

Opinion No. 2012-125

January 30, 2013

The Honorable Uvalde Lindsey  
State Senator  
2257 East Gentle Oaks Lane  
Fayetteville, Arkansas 72703-6142

Dear Senator Lindsey:

You have asked for my opinion on 15 questions dealing with the constitutionality, meaning, and application of some statutes regulating retail liquor permits. In the interest of brevity and clarity, I have regrouped and paraphrased your questions as follows:

1. Is either A.C.A. § 3-4-205(b)(1) or A.C.A. §§ 3-4-301(a)(8)–(10) unconstitutionally vague under the Due Process Clause of the U.S. Constitution?
2. Does A.C.A. §§ 3-4-301(a)(8)–(10) effect an unconstitutional taking of a franchisor's trademark and right to license its trademark for retail liquor store services under the Fifth Amendment to the United States Constitution and/or Article 2, Section 22 of the Arkansas Constitution, in the case where, prior to enactment of the statute, the trademark owner owned its trademark and invested money in franchising development in Arkansas with the expectation of selling franchises?
3. Does A.C.A. §§ 3-4-301(a)(8)–(10) violate the Equal Protection Clause of the U.S. Constitution because retail liquor stores are treated differently than on-premises liquor consumption permittees (e.g. Macaroni Grill or Copeland's)?

4. Does either A.C.A. § 3-4-205(b)(1) or A.C.A. §§ 3-4-301(a)(8)–(10) unconstitutionally abridge retail liquor-stores’ associational or speech rights under the First Amendment to the U.S. Constitution?
5. Does A.C.A. § 3-4-205(b)(1) allow an Arkansas retail liquor-store to enter into a franchise agreement with another Arkansas retail liquor-store so long as the franchise fees are paid only from moneys generated from the sale of non-alcoholic goods.

You have also set out several hypothetical “scenarios” and have asked me to decide whether they are prohibited under the statutes at issue (assuming the latter are constitutional). I must respectfully decline that request. The question whether any particular business arrangement qualifies as a prohibited franchise is one of fact, which falls outside the scope of an opinion from this office.

## **RESPONSE**

The answer to questions one, three, four, and five is “no,” in my opinion. And, for the reasons explained below, I am unable to answer question two.

## **DISCUSSION**

Before addressing each of the foregoing questions, I will address a recurring feature of several of your original questions and I will set out the text of the statutes you ask about.

Nearly all of your questions ask about the statutes’ constitutionality under both the state and federal constitutions. For purposes of most of your questions, the relevant federal and state constitutional provisions are identical. As Justice George Rose Smith said, stating the position of the Arkansas Supreme Court, “[w]hen the language of the federal and state constitution is identical, as in the instance of...the due process clause, and several others, **and** there is no reason for us to construe our constitution other than in the same way as the federal constitution has been construed” then the matter is addressed from the perspective of the federal

constitution.<sup>1</sup> Because you have not provided any “reason...to construe our constitution other than in the same way as the federal constitution has been construed,” I will address your questions from the perspective of the federal case law explicating the federal constitution.

Each of your questions asks about at least one subpart of two statutes. Section 3-4-205(b) lists some conditions for obtaining a retail-liquor permit:

(b)(1)(A) No retail liquor permit shall be issued, either as a new permit or as a replacement of an existing permit, to any person, firm, or corporation if the person, firm, or corporation has any interest in another retail liquor permit, regardless of the degree of interest.

(B) A retail liquor permit shall apply only to one (1) location, and a person, firm, or corporation shall not be permitted to receive any direct or indirect financial benefit from the sale of liquor at any location other than the permitted location.

(2) However, notwithstanding this prohibition, any retail liquor permits held by any person, firm, or corporation on July 19, 1971, which continue to be held by any person, firm, or corporation having an interest in more than one (1) retail liquor permit on August 13, 1993, shall be vested permits.

Sections 3-4-301(a)(8)–(10) list some circumstances that require a retail liquor permit be revoked:

(a) Any permit issued pursuant to this act...must be revoked for the following causes:

\* \* \*

(8) Subsequent to March 1, 2011, if a retail liquor permittee [*sic*] directly or indirectly remunerates any person, firm, or

---

<sup>1</sup> *Wilson v. City of Pine Bluff*, 278 Ark. 65, 643 S.W.2d 569 (1982) (emphasis added); see *Parkman v. Sex Offender Screening and Risk Assessment Committee*, 2009 Ark. 205, 11 n. 6, 307 S.W.3d 6, 14.

corporation that has a direct or indirect pecuniary, proprietary, or financial interest in the creation, establishment, operation, or contractual branding of another permitted liquor establishment;

(9) Subsequent to March 1, 2011, if a retail liquor permittee [*sic*] directly or indirectly receives remuneration from any other retail liquor permittee [*sic*] relating to the creation, establishment, operation, or contractual branding of another permitted liquor establishment; or

(10) Subsequent to March 1, 2011, if a retail liquor permittee [*sic*] brands the permitted location with the same name or logo as another retail liquor permittee [*sic*].

***Questions 1: Is either A.C.A. § 3-4-205(b)(1) or A.C.A. §§ 3-4-301(a)(8)–(10) unconstitutionally vague under the Due Process Clause of the U.S. Constitution?***

The U.S. Constitution—in the Fifth and Fourteenth Amendments—prohibits the federal and state governments (respectively) from depriving a person “of life, liberty, or property, without due process of law.” According to the U.S. Supreme Court, a statute can violate the due process clause if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”<sup>2</sup> But it is mistaken to think that the “mere fact that close cases can be envisioned renders a statute vague,” for “[c]lose cases can be imagined under virtually any statute.”<sup>3</sup> Instead, “[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.”<sup>4</sup>

The two sets of statutes you ask about clearly intend to prohibit retail liquor-stores

---

<sup>2</sup> *U.S. v. Williams*, 553 U.S. 285, 305 (2008).

<sup>3</sup> *Id.*, at 305–06.

<sup>4</sup> *Id.*

from joining together into franchise stores. You offer eight hypothetical applications of the statutes in an effort to show that the law is vague. Yet these hypotheticals seem to be the kinds of “close cases that can be imagined under virtually any statute.” As noted above, those close cases do not render a statute void-for-vagueness. The primary point of the statute is clearly, as just noted, to prohibit chains and franchises. And you recognize as much in the wording of many of your questions when you say “with respect to the prohibition on franchising....” Whether any specific business arrangement qualifies as a prohibited franchise is a question of fact, not an issue of void-for-vagueness. Such questions fall outside the usual scope of an Attorney General opinion, which is necessarily limited to questions of law.

***Question 2: Does A.C.A. §§ 3-4-301(a)(8)–(10) effect an unconstitutional taking of a franchisor’s trademark and right to license its trademark for retail liquor store services under the Fifth Amendment to the United States Constitution and/or Article 2, Section 22 of the Arkansas Constitution, in the case where, prior to enactment of the statute, the trademark owner owned its trademark and invested money in franchising development in Arkansas with the expectation of selling franchises?***

I am unable to answer this question for several reasons. First, your question does not clearly state what property has allegedly been taken by government action. Both the federal and state constitutions require that just compensation be given if “private property” is “taken” for “public use.”<sup>5</sup> Any analysis of a so-called “takings issue” requires an analysis of each of these three elements. Yet you have not clearly indicated what specific piece of private property is allegedly at issue or how that property was allegedly “taken.”

The wording of your question suggests that the property at issue is the franchisor’s “trademark and right to license its trademark.” But the statutes you ask about do not “take” the business’s trademark. Instead, the statutes, when read collectively, prohibit franchise agreements. Further, merely asserting that the business has some

---

<sup>5</sup> The federal provision states that “[n]o person shall...be deprived of life, liberty, or property, without due process of law...” The state provision states that “[t]he right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.” Ark. Const. art. 2, § 22.

pre-existing “right” to license its trademark begs the question, for whether there is such a “right” is precisely the focus of some of your other questions.

This failure to clearly identify a property interest also prevents you from clearly identifying a “taking.” You point to some kind of unspecified kind and/or degree of “damage” to the trademark and to the “right to license.” But, again, no “trademark” was taken. Nor did the statutes dissolve any existing franchise agreements. Accordingly, I am unable to assess this question.

***Question 3: Does A.C.A. §§ 3-4-301(a)(8)–(10) violate the Equal Protection Clause of the U.S. Constitution because retail liquor stores are treated differently than on-premises liquor consumption permittees (e.g. Macaroni Grill or Copeland’s)?***

In my opinion, the answer to this question is “no.” The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution prohibits states from denying “to any person within its jurisdiction the equal protection of the laws.” According to the U.S. Supreme Court, any equal-protection challenge to economic legislation is subjected to a “rational basis test,” which means that legislation will be upheld if “the means chosen by the legislature are rationally related to some legitimate government purpose.”<sup>6</sup> This language prohibits (a) different treatment of (b) similarly situated parties (c) in the absence of a sufficient reason.<sup>7</sup> When someone challenges a statute on equal-protection grounds and the statute is subject to a rational-basis review, the challenger must show that there is not a single “conceivable basis which might support” the “the legislative classification.”<sup>8</sup>

Under these principles, an equal-protection challenge to the statutes you reference would, in my opinion, probably fail for two, independent, reasons. First, a court faced with your question would probably hold that the equal-protection clause is

---

<sup>6</sup> *E.g. Hodel v. Indiana*, 452 U.S. 314, 331 (1981).

<sup>7</sup> *E.g. Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (explaining that the Equal Protection Clause of the Fourteenth Amendment “is essentially a direction that all persons similarly situated be treated alike.”).

<sup>8</sup> *F.C.C. v. Beach Commun. Inc.*, 508 U.S. 307, 315 (1993) (internal quotation omitted).

not even implicated by the different treatment of retail liquor stores and restaurants because the two are not similarly situated. Indeed, a federal district court in Rhode Island held precisely this when faced with this question. In that case, some retail liquor stores sued on equal-protection grounds, *inter alia*, to invalidate Rhode Island's ban on franchises—including ones that existed at the time the ban was passed. The stores claimed that the ban violated the Equal Protection Clause because it only applied to "off-premises consumption and not to holders of other classes of licenses who sell for on-premises consumption," such as restaurants.<sup>9</sup> The court noted that the two kinds of businesses are not similarly situated:

[I]t seems apparent to even a casual observer that significant differences exist between the relatively small number of retailers who exclusively sell unlimited quantities of alcoholic beverages for off-premises consumption to persons who may or may not be the ultimate consumers and the much larger number of restaurants and clubs that dispense alcoholic beverages in measured quantities, often accompanied by food, for on-premises consumption.<sup>10</sup>

Second, even assuming that restaurants with liquor permits are similarly situated to retail liquor permittees, a court would probably hold that the different treatment between the two is rational. Again, a federal district court in Rhode Island faced this question and held that, even assuming the rational-basis test was applied to the Rhode Island ban, the likelihood that the plaintiff/retail liquor stores would succeed in showing that Rhode Island's ban failed the rational-basis test was "rather remote."<sup>11</sup> The First Circuit Court of Appeals reached a similar conclusion when it held, under the same set of facts, that "no cognizable equal protection violation ha[d] been demonstrated."<sup>12</sup> In my opinion, an Arkansas court faced with the same question would probably agree with these authorities.

---

<sup>9</sup> *Wine and Spirits, Inc. v. Rhode Island*, 364 F. Supp. 2d 170, 180 (D.R.I. 2005).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 182.

<sup>12</sup> *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 16 (2007).

***Questions 4: Does either A.C.A. § 3-4-205(b)(1) or A.C.A. §§ 3-4-301(a)(8)–(10) unconstitutionally abridge retail liquor-stores’ associational or speech rights under the First Amendment to the U.S. Constitution?***<sup>[13]</sup>

As explained below, it appears that prospective franchisors lack any commercial-speech rights in the activities of providing advertising and licensing a trade name. Because franchisors likely lack such commercial speech rights, franchisors’ associational rights cannot be violated either.

Your question asks about speech and association under the First Amendment to the U.S. Constitution. Regarding speech, the First Amendment provides that “Congress shall make no law...abridging the freedom of speech.” While “association” is not listed in the First Amendment, the U.S. Supreme Court has clearly held that the “freedom of association” is a fundamental right that is protected by the First Amendment: “[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”<sup>14</sup> By incorporation through the Fourteenth Amendment, the First Amendment applies to states and their political subdivisions.<sup>15</sup>

---

<sup>13</sup> Your original question asks whether these statutes are “unconstitutionally overbroad.” Overbreadth is a doctrine that only clearly applies to the speech clause of the First Amendment. See 16 C.J.S. *Constitutional Law* § 117. Depending on how it is viewed, the doctrine operates as either an exception to the rules about standing (see *Bd. of Trs. of S.U.N.Y. v. Fox*, 492 U.S. 469, 481–86 (1989)) or a kind of remedy applicable when a statute is unconstitutional in a “substantial” number of circumstances when compared to its “legitimate sweep” (*Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); see Keller & Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes* In Toto, 98 Va. L. Rev. 301 (2012)). Your question suggests you are using “overbreadth” in the latter sense. In that case, I cannot address overbreadth for two reasons. First, overbreadth, as you are using the term, is a remedy for a statute that has *already* been found to be unconstitutional in at least some percentage of its applications. So the first question is about the statute’s constitutionality, not the remedy. Second, assessing whether a statute is unconstitutional in a “substantial” number of its applications is clearly a question of fact. This office lacks both the resources and the authority to address questions of fact in the limited context of official opinions.

<sup>14</sup> *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

<sup>15</sup> E.g. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 n. 1 (1996); *Gitlow v. New York*, 268 U.S. 652, 666 (1952).

Because your question is so broadly worded and because you have not made any argument about how these stores' First Amendment rights might have been violated, I will not speculate about the many ways that the vast area of First Amendment jurisprudence *might* apply to retail liquor-stores. Instead, I will simply note how some other, representative, jurisdictions have addressed this kind of question in light of a ban on franchises.

One such representative case is the decision of the First Circuit Court of Appeals in *Wine and Spirits Retailers, Inc. v. Rhode Island*.<sup>16</sup> In *Wine and Spirits*, the court assessed the constitutionality of a Rhode Island statute that banned retail liquor stores from joining together into franchises and dissolved the previously existing franchise agreements of several stores. Those stores sued, claiming, among other things, that the state statute violated their commercial-speech rights under the First Amendment.

When analyzing this claim, the court distinguished between the franchisor and the franchisees. Regarding the former, the court held that the ban on franchising did not violate the franchisor's commercial-speech rights because providing "advertising and [trade name] licensing services is not speech that proposes a commercial transaction and therefore does not constitute commercial speech" in the first place.<sup>17</sup> While the court assessed the existing franchisees differently, we need not address that part of the court's opinion because, in Arkansas, there are no currently existing retail liquor-store franchisees.<sup>18</sup> Accordingly, I believe that if an Arkansas court were faced with a question about the commercial-speech rights of a prospective retail liquor-store franchisor, the court would probably follow *Wine and Spirits* in holding that a ban on franchises does not violate the franchisor's speech rights.

Because there is probably no infringement on the prospective franchisor's speech rights, its associational rights cannot be violated either. This is seen most clearly

---

<sup>16</sup> 481 F.3d 1 (1st Cir. 2007).

<sup>17</sup> *Id.* at 6 (brackets in the original) (internal citations omitted).

<sup>18</sup> Since 1971, Arkansas has had a long-standing ban on retail liquor-stores entering into franchises. See Act 106 of 1971, which is codified at A.C.A. § 3-4-205 (Supp. 2011).

by noting the two sets of “associations” that the First Amendment protects. First, according to the U.S. Supreme Court, “choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.”<sup>19</sup> Second, association is protected when it is “for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”<sup>20</sup>

The first set of associational rights—the one for “intimate human relationships”—clearly does not apply to retail liquor-stores. The second set of associational rights simply protects association *as a means* to engage in otherwise protected activities—such as commercial speech. But, as explained above, franchisors probably lack any protected commercial-speech rights in providing joint advertising or licensing trade names. Therefore, the prospective franchisor’s associational rights have not been violated either.

***Question 5: Does A.C.A. § 3-4-205(b)(1) allow an Arkansas retail liquor-store to enter into a franchise agreement with another Arkansas retail liquor-store so long as the franchise fees are paid only from moneys generated from the sale of non-alcoholic goods.***

In my opinion, the answer to this question is “no.” Any court faced with your question will read section 3-4-205(b)(1) together with A.C.A. §§ 3-4-301(a)(8)–(10), all of which are quoted above.<sup>21</sup> Section 3-4-205(b)(1) prohibits “any person, firm, or corporation” from receiving a retail liquor permit if that entity “has any interest in another retail liquor permit, regardless of the degree of interest.” Under

---

<sup>19</sup> *City of Dallas v. Stanglin*, 490 U.S. 19, 24 (1989).

<sup>20</sup> *Id.*

<sup>21</sup> The rule of construction known as “*in pari materia*” requires that statutes that are of the same subject matter be read together and in a harmonious manner. *E.g. Mays v. Cole*, 374 Ark. 532, 289 S.W.3d 1 (2008). Section 3-4-205(b) states some conditions for obtaining a permit, whereas section 3-4-301(a)(10) states a condition that *requires* a permit be revoked. It would be absurd to read section 3-4-205(b)(1) as, in your words, “allowing” certain kinds of franchisees to obtain a permit while section 3-4-301(a)(10)—which clearly prohibits all kinds of franchises—would immediately require that same permit be revoked.

section 3-4-301(a)(10), a permit must be revoked if the permittee “brands the permitted location with the same name or logo as another retail liquor permittee [*sic*].” Section 3-4-301(a)(10) clearly prohibits franchising agreements because it requires all franchisees to forfeit their retail liquor permits. And nothing in that prohibition turns on the source of the proceeds that the franchisee uses to pay the franchise fees. Therefore, the answer to your question is “no.”

Assistant Attorney General Ryan Owsley prepared this opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL  
Attorney General

DM/RO:cyh