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April 27, 2012

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

RE: House Bill 1126 and Senate Bill 579

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 1126 and Senate Bill 579, identical bills entitled "Alcoholic Beverages - Farm Brewery Manufacturer's License." While we approve the bills, we conclude that a severable portion violates the Commerce Clause of the United States Constitution and cannot be given effect.

House Bill 1126 and Senate Bill 579 create a farm brewery manufacturer's license that permits the holder to sell and deliver beer manufactured on the licensed farm or another facility to a wholesaler licensed to sell beer in the State or to a person in another state authorized to acquire beer. The holder of the license may also sell beer produced by the licensee for consumption on the licensed farm and may provide samples in limited amounts. The beer to be sold and delivered must be manufactured with an ingredient from a Maryland agricultural product, including hops, grain, and fruit, produced on the licensed farm.

The bills also permit the holder of a license to "sponsor a multibrewery activity at the licensed farm." The multibrewery activity may include the products of other Maryland breweries, and may provide for sale of beer by the glass for consumption on the premises only. The limitation of multibrewery activities to Maryland breweries is direct discrimination against out-of-state breweries and is subject to strict scrutiny under well-established Commerce Clause jurisprudence. Discriminatory laws motivated by "simple economic protectionism" are subject to a "virtually per se rule of invalidity," *United Haulers Assoc. v Oneida-Herkimer Solid Waste Authority*, 550 U.S. 330, 338-39 (2007), which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

The Honorable Martin O'Malley

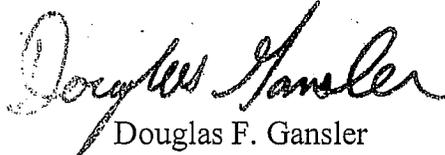
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Early cases under the Twenty-First Amendment indicated that state regulation of alcoholic beverages was simply exempt from the Commerce Clause. *State Board of Equalization v. Young's Market*, 299 U.S. 59, 62 (1936). Over time, however, the authority has been limited to State regulation aimed at core purposes of the Twenty-First Amendment. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275 (1984). Since the decision of the Supreme Court in *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), this office has taken the position that statutory limitation of wine festivals to Maryland wines violates the Commerce Clause. See Bill Review Letter on House Bills 1146 and 1353 of 1990; Bill Review Letter on House Bill 276 of 1991; Opinion No. 93-012 (March 29, 1993) (unpublished); Bill Review Letter of House Bill 95 of 1993. There has been no change in the law since that time that would change our view on this matter. In fact, since that time, the Supreme Court has taken an increasingly narrow view of the effect of the Twenty-First Amendment on the Commerce Clause. *Granholm v Heald*, 544 U.S. 460 (2005).

It is our view that the restriction of multibrewery activities to Maryland breweries, like the restriction of wine festivals to Maryland wineries, would not survive the strict scrutiny test. Therefore, we would recommend that the provision not be given effect.¹ Because it is our view that the provision is severable, however, we do not recommend veto of the bill. *Migdal v. State*, 358 Md. 308, 324 (2000); Md. Code, Art. 1, § 23.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable John P. McDonough
Joseph Bryce
Karl Aro

¹ It is our view that the multibrewery activities could be subject to other restrictions to limit participation, so long as the limitation would not discriminate against interstate commerce. For example, the activities could be limited to breweries similar to those licensed under the bill.