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April 27, 2023

The Honorable Wes Moore
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401
Delivered via email

RE: House Bill 158, "Howard County - Alcoholic Beverages Licenses - Residency Requirements"; House Bill 218, "Howard County - Alcoholic Beverages - Repeal of Petition of Support Requirement"; House Bill 258, "Caroline and Queen Anne's Counties - Alcoholic Beverages Licenses - Residency Requirement"; House Bill 558/Senate Bill 393, "Carroll County - Alcoholic Beverages Licenses - Residency Requirement"; and Senate Bill 962, "Anne Arundel County – Alcoholic Beverages Licenses – Residency Requirement"

Dear Governor Moore:

We have reviewed House Bills 158, 218, 258, 558 and Senate Bills 393 and 962 for constitutionality and legal sufficiency. In our view, the residency provisions of the bills are unconstitutional.[1]

House Bill 158 and House Bill 218 change the residency requirement for alcoholic beverages in Howard County. In addition, House Bill 558 and its identical cross-file Senate Bill 393 change the residency requirement for a partnership, limited liability company, corporation, or club in Carroll County to require State residency rather than county residency. Senate Bill 962 makes the same changes for Anne Arundel County and Senate Bill 258 makes this change for Caroline and Queen Anne's Counties.

[1] We additionally note that there are inconsistencies between House Bill 158 and House Bill 218. If both bills are enacted, House Bill 218 should be enacted last.

In *Tennessee Wine and Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019), the Supreme Court determined that durational residency requirements for applicants for retail alcoholic beverage licenses violated the Commerce Clause of the United States Constitution. Specifically, the Court looked to the dormant Commerce Clause, which "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services." *Id*. at 2460 (citing *New Energy Co. of Ind. v. Limbach*, 486 U. S. 269, 273 (1988)). Under the dormant Commerce Clause, a state law that discriminates against out-of-state goods or nonresident economic actors can be sustained only on a showing that it is narrowly tailored to "'advanc[e] a legitimate local purpose.'" *Thomas*, 139 S. Ct. at 2461. As a result, the Court suggested that the Commerce Clause would be violated by a residency requirement if applied to a person wishing to operate a retail store that sells any commodity other than alcohol. *Id*. at 2462.

The Court then proceeded to consider the issue of whether § 2 of the 21st Amendment to the United States Constitution, which prohibits the transportation or importation of alcoholic beverages into a state in violation of the law of that state, would protect the residency requirement in question. *Id*. In discussing the historical background of the 21st Amendment and the ways it has been interpreted over time, *id*. at 2463-70, the Court concluded that that the aims of § 2 did not include allowing states a free hand to restrict the importation of alcohol for purely protectionist purposes. *Id*. at 2469. In summary, the Court stated that it "has acknowledged that § 2 grants States latitude with respect to the regulation of alcohol, but the Court has repeatedly declined to read § 2 as allowing the States to violate the 'nondiscrimination principle' that was a central feature of the regulatory regime that the provision was meant to constitutionalize." *Id*. at 2470 (citing *Granholm v. Heald*, 544 U.S. 460, 487 (2005)).

The Court recognized, however, "that § 2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens," *Thomas*, 139 S. Ct. at 2474, and held that the correct test was "whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* It went on to explain that "mere speculation" or "unsupported assertions" were "not sufficient to sustain a law that would otherwise violate the Commerce Clause." *Id*. The Court ultimately rejected all of the proposed public health and safety grounds for the bill and found that the durational residency requirements violated the Commerce Clause.

Since the *Thomas* decision, Maryland has made changes to remove durational residency provisions from the alcoholic beverages laws but, in many places throughout the Alcoholic Beverages Article, has retained what are often referred to as nondurational residency requirements, that is, requirements that an applicant for an alcoholic beverages license be a resident of the county or of the State at the time of the application and/or during

the license term. *See* Chapter 462, Laws of Maryland 2020. In 2021, Attorney General Brian E. Frosh was asked for advice concerning whether the remaining nondurational residency requirements in Harford County would also violate the Commerce Clause. The resulting Opinion concludes that a court would apply the same test developed in the *Thomas* case to a challenge to a nondurational residency requirement. 106 *Opinions of the Attorney General* 82, 93 (2021).

The Opinion also concludes that the justifications for durational residency rejected by the *Thomas* Court would likely be found to be equally insufficient to support nondurational residency requirements:

> For example, the Association argued in *Thomas* that a residency requirement was needed to ensure that licensees would be amenable to service of process in Tennessee. *Id*. at 2475. It would make little sense to require that individuals be amenable to service of process prior to their application for a license, so this argument makes the most sense as a justification for requiring residency after issuance of the license. Similarly, the Association argued that residency requirements would make it easier for the state to oversee the operators of liquor stores. *Id*. This argument, too, seems to be a defense of requiring licensees to maintain residency during the license term, when the business is actually operating. The Court rejected both of these justifications for a residency mandate, noting that nondiscriminatory means were available to pursue each objective. *Id*. And more to the point, the alternatives the Court suggested, such as requiring applicants to appoint an in-state agent for service of process or mandating that retail staff undergo alcohol-awareness training, would function equally well as substitutes for a non-durational residency requirement. *See id*. at 2475-76.
>
> The Court's analysis thus suggests that it did not merely consider the durational aspect of Tennessee's residency requirement—that is, the requirement that applicants reside in the state for two years before applying—but instead evaluated and rejected the purported benefits of residency requirements for license applicants more generally. Indeed, it is unclear what health or safety interests would be advanced by a non-durational residency requirement...
>
> In fact, in some ways, the justification for a non-durational residency requirement is weaker than the justification for a durational residency requirement. For example, if residency requirements promote responsible sales practices by ensuring retailers have a stake in the community, then a durational residency requirement is superior to a non-durational requirement

> because it ensures stronger community ties. Given that it is unclear what, if any, health or safety advantages a non-durational residency requirement would have over a durational requirement, we think the Court would likely reject a non-durational residency requirement similar to Harford County's if one were before it.

Id. at 94-96 (footnotes deleted).

The Opinion ultimately reasoned that the Harford County nondurational residency requirement that was the subject of the Opinion request would likely violate the Commerce Clause of the United States Constitution. *Id*. at 99. While the Opinion did not address the residency requirement in other counties, it is likely that they too would be found to be unconstitutional. At least two other state attorneys general have reached the same conclusion. *Oklahoma Opinions of the Attorney General*, 2019 WL 7424693 at *3-4 (Dec. 31, 2019); *Kansas Opinions of the Attorney General*, 2020 WL 7422704 at *2 (Dec. 10, 2020). To date, we have found no cases that have specifically addressed nondurational residency requirements in this context. Nevertheless, it is our view that the rationale of the U.S. Supreme Court's binding decision in *Thomas* makes clear that the residency provisions of the bills are unconstitutional.[2]

Sincerely,

Anthony G. Brown

AGB/KMR/kd

cc: The Honorable Susan C. Lee
Eric G. Luedtke
Victoria L. Gruber

[2] In fact, a State residency requirement arguably raises more serious constitutional concerns than a county residency requirement. *Thomas* involved a state residency requirement. 139 S. Ct. at 2476. And the argument that a residency requirement serves public health and safety by ensuring the licensee has knowledge of the relevant community is weaker when the statute only requires residency somewhere in the State. *See* 106 *Opinions of the Attorney General* at 97-98.