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# Should Granholm Extend to Retailers?

Supreme Court hears arguments challenging Tennessee's durational residency law for wine retailers

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**A U.S. SUPREME COURT** case argued on the 100th anniversary of the establishment of Prohibition may redefine how states regulate alcohol. In January 2019, the **Supreme Court** heard arguments in *Wine and Spirits Retailers Association v. Blair*, a case that may decide whether Tennessee's residency requirements for liquor stores are constitutional under the 21st Amendment, which gives states the right to regulate alcohol beverages.

The Jan. 16 case zeroed in on the state's ability to control liquor sales under the 21st Amendment without violating the dormant Commerce Clause, which prohibits discrimination against out-of-state businesses. Tennessee law requires applicants to be state residents for two years to be eligible for a liquor license. It also imposes a 10-year residency requirement to renew the license.

The **Tennessee Wine and Spirits Retailers Association**, a trade association that represents about 600 Tennessee liquor retailers, appealed a lower court ruling that had found the Tennessee durational residency requirement unconstitutional.

The case started in 2016 when **Total Wine & More**, a nationwide family-owned chain of liquor stores, and Utah residents **Doug** and **Mary Ketchum** applied for a liquor license to operate a store in Knoxville and Memphis, respectively. The Tennessee Wine and Spirits Retailers Association threatened to sue. The state went to court to settle the matter. Lower courts ruled the durational residency requirements unconstitutional. The stores opened.

In its decision, the U.S. Court of Appeals for the Sixth District cited *Granholm v. Heald*, the Supreme Court ruling that declared laws that discriminate against out-of-state wineries unconstitutional. That 2005 decision opened the door for wineries to ship wine directly to consumers living in other states.

Wine industry observers and others have wondered if *Tennessee Wine and Spirits Retailers Association v. Blair* will broaden the case and weigh in on whether retailers can ship wine to customers nationwide. Only 14 states allow retailers to ship wine directly to out-of-state consumers.

Eight Justices heard the case on Jan. 16. Associate Justice **Bader Ginsburg** was recovering from surgery and did not hear the arguments.

**Carter Phillips**, an attorney for Total Wine, argued for the respondents that the durational residency requirement is discriminatory.



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“There is no rational basis for the two-year ban that they’ve put in place here,” Phillips told the Justices. “The Tennessee Attorney General himself has twice looked at this ban and said it doesn’t remotely serve any purpose that’s designed under the 21st Amendment when we’re dealing with alcohol or public safety, or public health or anything else. It’s only designed to exclude us.”

Justice **Neil Gorsuch** asked Phillips whether the next case would be about the three-tier system being discriminatory because of the states’ physical presence requirement to operate in a state. “Why isn’t this just the camel’s nose under the tent?” he asked.

Phillips responded he was not challenging the three-tier system. “Well, if only because, under these circumstances, as the camel at least, or I guess I’m the nose of the camel, that’s not what I’m looking for.”

Undoing the three-tier principle would be “fundamentally at odds” with his client’s business model, Phillips said.

Gorsuch answered: “But isn’t the business model just to—to try and operate as the **Amazon** of—of liquor?”

Phillips responded his client operates on a more “brick-and-mortar model that says we’re perfectly comfortable operating within the sphere of regulation that the state imposes on every in-state operator. And all we are seeking to have is not to be discriminated against,” Phillips said.

**Shay Dvoretzky**, the attorney for the Tennessee retailers who took the case to the Supreme Court, said the respondents “concede a residency requirement.”

Dvoretzky added the state’s “durational residency requirement follows that.”

As Justices **Sonia Sotomayor**, **Samuel Alito**, **Stephen Breyer** and **Brett Kavanaugh** peppered him with questions, Dvoretzky argued that states under the 21st Amendment “enacted residency requirements, like Tennessee’s, to regulate the sale of alcohol within their territory.

“All along the way, this Court recognized the states’ power to do so as part of their virtually complete control over how to structure the liquor distribution system,” Dvoretzky said. Alcohol, under the 21st Amendment, was to be “treated differently for dormant Commerce Clause purposes.”

Durational residency requirements facilitate background checks, investigation and enforcement of the law, Dvoretzky said. Somebody who has been there “for a while,” he noted, “is more likely to have substantial assets that can be enforced—that can be seized, and is less likely to flee at the first sign of trouble.”

## Wine Industry Reactions

Wine industry lawyers have been following the case closely.

The duration residency requirement is a low-hanging fruit and is very vulnerable to being struck down, said **Tracy Genesen**, vice president and general counsel at **Wine Institute**. She stressed she was not taking a position on the case on behalf of Wine Institute.

Will the Supreme Court also rule on the physical presence requirements for wholesalers and retailers be in the state to do business? “I don’t think they’ll go that far,” Genesen noted.

A ruling that retailers do not have to be physically present to reach consumers across the country would “definitely change the world,” Genesen said. “But that’s not within the confines of what they’re supposed to be deciding on.”

Still, the Court may signal views beyond the contours of the case before it and include language in their decision that could forecast other cases.

The Supreme Court may give a strong signal that in-state physical presence requirements for retailers and wholesalers are inherently suspect, Genesen said. They could even say, given the right case, that they could find in-state presence requirements unconstitutional.

**Todd Friedman**, partner with **Stoel Rives LLP** in Portland, anticipates the court will strike down the 10-year residency requirement for renewals and possibly the two-year residency requirement for new licenses. “I don’t buy the argument, nor do I think the court will, that the 21st Amendment absolutely trumps the dormant commerce clause,” Friedman noted. That said, Friedman anticipates the ruling will be narrow rather than “expansive.”

“I think the most likely outcome is that the court says the [Tennessee] law and other similar, thinly veiled discriminatory laws against non-residents

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violate the Commerce Clause, perhaps without providing a test of what is and what isn't discriminatory," Friedman said. "I doubt that any ruling will reach the physical presence requirements as that does not appear to be necessary to decide this case."

**John Trinidad**, partner at **Dickenson Peatman & Fogarty** in Napa, anticipates the Court to likely issue a narrow decision. "Prior to oral arguments, many thought the Court could issue a decision that would open the door up to retailers shipping wine directly to consumers in other states—a Granholm for retailers. That, of course, would have a significant impact on the wine market in the U.S.

"After oral arguments, most observers think that the decision will result in a ripple, not a tsunami. The Court will likely issue a narrow decision focused only on the immediate issue at hand: whether Tennessee's residency requirement for retail licenses is protected by the 21st Amendment," Trinidad said.

"The questions from the Justices indicated significant skepticism about the residency requirement. Some noted that it amounted to nothing more than economic protectionism, and a number of the Justices seemed inclined to find that such naked protectionism is not protected by the 21st Amendment," Trinidad added.

However, the attorney for the respondents "focused like a laser on the issue at hand and did not bite when questioned about the potential that the case would open states up to out-of-state or online retailers shipping wine in-state," Trinidad added.

"My bet is that the Court will strike down the residency requirement, but the decision will not directly address out-of-state retailer wine shipping. I also think we may see a concurring opinion, suggesting that state restrictions on out-of-state retailer shipping are consistent with the powers granted to states under the 21st Amendment," Trinidad said.

The Justices heard the arguments in *Tennessee Wine and Spirits Retailers Association v. Blair* a few weeks after the United States Court of Appeals for the Seventh Circuit in November reversed a lower court's decision over the ability of retailers to ship alcohol to Illinois residents.

Illinois allows in-state wine shipments from retailers to consumers. However, it refuses wine shipments

from out-of-state retailers. The state does not even allow out-of-state companies to apply for a shipping license. In 2016, Indiana wine retailer **Lebamoff Enterprises Inc.** filed a lawsuit against the State of Illinois as it sought the right to ship wine to customers in Illinois.

Lebamoff, which operates a chain of wine retail stores, argued the Grand Prairie state discriminated against out-of-state retailers in violation of the Commerce Clause, which prohibits discrimination in interstate commerce. The state responded the rules fall within the 21st Amendment and are necessary to protect the health and well-being of its residents.

A judge on Jan. 17 ordered the Lebamoff case stayed until the U.S. Supreme Court rules in *Tennessee Wine and Spirits Association v. Blair*. **WBM**



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