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Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Commission: The Supreme Court Misses Its "Shot" at Clarifying State Alcohol Regulations and the Commerce Clause

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WAL-MART STORES, INC. v. TEXAS ALCOHOLIC BEVERAGE COMMISSION: THE SUPREME COURT MISSES ITS "SHOT" AT CLARIFYING STATE ALCOHOL REGULATIONS AND THE COMMERCE CLAUSE

Josephine Battles*

INTRODUCTION

The Supreme Court erred by denying certiorari in *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Commission*.[1] The Texas statute that bans all publicly traded corporations from obtaining a license to sell liquor, but carves an exception for some Texas-run public corporations through an express clause, is in direct violation of the dormant Commerce Clause.[2] The Texas Legislature disguised the public corporation ban as a "facially neutral" alcohol regulation, however, the ban is discriminatory towards out-of-state competitors in both its purpose and effect.[3] Moreover, the Fifth Circuit's decision in *Wal-Mart Stores* is firmly inconsistent with Supreme Court precedent.[4] Additionally, the Fifth Circuit has misapplied and misinterpreted case precedent to generate an arbitrary per se rule for similarly situated businesses.[5] The interpretation used by the Fifth Circuit has created a circuit split for both state alcohol regulations and the Commerce Clause more generally.[6] The Supreme Court's ignorance of the errors committed by the Fifth Circuit in *Wal-Mart Stores* has opened the door to constitutional, legislative, and economic harms.

Part I of this Note will discuss the interconnection between the Commerce Clause and the Twenty-First Amendment. Part II will discuss the case history of *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Commission*. Part III will argue

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[1] 945 F.3d 206 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 874 (2020).

[2] *See* discussion *infra* Section III.A.

[3] *See* discussion *infra* Section III.B.

[4] *See* discussion *infra* Section I.C, Part III. The decision is primarily inconsistent with precedent set last term in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019), but also with longstanding Commerce Clause jurisprudence.

[5] *See infra* Section III.B.

[6] *See infra* Section III.C.

that the Supreme Court erred by denying certiorari in *Wal-Mart Stores* preview the potential harms stemming from this decision.

I. BACKGROUND INFORMATION

A. The Dormant Commerce Clause

The Commerce Clause authorizes Congress "to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."[7] As written, the Commerce Clause is an express grant of power for Congress to regulate commerce between the states.[8] The dormant Commerce Clause, however, is "the negative implication of the Commerce Clause"[9] that restricts the states from "imposing economic protectionism" against other states.[10] The dormant Commerce Clause enables the federal courts to guard Congress's power to regulate commerce[11] and prevents states from enacting laws "designed to benefit in-state economic interests by burdening out-of-state competitors."[12]

Though dormant Commerce Clause jurisprudence has evolved significantly during its two-hundred-year history in the Supreme Court,[13] several principles have remained consistent.[14] First, obvious discrimination against interstate commerce is presumptively invalid and can only be upheld if the discrimination is necessary to meet an important state interest.[15] Second, state regulations where burdens on interstate commerce clearly outweigh legitimate local benefits are unconstitutional.[16] State regulations are subject to two types of challenges under the dormant Commerce

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[7] U.S. CONST. art. I, § 8.

[8] Pamela R. Cote, Note, *Constitutional Law—The 'Grape' March on Washington: The Twenty-First Amendment, the Dormant Commerce Clause, and Direct Alcohol Shipments*, 26 W. NEW ENG. L. REV. 343, 345 (2004).

[9] Lisa Lucas, Comment, *A New Approach to the Wine Wars: Reconciling the Twenty-First Amendment with the Commerce Clause*, 52 UCLA L. REV. 899, 910–11 (2005). The dormant Commerce Clause is an implied, rather than express, power.

[10] Cote, *supra* note 8, at 346.

[11] Jason E. Prince, Note, *New Wine in Old Wineskins: Analyzing State Direct-Shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-First Amendment*, 79 NOTRE DAME L. REV. 1563, 1569 (2004).

[12] Tania K. M. Lex, Note, *Of Wine and War: The Fall of State Twenty-First Amendment Power at the Hands of the Dormant Commerce Clause*—Granholm v. Heald, 32 WM. MITCHELL L. REV. 1145, 1149 (2006) (quoting 15A AM. JUR. 2D *Commerce* § 1 (2005)) (internal quotation omitted).

[13] Cote, *supra* note 8, at 346.

[14] Lucas, *supra* note 9, at 911.

[15] *Id.* Since the 1930s, the Court has recognized the states' authority to enact legislation for the health and safety of its citizens. Cote, *supra* note 8, at 346.

[16] Lucas, *supra* note 9, at 911.

Clause—facial challenges and challenges to statutes "as applied."[17] The first prong of the dormant Commerce Clause analysis is to consider whether the "statute 'directly regulates or discriminates against interstate commerce' or 'favor[s] in-state economic interests over out-of-state interests."[18] A statute that falls within this description is presumptively invalid[19] unless it necessarily serves a "legitimate local purpose."[20] The second prong of the analysis is a fact-intensive inquiry into the justifications of the discriminatory nature and effect of the statute.[21] In most cases, the two prong Commerce Clause analysis is sufficient. The Twenty-First Amendment, however, complicates the dormant Commerce Clause by adding a third prong to the analysis.[22] The third prong determines whether a statute is "saved" by Section 2 of the Twenty-First Amendment.[23] A brief history on the passage and subsequent jurisprudence of the Twenty-First Amendment is helpful in understanding this additional prong of the Commerce Clause analysis.

B. The Twenty-First Amendment

1. The History of Prohibition and Repeal

In 1920, the United States began a national prohibition with the passage of the Eighteenth Amendment which forbade the "manufacture, sale, or transportation of intoxicating liquors."[24] However, this experimental prohibition was short-lived due to non-compliance.[25] As social and economic conditions worsened from the Great Depression and non-compliance with prohibition, the motivation to end the unsuccessful experiment increased.[26]

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[17] *Id.*

[18] *Id.* (quoting Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986)).

[19] *Id.* Statutes facing a facial challenge will always fit into this category. *See id.* at 912.

[20] *Id.* at 911. To be upheld, the legitimate local purpose "cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 911–12.

[21] *Id.* at 912. "[A]t this stage states are required to justify the discriminatory nature of the statute, which can be a significant hurdle to overcome." *Id.*

[22] *Id.* at 913.

[23] *See id.*

[24] Elizabeth Norton, Note, *The Twenty-First Amendment in the Twenty-First Century: Reconsidering State Liquor Controls in Light of* Granholm v. Heald, 67 OHIO ST. L.J. 1465, 1468 (2006); U.S. CONST. amend. XVIII, § 1; Lex, *supra* note 12, at 1152.

[25] *See* Brannon P. Denning, Smokey and the Bandit *in Cyberspace: The Dormant Commerce Clause, the Twenty-First Amendment, and State Regulation of Internet Alcohol Sales*, 19 CONST. COMMENT. 297, 303 (2002). Legislatures refused to allocate resources to enforce compliance with the amendment. *Id.*

[26] Norton, *supra* note 24, at 1470. Criminal rackets increased as people tried to illegally satisfy the demands for alcohol. Denning, *supra* note 25, at 303.

In 1932, Franklin D. Roosevelt won the presidency, running on an anti-prohibition platform.[27] Within a month of the election, a resolution to repeal the Eighteenth Amendment was introduced to the House.[28] Two months later, in February 1933, the Senate produced and passed a revised resolution that ended prohibition and gave states control of liquor regulation through Section Two of the Twenty-First Amendment.[29] Ratification of the Amendment, and the end of prohibition, was complete by December 1933.[30]

2. Section Two of the Twenty-First Amendment

Prior to prohibition, Congress granted the states the ability to regulate alcohol in interstate commerce through the Webb-Kenyon Act.[31] "The Act prohibited any importation, manufacture, or sale of alcohol in violation of state law."[32] The Act was designed to give states a pass around the dormant Commerce Clause.[33] The Twenty-First Amendment adopted similar language in Section 2 to give states the authority to regulate interstate liquor.[34]

Section 2 of the Twenty-First Amendment reads: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violations of the laws thereof, is hereby prohibited."[35] This language traditionally gave states the broad discretion to regulate alcohol.[36] However, as state alcohol regulations began to intertwine with traditional Commerce Clause regulations, the Court recognized the need to separate these rights.[37] Modern Section 2 cases fall within three separate categories.[38]

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[27] Cote, *supra* note 8, at 352.

[28] Norton, *supra* note 24, at 1470. The resolution was introduced to the House on December 5, 1932. *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 1471.

[32] Drew D. Massey, *Dueling Provisions: The 21st Amendment's Subjugation to the Dormant Commerce Clause Doctrine*, 7 TRANSACTIONS: TENN. J. BUS. L. 71, 78 (2005).

[33] *See id.*

[34] *See id.*

[35] U.S. CONST. amend. XXI, § 2.

[36] *See generally* State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59 (1936) (States may prohibit the importation of liquors as long as it prohibits manufacture and sale of liquors within its own borders); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939) (the Commerce Clause does not restrict the right of the states to regulate or prohibit alcohol); Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938) (states could discriminate in favor of in-state-manufactured liquor against out-of-state liquor).

[37] *See* Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324–25, 332 (1964). "Both the Twenty-[F]irst Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.* at 332.

[38] Granholm v. Heald, 544 U.S. 460, 486 (2005).

First, state alcohol regulations "that violate other provisions of the Constitution are not saved by the Twenty-first Amendment."[39] This has been applied to provisions like the Establishment Clause,[40] the Equal Protection Clause,[41] and the First Amendment.[42] Second, Section 2 of the Twenty-First Amendment does not override Congress's Commerce Clause powers regarding alcohol.[43] Just because states have the right to regulate alcohol does not mean alcohol is outside of the confines of Congress's power to regulate commerce.[44] Third, state alcohol regulations are "limited by the nondiscrimination principle of the Commerce Clause."[45] When states directly regulate against interstate commerce or when the effects favor in-state economic interests at the expense of out-of-state actors, those regulations are "generally struck down . . . without further inquiry."[46]

To survive modern Section 2 analysis, a regulation must "be justified as a public health or safety measure or on some other legitimate nonprotectionist ground."[47] Moreover, though Section 2 gives states greater regulatory authority for alcohol regulation, "'mere speculation'" and "'unsupported assertions'" cannot justify a regulation that otherwise violates the Commerce Clause.[48] Regulations with the predominant effect of protectionism, not public health or safety, are not saved by Section 2

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[39] *Id.* "Saved" meaning that the Twenty-First Amendment supersedes the Commerce Clause. *See id.* at 476.

[40] *See generally* Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (A Massachusetts statute that allowed the governing bodies of churches and schools to "prevent issuance of liquor licenses for premises within a 500-foot radius of the church or school by objecting the license application" was unconstitutional under the Establishment Clause).

[41] *See generally* Craig v. Boren, 429 U.S. 190 (1976) (An Oklahoma statute that allowed women to purchase certain beer at age 18 but prohibited men under age 21 from purchasing the same beer was unconstitutional under the Equal Protection Clause).

[42] *Granholm*, 544 U.S. at 486–87; *see also* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (Rhode Island's total ban on price advertising for alcoholic beverages violated the First Amendment).

[43] *See Granholm*, 544 U.S. at 487. *See generally* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

[44] *See Granholm*, 544 U.S. at 487; Hostetter v. Idlewild Bon Voyage Liquor Corp. 377 U.S. 324, 332 (1964). "Though the Court's language in *Hostetter* may have come uncommonly close to hyperbole in describing this argument as 'an absurd oversimplification,' 'patently bizarre,' and 'demonstrably incorrect,' the basic point was sound." *Granholm*, 544 U.S. at 487 (internal citations omitted).

[45] *Granholm*, 544 U.S. at 487 (citing Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 at 276; Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority, 476 U.S. 573 (1986); Healy v. Beer Institute, 491 U.S. 324 (1989)).

[46] *Id.* (internal quotations omitted) (quoting Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986)).

[47] *See* Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2474 (2019).

[48] *Id.* (citing *Granholm*, 544 U.S. at 490, 492).

of the Twenty-First Amendment.[49] The need to justify on nonprotectionist grounds makes the Section 2 analysis of alcohol regulations one with "teeth."[50] This analysis has shaped the modern jurisprudence concerning state alcohol regulations and the Commerce Clause.

C. The Connection Between Alcohol Regulations and the Commerce Clause

Section 2 and the Commerce Clause have intermingled since the ratification of the Twenty-First Amendment. A brief synopsis of modern landmark cases reveals the Court's interpretation of Section 2 regulations that conflict with the Commerce Clause. *Bacchus Imports, Ltd. V. Dias* formally established that state alcohol regulations were not shielded by Section 2 by virtue of being alcohol regulations.[51] *Granholm v. Heald* addressed the health and safety concerns, and other legitimate interests, that led to modern Section 2 analysis for alcohol regulations.[52] Lastly, in *Tennessee Wine and Spirits Retailers Association v. Thomas*, the Court "reiterate[d] that the Commerce Clause by its own force restricts state protectionism."[53] Moreover, it held that it is a violation of the Commerce Clause when the "predominant effect" of a state regulation is "simply to protect" in-state business "from out-of-state competition."[54] The analysis used in *Tennessee Wine* is critical to understanding the Supreme Court's mistake in denying certiorari in *Wal-Mart Stores*.

1. *Bacchus Imports, Ltd. v. Dias*

In 1939, Hawaii imposed a twenty percent excise tax on the sale of wholesale liquor.[55] However, in 1971, the state exempted okoleaho (a brandy made from "the root of . . . an indigenous shrub of Hawaii") and a Hawaiian fruit wine manufacturer from this tax "to encourage the development of the Hawaiian liquor industry."[56] The Court found that the tax exemption for the fruit wine and okoleaho had a discriminatory purpose and effect in favor of local products.[57] The exempted beverages did not pose a "competitive threat" to other liquors because they comprised a small portion

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[49] *Id.*

[50] Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n, 945 F.3d 206, 213 (5th Cir. 2019).

[51] *See* 468 U.S. 263 (1984) (State alcohol regulations may be saved by Section 2 if they serve a legitimate interest supported by the Twenty-First Amendment).

[52] *See* 544 U.S. 460, 463 (2005) (States must overcome Commerce Clause violations by showing their alcohol regulations advance a legitimate interest, like health and safety, that cannot be obtained by reasonable nondiscriminatory alternatives).

[53] 139 S. Ct. 2449, 2461 (2019).

[54] *Id.* at 2476.

[55] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 263, 265 (1984).

[56] *Id.* at 265.

[57] *Id.* at 268–73.

of total liquor sales in Hawaii.[58] Nevertheless, the Court still found *some* competition, and, therefore, discriminatory effect between the in-state exempted beverages and out-of-state nonexempted beverages.[59] The Court also noted that legislative intent to aid locally produced beverages, rather than to harm out-of-state producers, is irrelevant to the Commerce Clause inquiry.[60]

The state of Hawaii argued that the tax exemption was "saved" by Section 2 of the Twenty-First Amendment.[61] The Court held that the tax exemption was not saved by Section 2 of Twenty-First Amendment because it was enacted to promote local industry, not to "promote temperance or to carry out any other purpose of the Twenty-first Amendment."[62] The Court made clear that state laws amounting to "mere economic protectionism" should not be afforded the same deference as laws "enacted to combat the perceived evils of an unrestricted traffic in liquor."[63]

2. *Granholm v. Heald*

This action stemmed from Michigan and New York alcohol regulatory schemes that allowed for in-state wineries to make direct sales to consumers but prohibited out-of-state wineries from doing the same.[64] The Michigan system allowed for in-state wineries to sell directly to consumers if they met the state's licensing requirement.[65] However, out-of-state wineries faced a complete ban on shipment, regardless of their licensure.[66] The New York system required out-of-state wineries to establish a distribution operation in New York to access direct shipment—indirectly subjecting those wineries to a three-tiered system.[67] Many states employ a three-tiered distribution system that requires separate licenses for producers, wholesalers, and retailers.[68] New York's three-tiered system required out-of-state wineries to open a warehouse and branch office within the state to establish a distribution operation.[69]

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[58] *Id.* at 263, 269.

[59] *Id.* at 263 ("As long as there is some competition between the exempt beverages and nonexempt product from outside the State, there is a discriminatory effect.").

[60] *Id.* at 264 (stating that economic protectionism does not hinge on "characterizing the industry in question as 'thriving' or 'struggling'" nor on legislative intent).

[61] *Id.*

[62] *Id.* at 276 (the State "acknowledges that the purpose was to 'promote a local industry'").

[63] *Id.*

[64] Granholm v. Heald, 544 U.S. 460, 460 (2005).

[65] *Id.* at 473–74.

[66] *Id.* The system required "all out-of-state wine, but not all in-state wine, to pass through an in-state wholesaler and retailer before reaching consumers." *Id.* at 474.

[67] *Id.*

[68] *See id.* at 466. States have the authority to mandate a three-tiered distribution system under the authority granted by the Twenty-First Amendment. North Dakota v. United States, 495 U.S. 423, 433 (1990).

[69] *Granholm*, 544 U.S. at 474–75. This requirement adds additional costs to the sale of their wines. *Id.*

The Court held that "New York's in-state presence requirement runs contrary to [the] admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'"[70] Moreover, even if out-of-state wineries established the in-state presence requirement for distribution, they were still ineligible for the "farm winery license" that provided the best direct shipping method to New York consumers.[71]

The Court held that these laws faced "'a virtually *per se* rule of invalidity'" because they discriminated against interstate commerce.[72] The Court reached this decision following two lines of precedent. First, Commerce Clause jurisprudence has "prevented States from discriminating against imported liquor."[73] Second, states cannot pass facially neutral laws that cause an impermissible burden on interstate commerce.[74] Moreover, Section 2 of the Twenty-First Amendment did not shield these regulations from the Commerce Clause.[75]

States can overcome Commerce Clause violations through Section 2 of the Twenty-First Amendment by showing that the alcohol regulation "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[76] Michigan and New York advanced "keeping alcohol out of the hands of minors and facilitating tax collection" as the main justifications for their regulations.[77] The Court found these justifications insufficient to justify the discrimination against out-of-state wineries.[78] First, the States offered little evidence to prove there was a problem involving minors purchasing wine over the internet.[79] Second, while tax collection is a legitimate concern, the States can achieve that objective "without discriminating against interstate commerce."[80] In addition to the

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[70] *Id.* at 475 (quoting Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 72 (1963)).

[71] *Id.*

[72] *See id.* at 476 (citing Philadelphia v. New Jersey, 437 U.S. 617 (1978)).

[73] *Id.* at 476–77 (citing Scott v. Donald, 165 U.S. 58 (1897); Walling v. Michigan, 116 U.S. 446 (1886); Tiernan v. Rinker, 102 U.S. 123 (1880)).

[74] *Id.* at 477 (citing Rhodes v. Iowa, 170 U.S. 412 (1898); Vance v. W.A. Vandercook Co., 170 U.S. 438 (1898); Leisy v. Hardin, 135 U.S. 100 (1890); Bowman v. Chi. & Nw. Ry. Co., 125 U.S. 465 (1888)).

[75] *Granholm*, 544 U.S. at 476 ("The States' position is inconsistent with our precedents and with the Twenty-[F]irst Amendment's history.").

[76] *Id.* at 489 (internal quotations omitted) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1998)).

[77] *Id.*

[78] *Id.* at 490–91. To overcome a Commerce Clause violation, concrete record evidence must prove that "a State's nondiscriminatory alternatives will prove unworkable." *Id.* at 493; *see, e.g.*, Maine v. Taylor, 477 U.S. 131, 142–44 (1986).

[79] *Granholm*, 544 U.S. at 490. Minors are less likely to purchase wine than other intoxicating beverages. *See id.* Moreover, minors who wish to consume alcohol underage have more direct means of obtaining alcohol that satisfies their desire for instant gratification. *See id.*

[80] *Id.* at 491. For example, New York "protect[s] itself against lost tax revenue . . ." with in-state wineries "by requiring a permit as a condition of direct shipping." *Id.* The Court argues this method could be used for out-of-state wineries as well. *Id.*

two main justifications for the regulations, New York and Michigan offered several other rationales the Court believed could be achieved through nondiscriminatory practices.[81] While summarizing the lack of evidence-based justifications provided by the States, the Court declared, "[o]ur Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods."[82] In fact, to overcome allegations of Commerce Clause violations, states must offer "concrete record evidence" that "nondiscriminatory alternatives will prove unworkable."[83] The Court ultimately held:

> States have broad power to regulate liquor under § 2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers. If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms. Without demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage out-of-state wine producers. Under our Commerce Clause jurisprudence, these regulations cannot stand.[84]

The Court's clear and powerful decision in *Granholm* has since guided modern Section 2 analysis.[85]

D. Tennessee Wine and Spirits Retailers Association v. Thomas

The Supreme Court's ruling in *Tennessee Wine and Spirits Retailers Association v. Thomas* is a recent example of the Court's rejection of state alcohol regulations in violation of the dormant Commerce Clause.[86] In a 7–2 opinion,[87] the Supreme Court held that Tennessee's durational residency requirements for companies and persons wishing to operate a retail liquor store were unconstitutional violations of the Commerce Clause.[88]

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[81] *Id.* at 492 ("[F]acilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability" through an "an evenhanded licensing requirement.").

[82] *Id.* at 492.

[83] *Id.* at 492–93 (citing *Taylor*, 477 U.S. at 141–44).

[84] *Id.* at 493.

[85] *See, e.g.*, Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019) (*Granholm* is cited throughout the opinion).

[86] *See generally id.*

[87] *Id.* at 2456 (Justice Alito delivered the opinion of the Court, in which Roberts, Ginsburg, Breyer, Sotomayor, Kagan, and Kavanaugh joined).

[88] *Id.* at 2453.

Like many states, Tennessee employed a three-tiered system for alcohol distribution.[89] To obtain a retailer's license, Tennessee placed durational residency requirements on applicants.[90] The main requirements can be broken down into three separate issues. First, to obtain an initial license to operate a liquor store, a person was required to prove they had been a "bona fide resident" of Tennessee for two years.[91] Second, the initial license had to be renewed after one year of operation *and* licensees had to demonstrate a ten-year consecutive residency in Tennessee to qualify for renewal.[92] Third, corporations could not obtain a retail liquor license unless all directors, officers, and owners of capital satisfied "the durational-residency requirements applicable to individuals."[93]

In 2012, the Tennessee attorney general recognized the unconstitutional nature of the regulations and ceased enforcement until the General Assembly amended the laws to include a statement of legislative intent that claimed the regulations were enacted to increase management and control of alcohol suppliers and to protect the health and safety of Tennessee residents.[94] In 2016, two retailers, neither of which satisfied the residency requirements, applied for a retailer's license through the Tennessee Alcoholic Beverage Commission (TABC).[95] The TABC recommended approval of the application, as the residency requirements were no longer being enforced.[96] The Tennessee Wine and Spirits Retailers Association (the Association) threatened to sue if the TABC granted the new retailers a license against the durational residency requirements.[97] Thomas, the Executive Director of the TABC, sought declaratory judgment on the constitutionality of Tennessee's residency requirements.[98]

The Sixth Circuit invalidated all three provisions.[99] The petitioners only challenged the two-year durational requirement before the Supreme Court.[100] The Court

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[89] *See id.* at 2457; *see also* Granholm v. Heald, 544 U.S. 460, 466–67 (2005) (explanation of the three-tiered system).

[90] *Tennessee Wine*, 139 S. Ct. at 2457.

[91] *Id.* (citing TENN. CODE ANN. § 57-3-204(b)(2)(A) (2018)).

[92] *Id.* (citing TENN. CODE ANN. § 57-3-204(b)(2)(A) (2018)). Initial applicants had to prove a two-year residency and then prove a ten-year residency the very next year to renew their license. *See id.* While many in the legal community may joke that "most lawyers are pretty bad at math," there is a clear mathematical disconnect between the initial license requirement and renewal requirement. Ed Walters, *The Tyranny of Hunches: Using Analytics to Give Your Firm a Strategic Advantage*, 90 FLA. B.J. 46, 47 (2016).

[93] *Tennessee Wine*, 139 S. Ct. at 2457 (citing TENN. CODE ANN. § 57-3-204(b)(3)). In practice, publicly traded corporations could not operate a liquor store in Tennessee. *Id.*

[94] *Id.* at 2457–58.

[95] *Id.* at 2458.

[96] *See id.*

[97] *See id.*

[98] *Id.* at 2458.

[99] *Id.* at 2457–58 (the panel was divided on the two-year residency-requirement question but unanimously struck down the other two provisions).

[100] *Id.* at 2457.

held that the durational residency requirement violated the Commerce Clause[101] and was not shielded by the Twenty-First Amendment.[102]

The dissenting Justices agreed with the Association's argument that the two-year residency requirement should have been "shielded" by Section 2 of the Twenty-First Amendment.[103] Although the Association conceded that Section 2 does not allow states the right to discriminate against products and producers of out-of-state alcohol, they claimed that a different rule applied to in-state alcohol distribution.[104] The Court found this claimed distinction baseless.[105] Additionally, the Association argued that the history of Section 2 displayed an intent to broadly exempt "in-state distribution laws from dormant Commerce Clause scrutiny."[106] However, this only accounts for laws passed shortly after the end of prohibition and does not consider the jurisprudence that has flowed from the history of state alcohol regulations in violation of the Commerce Clause.[107]

The Court analyzed the Association's claims using modern Section 2 precedent.[108] To overcome a Commerce Clause violation, the alcohol regulation must be enacted as a health or safety provision, or for some other legitimate, non-protectionist purpose, that could not be achieved through nondiscriminatory alternatives.[109] The Association advanced three main arguments to justify the two-year residency requirement as a legitimate health and safety regulation.[110] First, the Association argued that "the requirement ensures that retailers are 'amenable to the direct process of state courts.'"[111] However, the Association did not demonstrate why the objective could not have been satisfied by readily available alternatives like consenting to suit in Tennessee courts or appointing an in-state agent to receive process.[112]

Second, the Association asserted that the residency requirements would give Tennessee a better chance to assess an applicant's fitness to sell alcohol and "guard[] against 'undesirable nonresidents'" moving to the state to sell liquor.[113] The Court

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[101] *Id.* at 2457, 2462 ("Tennessee's 2-year durational-residency requirement plainly favors Tennesseans over nonresidents . . . .").

[102] *Id.* at 2457.

[103] *See id.* at 2469.

[104] *See id.* at 2470–71.

[105] *Id.* at 2471 (finding that *Granholm* did not limit its holding to products and producers.).

[106] *Id.* at 2472.

[107] *Id.*; *see supra* notes 37–42 and accompanying text.

[108] *See Tennessee Wine*, 139 S. Ct. at 2469. The Court recognized that the requirement was subject to special analysis under Section 2 of the Twenty-First Amendment because it dealt with state alcohol regulation. Had the requirement only been subject to standard Commerce Clause analysis, it could not apply to any retail business because it was facially discriminatory against out-of-state businesses. *Id.* at 2474.

[109] *Id.*

[110] *Id.* at 2474–75.

[111] *Id.* at 2475.

[112] *Id.* (citing Cooper v. McBeath, 11 F.3d 547, 554 (5th Cir. 1994)).

[113] *Id.*

cited multiple reasons to find the Association's claim unpersuasive.[114] Most importantly, the Court pointed toward Fifth Circuit precedent that reinforced a state's right to thoroughly scrutinize applicants by nondiscriminatory means.[115] Moreover, the Court noted that Tennessee could easily maintain oversight over liquor stores without the residency requirement because the stores were physically located within the state.[116]

Third, the Association claimed the two-year residency requirement promoted responsible alcohol consumption.[117] The Association argued that requiring residency would lead to responsible sales practices because the retailer would be more likely to be familiar with the community they serve.[118] The Association offered no evidence to prove that residency requirements produce responsible sales practices.[119] Moreover, the residency requirement only applied to the retailer who held the license, not the employees making the sales.[120] Ultimately, the Court found the residency requirement to have "at best a highly attenuated relationship to public health or safety."[121]

Not only must a state advance a legitimate purpose for discriminatory regulations, they must also prove that their objectives could not be met by nondiscriminatory alternatives.[122] Here, the Court listed "obvious" nondiscriminatory alternatives to the two-year residency requirement that "better serve [the state's] goal[s]."[123] For example, the Court suggested, limiting the amount of alcohol and the number of retail licenses that may be sold to an individual, mandating training on responsible alcohol sales for managers and employees, mandating employees and managers to have an adequate connection and knowledge of the local community, and monitoring retail practices to "take action against those who violate the law."[124]

In closing the opinion, the Court declared, "[i]n light of this history and our established case law, we reiterate that the Commerce Clause by its own force restricts

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[114] *Tennessee Wine*, 139 S. Ct. at 2475. The state requires background checks on all applicants. *Id.* The TBAC would not necessarily know that a new resident moved to the state with the intent to apply for a liquor license after two years, so it does not save any investigation time. *Id.*

[115] *Id.* (citing *Cooper*, 11 F.3d at 554).

[116] *Id.*; *cf.* Granholm v. Heald, 544 U.S. 460, 492 (2005) (the Court found the States' argument that out-of-state retailers could not adequately monitored insufficient because of advancements in technology).

[117] *Tennessee Wine*, 139 S. Ct. at 2475.

[118] *Id.* at 2475–76. The "responsible neighborhood proprietor" would cut off sales to people who appear to abuse alcohol or are known in the community to abuse alcohol. *Id.* at 2476.

[119] *Id.*

[120] *Id.* Also, the requirement is only for residency—alcohol safety courses and trainings are not required in the two-year period. *See id.*

[121] *Id.* at 2474.

[122] *See, e.g.*, Granholm v. Heald, 544 U.S. 460, 463 (2005); Maine v. Taylor, 477 U.S. 131, 141–44 (1986).

[123] *Tennessee Wine*, 139 S. Ct. at 2476.

[124] *Id.*

state protectionism."[125] Moreover, the Court clearly established that state alcohol regulations with the "*predominant effect*" of protecting in-state retailers from "out-of-state competition" was an unconstitutional violation of the Commerce Clause.[126]

II. THE HISTORY OF *WAL-MART V. TEXAS ALCOHOLIC BEVERAGE COMMISSION*

This Note argues that the Supreme Court erred by denying certiorari in *Wal-Mart Stores*. The Fifth Circuit's decision was firmly inconsistent with the Court's recent decision in *Tennessee Wine* and Commerce Clause jurisprudence. Moreover, the denial of certiorari may lead to constitutional, legislative, and economic harms. A brief synopsis of the case's journey is helpful to evaluate why the Supreme Court should have granted certiorari.

A. The District Court Decision

In 2018, Wal-Mart challenged a Texas statute that regulated the issuance of "package store" or "P permits" which authorize the retail sale of liquor within the state.[127] Specifically, Wal-Mart challenged Texas Alcoholic Beverage Code § 22.16, which prohibits public corporations from obtaining P permits, as an unconstitutional violation of the dormant Commerce Clause.[128] An express clause in the statute allows corporations that obtained permits before 1995 to be grandfathered in.[129] The issue with this provision is that *only* Texas-owned companies could have obtained the permits before 1995, because Texas enforced unconstitutional residency requirements for licensure until 2007.[130]

The district court found the ban unduly burdensome on commerce and intentionally discriminatory against out-of-state actors.[131] To analyze discriminatory purpose, the court applied the four-factor *Arlington Heights*[132] analysis.[133] The four factors include: (1) whether there is a clear pattern of discrimination; (2) the decision's historical background, including a history of discrimination by law makers; (3) the sequence of events directing the challenged decision; and (4) the administrative or legislative

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[125] *Id.* at 2461.

[126] *Id.* at 2476 (emphasis added).

[127] Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n, 945 F.3d 206, 210–11 (5th Cir. 2019). In total, four statutes were challenged, including TEX. ALCO. BEV. CODE ANN. §§ 22.04, 22.05, 22.06, 22.16. However, only § 22.16 is within the scope of this Note.

[128] *Id.* at 211. Petitioners raised an Equal Protection concern that was rejected by both the district and circuit court. *Id.*

[129] *See* TEX. ALCO. BEV. CODE ANN. § 22.16(f).

[130] *Wal-Mart Stores*, 945 F.3d at 214 (Durational residency requirements were repealed in 1994, but Texas continued to enforce them until enjoined by a federal district court in 2007).

[131] Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n, 313 F. Supp. 3d 751, 767 (W.D. Tex. 2018).

[132] *See generally* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

[133] *Wal-Mart Stores*, 313 F. Supp. 3d at 767.

history of the state action, "including contemporary statements by decisionmakers."[134] Here, the district court found "all four *Arlington Heights* factors demonstrate[d] that the purpose of the ban was to discriminate against out-of-state companies."[135]

First, the ban showed a clear pattern of discrimination by essentially "barring nearly all out-of-state companies with the scale and capabilities necessary to serve the Texas retail liquor market."[136] As evidence, more than ninety-eight percent of package stores and package store companies in Texas are Texas-owned.[137] Furthermore, since ending enforcement of the unconstitutional residency requirements on companies, "only one significant out-of-state company has entered the Texas market."[138]

Second, Texas has demonstrated an "undeniable 'history of discrimination by the decision-making body.'"[139] After the Fifth Circuit found residency requirements to be unconstitutional violations of the Commerce Clause in 1994, Texas continued to enforce those requirements on package stores for another twelve years.[140]

Third, "the proximate cause of the Legislature's decision to enact the public corporation ban was the Fifth Circuit's decision invalidating the residency requirement."[141] The decision in *Cooper v. McBeath*[142] drove the passage of the public corporation ban, as the Legislature wanted to strike a deal to prevent a "broad ruling that would jeopardize the enforceability of all its residency requirements."[143] Once the Fifth Circuit found residency requirements to be unconstitutional violations of the Commerce Clause in *Cooper*,[144] the Texas legislature "enacted the public corporation ban in the very next session."[145]

Fourth, the legislative history included "direct evidence of discriminatory purpose."[146] For example, the bill's drafter testified that the motivation for the public corporation ban was to "preserve the 'stable business climate' created by the residency requirement."[147] Even more troublesome were the Senate sponsor's remarks that the

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[134] *Id.* (citing Allstate Ins. Co. v. Abbott, 495 F.3d 151 (5th Cir. 2007)).

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Wal-Mart Stores*, 313 F. Supp. 3d at 767.

[140] *Id.* Texas only ended the enforcement of the residency requirements after being "permanently enjoined by a federal district court." *Id.* (citing Wine & Spirits of Tex., Inc. v. Steen, 486 F. Supp. 2d 626, 633 (W.D. Tex. 2007)).

[141] *Id.*

[142] *See* 11 F.3d 547, 548 (5th Cir. 1994) (residency requirements "amount to simple economic protectionism" and therefore violate the Commerce Clause).

[143] *Wal-Mart Stores*, 313 F. Supp. 3d 751, 767–68 (W.D. Tex. 2018). After failing to strike a deal with Cooper, the Texas legislature passed the ban in the next legislative session. *Id.*

[144] *See Cooper*, 11 F.3d at 555–56 ("The discriminatory three-year residency requirement inherent in the challenged statutory provisions cannot stand.").

[145] *Wal-Mart Stores*, 313 F. Supp. 3d at 768.

[146] *Id.* (citing Allstate Ins. Co. v. Abbott, 495 F.3d 151, 160 (5th Cir. 2007)).

[147] *Id.*

public corporation ban was designed to guarantee that "somebody from Texas" owned package stores and to ensure that "you can't have a package store inside a Wal-Mart."[148] These statements led the court to believe that the Legislature's purpose in adopting the public corporation ban was to prevent "out-of-state companies from entering the market."[149]

After a careful analysis of the four *Arlington Heights* factors, the court determined that the public corporation ban had a discriminatory purpose to protect locally owned stores against out-of-state corporations.[150] Furthermore, the court supported its finding with evidence that the Texas Package Store Association (TPSA) made expressly discriminatory arguments while lobbying against the repeal of the ban.[151]

Relying on the "[t]he Legislature's discriminatory purpose in enacting the public corporation ban," the district court used strict scrutiny to analyze the statute.[152] The Fifth Circuit has repeatedly triggered strict scrutiny analysis for such cases.[153] Moreover, various federal appeals courts have found a statute in violation of the dormant Commerce Clause based on discriminatory purpose alone.[154] Under strict scrutiny, a discriminatory regulation is valid only if the "state 'can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.'"[155] Because neither the TABC nor the TPSA could satisfy the burden, the district court concluded that the public corporation ban violated the dormant Commerce Clause.[156]

Although the district court found that the "public corporation ban was enacted with discriminatory purpose," it did not find discriminatory effect when applying Fifth Circuit precedent.[157] The district court relied on *Exxon Corp. v. Governor of*

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[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Wal-Mart Stores*, 313 F. Supp. 3d at 768. Lobbying handouts from TPSA boasted that "all 2,300 liquor stores in the state are still owned by Texas residents" because of "the prohibition in the Code against a corporation with more than 35 shareholders." *Id.*

[152] *Id.* at 769.

[153] *See* Allstate Ins. Co. v. Abbott, 495 F.3d 151, 160 (5th Cir. 2007); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984); Int'l Truck & Engine Corp. v. Bray, 372 F.3d 717, 725 (5th Cir. 2004); Churchill Downs Inc. v. Trout, 589 Fed. App'x 233, 234 (5th Cir. 2014).

[154] *See, e.g.*, South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 596 (8th Cir. 2003) ("Because we conclude that Amendment E was motivated by a discriminatory purpose, we must strike it down as unconstitutional . . . ."); Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 345 (4th Cir. 2001) (No deference was given to Virginia's General Assembly after a finding of discriminatory purpose because "[s]uch a discriminatory purpose wholly undercuts the notion that Virginia's political process served as a check against unduly burdensome regulations.").

[155] *Wal-Mart Stores*, 313 F. Supp. 3d at 769 (quoting *Allstate*, 495 F.3d at 160).

[156] *Id.*

[157] *Id.* at 772–73.

Maryland,[158] *Ford Motor Co. v. Texas Department of Transportation*,[159] and *Allstate Insurance Co. v. Abbott*,[160] when analyzing the discriminatory effect of the ban.[161] In summarizing the precedents, the court determined that unless a law differentiates between similarly situated in-state and out-of-state companies based on their ties to the state, that law cannot discriminate in effect.[162] The court reasoned that because public corporations were banned from obtaining P permits "whether or not they are based in Texas or owned by Texans" the ban did not treat similarly situated companies differently.[163]

Although the court found no discriminatory effect, it nevertheless invalidated the ban because its local benefits were significantly outweighed by the burdens placed on interstate commerce.[164] The court reached its decision using the *Pike*[165] balancing test.[166]

> The *Pike* balancing test has three steps. First, a court must determine whether the challenged regulation incidentally burdens interstate commerce. Second, a court asks whether the regulation has "putative local benefits." Finally, the court must weigh the local benefits of the regulation against the burdens the regulation places on interstate commerce.[167]

Laws evaluated under the *Pike* test are to be upheld unless the burden on commerce is "clearly excessive" when balanced with local benefits.[168] The court determined the public corporation ban failed the *Pike* balancing test.[169]

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[158] *See generally* 437 U.S. 117 (1978) (A ban on oil refiners owning retail gas stations was upheld because the ban did not distinguish between out-of-state and in-state companies in the market).

[159] *See generally* 264 F.3d 493 (5th Cir. 2001) (In order to have a discriminatory effect, a law must provide a deferential treatment based on state contacts).

[160] *See generally* 495 F.3d 151 (5th Cir. 2007) (a law banning auto insurers from operating and owning auto body shops was not a violation of the Commerce Clause relying on *Exxon*).

[161] *Wal-Mart Stores*, 313 F. Supp. 3d at 772.

[162] *Id.*

[163] *Id.* Additionally, the court bolstered their reasoning with the fact that companies with fewer than thirty-five shareholders could obtain a permit whether or not they are based in Texas and that one out-of-state company had successfully established business in Texas. *Id.*

[164] *Id.* at 778.

[165] *See generally* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

[166] *Wal-Mart Stores*, 313 F. Supp. 3d at 773 ("*Pike* provides a standard for assessing state laws that regulate 'even-handedly' but nonetheless impose 'incidental' burdens on interstate commerce.").

[167] *Id.* (internal citations omitted).

[168] *Id.* at 773–74.

[169] *Id.* at 766.

First, the public corporation ban had a disparate impact on interstate commerce because it protected "Texas-owned package stores at the expense of potential out-of-state entrants."[170] To assess disparate impact, the court had to calculate the effects on out-of-state companies by determining what the market would have looked like without the public corporation ban.[171] The court noted that the effects would be difficult to measure because Texas enforced an unconstitutional residency requirement on out-of-state companies prior to the enactment of the public corporation ban.[172] Therefore, it was difficult to determine what the market would have looked like because out-of-state actors were prohibited from entering the market.[173] The court then used Texas's beer and wine market as a comparison.[174] About ninety-eight percent of package stores were wholly Texas-owned, while the beer and wine market, untouched by the ban, was significantly served by out-of-state companies.[175] Using this comparison, the court found a disparate impact on out-of-state companies and moved to the second *Pike* balancing step.[176]

In the second step, the court determined that the ban served a legitimate local purpose and produced *some* putative local benefits.[177] The legitimate local purpose and benefits are determined through a rational basis–like inquiry that gives great deference to lawmakers.[178] The court found a "conceivable relationship" between Texas's legitimate interest in reducing liquor consumption and the public corporation ban.[179] Relying on the conceivable relationship, the court moved to the final *Pike* balancing step.[180]

In the third and final *Pike* step, the court determined that the ban's burdens on interstate commerce were "clearly excessive" in comparison to any local putative benefits.[181] The effects of the ban in keeping out-of-state companies out of the market for the sake of protecting in-state companies served a heavy burden on interstate commerce compared to the state's interest in reducing the consumption

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[170] *Id.* at 774.

[171] *Id.* at 775.

[172] *Id.* at 775.

[173] *Id.*

[174] *Id.* at 774.

[175] *Id.* The public corporation ban in the liquor market acted as a block to a "vast majority of potential out-of-state entrants from the Texas market, while leaving undisturbed most potential in-state entrants." *Id.*

[176] *Id.* (citing Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth., 389 F.3d 491, 501 (2004)).

[177] *See id.* at 776.

[178] *Id. Pike*'s second step is like rational basis in giving deference to lawmakers unless the justification is "wholly irrational in light of its purposes." *See* Int'l Truck & Engine Corp. v. Bray, 372 F.3d 717, 728 (5th Cir. 2004) (quoting Ford Motor Co. v. Texas Dept. of Transp., 264 F.3d 493, 504 (2001)).

[179] *Wal-Mart Stores*, 313 F. Supp. 3d at 776.

[180] *Id.*

[181] *Id.* at 778.

and availability of liquor.[182] Therefore, the public corporation ban failed the *Pike* balancing test.[183]

In sum, the district court found the public corporation ban to be a violation of the Commerce Clause.[184] The court determined the ban had a discriminatory purpose under the *Arlington Heights* analysis;[185] however, it did not have a discriminatory effect under Fifth Circuit precedent.[186] Although there was no finding of discriminatory effect, the ban was nevertheless invalidated because of its disparate impact on interstate commerce under the *Pike* balancing test.[187]

B. The Fifth Circuit Decision

On appeal, the Fifth Circuit vacated and remanded the district court's finding of discriminatory purpose, affirmed the finding of discriminatory effect, and reversed the finding of disparate impact on interstate commerce under the *Pike* test.[188] Although the Fifth Circuit did not "disturb" any factual findings from the district court confirming that the ban bars "nearly all potential out-of-state entrants,"[189] the only section of the lower court's opinion that the Fifth Circuit affirmed "was the conclusion that the law does *not* have a discriminatory effect."[190]

The Fifth Circuit began its attack on the finding of discriminatory purpose by reviewing the district court's four-part *Arlington Heights* analysis.[191] The circuit court did not methodically walk through the *Arlington Heights* factors in its critique, but rather pointed to several district court findings that resembled the factors. First, the circuit confirmed the district court's finding of a clear history of discrimination.[192] Second, the circuit claimed the district court erred in finding "*direct* evidence of a purpose to discriminate against interstate commerce."[193] The Fifth Circuit argued that statements made by legislators were taken out of context and therefore did not meaningfully link the Legislature to the purpose of discrimination.[194] For example, the circuit argued Senator Kenneth Armbrister's statement that "you can't

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[182] *Id.* at 777. Texas had other methods of controlling liquor consumption than the public corporation ban like permit limits and excise taxes. *Id.* at 776–77.

[183] *Id.* at 778.

[184] *Id.*

[185] *See supra* notes 135–50 and accompanying text.

[186] *See supra* notes 157–63 and accompanying text.

[187] *See supra* notes 164–83 and accompanying text.

[188] Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n, 945 F.3d 206, 211 (2019).

[189] Petition for Writ of Certiorari, *Wal-Mart Stores*, 945 F.3d 206 (2019) (No. 19-1368), at 11–12 [hereinafter Pet. for Cert.].

[190] *Id.* at 11.

[191] *Wal-Mart Stores*, 945 F.3d at 214.

[192] *Id.* (citing only the enforcement of residency requirements on out-of-state corporations after the law had been repealed).

[193] *Id.* at 215 (emphasis added).

[194] *See id.*

have a package store inside a Walmart" was taken out of context merely because he later agreed with Senator Henderson's statement that the Texas Legislature "wanted to have somebody from Texas with a license that you could get ahold of . . . to enforce the code."[195] Third, the Fifth Circuit found that the district court erred by failing to apply a "'presumption of legislative good faith'" when analyzing the sequence of events that led to the ban's passage.[196] The district court concluded that but for the Fifth Circuit striking down residency requirements in *Cooper*, the TPSA and Legislature would not have enacted the public corporation ban.[197] The Fifth Circuit believed the district court's analysis of events did not give the Texas Legislature the appropriate "presumption of legislative good faith" required by Supreme Court precedent.[198] Lastly, the Fifth Circuit gave a blanket claim that "[t]he district court committed errors in its findings with respect to the other *Arlington* factors" and that the appropriate response was to "remand the discriminatory purpose issue for reconsideration."[199]

The Fifth Circuit reasoned that because the ban was for *all* public corporations, regardless of domicile, the ban did not have a discriminatory effect *or* burden on interstate commerce.[200] The court reached this holding by applying a line of precedent stemming from *Exxon Corp. v. Governor of Maryland*[201] that controls "facially neutral statute[s] that ban[] particular companies from the retail market."[202] The Fifth Circuit believed *Exxon* and its progeny created an exception for the discriminatory effects tests for facially neutral laws that regulated similarly situated companies.[203] Applying this reasoning, the court concluded that the ban did not have a discriminatory effect because both in-state and out-of-state corporations were banned.[204]

Further, the Fifth Circuit determined that the district court erred by finding a burden on interstate commerce under the *Pike* test.[205] Wal-Mart argued that controlling case law allowed *Pike* to be applied to alcohol regulations "despite the Twenty-first Amendment."[206] The Fifth Circuit went as far to acknowledge that the "[a]pplication of *Pike* in the face of § 2 of the Twenty-first Amendment is questionable in light of the [Supreme] Court's recent declaration that states 'remai[n] free to pursue' legitimate

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[195] *Id.*

[196] *Id.* at 216 (quoting Abbot v. Perez, 138 S. Ct. 2305, 2324 (2018)).

[197] *Id.* at 216.

[198] *Id.*; *see* Abbot v. Perez, 138 S. Ct. 2305, 2324 (2018) ("[t]he allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination.").

[199] *Wal-Mart Stores*, 945 F.3d at 218.

[200] *See id.* at 220–22.

[201] *See id.* at 218–19 (citing the district court's use of Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (2007); Ford Motor Co. v. Texas Dept. of Transp., 264 F.3d 493 (2001); and Allstate Ins. Co. v. Abbott, 495 F.3d 151 (2007)).

[202] *Id.*

[203] *See id.* at 219–20.

[204] *Id.* at 220. Note, this was the same conclusion reached by the district court.

[205] *Id.* at 221.

[206] *Id.* at 221–22.

interests aimed at regulating the ill-effects and risks associated with the alcohol trade."[207] However, instead of using the Supreme Court's analysis from *Tennessee Wine*, the Fifth Circuit claimed the analysis was irrelevant dicta and then "declared that the entirety of [the Supreme] Court's 'jurisprudence in the area of the dormant Commerce Clause is, quite simply, a mess.'"[208] Thus, ignoring Supreme Court precedent, the Fifth Circuit granted TABC "judgement as a matter of law on Walmart's discriminatory effects and *Pike* balancing claims."[209] The Fifth Circuit repeatedly noted that the district court gave "too little consideration to the fact that the ban is facially neutral."[210] However, the Fifth Circuit should have examined the public corporation ban differently, because an express provision of the statute that gives special permission to Texas-owned companies to keep their permits makes the ban clearly discriminatory.[211]

The Fifth Circuit further argued that the ban failed the *Pike* balancing test by claiming "the district court's analysis overlook[ed] the controlling precedent."[212] The Court reiterated its belief that the Commerce Clause *only* protects against discrimination between similarly situated in-state and out-of-state businesses.[213] It believed that the "facially neutral" public corporation ban made in-state and out-of-state retailers similarly situated because the distinction was made on corporate form, not corporate domicile.[214] Therefore, because the Fifth Circuit found the in-state and out-of-state retailers to be "similarly situated," they found no discriminatory effects, and thus, no Commerce Clause violation.[215]

In sum, although the Fifth Circuit agreed with the district court's factual findings, it nevertheless faulted the district court for treating those effects as evidence of discrimination.[216] Furthermore, the Fifth Circuit relied on the ban's prohibition on all public corporations as strong evidence that there was no purposeful discrimination from the legislature, despite the fact that an express provision allows for some Texas-owned public corporations to operate in the state.[217]

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[207] *Id.* at 222 (quoting Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2472 (2019)).

[208] Pet. for Cert., *supra* note 189, at 13 (citing *Wal-Mart Stores*, 945 F.3d at 220 n.21). "Because of the ambiguity in the *dicta* from *Tennessee Wine*, we decline to conclude that the Court meant to alter the discriminatory effect analysis when specifically considering a general public corporation ban." *Wal-Mart Stores*, 945 F.3d at 220 n.21.

[209] Pet. for Cert., *supra* note 189, at 13.

[210] *Id.*

[211] *See id.* at 14–15; TEX. ALCO. BEV. CODE § 22.16(f).

[212] *Wal-Mart Stores*, 945 F.3d at 223.

[213] Pet. for Cert., *supra* note 189, at 13.

[214] *See Wal-Mart Stores*, 945 F.3d at 220 ("[T]he public corporation ban treats in-state and out-of-state public corporations the same. Neither in-state nor out-of-state public corporations may obtain a P-permit or own a package state.").

[215] *Id.*

[216] *Id.* at 214–15.

[217] *Id.* at 218.

III. ARGUMENT

The Supreme Court should have granted certiorari in *Wal-Mart Stores* to address, correct, and avoid potential legislative, constitutional, and economic harms stemming from the Fifth Circuit's decision. The overarching issue in *Wal-Mart Stores'* erroneous holding is the Fifth Circuit's misinterpretation of the public corporation ban as facially neutral.[218] The Fifth Circuit uses "facial neutrality" as a justification for ignoring recent precedent set by *Tennessee Wine* and for subsequently misapplying *Exxon* and its progeny.[219] Moreover, the Fifth Circuit's decision is unequivocally inconsistent with the Supreme Court's recent decision in *Tennessee Wine*.[220] The ignorance of this precedent may embolden state legislatures to craft unconstitutional regulations disguised as facially neutral legislation.[221] Lastly, the Fifth Circuit erroneously applied *Exxon*, thus failing to consider the ban's practical effects on interstate commerce and creating a circuit split.[222] The Supreme Court should have "taken a shot" on *Wal-Mart Stores* to address potential harms stemming from the Fifth Circuit's decision.

A. The Issue of Facial Neutrality

The overarching issue in *Wal-Mart Stores'* erroneous holding is the Fifth Circuit's misinterpretation of the public corporation ban as facially neutral. The reliance placed on facial neutrality allowed the Fifth Circuit to circumvent *Tennessee Wine* and apply their own misinterpreted line of case precedent that is erroneous and creates a circuit split.[223] However, the public corporation ban is not facially neutral, as an express clause[224] allows for some Texas-only corporations to hold the P-Permit at issue.[225] The provision allows for corporations that obtained a P-Permit before 1995 to continue using their permits.[226] Without context, the provision does not appear discriminatory, however, Texas enforced durational residency requirements

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[218] *See* discussion *infra* Section III.A.

[219] *See* discussion *infra* Section III.A.

[220] *See* discussion *infra* Section III.B.

[221] *See* discussion *infra* Section III.B.

[222] *See* discussion *infra* Section III.C.

[223] *See* Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n, 945 F.3d 206, 214 (5th Cir. 2019).

[224] TEX. ALCO. BEV. CODE § 22.16(f). The cases, petitions, and amicus curiae briefs refer to this provision as the "grandfather clause." The author of this Note recognizes the loaded racial and historical underpinnings of that phrase and therefore only uses the term for clarity and consistency with the statutory text and precedent case law. For these reasons, "grandfather clause" will only appear as quoted language throughout this section.

[225] *See Wal-Mart Stores*, 945 F.3d at 217 n.10; *see also* TEX. ALCO. BEV. CODE § 22.16(f).

[226] TEX. ALCO. BEV. CODE § 22.16(f).

to obtain P-Permits until 2007, so only Texas-owned companies are saved by § 22.16(f).[227]

The "grandfather clause" provides an exception for some Texas-owned companies that is unavailable to corporations from other states.[228] Therefore, the public corporation ban "explicitly creates the same protectionist effect that Tennessee's law implicitly created."[229] Perhaps knowing § 22.16(f) would be detrimental to upholding the ban, the Fifth Circuit addressed the provision only once—in a footnote.[230] In the footnote, the court admitted: "Because Texas enforced durational residency requirements for package store owners until 2007, the exempted corporations are Texas-based firms. This clause arguably provides some evidence of an effort by the Legislature to benefit in-state corporations, which the court can consider along with other evidence in this case."[231]

Yet, the Fifth Circuit never addressed the provision again in its opinion.[232] The omission of discussion surrounding the "grandfather clause" undermines the court's reasoning and led to an inaccurate finding of facial neutrality.[233] Moreover, the TABC argued Wal-Mart did not properly alert the court to the factual details behind § 22.16(f).[234] The TABC that preceded the public corporation ban.[235] Therefore, regardl asserted that only 2 of 1,765 companies had been granted an exception under the clause, and therefore, it "has no real-world impact on the Texas liquor market."[236] While this argument may hold some merit, it ultimately fails. For one, the Fifth Circuit did not address § 22.16(f) when analyzing the ban's discriminatory effects.[237] More importantly, the provision implicates the unconstitutionally discriminatory regime ess of its impact, it should be deemed unconstitutional because it is facially discriminatory.[238] The Fifth Circuit relies on the facial neutrality of the public corporation ban for its ignorance of *Tennessee Wine* and its application of *Exxon*.

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[227] Brief for CATO Institute as Amicus Curiae Supporting Petitioners at 5, *Wal-Mart Stores*, 945 F.3d 206 (2019) (No. 19-1368) [hereinafter CATO Brief].

[228] *Id.* at 6.

[229] Pet. for Cert., *supra* note 189, at 16.

[230] *See* CATO Brief, *supra* note 227, at 6; *Wal-Mart Stores*, 945 F.3d at 217 n.10.

[231] *Wal-Mart Stores*, 945 F.3d at 217 n.10.

[232] *See* CATO Brief, *supra* note 227, at 6.

[233] *See id.*

[234] Brief of Respondent Texas Package Stores Association in Opposition at 2, *Wal-Mart Stores*, 945 F.3d 206 (2019) (No. 19-1368) [hereinafter Brief of Respondent].

[235] *See id.*; *see also Wal-Mart Stores*, 313 F. Supp. 3d at 759 ("[C]redible evidence shows that the public corporation ban was enacted in response to a successful dormant Commerce Clause challenge to . . . a residency requirement that restricted alcoholic-beverage permits to Texas residents and to firms majority-owned by Texans.").

[236] *Id.* at 2, 13.

[237] *See* CATO Brief, *supra* note 227, at 6.

[238] *See* CATO Brief, *supra* note 227, at 6.

B. The Supreme Court Should Have Granted Certiorari to Address the Fifth Circuit's Ignorance of Tennessee Wine

The Fifth Circuit's decision in *Wal-Mart Stores* is unequivocally inconsistent with the Supreme Court's recent decision in *Tennessee Wine*.[239] The cases are analogous in their facts and the proper application of *Tennessee Wine* would have resulted in a different decision in *Wal-Mart Stores*. The Fifth Circuit's blatant ignorance[240] of this case opens the door for state legislatures to violate the Commerce Clause by crafting "well written" laws to disguise discrimination.[241]

Just one year prior to denying certiorari in *Wal-Mart Stores*, the Supreme Court reiterated the idea that "removing state trade barriers was a principle reason for the adoption of the Constitution" in *Tennessee Wine*.[242] The Supreme Court did not solely focus on facial discrimination, but rather, it honed in on whether the purpose and effect of the legislation was fueled by protectionism.[243] The Court invalidated the two-year residency requirement in *Tennessee Wine*, concluding the "predominant effect" of the requirement was "simply to protect [in-state retailers] from out-of-state competition."[244] The Fifth Circuit abandoned this analysis in *Wal-Mart Stores*, replacing it, instead, with repeated insistence that the public corporation ban was facially neutral and that it was created to reduce the consumption of alcohol.[245] Additionally, the TABC argued and the Fifth Circuit found that *Wal-Mart Stores* was distinguishable from *Tennessee Wine* because there "the parties defending the statute failed to show the statute was anything but economic protectionism, [but] here the statute's effect . . . has been shown to be reduced consumption of liquor."[246] However, the cases are analogous and the Fifth Circuit should have applied *Tennessee Wine* in *Wal-Mart Stores*.[247]

Although both Tennessee and Texas drafted their legislation with the intent to avoid potential Commerce Clause challenges, the Supreme Court invalidated Tennessee's legislation in *Tennessee Wine*, while the Fifth Circuit allowed Texas to keep the carefully disguised discriminatory law in *Wal-Mart Stores*.[248] The Fifth Circuit

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[239] *See id.*

[240] *See supra* note 208 and accompanying text.

[241] *See infra* note 227 and accompanying text.

[242] Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2460, 2460 (2019).

[243] *Id.* at 2474.

[244] *Id.* at 2476.

[245] *See* Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n, 945 F.3d 206, 214, 221 (5th Cir. 2019); Brief of Respondent, *supra* note 234, at 4, 16.

[246] Brief of Respondent, *supra* note 234, at 16.

[247] *See infra* notes 248–66 and accompanying text.

[248] *Compare* Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2449 (2019), *with* Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n, 945 F.3d 206, 211 (5th Cir. 2019).

found a lack of direct evidence of purposeful discrimination in the legislative history, despite explicit commentary made by lawmakers indicating discrimination.[249] TABC argued and the Fifth Circuit found that Texas's legislative intent was to promote accountability and "'track' package store owners."[250] The circuit court cited the bill drafter's admission that "his assignment was to craft a bill which . . . would survive a [C]ommerce [C]lause challenge."[251] Additionally, the Fifth Circuit quoted the drafter's comment that the purpose of the bill was to promote accountability, or at least "have real human beings who are easily identifiable, who are close to the business, and who ultimately bear personal responsibility for the actions of the package store."[252] These facts mirror *Tennessee Wine*.[253] Upon recognizing a potential Commerce Clause challenge, the Tennessee General Assembly amended their law to include a statement of legislative intent citing better control, oversight, and accountability as the law's purpose.[254] Moreover, like the TABC, the Association argued local ownership would lead to the responsible sale and consumption of alcohol.[255] The Supreme Court found both arguments unpersuasive.[256] First, little evidence could be offered to support the claim that local ownership would be conducive to increased responsibility and decreased consumption because it was highly unlikely that the permit holder would be the same person as the clerk responsible for sales and store duties.[257] Second, monitoring and control are not dependent on local ownership because advancements in technology have made the monitoring and oversight of liquor stores relatively easy and accessible.[258] Had the Fifth Circuit applied *Tennessee Wine*, it could not have found a lack of direct evidence of discriminatory purpose.

Next, the sequence of events leading to the ratification of the public corporation ban clearly demonstrated discrimination[259] and the ban likely would have been invalidated if *Tennessee Wine* was properly applied. In *Wal-Mart Stores*, the Texas

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[249] *Wal-Mart Stores*, 945 F.3d at 215. *See* Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n, 313 F. Supp. 3d 751, 761–62 (W.D. Tex. 2018) (Sen. Armbrister supported the ban because "you can't have a package store inside a Walmart" and "Walmart can't own the package store." He further noted that the Texas legislature "wanted to have *somebody from Texas* with the license.").

[250] *See Wal-Mart Stores*, 945 F.3d at 215.

[251] *Id.*

[252] *See id.*

[253] *See Tennessee Wine*, 139 S. Ct. at 2458, 2476.

[254] *See id.* at 2458.

[255] *Id.* at 2475–76.

[256] *See id.* at 2476.

[257] *See id.*

[258] *See id.* at 2475 (citing Granholm v. Heald, 544 U.S. 460, 125 (2005)). The monitoring and control argument especially failed when applied to stores physically located in a state because inspections and audits could easily be conducted. *Id.*

[259] *See* Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n, 313 F. Supp. 3d 751, 767–68 (W.D. Tex. 2018).

Legislature passed the public corporation ban in response to the Fifth Circuit's declaration that residency requirements were unconstitutional.[260] If Tennessee were to respond to the Supreme Court's decision in *Tennessee Wine* by replacing the residency requirement with a flat ban on public corporations, the law would likely be invalidated.[261] The Commerce Clause inquiry looks to the challenged law's actual purpose and effect.[262] Enacting a flat ban on public corporations to achieve the same effects as residency requirements clearly demonstrates the unconstitutional purpose and effect of shielding in-state retailers from out-of-state competition.[263] Therefore, replacing residency requirements with a public corporation ban would not stand under *Tennessee Wine*.[264] Under this reasoning, *Wal-Mart Stores* should have been an "open and shut" case.[265] Instead, the Fifth Circuit wrote off *Tennessee Wine* as "dicta" and concluded that the Texas statute did not have a discriminatory purpose or effect—despite creating significant barriers to out-of-state actors—simply because the statute was not facially discriminatory.[266]

The ignorance of *Tennessee Wine* bears concern for future legislation and Commerce Clause challenges, especially in the Fifth Circuit. Lawmakers now have an easy avenue to craft legislation for unconstitutional, protectionist purposes. So long as the legislation is crafted to appear facially neutral, it is subject to a different analysis in the Fifth Circuit.[267] Moreover, the disconnect between *Wal-Mart Stores* and *Tennessee Wine* treats the Commerce Clause like a second-class constitutional restraint and may lead to arbitrary results for challenged legislation.[268]

Both the Commerce Clause and the Twenty-First Amendment are enumerated powers in the Constitution.[269] The Twenty-First Amendment may only supersede the Commerce Clause when regulations are made to meet a legitimate state interest that cannot be achieved through nondiscriminatory alternatives.[270] One cannot seriously support, especially in light of *Tennessee Wine*, that the public corporation ban was necessary for regulating the consumption of alcohol or monitoring accountability. Within the same breath, the TABC argued "[t]his statute is not economic protectionism" because it acts to reduce alcohol consumption "while simultaneously ensuring

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[260] *See id.*

[261] Pet. for Cert., *supra* note 189, at 17.

[262] *See Tennessee Wine*, 139 S. Ct. at 2473.

[263] *See* Pet. for Cert., *supra* note 189, at 17.

[264] *See id.*

[265] *Id.*

[266] *See id.* at 17–18; Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n, 945 F.3d 206, 221 (5th Cir. 2019).

[267] Pet. for Cert., *supra* note 189, at 19.

[268] *See* CATO Brief, *supra* note 227, at 10; Brief of Retail Litig. Ctr., Inc. as Amicus Curiae in Support of Petitioners at 16, Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n, 945 F.3d 206 (2019) (No. 19-1368) [hereinafter Retail Litig. Ctr. Brief].

[269] *See* U.S. CONST. art. 1, § 8; *id.* amend. XXI.

[270] *See* discussion *supra* Section I.C.

that small businesses in small towns throughout Texas can survive in the marketplace without having to compete with large corporations . . . ."[271] However, just because a health and safety measure is purported, does not mean it is sufficient to overcome a Commerce Clause violation.[272] When *Tennessee Wine* is properly applied, the TABC's justifications are "implausible on their face."[273] Moreover, when attempting to justify Texas's regulation as a health and safety measure, the TABC claimed Texas wanted to keep out public corporations to minimize alcohol consumption.[274] However, Texas's chosen approach to lowering consumption is to promote drinking beer and wine, rather than liquor.[275] As evidenced in *Tennessee Wine*, these are not good enough reasons to enact protectionist measures.

In conclusion, *Tennessee Wine* should have been applied in the *Wal-Mart Stores* decision. The Supreme Court used *Tennessee Wine* in early 2019 to reiterate the standard for Commerce Clause challenges to state alcohol regulations.[276] *Wal-Mart Stores*, a case with analogous facts, was decided merely months later in the Fifth Circuit, yet ignored the Supreme Court's analysis.[277] The proper application of *Tennessee Wine* by the Fifth Circuit in *Wal-Mart Stores* would have generated different results. The Supreme Court should have granted certiorari to correct the Fifth Circuit's ignorance of *Tennessee Wine* and set an example for future alcohol regulation challenges.

C. The Supreme Court Should Have Granted Certiorari to Correct the Fifth Circuit's Misapplication of Exxon

The Fifth Circuit erroneously relies on and applies *Exxon* in *Wal-Mart Stores*. The Fifth Circuit has used *Exxon* to generate a per se rule to circumvent the discriminatory effects test in Commerce Clause cases.[278] Moreover, the Fifth Circuit's use of *Exxon* has generated a circuit split. In addition to granting certiorari to address the Fifth Circuit's ignorance of *Tennessee Wine*, the Supreme Court should have granted certiorari to correct the Fifth Circuit's use of *Exxon* and prevent future legislative, economic, and constitutional harms.

The Fifth Circuit inaccurately relies on *Exxon Corp. v. Governor of Maryland* to create an exception for the discriminatory effects test based on distinctions in

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[271] Brief of Respondent, *supra* note 234, at 4.

[272] *See, e.g.*, Granholm v. Heald, 544 U.S. 460 (2005) ("[We] still must consider whether [a] State's regime 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988)).

[273] Retail Litig. Ctr. Brief, *supra* note 268, at 16.

[274] *See* Brief of Respondent, *supra* note 234, at 3.

[275] *See id.* at 4.

[276] *See generally* Tennessee Wine Retailer's Ass'n v. Thomas, 139 S. Ct. 2449 (2019).

[277] *See* Wal-Mart Stores, Inc. v. Texas Alcoholic Bev. Comm'n, 945 F.3d 206 (5th Cir. 2019).

[278] *See infra* notes 287–88 and accompanying text.

corporate form.[279] The Fifth Circuit uses the case to conclude that because the Texas statute does not facially differentiate between business forms, it is irrelevant to test for discriminatory effects.[280] However, the pertinent finding in *Exxon* was that "the law did not have a discriminatory effect *because* it imposed *no* constraints on a large swath of out-of-state competitors, not because the constraints it did impose were facially neutral."[281] *Exxon* does not treat facial neutrality as a dispositive factor in its analysis.[282] Moreover, *Exxon* emphasized the importance of recognizing how statutes treat in-state versus out-of-state interests "in the relevant market."[283] Therefore, Exxon "does not suggest, let alone hold, that a state law that draws distinctions based on business form had no legally cognizable discriminatory effect."[284] Yet the Fifth Circuit continues to apply *Exxon* as if it were an exception that "forecloses discriminatory effect challenges" to facially neutral laws that ban particular companies from retail markets.[285]

Tennessee Wine made it clear that alcohol regulations—even for health and safety—are subject to the usual fact-intensive "scrutiny mandated under the Commerce Clause, not to a per se rule."[286] Contrary to Supreme Court precedent, the Fifth Circuit created an "arbitrary, formalistic distinction" based on corporate form through the misapplication of *Exxon*.[287] This distinction was a judge-made rule designed to advance state protectionism by favoring private companies over public corporations.[288] By advantaging private entities, the Fifth Circuit "incentiviz[es] retailers to manipulate their corporate form to enter [a] restricted market, and motivat[es] state legislatures to adopt similar laws that advance protectionism."[289] State laws that discriminate against public corporations undermine the positive economic benefits provided by these entities.[290] Public corporations are crucial employers, innovators,

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[279] *See* Pet. for Cert., *supra* note 189, at 19.

[280] *See Wal-Mart Stores*, 945 F.3d at 219–20 (2019); Pet. for Cert., *supra* note 189, at 19.

[281] Pet. for Cert., *supra* note 189, at 20 (emphasis added); *see also* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 126 ("[T]he Act creates no barriers whatsoever against interstate independent dealers; it does 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.").

[282] Retail Litig. Ctr. Brief, *supra* note 268, at 8.

[283] *Id.* (emphasis omitted).

[284] Pet. for Cert., *supra* note 189, at 20.

[285] *Id.* at 20; *see also* Ford Motor Co. v. Texas Dept. of Transp., 264 F.3d 493, 500–01 (5th Cir. 2001); Allstate Ins. Co. v. Abbott, 495 F.3d 151, 160 (5th Cir. 2007); Int'l Truck & Engine Corp. v. Bray, 372 F.3d 717, 726 (5th Cir. 2004).

[286] Retail Litig. Ctr. Brief, *supra* note 268, at 17.

[287] *Id.* at 20 (quoting South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2092 (2018).

[288] Retail Litig. Ctr. Brief, *supra* note 268, at 20.

[289] *Id.* at 5.

[290] *See* Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Petitioners at 16, Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n, 945 F.3d 206 (2019) (No. 19-1368).

and investors in the economy.[291] The sale of public stock allows public corporations to create jobs and employ "nearly one-third of the American workforce."[292] Moreover, public corporations have the tools to retain and properly train their employees.[293] For example, public corporations are motivated by their national reputations to extensively train local employees on "drinking age laws, valid customer identification, and the recognition of forgeries" in order to maintain "responsible, law-abiding stores."[294] Allowing the Fifth Circuit to continue applying *Exxon* as a per se rule to differentiate companies based on corporate form is both unconstitutional and harmful.[295]

The *Wal-Mart Stores* decision is not the only time the Fifth Circuit has misapplied *Exxon*.[296] The Fifth Circuit has misapplied *Exxon* to a number of Commerce Clause cases—taking the impact of the denial of certiorari in the *Wal-Mart Stores* decision outside the realm of mere alcohol regulations.[297] The Supreme Court should have granted certiorari to correct the misapplication of *Exxon* and prevent further harm to the Commerce Clause. Moreover, the Fifth Circuit's misuse of *Exxon* has created a circuit split with alcohol regulations and the Commerce Clause more generally.[298] The Supreme Court should have granted certiorari in *Wal-Mart Stores* to address the circuit splits created by the Fifth Circuit.

The First and Sixth Circuits have applied *Exxon* to invalidate state liquor regulations based on discriminatory effects that would have "survive[d] an effects challenge as a matter of law in the Fifth Circuit."[299] For example, the First Circuit held that a statute distinguishing the distribution methods of "small" wineries from "large" wineries was unconstitutional because in its effects the statute discriminated against large out-of-state wineries.[300] Although the statute was facially neutral,[301] the First Circuit stated, "Section 2 of the Twenty-first Amendment does not exempt or

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[291] *Id.* at 16.

[292] *Id.* at 16–19 (quoting Dane Stangler & Same Arbesman, *What Does Fortune 500 Turnover Mean?*, EWING MARION KAUFFMAN FOUND. (June 2012), https://bit.ly/3hdRjyr). Access to capital markets allows public corporations to grow and expand, thus creating the demand for more jobs. *Id.*

[293] *Id.* at 18–19; Retail Litig. Ctr. Brief, *supra* note 268, at 21.

[294] Retail Litig. Ctr. Brief, *supra* note 268, at 18–19.

[295] *Id.* at 20 (per se rules not allowed according to precedent).

[296] Pet. for Cert., *supra* note 189, at 20–24. In *Ford*, *Allstate*, and *International Truck & Engine Corp.*, the Fifth Circuit used *Exxon* to "reject discriminatory effects challenges." *Id.*

[297] *Id.* at 20–22.

[298] *Id.* at 23.

[299] *Id.* at 24 (citing Family Winemakers of Cal. v. Jenkins, 592 F.3d 1 (1st Cir. 2010); Cherry Hill Vineyards, L.L.C. v. Lilly, 553 F.3d 423 (6th Cir. 2008)).

[300] *See Family Winemakers of Cal.*, 592 F.3d at 12 ("The ultimate effect of [the statute] is to artificially limit the playing field in this market in a way that enables Massachusetts's wineries to gain market share against their out-of-state competitors.").

[301] The statute only distinguished between "small" and "large" wineries, rather than in-state or out-of-state wineries. *Id.* at 7.

otherwise immunize facially neutral but discriminatory state alcohol laws . . . from scrutiny under the Commerce Clause."[302] Applying the discriminatory effects test, the First Circuit found the statute to be an unconstitutional violation of the Commerce Clause.[303] This law would have survived a discriminatory effects challenge in the Fifth Circuit. In fact, the Fifth Circuit, relying on the facial neutrality of the law differentiating "small" and "large" wineries (rather than in-state and out-of-state wineries) would not have inquired into discriminatory effects at all.[304] In a similar vein, the Sixth Circuit invalidated a regulation on small farm wineries that required in-person purchase for direct shipments because the practical effect of the law discriminated against out-of-state wineries.[305] The Sixth Circuit found that the practical effect of requiring consumers to travel hundreds or thousands of miles to purchase wine in-person from small out-of-state wineries clearly discriminated against interstate commerce.[306] Once again, the regulation would have survived a discriminatory effects challenge in the Fifth Circuit. The law was facially neutral in that it only regulated small farm wineries; therefore, the Fifth Circuit would not have applied the discriminatory effects test.[307] The Supreme Court's recent decision in *Tennessee Wine* should have amended this circuit split.[308] However, the Fifth Circuit continued to apply their judge-made rule that overlooks discriminatory effects in *Wal-Mart Stores*.[309] The Supreme Court should have granted certiorari in *Wal-Mart Stores* to definitively end this circuit split regarding state alcohol regulations.

In addition to a circuit split for alcohol regulations, the First and Eleventh Circuits have *expressly* declined to read *Exxon* in the same manner as the Fifth Circuit for other Commerce Clause challenges.[310] For example, in *Cachia v. Islamorada*,[311] the Eleventh Circuit refused to read *Exxon* as a command to ignore the discriminatory

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[302] *Id.* at 5.

[303] *Id.* at 12.

[304] Pet. for Cert., *supra* note 189, at 24.

[305] Cherry Hill Vineyards, L.L.C. v. Lilly, 553 F.3d 423, 432 (6th Cir. 2008).

[306] *Id.* at 433.

[307] Pet. for Cert., *supra* note 189, at 24–25.

[308] *See* Tennessee Wine & Spirits Retailer's Ass'n v. Thomas, 139 S. Ct. 2449, 2474 (2019) (finding that the Commerce Clause requires an inquiry into a regulation's predominant effect).

[309] *See* Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n, 945 F.3d 206, 220 (5th Cir. 2019) (The court did not apply the discriminatory effects test because they believed the facially neutral regulation on similarly situated companies could not have a discriminatory effect).

[310] *See generally* Cachia v. Islamorada, 542 F.3d 839, 842–43 (11th Cir. 2008) (an ordinance prohibiting chain restaurants with certain characteristics was unconstitutional because its effects discriminated against restaurants involved in interstate commerce); Walgreen Co. v. Rullan, 405 F.3d 50, 59 (1st Cir. 2005) (invalidating a statute requiring any pharmacies seeking to relocate or open in Puerto Rico to obtain a certificate of necessity and convenience because its effects were discriminatory).

[311] *Cachia*, 542 F.3d at 842–43 (11th Cir. 2008).

effects of a facially neutral ordinance that prevented the entry of chain restaurants "into competition with independent local restaurants."[312] The Supreme Court should have taken the opportunity to correct the circuit split by granting certiorari in *Wal-Mart Stores*. The Fifth Circuit's misapplication of Court precedent is damaging to the Commerce Clause and threatens future constitutional, legislative, and economic harms.

CONCLUSION

The Supreme Court's denial of certiorari in *Wal-Mart Stores* was erroneous, and frankly, a little confusing. It appears that the Fifth Circuit did everything wrong—it misinterpreted a discriminatory statute provision as facially neutral, ignored recent Supreme Court precedent, created an arbitrary per se rule for some Commerce Clause analyses, and generated a circuit split. *Wal-Mart Stores* appeared to be a case ripe for Supreme Court review, yet, certiorari was denied.

While the *exact* ramifications of the Supreme Court's decision are hard to predict, it is clear that the Fifth Circuit needs redirection on their application of *Exxon* to prevent future harms to the Commerce Clause. Moreover, denial of certiorari in *Wal-Mart Stores* has opened the door for state legislatures to draft around the Commerce Clause using "facially neutral" language to hide their discriminatory intent. Encouragement of discriminatory laws that favor in-state actors undermines the very purpose of the dormant Commerce Clause. The denial of certiorari in *Wal-Mart Stores* is brewing up constitutional, legislative, and economic harms. Hopefully, the Supreme Court will "take a shot" in the future to preserve and clarify the long-standing interconnection between the Twenty-First Amendment and the Commerce Clause.

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[312] *Id.* at 842.