Holland & Hart

MEMORANDUM

TO: Arrow International, Inc.

FROM: Michael C. Geraghty; William R. Crowther

RE: Constitutionality of SB 170

DATE: April 14, 2025

Introduction

Recently, SB 170 has been introduced, which proposes amending AS 05.15.181 to prohibit a pull-tab manufacturer from distributing pull-tabs or owning a distributor of pull-tabs.[1] However, this proposed legislation is constitutionally infirm for two reasons: (1) it violates the equal protection and due process clauses of the Alaska and United States Constitutions, and (2) it threatens a regulatory taking of private property, which would require just compensation under the Alaska and United States Constitutions.

More broadly, it is unclear what valid public interest supports arbitrarily constricting the class of persons which can invest money in Alaska pull-tab distributors. The proposed amendments to AS 05.15.181 will generate no revenue and would have the immediate effect of forcing one competitor in the pull-tab business out of the marketplace, harming competition, increasing price, and decreasing quality of services for Alaskan consumers. Careful scrutiny of the purpose, effect, and consequences of SB 170's amendments to AS 05.15.181 demonstrate that this proposed legislation is constitutionally impermissible.

Arrow International, Inc. ("Arrow") is a family managed company headquartered in Cleveland, Ohio which has worked in the charitable gaming business since 1967. Arrow currently manufactures pull-tabs and has been legally selling its pull-tabs in Alaska for over 35 years. In 2023, Arrow acquired an Alaskan distributor of pull-tabs, Whaler Casino Supply ("Whaler"). Whaler has been in business since 1987, and its day-to-day operations are still run by the previous Alaskan owner along with multiple Alaskan employees. The effect of SB 170's amendments to AS 05.15.181 would be to take away Whaler's ability to distribute pull-tabs, as it is now owned by a manufacturer of pull-tabs. This would end its ability to do business after nearly 40 years in Alaska, destroying its hard-earned value.

Discussion

[1] The relevant sections of SB 170 are Sections 23 and 24 and can be found on pages 9-12 of the bill.

I. The proposed changes to AS 05.15.181(d) violate the equal protection and due process clauses of the Alaska and United States Constitutions by treating similarly situated persons differently and singling out individual persons without legitimate reason.

The equal protection clause of the Alaska Constitution is a "command to state and local governments to treat those who are similarly situated alike," and it "affords greater protection to individual rights than its federal counterpart."[2] For economic interests specifically, Alaska courts examine whether the classifications in the relevant statute "bear a fair and substantial relation to attaining legitimate government objectives."[3] Additionally, when a law "singles out one or a few for uniquely disfavored treatment," courts carefully scrutinize laws for legitimate government objectives to protect individual persons from illegitimate use of government power.[4]

A. There is no legitimate governmental objective behind the proposed legislation as required by equal protection.

To pass equal protection scrutiny, a law must have a legitimate governmental objective. If the purpose of SB 170's proposed changes to AS 05.15.181 is simply to force Arrow to divest its interest in Whaler to benefit local interests, that is plainly not a legitimate objective. Indeed "[h]andicapping nonresidents admitted to do business in a state . . . has never in itself been considered a valid reason for a classification,"[5] and "the underlying objective of economically assisting one class over another. . . . is illegitimate."[6]

SB 170's proposed changes to AS 05.15.181 do not identify any explicit governmental objective. These changes generate no revenue, do not reduce state expenses, and do not identify any alleged problem which the changes are intended to solve. The only apparent objective is to prohibit a manufacturer of pull-tabs from owning a distributor, which has been legal for decades in Alaska and is legal in nearly every other state. Arrow relied on the legality of this arrangement

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[2] *Knolmayer v. McCollum*, 520 P.3d 634, 656-57 (Alaska 2022). Unless otherwise specified, internal quotation marks and citations are omitted.

[3] *Id.* at 658.

[4] *See News America Pub., Inc. v. FCC*, 844 F.2d 800, 813 (D.C. Cir. 1988) ("Nowhere are the protections of the Equal Protection Clause more critical than when legislation singles out one or a few for uniquely disfavored treatment."); *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710, 712 (6th Cir. 1991) (discussing due process concerns in the context of impermissible targeting).

[5] *Lynden Transp. v. State*, 532 P.2d 700, 709 (Alaska 1975).

[6] *State by Departments of Transp. & Labor v. Enserch Alaska Constr.*, 787 P.2d 624, 634 (Alaska 1989). In addition to violating equal protection, deliberate discrimination in favor of local interests also violates the dormant commerce clause of the United States Constitution. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023); *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 509 (2019) (invalidating discriminatory residency requirements in the context of liquor stores).

when it purchased Whaler in 2023 and had no reason to expect that 19 months later, legislation would be introduced to render its investment worthless.[7]

The Supreme Court has consistently stressed that the law should protect "competition, not competitors."[8] The legislation in question might benefit competitors of Whaler but would not benefit competition itself. The Supreme Court has also said: "[v]ertical integration [i.e. a manufacturer purchasing a distributor] can create efficiencies that lower costs and encourage innovation that often results in better products and lower prices for consumers."[9] Arrow has owned Whaler for over a year and a half, and there have been no adverse effects on competition. By contrast, the direct effects of SB 170's proposed changes to AS 05.15.181 would be (1) to reduce potential investment in Alaskan pull-tab distributors by outlawing ownership by pull-tab manufacturers and (2) to prohibit Whaler from distributing pull-tabs, immediately decreasing competition among distributors in Alaska.

Because SB 170's proposed changes to AS 05.15.181 lack a legitimate governmental objective[10] and, instead, harm competition in the Alaska pull-tab industry, they violate the equal protection clauses of the Alaska and United States Constitutions.

B. The proposed legislation impermissibly singles out an individual competitor for negative treatment, violating both the equal protection and due process clauses.

Despite its longstanding legality, there is only one other small company structured as a manufacturer/distributor of pull-tabs in Alaska. Arrow believes that competing distributors have drafted this proposed legislation with the intent of targeting Whaler specifically, and with the goal of prohibiting Whaler from conducting future business as a distributor. However, this use of the legislative process in an attempt to force out a competitor violates both equal protection and due process.

Beginning with equal protection, "[n]owhere are the protections of the Equal Protection Clause more critical than when legislation singles out one or a few for uniquely disfavored treatment."[11] In *TikTok Inc. & ByteDance Ltd. v. Garland*, a recent case regarding the

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[7] Beyond Arrow's loss of a substantial investment, the 12 employees of Whaler would lose their jobs, health insurance, and retirement benefits.

[8] *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993).

[9] *United States v. Paramount Pictures, Inc.*, 2020 U.S. Dist. LEXIS 141427, at *17 (S.D.N.Y. Aug. 7, 2020) (citing *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)).

[10] Even if a purported legitimate objective for this proposed legislation could be identified, the law must "bear a fair and substantial relation to attaining" that objective. This requires a proper fit between the objective and the legislation. Arbitrarily outlawing manufacturer ownership of pull-tab distributors is unlikely to pass this scrutiny, given the many narrower mechanisms available for regulating the marketplace.

[11] *News America Pub., Inc. v. FCC*, 844 F.2d 800, 813 (D.C. Cir. 1988).

congressionally mandated divestiture of the social media app Tik Tok, the D.C. Circuit noted that this "singling out" is valid if there is an "appropriate governmental interest suitably furthered by the differential treatment at issue."[12]

The interest justifying the divestiture of Tik Tok was substantial—the harvesting of 170 million American users' data by a foreign adversary and its adverse effect on national security.[13] There is a stark contrast between the forced divestiture of TikTok, justified by compelling national security reasons, and the forced divestiture of Whaler here, with no apparent public interest justification. Thus, the proposed provision violates equal protection.

Moving to due process, in *Brookpark Entertainment, Inc. v. Taft*,[14] Ohio law allowed voters to revoke an establishment's liquor license by referendum under certain circumstances. The Sixth Circuit first determined that the license in question was a property interest protected by due process under the United States Constitution.[15] Then, the court held that the law violated due process by authorizing "capricious action," specifically by allowing constituents to "gang[] up to drive out of business a seller of liquor whom they disliked for reasons unrelated to any plausible public interest."[16] While in this case Whaler's competitors, and not voters, are apparently attempting to drive it out of business, the same underlying due process concerns are present.

II. The proposed legislation takes private property for public use, requiring just compensation to be paid from public funds.

Article I, section 18 of the Alaska Constitution specifies that "[p]rivate property shall not be taken or damaged for public use without just compensation." This protection is broader than its federal counterpart.[17] The proposed legislation would, in the name of the public interest, prohibit Whaler from continuing to do business after nearly 40 years in Alaska, destroying the value of the business and its assets.

Federal law supports requiring compensation for this total diminution in value. With regard to real property, the Supreme Court has specified that a person who "has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle" has suffered a taking which requires compensation.[18] The proposed legislation would leave Whaler's business economically idle, supporting compensation under Alaska's more protective clause.

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[12] *TikTok Inc. & ByteDance Ltd. v. Garland*, 122 F.4th 930, 966 (D.C. Cir. 2024).

[13] *Id.* at 942-44.

[14] 951 F.2d 710, 712 (6th Cir. 1991).

[15] *Id.* at 716.

[16] *Id.* at 717.

[17] *Brewer v. State*, 341 P.3d 1107, 1111 (Alaska 2014).

[18] *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

Alaska's takings clause test requires a case specific determination analyzing "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations" along with "[t]he legitimacy of the interest advanced by the regulation."[19] Here, the economic impact on Whaler could not be larger. Despite its long history in Alaska, it would be forced to shutter its doors if the proposed legislation is adopted. Significant reasonable investment expectations support a finding of a taking, as Arrow reasonably relied on existing laws when investing in Whaler. Finally, as discussed above, no legitimate governmental interests are advanced by this change. To the contrary, adoption of the provision sends a message to all companies considering investing in Alaska that their investment might not be safe from subsequent legislative action.

Under Alaska's takings clause jurisprudence, SB 170's proposed changes to AS 05.15.181 would constitute a taking, and public funds would need to be set aside to compensate Arrow and Whaler for the corresponding damage to their property interests.

Conclusion

As detailed above, enacting the proposed changes to AS 05.15.181(d) would violate Arrow and Whaler's equal protection and due process rights, and work a taking of their private property, requiring compensation. More basically, it is unclear what public interest is furthered by this arbitrary and restrictive use of government power, which will immediately reduce competition to the detriment of Alaskans by forcing one competitor out of the pull-tab marketplace.

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[19] *Anchorage v. Sandberg*, 861 P.2d 554, 557 (Alaska 1993) (cleaned up).