicates that the constitutional standard articulated in Official Opinions Nos. 23 and 48 of 1974 has not changed, and applies with equal force today. The nondiscrimination principles articulated in Official Opinion No. 23 are not limited to the citizenship requirements imposed on corporate licensees with resident alien officers. Any citizenship requirement for licensure, be it for a corporation, association or individual, violates the Fourteenth Amendment.

In conjunction with the citizenship requirements, the Code mandates some form of Pennsylvania state residency as a condition for licensure. The constitutionality of the residency requirements is a separate issue, and necessitates its own analysis. To that end, when providing legal advice to the head of a Commonwealth agency, the Attorney General is required by Section 204(a)(3) of the Commonwealth Attorneys Act, 71 P.S. §732-204(a)(3), "to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction." As a threshold matter, it must be emphasized that the concept of a "controlling decision by a court of competent jurisdiction" is not predisposed to precise definition. The standard cannot be construed so narrowly as to require a decision by the highest possible appellate court holding unconstitutional the very provision on which the Attorney General's advice is sought. Conversely, a decision said to be "controlling"

must be more than merely predictive of the constitutionality of the statutory provision in question. It must adjudicate the constitutionality of a statutory provision materially indistinguishable from the statute at issue, and it must be rendered by a court that has jurisdiction over the entirety of Pennsylvania.

With regard to the validity of residency requirements as a condition for licensure under a state liquor code, there has not been a case decided by a court of competent jurisdiction that adjudicated the constitutionality of a statutory provision materially indistinguishable from the requirements contained in the Pennsylvania Liquor Code.

The leading case in area of state liquor law requirements is Granholm v. Heald, 544 U.S. 460 (2005). There, the United State Supreme Court addressed the validity, under the Commerce Clause, of state laws prohibiting out-of-state wineries from shipping wine directly to in-state customers, while permitting in-state wineries to ship directly to in-state consumers. In striking down these laws, the Court noted that "in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" Id. at 472, quoting Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore., 511 U.S. 93, 99 (1994). Nonresidence, by itself, should not prevent a producer in one state from accessing the market in another state. Id. at 472. A state is not permitted to promulgate laws that "burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. Id.

The Court considered, and quickly dismissed, the idea that the passage of the 21st Amendment to the United States Constitution gave states the authority to engage in unfettered discrimination against out-of-state goods. Section 2 of the 21st Amendment provides that "the transportation or importation into any State...for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S.C. Const. Amend. XXI, §2. Rather than immunizing the states from the reach of the Commerce Clause, the 21st Amendment allows states to "maintain an effective and uniform system for controlling liquor by regulating its transportation, importation and use." Granholm at 484.

At no time were in-state residency requirements directly addressed by the Granholm Court. When faced with the States' argument that the invalidation of the direct shipment laws at issue would call into question the constitutionality of the traditional three-tier system of alcohol production, importation and distribution, the Court unequivocally stated "we have previously recognized that the three-tier system itself is 'unquestionably legitimate.'" Granholm at 489, quoting North Dakota v. United States, 495 U.S. 423, 432 (1990). The Court firmly acknowledged that the 21st Amendment "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." Id. at 488, citing California Retail Liquor Dealers Assn v. Midcal Aluminum, 445 U.S.

97, 110 (1980). Further, the 21st Amendment protects state policies that treat liquor produced out-of-state the same as its domestic equivalent. Id. at 489.

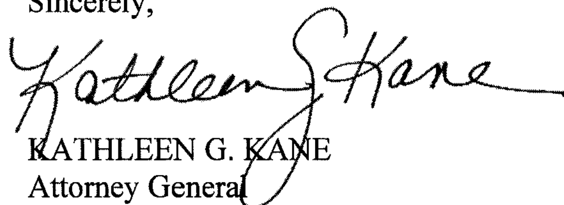
Given that the facts of Granholm, and its holding, centered around a direct shipping ban on wine applicable only to out-of-state producers, it cannot be said to have adjudicated a statute "materially indistinguishable" from the Pennsylvania in-state residency requirements for licensure. Furthermore, given the care with which the Court reaffirmed the legitimacy of the traditional three-tier system of alcohol production, importation and distribution, in conjunction with the state's power to structure the same, any attempt to construe Granholm as mandating the unconstitutionality of all in-state residency requirements, would anticipate a position the Court has not yet taken.

Therefore, given the lack of a controlling case from a court of competent jurisdiction, the in-state residency requirements in the Liquor Code must continue to stand as constitutional.

In summary, for the reasons set forth herein, it is our opinion, and you are so advised, that: (1) Official Opinion No. 23 of 1974 applies uniformly to the citizenship requirements for licensure in the Liquor Code, and so are unconstitutional and should not be enforced and (2) the in-state residency requirements for licensure remain constitutional and should be enforced.

Finally, you are advised that, in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. §732-204(a)(1), you are required to follow the advice set forth in this Opinion and shall not in any way be liable for doing so.

Sincerely,



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