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.

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

BRIEF IN OPPOSITION FOR TEXAS ALCOHOLIC BEVERAGE COMMISSION, KEVIN LILLY, AND HASAN K. MACK

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QUESTION PRESENTED

To combat the negative externalities that accompany liquor consumption, Texas limits the availability of liquor in a unique way. Under section 22.16 of the Texas Alcoholic Beverage Code, enacted 25 years ago, a company that has more than 35 owners or is publicly traded may not hold a liquor-store permit. The law precludes large corporations from using their economies of scale to lower liquor prices and increase the density of liquor outlets in the State. This approach has served Texas well—it has consistently ranked among the States with the lowest per capita liquor consumption.

Although section 22.16 treats in-state and out-of-state corporations the same, Petitioners contend that it violates the dormant Commerce Clause because it is discriminatory in purpose and effect. The court of appeals remanded the discriminatory-purpose claim for further proceedings. But it rejected the discriminatory-effect claim. Applying the principles set forth in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), the court concluded that, as in *Exxon*, there were no factors that supported a discriminatory effect. The law does not prohibit the flow of interstate liquor products, impose additional costs on out-of-state liquor retailers, or distinguish between Texas and out-of-state companies in the retail market. And several companies owned by out-of-state residents have entered the Texas market. Pet. App. 57.

In this interlocutory posture, the question presented is:

Whether the court of appeals correctly applied settled dormant Commerce Clause principles under *Exxon* and its progeny to the record evidence in holding that section 22.16 of the Texas Alcoholic Beverage Code does not have a discriminatory effect on interstate commerce.

PARTIES TO THE PROCEEDING

Petitioners, plaintiffs-appellees-cross-appellants below, are Wal-Mart Stores, Inc.; Wal-Mart Stores Texas, L.L.C.; Sam's East, Inc.; and Quality Licensing Corporation.

Respondents are: (1) defendants-appellants-cross-appellees Texas Alcoholic Beverage Commission; Kevin Lilly, Presiding Officer of the Texas Alcoholic Beverage Commission; and Hasan K. Mack (collectively, "TABC"); and (2) intervenor-appellant-cross-appellee Texas Package Stores Association, Inc. ("TPSA").

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INTRODUCTION

In an effort to make liquor less accessible and thereby reduce the negative externalities associated with liquor consumption, Texas does not allow public corporations—whether based in Texas or elsewhere—to operate liquor stores. Tex. Alco. Bev. Code § 22.16. Petitioners ask the Court to review the Fifth Circuit's holding that this prohibition does not have a discriminatory effect on interstate commerce under the dormant Commerce Clause. The Court should decline the invitation.

Petitioners' request is premature. In this case, they also contend that the same ban violates the dormant Commerce Clause because it was enacted with a discriminatory purpose. But that claim remains unresolved; the Fifth Circuit remanded it to the district court to reweigh

the evidence and redetermine the issue. Accordingly, this case comes to the Court in an interlocutory posture, a stage at which the Court customarily declines to exercise certiorari review. Petitioners offer no compelling reason for the Court to depart from that practice here and review their claims piecemeal.

Moreover, Petitioners package their early request in a question not presented by this case. They frame the issue as whether a state law with the "predominant effect" of protecting in-state retailers is constitutional "just because" the law does not facially distinguish between in-state and out-of-state businesses of the same corporate form. Pet. i. That framing is doubly flawed.

First, determining an alcohol regulation's "predominant effect" is the scrutiny that the Court recently held applies to such regulations *after* they have been found to violate the dormant Commerce Clause's "nondiscrimination principle." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2470, 2474 (2019). But because the courts below have not finally resolved the discrimination issue, they have not reached the "predominant effect" inquiry. Petitioners' suggestion that the Court should make that determination itself in the first instance imagines an unconventional role for the Court and rests on a misreading of the record.

And second, contrary to Petitioners' premise, the Fifth Circuit did not hold that the public-corporation ban is not discriminatory in effect "just because" it does not facially discriminate. Rather, the Court faithfully applied the Court's decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), and concluded that, apart from the facial neutrality, none of the other factors discussed in *Exxon* that could support a finding of discrimination was present. Pet. App. 57. In other words,

Petitioners' true complaint is that the Fifth Circuit purportedly misapplied *Exxon* to these facts. That sort of question, particularly in this interlocutory posture, does not merit review. Sup. Ct. R. 10.

Because the Fifth Circuit's decision was not based solely on the public-corporation ban's facial neutrality, the circuit conflict asserted by Petitioners is illusory as well. The different outcomes they tout reflect the different state laws and facts at issue in those cases, not any divergence in legal rules. The absence of a genuine conflict provides yet another reason why the petition should be denied.

STATEMENT

1.a. When the Twenty-first Amendment brought an end to Prohibition in 1933, it proscribed "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the law thereof." U.S. Const. amend. XXI, § 2. Since then, the State of Texas has been responsible for "combat[ing] the perceived evils of an unrestricted traffic in liquor" within its borders. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984).

Among those evils are the substantial social and economic costs caused by alcohol consumption. For example, drinking alcohol contributes to serious health problems such as "liver disease, heart disease, strokes, and cancer." Pet. App. 91. Other associated harms include "drinking and driving, child and spousal abuse, homicides, and suicides." Pet. App. 91.

These costs have been shown to increase where there is a greater density of retail outlets selling alcohol. Pet. App. 91-92. Accordingly, one proven way to reduce alcohol consumption and the negative externalities that

follow is to limit the number of those outlets. Pet. App. 91. Likewise, there is a "broad consensus" that higher alcohol prices have the effect of reducing alcohol consumption and its attendant harms. Pet. App. 91.

b. This case concerns Texas's unique approach to regulating retail sales of the alcoholic beverages with the highest alcohol content: liquor. "Liquor" includes distilled spirits, such as whiskey, rum, and gin. Tex. Alco. Bev. Code § 1.04(3), (5).

Retail sales of liquor for off-premises consumption must occur at stand-alone "package stores." *Id.* § 22.01. And each store location must have a package-store permit—known as a "P permit"—issued by TABC. *Id.* § 11.02.

Texas limits the size and form of entity that may hold a P permit. Section 22.16 of the Texas Alcoholic Beverage Code—the statute at issue here—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." *Id.* § 22.16(a). For purposes of this prohibition, a "public corporation" is defined as a corporation or other legal entity whose shares are traded on a public stock exchange or which has more than 35 owners. *Id.* § 22.16(b). The public-corporation ban does not apply to a corporation that already held or had applied for a P permit on April 28, 1995, shortly before the ban was passed. *Id.* § 22.16(f). Only two related permittees qualified for this exemption. ROA.10705:23-10706:1.[1]

[1] "ROA" refers to the record on appeal before the Fifth Circuit.

The public-corporation ban applies regardless of where the corporation is incorporated or domiciled or where its owners reside. *See* Tex. Alco. Bev. Code § 22.16(a); Pet. App. 108-09. That residence-neutral application is unsurprising, given that Texas enacted the ban after the Fifth Circuit struck down a Texas-residency requirement. *Cooper v. McBeath*, 11 F.3d 547, 555-56 (5th Cir. 1994); ROA.14536-38. Because of the ban, multiple Texas corporations that sell other alcoholic beverages cannot sell liquor in Texas, including competitors of Petitioners like Whole Foods and HEB (the largest grocery-store chain in Texas). ROA.14281-85, 14287, 14672. At the same time, as many as 40 companies with out-of-state ownership are unaffected by the ban and participate in the Texas liquor market. ROA.12083.

In addition to limiting the form of entities that may hold a P permit, Texas restricts the number of P permits a permittee may acquire. Currently, TABC may not issue more than 15 original P permits to a person per year (not counting acquisitions of existing package stores). Tex. Alco. Bev. Code § 22.04(c). And a person may not hold or have an interest in more than 250 package stores. *Id.* § 22.04(a).

c. In contrast to P permits, permits for retail sales of beer and wine for off-premises consumption—known as "BQ permits"—are not so limited. A beer-and-wine retailer may not sell any beverage containing more than 17 percent alcohol by volume. *Id.* § 26.01(a). But public corporations may be beer-and-wine retailers and the number of BQ permits is not capped. For example, Petitioners hold 647 BQ permits and collectively are the top retailer of beer and wine in Texas in terms of market share. ROA.10029:19-25, 12432.

d. Texas's approach to regulating alcohol sales has been effective in limiting liquor consumption by Texans. While the number of beer-and-wine retailers has increased over time, the number of package stores has remained stable. ROA.14665; Pet. App. 38. Correspondingly, increases in alcohol consumption have largely manifested in increased beer and wine sales while Texas's national ranking in the consumption of liquor, with its much higher alcohol content, has remained flat. ROA.14664-65. Indeed, Texas consistently ranks among the ten States with the lowest liquor consumption per capita. ROA.14662-63, 14673. And it has achieved this while maintaining the third lowest liquor excise tax in the country. ROA.10346:21-10347:2.

2. Petitioner Wal-Mart Stores, Inc. is the largest public company in the world. Pet. App. 38. It wants to increase its sales and profits from selling alcoholic beverages in Texas, in part by opening package stores next to its existing retail stores. Pet. App. 38-39. Because it is a "public corporation" under section 22.16, however, it cannot pursue this plan. Pet. App. 39.

Petitioners unsuccessfully lobbied the Texas Legislature to repeal the public-corporation ban and the then-existing limits on the number of P permits a permittee may hold. Pet. App. 39. Having failed in those efforts, they then sued TABC in federal court, claiming that the same provisions were invalid under the Equal Protection Clause and the dormant Commerce Clause. Pet. App. 36. TPSA, a trade organization, intervened to defend the challenged statutes. Pet. App. 39.

3. After a week-long bench trial, the district court rendered judgment striking down the public-corporation

ban and permanently enjoining its enforcement. Pet. App. 74, 137-38.[2]

a. The court did not accept all of Petitioners' various challenges to the ban. For one, it rejected the equal-protection claim. Pet. App. 129. The court explained that Texas legislators could have reasonably concluded that excluding public corporations from the Texas liquor market serves "the state's legitimate purpose of moderating the consumption of liquor and reducing liquor-related externalities." Pet. App. 126. That is because public corporations in particular can both significantly increase the number of liquor outlets and draw on their scale and capital to offer heavily discounted prices on liquor. Pet. App. 126-27.

For another, the court found the public-corporation ban does *not* have a discriminatory effect in violation of the dormant Commerce Clause. Pet. App. 102-09. The court reached that conclusion by applying this Court's controlling decision in *Exxon* and Fifth Circuit cases employing *Exxon*'s analytical framework. Pet. App. 105-109. Under that precedent, the court explained, the public-corporation ban does not discriminate, because it does not "differentiate[] between similarly situated in-state and out-of-state companies on the basis of the companies' ties to the state." Pet. App. 108. And, without more, the mere fact that the residence-neutral ban affects more interstate firms than Texas firms was insufficient to establish a discriminatory effect. Pet. App. 108-09.

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[2] The district court's rulings on the other challenged statutes are not at issue here. Because of recent changes to the provisions limiting the number of P permits, Petitioners withdrew their challenges to those provisions, and the parties agreed the district court's judgment on those challenges should be vacated. Pet. App. 69.

b. Despite the lack of any discriminatory effect, the district court concluded that the public-corporation ban violated the dormant Commerce Clause for two other reasons.

First, the court found that the Texas Legislature enacted the ban in 1995 for the purpose of discriminating against out-of-state corporations. Pet. App. 96-101. It divined that purpose by reviewing the evidence primarily through the prism of the factors prescribed in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977). Pet. App. 96-99. That purpose determination triggered heightened scrutiny, which led the court to find a dormant Commerce Clause violation. Pet. App. 100-01.

Second, the court held that even if the public-corporation ban did not discriminate against interstate commerce, it still impermissibly burdened interstate commerce under the balancing analysis of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Pet. App. 109-20. In the court's view, the burden of excluding potential out-of-state public-corporation entrants from the Texas liquor market outweighed Texas's admittedly "substantial" interests "in reducing the availability and consumption of liquor," a goal the court believed could be more effectively achieved by raising excise taxes. Pet. App. 116-18.

4. The Fifth Circuit affirmed in part and vacated in part, rendered judgment in part, and remanded for further proceedings. Pet. App. 70.

a. The court affirmed the judgment rejecting Petitioners' challenge to the public-corporation ban under the Equal Protection Clause. Pet. App. 66-69. The court found it "more than reasonable to assume that the state believed that public corporations have the capital and scale to offer liquor well below current prices," and

therefore, "excluding public corporations reduces both the total number of package store firms and overall liquor consumption." Pet. App. 68.

b. As to Petitioners' dormant Commerce Clause challenge, the court concluded that it was necessary to remand the case because some of the district court's factual findings on discriminatory purpose were "infirm." Pet. App. 43-53. For example, the district court erroneously found there was direct evidence that protectionist motives spurred the Texas Legislature to enact the public-corporation ban. Pet. App. 45-48. Additionally, the district court "failed to apply the 'presumption of legislative good faith' in finding that the sequence of events that led to the enactment of [the ban] evidences a discriminatory purpose." Pet. App. 48-50 (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018)). And the district court mistakenly derived a pattern of discrimination against out-of-state firms from the ban. Pet. App. 50-52. Despite these errors, the Fifth Circuit ultimately determined that the record did not support only one resolution of the factual issues. Pet. App. 43, 52. Accordingly, the court remanded the case to the district court "for a reweighing of the evidence" and new findings on discriminatory purpose. Pet. App. 43.

But the Fifth Circuit agreed with the district court that, under *Exxon* and Fifth Circuit precedent applying *Exxon*, the public-corporation ban does not have a discriminatory effect. Pet. App. 53-57. The court reiterated that "the public corporation ban treats in-state and out-of-state public corporations the same." Pet. App. 56-57. And, critically, there were no other factors that could support a finding of discriminatory effect despite that similar treatment. Pet. App. 57. An out-of-state company faces no barriers to obtaining P permits under the Code,

so long as it is not a "public corporation" under section 22.16. Pet. App. 57. And the public-corporation ban does not prohibit the flow of interstate liquor products, impose additional costs on out-of-state liquor retailers, or distinguish between Texas and out-of-state companies in the retail market. Pet. App. 57. Indeed, while "Texas-based public corporations are prohibited from selling liquor in the state," "several companies owned by out-of-state residents have entered the Texas liquor retail market, including one of the ten largest liquor retailers in the state." Pet. App. 57.

For related reasons, the Fifth Circuit reversed the judgment for Petitioners on their *Pike* challenge and rendered judgment for TABC and TPSA. Pet. App. 59-66. The court held that the district court had erred in finding a burden on interstate commerce based on the number of out-of-state companies that could serve the Texas liquor market but for the public-corporation ban. Pet. App. 62. That approach was incorrect, the court explained, because the Commerce Clause "protects the interstate *market*, *not* particular interstate *firms* from prohibitive or burdensome regulations." Pet. App. 62 (quoting *Exxon*, 437 U.S. at 127-28). Turning to that market, the court noted that what matters would be evidence that the public-corporation ban "prohibited the flow of interstate goods to the Texas liquor retail market, placed barriers and additional costs against interstate dealers, or distinguished between in-state and out-of-state companies in the market." Pet. App. 64. Here, the record was "devoid of such evidence." Pet. App. 64.

c. Petitioners sought rehearing en banc. Pet. App. 71. The court did not request a response, and no judge called for an en banc vote. Pet. App. 72.

REASONS FOR DENYING THE PETITION

I. The Lack Of A Final Decision In This Case Makes It Unsuitable For The Court's Review.

A. The Court's standard practice is to wait for a final decision in the courts below before granting certiorari review in a case. *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (observing that the judgment sought to be reviewed "was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application"). And the Court generally adheres to that practice when the court of appeals has remanded a case to the district court for further review that includes factual determinations. *See, e.g.*, *Wrotten v. New York*, 560 U.S. 959, 959-60 (2010) (Sotomayor, J., respecting the denial of certiorari) (noting that the denial of review was warranted because the case had been remanded "for further review, including of factual questions"); *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) (explaining that, "because the Court of Appeals remanded the case" to determine whether contempt had occurred "in fact," "it is not yet ripe for review by this Court").

A remand for further factual review is the precise posture of this case. The Fifth Circuit did not resolve Petitioners' claim that the public-corporation ban violates the dormant Commerce Clause because it was enacted with a discriminatory purpose. Pet. App. 43. Rather, because the district court's fact findings on discriminatory purpose were infected by legal error, the Fifth Circuit

remanded "for a reweighing of the evidence" and revised findings on that issue. Pet. App. 43. That remand puts this case at a stage at which the Court ordinarily does not exercise certiorari review.

Indeed, this case comes to the Court in a posture very similar to that of *Abbott v. Veasey*, 137 S. Ct. 612 (2017), in which the Court denied review. *Veasey* also concerned whether the Texas Legislature had enacted a law with a discriminatory purpose—there in the context of challenges to Texas's voter ID law under the Fourteenth and Fifteenth Amendments. *Id.* at 613 (Roberts, C.J., respecting the denial of certiorari). As it did here, the Fifth Circuit had "vacated the District Court's finding of discriminatory intent and remanded for further consideration of the facts." *Id.* Although the Court could have granted review at that time, the Chief Justice emphasized that "the discriminatory purpose claim is in an interlocutory posture, having been remanded for further consideration." *Id.* Accordingly, he suggested that the petitioners could seek review again "after entry of final judgment," when "[t]he issues will be better suited for certiorari review." *Id.* The same is true in this case.

And none of the "extraordinary" circumstances that might justify a departure from the Court's usual forbearance in reviewing interlocutory decisions is present here. *Hamilton-Brown Shoe*, 240 U.S. at 258. Review at this stage would not, for example, relieve a party from the burden of a preliminary injunction or a future trial that conflicts with sovereign immunity. *See, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997) (per curiam); *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 153-54 (1964). For this reason alone, the Court should deny the petition.

B. Petitioners scarcely acknowledge the lack of a final judgment here. And when they finally do, their case

for this Court's immediate review rests on a distorted reading of the decisions below.

1. Petitioners' primary argument is that the Fifth Circuit's application of *Exxon* in its discriminatory effect analysis—the issue on which Petitioners seek review—"pervaded its discriminatory purpose analysis too." Pet. 30. Thus, in Petitioners' view, unless the Court addresses the Fifth Circuit's alleged misapplication of *Exxon* now, they will be litigating their discriminatory purpose claim on remand "with one hand tied behind [their] back." Pet. 30. Neither the description of the Fifth Circuit's analysis nor the metaphor is remotely accurate.

The Fifth Circuit's application of *Exxon* in analyzing discriminatory effect—which, as discussed below, was correct—did not "pervade" its discriminatory purpose analysis. The effect of the public-corporation ban was only *one of five factors* that the court considered in evaluating discriminatory purpose. Pet. App. 43. Most of the court's discussion addressed the other factors, none of which involved its application of *Exxon*. Pet. App. 44-50, 52-53. And the court's overarching assessment was that "[t]he record does not support 'only one resolution of the factual issue.'" Pet. App. 43 (quoting *Veasey v. Abbott*, 830 F.3d 216, 230 (5th Cir. 2016) (en banc)). That indeterminate conclusion is what compelled the court to remand. Pet. App. 43.

In context, then, Petitioners' rationalization for review at this time boils down to this: they want the Court to recalibrate the scales as to a single factor bearing on discriminatory purpose before the district court conducts the reweighing of evidence that the Fifth Circuit ordered. That request surely does not present any extraordinary concerns that would justify the Court's intervention now. *If* Petitioners lose their discriminatory

purpose claim on remand, they can raise the matter again after that final judgment when "[t]he issues will be better suited for certiorari review." *Veasey*, 137 S. Ct. at 613 (Roberts, C.J.).

2. Petitioners also urge the Court to grant review at this stage on the premise that "no remand is necessary" because the public-corporation ban "cannot survive the scrutiny to which it should have been subjected." Pet. 30. This is an even more radical attempt to justify immediate review than Petitioners' discriminatory-purpose argument. In essence, Petitioners are asking the Court to grant review to apply the new standard of scrutiny for discriminatory alcohol regulations announced last year in *Tennessee Wine* before there is even a finding of discrimination in this case *and* before the courts below have had an opportunity to apply that new standard themselves.

a. In *Tennessee Wine*, the Court considered the interplay between the dormant Commerce Clause and section 2 of the Twenty-first Amendment and the extent to which those provisions, taken together, limit States' authority to regulate the alcohol trade. 139 S. Ct. at 2459.

The Court reiterated that state alcohol regulations remain subject to "the dormant Commerce Clause's nondiscrimination principle." *Id.* at 2470. But if an alcohol regulation violates that principle, it does not trigger the heightened level of scrutiny that would apply to restrictions on other types of commerce—i.e., "the law can be sustained only on a showing that it is narrowly tailored to advance a legitimate local purpose." *Id.* at 2461 (cleaned up). Rather, due to the reservation of States' authority over alcohol commerce in section 2 of the Twenty-first Amendment, the scrutiny applied involves "a different inquiry." *Id.* at 2474. A court must ask "whether the

challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground." *Id.* If that inquiry shows that the law's "predominant effect" is "protectionism, not the protection of public health or safety" or the advancement of another legitimate interest, then section 2 does not shield the law from Commerce Clause constraints. *Id.*

Applying this new test to invalidate the challenged law in *Tennessee Wine* was a straightforward task given the nature of the law and the manner in which it had been defended. It was undisputed that the law facially discriminated against nonresidents. *Id.* Only persons who had been Tennessee residents for the previous two years could obtain an initial license to operate a retail liquor store. *Id.* at 2457. And the law's defenders had done little to justify that disparate treatment. They had "relied almost entirely" on their (incorrect) legal argument that the Twenty-first Amendment insulated state alcohol regulations from any Commerce Clause challenge whatsoever. *Id.* at 2474. As a result of that strategy, the record was "devoid of any 'concrete evidence' showing that the 2-year residency requirement actually promotes public health or safety." *Id.* At most, the law's defenders had provided only unsupported assertions about public health and safety benefits in their briefing. *See id.* at 2475-76. That "far short" showing led the Court to conclude that the residency requirement's "predominant effect" was to protect in-state liquor store owners from out-of-state competition. *Id.* at 2476. Under the new standard of scrutiny, then, the law "violate[d] the Commerce Clause and [was] not saved by the Twenty-first Amendment." *Id.*

b. This case could hardly be in a more different posture from *Tennessee Wine*.

To begin, unlike Tennessee's residency requirement, the public-corporation ban is "facially neutral." Pet. App. 42. It "bans all public corporations from obtaining P permits irrespective of domicile." Pet. App. 42. Accordingly, whether the ban violates the dormant Commerce Clause's nondiscrimination principle—the first step in the *Tennessee Wine* analysis—turns not on simply reading a statute. Instead, that step requires answering the fact-intensive question of whether the ban was enacted with a "discriminatory purpose" or has a "discriminatory effect" on interstate commerce. *Bacchus Imports*, 468 U.S. at 270.

As discussed above, the lower courts have not finished resolving that fact-bound inquiry. Both courts found that the ban has no discriminatory effect. Pet. App. 53-57, 102-09. And although the district court concluded that the ban was enacted with a discriminatory purpose, Pet. App. 96-101, the Fifth Circuit vacated that determination and remanded for further reweighing of the evidence and revised findings, Pet. App. 43-53.

Because the threshold issue of discrimination remains unresolved, the lower courts have not reached the second step of the *Tennessee Wine* analysis: whether the public-corporation ban's "predominant effect" is economic protectionism or protecting public health and safety. 139 S. Ct. at 2474. The district court's now-vacated discriminatory-purpose finding predated *Tennessee Wine*, so that court applied heightened scrutiny. Pet. App. 101. Of course, we now know that was the wrong standard. The Fifth Circuit's post-*Tennessee Wine* decision identified the correct "predominant effect" test. Pet. App. 42. But the court did not have occasion to apply that test, because it remanded for resolution of whether the

public-corporation ban is discriminatory in the first place. Pet. App. 58-59.

If a court were to conclude that the public-corporation ban is discriminatory, teeing up *Tennessee Wine*'s second step, application of the "predominant effect" test would be a far different exercise from the task this Court confronted in *Tennessee Wine*. For unlike the law's defenders in that case, both TABC and TPSA submitted extensive "concrete evidence" (including expert testimony) regarding the ban's protective effects on public health and safety, including limiting the availability of liquor and reducing liquor consumption and the negative externalities that accompany it.[3] But, again, because of the posture of this case, neither the district court nor the Fifth Circuit has had reason to evaluate that evidence and make findings under *Tennessee Wine*'s "predominant effect" standard.

In sum, this case currently sits in the district court for a reweighing of evidence in the first step of *Tennessee Wine*'s analytical framework. Yet Petitioners would have this Court intercede now, decide that first step in their favor, *and* proceed to conduct and resolve *Tennessee Wine*'s second-step inquiry before either the district court or the court of appeals has passed upon it. That extreme request belies the Court's role as "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Because there is no compelling reason for

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[3] *E.g.*, ROA.10951:1-17, 10966:15-23, 11004:3-11005:3, 11334:13-18, 11369:9-11370:16, 11453:7-23 (expert testimony on liquor pricing); ROA.14047-48, 14665 (evidence relating to liquor-outlet density); ROA.10346:12-10347:15, 14662-65, 14673 (evidence relating to per capita liquor consumption); ROA.11006:3-25, 11114:1-11116:25 (testimony relating to the public health and social problems associated with higher liquor consumption).

the Court to depart from its usual practice of forgoing review of cases in this non-final posture, the petition should be denied.

II. Petitioners Seek Review Of A Question Not Presented By This Case.

Not only is the petition premature, but the question it presents was not passed upon by the courts below. Indeed, that question is not presented by this case.

Petitioners frame the question as whether a state law with the "predominant effect" of protecting in-state retailers from out-of-state competition is constitutional "just because" the law does not facially distinguish between in-state and out-of-state businesses of the same form. Pet. i. That query contains two false premises. No court has determined that the public-corporation ban's "predominant effect" is protectionist, nor does the record establish such an effect here. And the Fifth Circuit did not conclude that the ban is not discriminatory "just because" it does not facially discriminate between in-state and out-of-state corporations. These fundamental flaws in the question presented provide another reason to deny the petition.

A.1. As just discussed, whether a state alcohol regulation's "predominant effect" is economic protectionism or safeguarding public health and safety is a second-step inquiry that comes into play only *after* the regulation is determined to be discriminatory under the dormant Commerce Clause. *Tenn. Wine*, 139 S. Ct. at 2474. And, again, because the courts below have not determined that the ban is discriminatory, they also have not applied *Tennessee Wine*'s predominant-effect test.

To answer the question presented, then, this Court would first have to decide that the question's necessary premise is correct—i.e., that, on this record, the public-

corporation ban's "predominant effect" is protectionism and not advancing legitimate state ends. But that is not this Court's usual role. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). That the Court would have to resolve this fact-bound inquiry itself in the first instance to reach the question presented only reinforces that review is inappropriate at this juncture.

2. Petitioners nonetheless claim that the Court can bypass the courts below and "easily" find that the public-corporation ban's predominant effect is protectionist. Pet. 29-30. That contention rests on a misleading and incomplete view of the record.

To support their argument that the ban's predominant effect is protectionist, Petitioners rely heavily on the fact that around 98% of Texas package-store permittees are owned by Texans. Pet. i, 2, 15, 29. But they have never provided any context that would give that statistic meaning. That is, they have never showed that the 98% figure is out of proportion to what it would be without the public-corporation ban. If anything, the record demonstrates the opposite. Petitioners' own evidence in this case showed that over 99% of beer and wine retail permittees are also owned by Texans, even though there is no ban on public corporations holding those permits. ROA.14281-86. Standing alone, then, the 98% figure says nothing about whether the public-corporation ban has a protectionist effect.

Petitioners also make much of the public-corporation ban's "grandfather clause," which exempts from the ban a corporation that had held or applied for a package-store permit by April 28, 1995. Pet. 1-2, 7, 16, 17; Tex. Alco. Bev. Code § 22.16(f). In their telling, that clause "notabl[y]" protected incumbent permittees that had

obtained package-store permits when Texas had a residency requirement and thereby "incorporate[d] the discriminatory effects of the preexisting regime." Pet. 7; *see also* Pet. 16. But Petitioners neglect to mention that *only 2* of the 2,532 package-store permits in Texas are held by a grandfathered public corporation. ROA.10670, 10705:23-10706:1. The grandfather clause simply has not affected the Texas liquor market in any "notable" way, much less contributed to any supposedly "predominant" protectionist effect.

Finally, any assessment of a law's "predominant" effect necessarily requires consideration and comparison of *all* of its effects. Yet Petitioners wholly ignore the extensive record evidence of the public-corporation ban's beneficial effects on public health and safety in Texas—namely, reducing liquor consumption and the negative externalities associated with it. *See supra* pp. 6, 17 & n.3.

Because the question presented presumes a law with a "predominant effect" of protectionism, but Petitioners have failed to establish that basic premise, their petition should be denied.

B. The question presented also presumes that the Fifth Circuit held that the public-corporation ban is not discriminatory in effect "just because" it does not facially distinguish between in-state and out-of-state public corporations. Pet. i. The court did no such thing. Instead, it correctly applied this Court's decision in *Exxon* and found that this case's similar circumstances warranted the same outcome: a finding of no discrimination against interstate commerce.

1. In *Exxon*, the Court considered a dormant Commerce Clause challenge to a Maryland statute that banned a producer or refiner of petroleum products from operating its own retail gas stations in the State. 437 U.S.

at 119-20. Although the law was facially neutral, in practice it affected only out-of-state businesses, as "no petroleum products are produced or refined in Maryland." *Id.* at 123. Relying on that fact, the challengers claimed that the law discriminated against interstate commerce because "the effect of the statute is to protect in-state independent dealers from out-of-state competition." *Id.* at 125.

The Court rejected that challenge. *Id.* at 125-28. The fact that the law's burden fell "solely on interstate companies" did not show, "either logically or as a practical matter," that the State was discriminating against interstate commerce. *Id.* at 125. That's because the burden fell on only "some interstate companies," which was insufficient to establish discrimination. *Id.* at 126. There were at least two major interstate companies that operated retail gas stations in Maryland and were not affected by the statute because they did not produce or refine gasoline. *Id.* at 125-26 & n.15. Indeed, the statute "create[d] no barriers whatsoever" against interstate companies that were not producers or refiners. *Id.* at 126. Moreover, the statute did "not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market." *Id.* The absence of those factors "fully distinguishe[d]" the Maryland law from other state laws that the Court had found to discriminate against interstate commerce. *Id.*

The challengers had also argued that, by targeting and weakening petroleum refiners in particular, the Maryland law would necessarily affect the structure and functioning of the retail gasoline market. *Id.* at 127. The Court rejected that theory, too. The Court explained that the Commerce Clause "protects the interstate market,

not particular interstate firms, from prohibitive or burdensome regulations." *Id.* at 127-28. Thus, the Clause does *not* protect "the particular structure or methods of operation in a retail market." *Id.* at 127.

2. According to Petitioners, the Fifth Circuit stripped away almost all of *Exxon*'s analysis and reduced it to a simplistic rule: A State's "regulation of corporate form that applies to in-state and out-of-state corporations alike" "necessarily does not have a discriminatory effect." Pet. 2. That is incorrect.

The court started with the obvious parallel to *Exxon*: like the prohibition against refiners and producers owning gas stations in that case, the public-corporation ban "treats in-state and out-of-state public corporations the same." Pet. App. 56-57. Unlike in *Exxon*, however, the burden of that neutral rule does *not* fall "solely on interstate companies." 437 U.S. at 125. As the Fifth Circuit noted, the ban also prohibits several Texas public corporations from selling liquor in Texas. Pet. App. 57; ROA.14281-85, 14287, 14672. So, while *Exxon* rejected the notion that discrimination necessarily occurs when a regulatory burden affects only interstate actors, 437 U.S. at 125, Petitioners cannot claim even that insufficient premise for their challenge.

But the Fifth Circuit did not stop there. The court also noted that, as in *Exxon*, multiple out-of-state retailers are in fact unaffected by the challenged ban and are selling liquor in Texas. Pet. App. 57 ("several companies owned by out-of-state residents have entered the Texas liquor retail market"). Those out-of-state businesses include "one of the ten largest liquor retailers in the state." Pet. App. 57. That fact established another similarity to *Exxon*—the challenged regulation burdens only "some interstate companies," while others "compete directly"

with in-state firms. *Exxon*, 437 U.S. at 126; *see also* Pet. App. 54 (discussing *Exxon*).

There is more. The Fifth Circuit explained that, like the law at issue in *Exxon*, the public-corporation ban imposes "'no barriers whatsoever'" against out-of-state companies that fall outside its definition of a public corporation. Pet. App. 57 (quoting *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 163 (5th Cir. 2007), another case applying *Exxon*); *see also* Pet. App. 54 (discussing *Exxon*). And, tracing *Exxon*'s analysis further, the court pointed out that the ban does not "'prohibit the flow of interstate [liquor retail products], place additional costs upon [out-of-state retailers], or distinguish between in-state and out-of-state companies in the retail market.'" Pet. App. 57 (quoting *Allstate*, 495 F.3d at 163); *see also* Pet. App. 54 (discussing *Exxon*). Accordingly, just as "the absence of any of these factors fully distinguishe[d]" *Exxon* from cases involving laws found to discriminate against interstate commerce, 437 U.S. at 126, the same absence of these factors compelled the Fifth Circuit to reach the same result. Pet. App. 57.

Finally, as to Petitioners' claim that there is something especially invidious about excluding public corporations in particular because of their superior ability to enter the Texas liquor market, the Fifth Circuit relied on *Exxon* to dismiss that theory, too. Petitioners' argument echoed the *Exxon* challengers' contention that banning petroleum refiners specifically from the retail gas station market would have a discriminatory impact due to the peculiarities of that market. 437 U.S. at 127-28. So, the Fifth Circuit appropriately cited *Exxon*'s reasoning to reject Petitioners' claim, noting that the Commerce Clause "'protects the interstate *market*, *not* particular

interstate *firms* from prohibitive or burdensome regulations.'" Pet. App. 62 (quoting *Exxon*, 437 U.S. at 127-28).

Contrary to Petitioners' thesis, then, the Fifth Circuit did not simply spot a facially neutral regulation of corporate form and declare that no discrimination against interstate commerce existed. Rather, the court dutifully examined *all* the factors relevant to the Commerce Clause inquiry that this Court identified in *Exxon* and correctly found a similar array of circumstances in the law *and* the record. Based on that similarity, the court properly concluded that, as in *Exxon*, the public-corporation ban has no discriminatory effect on interstate commerce.

3. Because the Fifth Circuit did not hold that the public-corporation ban is constitutional "just because" it regulates corporate form in a facially neutral way, the question presented is fatally flawed. At most, Petitioners are complaining that the Fifth Circuit misapplied *Exxon* to these facts. That complaint, particularly in this interlocutory posture, does not merit review. Sup. Ct. R. 10; *see also Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in the denial of certiorari) ("[W]e rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case.").

III. Petitioners' Asserted Circuit Conflict Is Illusory.

Once Petitioners' inaccurate rendering of the Fifth Circuit's decision is set aside, their asserted circuit conflict disappears as well. The purportedly inconsistent decisions are distinguishable from this case and *Exxon* (often expressly so) because of the particular laws and facts at issue in those cases, not because the Fifth Circuit has distilled *Exxon* into a different legal rule. There is no real conflict that requires resolution by this Court.

A. Petitioners first claim that two other circuits have refused to adopt the Fifth Circuit's supposed "sweeping reading" of *Exxon*. Pet. 23-24 (citing *Cachia v. Islamorada*, 542 F.3d 839 (11th Cir. 2008); *Walgreen Co. v. Rullan*, 405 F.3d 50 (1st Cir. 2005)). That argument hinges entirely on Petitioners' distorted caricature of the decision below. Again, the Fifth Circuit correctly applied *Exxon* and found that all of the factors that showed a lack of discriminatory effect in that case were also present here. The Eleventh and First Circuits reached different results only because those Commerce Clause challenges involved features that distinguished *Exxon* and, it follows, this case.

1. In *Cachia*, the Eleventh Circuit found a discriminatory effect on interstate commerce because the challenged law was unlike one covered by *Exxon*'s analysis, not because the court construed *Exxon* differently from the Fifth Circuit.

The plaintiff had challenged a city zoning ordinance that barred "chain restaurants" from operating within the city. 542 F.3d at 840-41. The Eleventh Circuit held that, unlike the Maryland law in *Exxon*, that ordinance went beyond regulating a particular structure or method of operation in the market. *Id.* at 843. Instead, it completely prohibited a certain type of restaurant, and thereby "disproportionately target[ed] restaurants operating in interstate commerce." *Id.* The court did not address the presence or absence of the other factors discussed in *Exxon*, as the Fifth Circuit did here. *Id.*

At bottom, then, the Eleventh Circuit simply distinguished *Exxon*; it did not adopt a reading of *Exxon* at odds with the decision below.

2. In *Walgreen*, the First Circuit found that a discriminatory effect resulted from local authorities'

skewed "enforcement" of the challenged law against similarly-situated out-of-state businesses, which fully distinguished *Exxon*. 405 F.3d at 55, 59.

At issue was a Puerto Rico statute that required pharmacies to obtain a "certificate of necessity and convenience" to open a location in the Commonwealth. *Id.* at 52. The statute allowed the head of Puerto Rico's health department "to block a new pharmacy from locating in its desired location simply because of the adverse competitive effects that the new pharmacy will have on existing pharmacies." *Id.* at 55. In practice, that official had used his authority to subject substantially more out-of-Commonwealth applicants to the statute's burdensome administrative process and had ultimately approved far fewer of their applications. *Id.* at 56.

That discriminatory enforcement made *Exxon* "distinguishable." *Id.* at 59. Unlike the law in *Exxon*, the Puerto Rico statute was being applied disparately to "similarly-situated" local and out-of-Commonwealth pharmacies. *Id.* And that disparately applied statute governed "*every*" interstate company seeking to open a pharmacy, not just a "subgroup" of interstate firms, as in *Exxon*. *Id.*

Like the Eleventh Circuit, then, the First Circuit did not construe *Exxon* differently from the Fifth Circuit; it just confronted a dissimilar set of circumstances that took the case out of *Exxon*'s ambit.

B. Petitioners also argue that the First and Sixth Circuits have invalidated on discriminatory-effects grounds state liquor laws that would be upheld as a matter of law by the Fifth Circuit. Pet. 24-25 (citing *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1 (1st Cir. 2010); *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423

(6th Cir. 2008)). Again, those cases conflict only with Petitioners' incorrect account of the decision below. Pet. 24.

1. *Family Winemakers* concerned a Massachusetts law that distinguished "large" and "small" wineries based on the volume of wine produced and then allowed "small" wineries to use more distribution channels for their products. 592 F.3d at 4. That placed the "large" wineries, which were all out of state, at a competitive disadvantage in distributing their wine in Massachusetts. *Id.* at 10. All of Massachusetts's wineries were in the "small" category, and thus enjoyed the distribution benefits for that class. *Id.* Based on that disparity, the First Circuit found that the law was discriminatory in effect. *Id.* at 12-13.

According to Petitioners, that approach conflicts with the decision below because "the First Circuit's inquiry did not end with the text of the law," which was facially neutral, but "proceeded to consider its practical effects." Pet. 24. As shown above, however, the Fifth Circuit did the same thing. It expressly considered both the actual exclusion of Texas public corporations from the retail liquor market and the actual participation of out-of-state firms in that market, as well as the absence of other real-world factors that evince a discriminatory effect. Pet. App. 57. The difference between these cases is not that the Fifth Circuit failed to consider practical effects; it's that the practical effects here are not discriminatory against interstate commerce.

2. Petitioners claim that *Cherry Hill Vineyards* is "much the same" as *Family Winemakers*. Pet. 24. That is true—it is similarly *not* in conflict with the Fifth Circuit's decision for the same reason.

The Kentucky statute at issue allowed "small farm wineries" to ship wine directly to a consumer only if the

consumer had purchased it in person at the winery. 553 F.3d at 427-28. Although the law facially applied to both in-state and out-of-state wineries, the Sixth Circuit held that it was discriminatory in effect. *Id.* at 432-34. That was so because, in practice, the law made it "financially infeasible for out-of-state wineries to sell directly to Kentucky residents." *Id.* at 432. Unlike in-state wineries, all out-of-state wineries were required to "wait for Kentucky consumers to travel up to 4800 miles to purchase out-of-state wine" or else "incur the added cost of paying a wholesaler" to import their wine through Kentucky's three-tier system. *Id.* That in turn benefitted in-state wineries "by driving up the cost of out-of-state wine." *Id.*

The bare conflict Petitioners assert is again that the Sixth Circuit considered "how the statutes *in fact* affected interstate commerce" while the Fifth Circuit supposedly did not do that here. Pet. 25. As discussed above, that is not the case. In particular, the Fifth Circuit expressly noted that the public-corporation ban "does not prohibit the flow of interstate liquor retail products" or "place additional costs upon out-of-state retailers." Pet. App. 57 (cleaned up). Because the Kentucky "small farm winery" statute *did* have those practical effects, it would have met the same fate in the Fifth Circuit that it did in the Sixth Circuit.

C. Finally, Petitioners summarily list a few other cases in which circuit courts found facially neutral laws to be discriminatory in effect. Pet. 25-26. For the reasons already discussed, those decisions present no conflict either. The Fifth Circuit did not hold that a facially neutral regulation of corporate form is per se not discriminatory in effect.[4]

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[4] In a footnote, Petitioners also suggest that this case gives the Court an opportunity to resolve another purported conflict over

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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whether non-legislators' motivations in advancing proposed legislation may serve as evidence of a legislature's discriminatory intent. Pet. 26 n.6. That issue goes to Petitioners' discriminatory *purpose* claim, which has been remanded to the district court and is not encompassed by the question presented. *See* Pet. App. 43, 48.