

**Testimony of Jeffrey Redfern, Attorney at the Institute for Justice  
In Support of HB2212**

**House Federal and State Affairs Committee**

**February 19, 2021**

Thank you for the opportunity to testify about state residency requirements, an issue that has received nationwide attention in the wake of the Supreme Court's decision in *Tennessee Wine and Spirits Retailers Association v. Thomas*, 18-96 (2019). My name is Jeffrey Redfern, and I'm an attorney at the Institute for Justice. I had the honor of representing Doug and Mary Ketchum before the Supreme Court in that case.

My clients, the Ketchums, had been residents of Salt Lake City, but the air pollution there had been devastating to the health of their daughter, who has cerebral palsy. On the advice of their doctor, they decided to relocate. They learned of an opportunity to purchase a historic liquor store in Nashville. They were aware that Tennessee at the time had a law on the books prohibiting anyone from owning a retail liquor store unless they had been a resident of the state for 10 years, but they also knew that it was not being enforced because the Tennessee Attorney General had issued opinions stating that the requirement was unconstitutional. When the Ketchums applied for their license, however, the retailers' trade association sued to block issuance of the license. The Institute for Justice represented the Ketchums in the Supreme Court, which held, in 2019, that Tennessee's durational residency requirement violated the dormant Commerce Clause.

As I am sure the committee is aware, the dormant Commerce Clause prevents states from discriminating against or burdening interstate commerce. That includes not just the movement of goods, but also services, labor, and capital. The Supreme Court in *Thomas* held that these non-discrimination principles apply with full force to the liquor market. That means that, for a discriminatory law to pass muster, it must be the only possible means of advancing a legitimate, non-protectionist objective. If there is a non-discriminatory alternative, then the discriminatory law is unconstitutional.

Kansas has its own residency requirements for liquor licenses, and under the Supreme Court's decision in *Thomas*, those requirements are also clearly unconstitutional. Attorney General Lynn agreed, in an opinion dated December 10,

2020. While General Lynn notes that it is *possible* that Kansas could come up with better justifications to defend its laws, she acknowledges that in light of the way that the Supreme Court soundly rejected a range of justifications offered by Tennessee, such an effort would almost certainly fail.

The same is true for residency requirements outside of the liquor context. Although the State of Kansas, if forced to litigate in defense of such requirements, would likely proffer different rationales depending on which requirement is at issue, it is implausible that any such requirements could survive the strict scrutiny that the Supreme Court applied in *Thomas*.

Because residency requirements are so clearly unconstitutional, one might ask why it is worth formally repealing them. After all, every state and the federal government has clearly unconstitutional laws still on the books, unenforced and long ignored. Aside from sending the message that the legislature takes its responsibility to follow the constitution seriously, there are potentially real consequences to repealing these requirements. There is no way of knowing how many people have considered trying to do business in Kansas, only to see that there is a residency requirement that stands in their way. If they do not have a lawyer on retainer—and hardly anyone does—they may have no idea that these requirements are no longer enforced. Taking these requirements off the books announces that Kansas is open for business.