



ORIGINAL

2020 OK 5

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

THE INSTITUTE FOR RESPONSIBLE)
 ALCOHOL POLICY, SOUTHERN)
 GLAZER'S WINE AND SPIRITS OF)
 OKLAHOMA, LLLP, J.B. JARBOE II,)
 CENTRAL LIQUOR CO. L.P. d/b/a RNDC)
 OKLAHOMA, JUSTIN NAIFEH, E. & J.)
 GALLO WINERY, SUTTER HOME)
 WINERY INC., d/b/a TRINCHERO FAMILY)
 ESTATES, DIAGEO AMERICAS, INC.,)
 LUXCO, INC., RIBOLI FAMILY OF SAN)
 ANTONIO WINERY, INC., JENNIFER)
 BLACKBURN, d/b/a CELLAR WINE AND)
 SPIRITS OF NORMAN, and DALE)
 BLACKBURN d/b/a GRAND CRU WINE)
 AND SPIRITS SUPERSTORE,)

Plaintiffs/Appellees,)

v.)

STATE OF OKLAHOMA, ex rel.)
 ALCOHOLIC BEVERAGE LAWS)
 ENFORCEMENT COMMISSION, and)
 THE HONORABLE KEVIN STITT,)
 GOVERNOR, in his official capacity,)

Defendants/Appellants,)

and)

BRYAN HENDERSHOT, individually, and)
 d/b/a BOARDWALK DISTRIBUTION)
 COMPANY,)

Intervenor/Appellant.)

FILED
SUPREME COURT
STATE OF OKLAHOMA

JAN 22 2020

JOHN D. HADDEN
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Case No. 118,209

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ON APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY

The Honorable Thomas E. Prince, Trial Judge

¶0 Senate Bill 608 mandates that manufacturers of the top 25 brands of liquor and wine sell their product to all licensed wholesalers. Appellees, a group of liquor and wine wholesalers, manufacturers, retail liquor stores, and consumers, challenged Senate Bill 608 as unconstitutional, contending it was in conflict with Okla. Const. art. 28A, § 2(A)(2)'s discretion given to a liquor or wine manufacturer to determine what wholesaler sells its product. The district court agreed and ruled Senate Bill 608 unconstitutional. Appellants appealed, and this Court retained the appeal.

DISTRICT COURT'S JUDGMENT AFFIRMED.

Mithun Mansinghani, Solicitor General, and Zach West, Assistant Solicitor General, Office of the Attorney General, Oklahoma City, Oklahoma, for Defendants/Appellants.

Thomas G. Wolfe, Heather L. Hintz, Fred A. Leibrock, and Martin J. Lopez III, Phillips Murrah P.C., Oklahoma City, Oklahoma, for Intervenor/Appellant.

Robert G. McCampbell, Amelia A. Fogleman, and Travis V. Jett, GableGotwals, Oklahoma City, Oklahoma, for Plaintiffs/Appellees.

D. Kent Meyers, Crowe & Dunlevy, P.C., Oklahoma City, Oklahoma, for Plaintiffs/Appellees.

Winchester, J.

¶1 The Oklahoma Legislature passed Senate Bill 608 ("SB 608") which mandates that liquor and wine manufacturers of the 25 top-selling brands must sell their products to all licensed Oklahoma wholesalers. Appellees, The Institute for Responsible Alcohol Policy; Southern Glazer's Wine & Spirits of Oklahoma, LLLP;

J.B. Jarboe II; Central Liquor Co. L.P., d/b/a RNDC Oklahoma; Justin Naifeh; E. & J. Gallo Winery; Sutter Home Winery, Inc., d/b/a Trinchero Family Estates; Diageo Americas, Inc.; Luxco, Inc.; Riboli Family of San Antonio Winery, Inc.; Jennifer Blackburn, d/b/a Cellar Wine and Spirits of Norman; and Dale Blackburn, d/b/a Grand Cru Wine and Spirits Superstore (collectively "Distributors"),¹ challenged SB 608 as unconstitutional, arguing it conflicts with the recently passed Article 28A, § 2(A)(2) of the Oklahoma Constitution (State Question 792).

¶2 The issues before the Court are (1) whether SB 608 is in conflict with Article 28A, § 2(A)(2), and (2) whether SB 608 is a proper use of legislative authority under the anticompetitive provisions of the Oklahoma Constitution. For the reasons stated herein, we hold SB 608 is "clearly, palpably, and plainly inconsistent" with Article 28A, § 2(A)(2)'s discretion given to a liquor or wine manufacturer to determine what wholesaler sells its product. See *EOG Res. Mktg. v. Okla. State Bd. of Equalization*, 2008 OK 95, ¶ 13, 196 P.3d 511, 519. We further rule that SB 608 is not a proper use of legislative authority as Article 28A, § 2(A)(2) is not in conflict with the Oklahoma Constitution's anticompetitive provisions. The district court did not err by granting Distributors' Motion for Summary Judgment and ruling SB 608 unconstitutional.

¹ Appellees are a collection of wholesalers, their principal officers, liquor and wine manufacturers, two Oklahoma retail liquor stores, and consumers.

I. FACTS

¶3 Since the end of alcohol prohibition, Oklahoma has maintained strict control over the distribution of alcoholic beverages. See *State ex rel. Hart v. Parham*, 1966 OK 9, ¶ 11, 412 P.2d 142, 147. Beginning in 1984, Oklahoma regulated alcohol pursuant to Article 28 of the Oklahoma Constitution, which created Appellant Alcoholic Beverage Laws Enforcement Commission (“ABLE Commission”). The centerpiece of this regulation still in place today is Oklahoma’s three-tier system for alcohol distribution: alcohol manufacturers (first tier) can only sell to licensed Oklahoma wholesalers (second tier); licensed Oklahoma wholesalers (second tier) can only sell to licensed retailers (third tier); and licensed retailers (third tier) can only sell to consumers. This case involves the relationship between the first and second tiers under the recently passed Article 28A. Until recently, the top two tiers operated under a “forced sale clause” that required a manufacturer to sell its products to every licensed Oklahoma wholesaler. See *Central Liquor Co. v. Okla. Alcoholic Beverage Control Bd.*, 1982 OK 16, ¶ 4, 640 P.2d 1351, 1353 (discussing the forced sale clause). Now repealed Article 28 of the Oklahoma Constitution stated:

Provided, that any manufacturer . . . shall be required to sell such brands . . . to every licensed wholesale distributor who desires to purchase the same, on the same price basis and without discrimination

Okla. Const. art. 28, § 3(A) (repealed Oct. 1, 2018).

¶4 In 2016, the Oklahoma Legislature passed a joint resolution to place State Question 792 on the November 2016 ballot. State Question 792 repealed Article 28 of the Oklahoma Constitution, replacing it with Article 28A and fundamentally changed how Oklahoma regulates the sale and distribution of alcohol. The people of Oklahoma approved State Question 792 by a 65.62% vote,² and it went into

² See Official Results, Federal, State, Legislative and Judicial Races, General Election—November 8, 2016, Oklahoma State Election Board, http://ok.gov/elections/support/20161108_seb.html (last visited Nov. 13, 2019).

The ballot title for State Question 792 provided:

This measure repeals Article 28 of the Oklahoma Constitution and restructures the laws governing alcoholic beverages through a new Article 28A and other laws the Legislature will create if the measure passes.

The new Article 28A provides that with exceptions, a person or company can have an ownership interest in only one area of the alcoholic beverage business—manufacturing, wholesaling, or retailing. Some restrictions apply to the sales of manufacturers, brewers, winemakers, and wholesalers. Subject to limitations, the Legislature may authorize direct shipments to consumers of wine.

Retail locations like grocery stores may sell wine and beer. Liquor stores may sell products other than alcoholic beverages in limited amounts.

The Legislature must create licenses for retail locations, liquor stores, and places serving alcoholic beverages and may create other licenses. Certain licensees must meet residency requirements. Felons cannot be licensees.

The Legislature must designate days and hours when alcoholic beverages may be sold and may impose taxes on sales. Municipalities may levy an occupation tax. If authorized, a state lodge may sell individual alcoholic beverages for on-premises consumption but no other state involvement in the alcoholic beverage business is allowed.

With one exception, the measure will take effect October 1, 2018.

effect on October 1, 2018. The Legislature also passed companion legislation in Title 37A of the Oklahoma Statutes to create Oklahoma's new alcohol regulatory scheme. The key provision in Article 28A at issue here permits how a liquor or wine manufacturer can sell products to a licensed Oklahoma wholesaler:

A manufacturer . . . may sell such brands or kinds of alcoholic beverages to any licensed wholesaler who desires to purchase the same. Provided, if a manufacturer, except a brewer, elects to sell its products to multiple wholesalers, such sales shall be made on the same price basis and without discrimination to each wholesaler.

Okla. Const. art. 28A, § 2(A)(2).³

¶5 After passage of State Question 792, Oklahoma's two largest wholesalers, Central Liquor and Jarboe Sales Company, each sold 49% of their respective businesses to the two largest national alcohol distributors, Southern Glazer's Wine & Spirits and Republic National Distribution Co. As a result, these two wholesalers—now known as Appellees Southern Glazer's Wine and Spirits of Oklahoma, LLLP and Central Liquor Co. L.P., d/b/a RNDC Oklahoma—obtained

³ Article 28A, § 2(A)(4) provides the same direction to winemakers:

Winemakers either within or without this state may sell wine produced at their wineries to any licensed wholesaler who desires to purchase the wine; provided, that if a winemaker elects to sell the wine it produces to multiple wholesalers, then such sales shall be made on the same price basis and without discrimination to each wholesaler. In addition to its sales through one or more licensed wholesalers, a winemaker may be authorized to sell its wine as follows

exclusive distribution contracts with the majority of liquor and wine manufacturers, including distribution of the top 25 brands at issue here.⁴ The two largest wholesalers controlled the majority of all wholesale distribution in Oklahoma when Article 28A went into effect on October 1, 2018.

¶6 Intervenor/Appellant Bryan Hendershot, owner of Oklahoma's third-largest wholesaler, Boardwalk Distribution Company, and other wholesalers and liquor stores, advocated for a change to the statutory scheme. The Legislature took up what became SB 608:

Any wine or spirit product that constitutes a top brand, as defined in this section, shall be offered by the manufacturer for sale to every licensed wine and spirits wholesaler who desires to purchase the same on the same price basis and without discrimination or inducements.⁵

⁴ On July 15, 2019, the ABLE Commission published the top 25 brands of wine and liquor. Southern Glazer's Wine and Spirits of Oklahoma, LLLP is the exclusive distributor of fourteen of the top 25 brands. Central Liquor Co. L.P., d/b/a RNDC Oklahoma is the exclusive distributor of the other eleven top 25 brands.

⁵ SB 608 also sets out how the ABLE Commission determines what liquor or wine brand constitutes a "top brand":

"Top brand" shall mean those brands constituting the top twenty-five brands in total sales of spirits and of wine by all wholesalers during the past twelve-month period, according to the records of the ABLE Commission as revised by the ABLE Commission quarterly. In order to allow the ABLE Commission to determine the top twenty-five brands of spirits and of wine, all wholesalers must submit to the ABLE Commission every sixty (60) days a sworn affidavit listing their top thirty brands of spirits and of wine in sales for the previous sixty (60) days, excluding sales to wholesalers.

Id. The ABLE Commission's list of the top 25 brands of wine and liquor is as follows:

Barefoot Moscato	Barefoot Pink Moscato	Barton Vodka 80 Proof
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S.B. 608, 57th Leg., 1st Sess. (Okla. 2019) (codified as 37A O.S. Supp. 2019, § 3-116.4). The Legislature passed SB 608, and Governor Stitt signed the bill on May 19, 2019. *Id.*

II. PROCEDURAL HISTORY AND ARGUMENTS

¶7 Distributors previously requested this Court exercise its original jurisdiction and either issue a writ of prohibition against enforcement of SB 608 or declaratory relief that SB 608 is unconstitutional. This Court declined to exercise its concurrent jurisdiction and transferred the case to district court.

¶8 The parties moved for summary judgment in district court. Distributors claimed that SB 608 directly conflicts with Article 28A, § 2(A)(2), as SB 608 makes Article 28A, § 2(A)(2)'s discretion to select a single wholesaler a nullity. Had Article 28A allowed the Legislature's actions here, Distributors contended Article 28A would have said "shall sell," which the now-repealed Article 28 had required, not "may sell." Appellants, ABLE Commission, Governor Kevin Stitt, and Bryan

Beringer White Zinfandel	Burnetts Vodka	Crown Royal
Evan Williams Black 7 Years	Fireball Cinnamon Whiskey	Franzia Chardonnay
Franzia Chillable Red	Franzia Crisp White	Franzia Fruity Red Sangria
Franzia Merlot	Franzia Sunset Blush	Franzia White Zinfandel
Heaven Hill Vodka 80 Proof	Jack Daniels Whiskey	Jim Beam White 80 Proof
Kentucky Deluxe Blend	McCormick Vodka 80 Proof	Seagrams 7 Crown Blend
SKYY Vodka	Svedka Vodka 80 Proof	Titos Handmade Vodka
Tvarscki Vodka 100 Proof		

Hendershot, individually and d/b/a Boardwalk Distribution Center (collectively “the State”), filed a cross-motion for summary judgment and countered that Article 28A must be read in conjunction with the anticompetitive provisions of the Oklahoma Constitution, specifically Okla. Const. art. V, § 44 and § 51. The State further argued that Article 28A, § 2(A)(2)’s phrase *a manufacturer . . . may sell* does give manufacturers discretion to sell to one wholesaler, but that discretion must give way where the Legislature passes a law otherwise.

¶9 Judge Prince granted Distributors’ motion, ruling the clear and ordinary language of Article 28A, § 2(A)(2) identifies an intent by the voters to give discretion to liquor and wine manufacturers to decide to sell to only one wholesaler. The district court held the language of SB 608 requiring manufacturers to sell to all wholesalers is “clearly, palpably, and plainly inconsistent with Article 28A,” and therefore, unconstitutional. The State appealed. This Court retained the appeal.

III. STANDARD OF REVIEW

¶10 Summary judgment is properly granted when there are no disputed questions of material fact and the moving party is entitled to judgment as a matter of law. *S. Tulsa Citizens Coal., L.L.C. v. Ark. River Bridge Auth.*, 2008 OK 4, ¶ 10, 176 P.3d 1217, 1220. An appeal on summary judgment comes to this Court as a *de novo* review, as the matter presents only questions of law, not fact. *In re Estate of Bell-Levine*, 2012 OK 112, ¶ 5, 293 P.3d 964, 966; *Carmichael v. Beller*, 1996

OK 48, ¶ 2, 914 P.2d 1051, 1053. This Court assumes “plenary independent and non-deferential authority to reexamine a trial court’s legal rulings.” *Kluver v. Weatherford Hosp. Auth.*, 1993 OK 85, ¶ 14, 859 P.2d 1081, 1084.

IV. DISCUSSION

¶11 This Court is the final interpreter of Oklahoma’s laws, including the Oklahoma Constitution. See *Monson v. State ex rel. Okla. Corp. Comm’n*, 1983 OK 115, ¶ 7, 673 P.2d 839, 843. We are bound to follow the Oklahoma Constitution, and we cannot “circumvent it because of private notions of justice or because of personal inclinations.” *Gurney v. Ferguson*, 1941 OK 397, ¶ 12, 122 P.2d 1002, 1004 (quoting *Judd v. Bd. of Educ.*, 15 N.E. 2d 576, 584 (N.Y. 1938)). “In assessing the conformity of a challenged state statute to our fundamental law, we are guided by well-established principles. The Constitution is the bulwark to which all statutes must yield.” *Liddell v. Heavener*, 2008 OK 6, ¶ 16, 180 P.3d 1191, 1199.

¶12 The objective of construing the Oklahoma Constitution is to give effect to the framers’ intent, as well as the people adopting it. *Shaw v. Grumbine*, 1929 OK 116, ¶ 30, 278 P. 311, 315. When a challenge is limited to the Oklahoma Constitution, the Court looks first to its language, which if unambiguous, binds the Court. *Id.* ¶ 0, 278 P. at 311 (Syllabus by the Court No. 5). “Every provision of the Constitution and statutes of Oklahoma is presumed to have been intended for some useful

purpose and every provision should be given effect.” *Darnell v. Chrysler Corp.*, 1984 OK 57, ¶ 5, 687 P.2d 132, 134; *Cowart v. Piper Aircraft Corp.*, 1983 OK 66, ¶ 5, 665 P.2d 315, 317 (holding “each portion of the Constitution was intended to be operative and not surplus language”). The Court, therefore, construes constitutional provisions “as a consistent whole in harmony with common sense and reason.” *Cowart*, 1983 OK 66, ¶ 4, 665 P.2d at 317. We will uphold a duly enacted statute unless it is “clearly, palpably and plainly” inconsistent with the Constitution. *Lafalier v. Lead-Impacted Cmty. Relocation Assistance Trust*, 2010 OK 48, ¶ 15, 237 P.3d 181, 188.

¶13 In determining whether SB 608 is in conflict with the Oklahoma Constitution, the key question before the Court is whether Article 28A, § 2(A)(2) grants to liquor or wine manufacturers the discretion to select a single wholesaler free from legislative interference. A comparison of now-repealed Article 28, § 3(A), Article 28A, § 2(A)(2), and SB 608 is helpful for this discussion:

Okla. Const. art. 28, § 3(A) (repealed Oct. 1, 2018)	Okla. Const. art. 28A, § 2(A)(2)	S.B. 608, 57th Leg., 1st Sess. (Okla. 2019)
<p>Provided, that any manufacturer . . . shall be required to sell such brands . . . to every licensed wholesale distributor who desires to purchase the same, on the same price basis and without discrimination</p>	<p>A manufacturer . . . may sell such brands or kinds of alcoholic beverages to any licensed wholesaler who desires to purchase the same. Provided, if a manufacturer, except a brewer, elects to sell its products to multiple wholesalers, such sales shall be made on the same price basis and without discrimination to each wholesaler.</p>	<p>Any wine or spirit product that constitutes a top brand, as defined in this section, shall be offered by the manufacturer for sale to every licensed wine and spirits wholesaler who desires to purchase the same on the same price basis and without discrimination or inducements.</p>

¶14 This Court must interpret constitutional provisions in conformity with their ordinary significance in the English language—given their commonly accepted and nontechnical meaning. See *In re Initiative Petition No. 363, State Question No. 672*, 1996 OK 122, ¶ 33, 927 P.2d 558, 570. The clear and ordinary language of Article 28A, § 2(A)(2) allows a liquor or wine manufacturer to select *one or more than one* wholesaler to distribute its product. The second sentence of the section provides: “a manufacturer . . . **may sell** such brands . . . to any licensed wholesaler who desires to purchase the same.” *May* denotes that an action is permissive or

discretionary, and not mandatory. *Shea v. Shea*, 1975 OK 90, ¶ 10, 537 P.2d 417, 418. The third sentence of Article 28A, § 2(A)(2) further clarifies the second: "Provided, *if* a manufacturer . . . *elects* to sell its products to multiple wholesalers, such sales shall be made on the same price basis" By providing direction to manufacturers when they choose to sell to more than one wholesaler, Article 28A, § 2(A)(2) implies that a manufacturer can also select only one wholesaler. The third sentence is purely conditional based on a manufacturer's decision to *elect* to sell to more than one wholesaler and forbids price discrimination when a manufacturer elects to do so. We must conclude then that a manufacturer can elect to sell to only one wholesaler.

¶15 An opinion by the Office of the Attorney General also supports this conclusion:

Thus, whereas both Article 28 of the Oklahoma Constitution and Section 533 of the Old Act required a manufacturer to sell its products to every wholesaler wishing to purchase them, Article 28A and Section 3-116 of the New Act permit a manufacturer to choose to sell its products to any or every wholesaler who wishes to distribute its products. Indeed, Article 28A explicitly leaves to the manufacturer's discretion whether to sell to more than one wholesaler. OKLA. CONST. art 28A, § 2(A)(2) ("If a manufacturer, except a brewer, **elects** to sell its products to multiple wholesalers").

Question Submitted by: Harry "Trey" Kouri, III, Chairman, ABLE Commission, 2018
OK AG 6, ¶ 11. Legislation passed after State Question 792 made the same determination that a manufacturer may select one wholesaler to the exclusion of

all others. See 37A O.S. Supp. 2016, §§ 3-123(A)(1), 3-116 (repealed May 7, 2019).⁶

¶16 Constitutional construction requires the Court to garner the drafter's intent, as well as the people adopting it, from the plain language of the provision. *Darnell*, 1984 OK 57, ¶ 5, 687 P.2d at 134; *Shaw*, 1929 OK 116, ¶ 30, 278 P. at 315. The now repealed Article 28, § 3(A) further clarifies what the Legislature, through a vote of the people, granted to all manufacturers in Article 28A, § 2(A)(2)—the removal of the “forced sale clause” from *both* the Oklahoma Constitution and statutes and the ability to select a single wholesaler to the exclusion of all other licensed wholesalers.⁷ For the Court to construe Article 28A in a vacuum without reference to the repealed Article 28 would turn a blind eye to what the public intended.

¶17 In contrast, SB 608 states that manufacturers **shall** sell the top 25 brands to **every** licensed wholesaler. *Shall* is usually “given its common meaning of ‘must’ . . . implying a command or mandate.” *Sneed v. Sneed*, 1978 OK 138, ¶ 3, 585 P.2d

⁶ For example, the Legislature prohibited price discrimination to wholesalers only “when that manufacturer has not designated a single wine and spirits wholesaler.” *Id.* § 3-123(A)(1). Similarly, the Legislature provided the post and adjust price-posting system would not apply to a manufacturer that has a designated wholesaler to sell its products in the state. *Id.* § 3-116(D); § 3-116.1(A).

⁷ This Court has found that “[a]n amendment to a constitutional provision that has been judicially interpreted is presumed to have changed the existing law.” *Williams Nat. Gas Co. v. Perkins*, 1997 OK 72, ¶ 14 n.11, 952 P.2d 483, 489 n.11.

1363, 1364. From its plain language, SB 608 modifies the alcohol distribution scheme by mandating that all manufacturers of the top 25 brands of liquor and wine—as determined by the ABLE Commission each quarter—sell those products “to every licensed wine and spirits wholesaler who desires to purchase the same on the same price basis and without discrimination or inducements.” S.B. 608, 57th Leg., 1st Sess. (Okla. 2019) (codified as 37A O.S. Supp. 2019, § 3-116.4). SB 608 thus infringes on a manufacturer’s constitutionally granted discretion to select one wholesaler to the exclusion of all others, as it mandates that a manufacturer of a top 25 brand must sell to all wholesalers. We hold SB 608’s infringement of Article 28A, § 2(A)(2) is unconstitutional.

¶18 The second question before this court is whether SB 608 is a proper use of legislative authority under the anticompetitive provisions of the Oklahoma Constitution. The State contends that Article 28A, § 2(A)(2) must be read in conjunction with the Oklahoma Constitution’s provisions against anticompetitive markets, specifically Okla. Const. art. V, § 44⁸ and § 51.⁹ Taken to its logical

⁸ Okla. Const. art. V, § 44 provides:

The Legislature shall define what is an unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, and enact laws to punish persons engaged in any unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, or composing any such monopoly, trust, or combination.

⁹ Okla. Const. art. V, § 51 provides: “The Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State.”

conclusion, the State's argument that these constitutional provisions grant the Legislature broad powers to combat monopolies or anticompetitive markets confers to the Legislature broad power to overrule or amend another constitutional provision, here Article 28A. The State has pushed this argument too far. The entirety of the Oklahoma Constitution applies with equal force to statutes enacted pursuant to Okla. Const. art. V, § 44 and § 51. *Cf. Liddell*, 2008 OK 6, ¶ 18, 180 P.3d at 1200 (rejecting the argument that Okla. Const. art. X, § 8(A)(2) and § 22's grant of legislative power to define assessment classifications justified an unconstitutional statute). The Oklahoma Constitution prevails over a conflicting statute, and where a statute violates one constitutional provision, another constitutional provision cannot save it.

¶19 The passage of Article 28A also confines those anticompetitive constitutional provisions. *See, e.g., Naifeh v. State ex rel. Okla. Tax Comm'n*, 2017 OK 63, ¶ 14, 400 P.3d 759, 764 (examining other constitutional provisions to help define the constitutional provision at issue). Prior holdings of this Court instructed that if there is a conflict between a constitutional amendment and other, earlier passed, provisions of the Oklahoma Constitution, the more recent amendment prevails. *See E. Okla. Bldg. & Constr. Trades Council v. Pitts*, 2003 OK 113, ¶ 10, 82 P.3d 1008, 1012; *In re Initiative Petition No. 259*, 1957 OK 167, ¶ 23, 316 P.2d 139, 144; *Adams v. City of Hobart*, 1933 OK 646, ¶ 0, 27 P.2d 595, 595 (Syllabus

by the Court No. 2). Article 28A's change in the manufacturing-wholesaling distribution tier is the most recent constitutional change, and if there is a conflict, it controls over any other constitutional provision. *See id.*

¶20 We hold, however, that the plain language of Article 28A, § 2(A)(2) is not in conflict with the anticompetitive provisions of the Constitution. *See Okla. Const. art. V, § 44 & § 51.* Article 28A, § 2(A)(2)'s discretion allows liquor and wine manufacturers and wholesalers to have exclusive distributorships, and this Court has upheld exclusive distributorships as lawful. *Crown Paint Co. v. Bankston*, 1981 OK 104, ¶ 13, 640 P.2d 948, 951 (finding an agreement between a manufacturer and a distributor setting up an exclusive territory within which the distributor will have exclusive rights to sell does not in itself violate antitrust provisions); *Teleco, Inc. v. Ford Indus., Inc.*, 1978 OK 159, ¶ 9, 587 P.2d 1360, 1363 ("It is, however, well settled that it is not a per se violation of antitrust law for a manufacturer or supplier to agree with the distributor to give him an exclusive franchise or distributorship, even if this means cutting off another distributor."). We, therefore, hold that SB 608 is not a proper use of legislative authority under the anticompetitive provisions of the Oklahoma Constitution.¹⁰

¹⁰ The plain language of SB 608 further shows that the statute is not an operation of the Legislature's power to combat anticompetitive markets pursuant to Okla. Const. art. V, § 44. SB 608 does not define an unlawful restraint of trade nor does it set forth any punishment for those entities engaging in unlawful restraint of trade. *Id.* Further, SB 608 **only** deals with the top 25 brands of liquor and wine as determined by the ABLE Commission every quarter. To apply the

V. CONCLUSION

¶21 The Court must always presume that a law is constitutional unless “clearly, palpably, and plainly inconsistent with the Constitution.” *Lafalier*, 2010 OK 48, ¶ 15, 237 P.3d at 188. Here, SB 608 is clearly, palpably, and plainly inconsistent with Article 28A, § 2(A)(2)’s grant of discretion to a liquor or wine manufacturer to determine what wholesaler sells its product.

¶22 This Court must uphold the will of the people of Oklahoma who voted to adopt Article 28A of the Oklahoma Constitution and open the market between the alcohol manufacturing and wholesaling tier—allowing those actors within the tier to make decisions without interference in a force-sale system. Only an amendment to the Constitution can change what the people enshrined. We, therefore, affirm the district court’s holding SB 608 unconstitutional.

DISTRICT COURT’S JUDGMENT AFFIRMED.

Gurich, C.J., Darby, V.C.J., Winchester, Edmondson, JJ., and Reif, S.J., concur.

Kauger (by separate writing), Kane, JJ., Barnes, S.J. (by separate writing), and Goodman, S.J., dissent.

State’s argument beyond the top 25 brands specified in SB 608, the statute would allow for a restraint of trade on thousands of other brands of liquor and wine. If SB 608 was an anticompetitive measure, it would logically restrict anticompetition on **all** brands of liquor and wine.