In *Tennessee Wine and Spirits Retailers Association v. Thomas* [2] the Supreme Court held 7-2 that Tennessee’s law requiring alcohol retailers to live in the state for two years to receive a license is unconstitutional. The State and Local Legal Center (SLLC) filed an *amicus brief* [3] in this case arguing the law was constitutional.

Two constitutional provisions are at issue in this case. The dormant Commerce Clause prohibits state laws that unduly restrict interstate commerce. Both parties agree that if Tennessee’s durational-residency requirement applied to anyone wishing to sell anything other than alcohol it would violate the dormant Commerce Clause.

Section 2 of the Twenty-first Amendment prohibits the transportation or importation of alcohol into a state in violation of state law. Read literally this section would “prohibit the transportation or importation of alcoholic beverages in violation of *any* state law,” even if the state law violated another section of the constitution. But, according to Justice Alito, writing for the majority of the Court: “Although some Justices have argued that §2 shields all state alcohol regulation—including discriminatory laws—from any application of dormant Commerce Clause doctrine, the Court’s modern §2 precedents have repeatedly rejected that view.”

Tennessee Wine and Spirits Retailers Association argued based on *Granholm v. Heald* (2005), where the Court struck down discriminatory direct-shipment laws that favored in-state wineries over out-of-state competitors, that §2 limits discrimination against out-of-state alcohol products and producers not alcohol distributors. The Court disagreed with this interpretation of *Granholm* writing, “On the contrary, the Court stated that the Clause prohibits state discrimination against all ‘out-of-state economic interests,’ and noted that the direct-shipment laws in question ‘contradict[e]’ dormant Commerce Clause principles because they ‘deprive[d] citizens of their right to have access to the markets of other States on equal terms.’” The Court also opined that just because many durational-residency laws predate Prohibition or were adopted shortly after it does not make the laws constitutional.

The SLLC *amicus* brief argued “courts should review State regulation of alcohol with a heavy thumb on the scale in favor of upholding the regulation, striking it down only if there could be no rational basis on which the regulation serves a legitimate interest in regulating alcohol and instead could have no purpose other than discrimination against out-of-state economic interests. Under that standard, the Tennessee two-year residency requirement easily passes muster.”

The Supreme Court took an approach less generous to Tennessee’s law concluding: “The provision at issue here expressly discriminates against nonresidents and has at best a highly attenuated relationship to public health or safety.”

In its petition for *certiorari* [4] the Association states, “[a]t least twenty-one States impose some form of durational-residency requirement for liquor retailers or wholesalers. And many States impose other residency-based requirements on those entities.” States should review these laws to determine their constitutionality following the Court’s decision in this case.

Richard A. Simpson, Tara L. Ward, and Emily S. Hart of Wiley Rein wrote the SLLC brief which the following organizations joined: National Conference of State Legislatures [5], the National Association of Counties [6], the National League of Cities [7], the United States Conference of Mayors [8], the International City/County...
Management Association [9], and the International Municipal Lawyers Association [10].

By:
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