UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA FINE WINE & SPIRITS, LLC, Plaintiff, v. DAVID COOK, Chairman, Indiana Alcohol and Tobacco Commission; JOHN KRAUSS, Vice Chairman, Indiana Alcohol and Tobacco Commission; DALE GRUBB, Commissioner, Indiana Alcohol and Tobacco Commission; and MARJORIE MAGINN, Commissioner, Indiana Alcohol and Tobacco Commission, Defendants.	)	CASE NO. 1:20-cv-00741-TWP-MJD

Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction

Indiana Fine Wine & Spirits, LLC, ("IFWS") asks this Court to strike down an Indiana law even though it filed its lawsuit prematurely in federal court while the administrative review of its application should have been proceeding. While IFWS argues that this Court should jump right into the constitutional question of Indiana's residency requirements for a holder of an alcoholic beverage dealer's permit, the Supreme Court has recognized that, even with questions of the constitutionality of a challenged statute, it is often desirable for state courts to have the first opportunity to consider the statute. Consequently, the Court should deny IFWS's request for the extraordinary relief of a preliminary injunction.

This brief is for the purpose of the defendants' response to IFWS's motion for a preliminary injunction, and the defendants retain all rights they may have to raise additional arguments and defenses as this litigation progresses.

I. IFWS brings this challenge before the review of its permit application is complete.

IFWS applied to the Indiana Alcohol and Tobacco Commission ("ATC") to transfer a package store permit to IFWS. (Dkt. 14 at 3). The ATC reviewed IFWS's application in a public hearing on March 3, 2020, and, at that hearing, voted 4-0 to deny IFWS's application because its owners did not satisfy the residency requirements under Indiana law. Specifically, Indiana Code section 7.1-3-21-5.4(b) ("Section 5.4(b)") prohibits the ATC from issuing a dealer's permit unless at least 60% of the LLC's members are persons who have been Indiana residents for at least five years. (Declaration of David Cook, Chairman of the ATC, Ex. 1). The parties agree that IFWS does not meet the requirements of Section 5.4(b). IFWS acknowledges that it filed its complaint for this case a mere three days after the ATC denied IFWS's transfer application. (Dkt. 14 at 4).

But ATC's denial is not the end of the administrative and state court review process for the transfer of dealer permit applications. Transfers of dealer permits are subject to the same notice, publication, and investigation requirements before the local board as if the transfer were an original permit application. Ind. Code § 7.1-3-24-3. After those requirements are met, and a hearing on the transfer application has been held before the local alcoholic beverage board, the Commission is generally required to follow the recommendation of the majority of the local

board. Ind. Code § 7.1-3-19. The Commission must act promptly on the local board's recommendation by, in the case of a denial, giving either personal notice of the denial or written notice by certified mail to the applicant. 905 Ind. Admin. Code 1-36-2(a). An applicant has 15 days upon receipt of notice of the commission's action to file an objection to the commission's action and to request an appeal hearing before the commission, and failure to file an objection constitutes a waiver of appeal. 905 Ind. Admin. Code 1-36-2(b).

Following the appeal hearing, the Commission shall issue findings of fact, conclusions of law, and an order announcing its final determination. 905 Ind. Admin. Code 1-36-9. The Commission must send the findings of fact, conclusions of law, and the order to the applicant by certified or registered mail, and in the case of a denial, the Commission must inform the applicant that the Commission's decision may be subject to judicial review. *Id.* The applicant's written objections are due within 15 days of receipt of the findings of fact, conclusions of law, and the order. *Id.* While the Commission's administrative review proceedings are not subject to the Indiana Administrative Orders and Procedures Act, judicial review of the Commission's final determinations are still available under AOPA. Ind. Code § 4-21.5-2-6; *see also Honeycutt v. Ong*, 806 N.E.2d 52, 56–57 (Ind. Ct. App. 2004) (discussion how judicial review of a Commission action was not available to a plaintiff because she had not exhausted her administrative remedies with the Commission before filing her petition for judicial review).

II. The Court should not grant IFWS's motion for a preliminary injunction because it has not met the requirements for that extraordinary relief.

While a court may exercise the "very far-reaching power" of a preliminary injunction, such power should never "be indulged in except in a case clearly demanding it." *Roland Mach. Co. v. Dresser Indus., Inc.,* 749 F.2d 380, 389 (7th Cir. 1984) (internal quotations and citation omitted).

A court should consider several factors when a party seeks a preliminary injunction: the moving party must show a likelihood of success on the merits, no adequate remedy at law, and irreparable harm if the court does not grant the preliminary injunction. *Reid L. v. Ill. State Bd. of Educ.,* 289 F.3d 1009, 1020–21 (7th Cir. 2002). After considering these factors, a court should balance any irreparable harm that an injunction would cause to an opposing party, adjusting the calculus depending on the party's likelihood of success. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of America, Inc.,* 549 F.3d 1079, 1086 (7th Cir. 2008). A party with little likelihood of success must show more harm than would a party with a strong likelihood of a success. *Id.* This harm must be real and a court may only award relief "upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (*citing Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997)). The court should also consider the public interest, including the interests of any nonparties to the litigation. *Girl Scouts of Manitou Council, Inc.,* 549 F.3d at 1100.

A. IFWS has an adequate remedy at law.

IFWS claims that it has no adequate remedy at law and faces irreparable harm unless this Court enjoins Section 5.4(b). Because judicial review is available for permit denials, and because state courts may declare state statutes unconstitutional and unenforceable, IFWS has an adequate remedy at law that should preclude this Court from issuing a preliminary injunction.

A moving party must demonstrate that no adequate remedy at law exists absent a preliminary injunction. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046 (7th Cir. 2017). Federal and state courts have both recognized that judicial review itself is an adequate remedy at law. *Scales v. Hosp. House of Bedford*, 593 N.E.2d 1283, 1286 (Ind. Ct. App. 1992); *Wisconsin Cent. Ltd. v. Pub. Serv. Comm'n of Wisconsin*, 95 F.3d 1359, 1370 (7th Cir. 1996). While this Court distinguished *Scales* and *Wisconsin Cent. Ltd.* in *Schmitz v. Marion Cty. Bd. of Elections*, that was because those cases involved monetary damages whereas the plaintiffs in *Schmitz* sought "a very specific form of relief—to have Schmitz placed on the ballot as a candidate for Mayor of Indianapolis in November [2019]." *Schmitz v. Marion Cty. Bd. of Elections*, 2019 WL 4243196 No. 1:19-cv-03314 at *3 (S.D. Ind. Sept. 5, 2019).

Here, though, IFWS does not seek a very specific form of relief. IFWS seeks to enjoin the statute as unenforceable. IFWS could have pursued the administrative appeals process available following the permit denial and sought judicial review if the Commission affirmed the denial on appeal. Had IFWS sought judicial review, a

state court could have reviewed the challenged statute, and, in effect, have provided the same relief to IFWS as it seeks in moving for a preliminary injunction in this Court.[1]

Moreover, the Supreme Court has recognized the "desirability of giving the state court the first opportunity to consider a state statute or rule in light of federal constitutional arguments" as a "state court may give the statute a saving construction in response to those arguments." *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983). While *Tennessee Wine* foreclosed durational residency requirements for individuals and corporations, requiring all officers, directors, and capital stock owners to meet the durational residency requirement, Indiana Code section 7.1-3-21-5.4(b) is a percentage-ownership requirement distinguishable from the requirement in *Tennessee Wine* that is not necessarily foreclosed by *Tennessee Wine*. *See generally Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2483 (2019) (Gorsuch, J., dissenting) (noting that the Court in *Granholm* had upheld the "unquestionable legitimacy" of state laws requiring all alcohol sold within a state to be purchased from a licensed in-state wholesaler, distinguishing between producers and other levels of the distribution system). Had IFWS sought judicial review, a state court also could have had the opportunity to distinguish

[1] Notably, in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, the defendant trade association removed the case to federal court. 139 S. Ct. 2449, 2458 (2019). Consequently, any argument that the case would be more appropriately litigated through an administrative or state court review would have been waived.

percentage-ownership residency requirements and provide a "saving construction" in response to IFWS's arguments.

B. IFWS has not demonstrated irreparable harm.

In order to prevail on a motion for a preliminary injunction, IFWS must establish that the denial of such an injunction will result in irreparable harm. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "'Irreparable' in the injunction context means not rectifiable by the entry of a final judgment." *Walgreen Co. v. Sara Creek Prop. Co.*, 966 F.2d 273, 275 (7th Cir. 1992) (citations omitted). Related to the question of an adequate remedy at law, IFWS may not suffer from irreparable harm if it were merely to continue with the application review process established by Indiana law. While IFWS spends several pages discussing its alleged irreparable harm, it is only after nearly four pages of this discussion when it finally acknowledges that, "[o]f course, the parties to the Purchase Agreement and the Lease could mutually agree to extend the contingency dates, but that is never certain." (Dkt. 14 at 18). And, further, the whole argument about its supposed irreparable harm is premised on a delay "if this case continues through the normal course of *federal civil litigation*, including motions to dismiss, discovery, motions for summary judgment, trial, and appeal." (Dkt. 14 at 19, emphasis added). But IFWS says nothing about the administrative and state trial court review, which would not involve discovery, motions to dismiss, or trial. *See generally,* Indiana Code § 4-21.5-5 (providing the procedure for state court review of an agency action). Notably, this state court trial court proceeding may include review of whether the agency's action

was "contrary to constitutional right, power, privilege, or immunity." Indiana Code § 4-21.5-5-14.

The irreparable harm comes only from IFWS's choice of forum. If the administrative and state trial court were to run its course, the asserted "irreparable harm" could wholly disappear. Consequently, the Court should deny the request for a preliminary injunction.

C. IFWS is unlikely to succeed on the merits given the procedural posture of its permit application review.

1. IFWS's claim is not yet ripe.

Ripeness is largely an issue of timing. See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985); *Triple G Landfills, Inc. v. Fountain County Bd. of Comm'rs*, 977 F.2d 287, 288 (7th Cir. 1992). The basic rationale is "to avoid premature adjudication of cases when the issues posed are not fully formed, or *when the nature and extent of the statute's application are not certain*." *Triple G Landfills*, 977 F.2d at 288–89 (emphasis added); *see also Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–49 (1967) (explaining that ripeness doctrine prevents "courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also [protects] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties"), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Again, and also related to the procedural question of review of IFWS's application, there is no need for this Court to entangle itself in the disagreement that has yet been formalized or the effects of

the ATC's action been felt after the review of the ATC's decision has run its course.

2. While the Court does not need to get to the question of constitutionality, the statute serves important, non-protectionist functions.

As noted in the declaration by David Cook, the Chairman of the ATC, the percentage-ownership requirement and durational-residency requirements of Section 5.4(b) serve multiple purposes. Exhibit 1. For example, the residency requirements increases the likelihood that the license holders would be able to effectively curtail alcohol abuse and prevent underage drinking, and that tax revenue collection may be easier, if the majority of license holders are current Indiana residents who have established a presence in the state. In sum, the residency requirements provide better oversight of the State over liquor store operators. That being said, the defendants acknowledge that the Supreme Court held that Tennessee's residency requirements were not needed to enable such oversight, and thus these rationales provided were insufficient to overcome to challenge under the dormant Commerce Clause. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2475 (2019).

D. Public policy and the balance of equities favor the State.

A plaintiff "must show that the probability of success on the merits is sufficiently high—or the injury from the enforcement of the order sufficiently great—to warrant a conclusion that the balance of error costs tilts in favor of relief." *Ill. Bell Tel. Co. v. WorldCom Techs., Inc.*, 157 F.3d 500, 503 (7th Cir. 1998). When the party opposing the motion for preliminary injunction is a political branch of government, the restraint for issuing such an injunction is particularly

high due to public policy considerations, as "the court must consider that all judicial interference with a public program has the cost of diminishing the scope of democratic governance." *Id.* Indeed, "the government's interest is in large part presumed to be the public's interest." *United States v. Rural Elec. Convenience Coop. Co.*, 922 F.2d 429, 440 (7th Cir. 1991).

Here, IFWS asks this Court to strike down an Indiana law when it has a clear avenue for review of the ATC's decision. As noted above, the Supreme Court has recognized the "desirability of giving the state court the first opportunity to consider a state statute or rule in light of federal constitutional arguments" as a "state court may give the statute a saving construction in response to those arguments." *D.C. Court of Appeals*, 460 U.S. at 482 n.16. Indeed, the Supreme Court has "noted the competence of state courts to adjudicate federal constitutional claims." *Id.* The reasons for this preference is imminently defensible given the policy considerations and basic principles of federalism. Accordingly, the balance of harms here, when the supposed irreparable harm stems from IFWS's failure to continue with the administrative process provided under Indiana law, weighs in favor of the defendants, and thus in favor of denying the motion for a preliminary injunction.

* * *

For the foregoing reasons, the Court should deny the Motion for Preliminary Injunction.

Respectfully submitted,

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Date: April 10, 2020

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DECLARATION OF DAVID COOK

I, David Cook, am an adult competent to testify who has personal knowledge of the following and declare under the penalties of perjury that:

1. I am the Chairman of the Indiana Alcohol and Tobacco Commission.
2. In my capacity as Chairman, I participated in a hearing on March 3, 2020 regarding an application for a package store dealer's permit submitted by Indiana Fine Wine and Spirits, LLC ("IFWS").
3. During that hearing, the Commission voted 4-0 to deny IFWS's application, on the ground that IFWS's members do not satisfy the in-state residency requirement under Indiana Code section 7.1-3-21-5.4(b) ("Section 5.4(b)").
4. Section 5.4(b) prohibits the Commission from issuing a dealer's permit unless at least sixty percent (60%) of the LLC's members are persons who have been Indiana residents for five (5) years.

EXHIBIT 1

5. It is my understanding that the percentage-ownership requirement and durational-residency requirement of Section 5.4(b) serve multiple purposes. For example, these requirements increase the likelihood that the license holders (most of whom would be in-state) would be able to effectively curtail alcohol abuse and prevent underage drinking. The requirements also assist the State in its collection of tax revenue.

I AFFIRM UNDER THE PENALTY FOR PERJURY THAT THE FOREGOING STATEMENTS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Date: 4-8-20

David Cook, Chairman
Indiana Alcohol and Tobacco Commission

EXHIBIT 1