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

REPLY BRIEF

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REPLY BRIEF

The decision below holds that a Texas law that keeps 98% of Texas liquor stores in the hands of Texans does not have the effect of discriminating against interstate commerce. More remarkable still, it reached that bewildering conclusion by insisting that this Court's precedent compels it. In reality, *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), does nothing of the sort, which is why every other circuit to confront that argument has rejected it.

It is little surprise, then, that Texas spends nearly all of its opposition trying to reframe the decision below as fact-bound and non-final. But the court's own words refute those efforts. The Fifth Circuit expressly reaffirmed circuit precedent under which state "corporate form" laws survive Commerce Clause scrutiny *as a matter of law* even if they "create an obvious and significant barrier against out-of-state economic actors" *as a matter of fact*. Pet.App.52 n.11. For good measure, the court admitted that its decision is in "tension" (to put it mildly) with *Tennessee Wine & Spirits Retailers Association v. Thomas*, 139 S. Ct. 2449 (2019), because this Court *actually considered* a public-corporation ban's "practical effect." Pet.App.57 n.21. Under the Fifth Circuit's test, by contrast, the discriminatory effects analysis began and ended with the fact that Texas's public-corporation ban is facially neutral. That is a legal holding, and it cannot be reconciled with decisions from this Court or others.

The Fifth Circuit's decision likewise leaves no doubt that its resolution of Walmart's discriminatory-effects claim was final. On appeal from a final decision that followed a full-blown trial, the Fifth Circuit

definitively declared "that the ban does not have a discriminatory effect on interstate commerce." Pet.App.57. And while the court remanded on Walmart's discriminatory-*purpose* claim, it did so because it faulted the district court for treating the ban's undisputed effect of foreclosing virtually all out-of-state competitors as discriminatory. Awaiting resolution of a stand-alone *purpose* challenge to a law that has been conclusively declared to have no discriminatory *effect* would accomplish nothing but a massive waste of judicial and litigant resources.

That leaves Texas complaining that the lower courts did not resolve the *second* step of the Commerce Clause analysis *Tennessee Wine* articulated. But that is hardly a compelling reason to deny review when the question is whether the Fifth Circuit erred by rejecting Walmart's claim at the *first* step—especially when the court did so by employing a test that applies to alcohol and non-alcohol laws alike. At any rate, Texas's efforts to defend its ban under the "predominant effect" test are virtually identical to the arguments the Court rejected in *Tennessee Wine* itself. Indeed, when respondent TPSA (the trade group that represents Texas liquor stores) is not making the difficult-to-take-seriously claim that it supports the ban because the ban reduces liquor sales, it unabashedly defends the ban as necessary to "ensur[e] that small businesses in small towns throughout Texas can survive in the marketplace without having to compete with large corporations." TPSA.BIO.4. That is the definition of "unalloyed protectionism." *Tennessee Wine*, 139 S. Ct. at 2474. No serious effort to enforce the Commerce Clause's non-discrimination principle could allow such a law to survive.

ARGUMENT

I. The Decision Below Squarely Conflicts With This Court's Commerce Clause Cases.

In *Tennessee Wine*, this Court held that a state law that operates to ensure "that no corporation whose stock is publicly traded may operate a liquor store in" the state violates the Commerce Clause because its "predominant effect" is "simply to protect [in-state retailers] from out-of-state competition." 139 S. Ct. at 2457, 2474, 2476. Texas Alcohol Beverage Code §22.16 has precisely that effect: It expressly bans public corporations from operating liquor stores in Texas (unless they did so as of April 1995, when Texas explicitly barred all out-of-state companies), and it (unsurprisingly) has had the real-world effect of protecting in-state liquor-store owners from out-of-state competition. That is not up for debate. Texas itself produced evidence that only *four* of the 1,765 P permit-holders (less than 0.3%) are out-of-state entities, and that those four entities hold a collective *five* of the 2,579 P permits (less than 0.2%). Pet.App.87.[1] Yet rather than recognize §22.16 as the "unalloyed protectionism" it is, *Tennessee Wine*, 139 S. Ct. at 2474, the Fifth Circuit held that it "does not have a discriminatory effect on interstate commerce" *as a matter of law* simply because it applies to "in-state

[1] Texas claims that "as many as 40 companies with out-of-state ownership" hold P permits, State.BIO.5, but that figure defines "out-of-state ownership" to mean *even one* out-of-state owner. *See* Pet.App.87. At any rate, those at-least-one-non-Texan companies account for less than 2% of permits, leaving 98% of permits held by entities *wholly* owned by Texans. Pet.App.87.

[and] out-of-state public corporations" alike. Pet.App.57.

Texas's half-baked effort to reframe that holding as fact-bound succeeds only in confirming that the Fifth Circuit committed *legal* error. Texas emphasizes that the court looked to four "factors" drawn from pre–*Tennessee Wine* circuit precedent (mis-)interpreting *Exxon*. *See* Pet.App.54, 56-57. But none of those factors does anything to ferret out discrimination that is not apparent on the face of a law. One—whether a law "distinguishes between in-state and out-of-state entities"—just asks whether a law is facially neutral. And two more—whether a law "prohibit[s] the flow of interstate goods" or "place[s] added costs on interstate goods" or out-of-state actors—are satisfied in the Fifth Circuit's view only if a law singles out out-of-state goods or actors *on its face*. That is clear from the decision below, which analyzed those factors solely by reference to §22.16's text, without mention of the evidence of its real-world effects. Pet.App.57.

The only "factor" that even purports to do anything other than ask whether a law is facially neutral is the first one, which asks whether a law "restrict[s] interstate dealers in the retail market." Pet.App.54. But while that factor looks promising at first blush, it proves useless as well, for it turns out that "restrict" actually means "foreclose": The Fifth Circuit will find this factor satisfied only if a law bars *literally 100%* of out-of-state entrants. So the fact that §22.16 keeps Texas liquor stores (at least) 98% Texan-owned did not even feature in the court's analysis.[2] All

[2] Neither did respondents' claim, made for the first time in this Court, that 99% of beer-and-wine permit-holders are Texans.

that mattered was that a handful of privately owned out-of-state entities have slipped through the cracks. Pet.App.56-57.

To the extent that there were any doubt about the irrelevance of the law's real-world effects to the Fifth Circuit, the court's footnote endeavoring to reconcile its decision with *Tennessee Wine* eliminates it. To its credit, the court acknowledged (albeit with considerable understatement) the "tension" between its decision and *Tennessee Wine*'s conclusion that a "provision that shuts out all publicly traded corporations" was "so plainly based on unalloyed protectionism" that its unconstitutionality was obvious, 139 S. Ct. at 2474. *See* Pet.App.57 n.21. But in the Fifth Circuit's view, the way to reconcile that tension was to read *Tennessee Wine* as declaring "the predominant effect of the provision protectionism because it was facially discriminatory," not "because of its practical effect." Pet.App.57 n.21. That claim is bewildering; why would this Court have (thrice)

State.BIO.19; TPSA.BIO.1. Nor could that claim have featured below, for nothing in the record supports it. The sole cite respondents offer analyzes which entities hold the most permits, not what percentage of permits are held by out-of-state entities. ROA.14281-86. And that evidence is *unhelpful* to respondents, for it showed that whereas all but one of the ten largest P permit holders in Texas's five most-populous areas is a Texas entity, "the ten largest beer-and-wine retailers in [those same areas] are evenly split between Texas retailers and out-of-state retailers." Pet.App.87-88. Respondents' unsubstantiated claim also conflates the number of out-of-state permit-holders with the number of permits held by out-of-state entities, as TPSA itself highlights that *at least* 15% of beer-and-wine permits are held by out-of-state entities—and that is just counting the ten permit-holders with the most permits. TPSA.BIO.App.4.

discussed the law's practical effect if the analysis began and ended with its facial discrimination? In all events, the Fifth Circuit's candid acknowledgement that its test is incompatible with an analysis that actually considers a law's "practical effect" gives the lie to Texas's efforts to portray the decision below as grounded in fact rather than law.

Ultimately, then, Texas is left defending the proposition that *Exxon* really did declare virtually *per se* constitutional any "facially neutral statute that bans particular companies from a retail market." Pet.App.53-54. Indeed, Texas conspicuously fails to identify any such law that it thinks would *not* be constitutional. Instead, in its view, the bare fact that *some* out-of-state entities "are selling liquor in Texas" renders it irrelevant that §22.16 keeps Texas liquor stores (at least) 98% Texan-owned. State.BIO.22. That is not how this Court or any other (save the Fifth Circuit) has read *Exxon*—likely because doing so would render *Exxon* "woefully out of step with" a host of other decisions. *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 512 (5th Cir. 2001) (Jones, J., concurring); *see, e.g.*, *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263 (1984). But if even an intervening decision of this Court declaring a law with *exactly the same practical effect* as this one "unalloyed protectionism" was not enough to persuade the Fifth Circuit to change its ways, then nothing short of plenary review will suffice.

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

Respondents' efforts to deny the circuit conflict are equally unavailing. According to Texas, an Eleventh Circuit case striking down a facially neutral law that "prohibited a certain type of restaurant, and thereby 'disproportionately target[ed] restaurants operating in interstate commerce,'" does not conflict with the Fifth Circuit's decision upholding a facially neutral law that prohibits a certain type of corporation, and thereby disproportionately targets corporations that operate in interstate commerce. State.BIO.25 (quoting *Cachia v. Islamorada*, 542 F.3d 839, 843 (11th Cir. 2008)). To state that claim is to refute it. After all, the prohibited restaurant type in *Cachia* was not "out-of-state"; it was restaurants that are "one of a chain or group of three," 542 F.3d at 841—a classification that (like public corporation) excluded virtually (but not literally) all out-of-state entities with "the scale and capabilities necessary to" enter the market. Pet.App.50.

Texas's claim that the Eleventh Circuit "did not address the presence or absence of the other factors" the Fifth Circuit (mis-)derived from *Exxon* in reaching that conclusion fails too. State.BIO.25. The Eleventh Circuit expressly acknowledged (citing *Exxon*) that "the ordinance does not facially discriminate between in-state [chains] and out-of-state [chains]," "does not prevent all out-of-state restaurants from entering the local market," and does not distinguish between in-state and out-of-state chains. 542 F.3d at 842-43. But none of that saved from invalidation because the ordinance "disproportionately target[ed] restaurants

operating in interstate commerce" as a *factual* matter. *Id.* at 843. Here, by contrast, the Fifth Circuit did not (and could not) disturb the district court's detailed findings that §22.16 disproportionately targets out-of-state competitors as a factual matter. *See* Pet.App.87-89. It just deemed those facts not "relevant" under *Exxon*. Pet.App.50.

Texas's effort to distinguish *Walgreen Co. v. Rullan,* 405 F.3d 50 (1st Cir. 2005), fares no better. There too, Puerto Rico's certification requirement was "neutral[]" "[o]n its face," applying to anyone wanting to open a pharmacy. *Id.* at 55. And there too, Puerto Rico argued that the "case [wa]s controlled by *Exxon*['s]" dictum that "'[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish discrimination against interstate commerce.'" *Id.* at 59 (quoting *Exxon*, 437 U.S. at 127). But unlike here, the First Circuit held the challenged law unconstitutionally discriminatory anyway because it "perpetuate[d] local dominance of the Puerto Rico pharmacy market" as a factual matter. *Id.* Texas insists that the real culprit there was "discriminatory enforcement." State.BIO.26. But the discrimination the First Circuit identified stemmed from the law's *facial* exemption for "all existing pharmacies," 92% of which "were locally owned." 405 F.3d at 55. As a result, most "out-of-Commonwealth entities [were] forced to undergo the entire administrative process" (which "frequently" resulted in denials), while most in-Commonwealth entities were not. *Id.* at 56. The First Circuit did not say (as the Fifth Circuit would have) that none of that mattered because 8% were *not* locally owned or because not *all* out-of-state applications were denied.

It instead (correctly) concluded that *Exxon* cannot save a facially neutral law that has the practical effect of "perpetuat[ing] local dominance." *Id.* at 59.

And those are just cases outside the alcohol context. The Fifth Circuit's rule is equally incompatible with *Family Winemakers of California v. Jenkins*, 592 F.3d 1 (1st Cir. 2010), and *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423 (6th Cir. 2008). Texas tries to distinguish *Family Winemakers* by noting that there were no "large" wineries in Massachusetts, which meant that the state's "small" wineries preference exclusively disadvantaged out-of-state entities. State.BIO.27. But that purported distinction would make no difference in the Fifth Circuit. Whereas the First Circuit (correctly) refused to read *Exxon* as compelling the conclusion that "the fact that [the law] benefits both in-state and some out-of-state 'small' wineries … prove[s] that [it] is non-discriminatory," 592 F.3d at 13, the Fifth Circuit holds that a state law is *per se* non-discriminatory unless *all advantaged* entities are *in*-state and *no* out-of-state entities can compete. Pet.App.54-56.

Cherry Hill is likewise irreconcilable. The Sixth Circuit there found a "small" wineries preference discriminatory because it disadvantaged "[t]he *majority* of wineries" based out-of-state. 553 F.3d at 433 (emphasis added). Under the Fifth Circuit's rule, by contrast, the fact that §22.16 has the effect of "barring *nearly all* out-of-state companies with the scale and capabilities necessary to serve the Texas retail liquor market," Pet.App.50 (emphasis added), is irrelevant simply because of the qualifier "nearly." The conflict between how the Fifth Circuit and other

circuits analyze facially neutral laws that distinguish on the basis of "size and form," State.BIO.4, thus could not be more stark.

III. This Case Is An Excellent Vehicle To Resolve This Square Circuit Split.

Unable to deny the clear conflict with *Tennessee Wine* and decisions from other circuits, Texas urges the Court to stay its hand because this case is "interlocutory." But there is nothing interlocutory about the Fifth Circuit's resolution of Walmart's discriminatory-effects claim: The court *expressly held* that "the ban does not have a discriminatory effect on interstate commerce." Pet.App.57. To be sure, the court remanded Walmart's separate discriminatory-*purpose* claim. Pet.App.70. But unlike in *Abbott v. Veasey*, 137 S. Ct. 612 (2017) (mem.), where Texas was asking this Court to consider the same discriminatory-purpose claim the lower courts had not yet resolved, Walmart asks this Court to consider its *effects* claim.

Nor would it make any sense to wait until the purpose claim has been resolved, for "the general flaw" the Fifth Circuit identified "throughout the district court's findings" on that claim was the court's repeated reliance on its (undisturbed) finding that §22.16 "had the 'effect of barring nearly all out-of-state companies with the scale and capabilities necessary to serve the Texas retail liquor market.'" Pet.App.50-51. In the Fifth Circuit's view, "[t]hat finding does not answer the relevant question" because that effect *does not count as discriminatory*. Pet.App.50. Thus, even setting aside the peculiar dynamic of litigating a stand-alone discriminatory-purpose challenge to a statute declared to have no discriminatory effect,

awaiting resolution of the purpose claim would accomplish nothing but years of wasted judicial and litigant resources if the Fifth Circuit's reading of *Exxon* is wrong.[3]

Texas complains that the lower courts did not resolve whether §22.16 could survive *Tennessee Wine's* "predominant effect" test. State.BIO.16. But they did not do so because the Fifth Circuit concluded that §22.16 does not have a discriminatory effect at all. Pet.App.50. This Court need not know how §22.16 would fare at "the second step" of the analysis, State.BIO.16, to decide whether the Fifth Circuit erred by upholding it at the first. At any rate, Texas's arguments are virtually identical to the arguments this Court rejected in *Tennessee Wine*. *Compare* State.BIO.17 (touting §22.16's "protective effects" of "limiting the availability of liquor and reducing liquor consumption"), *with* Reply.Br.16, *Tennessee Wine* (U.S. filed Jan. 4, 2019) ("durational-residency requirements advance the core state interest of promoting temperance" because "they make it harder to sell—and thus purchase—alcohol"). And no matter what facts Texas mustered to support its dubious reducing-consumption claim, it too is ultimately doomed by the reality that "there are obvious alternatives that better serve that goal without

[3] Texas protests that the Fifth Circuit identified other purported "errors" in the district court's purpose analysis. State.BIO.9, 13. But to the extent that Texas is arguing that Walmart's purpose claim is unlikely to *succeed*, it would make even less sense to force another round of lower-court proceedings before resolving a constitutional question that has been finally resolved and, by the State's own telling, is likely to persist.

discriminating against" out-of-state entities. *Tennessee Wine*, 139 S. Ct. at 2476.

In all events, this Court could always remand if it prefers not to answer the "predominant effect" question in the first instance. That course has far more to recommend it than leaving in place a legal test that forecloses discriminatory-effects challenges to all manner of facially neutral laws, not just to those regulating the alcohol industry. *See, e.g.*, *Ford*, 264 F.3d at 500-01 (car manufacturers); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007) (insurance companies). That test is incompatible with this Court's cases, with decision from other circuits, and with any sensible understanding of the anti-discrimination principle *Tennessee Wine* affirmed. The Court should not allow it to continue to foreclose challenges to laws as blatantly protectionist as Texas's public-corporation ban.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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