



October 22, 2020

## CERT PETITION IN FOCUS: SUPREME COURT SHOULD REVIEW TEXAS'S RETAIL LIQUOR-SALES TRADE BARRIER

by Glenn G. Lammi

Texas boasts America's "[best business climate](#)." But not all businesses would agree. Consider, for instance, out-of-state retailers who want to sell distilled spirits in Texas. A Texas law protects local liquor retailers from outside competition. Last December, the Fifth Circuit [rejected](#) Walmart's argument that the law violated the U.S. Constitution's Commerce Clause. Walmart had [petitioned](#) for certiorari in *Wal-Mart Stores, Inc. v. Texas Alcohol Beverage Commission*. The Supreme Court should grant the petition and clarify that states cannot discriminate against businesses on account of their location or corporate form.

### A Texas Two-Step

Texas's discrimination against out-of-state alcohol retailers dates back to 1935, when the state imposed a three-year residency requirement on liquor-sales licensees. Sixty years later, a federal district court ruled the residency requirement violated the Commerce Clause. The Fifth Circuit affirmed.

The Texas legislature responded in 1995 with a deft two-step move to maintain market protection. First, it prohibited publicly traded corporations from holding liquor-sales licenses. Second, it grandfathered in any publicly traded companies that held or had applied for licenses prior to the new law's effective date. Because of the previous law's residency requirement, the *only* grandfathered public corporations were Texas corporations.

The 1995 law did little to advance a legitimate public-health purpose, or any other state interest for that matter, other than economic favoritism. The state was essentially colluding with local retailers to create a liquor-store cartel. The record in *Wal-Mart Stores* reflects that the retail-store trade association "conceived, drafted, and supported" the law. The legislation's Senate sponsor stated baldly that, under his bill, "you can't have a package store inside a Walmart."

Walmart filed suit in federal district court alleging Commerce Clause violations. After a bench trial, the court concluded that Fifth Circuit precedent precluded it from finding that the law has a discriminatory effect. The court held, however, that the law intentionally discriminates against out-of-state actors and that its burdens on interstate commerce exceeded its local benefits. Both parties appealed to the Fifth Circuit.

---

**Glenn G. Lammi** is Chief Counsel of Washington Legal Foundation's Legal Studies Division.

## The Fifth Circuit Abstains from *Tennessee Wine*

While Walmart's appeal was pending, the U.S. Supreme Court decided [Tennessee Wine & Spirits Retailers Assn. v. Thomas](#). That June 26, 2019 decision held that Tennessee's two-year residency requirement for individuals and businesses to secure a liquor-retail license violated the Commerce Clause. The Court first ruled that the Twenty-First Amendment did not "give States a free hand to restrict the importation of alcohol for purely protectionist purposes." It then concluded that the "predominant effect of the 2-year residency requirement is simply to protect the Association's members from out-of-state competition." Because the state could offer no legitimate public health or other non-protectionist justification, the Court held that the Tennessee law violated the Commerce Clause.

*Tennessee Wine* should have signaled the end to Texas's public-company ban. Not so. On December 9, 2019, the Fifth Circuit gave Texas liquor stores an early Christmas present, upholding the lower court's "no discriminatory effects" ruling and reversing its other two Commerce Clause holdings.

The appeals court reasoned that a line of Fifth Circuit precedents that relied on a 1978 Supreme Court ruling, *Exxon Corp. v. Gov. of Maryland*, compelled a finding of no unlawful discrimination. Those precedents dictate that if a state law bans companies from a market based on their corporate form in a *facially neutral* manner, the law neither discriminates against nor burdens interstate commerce. The Texas ban, the Fifth Circuit explained, bans *all* public companies, both in-state and out-of-state, so in-state companies do not have a competitive advantage.

What of *Tennessee Wine*? The Fifth Circuit acknowledged that *Wal-Mart Stores* was in "tension" with the Supreme Court's ruling. But the court refused to apply *Tennessee Wine*'s practical-effects analysis, dismissing that analysis as "dicta." The Fifth Circuit also remarked that the Supreme Court's dormant Commerce Clause jurisprudence was "quite simply, a mess." Walmart petitioned the Fifth Circuit for rehearing *en banc*, but inexplicably, the full court denied that request.

### A Compelling Case for Certiorari

[Cato Institute](#), the [Retail Litigation Center](#), and the [U.S. Chamber of Commerce](#) filed *amicus* briefs supporting Walmart's petition. The respondents (a package-store association and the Texas ABC) waived their right to respond. On July 22, the Court requested responses, which were filed on October 20. The Court could rule on Walmart's petition in early November.

The Fifth Circuit's suggestion that its *Wal-Mart Stores* ruling was in "tension" with *Tennessee Wine* is quite an understatement. Walmart's petition explains why:

According to the Fifth Circuit, because the law is a 'facially neutral' regulation of 'corporate form,' it necessarily does not have a discriminatory effect, even though it operates to bar nearly all out-of-state competition. That form-over-substance approach flies in the face of this Court's cases and conflicts with decisions from other circuits.

The petitioner also argues that the Supreme Court's *Exxon Corp. v. Gov. of Maryland* does not justify the Fifth Circuit's dismissal of the clear discriminatory effects of the public-company ban. The Court in *Exxon Corp.* found that as a matter of *fact*, not law, the Maryland law at issue did not have a discriminatory effect. The U.S. Chamber's *amicus* brief amplifies the hazards for public companies if the Court denies certiorari:

Public companies could become ready targets of protectionist measures designed to give favored, in-state actors market-distorting advantages. The Court should consider the potential economic and societal consequences if that happens—outcomes far weightier than attend a typical decision to deny certiorari.

One of those potential economic consequences is that favored in-state actors will have less incentive to lower prices if state law locks out foreign competition. In that way, the Commerce Clause protects consumers as much as it does businesses.

The justices tend to deny certiorari in cases that implicate legal or constitutional issues on which they have very recently ruled. They should set aside that tendency in *Wal-Mart Stores*. The Fifth Circuit has given states a roadmap to circumvent *Tennessee Wine*, one that will result in discrimination against a particular type of business. The justices should not let more such laws and resulting constitutional challenges percolate. The time to act is now.