No. 19-1368

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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This case involves a Texas statute that bars companies with over 35 owners from selling liquor at retail.

First, the statute is residence-neutral. There are out-of-state companies freely participating in Texas's retail liquor market. Likewise, there are in-state companies barred from participating.

Second, liquor is not harmless. Thus, unlike products such as bicycles or fruit juice, higher sales are not necessarily a positive for a society or a state.

Third, the statute's effect is to moderate liquor consumption. It is uncontroverted that Texas has the third lowest excise tax on liquor among the 50 states and yet consistently remains among the 10 lowest states in per capita liquor consumption. That is the purpose and effect of the statute here. Texas has chosen to regulate alcohol sales in a way that allows a higher beer-and-wine consumption while shifting sales away from liquor with its higher alcohol content, without having to implement a high-taxation marketplace.

The question presented is:

Whether a Texas law regulating the sale of liquor that treats out-of-state retailers the same as in-state retailers should nonetheless be struck down under the dormant Commerce Clause simply because it prevents megacorporations such as Walmart from retailing liquor at their stores in Texas.

PARTIES TO THE PROCEEDING

Respondents Texas Alcoholic Beverage Commission, Kevin J. Lilly in his official capacity as Presiding Officer, and the current Commissioners (collectively, "TABC") oversee the licensing of companies that make in-person retail sales of distilled spirits in Texas.

Respondent Texas Package Stores Association ("TPSA") is an association of Texas liquor store owners that conduct their business in accordance with Texas Alcoholic Beverage Code chapter 22. Because TPSA members' livelihoods depend upon the longstanding framework established as the law in Texas, TPSA intervened in this lawsuit.

TABC and TPSA were defendants in the district court and, on the issue of discriminatory effect under the dormant Commerce Clause, appellees in the Fifth Circuit after the district court held that the public corporation ban did not discriminate facially or by effect.

Petitioners Wal-Mart Stores, Inc., Wal-Mart Stores Texas, L.L.C., Sam's East, Inc., and Quality Licensing Corporation (collectively, "Walmart") were the plaintiffs at the district court.

CORPORATE DISCLOSURE STATEMENT

TPSA has no parent corporation or publicly held company owning 10% or more of TPSA's stock.

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INTRODUCTION

The state law at issue in this case has no discriminatory effect against out-of-state interests. The record evidence below was conclusive that the Texas law does not interfere with the flow of interstate goods or place added costs upon them, nor does it distinguish between in-state and out-of-state companies. This Court should deny review.

In Texas, retail sales of liquor (as opposed to beer and wine) for off-premises consumption occur only in "package stores," and require a "P permit" issued by TABC for each location. *See Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 945 F.3d 206, 211 (5th Cir. 2019).

Walmart's petition for writ of certiorari involves a single Texas statute. Texas Alcoholic Beverage Code section 22.16 bars a company from holding a P permit if it has more than 35 owners or is publicly traded (the "public corporation ban"). *See* TEX. ALCO. BEV. CODE § 22.16(a)-(b). This bar applies equally to in-state and out-of-state retailers.

In its petition, Walmart repeatedly claims that 98% of Texas package store companies are in-state. That statistic is meaningless absent a comparator to demonstrate that 98% is disproportionately high. What neither Walmart nor the district court mentioned is that Walmart's own evidence indicated over 99% of beer-and-wine retailers are in-state entities—*in the complete absence of a public corporation ban*. The 98% statistic in this case demonstrates nothing about discriminatory

effect as between in-state and out-of-state companies without some showing that it is higher than it would be without the statutory ban and, thus, is irrelevant to the issue of discriminatory effect.

Similarly, in its petition, Walmart repeatedly observes that the public corporation ban has a grandfather clause, *see id.* § 22.16(f), but never alerts this Court to any factual details about that clause that are in the record. It turns out that at most *2 out of 2,532* total retail stores in the entire state of Texas are owned by a grandfathered company from 1995. The grandfather clause has no real-world impact on the Texas liquor market.

What, then, is the actual purpose of the public corporation ban? Section 22.16 is a uniquely-effective method of regulating liquor sales and controlling the negative externalities associated with liquor consumption. The result of Texas's chosen means of regulating liquor sales is that Texas has the unique combination of having the third lowest excise tax among the 50 states and yet consistently remaining among the 10 states with the lowest per capita liquor consumption in the country. App.1.[1]

Meanwhile, Texas allows beer-and-wine retailers (holding a "BQ permit" for each location) to be public corporations. Thus, Texas has chosen to regulate

1. The slight increase in per capita liquor consumption over the past two decades, App.3, is not a Texas issue, but is the result of nationwide trends, App.5. Texas has maintained its low ranking among the 50 states in per capita liquor consumption. App.2.

alcohol sales in a way that allows a higher per capita beer-and-wine consumption while shifting sales—and thus consumption—away from liquor with its much higher alcohol content. App.3. As of 2016, there were over a dozen beer-and-wine retailers in Texas holding hundreds of BQ permits each—*e.g.*, Dollar General (908 permits), Walgreens (647 permits), and Walmart (605 permits). App.4. Only *one* liquor retailer in Texas holds over 100 P permits—Spec's (160 permits). *Id.*

The historical results of Texas's disparate treatment of liquor retailers versus beer-and-wine-only retailers are uncontroverted. As the number of beer-and-wine outlets in Texas increased, per capita beer-and-wine consumption increased, while as the number of package (liquor) stores remained relatively constant across Texas, so did per capita liquor consumption. App.3.

In fact, the evidence also shows a direct correlation between Walmart's participation in a state's liquor marketplace and per capita consumption in that state. Walmart itself divided the states into categories defined by its participation in each state's alcohol marketplace. In response, TPSA had its experts examine consumption levels and drunk driving levels in those states. The numbers were illuminating: as Walmart's presence in an alcohol market increased, the lowering of prices and increase in purchasing convenience for consumers corresponded to an increase in per capita alcohol consumption, along with the negative externality of drunk driving. App.6. Texas's higher per capita total alcohol consumption is consistent with Walmart's strong

presence in the beer-and-wine marketplace;[2] but Texas's lower per capita liquor consumption is consistent with the exclusion of very large companies like Walmart (as well as large Texas-based public corporations) from the Texas liquor marketplace. *Id.*

That is the background of Texas Alcoholic Beverage Code section 22.16. This statute is not economic protectionism. On the contrary, the statute acts to reduce per capita consumption of liquor, while simultaneously ensuring that small businesses in small towns throughout Texas can survive in the marketplace without having to compete with large corporations, regardless of their domicile.

The logic is straightforward. The more owners a retailer has, the more likely the retailer has sufficient access to capital to expand more rapidly and dominate more readily, and the more likely it will have more outlets, and the more likely it will have economies of scale so as to offer lower prices, and the more likely it will have economies of scope so as to increase convenience for consumers, and the more likely it will have a more efficient business model that can drive increased sales and increased consumption as well as drive smaller competitors out of business. These are basic economic principles—and were all supported by record evidence. Thus, by excluding public corporations—both in-state and out-of-state—from the retail liquor market, Texas has successfully moderated per capita consumption of liquor within its state. This has the direct public benefit

2. Walmart is the number one seller of beer and wine in Texas.

of mitigating the negative externalities of high liquor consumption in the State.

Accordingly, this case does not present an issue worthy of review by this Court. There is no economic protectionism here. Instead, Texas has chosen to employ a residence-neutral, non-taxation-based approach to moderating per capita liquor consumption in its state. Texas's unique approach is fair, and it works.

STATEMENT OF THE CASE

The only holding below challenged by Walmart is whether section 22.16 (the public corporation ban) discriminates "in effect" for purposes of a Commerce Clause challenge. To properly consider this state statute and Walmart's challenge thereto, it is helpful to start with the holdings below that Walmart does *not* challenge before this Court.

No Equal Protection violation

Both the district court and the Fifth Circuit correctly held that section 22.16 does *not* violate the Equal Protection Clause, because the statute has a rational relationship to legitimate state interests. Excluding public corporations helps keep liquor prices higher, reduce the convenience of one-stop shopping, and lower the number of outlets selling liquor. As a matter of economics, these factors lower per capita liquor consumption, which, as a matter of public health, lowers the negative externalities of liquor availability and consumption—such as cancer, drunk driving, and child abuse. *See Wal-Mart*, 945 F.3d at 224-26.

No facial discrimination against out-of-state firms

Turning to the dormant Commerce Clause, both the district court and the Fifth Circuit correctly held that section 22.16 does not *facially* discriminate against out-of-state retailers. Section 22.16 by its plain language is residence-neutral. It does not matter where a company is located. If that company is a public corporation, it cannot sell liquor, even if it is domiciled in Texas. If that company is not a public corporation, it can sell liquor, even if it is domiciled outside Texas. *See id.* at 214.

No discriminatory purpose against out-of-state firms

While the district court erroneously held that section 22.16 discriminated by its *purpose*, based on the Texas Legislature supposedly having an intent to discriminate against out-of-state firms when it enacted section 22.16 in 1995, the Fifth Circuit correctly reversed that finding. As the drafter of section 22.16 testified at trial:

> Q. But that's the real reason TPSA went to all this trouble to draft this bill, to make sure that the owners of package stores remained Texas residents, right?
>
> A. No. Actually, exactly the opposite.... [W]e said, okay, what's really happening here? The residency law has accidentally prevented huge megastores from putting our mom-and-pop small businesses out of the business. Now, is

> there a way that we can accomplish the same thing that does not discriminate between … in-state and out-of-state owners.

ROA.10819:19 – 10820:5.

The whole point of section 22.16—from its inception—was to create categories that lacked any purpose or effect of treating similarly-situated in-state and out-of-state firms differently. According to the legislation's drafter, "that was my assignment, something that didn't touch in-state, out-of-state ownership top[,] side[,] or bottom." ROA.10825:4-16. Because the district court relied on improper evidence to find a discriminatory intent, and ignored the proper evidence for such an analysis, the Fifth Circuit concluded the appropriate action was to remand the discriminatory purpose issue for reconsideration by the district court. *See Wal-Mart*, 945 F.3d at 214-18.

No improper burden on interstate commerce

Next, while the district court erroneously held that section 22.16 failed the *Pike* balancing test, the Fifth Circuit correctly reversed on that point as well. Section 22.16 does not interfere with the flow of interstate goods. Moreover, Walmart failed to introduce any record evidence of any barriers or additional costs placed on interstate firms as compared to in-state firms, or any record evidence that in-state firms had any competitive advantage over out-of-state firms. In fact, during the entire five-day trial, Walmart did not even mention any "excessive," "outweighing," or "lesser" burdens. Walmart had failed to put on any evidence to

support a *Pike* analysis or overturn the statute based on *Pike*, and the district court's self-generated holding that section 22.16 violated *Pike* was reversed in full. *See id.* at 221-24.

At issue in the petition: No discriminatory effect

The only remaining issue, then, is whether section 22.16 discriminates against out-of-state companies by *effect*. The fundamental problem with this claim, however, is that Walmart had to do more than simply *say* the statute was discriminatory. Walmart had to prove it. Walmart failed to do so. Instead, what the trial evidence showed is that this case falls squarely within this Court's opinion in *Exxon*. A statute which distinguishes among types of retailers, in a residence-neutral fashion, does not run afoul of the dormant Commerce Clause. *See Exxon Corp. v. Maryland*, 437 U.S. 117, 125-26 (1978).

The Fifth Circuit correctly affirmed the district court's holding that section 22.16 does not discriminate by effect. *See Wal-Mart*, 945 F.3d at 218-21. The evidence is undisputed that both in-state and out-of-state retailers (not public corporations) hold P permits and freely participate in the Texas retail liquor market, while there are both in-state and out-of-state retailers (public corporations) barred from doing so. Section 22.16's effect—not just the face of the statute—is, in reality, residence-neutral, treating in-state and out-of-state retailers identically, and successfully moderating the consumption of high alcohol content liquor in Texas. This Court should deny review.

THIS CASE DOES NOT MERIT SUPREME COURT REVIEW

This case is unsuited for review by this Court. On the relevant issue of discriminatory effect under the Commerce Clause, the Fifth Circuit below strictly adhered to this Court's precedent in *Exxon*.

I. The actual effect of the Texas law is residence-neutral, and thus this case is governed by this Court's *Exxon* opinion.

This Court in *Exxon* rejected the notion that the Commerce Clause protects the particular structure or methods of operation in a retail market. *See Exxon*, 437 U.S. at 127. It is immaterial that a state law's burden falls on *some* interstate companies such as Walmart, so long as the state law does not "distinguish between in-state and out-of-state companies in the retail market." *See id.* at 126.

This Court has frequently cited *Exxon* with approval, and returned to this specific issue 9 years later. In *CTS Corp. v. Dynamics Corp. of Am.*, the plaintiff insisted that the challenged state statute "will apply most often to out-of-state entities." *See* 481 U.S. 69, 87-88 (1987). Even if true, that was irrelevant according to this Court because the state statute's effect was *identical* for an interstate business as it was to a "similarly situated" local business. *See id.* at 88; *see also Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997) ("Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities.").

The same holding applies here. Walmart's *own* expert witness testified regarding section 22.16:

> Q. All right. So I want to get this clear. We can agree, you and I, Mr. Elzinga, that under Section 22.16 of the Texas Alcoholic Beverage Code similarly situated in-state and out-of-state business types are treated identically, correct?
>
> A. The answer is yes.

ROA.10314:6-11.

Section 22.16 is residence-neutral. The evidence is undisputed that there were in-state public corporations that could enter the Texas retail liquor market except that they are barred by section 22.16 from holding a P permit.[3] The evidence is also undisputed that there are out-of-state residents that hold P permits—including Total Wine and More, which is an out-of-state firm located in Maryland but as of the trial date was the *sixth largest* firm in the Texas liquor market. ROA.13735.

Walmart—and every other non-Texas-based retailer in the United States—would be in the exact same position if it were incorporated, domiciled, and located entirely inside Texas.

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3. These included supermarket chain Whole Foods, convenience store chain 7-Eleven, and HEB (the largest grocery store chain in Texas).

The Fifth Circuit has consistently adhered to this Court's analysis in *Exxon* and *CTS Corp. See Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 163 (5th Cir. 2007) ("A state statute impermissibly discriminates only when it discriminates between similarly situated in-state and out-of-state interests."). Indeed, this Court denied Allstate's petition for writ of certiorari. *See Allstate Ins. Co. v. Abbott*, 552 U.S. 1184 (2008). Walmart's petition should likewise be denied.

Walmart and its amici's briefing incorrectly assert that the courts below analyzed solely whether section 22.16 discriminated on its face. On the contrary, the courts below asked whether section 22.16 discriminated against out-of-state interests "in reality." The answer was "no." Section 22.16 does not have a different effect on out-of-state retailers than it does on in-state retailers.

Walmart touts the district court's misleading observation that "98% of Texas package stores and Texas package store companies are 100% Texas-owned." It is true that TABC's evidence showed that 40 out of the 1,765 P permit holders have out-of-state ownership, and this equates to 2.27%. However, Walmart fails to inform this Court that it put on no evidence of a control group, to discern whether that out-of-state percentage would be higher in the absence of section 22.16. The closest to a control group in the record is BQ permits (Texas beer-and-wine retailers). There is no Texas bar to public corporations holding BQ permits. The record below showed 9,009 BQ permit holders, and thus there would need to be more than 204 (2.27% of 9,009) out-of-state BQ permit holders for even a possibility of arguing

section 22.16 creates a disparate impact. Yet, Walmart's evidence revealed only *15* BQ permit holders (0.17% of 9,009) with out-of-state ownership.[4]

This record evidence is not just compelling, it is dispositive of the lack of significance of a bare assertion that the 98% figure (which forms the backbone of Walmart's plea to this Court) is meaningful. Under Walmart's *evidence*, the Texas liquor retail marketplace with its public corporation ban has a *greater* out-of-state percentage of companies (2.27%) than the Texas beer and wine marketplace with no public corporation ban (0.17%). Walmart did not show any discriminatory effect against out-of-state retailers. The 98% figure, standing alone, demonstrates nothing about a discriminatory effect. In fact, the record evidence that is available shows out-of-state firms participating in the Texas liquor market at a greater number than those participating in the beer-and-wine market without a public corporation ban.

As the Fifth Circuit observed after discussing the district court's "98%" statistic, Walmart had a "fair opportunity to prove their claim and they failed to do so." *See Wal-Mart*, 945 F.3d at 224.

This case is directly governed by *Exxon*. Just as in *Exxon*, section 22.16 "does not prohibit the flow of interstate goods, place added costs upon them, or

4. Those 15 companies are: (1) variety stores Walmart, Target, Costco, Dollar General, and Family Dollar; (2) grocery stores Kroger, Albertsons/Randalls, Winco, Aldi, and Trader Joes; (3) pharmacies Walgreens and CVS; and (4) convenience stores Circle K, Quiktrip, and Racetrac. ROA.14281-86.

distinguish between in-state and out-of-state companies in the retail market." *See Exxon*, 437 U.S. at 126. Also, just as in *Exxon*, section 22.16 cannot be found discriminatory by effect simply because it "causes some business to shift from one interstate supplier to another." *See id.* at 127. That is certainly the case here, as Walmart identified only 28 out-of-state companies potentially excluded by the public corporation ban,[5] while the evidence showed as many as 40 out-of-state companies able to compete in the Texas retail liquor marketplace in the absence of the public corporations' presence in the market. ROA.12075, 83.

Walmart also complains of section 22.16's grandfather clause. Section 22.16, enacted in May 1995, has an exception for firms that had already applied for a P permit as of April 28, 1995. *See* TEX. ALCO. BEV. CODE § 22.16(f). Notably, Walmart declines to share any details about that clause. Walmart (and its supporting amici) wants this Court to assume there are hundreds of Texas public corporations operating and thriving under this grandfather clause, thereby suggesting the public corporation ban was a ruse to protect Texas public corporations. In reality, the grandfathered companies comprise only 2 out of 1,765 total companies—both of which are controlled by the same family—together holding only 2 out of 2,532 total P permits. ROA.10705:23 – 10706:1. That is only

5. Walmart's expert witness admitted he had no knowledge whether 17 of his selected 28 firms actually were "public corporations" under section 22.16 because he did not know their ownership numbers. ROA.14286. Thus, the real number of excluded out-of-state retailers may be as low as 11, compared to 1,765 retailers holding P permits.

2 stores in the entire state of Texas. The grandfather clause is not evidence of Texas being "protectionist" and "discriminatory," or somehow protecting Texas public corporations at the expense of out-of-state public corporations.

Section 22.16's two-store grandfather clause was not part of the overall intent for the public corporation ban in 1995, but was added solely due to the lobbying efforts of an individual owner of Gabriel's Wine and Spirits (operating in San Antonio). ROA.10829:13-25. Thus, the two grandfathered firms (and locations) are Gabriel's companies, and their impact on the Texas liquor retail marketplace is essentially nonexistent[6]—and consistent with a residence-neutral intent to exclude only the largest of companies.

In any event, such a two-store grandfather clause would not render an otherwise constitutional statute void. *See New Orleans v. Dukes*, 427 U.S. 297, 305 (1976) (grandfather clause causing only recent entrants to be barred "is not constitutionally impermissible"); *Lindquist v. City of Pasadena*, 669 F.3d 225, 236 (5th Cir. 2012) (finding it rational to address perceived ill by only preventing new entrants). At worst, the grandfather clause itself could be struck down (its effect is of little consequence), but Walmart does not seek that relief.

The Fifth Circuit has consistently adhered to this Court's Commerce Clause jurisprudence as set forth

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6. Gabriel's has since filed for bankruptcy. *See In re Gabriel Inv. Group, Inc.*, Case No. 19-52298-rbk.

in *Exxon*. Discrimination is not shown by a barrier to out-of-state firms if that identical barrier applies to similarly-situated in-state firms. Thus, this case does not merit Supreme Court review.

II. The Fifth Circuit's opinion is consistent with this Court's *Tennessee Wine* opinion.

The holding below does not conflict with this Court's *Tennessee Wine* opinion. In *Tennessee Wine*, the state statute at issue imposed a two-year residency requirement and thus facially discriminated against out-of-state economic interests. *See Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2461-62 (2019). The question in *Tennessee Wine* was whether the Twenty-First Amendment nonetheless saved that discriminatory state law. *See id.* at 2462-76.

Here, in contrast, section 22.16 is not, and has not been held to be, discriminatory. It is not discriminatory on its face, and as discussed above, it does not discriminate in its effects.

Thus, the issue of "predominant effect" does not come into play here. *See id.* at 2474 (holding that a discriminatory state alcohol law can be sustained if predominant effect is protection of public health or safety). If a non-alcohol-related state law cannot be struck down because it is not "discriminatory," then certainly the Twenty-First Amendment would not intervene to *reduce* such state rights in the alcohol context by calling the law "protectionist."

Moreover, unlike in *Tennessee Wine* where the parties defending the statute failed to show the statute was anything but economic protectionism, here the statute's effect has been tried and has been shown to be reduced consumption of liquor.

It is undisputed that alcohol consumption can be reduced by raising prices, reducing accessibility, or reducing convenience—all three of which section 22.16 accomplishes. The more owners a retailer has, the more likely the retailer has sufficient access to capital to expand more rapidly and dominate more readily,[7] and the more likely it will have more outlets,[8] and the more likely it will have economies of scale so as to offer lower prices and economies of scope so as to increase convenience for consumers,[9] and the more likely it will

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7. Amicus Retail Litigation Center posited that there is no difference between public corporations and private retailers. *See* Amicus Br. of Retail Litig. Ctr., at p. 5. Amicus Chamber of Commerce succinctly explained the critical difference: public corporations "can readily access capital through the Nation's public securities markets." *See* Amicus Br. of Chamber of Commerce, at p. 5.

8. There are 2,532 total retail outlets selling liquor in Texas. The largest four BQ permit holders alone sell beer and wine from more retail outlets in Texas than that. App.4.

9. The Retail Litigation Center agrees, boasting to this Court that if public corporations can sell liquor in Texas, liquor prices will drop, and liquor availability will be "enhanced." *See* Amicus Br. of Retail Litig. Ctr., at p. 14. The Chamber of Commerce also agrees, promising that public corporations would "unleash their scaled-up capital" to sell liquor to Texans "efficiently and cheaply." *See* Amicus Br. of Chamber of Commerce, at p. 16.

have a more efficient business model that can drive its smaller competitors out of business. Indeed, Walmart's live pleadings affirmatively assert that section 22.16 "negatively impacts Texas consumers, who are forced to pay non-competitive prices because fair competition is prevented." ROA.72; *see Wal-Mart*, 945 F.3d at 225.

The result of Texas's chosen means of regulating liquor sales is that Texas has the third lowest excise tax among the 50 states and yet consistently remains among the 10 states with the lowest per capita liquor consumption in the country. App.2. Texas has accomplished a remarkable feat of low excise taxes matched with low per capita consumption.

In response, Walmart's expert witness offered no opinion on the cause for Texas's lowered liquor consumption. Walmart's representative testified that both Texas and Oklahoma prohibit Walmart from selling liquor and that Arkansas allows only one Walmart store to sell liquor, *see* ROA.10045:22 – 10046:15, and the evidence showed that among the states which do not run a state monopoly for liquor sales, those three states are the *three lowest states in the country* in per capita liquor consumption, *see* App.1.

As the Fifth Circuit observed: "Walmart does not dispute that Texas has a legitimate interest in regulating the consumption of liquor and limiting the effects of liquor-related externalities." *See Wal-Mart*, 945 F.3d at 225. According to the record evidence, those externalities include liver disease, heart disease, strokes, and cancer, as well as drinking and driving, child and spousal abuse, homicides, and suicides. Under *Tennessee Wine*, Texas has "leeway to enact the

measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use." *See Tennessee Wine*, 139 S. Ct. at 2474.

In short, Walmart's insistence to this Court that section 22.16 is "unalloyed protectionism" is inconsistent with reality and the record after a full trial.

Walmart's remaining attacks on the Fifth Circuit's opinion below rely on misconstruing that opinion's footnote commentary. Seven times in its petition Walmart quotes the Fifth Circuit's observation that "an obvious and significant barrier against out-of-state economic actors," under *Exxon*, might not evidence discrimination against the Commerce Clause. *See Wal-Mart*, 945 F.3d at 218 n.11. The reason for this statement, in its context, is the recognition that the exact same "obvious and significant barrier" applies equally to in-state economic actors. *See Exxon*, 437 U.S. at 126 (finding no discrimination where law does not "distinguish between in-state and out-of-state companies in the retail market"). In other words, under *Exxon*, the magnitude of a barrier against out-of-state interests is irrelevant so long as the very same barrier is present against in-state interests.

The proof is in dry counties. In Texas, today, there are still counties that do not allow liquor sales at all. That is the most "obvious and significant barrier" against out-of-state liquor retailers possible. Yet, there is no Commerce Clause violation, because in-state retailers cannot sell liquor in those counties either.

Further proof lies in "alcohol beverage control" states, which run a state monopoly on retail liquor sales. There are over a dozen such states. App.1. This "obvious and significant barrier" keeps all out-of-state companies from selling liquor, but there is no Commerce Clause violation, because in-state private retailers cannot sell liquor in those states either.

Three times in its petition Walmart quotes the Fifth Circuit's observation that "jurisprudence in the area of the dormant Commerce Clause is, quite simply, a mess," as if the Fifth Circuit were disparaging this Court, when the opposite is true. *See Wal-Mart*, 945 F.3d at 220 n.21. In actuality, the Fifth Circuit was referencing this Court's *own* observations—"The Supreme Court has acknowledged the muddled state of its dormant Commerce Clause jurisprudence." *See Churchill Downs Inc. v. Trout*, 589 F. App'x 233, 235 (5th Cir. 2014) (citing *Gen. Motors Corp.*, 519 U.S. at 298 n.12). The Fifth Circuit plainly respected this Court's jurisprudence, by religiously following this Court's *Exxon* and *Tennessee Wine* opinions.

No aspect of the Fifth Circuit's opinion contradicts this Court's recent *Tennessee Wine* opinion—nor any other opinion of this Court. There is no reason to grant review.

III. This case does not involve a discriminatory legislative intent.

Walmart devotes a significant portion of its brief to insisting the Texas Legislature had a discriminatory "purpose" when it enacted section 22.16. That is not

before this Court, because the petition relies solely on discriminatory effect, and the discriminatory-intent issue has been remanded to the district court.[10] Nonetheless, it is worth detailing how Walmart's allegations on this point are baseless.

The fact is there was no legislative intent to discriminate against out-of-state companies. This fact was demonstrated at trial. Both Walmart and the district court ignored the Texas Legislature's own formal legislative history of the 1995 law, which stated that the public corporation ban would "prevent the take over of the package liquor store market by large corporations." ROA.14580. In other words, the Texas Legislature expressed its concern as one of company size, not company domicile. There is not one mention in the entire legislative history of section 22.16 hindering out-of-state interests or benefiting in-state interests.

That comports with the statute's text. *See Railroad Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("[W]e have

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10. Of course, a statute which does not actually discriminate—whether facially or by effect—could not be held unconstitutional based on legislators' purported motives alone. *See Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1801 n.4 (2015); *United States v. O'Brien*, 391 U.S. 367, 382-84 (1968). Otherwise, two states could pass identical statutes that accomplish identical nondiscriminatory objectives and yet a federal court could strike down one of those laws by concluding its state's legislature acted with discriminatory intent even though no discrimination was actually accomplished. But the issue of whether there was discriminatory purpose by the Texas Legislature in 1995 is on remand, and is not before this Court here.

historically assumed that Congress intended what it enacted."). Section 22.16 distinguishes between large and small companies—based on whether more than 35 persons hold an ownership interest. *See* TEX. ALCO. BEV. CODE § 22.16(b). In doing so, Texas borrowed from federal tax law, because in 1995 a "closely held corporation" had less than 35 shareholders and no shares listed on a public stock exchange. *See* Small Bus. Job Prot. Act of 1996, Pub. L. No. 104-188, § 1301 (1996) (increasing Subchapter S shareholder cap from 35 to 75).

In its petition, Walmart declares that the state law's sponsoring senator "acknowledged" on the Senate floor that section 22.16 was designed to protect in-state retailers. The Fifth Circuit explained in its opinion why that characterization of the individual senator's remarks is simply wrong. *See Wal-Mart*, 945 F.3d at 215-16. First, the senator observed that a package store could not be "inside a Walmart." *See id.* But that says nothing about Walmart being an out-of-state company. Second, the senator discussed having "somebody from Texas" to "get ahold of." But, in context, he was referring to the old residency rules, not section 22.16. *See id.* Third, both Walmart and the district court ignored the senator's closing statement, that section 22.16 was *not* a bill intended to "keep[] foreign ownership from coming in and getting licensed." *See id.*[11] The district court ignored all the express statements of non-discriminatory purpose for section 22.16, so that

11. Walmart deposed the retired senator before trial, but he had no recollection of the 1995 legislation or its purposes. ROA.8612-24.

it could infer an unexpressed, "secret" discriminatory purpose. That was reversible error. *See id.*

Walmart also references lobbyists' statements regarding section 22.16, but fails to note that none of those statements were made in 1995 when section 22.16 was enacted. The statements were made by lobbyists over a decade later, in 2009 and 2013. As the Fifth Circuit has observed:

> What happened after a statute was enacted may be history and it may come from members of the Congress, but it is not part of the legislative history of the original enactment.
>
> ….
>
> When uttered five years later, it is mere commentary.

Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1080, 1082 (5th Cir. 1980); *see Maine v. Taylor*, 477 U.S. 131, 149-50 (1986).[12]

The actual point of section 22.16—at its inception—was to create categories that lacked any purpose or effect of treating similarly-situated in-state and out-of-state firms differently. As the drafter of the legislation testified:

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12. This point is dispositive as an evidentiary matter, but an additional dispositive point is that lobbyists' remarks are not evidence of a legislature's intent.

> And so we – we crafted a bill that said the small owner – small stores with less than 35 owners can operate in Texas. That will keep it at a human scale. But we prohibit larger corporations, whether they be in-state or out-of-state, from holding package store permits. And that's – my assignment was do something that does not treat in-state and out-of-state businesses differently, to shift the focus from that to size, numbers of owners.

ROA.10820:11-18.

It is true that the catalyst for section 22.16 in 1995 was the Fifth Circuit's striking down a durational-residency requirement for certain alcohol permits in 1994. *See Cooper v. McBeath*, 11 F.3d 547, 555-56 (5th Cir. 1994). However, as this Court has recently held, federal courts cannot presume that a legislature's goal was to act in *violation* of the Constitution, but rather must presume that the legislature's goal was to *comply* with the Constitution, in this case developing a new, constitutional means of accomplishing Texas's goals of liquor regulation. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324-26 (2018) (placing burden on plaintiff challenging a 2013 legislative act to "show that the 2013 Legislature acted with invidious intent" rather than rely on some "discriminatory taint" from prior sessions). So long as a constitutional motive could be discerned,[13] the district court was not at liberty to infer an unexpressed unconstitutional motive. *See*

13. Indeed, the only expressed motives for section 22.16 before the Legislature were constitutional ones.

Trump v. Hawaii, 138 S. Ct. 2392, 2420-21 (2018) ("But because there is persuasive evidence that the [law] has a legitimate grounding … we must accept that independent justification."). Otherwise, *every* legislative response to a court ruling could be struck down simply because it was done in response to the ruling. *See Wal-Mart*, 945 F.3d at 218.

The Fifth Circuit was right to reject the district court's flawed finding of the Texas Legislature's supposed, secret motives in 1995. In actuality, once the correct presumption is applied, the legislative history reveals no intent, secret or otherwise, by the Texas Legislature to discriminate against out-of-state interests when it enacted the residence-neutral public corporation ban at section 22.16.

CONCLUSION

The petition for a writ of certiorari should be denied. The Fifth Circuit meticulously adhered to this Court's dormant Commerce Clause precedent. The Fifth Circuit rightly held that Texas Alcoholic Beverage Code section 22.16 does not discriminate facially or by effect, and it remanded to the district court on the issue of discriminatory purpose due to the district court's errors in relying on incompetent evidence in making its finding as to legislative purpose.

The district court found no discriminatory effect; the Fifth Circuit panel unanimously agreed; and no judge on the *en banc* Fifth Circuit voted to rehear the panel decision. As every judge below agreed, the Texas law at issue has no discriminatory effect on interstate commerce.

The facts in this case could hardly be more different from those in *Tennessee Wine*. Here, all parties agree the state statute is not facially discriminatory, both lower courts concluded that the statute does not discriminate by effect as a matter of fact and law, and the parties submitted detailed evidence (including expert witness testimony) to prove that the state statute has the real-world effect of moderating liquor consumption with its negative externalities, including by raising liquor prices, reducing liquor accessibility, and reducing liquor purchasing convenience.

This case does not implicate the principle articulated in *Tennessee Wine* that deals with whether a facially discriminatory state statute can survive under the Twenty-First Amendment, and does not merit review by this Court.

Respectfully submitted,

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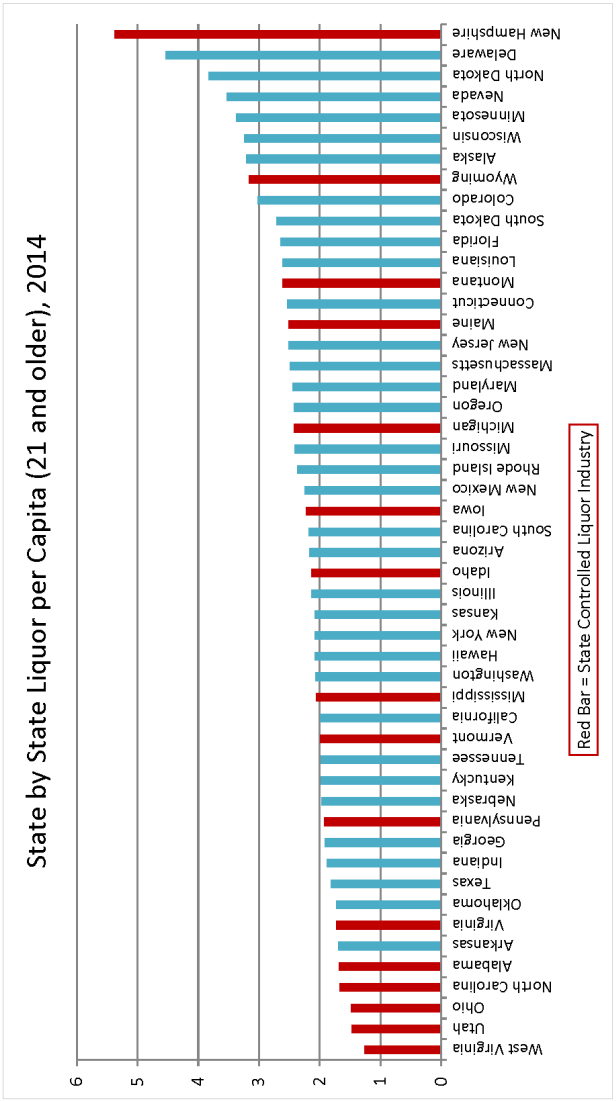
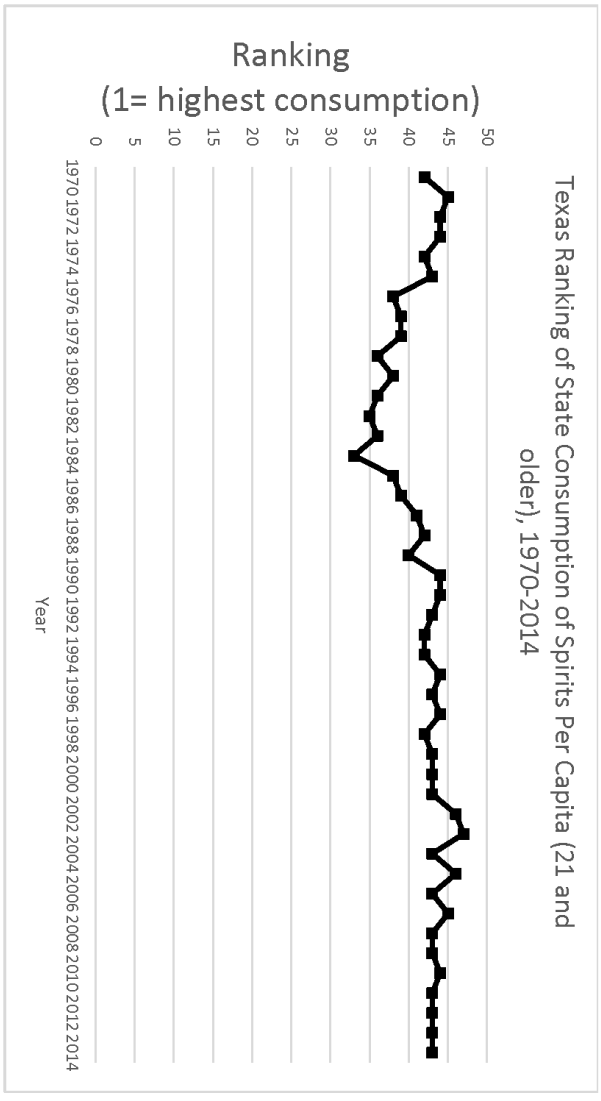
APPENDIX

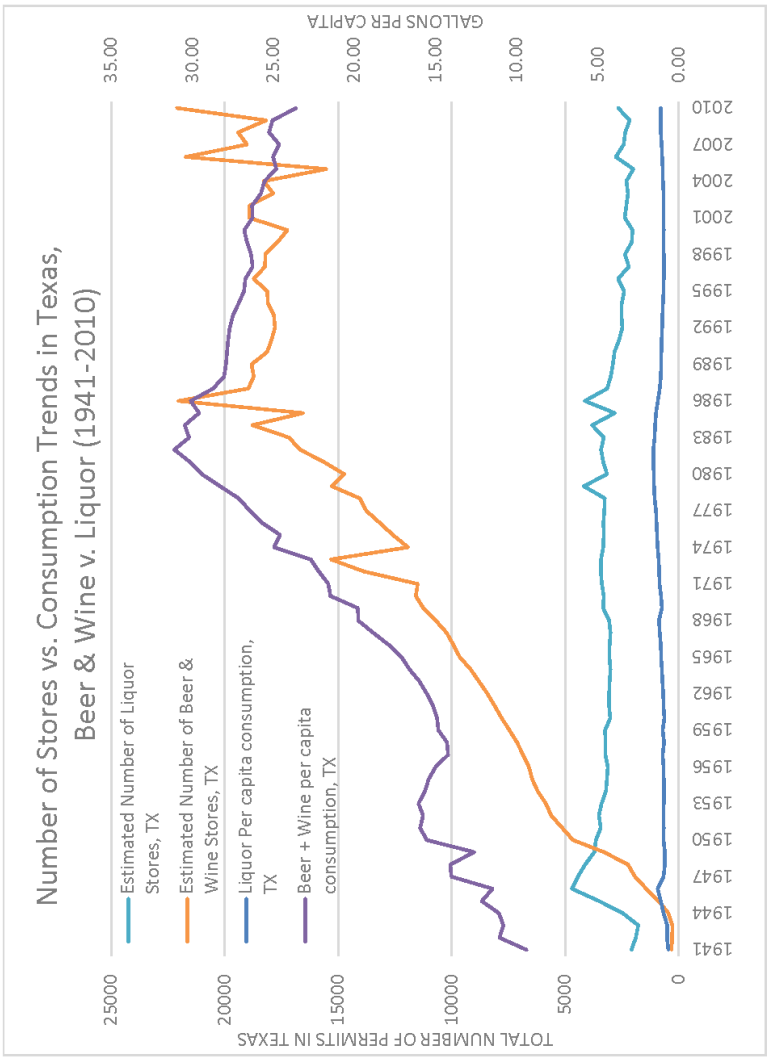
APPENDIX A — EXHIBIT I-38, WAL-MART STORES, INC. ET AL. V. TEXAS ALCOHOLIC BEVERAGE COMMISSION ET AL., CASE 1:15-CV-00134-RP. FILED JUNE 9. 2017



APPENDIX B — EXHIBIT I-39, WAL-MART STORES, INC. ET AL. V. TEXAS ALCOHOLIC BEVERAGE COMMISSION ET AL., CASE 1:15-CV-00134-RP, FILED JUNE 9, 2017



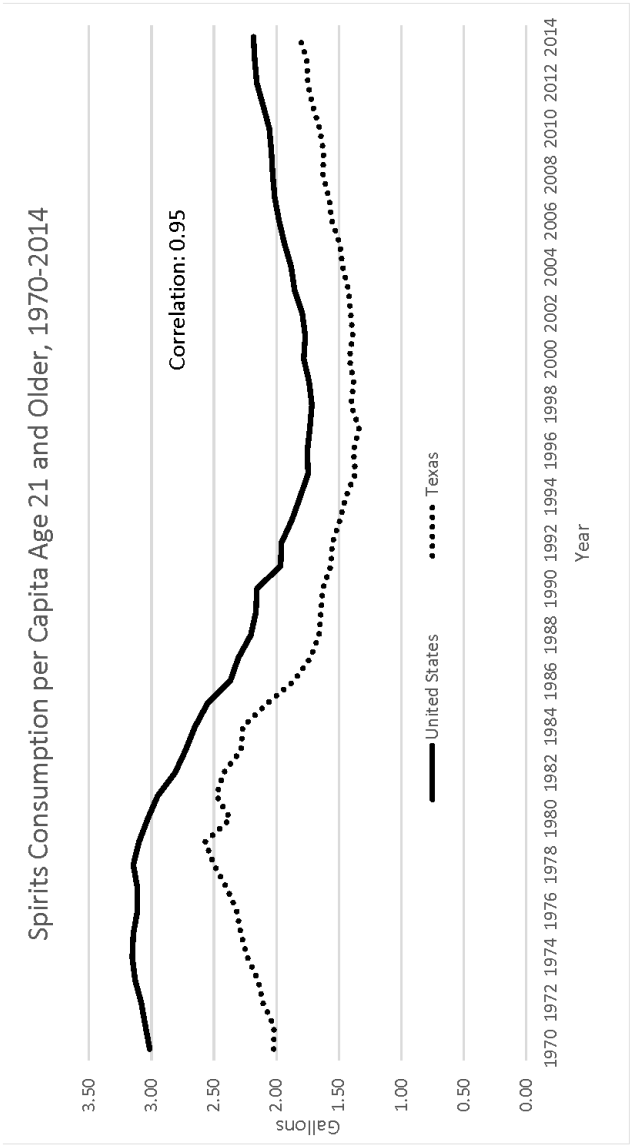
APPENDIX C — EXHIBIT I-41, WAL-MART STORES, INC. ET AL. V. TEXAS ALCOHOLIC BEVERAGE COMMISSION ET AL., CASE 1:15-CV-00134-RP, FILED JUNE 9, 2017



APPENDIX D — EXHIBIT I-43, WAL-MART STORES, INC. ET AL. V. TEXAS ALCOHOLIC BEVERAGE COMMISSION ET AL., CASE 1:15-CV-00134-RP, FILED JUNE 9, 2017

Comparison of Top Ten Retailers in Liquor vs Beer and Wine Market in Texas (January 2016)					
Top 10 P permit Holders	**No. of permits**	**% of total permits**	**Top 10 Beer & Wine Permit Holders**	**No. of permits**	**% of total permits**
Spec's Family Partners Ltd.	160	6.7%	Dolgencorp of Texas Inc.	908	4.4%
Twin Liquors L.P.	79	3.3%	Walgreen Co.	647	3.1%
Western Beverages Liquors of Texas Inc.	61	2.6%	Quality Licensing Corp.	605	2.9%
Gabriel Investment Group Inc.	49	2.1%	7-Eleven Beverage Company Inc.	604	2.9%
Goody Goody Liquor Inc.	33	1.4%	E. T. B. Inc.	589	2.8%
D-Z Liquor Co.	19	0.8%	SSP Beverage LLC	465	2.2%
Pinkie's Inc.	18	0.8%	Family Dollar Stores of Texas	402	1.9%
Fiesta Liquors Inc.	16	0.7%	Big Diamond LLC	392	1.9%
Sigel's Beverages L.P.	16	0.7%	HEB Beverage Company LLC	313	1.5%
Zipps Liquor Inc.	15	0.6%	Hempil Inc.	215	1.0%

APPENDIX E — EXHIBIT I-54, WAL-MART STORES, INC. ET AL. V. TEXAS ALCOHOLIC BEVERAGE COMMISSION ET AL., CASE 1:15-CV-00134-RP, FILED JUNE 9, 2017



APPENDIX F — EXHIBIT I-72, WAL-MART STORES, INC. ET AL. V. TEXAS ALCOHOLIC BEVERAGE COMMISSION ET AL., CASE 1:15-CV-00134-RP, FILED JUNE 9, 2017

Wal-Mart's Presence on the Liquor Market, Average Consumption Per Capita Comparison Across States, 2014 (in gallons)

Wal-Mart's Presence in the Liquor Market	*Alcohol per Capita (21 and older)*	*Liquor per Capita (21 and older)*	*Liquor per capita (14-21 age)*	*Average of DUI per 000 persons*
Texas	36.52	1.82	0.23	2.61
States in which Wal-Mart is not selling Liquor (n=24)	34.64	2.18	0.25	3.02
States in which Wal-Mart Sells Liquor without strong presence (n=9)	36.05	2.57	0.29	3.32
States in which Wal-Mart sells Liquor and has strong presence (n=8)	39.31	2.63	0.30	3.99