



On September 27, 2018, the United States Supreme Court agreed to hear the case, *Tennessee Wine and Spirits Retailers v. Clayton Byrd*, Executive Director of the Tennessee Alcoholic Beverage Commission (TWSRA v. Byrd). The direct question at hand is “Whether the 21st 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.”

Since the announcement that the Supreme Court would hear *TWSRA v. Byrd*, there has been much discussion of the broader issues the case presents to those whose businesses operate in the state-based alcohol regulatory structure created by the 21st Amendment, and who are invested in the beverage alcohol marketplace that has been created because of it. This includes on- and off-premise beverage retailers.

Should the Supreme Court uphold the 6th Circuit decision, their ruling could be narrow, sweeping or somewhere in between as it relates to the interplay of the “dormant” Commerce Clause and the 21st Amendment. A broad ruling against 21st Amendment authority could potentially make vulnerable and/or invite legitimate challenges to any state alcohol laws that are perceived to discriminate against out-of-state parties (e.g. retail direct-to-consumer shipping; license limitations; franchise laws and other laws that require physical presence.)

Some possible outcomes:

- The Court could reverse the 6th Circuit and affirm the strong authority of the 21st Amendment. Durational residency laws are legitimate. **(OK.)**
- The Court could rule that the “durational” part of the residency law is illegitimate, but that residency laws in general serve a valuable and lawful purpose. **(Not optimal, but OK.)**
- The Court could rule narrowly against residency, but “sever” that from the rest of the Tennessee alcohol code, reaffirming the unquestionably legitimate “three-tier system”. **(Not great for Tennessee retailers, but the system overall survives.)**
- The Court could rule broadly against the 21st Amendment (in favor of a more robust “dormant” Commerce Clause), essentially invalidating any state alcohol law that discriminates against the economic interests of out-of-state parties. This would eviscerate the 21st Amendment; delegitimize state alcohol regulatory systems; and invalidate most any state alcohol regulations that treat in-state and out-of-state interests differently. For example, a state law that limits the number of retail liquor licenses one can hold would be challenged as facially discriminatory, as likely would quota systems. A ruling of this nature would also allow for retail direct-to-consumer shipping. More generally, a sweeping, anti-21st Amendment opinion would create a chaotic national alcohol market where state authority – which has served us well as a nation since the end of Prohibition – would, in many ways, cease to exist. **(Not good at all.)**

ABL Action

The ABL Board voted unanimously to write an amicus curiae brief in support of TWSRA and appropriated funds from the ABL Legal Fund to hire an established Supreme Court attorney to effectively represent ABL and its members’ interests. ABL has entered an agreement with Scott Keller of Baker Botts to write ABL’s amicus curiae brief. Scott is Chair of Baker Botts’ Supreme Court and Constitutional Law Practice and has argued 11 cases in the U.S. Supreme Court. He served as the Solicitor General of Texas from 2015-2018; has served as U.S. Senator Ted Cruz’s chief counsel; and clerked for U.S. Supreme Court Justice Anthony Kennedy. Briefs are due on November 19, 2018.