



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2019-13

December 31, 2019

A. Keith Burt
Director and Secretary to the Commission
Alcoholic Beverage Law Enforcement (ABLE) Commission
3812 N. Santa Fe Ave., Suite 200
Oklahoma City, OK 73118

Dear Director Burt,

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

Does the U.S. Supreme Court decision in *Tennessee Wine and Spirits Retailers Association v. Thomas*, 139 S. Ct. 2449 (2019), render the residency requirements in Article 28A, Section 4(A) & (B) of the Oklahoma Constitution unenforceable pursuant to the federal Constitution?

I.
BACKGROUND

A. Federal and state regulation of interstate commerce.

Article I, Section 8 of the U.S. Constitution provides that “Congress shall have Power . . . [t]o regulate Commerce . . . among the several States.” U.S. CONST. art. I, § 8, cl. 3. Although the Commerce Clause “says nothing about the protection of interstate commerce in the absence of any action by Congress,” it has long been interpreted by the U.S. Supreme Court as including an implicit “negative” or “dormant” component that prohibits states from discriminating against or unduly burdening interstate commerce. *CDR Sys. Corp. v. Okla. Tax Comm’n*, 2014 OK 31, ¶ 11, 339 P.3d 848, 853 (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992), and *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997)). Put differently, this “‘negative’ aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988).

Historically speaking, this doctrine “reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of

Confederation.” *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (alteration in original) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979)).

B. State regulation of alcohol products.

In 1933, federal prohibition of alcohol ended with the passage of the Twenty-first Amendment to the U.S. Constitution. The Amendment also provided, however, that “transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation *of the laws thereof*, is hereby prohibited.” U.S. CONST. amend. XXI, § 2 (emphasis added). Thus, while federal prohibition was abolished, states were given broad leeway to continue prohibition, or to otherwise regulate the sale and import of alcohol products. This led to debate regarding the interaction between states’ authority to regulate alcohol and the “dormant” or “negative” aspect of the federal Commerce Clause. Put simply, did the dormant Commerce Clause apply with full force to state regulations implemented through specific authority granted by the Twenty-first Amendment?

That question is open no longer. In 2005, for example, the U.S. Supreme Court held that state statutes that “allow in-state wineries to sell wine directly to consumers in that State but . . . prohibit out-of-state wineries from doing so” violate the dormant Commerce Clause. *Granholm*, 544 U.S. at 466. The Court found it “evident that the object and design” of the statutes was “to grant in-state wineries a competitive advantage over wineries located beyond the States’ borders,” and held that such “discrimination is neither authorized nor permitted by the Twenty-first Amendment.” *Id.*

More recently, the U.S. Supreme Court granted certiorari in *Tennessee Wine and Spirits Retailers Association v. Thomas* to decide “[w]hether the Twenty-first Amendment empowers States, consistent with the dormant Commerce Clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities that have resided in-state for a specified time.” See Petition for a Writ of Certiorari, *Tennessee Wine*, 2018 WL 3533084 (July 20, 2018), certiorari granted 139 S.Ct. 52 (Sept. 27, 2018). This question stemmed from a Tennessee statute that required an applicant for a retail liquor store license be a resident of Tennessee for two years prior to applying. *Tennessee Wine*, 139 S.Ct. 2449, 2456-57 (2019).¹

On June 26, 2019, the U.S. Supreme Court struck down Tennessee’s two-year “durational residency” requirement as unconstitutional. *Tennessee Wine*, 139 S.Ct. 2449. As in *Granholm*, the Tennessee statute was not saved by the Twenty-first Amendment, which “cannot be given an interpretation that overrides all previously adopted constitutional provisions.” *Id.* at 2468. Indeed, the Court noted, it had already held in the past that alcohol regulations must comply with the Free Speech, Establishment, Equal Protection, and Due Process Clauses, among others, so the Commerce Clause would be no different. *Id.* at 2469. The aim of the Twenty-first Amendment, the Court insisted, “was not to give States a free hand to restrict the importation of alcohol for purely protectionist purposes.” *Id.* And the “predominant effect” of Tennessee’s durational-residency requirement, the Court held, was protectionism. *Id.* at 2476. While the Court considered numerous arguments to the contrary, including arguments supported by this office, *see supra* n.1, it ultimately found them to be “implausible” and unpersuasive. *Id.* at 2474-76.

¹ After the Court granted certiorari, a bipartisan coalition of 35 state attorneys general—including this office—filed a joint amicus brief arguing that the Tennessee statute was not protectionist and did not violate the dormant Commerce Clause. See Brief for Illinois, et al., *Tennessee Wine*, 2018 WL 6168781 (Nov. 20, 2018).

C. Residency requirements in Oklahoma for alcohol licenses.

Oklahomans did not repeal alcohol prohibition until 1959, when Article 27 was added to the Oklahoma Constitution to strictly regulate the sale of alcohol. *See Action Wholesale Liquors v. Okla. ABLE Comm'n*, 463 F.Supp.2d 1294, 1297 (W.D. Okla. 2006); *Adolph Coors Co. v. Okla. Alcoholic Beverage Control Bd.*, 1978 OK 119, ¶ 5, 584 P.2d 717, 719; *State ex rel. Hart v. Parham*, 1966 OK 9, ¶ 11-15, 412 P.2d 142, 147-48. Section 10 of Article 27 provided that retailer and wholesaler licenses could only be issued to those who had been Oklahoma residents “for at least ten (10) years immediately preceding the date of application for such license.” OKLA. CONST. art. XXVII, § 10 (repealed). When Oklahomans repealed Article 27 in 1984, it was replaced with Article 28, which established the Alcoholic Beverage Laws Enforcement (ABLE) Commission. *Action Wholesale Liquors*, 463 F. Supp. 2d at 1297. But Article 28 retained the same 10-year residency requirement for retailers and wholesalers. OKLA. CONST. art. XXVIII, § 10 (repealed).

Most recently, in 2016, Oklahomans repealed Article 28 and replaced it with Article 28A, effecting a broad-scale reform of the State’s regulation of beer, wine, and liquor. *See, e.g.*, 2018 OK AG 6, ¶¶ 1-2. Article 28A retained durational residency requirements for alcohol retail and wholesale licenses, although it cut the length of required residency in half.² Specifically, Section 4 of Article 28A provides that a “Retail Spirits License shall only be issued to a sole proprietor who has been a resident of this state for at least five (5) years immediately preceding the date of application for such license[.]” OKLA. CONST. art. 28A, § 4(A). Similarly, a “Wine and Spirits Wholesaler’s License shall only be issued to a sole proprietor who has been a resident of this state for at least five (5) years immediately preceding the date of application for such license[.]” *Id.* § 4(B). These restrictions also appear in statute. *See* 37A O.S.Supp.2019, § 2-146(A)(1).

II. DISCUSSION

Your question is what effect, if any, the *Tennessee Wine* decision has on the validity of the residency requirements found in Section 4 of Article 28A of our State Constitution. We believe the U.S. Supreme Court would now hold those requirements to be unconstitutional.

The most obvious provision affected by *Tennessee Wine* is the requirement in Article 28A, Section 4(A) that prospective retailers seeking a license be a “resident of this state for at least five (5) years immediately preceding” application. This requirement is plainly covered by *Tennessee Wine*—indeed, it is more onerous than Tennessee’s mere two-year requirement for retailers—and thus undeniably unconstitutional pursuant to *Tennessee Wine*.

But that does not answer the question of whether the holding in *Tennessee Wine* affects the residency requirement for wholesalers in Article 28A, Section 4(B). Nor does it answer whether the *Tennessee Wine* holding strikes down a residency requirement that does not have a durational aspect. That is to say, we read your question to also be asking whether the ABLE Commission could, consistent with *Tennessee Wine*, decline to enforce the durational aspect of both Section

² Although Article 28A does not define residency, “place of residence is generally regarded as the particular place in which the registrant is habitually located and intends to remain for an indefinite period.” 1997 OK AG 45, ¶ 11. *See also* *Box v. State Election Bd. of Okla.*, 1974 OK 104, ¶¶ 21-23, 526 P.2d 936, 940.

4(A) and 4(B), yet still require applicants for alcohol retailer and wholesaler licenses to be current Oklahoma residents? In our view, the inescapable conclusion from *Tennessee Wine* is that the U.S. Supreme Court would strike down *all* residency requirements in this context, including with regard to wholesalers. This is so for the following reasons:

First, the Court emphasized that, pursuant to the dormant Commerce Clause, “if a state law discriminates against . . . nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to advance a legitimate local purpose.” *Tennessee Wine*, 139 S. Ct. at 2461 (cleaned up). This places a heavy burden on any state defending laws like those in Tennessee and Oklahoma that openly favor residents for alcohol wholesaler and retailer licenses.

Second, the Supreme Court used expansive language in *Tennessee Wine*, especially when describing basic constitutional law principles surrounding the dormant Commerce Clause and alcohol regulation. The Court’s introduction, for example, stated that Section 2 of the Twenty-first Amendment “is not a license to impose all manner of protectionist restrictions on commerce in alcoholic beverages.” *Id.* at 2457. That is not a phrase limited to durational residency, explicitly or implicitly, nor is it limited to just retailers. Similarly, the Court “reiterate[d] that the Commerce Clause by its own force restricts state protectionism,” *id.* at 2461, and recalled that “we have invalidated state alcohol laws aimed at giving a competitive advantage to in-state businesses.” *Id.* at 2470. Again, all of these statements, and more,³ can be applied equally in the non-durational and non-retail context.

Perhaps most significantly, in rejecting the petitioners’ argument that the two-year residency requirement was needed for the State to evaluate an applicant’s fitness to sell alcohol, the Supreme Court wrote that “if the State desires to scrutinize its applicants thoroughly, as is its right, it can devise nondiscriminatory means short of saddling applicants with the *burden of residing in the State.*” *Id.* at 2475 (emphasis added) (quoting *Cooper v. McBeath*, 11 F.3d 547, 554 (5th Cir. 1994)) (cleaned up). This statement shows that the Supreme Court has not simply rejected the durational residency requirement, but residency as a prerequisite altogether. In other words, by employing such expansive language the Supreme Court signaled its unwillingness to uphold *any* residency requirement in this particular context.

Third, even where the Supreme Court used narrower qualified language like “durational” and “2-year,” the Court’s logic extends to non-durational residency requirements and those outside the retail context. The Court, for instance, held that “[b]ecause Tennessee’s 2-year residency requirement for retail license applicants *blatantly favors the State’s residents* and has *little relationship to public health and safety*, it is unconstitutional.” *Id.* at 2457 (emphasis added). It is undeniable that a *non*-durational residency requirement, for retailers *or* wholesalers, also

³ See also *Tennessee Wine*, 139 S. Ct. at 2468 (“[T]he Commerce Clause did not permit the States to impose protectionist measures clothed as police power regulations.”); *id.* at 2469 (“[P]rotectionism, we have stressed, is not . . . [a legitimate] interest.”); *id.* at 2470 (“[Section] 2 did not save the disputed tax [in *Bacchus Imports, Ltd. v. Dias*] because it clearly aimed to promote a local industry rather than to promote temperance or to carry out any other purpose of the Twenty-first Amendment.”) (cleaned up); *id.* at 2471 (The Commerce Clause “prohibits state discrimination against all out-of-state economic *interests.*” (emphasis in original) (quoting *Granholm*, 544 U.S. at 472) (cleaned up)); *id.* (“[W]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic *interests* over out-of-state *interests*, we have generally struck down the statute without further inquiry.” (emphasis in original) (quoting *Granholm*, 544 U.S. at 487)).

“blatantly favors the State’s residents.” So the only question for constitutionality is whether such a requirement relates more to “public health and safety” than a durational mandate.

However, the arguments for why a *durational* residency requirement promotes public health and safety are the same as those used to defend a *non-durational* residency requirement. Those arguments were rejected by the Supreme Court as “implausible on [their] face.” *Id.* at 2475. For example, the petitioners argued that the two-year requirement ensured that retailers were amenable to the process of state courts. The Court was not persuaded, given that there are less restrictive methods to achieve the same goal such as “requiring a nonresident to designate an agent to receive process or to consent to suit in the Tennessee courts.” *Id.* This same logic would apply to a non-durational residency requirement, for retailers and wholesalers. *See* Braden H. Boucek, *That’s Why I Hang My Hat in Tennessee: Alcohol and the Commerce Clause*, 2018-19 CATO SUP. CT. REV. 119, 148 (“For many alcohol-related laws, a state may find [mounting a defense] impossible[.]”).

Furthermore, in response to the argument that the durational residency requirement was critical to Tennessee’s three-tier alcohol regulation system—an argument that would surely be made in defense of any non-durational residency requirements, as well—the Supreme Court found that “[s]uch a requirement is *not* an essential feature of a three-tiered scheme.” *Tennessee Wine*, 139 S. Ct. at 2471 (emphasis added). The Court went on to point out that “[m]any such [three-tier] schemes [in different states] do not impose durational-residency requirements—or *indeed any residency requirements*—on individual or corporate liquor store owners.” *Id.* at 2471-72 (emphasis added). So the Court indicated, plainly, that its logic on this point applied to both durational and non-durational residency requirements.

Significantly, the Supreme Court also rejected the historical argument that “in-state presence and residency requirements . . . long predate Prohibition and were adopted by many States following ratification of the Twenty-first Amendment.” *Id.* at 2472. If longstanding historical practice is not enough to preserve durational residency requirements with respect to licensing retailers of alcohol products, it is unlikely to be persuasive for non-durational residency requirements, or in the context of alcohol wholesalers. Indeed, it is telling that the Court did not use the adjective “durational” at all when describing the petitioners’ historical argument in *Tennessee Wine*.⁴

Fourth, the Supreme Court indicated that while it often spoke in terms of *durational* residency requirements for *retailers*, such language was not a sign that *Tennessee Wine* should be interpreted narrowly. To be specific, the *Tennessee Wine* petitioners claimed that the Court’s 2005 decision in *Granholm*—the key Commerce Clause precedent—should be narrowly interpreted in line with its language and facts. And *Granholm* was distinguishable, the petitioners argued, because it “repeatedly spoke of discrimination against out-of-state *products and producers*” and did *not* discuss in-state retailers. *Id.* at 2471 (emphasis added). But the “obvious explanation,” the Court responded, was that its language was limited in *Granholm* because the Court was simply addressing the facts of that case. *Id.* Presumably, the Court would dismiss a similar argument about limiting the *Tennessee Wine* holding for the same reason. *See* Boucek, *supra*, at 140 (“The Court

⁴ It is also telling that the *Tennessee Wine* dissent never uses the words “durational” or “2-year.” Instead, the dissent assumes that the Supreme Court has indeed wiped out all residency requirements. *See Tennessee Wine*, 139 S. Ct. at 2476-84. And while the majority responds to several points made in the dissent, it never addresses or rebuts the dissent’s assumption that all residency requirements are indeed void.

also tore down the idea that *Granholm* was limited to producers and products, making its analysis applicable across the three tiers[.]”).

Fifth, the Court declined to give weight to authority that could have been used to distinguish retailers from wholesalers. In *Granholm*, for instance, the Supreme Court favorably quoted an earlier concurrence from Justice Scalia stating that the “Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed *in-state* wholesaler.” *Granholm*, 544 U.S. at 489 (emphasis added) (quoting *North Dakota v. United States*, 495 U.S. 423, 447 (1990) (Scalia, J., concurring in the judgment)). If a State can require a wholesaler to be “in-state,” it stands to reason that the State may also implement a non-durational residency requirement for wholesalers. But the dissent directly quoted this *Granholm* passage, *Tennessee Wine*, 139 S. Ct. at 2483, and it had no effect on the Court’s decision, so it seems unlikely that the Court would find it more persuasive in future cases.⁵

To summarize, in *Tennessee Wine* the U.S. Supreme Court stated it will apply intense scrutiny to state residency requirements in the context of alcohol regulation, it used expansive language and logic that strongly suggests its reasoning will apply to durational and non-durational residency requirements and to retailer and wholesaler licenses, it dismissed virtually all arguments that could be made in favor of residency requirements, and it made clear that its decision should not be interpreted narrowly.

⁵ Along these same lines, the dissent also pointed to a case in which the Supreme Court “unanimously upheld a South Carolina law permitting producers to transfer liquor to in-state wholesalers only through ‘resident representatives.’” *Tennessee Wine*, 139 S. Ct. at 2482 (emphasis added) (quoting *Heublein, Inc. v. South Carolina Tax Comm’n*, 409 U.S. 275, 277 (1972)). But again, the Court in *Tennessee Wine* ignored this citation to precedent, and we see no indication that this would somehow change in a different case. It is also notable that the original petition for certiorari—which the Supreme Court granted—listed both retailers *and* wholesalers in its question presented. See 2018 WL 3533084 (July 20, 2018), *certiorari granted* 139 S.Ct. 52. This further indicates that the Court did not intend for its analysis to be limited to just retailers.

It is, therefore, the official Opinion of the Attorney General that:

Pursuant to the holding of the United States Supreme Court in *Tennessee Wine and Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019), the residency requirements for obtaining a Retail Spirits License or a Wine and Spirits Wholesaler's License set forth in OKLA. CONST. art. 28A, § 4(A), (B) and in 37A O.S.Supp.2019, § 2-146 are likely to be found in violation of the Commerce Clause of U.S. CONST. art. I, § 8 and are therefore unenforceable.⁶



MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA



ZACH WEST
ASSISTANT SOLICITOR GENERAL



⁶ It has long been recognized that an Attorney General opinion finding an “act of the legislature is unconstitutional should be considered advisory only, and thus not binding until finally so determined by an action in the District Court of this state.” *State ex rel. York v. Turpen*, 1984 OK 26, ¶ 12, 681 P.2d 763, 767. There is no reason to believe that an Attorney General opinion finding a provision of the Oklahoma Constitution to be in likely conflict with the U.S. Constitution, as construed by the U.S. Supreme Court, should be treated any differently. Accordingly, this opinion should be deemed advisory only.