

BRIAN E. FROSH
ATTORNEY GENERAL

SANDRA BENSON BRANTLEY
COUNSEL TO THE GENERAL ASSEMBLY



ELIZABETH F. HARRIS
CHIEF DEPUTY ATTORNEY GENERAL

KATHRYN M. ROWE
DEPUTY COUNSEL

CAROLYN A. QUATROCKI
DEPUTY ATTORNEY GENERAL

JEREMY M. MCCOY
ASSISTANT ATTORNEY GENERAL

DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 8, 2019

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 447 and Senate Bill 325, "Frederick County - Alcoholic Beverages - Basket of Cheer"

Dear Governor Hogan:

We have reviewed House Bill 447 and Senate Bill 325, identical bills entitled "Frederick County - Alcoholic Beverages - Basket of Cheer," for constitutionality and legal sufficiency. While we approve the bills, we have concluded that a severable portion of the bills is unconstitutional and may not be given effect. Specifically, it is our view that the limitation to alcoholic beverages produced in Maryland violates the Commerce Clause of the United States Constitution.

House Bill 447 and Senate Bill 325 create a basket of cheer permit for Class C per diem license holders in Frederick County. The permit authorizes the permit holder to provide a basket of cheer of alcoholic beverages produced in Maryland as a prize at a benefit performance. We have long advised that limitation of alcoholic beverage licenses and permits to alcoholic beverages produced in this State violates the Commerce Clause, which is found at Article I, § 8, clause 3 of the United States Constitution. *Opinions of the Attorney General* No. 93-012 (March 29, 1993) (unpublished); Bill Review Letter on House Bill 95 of 1993 dated May 20, 1993; Bill Review Letter on House Bill 276 dated May 20, 1991, Bill Review Letter on House Bills 1146 and 1353 dated May 15, 1990.

The limitation of baskets of cheer to alcoholic beverages produced in Maryland is facially discriminatory against alcoholic beverages in other states. This facial discrimination is virtually per se invalid. *Granholm v Heald*, 544 U.S. 460, 476 (2005). It can be upheld only if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 489. Providing a competitive advantage to in-state businesses does not meet this test. *Id.* at 472. Moreover, modern

The Honorable Lawrence J. Hogan, Jr.
May 8, 2019
Page 2

cases have established that the 21st Amendment to the United States Constitution does not permit states to engage in this type of discrimination. *Id.* at 486.

For these reasons, we believe that the restriction to alcoholic beverages produced in Maryland is unconstitutional. Because we are of the view that the provision is severable, however, we do not recommend veto. *See* Bill Review Letter on House Bill 276 dated May 20, 1991, Bill Review Letter on House Bills 1146 and 1353 dated May 15, 1990.

Sincerely,

A handwritten signature in black ink that reads "Brian E. Frosh". The signature is written in a cursive, flowing style.

Brian E. Frosh
Attorney General

BEF/KMR/kd

cc: The Honorable John C. Wobensmith
Chris Shank
Victoria L. Gruber