No. 19-1368

IN THE

Supreme Court of the United States

WALMART STORES, INC., ET AL.,

Petitioners,

v.

TEXAS ALCOHOLIC BEVERAGE COMMISSION, ET AL.,

Respondents.

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

BRIEF OF RETAIL LITIGATION CENTER, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE*

The Retail Litigation Center, Inc. ("RLC") is the only trade organization dedicated to representing the retail industry in the judiciary. The RLC's members include many of the country's largest and most innovative retailers. These leading retailers employ millions of workers in the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as an amicus in more than 150 judicial proceedings of importance to retailers.

The RLC and its members have a significant interest in this case. Nearly all RLC members are public corporations based outside of Texas. Some RLC members sell liquor. As a result, they are barred by Texas's public corporation ban and subject to the ban's disproportionate effects on out-of-state corporations. More importantly, RLC members have a strong and abiding interest in ensuring that the Commerce Clause serves

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* Pursuant to Supreme Court Rule 37, counsel for *amicus* represents that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and counsel for all parties received timely notice of *amicus*'s intent to file this brief.

its role as “the primary safeguard against state protectionism,” *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2461 (2019), in all industries.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Commerce Clause forbids States from adopting "protectionist measures" that shut out a "national market for goods and services" from their borders. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)). Nevertheless, the Fifth Circuit upheld Texas's public corporation ban, which has restricted the State's retail liquor market to a small number of powerful local players. The Fifth Circuit did so because it believed, under *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), that a facially neutral ban regulating market entrants based on corporate form can *never* have discriminatory effect against interstate commerce, no matter the effects of the ban in reality.

That rigid, bright-line interpretation of *Exxon* is wrong, and if allowed to stand, will entrench a policy harmful to interstate commerce, free-market competition, and consumers who ultimately benefit from a competitive marketplace. At the same time, state legislatures will be emboldened to exclude out-of-state competitors under the guise of corporate-form regulation, safe in the knowledge that courts will be unable to examine the actual discriminatory effects of these regulations, however transparent the disguise may be.

The Fifth Circuit's formalistic approach is indefensible because this Court has warned, time and again, that its "Commerce Clause jurisprudence 'eschew[s] formalism for a sensitive, case-by-case analysis of [the] purposes and effects'" of state laws. *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2094 (2018) (quoting *W. Lynn Creamery, Inc. v. Healey*, 512 U.S. 186, 201 (1994)). Just last Term, this Court applied that analysis and recognized that a ban of "all publicly traded corporations" from a market was "based on unalloyed protectionism." *Tennessee Wine*, 139 S. Ct. at 2474. There is, accordingly, no plausible defense of the Fifth Circuit's view that a facially neutral ban of all public corporations can *never* be invalidated. That is particularly so where, as here, the ban is accompanied by a unique grandfather clause that exempts certain *in-state* public corporations from the ban and doubles down on the protectionist effects.

While the Fifth Circuit's per se rule blesses Texas's ban, this Court's required "sensitive, case-by-case analysis" of discriminatory effect would easily reject it. *Wayfair*, 138 S. Ct. at 2094. The ban impedes fair competition between local and interstate commerce, deprives consumers of benefits that open competition creates, and contravenes the Constitution's protection of robust interstate commerce. Twenty-five years after the ban's adoption, 98% of retail liquor stores in Texas are 100% Texas-owned. Only four discrete out-of-state entities own 5 of the nearly 2,600 stores in the State. The majority of the Texas market share belongs to a few powerful local families. These anticompetitive and discriminatory effects, which the district court correctly tied to the ban, reflect local protectionism at its very worst.

The benefits of eliminating such protectionism are as obvious today as they were to the Founders in 1789. Retailers, like RLC members, bring healthy competition to local markets, offer consumers a wide selection of goods from national supply chains, and create opportunities for producers and suppliers throughout the country. These positive effects extend to the retail liquor market. In States like California, public corporations are permitted to compete in this market and no demonstrable harms have followed.

A final point bears emphasis. The Fifth Circuit's rule is arbitrary because there is no legitimate reason for Texas to target public corporations. In *Wayfair*, this Court made clear that judge-made rules based on "arbitrary, formalistic distinction[s]" that have no intelligible regulatory purpose under the Commerce Clause are improper. *Wayfair*, 138 S. Ct. at 2092. Thus, this Court invalidated a longstanding rule that only retailers with physical presence in a State were required to collect sales tax on transactions with instate customers, because this physical-presence requirement had no actual purpose or value under the Commerce Clause. *See id.* at 2092–99. Similarly here, Texas's claims that the public corporation ban is necessary for public health and safety are implausible on their face: There is no meaningful difference between the large *private* retailers that Texas favors and the *public* corporations that Texas excludes for public health and safety purposes, or otherwise. The Fifth Circuit's reinforcement of Texas's arbitrary line-drawing is thus itself arbitrary and improper. The rule "creates rather than resolves market distortions," *id.* at 2085, by advantaging private entities, incentivizing retailers to manipulate their corporate form to enter Texas's restricted market, and motivating state legislatures to adopt similar laws that advance protectionism. Even worse than the physical-presence rule in *Wayfair*, the Fifth Circuit's rule enables the very harms that the Commerce Clause targets: extreme state protectionism and the obstruction of national markets.

ARGUMENT

I. The Fifth Circuit's Formalistic Rule Is Wrong Under This Court's Commerce Clause Jurisprudence.

The Fifth Circuit held below that a "facially neutral ban does not have a discriminatory effect" so long as the ban "treats in-state and out-of-state public corporations the same." *Wal-Mart Stores, Inc. v. Texas Alcohol Beverage Comm'n*, 945 F.3d 206, 220–21 (5th Cir. 2019). Period. This rule is fundamentally wrong under this Court's Commerce Clause jurisprudence, which requires courts to examine the *real-world* discriminatory effects of state laws, not just their formal neutrality.

State laws violate the Commerce Clause if they either "discriminate against interstate commerce" in their purposes and effects *or* "impose undue burdens on interstate commerce." *Wayfair*, 138 S. Ct. at 2090–91. The Fifth Circuit's rule applies to the purposes-and-effects analysis, and specifically, to the effects prong. In this context, this Court's precedents have time and again "eschewed formalism for a *sensitive, case-by-case analysis* of purposes and effects" of state laws in the "economic realities" of a market. *See id.* at 2089, 2094 (emphasis added). This pragmatic analysis serves pragmatic goals: The Commerce Clause fundamentally ensures that "a national market for goods and services" remains open across States, *Tennessee Wine*, 139 S. Ct. at 2459, and guards against "economic Balkanization" caused by state protectionism. *Id.* at

2461 (quoting *Granholm v. Heald*, 544 U.S. 460, 472 (2005)).

The Fifth Circuit's rule plainly violates these principles. It carves out a per se exception for facially neutral corporate-form regulations from this Court's established fact-intensive analysis of discriminatory effects. *See Wayfair*, 138 S. Ct. at 2092, 2094. While this incompatibility alone invalidates the Fifth Circuit's rule, this conclusion becomes inescapable in light of this Court's recent determination that a ban of "all publicly traded corporations" from a market evinces "unalloyed protectionism." *Tennessee Wine*, 139 S. Ct. at 2474. These precedents show that the Fifth Circuit's position that the public corporation ban is *necessarily* permissible because it is facially neutral is untenable.

The only defense the Fifth Circuit offers is that its corporate-form exception follows from *Exxon* and a line of Fifth Circuit precedent growing out of that case. *See Wal-Mart*, 945 F.3d at 218–21. But this argument is wrong. At issue in *Exxon* was a Maryland statute that barred oil producers and refiners from operating retail gas stations in the State. *Exxon*, 437 U.S. at 119–20. Because all producers and refiners were from outside Maryland, the statute invariably impacted out-of-state interests, but this was beside the point. *Id.* at 123, 125. The relevant question, as this Court framed it, was whether the statute had a discriminatory effect on the retail gas market overall. *Id.* at 125–28. This is because the Commerce Clause "protects the interstate market, not particular interstate firms." *Exxon*, 437 U.S. at 127–28 (discussing *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)). Under the statute, in-state and out-of-state retailers, including "several major interstate" retailers like Sears, Roebuck & Co., continued to compete actively. *Id.* at 125–28, 126 n.15. The producers and refiners that exited the market comprised only a small sliver of the out-of-state activity, and overall, were 36 of the total 3,800 retailers. *See id.* at 121–23, 125–26. Given these real-world dynamics in the market, this Court concluded the statute was not discriminatory.

Nevertheless, the Fifth Circuit derived from *Exxon* a test that a "facially neutral" statute "impermissibly discriminates only when it discriminates between similarly situated in-state and out-of-state interests," or specifically here, public corporations. *Wal-Mart*, 945 F.3d at 220–21 (quoting *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 163 (5th Cir. 2007)) (emphasis added). Thus, according to the Fifth Circuit, so long as a rule "treats in-state and out-of-state *public corporations* the same," it does not have discriminatory effect. *Id.* at 220 (emphasis added).

But *Exxon* does not support this result. First, nowhere in *Exxon* is the facial neutrality of a statute a dispositive factor. Indeed, this Court emphasized the importance of a fact-intensive real-world analysis of discriminatory effects. Second, the key in *Exxon* was that courts must pay attention to how a statute treats in-state and out-of-state interests *in the relevant market*. The Court rejected a comparison of producers and refiners versus retailers as the relevant inquiry because these entities did not compete in the same retail market, under the Maryland statute. *Exxon* does not require, and if anything, discourages, limiting the discriminatory-effects analysis to only the same types of *firms* within a market. The Fifth Circuit's ruling indeed exhibits the myopia that *Exxon* sought to redress, namely an improper focus on harm to particular "firms" (*i.e.*, only out-of-state public corporations) rather than to the "interstate market" overall (*i.e.*, all out-of-state competitors). *Exxon*, 437 U.S. at 127–28. This is the nub of Wal-Mart's argument: The Fifth Circuit erred by ignoring the startling reality that 98% of all retailers in Texas's retail liquor market are 100% Texas-owned.

Put another way, *Exxon* recognizes that States may reasonably regulate entities based on their role in an industry, such as by restricting the activities of refiners and producers. Similarly here, States need not provide identical liquor licenses to wholesalers, package stores, or dining establishments, each of which compete in their own markets. But simply because *Exxon* permits regulation of industry role does not compel or authorize special treatment for corporate-form regulations under the Commerce Clause, as the Fifth Circuit believes. *Exxon* instead requires a meaningful comparison of *all* in-state and out-of-state interests in the relevant market regardless of their corporate forms. Otherwise, a rule like the Fifth Circuit's insulates potentially protectionist policies from Commerce Clause scrutiny.

II. The Fifth Circuit's Rule Undermines The Goals Of The Commerce Clause.

The Fifth Circuit's rule actively harms interstate commerce, fair competition, and consumers. If this Court does not act, the decision will give state legislatures a roadmap for circumventing the Commerce Clause and installing protectionist regimes, like Texas's scheme to bar out-of-state competition.

A. Texas's Ban Exemplifies The Protectionist Nature Of Corporate-Form Regulations.

This case is, perhaps ironically for the Fifth Circuit, the perfect example of how a per se exception for corporate-form regulations produces absurd results. Under this rule, the Fifth Circuit overlooked significant—and rather extreme—evidence of discriminatory effect. As this Court has already found, a total ban of all public corporations from a market is likely to be a Trojan horse for protectionist forces. *See Tennessee Wine*, 139 S. Ct. at 2474.

At issue is Texas's retail liquor market. For a retail store to sell liquor in Texas, it must obtain a so-called "Package Store Permit" or "P permit." *See Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 313 F. Supp. 3d 751, 757 (W.D. Tex. 2018) ("*Wal-Mart* (trial court)"). Texas also offers more limited licenses for the retail sale of wine, beer, or both, but those permit holders comprise a different market than the liquor market at issue. *See id.* at 757–58. In 1995, Texas enacted the public corporation ban, which provides that a P 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." Tex. Alco. Bev. Code § 22.16(a). Despite this ban, a grandfather clause permitted certain Texas public corporations, which already held P permits, to remain in the market. *See Wal-Mart* (trial court), 313 F. Supp. 3d at 760–61. The grandfather clause technically covered all public corporations with existing P permits. *See* Tex. Alco. Bev. Code § 22.16(f). But because Texas had also enforced residency requirements as a prerequisite to obtaining P permits, no out-of-state public corporations benefited from the grandfather clause. *See Wal-Mart* (trial court), 313 F. Supp. 3d at 759–61 (all "incumbent" permit-holders in the market, at the time the ban went into effect, were "Texans or majority-owned by Texans" due to the residency requirements). Eventually, the residency requirements were deemed unconstitutional, and Texas ceased enforcing them for P permits in 2007, although the public corporation ban remained. *Id.* at 767.

Now, nearly twenty-five years after the ban was adopted, its discriminatory effects on the Texas retail liquor market are staggering: Over 98% of retail liquor stores are "100% Texas-owned." *Wal-Mart* (trial court), 313 F. Supp. 3d at 762–63, 767. The remaining 2% sliver are retail stores that belong overwhelmingly to Texas entities with a *single* out-of-state shareholder. *Id.* at 762–63. Only 4 out-of-state firms directly own any stores, in total 5 of the 2,579 stores. *See id*. (citing to the Texas Alcohol Beverage Commission's trial exhibits 32 and 33, which respectively set out the four out-of-state entities and the Texas entities that have a single out-of-state shareholder). Large private chains, belonging to a few Texas families, dominate the market. *See id.* at 758–50, 783–84. Although the total number of stores has remained stable over time, these private "chains have greatly increased their number of stores, and their volume of sales." *Id.* at 759. The largest private chains have hundreds of locations and physically massive stores. *Id*. The trial court credited an expert finding that these private chains own at least 60% of the market share in twenty-two Texas cities. *Id*.

The district court found ample evidence that the public corporation ban is responsible for these above-described effects. A comparison of the retail liquor market with the wine and beer markets, which are not subject to the ban, reveals significant differences: Whereas the ten largest retail liquor chains are 100% Texas-owned except for one, the ten largest chains in the other markets are evenly split between Texas and out-of-state retailers. *Wal-Mart* (trial court), 313 F. Supp. 3d at 763 (crediting an expert conclusion that "the dominance of Texas-owned firms in the package store market is the result of the challenged statute"). Even since Texas stopped enforcing residency requirements in 2007, "[o]nly one significant out-of-state company has entered the Texas [retail liquor] market." *Id.* at 767. This is because there are nearly no viable out-of-state competitors other than public corporations. *Id.* at 763. At least twenty-eight out-of-state public corporations are likely market entrants, but only around three Texas public corporations may be entrants but for the ban. *Id*. at 763–64. It is therefore beyond dispute that the ban is a unique barrier to entry for out-of-state competition, and has marked protectionist effects.

In this context, the grandfather clause that the Fifth Circuit ignored is particularly problematic. Even if Texas could identify a colorable problem with public corporations selling retail liquor, this problem presumably should be present for the Texas public corporations that the grandfather clause permits. But the State's willingness to license these Texas businesses belies any legitimate non-protectionist objection to public corporations as a category. The Fifth Circuit's ruling thus provides a detailed and precise roadmap for how state legislatures may achieve protectionist agendas without harming in-state interests.

B. Total Bans Of Public Corporations From Markets Impede An Important Source Of Interstate Competition.

The nonsensical nature of the Fifth Circuit's rule furthermore defies common sense because a total ban of public corporations is substantially more likely than not to be outright protectionist. Accordingly, if there were any bright-line rule, it should be the opposite of the Fifth Circuit's. Viable interstate competitors are overwhelmingly organized as public corporations and are forces for local and national economic well-being that the Constitution protects.

In *Tennessee Wine*, this Court recognized that a de facto ban of "all publicly traded corporations" from a retail liquor market was "plainly based on unalloyed protectionism." *Tennessee Wine*, 139 S. Ct. at 2474. That ban required all shareholders, directors, and officers to be residents of a State, but the practical import was that "no corporation whose stock is publicly traded may operate a liquor store in the State." *Id.* at 2457 (emphasis added). The economic reason for the protectionist effects is straightforward: Public corporations are major players in, and account for a substantial volume of, interstate commerce across industries. In the Texas market at issue, public corporations are nearly the only conceivable source of interstate commerce and competition, because only these entities have the "necessary capital and scale" to compete. *Wal-Mart* (trial court), 313 F. Supp. 3d. at 763. As a result, Texas's ban effectively bars all "the out-of-state companies that are most likely to enter the Texas retail liquor market." *Id.*

The reasons for protecting robust interstate commerce associated with publicly held corporations are as evident today as they were to the Framers who established this policy in 1789. In the retail sector, advancements by public corporations have improved consumer welfare by enhancing the variety, quality, and price of products. Even economists who worry about increasing concentration in the U.S. economy have found that large public retailers spearheaded significant innovation and economic growth. *See, e.g.*, THOMAS PHILIPPON, THE GREAT REVERSAL 31, 34 (2019). Specifically, public retailers propelled innovation in operations, supply chain management, and data-driven business strategy, thereby making the retail sector more efficient and enabling retailers to pass on the corresponding "cost savings" to consumers. *See id*. at 34. This growth in the retail industry in turn drove "as much as one-third of the improvement" in the U.S. economy overall during certain periods. *See id*. at 31.

Public retailers also bring healthy competition to local markets. As the district court recognized, the existing private chains in the Texas market "compete vigorously" in order "to be the most convenient to their customers and to offer the largest selection and variety of products." *Wal-Mart* (trial court), 313 F. Supp. 3d at 759. The entrance of public retailers would only enhance this competition. They would offer their characteristic wide selection of goods from national supply chains in a convenient one-stop shopping experience. Public retailers also develop unique products under their own private labels. Nor would these retailers overwhelm small retailers because Texas's market is dominated by a few massive private chains with firm grips on local submarkets. *See*, *e.g.*, *id.* at 759 (describing the large private chains as owning up to "40%" of the stores in the "five most populous" metropolitan areas, where "two-thirds of the state's population" live).

Furthermore, public retailers help local economies. They drive local economic development, increase sales-tax revenue, adapt products to local consumer interests, and provide store managers with budgets to donate to local causes. Importantly, many of these retailers have dedicated programs for selling the goods of local suppliers and businesses, including liquor producers, thus enhancing the visibility of these small businesses.

These positive effects remain evident in States that, unlike Texas, permit public corporations to compete in the retail liquor market. For example, California authorizes public retailers to obtain the equivalent of P permits and thus to sell wine, beer, and liquor. *See generally* Cal. Bus. & Prof. Code D. 9; Cal. Dep't of Alcohol Beverage Control, *License Types*, https://bit.ly/320qY25 (license type 21 "authorizes the sale of beer, wine and distilled spirits for consumption off the premises"). Public retailers, like Costco and Walmart, sell liquor at hundreds of stores in California. Yet, the State's market remains competitive and diverse. A recent industry trend is the rise of small producers that offer unique specialty goods for retail sale in California. *See*, *e.g.*, Cal. Dep't of Tax and Fee Admin., Pub. No. 329, *Alcohol Industry Trends* 2 (2019), *available at* https://bit.ly/2BVSEdN (noting that "[m]ost new alcoholic beverage manufacturers are small," such as "small distillery accounts [which] increased by 60 percent" in just one year). An example like California demonstrates that the sky will not fall if Texas's ban is lifted. If anything, Texas would enjoy the benefits that its more competitive counterparts do, like California.

C. The Fifth Circuit's Rule Leads To Arbitrary Results.

This leads to a final important point. Texas might respond to the above objections by arguing that its large, family-owned retailers already provide the competitive benefits that interstate, publicly-held retail firms would. But this argument is self-defeating. As discussed, public corporation retailers bring unique economic benefits to local markets. But to the extent that Texas views in-state family corporations and out-of-state public corporations as interchangeable, its choice to selectively ban the latter is, at best, arbitrary and—perhaps more realistically—outright protectionist. Absent any legitimate non-protectionist justification for this line-drawing, the Fifth Circuit's special treatment of Texas's public corporation ban is wholly improper.

The only non-protectionist justifications that Texas attempts are implausible on their face. During the legislative process, Texas claimed that its ban was necessary "to ensure owners were known to the community and could be held accountable for responsible operation." *Wal-Mart*, 945 F.3d at 216; *see Wal-Mart* (trial court), 313 F. Supp. 3d at 761–62. Later, during this litigation, Texas added that the ban might reduce the availability of liquor and public consumption. *See Wal-Mart*, 945 F.3d at 224–26. But in *Tennessee Wine*, this Court made clear that state liquor regulations for health and safety purposes are subject to the usual intensive scrutiny mandated under the Commerce Clause, not to a per se rule like the Fifth Circuit's. "Where the *predominant effect* of a law is [economic] protectionism, not the protection of public health or safety," it is invalid. *Tennessee Wine*, 139 S. Ct. at 2474 (emphasis added). In determining "predominant effect," this Court considered, among other things, whether the law was properly tailored to local health or safety, whether "nondiscriminatory alternatives would be insufficient to further" these objectives, and whether there was "concrete evidence" and not just "mere speculation" or "unsupported assertions" to show that the law would actually achieve these objectives. *Id.* at 2474–76 (internal quotation marks omitted). Although the state law at issue in *Tennessee Wine* was facially discriminatory, the predominant-effects analysis is not limited to such laws. This Court considered facial discrimination as one factor among several in its analysis. *See id.* at 2474. Given the fact-intensive scrutiny that *Tennessee Wine* demands, the Fifth Circuit's per se approval of Texas's purported health-and-safety regulation is improper.

In any case, Texas's claims that the public corporation ban are necessary for regulating consumption or ensuring that liquor retailers are accountable are unsupportable. Regarding consumption, the district court found that "there is hardly any dispute" that Texas can and does regulate consumption "most efficaciously" through "alternative means with less impact on interstate commerce," like excise taxes and permit limits. *Wal-Mart* (trial court), 313 F. Supp. 3d at 776. Indeed, Texas "concede[d]" at trial that its excise taxes are *the* "proven method of reducing consumption," apparently displacing any need for a wholesale ban of public corporations. *See id*. Regarding accountability, Texas provided no evidence that public corporations cannot be trusted to be accountable, that they are meaningfully different from Texas's large private chains in this regard, or that accountability tracks with the form of corporate entity that owns a liquor retailer. The district court found that "[c]redible evidence demonstrates that public corporations are not less accountable than firms with fewer than 35 owners." *Id.* at 765. Likewise, undisputed expert testimony confirmed "there is no support in the academic literature for the notion that public corporations are less accountable to regulators than privately held corporations. To the contrary, the literature indicates public corporations tend to be very concerned with compliance and reputation." *Id*.

These conclusions follow from how public retailers typically operate: They comply with the law, have responsive legal teams, and train and require local employees to operate responsible, law-abiding stores. Because a nationwide reputation is at stake, public retailers arguably have more incentive to abide by local regulations and to behave more accountably than regional competitors. Their experiences across jurisdictions furthermore enable them to develop compliance mechanisms based on best practices and cutting-edge technology. Meanwhile, the local employees who run retail stores do not become any more or less familiar with their communities simply because their corporate parent is private or public. These employees undergo extensive training on drinking-age laws, valid customer identification, and the recognition of forgeries. In sum, the extensive record shows that there are no meaningful differences between Texas's existing private retailers and public corporations from a health and safety standpoint. The Fifth Circuit is not permitted to give these in-state private retailers (and grandfathered Texas public retailers) an "artificial competitive advantages" for no justifiable reason, under the Commerce Clause. *Wayfair*, 138 S. Ct. at 2094.

This final point bears emphasis. This Court has repeatedly held that judge-made rules may not be arbitrary and must facilitate an actual regulatory objective consonant with the Commerce Clause. *See Wayfair*, 138 S. Ct. at 2092. In *Wayfair*, this Court rejected a longstanding doctrine that only retailers with a physical presence in a State were required to collect sales tax on transactions with in-state customers, under *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). *See id.* at 2084. The *Quill* rule effectively shielded online retailers, without a physical presence in the State, from this tax burden. This Court rejected *Quill* because there was no intelligible Commerce Clause policy served by tying the tax-collection obligation to physical presence: The requirement did not protect the due process rights of remote retailers, did not address any actual hardships that these retailers faced in calculating and remitting sales tax, and only had the effect of putting "local businesses and many interstate businesses with physical presence at a competitive disadvantage relative to remote sellers." *See id.* at 2092-95. Even worse, the *Quill* rule incentivized retailers to avoid physical presence in a State simply to take advantage of this "judicially created tax shelter." *Id.* at

2094. As this Court recognized, the Commerce Clause should *forbid*—rather than enact—a rule like *Quill*'s that "creates rather than resolves market distortions." *Id.* at 2085.

The problem that the Court solved in *Wayfair* is exactly the same problem with the Fifth Circuit's per se rule. It creates a shelter for protectionism by regulating an "arbitrary, formalistic distinction," *i.e.*, the corporate form of the entity that owns a liquor retailer. *See Wayfair*, 138 S. Ct. at 2092. So long as the entity is not a public corporation, then it can compete in Texas's restricted market (unless, of course, it is a grandfathered Texas public corporation). But this focus on corporate form bears no relation to any legitimate regulatory purpose. Like in *Quill*, the rule incentivizes retailers to manipulate their corporate form, as well as state legislatures to issue similar laws with subliminal protectionist motives. Even worse than the *Quill* rule, however, the Fifth Circuit's rule facilitates the very evil that the Commerce Clause is designed to address: state protectionism, economic Balkanization, and obstruction of national markets. This point by itself counsels that this Court grant certiorari and reject the Fifth Circuit's arbitrary exception to the required case-by-case scrutiny of discriminatory state laws.

CONCLUSION

The Court should grant Walmart's petition for a writ of certiorari.

Respectfully submitted,

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