No. _____

In the
Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Just this past Term, this Court "reiterate[d] that the Commerce Clause by its own force restricts state protectionism" and that a state law violates that constitutional constraint if its "predominant effect … is simply to protect" in-state retailers "from out-of-state competition." *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2461, 2476 (2019). In this case, the district court found as a matter of fact that a Texas law that bans public corporations from obtaining a license to own a retail liquor store has exactly that effect. Indeed, as a direct result of that law, *98%* of liquor stores in Texas are wholly owned by Texans. Yet the Fifth Circuit nonetheless held that the law does not have a discriminatory effect on interstate commerce. It did not do so because it disputed the district court's factual findings about the law's real-world effects. It did so because, in its view, this Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), compels the conclusion that a facially neutral regulation based on "corporate form" does not have a discriminatory effect as *a matter of law*, even if it "create[s] an obvious and significant barrier against out-of-state economic actors." App.52 n.11.

The question presented is:

Whether a state law that has the predominant effect of protecting in-state retailers from out-of-state competition is immune from constitutional scrutiny just because it does not facially distinguish between in-state and out-of-state businesses of the same form.

PARTIES TO THE PROCEEDING

Petitioners, and plaintiffs-appellees below, are Wal-Mart Stores, Inc.; Wal-Mart Stores Texas, L.L.C.; Sam's East, Inc.; and Quality Licensing Corporation (collectively, "Walmart").

Respondents are defendants-appellants Texas Alcoholic Beverage Commission ("TABC"); Kevin Lilly, presiding officer; and Ida Clement Steen; as well as intervenor Texas Package Stores Association, Inc.

CORPORATE DISCLOSURE STATEMENT

Wal-Mart Stores, Inc., is a Delaware corporation that is publicly traded on the New York Stock Exchange, with its headquarters in Bentonville, Arkansas. Wal-Mart Stores, Inc., changed its legal name to Walmart Inc. effective February 1, 2018. Walmart Inc. has no parent corporation. Alice L. Walton, Jim C. Walton, the John T. Walton Estate Trust, S. Robson Walton, the Walton Family Holdings Trust, and Walton Enterprises, LLC, each has a greater than 10% beneficial ownership of stock issued by Walmart Inc.

Wal-Mart Stores Texas, L.L.C., is a Delaware limited liability company and a wholly owned, indirect subsidiary of Walmart Inc.

Sam's East, Inc., is an Arkansas corporation and a wholly owned, indirect subsidiary of Walmart Inc.

Quality Licensing Corporation is a Texas corporation and a wholly owned, indirect subsidiary of Wal-Mart Stores Texas, LLC.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the U.S. District Court for the Western District of Texas and the U.S. Court of Appeals for the Fifth Circuit:

- *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, No. 16-50041 (5th Cir.) (opinion reversing denial of TPSA's motion to intervene issued August 22, 2016);
- *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, No. 1:15-cv-134-RP (W.D. Tex.) (opinion invalidating public corporation ban issued March 20, 2018);
- *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, No. 18-50299 (5th Cir.) (initial opinion issued August 15, 2019; revised opinion issued December 9, 2019; en banc rehearing denied January 7, 2020).

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Just this past Term, this Court "reiterate[d] that the Commerce Clause by its own force restricts state protectionism." *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2461 (2019). The Court then proceeded to hold unconstitutional a durational-residency requirement that had the practical effect of ensuring "that no corporation whose stock is publicly traded may operate a liquor store in" Tennessee, describing the law as "unalloyed protectionism." *Id.* at 2457, 2474. Had Tennessee responded to that decision by replacing its *de facto* public corporation ban with a *de jure* one, it is not difficult to predict how this Court would have reacted. Indeed, the only thing that could further demonstrate the protectionist purpose and effect of such a blatant effort to circumvent this Court's decision would be if the new law also grandfathered in any public corporation that had managed to obtain a license while the durational-residency requirement was in place.

Swap Tennessee for Texas, and that hypothetical is this case. Before *Tennessee Wine*, the Fifth Circuit held that Texas's durational-residency requirement for obtaining a permit to operate a liquor store violated the Commerce Clause. Texas responded by enacting a law outright prohibiting public corporations—the only out-of-state entities with the capital and scale to compete successfully against existing Texas liquor store owners—from obtaining a permit to operate a liquor store. For good measure, the state grandfathered in any corporation that had obtained a permit while its durational-residency requirement

was in place. 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. And it 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.

Remarkably, the Fifth Circuit nonetheless held that Texas's public corporation ban does not have the effect of discriminating against out-of-state companies. The court did not do so because it denied that the law has the practical effect of foreclosing virtually all out-of-state entrants from operating liquor stores in Texas. It did so because, under Fifth Circuit law, that practical effect does not matter. According to the Fifth Circuit, even if a law "create[s] an obvious and significant barrier against out-of-state economic actors," it nonetheless does not qualify as discriminatory if it is a facially neutral regulation of corporate form. App.52 n.11. Thus, in the Fifth Circuit's view, because Texas's public corporation ban is a regulation of corporate form that applies to in-state and out-of-state corporations alike (setting aside its grandfather clause, which the Fifth Circuit ignored), it necessarily does not have a discriminatory effect. Lest there be any doubt about the categorical nature of the Fifth Circuit's rule, the court held that the law has no discriminatory effect without disturbing a factual finding that the law "bar[s] nearly all potential out-of-state entrants" into the Texas retail liquor market. App.108.

More remarkable still, the Fifth Circuit insists that *this Court's* precedent compels the conclusion

that facially neutral regulations of corporate form have no legally cognizable discriminatory effect. According to the Fifth Circuit, that was the holding of this Court in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). And while the Fifth Circuit acknowledged (with considerable understatement) the "tension" between that anomalous reading of *Exxon* and *Tennessee Wine*, it purported to reconcile that tension by brushing off the Court's discussion of the effects of Tennessee's laws as meaningless "dicta" and declaring this Court's entire body of dormant Commerce Clause jurisprudence "a mess." App.57 n.21.

The decision below is flatly inconsistent with this Court's precedent. That was evident even before *Tennessee Wine*, but is crystal clear after it. The decision below also squarely conflicts with decisions from other circuits, which not only have expressly rejected the same untenable reading of *Exxon* that the Fifth Circuit has embraced, but have repeatedly struck down as discriminatory in their effects regulations of corporate form, both in the alcohol context and elsewhere. More fundamentally, the Fifth Circuit's misguided jurisprudence provides states with a clear roadmap to circumvent the constitutional prohibition on artificial state-law barriers to interstate trade. And it creates a problem that only this Court can solve, for even this Court's recent decision declaring a law with *the exact same effect* "unalloyed protectionism" was not enough to persuade either the panel or the full court to consider changing its ways. This case thus presents an ideal opportunity for this Court to eliminate the Fifth Circuit's massive

exception to the constitutional constraint that *Tennessee Wine* just reinforced.

OPINIONS BELOW

The Fifth Circuit's revised opinion is reported at 945 F.3d 206 and reproduced at App.35-70; its initial opinion is reported at 935 F.3d 362 and reproduced at App.1-34. The district court's opinion is reported at 313 F. Supp. 3d 751 and reproduced at App.73-138.

JURISDICTION

The Fifth Circuit issued its revised opinion on December 9, 2019, and denied rehearing en banc on January 7, 2020. On March 19, 2020, the Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause, which is reproduced at App.139, provides in relevant part: "Congress shall have Power … [t]o regulate Commerce … among the several States." U.S. Const. art. I, §8, cl. 3.

Texas Alcoholic Beverage Code §22.16, which is reproduced at App.139-40, provides in relevant part: "A package store permit may not be owned or held by a public corporation" unless the corporation held one as of "April 28, 1995," at which time Texas restricted the permits to businesses owned by Texans.

STATEMENT OF THE CASE

A. Factual and Legal Background

1. "Texas has a clear history of discriminating against out-of-state alcohol retailers." App.44. When

Texas reauthorized alcohol sales in 1935, it imposed a three-year residency requirement on all types of permits to sell liquor. App.44. That facially discriminatory regime proved an "impenetrable barrier to entering the Texas liquor industry" from out of state. *Cooper v. McBeath*, 11 F.3d 547, 553 (5th Cir. 1994). Indeed, "every permit issued" between 1935 and 1994 went "to Texans." *Id.*

That longstanding protection for Texas's in-state liquor stores came under threat in 1991 when, in a decision presaging *Tennessee Wine*, a district court concluded that Texas's durational-residency requirement violated the Commerce Clause. *See Wilson v. McBeath*, 1991 WL 540043 (W.D. Tex. June 13, 1991), *aff'd sub nom.*, *Cooper*, 11 F.3d 547. Texas's incumbent liquor store owners saw that decision as a shot across the bow. Seeking to safeguard the protectionism they had enjoyed for nearly 60 years, they worked with allies in the state legislature to craft a way "to prevent … a merits decision in *Cooper*" while preserving as much of the state's discriminatory regime as they could. App.80.

To that end, while *Cooper* "was pending before the Fifth Circuit," the legislature enacted a law that eliminated the durational-residency requirement for the two specific types of permits sought in *Cooper* (namely, a mixed-beverage permit, which permits the sale of alcohol for on-premises consumption, and a beer-and-wine permit, which permits the sale of beer and wine for off-premises consumption). For all other permits, including the package store (or "P") permit, which is required to sell liquor at retail for off-premises consumption in Texas, the law reduced the

durational-residency requirement from three years to one year. App.44, 80.[1] But the legislature's efforts failed to prevent a decision on the merits. The Fifth Circuit rejected the parties' contrived mootness claim and affirmed across the board. In doing so, the court "us[ed] broad language that, fairly read, applied not only to" the two types of permits at issue, "but to all other retail permits as well." App.81; *see Cooper*, 11 F.3d at 554.

2. Although *Cooper* invalidated the "overt, in-state favoritism" of Texas's liquor laws, *id.* at 553, it by no means put an end to protectionism in Texas. Instead, it simply drove the Texas Package Store Association ("TPSA"), which represents the interests of "package stores that are majority-owned by Texans," and their allies in the state legislature to work harder to obscure that protectionism. Recognizing that it was only a matter of time before a court applied *Cooper*'s rationale to invalidate the durational-residency requirement for package store permits—and that such a ruling would "'disrupt what had been a very stable business climate' for" its members—TPSA "conceived, drafted and supported" a new law: a ban on ownership of a package store by a public corporation. App.81-82. The legislature enacted the public corporation ban in 1995, and it was codified as §22.16 of the Alcoholic Beverage Code. *See* SB 1063, 74R Sess. (Tex. 1995), https://bit.ly/2UjY7BR.

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[1] Retail liquor stores have long been known as "package stores" in much of the country. *See* Robert F. Moss, The Origins of the Package Store (June 4, 2016), https://bit.ly/3bkcU4Q.

Under §22.16(a), a package store permit "may not be owned or held by a public corporation, or by any entity which is directly or indirectly owned or controlled, in whole or in part, by a public corporation, or by any entity which would hold the package store permit for the benefit of a public corporation." Section 22.16(b) in turn defines "public corporation" to "mean[]: (1) any corporation or other legal entity whose shares or other evidence of ownership are listed on a public stock exchange; or (2) any corporation or other legal entity in which more than 35 persons hold an ownership interest in the entity."

That otherwise-flat ban contains one notable exception: A public corporation may hold a package store permit if it held or "ha[d] an application pending for" a package store permit "on April 28, 1995." Tex. Alco. Bev. Code §22.16(f). In other words, §22.16(f) grandfathers in any public corporation that obtained a package permit while the durational-residency requirement was in place, thereby incorporating the discriminatory effects of the preexisting regime of *de jure* discrimination.[2]

Section 22.16 has proven remarkably successful at accomplishing the legislature's objective of maintaining the *status quo ante*. On the one hand, because of its grandfather clause, the statute has "not affect[ed] *any* of the incumbent package store permittees, *all* of whom were Texans or were majority-owned by Texans." App.82 (emphases added). On the other hand, it has succeeded in "block[ing] the vast

[2] The public corporation ban also does "not apply to a package store located in a hotel." Tex. Alco. Bev. Code §22.16(d).

majority of potential out-of-state entrants from the Texas market." App.112. Indeed, a remarkable "[*n*]*inety-eight percent* of Texas package stores and Texas package store companies" today "are wholly owned by Texans." App.87 (emphasis added). It is not hard to see why. "Expanding into even a neighboring state requires capital and scale," and an out-of-state company with those kinds of resources will "almost always" be one with "diffuse ownership" (either as a publicly traded company or because it otherwise has at least 35 owners). App.88. As a result, "the out-of-state companies that are most likely to enter the Texas retail liquor market—those with the necessary capital and scale—are the same companies that are blocked by the public corporation ban." App.88-89.

TPSA has been quite candid about its intent to entrench its members' position. When the legislature considered an effort to repeal the public corporation ban in 2009, a TPSA representative testified that repeal "would open the door wide for out-of-state big box chains to enter the Texas market and use massive marketing power to displace Texas liquor stores." App.85. During another repeal effort in 2013, TPSA again testified that repeal would "open it up for [companies] outside Texas to come in and take the money right out of the state." App.85. And in its written lobbying materials, TPSA forthrightly acknowledged that "[t]he Alcoholic Beverage Code is biased in favor of Texas ownership of liquor stores," and touted the public corporation ban's success at keeping liquor stores in the hands of Texans. App.86.

B. The District Court's Decision

Walmart has thousands of stores in the United States, including hundreds in Texas. App.74. But because it is "listed on a public stock exchange," Tex. Alco. Bev. Code §22.16(b)(1), Walmart cannot sell liquor in or adjacent to its stores, as it does in other states. That is no accident. Walmart was an express target of the public corporation ban's protectionism. When asked to explain the ban's purpose on the Senate floor, its sponsor described the law as ensuring that "you can't have a package store inside a Walmart," and that "Walmart can't own the package store." App.84. And in lobbying against repeal of the ban, TPSA fear-mongered that "Wal-Mart wants to take profits that are now going to local Texas businesses, profits that are now staying in local Texas communities, and instead, Wal-Mart wants to send those profits to Bentonville, Arkansas!" App.86.

Once TPSA's efforts succeeded in extinguishing any hope of repealing the public corporation ban, Walmart brought this lawsuit challenging its constitutionality, arguing that the ban discriminates against and unduly burdens interstate commerce in violation of the Commerce Clause. App.74, 76.[3] TPSA intervened to defend the ban. App.74. After holding

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[3] Walmart also challenged Texas Alcoholic Beverage Code §22.04 (under which "the commission may not issue more than 15 original package store permits to a person in a calendar year"), §22.05 (under which family members may consolidate businesses into a single entity, and thus circumvent a separate, five-permit-per-person limit), and §22.06 (under which the holder of a wine-and-beer retailer's off-premise permit may not hold a package store permit). Those provisions are not at issue in this petition.

a weeklong bench trial, the district court concluded that the ban intentionally discriminates against out-of-state economic actors and unduly burdens interstate commerce. App.74, 95-96.

The court began by cataloguing Texas's long and "undeniable 'history of discrimination.'" App.97; *see supra*. It explained how the "'specific sequence of events leading up to'" the ban's passage left no doubt about its "discriminatory purpose." App.98 (quoting *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007)); *see also*, *e.g.*, App.45 (Texas lawmakers were "aware that, but for the [*Cooper*] decision, the TPSA would not have suggested and supported the public corporation ban."). It recounted how the ban's sponsor openly acknowledged on the Senate floor that—consistent with the facially discriminatory regime it replaced—the ban was intended to ensure that only "somebody from Texas" could get a P permit. App.84-85. And it highlighted testimony from "TPSA's lawyer and lobbyist … that the purpose of the public corporation ban was to preserve a favorable 'business climate' for TPSA's members"—*i.e.*, Texas's incumbent, Texan-owned liquor stores. App.83.

The district court also found that the ban had accomplished its objective. It explained how the ban ensures that no out-of-state actor with the necessary "capital and scale" to serve the Texas market will be eligible for a P permit. App.88. It observed that this has in fact proven true, as TABC admits that "[n]inety-eight percent of Texas package stores and Texas package store companies are wholly owned by

Texans." App.87.[4] And it detailed how out-of-state ownership is much more prevalent in the segments of the Texas alcohol industry that are *not* off-limits to public corporations. *See, e.g.*, App.87-88 (while "[t]he ten largest package store chains in Texas's five most populous [metropolitan areas] are all Texas-owned, with a single exception in Dallas … the ten largest beer-and-wine retailers in these same [areas] are evenly split between Texas retailers and out-of-state retailers"). In short, the court concluded, §22.16 "bar[s] nearly all potential out-of-state entrants." App.108.

Notwithstanding those findings, the court concluded that "controlling" Fifth Circuit precedent "preclude[d]" it from "finding" that §22.16 has a "discriminatory effect," because "the public corporation ban nominally treats similarly situated in-state and out-of-state companies equally." App.95, 108. But the court invalidated the law on the grounds that it intentionally discriminates against out-of-state actors and that its burdens on interstate commerce clearly exceed its local benefits under the test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

C. The Fifth Circuit's Decision

The Fifth Circuit affirmed in part, reversed in part, and vacated and remanded in part. Remarkably, while the court disturbed none of the district court's

[4] Most of the remaining 2% results from one out-of-state family-owned business, Fine Wines & Spirits of North Texas, LLC. App.87. Of the 28 other largest businesses likely to seek entry into the Texas market, all 28 would be blocked by the public corporation ban. App.28.

factual findings confirming that the ban operates to "bar nearly all potential out-of-state entrants," App.108, the only part of the district court's opinion that it affirmed was the conclusion that the law does *not* have a discriminatory effect. Indeed, according to the Fifth Circuit, because "Section 22.16 is a facially neutral statute that bans all public corporations from obtaining P permits irrespective of domicile," App.42, not only does it have no legally cognizable discriminatory *effect*, but it does not even *burden* interstate commerce.

The court reached those startling conclusions by applying a line of Fifth Circuit precedent that holds that "a facially neutral statute that bans particular companies from a retail market" based on their corporate form does not have a discriminatory effect because it does not provide a "competitive advantage to in-state interests vis-à-vis *similarly situated* out-of-state interests." App.53-55 (quoting *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 501 (5th Cir. 2001)). In the Fifth Circuit's view, that conclusion is compelled by this Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). Accordingly, while the court did not dispute that the practical effect of the public corporation ban is to "protect[] package stores owned by Texas residents from out-of-state market entrants," it nonetheless concluded that the "ban does not have a discriminatory effect on interstate commerce" because it "treats in-state and out-of-state public corporations the same." App.56-57, 62.

Taking that (il)logic one step further, the Fifth Circuit also concluded that the district court erred by

finding that the ban *burdens* interstate commerce under a *Pike* analysis. According to the Fifth Circuit, the district court "overlook[ed]" the same line of "controlling precedent," under which "[s]tate laws are upheld when 'similarly situated in-state and out-of-state companies are treated identically,'" and that is necessarily the case with any regulation of corporate form. App.62-63 (quoting *Allstate*, 495 F.3d at 163).

The court acknowledged that this line of Fifth Circuit precedent is in "tension" with this Court's "recent opinion in *Tennessee Wine*," which repeatedly focused on the "practical effect" of the provisions it struck down. App.57 n.21. But instead of following this Court's careful analysis in *Tennessee Wine*, the Fifth Circuit dismissed that analysis as irrelevant "dicta" and declared that the entirety of this Court's "'jurisprudence in the area of the dormant Commerce Clause is, quite simply, a mess.'" App.58 n.21 (quoting *Churchill Downs, Inc. v. Trout*, 589 F. App'x 233, 235 (5th Cir. 2014)). The court thus granted TABC judgment as a matter of law on Walmart's discriminatory effects and *Pike* balancing claims. As for the problem that the public corporation ban is actually *not* facially neutral—since it grandfathers in anyone who obtained a license under the durational-residency-requirement regime—the court never mentioned it anywhere in its effects or *Pike* analysis.

Finally, the Fifth Circuit vacated and remanded on the discriminatory purpose claim, once again finding that the district court gave too little consideration to the fact that the ban is facially neutral. The court readily agreed that "Texas has a clear history of discriminating against out-of-state

alcohol retailers," App.44, and it did not disturb any of the district court's factual findings as to the motivations behind or practical effects of the ban. Instead, it faulted the district court for treating those effects as evidence of discrimination, and instead declared that "[t]he ban's effect on *all* public corporations provides strong evidence that the Legislature did *not* purposefully discriminate against out-of-state corporations." App.51-52 (second emphasis added).[5] The court acknowledged that, by that logic, "a statute can create an obvious and significant barrier against out-of-state economic actors and, nevertheless, not evidence a discriminatory purpose," so long as the legislature employs "[g]ood drafting." App.52 n.11. But, once again, it deemed that conclusion compelled by *Exxon* and the Fifth Circuit's *Ford*/*Allstate* line of precedent.

REASONS FOR GRANTING THE PETITION

The decision below marks the nadir of a long-running line of Fifth Circuit precedent that is antithetical to the Constitution and this Court's cases enforcing it. Texas Alcoholic Beverage Code §22.16 is the definition of "local legislation that discriminates in favor of local interests." *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994). The law was enacted for the express purpose of protecting Texan-owned liquor stores from out-of-state competition, and

[5] The court also faulted the district court for according weight to the "motivations of the TPSA"—which paid the lobbyist who "drafted the corporation ban" and lobbied for its enactment—insisting that they shed no light on whether "the Texas *legislature* enacted the public corporation ban with the same protectionist motivations." App.45.

it has been remarkably successful at doing so: Twenty-five years after its enactment, a whopping 98% of Texas retail liquor stores remain owned by Texans. That is no surprise, for the law expressly incorporates by reference the overtly discriminatory regime that it replaced. In short, §22.16 operates to block anyone in a position to compete with Texans in the retail liquor market from doing so.

Nonetheless, the Fifth Circuit deemed itself bound by a decision of this Court to ignore §22.16's undisputed real-world effects. According to the Fifth Circuit, because the law is a "facially neutral" regulation of "corporate form," it necessarily does not have a discriminatory effect, even though it operates to bar nearly all out-of-state competition. That form-over-substance approach flies in the face of this Court's cases and conflicts with decisions from other circuits that have squarely rejected the reasoning the Fifth Circuit embraced. It also provides states with a clear roadmap to circumvent this Court's decision in *Tennessee Wine*, which left no doubt that the Commerce Clause constrains states' ability to impede interstate commerce. This Court should grant certiorari and bring the Fifth Circuit's outlier jurisprudence in line with the decisions of this Court and of other courts that faithfully follow them.

I. The Decision Below Is Fundamentally Irreconcilable With This Court's Caselaw.

1. Just this past Term, this Court "reiterate[d] that the Commerce Clause by its own force restricts state protectionism." *Tennessee Wine*, 139 S. Ct. at 2461. The Court found that principle "deeply rooted in our case law" and in history, explaining that

"removing state trade barriers was a principal reason for the adoption of the Constitution." *Id.* at 2460. When it turned to applying that principle to the state laws before it, the Court focused not just on the facial distinctions between in-state and out-of-state actors that Tennessee's durational-residency requirements drew, but on whether their "purpose and effect" was "protectionism." *Id.* at 2474. And in invalidating Tennessee's highly restrictive corporate durational-residency requirement, which operated to ensure "that no corporation whose stock is publicly traded may operate a liquor store in" Tennessee, the Court had little trouble concluding that its "predominant effect" was "simply to protect [in-state retailers] from out-of-state competition." *Id.* at 2457, 2474, 2476.

There is no denying that the Texas law at issue here explicitly creates the same protectionist effect that Tennessee's law implicitly created. The law is not just a *de facto* ban on ownership of liquor stores in Texas by any "corporation whose stock is publicly traded," *id.* at 2457, 2474; it is a *de jure* one. *See* Tex. Alco. Bev. Code §22.16. The law grandfathers in any corporation that obtained a package store permit before the law passed—*i.e.*, when Texas had a durational-residency requirement in place. *See id.* §22.16(f). The law thus not only is a *de jure* public corporation ban, but grandfathers in the *de jure* regime of discrimination that preceded it. And as the icing on the cake, the law was passed in direct response to a decision invalidating under the Commerce Clause the very durational-residency requirement that it grandfathers in. App.81-82.

If Tennessee responded to this Court's decision in *Tennessee Wine* by repealing its durational-residency requirement but replacing it with a flat ban on public corporations owning liquor stores, that law undoubtedly would meet the same fate as its predecessor—with or without a grandfather clause protecting any Tennessee corporation that managed to obtain a license under the invalidated, facially discriminatory regime. After all, the Commerce Clause inquiry turns on "the actual purpose and effect of a challenged law," *Tennessee Wine*, 139 S. Ct. at 2473, and the purpose and effect of such a law would be the same as its predecessor's: to "protect [in-state retailers] from out-of-state competition" by ensuring "that no corporation whose stock is publicly traded may operate a liquor store in" Tennessee. *Id.* at 2457, 2474, 2476. Accordingly, as easy as this case should have been before *Tennessee Wine*, it should have been open and shut after it.

2. Remarkably, the Fifth Circuit instead concluded that §22.16—which has the exact same effect as the Tennessee law that this Court just struck down as "unalloyed protectionism," *id.* at 2474—"does not have a discriminatory effect on interstate commerce." App.57. The court did not reach that conclusion based on some unusual set of facts that rendered the same law less discriminatory in Texas. Instead, according to the Fifth Circuit, because "the public corporation ban treats in-state and out-of-state public corporations the same," it *necessarily* does not have any legally cognizable discriminatory effect. App.56-57. In other words, according to the Fifth Circuit, because the Texas law is not *facially* discriminatory, it cannot be discriminatory in its

effects either—even if it "create[s] an obvious and significant barrier against out-of-state economic actors." App.52 n.11. Even more remarkable still, the Fifth Circuit insisted that this nonsensical result is compelled by this Court's precedent.

That reasoning flouts decades of this Court's caselaw. This Court has long held that the Commerce Clause "prohibits discrimination against interstate commerce, *whatever its form or method*." *S.C. Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 185-86 (1938) (emphasis added); *see also, e.g.*, *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994) (Commerce Clause "forbids discrimination, whether forthright or ingenious" (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940))). It could hardly be otherwise, for a prohibition on protectionist measures would be of little value if it were limited to "the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951).

Time and again, then, this Court has held that a state law violates the Commerce Clause if it discriminates "'either on its face *or in practical effect*.'" *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (emphasis added) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)); *see also, e.g.*, *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445-46 (1978). And the Court has had no trouble invalidating "facial[ly] neutral[]" state laws that had real-world "discriminatory impact[s] on interstate commerce." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 352-53 (1977); *see also, e.g.*, *Best & Co.*, 311 U.S.

at 456 (striking down facially neutral North Carolina tax law that distinguished between "regular retail merchants" and those that sold their wares out of rented hotel rooms because it primarily affected out-of-state retailers).

3. Contrary to the Fifth Circuit's contentions, there is no exception to that discriminatory effects doctrine for laws that draw distinctions based on corporate form. The Fifth Circuit purported to derive such an exception from this Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). But nothing in *Exxon* supports the Fifth Circuit's view that evidence of discriminatory effects is irrelevant so long as a law facially differentiates only between business forms.

Exxon involved a Maryland law that prohibited "a producer or refiner of petroleum products" from operating a "retail service station within the State." *Id.* at 119. The challengers "argu[ed] that the effect of the statute [was] to protect in-state independent dealers"—gas distributors that did not produce or refine petroleum on their own—"from out-of-state competition." *Id.* at 125. This Court disagreed. In doing so, the Court did not reason that the facial neutrality of the law rendered its real-world effects irrelevant. It simply concluded that the challengers failed to prove as a matter of fact that the law actually had a discriminatory effect. As the Court explained, the law did not prevent "interstate dealers" who did *not* produce or refine petroleum from "compet[ing] directly with the Maryland independent dealers"—a considerable exclusion since there were "several major interstate marketers of petroleum that own[ed] and

operate[d] their own retail gasoline stations." *Id.* at 125-27. And even if the law might end up causing a few consumers to "switch from company-operated stations to independent dealers," the Court observed, "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." *Id.* at 127.

In other words, the Court found that the law did not have a discriminatory effect because it imposed *no* constraints on a large swath of out-of-state competitors, not because the constraints it did impose were facially neutral. Indeed, that is how this Court has since described *Exxon*, explaining that the Court found no discriminatory effects there "as a matter of fact" because "neither the placing of a disparate burden on *some* interstate competitors nor the shifting of business from one part of the interstate market *to another* was enough, under the circumstances, to establish a Commerce Clause violation." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 40-41 (1980) (emphases added). *Exxon* thus does not suggest, let alone hold, that a state law that draws distinctions based on business form has no legally cognizable discriminatory effect.

4. Nonetheless, the Fifth Circuit continues to hew to its view that "*Exxon* is the controlling dormant Commerce Clause case for considering a facially neutral statute that bans particular companies from a retail market," and that *Exxon* forecloses discriminatory effect challenges to such laws. App.53-54. And the decision below is no isolated incident. The Fifth Circuit has applied that anomalous reading of

Exxon to reject discriminatory effects challenges to a wide range of state laws without regard for their real-world effects. *See, e.g.*, *Ford*, 264 F.3d at 500-01 (law prohibiting car manufacturers from obtaining a license to become car dealers); *Allstate*, 495 F.3d at 160, 162-63 (law prohibiting insurance companies from acquiring an interest in auto body shops); *see also Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 726 (5th Cir. 2004) ("That all or most affected businesses are located out-of-state does not tend to prove that a statute is discriminatory.").

Indeed, if anything, the decision below expands on the Fifth Circuit's deeply problematic reading of *Exxon*, for it extends the decision to immunize not just restrictions relating to vertical integration, like the law at issue in *Exxon*, but to *all* facially neutral laws having *anything* to do with "corporate form." That is particularly problematic when it comes to public corporation bans like the one at issue here. It is one thing to sanction restrictions on vertically integrated entities, as vertical integration is not a corporate form that is *inherently* more likely to be employed by out-of-state competitors. But the same cannot be said of restrictions on public corporations, as public corporations not only are the entities most likely to have the resources to compete with in-state entities, but are particularly likely (indeed, all but certain) to be owned in whole or in part by out-of-state residents. That is why this Court had little trouble recognizing that no public corporation would be able to satisfy Tennessee's stringent corporate durational-residency requirement. And it is why this Court had equally little trouble recognizing that *de facto* public corporation ban for what it was: "unalloyed

protectionism." *Tennessee Wine*, 139 S. Ct. at 2474. Accordingly, whatever *Exxon* may mean for a law that differentiates based on vertical integration, the Fifth Circuit fundamentally jumped the tracks by extending it to public corporation bans.

Making matters worse, the Fifth Circuit's (mis)reading of *Exxon* pervades not just its view of the effects doctrine, but all aspects of its Commerce Clause jurisprudence. Like most lower courts, the Fifth Circuit begins the discriminatory *purpose* analysis by asking whether "a clear pattern of discrimination emerges from the *effect* of the state action." App.50. Yet, according to the Fifth Circuit, the district court's undisturbed finding that "the corporation ban had the 'effect of barring nearly all out-of-state companies with the scale and capabilities necessary to serve the Texas retail liquor market'" is "not … relevant" to the purpose inquiry either, because it purportedly does not qualify as a discriminatory effect under *Exxon*. App.50. Instead, the court declared the bare fact that the ban is facially neutral "strong evidence that the Legislature did *not* purposefully discriminate against out-of-state corporations," App.51-52 (emphasis added), even though that was the avowed purpose of the ban's proponents. Adding insult to injury, it then held that *Exxon* foreclosed consideration of the ban's protectionist effects under a *Pike* analysis, declaring that those effects cannot even be understood to *burden* interstate commerce if "in-state and out-of-state companies are treated identically." App.63.

If *Exxon* really did command those results, it would be "woefully out of step with th[is] Court's more

recent cases." *Ford*, 264 F.3d at 512 (Jones, J., concurring). That was true when Judge Jones pointed it out in 2001, and it is even more so today. After all, it was just this past Term that this Court reiterated that the Commerce Clause is concerned not just with form, but with "purpose and effect." *Tennessee Wine*, 139 S. Ct. at 2474. Yet while the Fifth Circuit openly acknowledged (with considerable understatement) the "tension" between *Tennessee Wine* and its reading of *Exxon*, it nonetheless expressly hewed to—indeed, expanded—its own anomalous reading, dismissing *Tennessee Wine*'s discussion of purpose and effect as "dicta." App.57 n.21. And the court then denied rehearing en banc without even calling for a vote. App.72. Accordingly, nothing short of plenary review will suffice to bring the Fifth Circuit's Commerce Clause jurisprudence back in line with this Court's precedent.

II. The Decision Below Squarely Conflicts With Decisions From Other Circuits.

Unsurprisingly, given its irreconcilability with this Court's precedent, the decision below also conflicts in both reasoning and result with decisions from numerous other circuits.

At the outset, at least two circuits have expressly refused to adopt the sweeping reading of *Exxon* that the Fifth Circuit has embraced. In *Cachia v. Islamorada*, 542 F.3d 839 (11th Cir. 2008), the Eleventh Circuit declined a party's invitation to read *Exxon* to compel it to uphold a facially neutral ordinance that had the obviously "discriminatory effect" of "prevent[ing] the entry of" "national chain restaurants" "into competition with independent local

restaurants." *Id.* at 841-44. And in *Walgreen Co. v. Rullan*, 405 F.3d 50 (1st Cir. 2005), the First Circuit likewise declined to read *Exxon* as requiring it to uphold a "facially neutral" state law that "favor[ed] the largely local group of established pharmacies over similarly-situated out-of-[state] pharmacies seeking to open new stores." *Id.* at 59-60.

Moreover, both the First Circuit and the Sixth Circuit have faithfully applied this Court's precedent to strike down as discriminatory in their effects state liquor laws that would survive an effects challenge as a matter of law in the Fifth Circuit. *See Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1 (1st Cir. 2010); *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423 (6th Cir. 2008). *Family Winemakers* concerned a Massachusetts law that allowed "small" wineries to sell wine directly to consumers in Massachusetts, but prohibited "large" wineries from doing the same. Mass. Gen. Laws ch. 138, §19F (2006). Like §22.16, that law was "neutral on its face"; "it [did] not, by its terms," distinguish between in-state wineries and out-of-state wineries. *Family Winemakers*, 592 F.3d at 5. Yet, unlike here, the First Circuit's inquiry did not end with the text of the law. The court instead proceeded to consider its practical effects. *Id.* at 10-13. And because "[t]he ultimate effect of" the law was "to artificially limit the playing field in this market in a way that enables Massachusetts's wineries to gain market share against their out-of-state competitors," the court held that the law was "impermissibly discriminatory in effect." *Id.* at 12-13.

Cherry Hill Vineyards is much the same. As in this case and in *Family Winemakers*, the provisions at

issue there, which "regulat[ed] small farm wineries," were "not facially discriminatory." 553 F.3d at 426-32. Yet, unlike in the Fifth Circuit, that did not end the Sixth Circuit's inquiry. The Sixth Circuit instead went on to consider "th[e] evidence" of how the statutes *in fact* affected interstate commerce. *Id.* at 433. And because that evidence showed that "the challenged statutes" operated as "an economic barrier that both benefits in-state wineries and burdens out-of-state wineries by making it financially infeasible for out-of-state wineries to sell directly to Kentucky residents," the court held that they impermissibly "discriminate[d] against interstate commerce in practical effect." *Id.* at 432-34.

The conflict among the circuits does not end with their differential treatment of state liquor laws. The decision below also conflicts with decisions from numerous circuits recognizing that facially neutral state laws violate the Commerce Clause when they have the effect of discriminating against other sorts of interstate commerce. *See, e.g.*, *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 442-43 (6th Cir. 2000) (invalidating facially neutral state law that discriminated against interstate commerce "in effect" by "benefit[ting]" "in-state dealers and remanufacturers" to "the exclusion of" some "out-of-state remanufacturers"); *Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992) (invalidating facially neutral state law that "discriminate[d] in practical effect" by requiring garbage to be shipped in "dedicated" trucks, because "a significant number" of out-of-state truckers would be "[unable] to afford to dedicate their trucks"); *Nat'l Revenue Corp. v. Violet*, 807 F.2d 285, 290 (1st Cir.

1986) (invalidating facially neutral state law that "prohibit[ed] all debt collection activities" because it "effectively bar[red] out-of-staters from offering a commercial service within its borders and confer[red] the right to provide that service—and to reap the associated economic benefit—upon a class largely composed of Rhode Island citizens").

In sum, when a state law "create[s] an obvious and significant barrier against out-of-state economic actors," App.52 n.11, this Court's precedent instructs that the law is virtually per se invalid under the Commerce Clause, even if it regulates corporate form. Yet, in the Fifth Circuit, that kind of blatant protectionism is excused so long as the legislature was savvy enough to cloak it in the trappings of a regulation of business form. The irreconcilability of that result with this Court's precedent is reason enough to grant certiorari. But the clear conflict among the circuits confirms the need for this Court's intervention.[6]

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[6] The Fifth Circuit also broke with decisions from other courts by declaring that the blatantly protectionist "motivations of the TPSA" shed no light on whether "the Texas *legislature* enacted the public corporation ban with the same protectionist motivations." App.45. *Compare* App.45, *with e.g.*, *Deere & Co. v. State*, 130 A.3d 1197, 1217 (N.H. 2015) ("statements by a law's private-sector proponents sometimes can shed light on [a law's] purpose"); *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 593-96 (8th Cir. 2003) (relying on testimony and documents from individuals involved in drafting process to conclude that "the intent behind [the challenged law] was to restrict in-state farming by out-of-state corporations and syndicates in order to protect perceived local interests"); *E. Ky. Res. v. Fiscal Court of Magoffin Cty.*, 127 F.3d 532, 542 (6th Cir. 1997) ("a state's discriminatory purpose can be ascertained from sources" "other

III. This Case Is An Ideal Vehicle To Ensure That Lower Courts Meaningfully Enforce The Critical Commerce Clause Constraints That *Tennessee Wine* Reaffirmed.

The implications of the Fifth Circuit's opinion are profound, and they extend far beyond the retail liquor market. Under the decision below, so long as a state law *facially* differentiates only between business forms, the Commerce Clause imposes no constraint. As the Fifth Circuit itself put it, "a statute can create an obvious and significant barrier against out-of-state economic actors and, nevertheless, not evidence a discriminatory purpose" or effect, so long as the legislature used "[g]ood drafting." App.52 n.11.

That gaping loophole in the Commerce Clause flouts bedrock constitutional principles. The Framers witnessed first-hand "the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995). That is a principal reason why they gathered at Annapolis and Philadelphia—to design a system of government that could forestall the "serious interruptions of the public tranquility" that they knew would arise if parochial efforts to protect local economic interests continued apace. *The Federalist* No. 42, at 218-19 (James Madison) (Gideon ed., 2001); *see also Tennessee Wine*, 139 S. Ct. at 2460 ("[R]emoving state

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than the state's own self-serving statement of its legislative intent"). This case thus presents this Court with an opportunity to resolve two circuit splits at once.

trade barriers was a principal reason for the adoption of the Constitution.").

It is also why this Court has long held that the Commerce Clause "by its own force[] prohibits discrimination against interstate commerce, *whatever its form or method*." *Barnwell Bros.*, 303 U.S. at 185-86 (emphasis added); *see also, e.g.*, *W. Lynn Creamery*, 512 U.S. at 201; *Best & Co.*, 311 U.S. at 455. After all, the Framers well understood that states would seek to "evade" limits on their authority by "an infinitude of legislative expedients." Letter from J. Madison to T. Jefferson (Oct. 24, 1787), in *James Madison: Writings* 146 (Jack N. Rakove ed., 1999). The limits of the Commerce Clause are no exception, for "any protectionist law can be couched in non-protectionist terms." *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 211 (3d Cir. 2002). A prohibition against protectionist measures limited to "the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods," *Dean Milk*, 340 U.S. at 354, would therefore be a prohibition in name only.

This case makes that all too clear. By focusing on form to the exclusion of substantive effect, the decision below provides states with a roadmap for enacting blatantly protectionist laws with impunity. It does so, moreover, to the detriment not just of the businesses that are kept out of Texas, but of the consumers who are deprived of commercial options they may prefer. The marketplace, not the state legislature and the special interests that capture it, should determine the fate of businesses that seek to compete with incumbents by offering the same goods to the same

consumers in the same market. The Constitution guarantees no less.

That the decision below comes on the heels of *Tennessee Wine* makes the need for this Court's review all the more acute. *Tennessee Wine* definitively solidified the Commerce Clause as a critical constraint on the states' police powers. Yet while that decision should have reinvigorated Commerce Clause scrutiny in any lower courts that had doubted the doctrine's vitality, the Fifth Circuit instead dismissed critical parts of its analysis as "dicta"—indeed, dismissed this Court's entire body of Commerce Clause jurisprudence as "a mess." App.57 n.21. And notwithstanding the clear conflicts with both this Court's precedent and decisions of other courts, the Fifth Circuit proceeded to deny rehearing en banc with no vote, a powerful illustration that hostility toward dormant Commerce Clause claims remains alive and well notwithstanding this Court's efforts to quash it.

This case is an ideal vehicle to ensure that the principles that *Tennessee Wine* reaffirmed are meaningfully enforced. This case comes to this Court on a full record with detailed factual findings, including an express finding—which the Fifth Circuit did not disturb—that Texas's public corporation ban has the "effect of barring nearly all out-of-state companies with the scale and capabilities necessary to serve the Texas retail liquor market." App.97; *see also, e.g.*, App.97 (98% of Texas package stores today are owned by Texans); App.88 (because "[e]xpanding into even a neighboring state requires capital and scale," out-of-state firms capable of entering Texas market will "almost always" have "diffuse ownership"). Those

findings easily suffice to establish discriminatory effects under any reasonable reading of this Court's precedent. Yet in the Fifth Circuit, they were dismissed as wholly irrelevant to the Commerce Clause inquiry. And that legal principle was plainly dispositive, for the court entered judgment for TABC on Walmart's discriminatory effects claim. App.70.

To be sure, the Fifth Circuit did not definitively reject Walmart's discriminatory purpose claim. But because its anomalous reading of *Exxon* pervaded its discriminatory purpose analysis too, *see supra* pp.13-14, 22, remanding for reconsideration of a standalone purpose analysis without first correcting that error would force Walmart to litigate that claim with one hand tied behind its back. After all, the Fifth Circuit has already declared that the public corporation ban's facial neutrality is "strong evidence" that the ban does *not* have a discriminatory purpose—even though it "create[s] an obvious and significant barrier against out-of-state economic actors." App.52 n.11. Remand for an analysis in which the most powerful evidence of discrimination has instead somehow been declared to cut strongly in the state's favor would just compound the constitutional problems.

In sum, no remand is necessary under a proper application of this Court's precedent, for the record more than suffices to confirm that Texas's public corporation ban cannot survive the scrutiny to which it should have been subjected. The Fifth Circuit concluded otherwise only because it failed to follow the clear teachings of this Court. Accordingly, the Court should grant certiorari to close the glaring loophole that the decision below creates, and to ensure that the

promise of *Tennessee Wine* does not become an empty one in the Fifth Circuit.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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