

Forbes

U.S. Supreme Court To Decide If A Texas Law Interfering With Interstate Commerce Can Stand

September 25, 2020

Patrick Gleason

Many state restrictions on the sale of alcohol have been temporarily lifted by governors across the country since mid-March. There is an ongoing effort to make many of these deregulatory actions permanent. In addition to that, as soon as next year a controversial restriction on who can sell alcohol in the nation's second most populous state, Texas, could be overturned by United States Supreme Court. The Court is expected to announce later this fall whether it will take up the case against a Texas law that impedes inter-state commerce in the same manner as another state law that the Supreme Court struck down in 2019.

The United States Supreme Court issued a decision last year in *Tennessee Wine & Spirits Retailers Association v. Thomas*, striking down the Volunteer State's residency requirements for retail liquor licenses as unconstitutional, a violation of the U.S. Constitution's dormant commerce clause. The highest court in the land is now being asked to take up the case against the Texas law that, like the Tennessee law struck down last year, is being challenged as a violation of the dormant commerce clause.

The Texas law now facing legal challenge from Wal-Mart Stores, Inc. prohibits publicly traded companies from obtaining the retail permits needed to sell spirits, which is what the stricken Tennessee law also did. Yet Tennessee officials didn't even try to defend that provision of their law, believing it was so obviously unconstitutional. Tennessee officials instead sought to defend their law's residency requirements for obtaining alcohol permits, which was still overturned.

Though the contested Texas law impedes interstate commerce in the same manner as the unconstitutional Tennessee law, the U.S. Court of Appeals for the Fifth Circuit declined to invalidate it. As a result, Walmart is now petitioning the U.S. Supreme Court to take up the case.

"Texas bans publicly traded companies from obtaining the 'package store' permits (or 'P permits') required for retail liquor sales," writes Illya Shapiro, director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute, along with his colleagues Trevor Burrus and Jame Knight. "At the same time, the ban has a grandfather clause exempting companies that had a P permit before the law went into effect."

Shapiro & company explain how this carveout gives Texas-based companies a government-imposed advantage:

“As a result, the only public corporations with a P permit are Texas companies who had met the old, unconstitutional residency requirement. Even without the grandfather clause, however, the public corporation ban has served its intended protectionist purpose: 98% of retail liquor stores in Texas are owned by Texans.”

Walmart’s petition to the Supreme Court also points to the demonstrably protectionist effect had by the existing statute.

“Both the trade group that drafted the legislation and the senator who sponsored it openly acknowledged that it was designed to protect in-state retailers from out-of-state competition,” Walmart notes in its petition to the Supreme Court, pointing out the contested statute “has served its purpose well: Two-and-a-half decades after its enactment, fully 98% of liquor stores in Texas remain in the hands of Texans.”

In addition to Cato, amicus briefs in support of Walmart’s lawsuit have been filed by the U.S. Chamber of Commerce and the Retail Litigation Center. The Retail Litigation Center points out that if Tennessee’s residency requirement to obtain alcohol retail permits was so anti-competitive as to violate the dormant commerce clause, then the Texas law outright prohibiting public companies from obtaining alcohol permits must also be unconstitutional. In its brief, the Retail Litigation Center argues that the Fifth Circuit ruling “defies common sense because a total ban on public corporations is substantially more likely than not to be outright protectionist.”

The Retail Litigation Center’s brief to the Supreme Court explains why it’s in the consumer interest to strike down protectionist laws that thwart inter-state commerce and competition:

“The reasons for protecting robust interstate commerce associated with publicly held corporations are as evident today as they were to the Framers who established this policy in 1789,” notes the Center. “In the retail sector, advancements by public corporations have improved consumer welfare by enhancing the variety, quality, and price of products.”

Put another way, protectionist statutes and regulations, like the Texas law preventing publicly traded companies from obtaining alcohol retail permits, adversely affect the “variety, quality, and price of products” available to consumers.

On July 31, the deadline for the state of Texas to file a response to Walmart’s petition for writ of certiorari was extended from August 21 to October 20, 2020. The Supreme Court is expected to determine whether to grant this petition at a mid-November conference. If cert is granted, the case will likely be argued before the Court in March or April of 2021.

"Of the 7,000 to 8,000 cert petitions filed each term," explains SCOTUSblog, "the court grants certiorari and hears oral argument in only about 80," with the votes of four justices needed to grant cert. The Fifth Circuit's decision to uphold the Texas prohibition on publicly traded companies obtaining alcohol permits has major implications for inter-state commerce. It also appears to many to be inconsistent with the Supreme Court’s ruling in *Tennessee Wine & Spirits Retailers Association v. Thomas*. If at least four Supreme Court justices agree, a newly composed U.S. Supreme Court will have the final say on this matter come 2021.

