

IN THE SUPREME COURT OF THE UNITED STATES

No. ____

WAL-MART STORES, INC., WAL-MART STORES TEXAS, L.L.C;
SAM'S EAST, INC.; QUALITY LICENSING CORPORATION

Applicants,

v.

TEXAS ALCOHOLIC BEVERAGE COMMISSION; KEVIN LILLY, PRESIDING OFFICER;
IDA CLEMENT STEEN; TEXAS PACKAGE STORES ASSOCIATION, INC.,

Respondents.

**APPLICATION TO THE HON. SAMUEL A. ALITO, JR.,
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

Pursuant to Supreme Court Rule 13(5), Wal-Mart Stores, Inc., Wal-Mart Stores Texas, L.L.C., Sam's East, Inc., and Quality Licensing Corporation (collectively, "Applicants") hereby move for an extension of time of 30 days, to and including May 6, 2020, for the filing of a petition for a writ of certiorari. Unless an extension is granted, the deadline for filing the petition will be April 6, 2020.

In support of this request, Applicants state as follows:

1. The U.S. Court of Appeals for the Fifth Circuit rendered its initial decision on August 15, 2019, issued a revised decision on December 9, 2019 (Exhibit 1), and denied rehearing en banc on January 7, 2020 (Exhibit 2). This Court has jurisdiction under 28 U.S.C. §1254(1).

2. This case concerns the constitutional status of state laws that discriminate against out-of-state businesses in practical effect. Texas Alcoholic Beverage Code §22.16 bars public corporations from obtaining a “package store permit” (also known as a “P permit”), which is necessary to lawfully sell “liquor, wine, and ale” at retail in Texas. Exhibit 1 at 2-3. “The statute defines a ‘public corporation’ as a corporation ‘whose shares ... are listed on a public stock exchange’ or ‘in which more than 35 persons hold an ownership interest.’” *Id.* at 3 (ellipsis in original) (quoting Tex. Alco. Bev. Code §22.16(b)).

3. Despite significant, real-world discriminatory effects, the Fifth Circuit upheld section 22.16 against dormant Commerce Clause attack on the ground that it is “facially neutral” between in-state and out-of-state corporations of the same form. *Id.* at 19. The court was clear about what its holding means: Under the decision below, “a statute can create an obvious and significant barrier against out-of-state economic actors” and yet evade the Commerce Clause as long as it facially distinguishes only between corporate forms. *Id.* at 14 n.11.

4. That conclusion cannot be reconciled with this Court’s case law. Just this past year, this Court made clear that a state statute with the “predominant effect” of “simply ... protect[ing]” in-state retailers “from out-of-state competition” is obviously unconstitutional. *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2476 (2019). The decision below provides states with a roadmap to circumvent *Tennessee Wine*. It also conflicts with the decisions of numerous other circuits that correctly recognize that state laws do not escape Commerce Clause

scrutiny simply because they distinguish on their faces only between business forms. *See, e.g., Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1 (1st Cir. 2010) (invalidating as “impermissibly discriminatory in effect” a Massachusetts law that was “neutral on its face” between “Massachusetts wineries” and out-of-state wineries, but that in fact “artificially limit[ed] the playing field in this market in a way that enables Massachusetts’s wineries to gain market share against their out-of-state competitors”); *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423 (6th Cir. 2008) (invalidating Kentucky laws that “are not facially discriminatory” on the ground that they “in practical effect” pose “an economic barrier that both benefits in-state wineries and burdens out-of-state wineries”). The decision below is also inconsistent with numerous additional circuit court decisions outside the specific context of liquor laws. *See, e.g., Cachia v. Islamorada*, 542 F.3d 839 (11th Cir. 2008); *Walgreen Co. v. Rullan*, 405 F.3d 50, 59-60 (1st Cir. 2005); *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 442-43 (6th Cir. 2000); *Gov’t Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992).

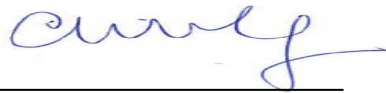
5. Applicants’ counsel, Erin E. Murphy, was not involved in the extensive proceedings below and was only recently retained. Applicants’ counsel requires additional time to review the record and proceedings in order to prepare and file a petition for certiorari that best presents the arguments for this Court’s review.

6. Applicants’ counsel also has substantial briefing and argument obligations between now and the current due date, including oral argument in

Duncan v. Becerra, No. 19-55376 (9th Cir.) (on April 2); a reply brief in *Thompson v. Hebdon*, No. 17-35019 (9th Cir.) (due March 31); and three petitions for certiorari.

WHEREFORE, for the foregoing reasons, Applicants request that an extension of time to and including May 6, 2020, be granted within which Applicants may file a petition for a writ of certiorari.

Respectfully submitted,



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