

No. 18-96

IN THE
Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

ZACKARY W. BLAIR, INTERIM DIRECTOR OF THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION; TENNESSEE FINE WINES & SPIRITS, LLC, DBA TOTAL WINE SPIRITS BEER & MORE; AND AFFLUERE INVESTMENTS, INC., DBA KIMBROUGH FINE WINE & SPIRITS,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**JOINT, UNOPPOSED MOTION OF RESPONDENTS AFFLUERE
INVESTMENTS, INC. AND TENNESSEE FINE WINES & SPIRITS, LLC
FOR DIVIDED ARGUMENT**

Pursuant to this Court’s Rule 28.4, Respondents Affluere Investments, Inc. (hereinafter “Affluere”) and Tennessee Fine Wines & Spirits, LLC (hereinafter “Total Wine”) respectfully move for divided argument in this case and propose that the undersigned counsel for Total Wine receive twenty minutes, and the undersigned counsel for Affluere receive ten minutes, of the total time allotted for respondents. Thus, granting this motion would not require the Court to enlarge the total amount of time for argument, which is set for January 16, 2019. Granting the motion would,

however, materially assist the Court by ensuring a full exploration of the alternative ground, set forth at pages 27-63 of Affluere’s brief, for affirming the judgment below. Petitioner Tennessee Wine and Spirits Retailers Association and nominal Respondent Zackary W. Blair, who supports the position of the Petitioner,¹ do not oppose this motion.

Petitioner has asked this Court to resolve whether the Twenty-first Amendment empowers Tennessee to impose durational residency requirements for retail liquor licenses. *See* Pet. i; Pet’r’s Br. 17. Specifically, Tennessee requires (1) that an individual applying for issuance or transfer of a license have resided in the state for at least two years immediately preceding the application and (2) that an individual applying to renew a license (which expires after one year) have resided in the state for at least ten consecutive years in the past. Tenn. Code Ann. § 57-3-204(b)(2)(A). For corporate applicants, a license may not be issued, transferred, or renewed unless every “officer, director [and] stockholder owning any capital stock in the corporation” satisfies the durational periods applicable to individuals. *Id.* § 57-3-204(b)(3)(A), (B), (D).

The respondents are equally, but in unique ways, impacted by these requirements. The sole officers, directors, and stockholders of Affluere—Doug and Mary Ketchum—are residents of Tennessee, but they have not resided there for ten consecutive years. Br. Affluere 2-3.² At their doctor’s urging, they moved to Tennessee

¹ Letter from Herbert Slatery III, Tenn. Att’y Gen., to Scott Harris, Clerk, S. Ct. (Nov. 13, 2018).

² Moreover, while the Ketchums have now been residents of Tennessee for more than

from Utah in 2016 after their 32-year-old daughter, who has cerebral palsy and quadriplegia, suffered a collapsed lung from the temperature inversion and air stagnation in the Salt Lake Valley. *See id.* at 2. The Ketchums settled on Tennessee after learning of an opportunity to purchase a wine and liquor store in Memphis. *Id.* Becoming business owners would afford them flexibility to care for their daughter, who requires full-time attention, while also providing for their family. *Id.*

The ownership of Total Wine, meanwhile, does not reside within Tennessee. *See Br.* Total Wine 10. The respondent company, which is a limited liability company organized under Tennessee law, and its affiliates operate 193 retail alcohol beverage businesses in 23 states throughout the country. *Id.* But the ultimate owners of Total Wine and its affiliates reside in Maryland. *Id.*

The distinct situations of the respondents bear directly on the nature of the injury each suffers as a result of Tennessee's durational residency requirements. While Total Wine's concern is primarily with the right of out-of-state residents to be free from discrimination in other states under the dormant Commerce Clause, *Granholm v. Heald*, 544 U.S. 460, 486-88 (2005), Affluere is also concerned with the right of newly-arrived residents of a state (e.g., Doug and Mary Ketchum) to be free from discrimination in their own State—a right protected by the Privileges or

two years, they had only resided there for nine months when Affluere's application for a license was granted pursuant to the district court's injunction below. *See Affluere Br.* 6, 28-29 n.8. Unless Affluere successfully defends that injunction in this Court—that is, unless it establishes that the two-year residency requirement is unconstitutional—it risks losing the license as unlawfully granted. *Id.*

Immunities Clause of the Fourteenth Amendment. *Saenz v. Roe*, 526 U.S. 489, 502-04 (1999); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80 (1873); *see also id.* at 112-13 (Bradley, J., dissenting); *id.* at 100-01 (Field, J., dissenting).

In asking whether the Twenty-first Amendment empowers states to impose durational residency requirements for retail liquor licenses, Petitioner recognizes, correctly, that the states would *not* have that power in the absence of the Twenty-first Amendment. That is true, and it is true for both Commerce Clause *and* Privileges or Immunities Clause reasons. This Court should have the benefit of argument on both grounds to fully appreciate the impact that durational residency requirements have on the ability of *all* Americans—out-of-state residents or in-state residents, owners of a national chain or owners of a mom-and-pop business—to compete equally in the marketplace. Indeed, this Court has granted divided argument between non-governmental parties where those parties presented distinct interests, perspectives, or grounds for disposing of the case.³

³ E.g., *Frank v. Gaos*, 139 S. Ct. 304 (2018) (mem.) (granting divided argument where respondents asserted distinct interests and perspectives on *cy pres* distributions); *McDonald v. City of Chicago*, 559 U.S. 902 (2010) (mem.) (granting divided argument where petitioners primarily invoked the Privileges or Immunities Clause and respondents-supporting-petitioners primarily invoked the Due Process Clause as grounds for applying the Second Amendment against the states); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 558 U.S. 1010 (2009) (mem.) (granting divided argument where a local union and its international parent provided distinct perspectives on an economic damages dispute).

For these reasons, Affluere and Total Wine jointly request that the Court divide argument time between them, with counsel for Total Wine receiving twenty minutes and counsel for Affluere receiving ten.⁴

Respectfully submitted,

/s/ Carter G. Phillips
Carter G. Phillips
Counsel of Record
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Total Wine

/s/Michael E. Bindas
Michael E. Bindas
Counsel of Record
INSTITUTE FOR JUSTICE
600 University Street,
Suite 1730
Seattle, WA 98101
(206) 957-1300
mbindas@ij.org

Counsel for Affluere

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⁴ Pursuant to Rule 29.6, Affluere and Total Wine refer to the earlier disclosure statements included in their respective merits briefs.