NEBRASKA DEPARTMENT OF JUSTICE

Opinion No. 25-001 — March 13, 2025

OPINION FOR SENATOR JANE RAYBOULD

Susceptibility of L.B. 113 to Dormant Commerce Clause Challenge

Summary: The federal Constitution's "dormant" Commerce Clause forbids States from enacting laws that discriminate against interstate commerce. L.B. 113 is a proposed amendment to Nebraska's regulatory scheme governing the production and sale of alcoholic liquor. L.B. 113 would increase by at least seven times the amount of liquor certain in-state distilleries can sell to wholesalers or retailers. A change of this magnitude is likely to interpreted as a difference in kind, rather than a mere difference in degree. Because this expansion applies only to in-state distilleries, if enacted without revision, L.B. 113 both presents heightened constitutional concerns and is likely to invite a dormant Commerce Clause challenge.

You have requested our opinion on whether L.B. 113 "provide[s] differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter, raising concerns under the dormant Commerce Clause that would require Nebraska to establish concrete evidence that the law is reasonably necessary to support public health or safety measures or on some other legitimate non-protectionist ground."

As a preliminary matter, and in accordance with long-held policies of this office, we limit the scope of this opinion to L.B. 113 and not the statutes it seeks to amend. In *Op. Att'y Gen. No. 157* (Dec. 20, 1985), this office clarified its policies regarding the issuance of opinions to members of the Legislature. In that opinion, we advised that senators may request opinions from the Attorney General only upon

questions of law which "arise in the discharge of their official duties." *Id.* at 1 (quoting *Follmer v. State*, 94 Neb. 217, 142 N.W. 908 (1913)). We clarified in that opinion that "it has been and continues to be the policy of the Attorney General that we issue opinions to state legislators which pertain only to pending or proposed legislation." *Id.* We further stated that "it is also our policy to decline opinion requests from legislators concerning the constitutionality, or seeking interpretations, of existing statutes." *Id.* We reaffirm that policy today and limit this opinion to an analysis of L.B. 113.

I.

Under the Nebraska Liquor Control Act, Neb. Rev. Stat. §§ 53-101 to 53-1,122 (2021 and Cum. Supp. 2024) (the "Act"), no person may "manufacture, bottle, blend, sell, barter, transport, deliver, furnish, or possess any alcoholic liquor for beverage purposes except as specifically provided" for by the Act. Neb. Rev. Stat. § 53-168.06 (2021). Performing any of these activities requires a license under the Act with each license type limiting the scope of the licensee's liquor-related permissions to a subset of these activities. Without diving into the historical demands that led to the current scheme, these permissions were traditionally divided into a strict three-tier system. Manufacturers produced and shipped alcoholic products to wholesalers. In-state wholesalers distributed the product to in-state retailers. And retailers sold the product to consumers. Under the traditional three-tier system, each tier was strictly confined to the activities necessary for its role in the chain. However, over the last few decades, States have blurred the clear divisions in the traditional three-tier model allowing previously prohibited crossover activities, such as granting retailers or manufacturers limited self-distribution or direct-to-consumer delivery rights. L.B. 113 expands on some of these cross-tier rights

previously granted to Nebraska craft breweries and microdistilleries.

Under § 53-123.14(1) (Cum. Supp. 2024), a licensed craft brewery may manufacture beer and sell beer brewed at its licensed premises to wholesalers for subsequent distribution to retailers or for consumption on or off the licensed premises. A craft brewery may also obtain a retail license for the sale of alcohol produced by other manufacturers. Thus, craft breweries function as a hybrid of the retail and manufacturing tiers with the proviso that production is capped at 20,000 barrels per year. And since 2012, a craft brewery looking to exceed its production cap may apply for a manufacturer's license while retaining its retail rights at up to five of its previously licensed premises, keeping a hybrid advantage limited to licensees that previously operated as a craft brewery. § 53-123.01(2) (Cum. Supp. 2024); 2012 Neb. Laws LB 1105, § 11. Three years ago, the Legislature further amended § 53-123.14 extending craft breweries the right to sell for resale, i.e., direct to retailers, up to 250 barrels of beer brewed at its licensed premises per calendar year, thus providing a limited self-distribution right previously exclusive to wholesalers. § 53-123.14(2); 2022 Neb. Laws LB 1236, § 1.

Moving to § 53-123.16(1) (Cum. Supp. 2024), a licensed microdistillery also functions as a hybrid license with permission to manufacture spirits up to a production cap of 100,000 gallons of liquor per year and sell its distilled products to wholesalers for subsequent distribution to retailers or for consumption on or off the licensed premises. A microdistillery may also apply for a retail license for the sale of alcohol from other sources. When a microdistillery exceeds its production cap, it may apply for a manufacturer's license—while the licensee would lose its off-premises retail rights, it would retain the ability to sell its distilled products to wholesalers and for on-premises consumption. § 53-123.01. Two years ago, legislative

enactments permitted microdistilleries to sell direct to retailers up to 500 gallons per calendar year of microdistilled products produced on the licensed premises, providing a similar limited self-distribution right previously exclusive to wholesalers. § 53-123.16(2); 2023 Neb. Laws LB 376, § 8.

Out-of-state entities may not obtain a manufacturing, craft brewery, or microdistillery license from Nebraska. § 53-125 (2021) (no license may be issued to "a person who is not a resident of Nebraska"). Instead, out-of-state entities may apply for shipping licenses under § 53-123.15 (2021). In-state and out-of-state manufacturers and persons dealing with vintage wines may apply for a license to ship liquor to an in-state wholesaler. § 53-123.15(2), (3). Manufacturers shipping from outside the state may also apply for a shipping license authorizing sales directly to Nebraska consumers. § 53-123.15(4). Finally, retailers licensed within or outside Nebraska may apply for a shipping license allowing direct-to-consumer sales from another state. § 53-123.15(5). For the purposes of these provisions, an out-of-state craft brewery or craft distillery could qualify as a manufacturer or a retailer. *See* § 53-123.15(7).

On January 10, 2025, Senator Quick introduced L.B. 113, which would amend §§ 53-123.14 and 53-123.16 to increase the amount that a microdistillery may self-distribute from five hundred gallons to five thousand gallons and increase the number of licensed premises and retail locations that a craft brewery may operate as a craft brewery or continue to operate after obtaining a manufacturer's license from five to ten. The General Affairs Committee subsequently adopted AM 232 which would reduce the increase in the self-distribution limit for microdistilleries to three thousand five hundred gallons and the number of craft brewery locations to eight. While these proposals increase benefits already available to

specific in-state licensees, neither L.B. 113 or AM 232 create a new benefit for Nebraska licensees nor a new burden for out-of-state entities.

II.

A.

Under the Twenty-first Amendment, States possess explicit constitutional authority to regulate alcohol: "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. Const. amend. XXI, § 2. While the traditional three-tier system itself is "unquestionably legitimate," "the Twenty-first Amendment does not immunize all laws from Commerce Clause challenge." *Granholm v. Heald*, 544 U.S. 460, 488–489 (2005) ("*Granholm*"). Normally, state statutes that facially discriminate against interstate commerce are virtually per se invalid. *Id.* at 476. But because any restriction derived from the Twenty-first Amendment is inherently discriminatory since it permits limiting imports while leaving intrastate commerce unaffected, regulation invoking Section 2 of the Twenty-first Amendment necessarily calls for a different inquiry. *Id.*

The Supreme Court has set forth a two-step framework for assessing challenges to state liquor laws under the dormant Commerce Clause. First, the reviewing court determines whether the law discriminates against interstate commerce. *Buckel Fam. Wine LLC v. Mosiman*, 2024 WL 4513039, at *4 (S.D. Iowa Sept. 30, 2024) (citing *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504 (2019) ("*Tennessee Wine*")). If the law is discriminatory, the court then assesses "whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate

nonprotectionist ground." *Tennessee Wine,* 588 U.S. at 539–40.

By assessing whether the challenged laws are "reasonably necessary to protect the States' asserted interests," *see id.* at 533, the Supreme Court has recognized that the Twenty-first Amendment grants States the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens. *Id.* That is, courts "must take into account a State's valid interests in regulating alcohol, such as promoting responsible consumption, preventing underage drinking, and collecting taxes." *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1180 (8th Cir.), *cert. denied* 142 S. Ct. 335 (2021) ("*Sarasota Wine*")). However, while the Twenty-first Amendment gives states greater regulatory latitude than normally afforded, "'mere speculation' or 'unsupported assertions' are insufficient to sustain a law that would otherwise violate the Commerce Clause." *Tennessee Wine*, 588 U.S. at 539–40. The Twenty-first Amendment will not shield any law where the predominant effect of the law is protectionism and not the protection of public health or safety. *Id.* "The burden is on the State to show that discriminatory laws are 'demonstrably justified.'" *Granholm*, 544 U.S. at 492.

Granholm is the seminal case clarifying the contemporary Commerce Clause framework for reviewing regulation underpinned by the Twenty-first Amendment. In *Granholm*, the Supreme Court considered two consolidated cases involving laws that permitted in-state wine manufacturers to sell directly to consumers while prohibiting out-of-state wine manufacturers from doing so. The Court held that this differential treatment between in-state and out-of-state wineries constituted explicit discrimination against interstate commerce with the Court specifically identifying increased cost burdens and "in some cases the inability to secure a wholesaler for small

shipments." 544 U.S. at 467–474. The States in *Granholm* failed to show that the discriminatory direct-shipping restrictions advanced a valid local purpose that could not be served by nondiscriminatory alternatives. The Court elaborated that, "[w]ithout concrete evidence . . . we are left with the State's unsupported assertions. Under our precedents which require the 'clearest showing' to justify discriminatory state regulation, [] this is not enough." *Id.* at 490. The Supreme Court concluded that, "[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms." *Id.* at 493.

B.

Over the last two decades, numerous jurisdictions have considered dormant Commerce Clause challenges under the *Granholm* framework. These cases illuminate the risks of a potential challenge to L.B. 113 and underlying statutes.

Costco Wholesale Corp. v. Hoen, 407 F. Supp. 2d 1247 (W.D. Wash. 2005), involved Washington statutes that permitted domestic breweries and wineries to act as distributors, while prohibiting out-of-state entities from performing similar wholesale functions. The Court held that the discriminatory nature of Washington's system was "obvious," because the privilege of in-state producers to distribute directly to retailers "provides clear advantages to in-state wineries and breweries that out-of-state producers do not enjoy." *Id.* at 1251. Accordingly, the Court held that Washington's system discriminated against out-of-state producers in violation of the Commerce Clause and struck the offending language eliminating the domestic distribution right.

In *Black Star Farms LLC v. Oliver*, 600 F.3d 1225 (9th Cir. 2010), an out-of-state commercial winery challenged Arizona's small winery and in-person exceptions to its

three-tier system under the dormant Commerce Clause. The Court held that Arizona's in-person purchase requirement did not discriminate against out-of-state wineries because there was no differential treatment. The Court elaborated that the out-of-state winery adduced no evidence that the in-person exception created differential treatment commenting that the "'mere fact that a statutory regime has a discriminatory potential is not enough to trigger strict scrutiny under the dormant commerce clause." *Id.* at 1235 (quoting *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 37–39 (1st Cir. 2007)). The Court further clarified that a "de minimis benefit to in-state wineries is also insufficient to trigger strict scrutiny." *Id.* at 1235 (citing *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 37–39 (1st Cir. 2007); *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 216 (2d Cir. 2003)).

In *Anheuser-Busch, Inc. v. Schnorf*, 738 F. Supp. 2d 793 (N.D. Ill. 2010), an out-of-state beer producer successfully challenged Illinois Liquor Control Commission regulations requiring out-of-state producers to go through an in-state distributor while in-state producers could acquire a license permitting self-distribution to retailers. The Court found that the regulation, by its own terms, explicitly discriminated against out-of-state brewers because the basis for determining distribution rights turned on the brewer's residency. *Id.* at 805. After noting the absence of a *de minimis* exception for explicitly discriminatory laws and the state's failure to articulate a legitimate local purpose to justify the discrimination, *Id.* at 807–810, the Court turned to "the intensity of commitment to the residual policy and "the degree of potential disruption of the statutory scheme" when fashioning the appropriate remedy. *Id.* at 813. Although deciding to withdraw the self-distribution privilege, the Court ultimately stayed enforcement of its decision to allow the state's General Assembly "an opportunity to avail itself of a much broader range of solutions." *Id.* at 816.

L.B. 113 and the Dormant Commerce Clause

In *Tennessee Wine*, a trade association of in-state liquor stores challenged a Sixth Circuit decision striking down a two-year residency requirement for in-state retailer licenses. The Supreme Court found that the two-year residency requirement violated the Commerce Clause and could not be saved by the Twenty-first Amendment because the predominant effect of the regulation protected in-state retailers from out-of-state competition. 588 U.S. at 543. In reaching that conclusion, the Court clarified that the Twenty-first Amendment

> allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests, but it does not license the States to adopt protectionist measures with no demonstrable connection to those interests.

Id. at 538. In *Tennessee Wine*, the State failed show with "concrete evidence" that the law was "reasonably related" to the state's asserted interests or "that nondiscriminatory alternatives would be insufficient to further those interests." *Id.* at 540.

In *Lebamoff Enterprises Inc. v. Whitmer*, 956 F.3d 863 (6th Cir. 2020), *cert. denied* 141 S. Ct. 1049 (2021) ("*Lebamoff*"), the Sixth Circuit rejected an Indiana wine retailer's Commerce Clause challenge to a Michigan law allowing in-state retailers to deliver alcohol direct to consumers through common carriers without extending that benefit to out-of-state retailers. The Court acknowledged that nothing stops States from "funnel[ing] sales through the three-tier system" or "[requiring] retailers to be physically based in the State." *Id.* at 869–70 (citing *Granholm*, 544 U.S. at 489; *Byrd v. Tennessee Wine*

& Spirits Retailers Ass'n, 883 F.3d 608, 625 (6th Cir. 2018), aff'd sub nom. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, (2019)). The Court opined that if a State may require "all alcohol sales to run through its in-state wholesalers, and if it may require retailers to locate within the State, may it limit the delivery options created by the new law to in-state retailers? The answer is yes." *Id.* at 870. In *Lebamoff*, Michigan itself was the wholesale tier and imposed heavy taxes at the wholesale level. Thus, extending the benefit would have left "too much room for out-of-state retailers to undercut local prices and to escape the State's interests in limiting consumption." *Id.* at 872. The Court held that the purpose of the system was to require alcohol to pass through regulated in-state wholesalers, and that "the Twenty-first Amendment leaves these considerations to the people of Michigan." *Id.* at 875.

In *Sarasota Wine,* the Eighth Circuit did not need to address whether a State had justified its law allowing in-state retailers to ship alcohol to consumers while prohibiting out-of-state retailers from doing so because the Court found that the law did not discriminate against interstate commerce in the first place. Relying on *Lebamoff* and *Tennessee Wine*, the Court ultimately found that the rules governing direct shipments of wine to Missouri consumers was an essential feature of its three-tiered scheme and evenhandedly applied to all who qualify for a Missouri retailers license. 987 F.3d at 1184. The Court further commented that compliance with the conditions Missouri retailers must adhere to and which Sarasota Wines was unwilling to comply with, such as having an in-state retail location and exclusively purchasing alcohol from an in-state wholesaler, would frustrate the relief Sarasota sought. *Id.* at 1179.

And most recently, in *Buckel Fam. Wine LLC v. Mosiman*, the court was tasked with reviewing an Iowa law that prohibited only out-of-state wine manufacturers from

securing a permit that would allow direct-to-retail wine sales in the state. 2024 WL 4513039 at *1 (S.D. Iowa Sept. 30, 2024). Specifically, Iowa law required applicants to have a premises located within the state. For the same reasons underpinning *Granholm*, the Iowa Court determined that the law discriminated against interstate commerce through its in-state premises requirement. While the State asserted issues stemming from limited compliance personnel, tax collection and reporting reliability concerns, community connection protections, and public health and safety interests served by limiting the number of sources for alcohol, the Court ultimately determined that the State failed to "provide 'concrete evidence' that the in-state premises requirement [was] 'reasonably necessary' to achieve these interests" or "that 'nondiscriminatory alternatives' would be insufficient." *Id.* at *7–9.

III.

We have identified two portions of L.B. 113, as amended, that implicate this dormant Commerce Clause jurisprudence. We discuss each in turn.

A.

The first constitutionally suspect portion of L.B. 113 increases the gallonage threshold for limited self-distribution by microdistilleries from five hundred gallons to five thousand gallons, which AM 232 would reduce to three thousand five hundred gallons. Because out-of-state entities may not obtain a license that permits direct-to-retail sales unless they establish a physical presence in the State, Nebraska microdistilleries would enjoy an increased privilege—a gallonage threshold that is 7-times larger—that is unavailable to out-of-state entities under the amendment. As a consequence, we conclude that this

change from L.B. 113 raises the greatest concern under the dormant Commerce Clause.

It is true that increasing the limited self-distribution privilege from five hundred gallons to three thousand five hundred gallons or more does not establish any *new* forms of differential treatment; after all, to the extent any discrimination exists in L.B. 113 it only expands on what is currently allowed. However, the difference in degree is large enough to suggest a difference in kind. If a *de minimis* exception to the ban on interstate discrimination exists, *see Black Star Farms LLC v. Oliver*, 600 F.3d 1225 (9th Cir. 2010), then L.B. 113's 7-fold increase to the self-distribution gallonage limits very well may push these benefits beyond the *de minimis* threshold.

B.

L.B. 113's increase to the number of physical retail locations that a craft brewery and microdistillery can operate or that a craft brewery may continue to operate as a manufacturer increases the concern that L.B. 113 would be subject to a successful dormant Commerce Clause challenge. L.B. 113 would allow craft breweries and microdistilleries in Nebraska to produce and serve their own products at 10 retail locations (eight under AM 232), up from the five locations allowed under current law. *See* Neb. Rev. Stat. § 53-129(1). They are also allowed to sell the beer and spirits produced at these locations directly to other Nebraska retailers. As we have explained, however, out-of-state craft breweries and microdistilleries cannot sell their products directly to Nebraska retailers unless they first establish a physical presence in Nebraska. *See* pp. 11–12, *supra*.

Increasing the number of locations that Nebraska craft breweries and microdistilleries can operate, while still prohibiting out-of-state companies from selling directly to

Nebraska retailers, further increases the differential treatment of Nebraska and out-of-state craft breweries and distilleries. As the number of physical locations of Nebraska craft breweries and microdistilleries increases, it becomes more likely that Nebraska companies will be able to produce beer and spirits up to the new self-distribution limits proposed by L.B. 113. The increased number of taprooms for Nebraska companies therefore bolsters their right to self-distribute to retailers—a right that out-of-state craft breweries and microdistilleries do not have. As Nebraska craft breweries and microdistilleries can self-distribute more product—through increased self-distribution limits and more physical locations—Nebraska's scheme becomes further removed from the "unquestionably legitimate" three-tier system. *Granholm*, 544 U.S. at 488–489.

IV.

Any constitutional infirmities introduced by L.B. 113 will likely result in the nullification of the offending provisions. When faced with a "constitutionally underinclusive" statute there are two remedial alternatives: the court "may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." *Costco Wholesale Corp. v. Hoen*, 407 F. Supp. 2d 1247, 1254 (W.D. Wash. 2005) (citing *Heckler v. Mathews*, 465 U.S. 728 (1984)).

> Although the choice between "extension" and "nullification" is within the "constitutional competence of a federal district court," and ordinarily "extension, rather than nullification, is the proper course," the court should not, of course, "use its remedial powers to circumvent the intent

> of the legislature," and should therefore "measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation."

Heckler v. Mathews, 465 U.S. 728, 739 n. 5 (1984) (internal citations omitted).

Although extension, as opposed to nullification, is ordinarily proper, most courts addressing Commerce Clause violations involving state liquor regulatory schemes have opted to strike the offending provisions. That is, courts have sought to disturb only as much of the state regulatory scheme as is necessary to enforce the constitutional requirement with the primary touchstone for that decision based in legislative intent. *See, e.g., Anheuser-Busch, Inc. v. Schnorf*, 738 F. Supp. 2d 793 (N.D. Ill. 2010) (determining that "'nullification'—that is, withdrawing self-distribution privileges from in-state brewers rather than extending those privileges to out-of-state brewers—does the 'minimum damage' to the legislative and regulatory scheme"); *Costco Wholesale Corp. v. Hoen*, 407 F. Supp. 2d 1247, 1254 (W.D. Wash. 2005) (rationalizing that striking the unconstitutional language would require fewer revisions to the state's liquor laws, be less disruptive to the regulatory scheme, and likely be more consistent with legislative intent); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003) (remedied the unconstitutionality of the statute limiting direct-to-consumer sales to in-state licensees by eliminating that benefit for in-state entities).

The legislative intent as expressed in the Nebraska Liquor Control Act would support a similar approach here. The Nebraska Legislature has explicitly declared its intent in the Act to:

> (1) regulate the transportation or importation of alcoholic liquor into this state when such alcoholic liquor is intended for delivery or use within the state, (2) promote adequate, economical, and efficient service by licensees selling alcoholic liquor within the State of Nebraska without unjust or undue discrimination, preference, or advantage, (3) generate revenue by imposing an excise tax upon alcoholic liquor, and (4) promote the health, safety, and welfare of the people of the state and encourage temperance in the consumption of alcoholic liquor by sound and careful control and regulation of the manufacture, distribution, and sale of alcoholic liquor.

Neb. Rev. Stat. § 53-101.01 (2021). The Legislature further requires that the Act "be liberally construed to the end that the health, safety, and welfare of the people of the State of Nebraska are protected and temperance in the consumption of alcoholic liquor is fostered and promoted by sound and careful control and regulation of the manufacture, sale, and distribution of alcoholic liquor." § 53-101.05 (2021). The Legislature's clear intent to foster and carefully regulate alcoholic liquor in the State while encouraging temperance and promoting the health, safety, and welfare of Nebraskans runs counter to the idea of haphazardly extending restricted benefits to countless out-of-state entities without first ensuring sufficient regulatory systems are in place. For these reasons, we expect that a court would nullify any unconstitutional provisions to preserve legislative intent and the regulatory scheme.

* * *

The changes wrought by L.B. 113 would increase the likelihood of a constitutional challenge and hamper the State's ability to effectively defend against such a challenge by limiting the defenses available to it. In the event of such a successful challenge, nullification is the most likely result under the law.

MICHAEL T. HILGERS
Attorney General of Nebraska