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OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

May 23, 1973

OPINION LETTER NO. 142

Honorable Earl L. Schlef
Representative, District 60
Room 302, Capitol Building
Jefferson City, Missouri 65101

Dear Representative Schlef:

This letter is in response to your official request for an opinion from the office of the Attorney General in which you make inquiry regarding the constitutionality of Section 311.090, RSMo 1969, as follows:

> "Request your opinion as to the constitutionality of the 20,000 population figure for an incorporated city to be eligible to issue liquor by the drink licenses since there is a contention that the 20,000 population figure is discrimination against those people living in towns smaller than 20,000 population."

Section 311.090, RSMo 1969, provides that:

> "1. Any person who possesses the qualifications required by this chapter, and who meets the requirements of and complies with the provisions of this chapter, and the ordinances, rules and regulations of the incorporated city in which such licensee proposes to operate his business, may apply for and the supervisor of liquor control may issue a license to sell intoxicating liquor, as in this chapter defined, by the drink at retail for consumption on the premises described in the application; provided, that no license shall be issued for the sale

> of intoxicating liquor, other than malt liquor containing alcohol not in excess of five percent by weight, by the drink at retail for consumption on the premises where sold, in any incorporated city having a population of less than twenty thousand inhabitants, until the sale of such intoxicating liquor, by the drink at retail for consumption on the premises where sold, shall have been authorized by a vote of the majority of the qualified voters of said city. Such authority to be determined by an election to be held in said cities having a population of less than twenty thousand inhabitants, under the provisions and methods set out in this chapter. The population of said cities to be determined by the last census of the United States completed before the holding of said election; provided further, that for the purpose of this law, the term 'city' shall be construed to mean any municipal corporation having a population of five hundred inhabitants or more; provided further, that no license shall be issued for the sale of intoxicating liquor, other than malt liquor containing alcohol not in excess of five percent by weight, by the drink at retail for consumption on the premises where sold, outside the limits of such incorporated cities.
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> "2. In each instance, a bond in the sum of two thousand dollars, with sufficient surety, to be approved by the supervisor of liquor control, must be given for the faithful performance of all duties imposed by law upon the licensee, and for the faithful performance of all the requirements of this law, and any violation of such conditions, duties or requirements shall be a breach of said bond and shall automatically cancel and forfeit the license granted hereunder; provided, that no person financially interested in the sale of intoxicating liquor at wholesale shall be accepted as surety on any such bond."

We have assumed from the terminology of your question that you desire our opinion as to whether the above-quoted statutory section deprives individuals living in incorporated cities of less than 20,000 population of the equal protection of the laws. We believe that the Supreme Court of the state of Missouri disposed of all

questions regarding the constitutionality of the section in question in the case of State v. Kennedy, 343 Mo. 786, 123 S.W.2d 118, 120-123 (Mo. 1938). The Kennedy case has not been reversed and represents the controlling legal authority regarding the constitutionality of what is now Section 311.090, RSMo 1969.

The state of Missouri, in common with all other states of the United States, has been given broad latitude by the Twenty-first Amendment to the Constitution of the United States to enact laws relating to the liquor business. In that state liquor statutes are protected under the Twenty-first Amendment, such statutes are not normally subservient to other federal constitutional provisions. We quote from California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342, 349-350 (1972):

> "While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals. In Hostetter v. Idlewild Liquor Corp., 377 US 324, 330, 12 L Ed 2d 350, 84 S Ct 1293 (1964), the Court reaffirmed that by reason of the Twenty-first Amendment 'a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' Still earlier, the Court stated in State Board v. Young's Market Co., 299 US 59, 64, 81 L Ed 38, 57 S Ct 77 (1936):
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> > 'A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth.'"

It is our view that Section 311.090, RSMo 1969, is not, therefore, unconstitutional insofar as it requires an affirmative vote in incorporated cities of less than 20,000 in order that liquor by the drink may be sold therein, but makes no such requirement as regards incorporated cities of greater than 20,000 population.

Yours very truly,

JOHN C. DANFORTH
Attorney General