No. 19-1368

IN THE

Supreme Court of the United States

WAL-MART STORES, INC., ET AL.,
PETITIONERS,

V.

TEXAS ALCOHOLIC BEVERAGE COMMISSION, ET AL.,
RESPONDENTS.

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

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether Texas's ban on publicly traded corporations obtaining permits to sell liquor at retail, with the exception of certain in-state corporations grandfathered in, is constitutional under the dormant Commerce Clause despite this Court's strong suggestion to the contrary in *Tennessee Wine and Spirits Retailers Ass'n v. Thomas*, 129 S. Ct. 2449, 2460 (2019).

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because restrictions on free interstate trade like those at issue here are contrary to the Founders' vision of promoting united commercial markets and avoiding economic discrimination between in-state and out-of-state residents.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution guarantees citizens' right to engage in interstate commerce free from discriminatory and protectionist state regulations. This fundamental rule stems from the Framers' concern that, left unchecked, states would enact commercial regulations favoring their own residents at the expense of non-residents. Indeed, this Court has time and again invalidated state laws that deprive citizens of their right to access the markets of other states on equal terms.

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[1] Rule 37 statement: All parties were timely notified of and consented to this brief. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than amicus funded its preparation or submission.

In setting aside discriminatory state commercial regulations, the Court has primarily relied on the dormant Commerce Clause. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617 (1978). As the Court reaffirmed in *Granholm v. Heald*, the Commerce Clause has always applied to "differential treatment of in-state and out-of-state economic interests that benefits the former and burden the latter." 544 U.S. 460, 472 (2005). Just last year in *Tenn. Wine and Spirits Retailers Ass'n v. Thomas* the Court recognized that "the proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in [the Court's] case law." 129 S. Ct. 2449, 2460 (2019). The Commerce Clause ensures citizens of their right to access the markets of other states on equal terms. Indeed, "removing state trade barriers was a principal reason for the adoption of the Constitution." *Id.* The statute at issue here, however, contradicts this central constitutional principle.

Texas bans all out-of-state publicly traded companies from obtaining "package store" permits, or "P permits," which are required under state law to sell liquor at retail. At the same time, the ban has a grandfather clause exempting publicly traded companies that had obtained or applied for a P permit before the ban. Under this previous regime, the state imposed a residency requirement on P permit applicants, a requirement that was backstopped by the public corporation ban when it became evident that the residency requirement violated the dormant Commerce Clause. Thus, the only publicly traded companies with a P permit are companies based in Texas who were able to meet the unconstitutional residency-based requirement.

Even without the grandfather clause, the public corporation ban has served its intended purpose of protecting in-state businesses from out-of-state competition such that 98 percent of package stores in Texas are owned by Texas residents. And yet, despite a clear outsized impact on out-of-state businesses, the Fifth Circuit found that the ban had no discriminatory effect. The court reached that conclusion despite clear Supreme Court precedent to the contrary.

Hearing this case is crucial to clarifying the Court's dormant Commerce Clause jurisprudence and rejecting the Fifth Circuit's flagrant disregard of *Tennessee Wine*. Once recognized by this Court, constitutional rights and principals are not optional for lower courts to apply. The Constitution's meaning does not change state to state or circuit to circuit, and it is this Court that ensures that remains so. Because the Fifth Circuit's dormant Commerce Clause errors undermine that vital imperative, the Court should grant certiorari and reverse the lower court.

ARGUMENT

I. THE GRANDFATHER CLAUSE IS FACIALLY DISCRIMINATORY AND HAS PERPETUATED TEXAS'S UNCONSTITUTIONAL RESIDENCY-BASED PERMITTING REGIME

In its opinion below, the Fifth Circuit claims that "the public corporation ban treats in-state and out-of-state public corporations the same. Neither in-state nor out-of-state public corporations may obtain a P permit or own a package store." *Wal-Mart Stores, Inc. v. Tex. Alcoholic Bev. Comm'n*, 945 F.3d 206, 220 (5th

Cir. 2019). Because the public corporation ban contains a grandfather clause, this is false. Although it is true that no public corporation, Texan or not, can obtain a new P permit now, in-state public corporations were able to obtain P permits under the previous residency-based regime and are allowed to keep their permits now. Far from treating in- and out-of-state businesses the same, § 22.16's grandfather clause creates a special carveout for Texan public corporations that was never available to out-of-state companies.

In 1935, following the ratification of the Twenty-First Amendment and the end of Prohibition, Texas passed the Liquor Control Act which "prohibited out-of-state individuals and companies from owning" retail liquor stores, known as "package stores." *Id.* at 214. This was accomplished through what are known as "durational residency requirements," which mandate that an individual reside in the state for a set number of years before being eligible for permits to sell alcohol. *Id.* In 1994, the Fifth Circuit found these durational residency requirements invalid on the grounds that they discriminated against out-of-state individuals and entities in violation of the dormant Commerce Clause. *Id.* (citing *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994) (*Cooper I*)). Although the court's reasoning was "broad enough to apply to all" durational residency requirements for alcohol permits, the P permits were not directly challenged and Texas continued to enforce the durational residency requirement for P permits (among others) until 2007. *Id.* at 217.

After the 1994 decision, however, the writing was on the wall for residency requirements. In order to preserve protectionist benefits for in-staters, the state legislature enacted § 22.16 in 1995, which bans public corporations from obtaining P permits. Tex. Alco. Bev. Code § 22.16. For twelve years, the public corporation ban and the durational residency requirement were both on the books, until 2007 when a federal district court permanently enjoined Texas's residency requirements laws. *S. Wine & Spirits of Texas, Inc. v. Steen*, 486 F. Supp. 2d 626, 633 (W.D. Tex. 2007).

But the durational residency requirement's discriminatory impact was not fully scrubbed from Texas law when the requirement was invalidated in 2007. Instead, § 22.16 contains "a 'grandfather clause' that exempts [from the ban] corporations that held a P permit before the day the statute was enacted." *Wal-Mart*, 945 F.3d at 217 n.10. Importantly, "[b]ecause Texas enforced durational residency requirements for package store owners until 2007, the exempted corporations are [all] Texas-based firms." *Id.*

The Fifth Circuit declares that "[s]tate laws are upheld when similarly situated in-state and out-of-state companies are treated identically. Indeed, § 22.16 prohibits all public corporations, regardless of in-state or out-of-state status, from holding P permits." *Id.* at 223. When it comes to public corporations that predate § 22.16, however, this simply isn't true. A New Mexico-based public corporation started in 1990 could never have obtained a P permit and could not own a package store today. A "similarly situated" Texan company started at the same time could.

Absent context, the grandfather clause does not clearly preference in-state or out-of-state businesses. With context, however, it's facially discriminatory. By providing a special exemption for Texan companies allowing them to evade the public corporation ban that is not available to companies from any other state, the grandfather clause necessarily discriminates against out-of-state companies and violates the dormant Commerce Clause. The grandfather clause has effectively perpetuated the constitutional defect of the durational residency requirement preceding § 22.16 and, like that requirement, is unconstitutional.

The Fifth Circuit's opinion mentions the grandfather clause exactly once, in a footnote, and not at all when discussing the discriminatory effect of the public corporation ban. This omission led the court to, multiple times, over- or misstate the facial neutrality of the public corporation ban and severely undercuts the court's reasoning. The preference given to in-state companies perpetuated by the grandfather clause is unconstitutional under this Court's opinion in *Tennessee Wine* as well as under the Fifth Circuit's own holding in *Cooper I* (the decision, ironically, that led to the creation of the public corporation ban).

II. THE FIFTH CIRCUIT'S INTERPRETATION OF THE DISCRIMINATORY EFFECTS TEST IS FLATLY INCONSISTENT WITH *TENNESSEE WINE*

In setting aside Tennessee's protectionist, residency-based retail liquor permitting regime in *Tennessee Wine*, the Court focused its analysis on the practical effect of the law in question. 129 S. Ct. 2449. It was

because the "predominant effect of the [Tennessee] residency requirement [wa]s simply to protect" in-state businesses "from out of state competition" that the Court held that "th[e] provision violate[d] the Commerce Clause." *Tenn. Wine*, 129 S. Ct. at 2476. Despite this recent precedent, the Fifth Circuit failed to consider the practical effects of § 22.16 on interstate commerce, with its "discriminatory *effects*" analysis boiling down to only a test for *facial* discrimination.

The Fifth Circuit held that "the ban does not have a discriminatory effect on interstate commerce," relying on its own previous cases interpreting *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978), which the court considered to be "the controlling dormant Commerce Clause case for considering a facially neutral statute that bans particular companies from a retail market." *Wal-Mart*, 945 F.3d, 218–19. This Fifth Circuit line of cases rejects "discriminatory effect arguments, stating that a statute impermissibly discriminates only when it discriminates between similarly situated in-state and out-of-state interests" *Id.* at 220 (cleaned up). *See Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007); *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493 (5th Cir. 2001).

The problem with the Fifth Circuit's test is the "similarly situated" language. The dormant Commerce Clause prohibits discrimination between in-state and out-of-state interests, not only similarly situated ones. Imposing a "similarly situated requirement" in all dormant Commerce Clause cases ignores the possibility that the out-of-state nature of potential competitors might render them inherently non-similarly situated. Instead, the Fifth Circuit uses the "similarly situated" element to transform the discriminatory effects test

into a facial test; if the law discriminates between in- and out-of-state businesses of the same corporate structure, there is a discriminatory impact. If, however, the legislature can find a class of businesses that encompasses most out-of-state businesses but not most in-state businesses—or if it favors in-state businesses by grandfathering them in—then it is permitted to discriminate against that class because it is not treating "similarly situated" businesses differently.

But the competitor to a local neighborhood bookstore in Portland, Maine, isn't a local neighborhood bookstore in Portland, Oregon—it's Amazon. The fact that a company such as Amazon or Walmart is not similarly situated to a small, local, single-state company is precisely what allows it to compete across state lines. Are there some non-publicly traded companies that have the resources to compete across state lines too? Of course. But companies able to compete across state lines are predominantly large, publicly held corporations. For proof, you need look no farther than the extraordinary effectiveness of the ban at keeping out out-of-state businesses: currently 98 percent of package stores are in the hands of Texans despite almost a decade and a half having passed since the death of the residency requirement. *Wal-Mart*, 945 F.3d at 222.

This Court seems to agree. Although the licensing law at issue in *Tennessee Wine* did not on its face prohibit publicly traded corporations from receiving a retail license, the residency rules were so "extraordinarily restrictive" that, "[i]n practice, [it] mean[t] that no corporation whose stock is publicly traded [could] operate a liquor store in the State." *Tenn. Wine*, 139 S. Ct. at 2457. It was noteworthy that the provision was

"so plainly based on unalloyed protectionism that neither the [trade a]ssociation nor the State [wa]s willing to come to [its] defense. *Id.* at 2474. Explicitly applying the reasoning to both the public corporation rules and the entire body of Tennessee's discriminatory residency requirements, the Court held that the provisions violated the dormant Commerce Clause because the "predominant effect" was "simply to protect [in state businesses] from out-of-state competition." *Id.* at 2476. Although the Tennessee law achieved its public corporation ban through an onerous and near-impossible to meet residency requirement, the Court was far more concerned with the "predominant effect" of the law—namely, to ban public corporations from owning liquor stores—than it was with the form that law took.

In the face of *Tennessee Wine*'s sustained attack on the constitutionality of a public corporation ban, the Fifth Circuit did note that there was "tension" between the *Exxon* approach it followed and this Court's recent opinion. *Wal-Mart*, 945 F.3d at 220 n.21. By the Fifth Circuit's own description of that case, the Court referred to a provision where the "practical effect . . . was that 'no corporation whose stock is publicly traded may operate a liquor store in the State' as a "'blatant' violation of the Commerce Clause." *Id.* (citing *Tenn. Wine*, 139 S. Ct. at 2457). The Fifth Circuit was apparently mystified as to how to apply this to *Wal-Mart*, adding that "the Court did not say more on that point," that there were still "many questions to be answered" following the opinion, and that this Court's dormant Commerce Clause doctrine "is, quite simply, a mess." *Id.* at 220 n.21 (cleaned up).

Rather than grapple with the difficulties it saw and attempt to apply *Tennessee Wine* in good faith, however, the Fifth Circuit dismissed *Tennessee Wine*'s unequivocal statements as *dicta* and declined to apply the case in its opinion. Instead of taking note of this Court's heavy focus on the practical effects of a law, the Fifth Circuit limited its analysis to formalism only. These flaws are fatal for the Fifth Circuit's reasoning and warrant the Court's attention to clarify *Tennessee Wine*'s status as good law.

III. THE FIFTH CIRCUIT'S NARROW INTERPRETATION OF THE DORMANT COMMERCE CLAUSE IMPROPERLY TREATS THE DOCTRINE AS A SECOND-CLASS CONSTITUTIONAL RESTRAINT

Between its refusal to engage with the implications of § 22.16's grandfather clause, its highly formalistic discriminatory effect analysis, and its disregard for the clear implications of *Tennessee Wine*, the Fifth Circuit's approach to the dormant Commerce Clause is unduly narrow. While the court appears to remain open to enforcing the doctrine in extreme cases, even a moderately talented legislator could craft a protectionist law that appeared sufficiently neutral to pass constitutional muster in the Fifth Circuit.

The dormant implications of the Commerce Clause reflect one of the primary drives behind the Constitution's adoption: the protection and preservation of free trade within the union. Among the limited number of enumerated powers ceded by the states to the federal government is the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8. The power was given to Congress, rather than the states,

to prevent trade wars from gutting the nation's economy from within and to protect the economic liberty of American citizens wherever they might be in the new nation. As far back as 1824 in *Gibbons v. Ogden* "Chief Justice Marshall found that a version of the dormant Commerce Clause argument had 'great force,'" because a grant of power to regulate a thing implies an *exclusive* grant such that others cannot regulate the same thing. *Tenn. Wine*, 139 S. Ct. at 2459 (quoting *Gibbons v. Ogden*, 22 US. (9 Wheat.) 1 (1824)). Thus, the power of Congress to regulate interstate commerce implies that states *lack* that power.

Our system is a federal one, with powers divided between the state and national governments. And while policing that line more frequently means protecting state power from federal usurpation, protecting the powers of Congress from interference by the states is no less vital to maintaining our constitutional system. In the context of the Second Amendment, Justice Thomas has described how the test for challenges adopted by the Court has been "systematically ignore[d]," and asked "[w]ith what other constitutional right would this Court allow such blatant defiance of its precedent?" *Andrus v. Texas*, 590 U.S. ___ (2020) (Thomas, J., dissenting from denial of cert.) (slip op. at 5). The Fifth Circuit, it seems, thinks the answer is Congress's exclusive right to regulate interstate commerce. This Court should hear this case and reverse the Fifth Circuit to make clear that this just isn't true.

CONCLUSION

For the reasons stated above, and those in Petitioner's brief, the Court should grant the petition.

Respectfully submitted,

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