No. 19-1368

IN THE

Supreme Court of the United States

WAL-MART STORES, INC., ET AL.,

Petitioners,

v.

TEXAS ALCOHOLIC BEVERAGE COMMISSION, ET AL.,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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TABLE OF CITED AUTHORITIES

CASES

Assoc. Indus. of Mo. v. Lohman,
511 U.S. 641 (1994)..5, 6

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984)..8

Best & Co. v. Maxwell,
311 U.S. 454 (1940)...13

Boston Stock Exch. v. State Tax Comm'n,
429 U.S. 318 (1977)...6, 14

Burwell v. Hobby Lobby Stores, Inc.,
573 U.S. 682 (2014)...23

Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564 (1997)...6, 8, 11, 12, 13

City of Philadelphia v. New Jersey,
437 U.S. 617 (1978)..8

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977)...11

Comptroller of Treasury of Maryland v. Wynne,
575 U.S. 542 (2015)...1, 13

Cooper v. McBeath,
11 F.3d 547 (5th Cir. 1994).....................................3

Edgar v. MITE Corp.,
457 U.S. 624 (1982)..11

Exxon Corp. v. Maryland,
437 U.S. 117 (1978)..12

Freeman v. Hewit,
329 U.S. 249 (1946)..11

Fulton Corp. v. Faulkner,
516 U.S. 325 (1996)......................................11, 12

Granholm v. Heald,
544 U.S. 460 (2005)......................................5, 6, 14

Gustafson v. Alloyd Co., Inc.,
513 U.S. 561 (1995)..9

H.P. Hood & Sons, Inc. v. Du Mond,
336 U.S. 525 (1949)..6

Hughes v. Alexandria Scrap Corp.,
426 U.S. 794 (1976)..4

McBurney v. Young,
569 U.S. 221 (2013)..4

McLeod v. J.E. Dilworth Co.,
322 U.S. 327 (1944)..7

New Energy Co. of Ind. v. Limbach,
486 U.S. 269 (1988)..14

North Am. Co. v. SEC,
327 U.S. 686 (1946) 11

Oklahoma-Texas Tr. v. SEC,
100 F.2d 888 (10th Cir. 1939) 11

Smolowe v. Delendo Corp.,
136 F.2d 231 (2d Cir. 1943) 11

South Dakota v. Wayfair, Inc.,
138 S. Ct. 2080 (2018) 6, 8

Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019) .... *passim*

Wardair Canada, Inc. v. Fla. Dep't of Revenue,
477 U.S. 1 (1986) 6

CONSTITUTION AND STATUTES

U.S. Const. Art. I, §8, cl.3 5

Tex. Alco. Bev. Code §22.16 .... *passim*

OTHER AUTHORITIES

Sarah Chaney, *Unemployment Rate Fell to 10.2% in July, U.S. Employers Added 1.8 Million Jobs*, Wall St. J. (Aug. 7, 2020), https://on.wsj.com/2FJv4CV

Courtney Connley, *These Are the 25 Most Attractive Employers in America, According to LinkedIn, CNBC* (Apr. 3, 2019), https://cnb.cx/2Q8vZhR 18

Steven J. Davis and James A. Kahn, *Interpreting the Great Moderation: Changes in the Volatility of Economic Activity at the Macro and Micro Levels*, J. of Econ. Perspectives (2008) 17

Corrie Driebusch et al., *Airbnb Plans to File for IPO in August*, Wall St. J. (Aug. 11, 2020), https://on.wsj.com/3kYICup 18

Clare Duffy, *How Jeff Bezos Changed the World*, CNN Business, (Aug. 16, 2019), https://cnn.it/3gcKU5u 21

Expanding the On-Ramp: Recommendations to Help More Companies Go and Stay Public, Center for Capital Markets at 4-5 (2018), available at https://bit.ly/319sheb 2, 19, 20

"Fortune 500," *Fortune* (2020), available at https://fortune.com/fortune500/ 16

Gillian Friedman, *Big-Box Retailers' Profits Surge as Pandemic Marches On*, N.Y. Times (Aug. 19, 2020), https://nyti.ms/3hj87nL 19

Chelsea Greenwood, *10 of the Companies That Give the Most to Charity in the US*, Business Insider (Nov. 14, 2018), https://bit.ly/34cRt5D..23

Gillermo C. Jimenez & Elizabeth Pulos, *Good Corporation, Bad Corporation: Corporate Social Responsibility in the Global Economy* (Milne Publishing 2017), https://bit.ly/3aIgo2i............................19, 20, 21, 22

James A. Kahn, *Interpreting the Great Moderation: Changes in the Volatility of Economic Activity at the Macro and Micro Levels*, 22 J. of Econ. Perspectives, vol. 155, 173 (2008)...17

Martin Kenney, et al., *Post-IPO Employment and Revenue Growth for U.S. IPOs, June 1996-2010: Report for the Kauffman Foundation*, Kauffman (2012), available at https://bit.ly/3gkZlVf..17

Kif Leswing, *The iPhone Decade: How Apple's Phone Created and Destroyed Industries and Changed the World*, CNBC (Dec. 16, 2019), https://cnb.cx/2YiQ0Xv 21

Listed Companies — Country Rankings, TheGlobalEconomy.com, https://bit.ly/3kYIhYt..15

Methodology for Fortune 500, Fortune (2020), https://bit.ly/2EgnPS0..16

Andrea Murphy et al., *Global 2000: The World's Largest Public Companies*, Forbes (May 13, 2020), https://bit.ly/3aFFGy1...........18, 20

National Venture Capital Association, *Venture Impact: The Economic Importance of Venture Capital-Backed Companies to the U.S. Economy* (2011), available at https://bit.ly/34bVbfT..18

Kim Parker & Richard Fry, *More Than Half of U.S. Households Have Some Investment in the Stock Market*, Pew Research Center (Mar. 25, 2020), https://pewrsr.ch/32nbfJh 22

Ann M. Scarlett, *Shareholder Derivative Litigation's Historical and Normative Foundations*, 61 Buff. L. Rev. 837 (2013) 22

Sources of Capital and Economic Growth: Interconnected and Diverse Markets Driving U.S. Competitiveness, Center for Capital Markets at 20-21 (2011), available at https://bit.ly/34aZ8kZ 17, 18

Dane Stangler & Same Arbesman, *What Does Fortune 500 Turnover Mean?* Ewing Marion Kauffman Foundation (June 2012), available at https://bit.ly/3hdRjyr...................16, 17

Samuel Stebbins, *The world's 50 most innovative companies*, USA Today (Jan 12, 2018), https://bit.ly/3haMrdC 20

Total Market Value of U.S. Stock Market, Siblis Research (June 30, 2020), available at https://bit.ly/2E7HYKm 16

"USA: Listed Companies," TheGlobalEconomy.com, available at https://bit.ly/2YxzEL5 15

INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million U.S. businesses and professional organizations of every size, in every economic sector, and in every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community. This case fits that bill for two reasons.

First, the Chamber has a strong interest in preventing state and local discrimination against interstate commerce, and has filed prior *amicus* briefs in cases addressing that question. *See, e.g.*, *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015). The Chamber's members include a significant number of publicly traded companies that engage in commerce in and among the 50 States. As a result, they are subject to a host of state licensing and permitting regimes across virtually every economic

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[1] In accordance with this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice of *amicus curiae*'s intent to file this brief and consented to it.

sector. Discriminatory state regulations can significantly affect their business objectives—particularly their interstate activities. Properly interpreted, the Commerce Clause protects the Chamber's members from those discriminatory laws.

That remains true even where—as here—protectionist laws stem from state regulation of alcohol. Some disputes in that context implicate principles unique to the Twenty-First Amendment. This is not one of those cases, and the Chamber takes no position on the full scope of the states' Twenty-First Amendment authority. Nor need it, because Texas's ban so flagrantly violates bedrock dormant Commerce Clause principles important to all of the Chamber's members, regardless of sector.

That leads to the Chamber's second interest: helping to build a legal framework that enables all companies, in any sector, to go (and stay) public. *See Expanding the On-Ramp: Recommendations to Help More Companies Go and Stay Public*, Ctr. for Capital Markets Competitiveness (2018) https://bit.ly/319sheb. Protectionist laws like Texas's disincentivize companies from going public, because they become targets of them as soon as they do. Interpreting the dormant Commerce Clause to forbid those laws bolsters the Chamber's longstanding efforts to encourage companies to raise capital in the public markets—and produce the significant economic benefits accompanying that choice.

INTRODUCTION AND SUMMARY OF ARGUMENT

Texas law prohibits public companies from obtaining permits for liquor stores. Tex. Alco. Bev. Code §22.16(a). Well, *most* public companies: companies who had a permit in 1995—when only Texas companies could get them—can keep them. *Id.* §22.16(f). Otherwise, any corporation "whose shares … are listed on a public stock exchange" or "in which more than 35 persons hold an ownership interest" are out of luck. *Id.* §22.16(b). And, as it turns out, the ban applies only to one type of liquor permit: a P permit, or package store permit, which authorizes the sale of liquor, wine, and ale for off-premises consumption. *Id.* §22.01. "Public corporations can hold any of the other seventy-five types of alcohol permits that Texas issues." Pet.App.38a.

Why did the Texas Legislature ban public companies (except Texas companies dating to 1995) from obtaining just one type of liquor permit? It enacted the law in 1995, a year after the Fifth Circuit struck down a durational-residency requirement in Texas's prior liquor-permitting regime. *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994). But §22.16's public-company ban has effectively kept the defunct residency requirement in place: today "[n]inety-eight percent of Texas package stores and Texas package store companies are wholly owned by Texans." Pet. App. 87a. Put differently, "[i]n practice, … no corporation whose stock is publicly traded may operate a liquor store in the State." *Tennessee Wine &*

Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2457 (2019).

It's hard to imagine a more "blatant violation[] of the Commerce Clause." *Id.* "The 'common thread' among those cases in which the Court has found a dormant Commerce Clause violation is that 'the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation.'" *McBurney v. Young*, 569 U.S. 221, 235 (2013) (quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976)). So it is here: on its face, §22.16(a) interferes with the natural functioning of the interstate market by banning publicly traded companies (save the in-state companies it grandfathers in) from obtaining a P permit.

That protectionist ban discriminates against out-of-state firms in purpose and in effect in at least three ways. First, by its grandfathering clause, §22.16 overtly grants benefits to in-state corporations that it denies to their out-of-state competitors. Second, discriminating against publicly traded companies *is* discrimination against interstate commerce: listing companies on public exchanges and selling shares to buyers throughout America falls squarely within the heartland of constitutionally protected interstate commerce. Third, this Court's cases establish that the Commerce Clause protects interstate commercial *interests*, not particular types of interstate commercial *firms*. All interstate economic actors—persons, for-profit companies, not-for-profit companies—are equally entitled to the Commerce Clause's benefits.

There is no basis for the Fifth Circuit's contrary rule approving facial discrimination against public companies just because they are public companies. Those patent discriminatory effects and purpose make §22.16 subject to this Court's "virtually *per se* rule of invalidity." *Granholm v. Heald*, 544 U.S. 460, 476 (2005). It must be struck down. This Court should grant the petition for a writ of certiorari, and reverse.

Failing to do so would create a blueprint for states to adopt facially discriminatory laws against public companies, a vital part of America's economy. Because they can readily access capital through the Nation's public securities markets, public companies can readily create jobs, produce innovative products and services, and provide opportunities for investment. Laws like §22.16 threaten to curtail each of those critical economic benefits because they disincentivize entrepreneurs from taking their companies public. In other words, they magnify the very evil the Framers designed the Commerce Clause to prevent.

ARGUMENT

I. Texas's ban on public companies obtaining liquor licenses violates the dormant Commerce Clause.

The Constitution vests Congress with the power "[t]o regulate Commerce … among the several States." Art. I, §8, cl. 3. By negative implication, that grant of federal power restrains state power: it "forbid[s] the States to discriminate against interstate trade," *Assoc. Indus. of Mo. v. Lohman*, 511 U.S. 641, 646

(1994), and is "self-executing," *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 7 (1986). That constitutional bar to discriminatory state economic regulation also is "deeply rooted in" this Court's "case law," *Tennessee Wine*, 139 S. Ct. at 2460, and has long been deemed "established beyond dispute," *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977).

In fact, this Court has repeatedly identified the Clause's purpose—"prevent[ing] the States from adopting protectionist measures and thus preserv[ing] a national market for goods and services"—as one of the Founders' animating concerns. *Tennessee Wine*, 139 S. Ct. at 2459; *see, e.g.*, *id.* at 2460-61; *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018); *Granholm v. Heald*, 544 U.S. 460, 472 (2005); *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 571-72 (1997) *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34 (1949). How could "the new Union … avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation"? *Granholm*, 544 U.S. at 472. Discussions about that question at the 1787 constitutional convention "almost uniformly linked" the "power to regulate interstate commerce" to "the removal of state trade barriers." *Tennessee Wine*, 139 S. Ct. at 2460. And state ratification debates "prominently" featured discussions about "fostering free trade among the States." *Id.* The Clause emerged from those debates as the Nation's promise to

preserve an "area of free trade among the several States" for all interstate commerce. *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944).

Later political debates have augmented that bargain. As relevant here, the Twenty-First Amendment affects the Clause's operation against certain state liquor laws. Section 2 of the Twenty-First Amendment "give[s] each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens." *Tennessee Wine*, 139 S. Ct. at 2474. Based on that authority, many states have adopted a three-tiered system for regulating producers, wholesalers, and retailers of alcohol. *See, e.g.*, Pet. App.37a. None of the laws for the production and wholesale distribution of alcohol is at issue here, and the Chamber takes no position on them or on any other established Twenty-First Amendment law.

Rather, the Chamber's interests here lie in enforcing the dormant Commerce Clause's general nondiscrimination principle. As the Court reiterated just last year, Section 2 of the Twenty-First Amendment creates no "shield[]" for laws whose "predominant effect…is protectionism, not the protection of public health or safety." *Id.* In other words, Section 2 "is not a license to impose all manner of protectionist restrictions on commerce in alcoholic beverages." *Id.* at 2457. Section 2 thus does not "allow[] the States to violate the 'nondiscrimination principle' that was a central feature of the regulatory regime that the provision was meant to constitutionalize." *Id.* at 2470.

Under those established rules, ordinary dormant Commerce Clause principles apply here and doom Texas's ban on public corporations obtaining liquor licenses. That ban violates the "primary principle[] that mark[s] the boundaries of a State's authority to regulate interstate commerce." *Wayfair*, 138 S. Ct. at 2090. That principle is simple: "state regulations may not discriminate against interstate commerce." *Id.* at 2091 ; *see also Camps Newfound*, 520 U.S. at 578 ("[I]t is clear that discriminatory burdens on interstate commerce imposed by regulation or taxation may also violate the Commerce Clause."). "The crucial inquiry … must be directed to determining whether" the challenged statute "is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). And when conducting that inquiry, "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (citations omitted). Once a court finds either, it applies "a virtually *per se* rule of invalidity." *City of Philadelphia*, 437 U.S. at 624.

That *per se* rule of invalidity applies to §22.16 because §22.16 is facially discriminatory for at least three reasons. Standing alone, each warrants review; together, they require it—and require striking down Texas's ban.

First, the Fifth Circuit held that Texas's public-corporation ban has neither a discriminatory purpose nor discriminatory effects because it "affects public corporations irrespective of location." Pet.App.49a; *see also id.* at 42a ("Section 22.16 is a facially neutral statute that bans all public corporations from obtaining P permits irrespective of domicile."); *id.* at 51a ("Section 22.16 bans public corporations from obtaining P permits irrespective of location."). But no number of talismanic incantations about facial neutrality can change §22.16's statutory text. And that text falsifies that premise.

After setting forth the ban itself in subsection (a), §22.16(f) creates a facially discriminatory exception: Any public corporation that held "a package store permit on April 28, 1995"—the date Texas adopted the ban—or had a permit application pending on that date may continue to hold that permit. And before April 1995, only Texas corporations (and individuals) were eligible to obtain permits; permit holders then were subject to an express residency requirement Texas had first adopted in 1935. *See* Pet.App.44a. Even the Fifth Circuit acknowledged that the grandfathered, "exempted corporations are Texas-based firms." *Id.* at 50 n.10. So read as a whole—and "not … as a series of unrelated and isolated provisions," *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995)—§22.16 readily produces discriminatory effects. It allows Texas public corporations to hold permits (obtained before 1995) but forbids foreign corporations to do so.

As a result, Texas liquor licensing is no different "[i]n practice" than Tennessee's unconstitutional

liquor licensing used to be: "no corporation whose stock is publicly traded may operate a liquor store in the State." *Tennessee Wine*, 139 S. Ct. at 2457. At least Tennessee recognized its indistinguishable ban as "plainly based on unalloyed protectionism," *id.* at 2474, and thus refused to defend that "blatant violation[] of the Commerce Clause," *id.* at 2457. Texas, however, persists.

Its basis for doing so cries out for this Court's review. The Fifth Circuit abetted Texas's avoidance of *Tennessee Wine* by couching this Court's teachings as sparse "*dicta*" on which this "Court did not say more" and that "le[ft] many questions to be answered." Pet.App.57a-58a n.10. But what more needs to be said? A Tennessee law effectively precluding public corporations from "operat[ing] a liquor store in the State" was "plainly based on unalloyed protectionism" and thus "blatant[ly] violat[ed] … the Commerce Clause." *Tennessee Wine*, 139 S. Ct. at 2457, 2474. Section 22.16(a), in turn, effectively precludes public corporations from operating liquor stores in the state and is based on unalloyed protectionism. No conclusion can follow in these circumstances *other than* §22.16 is also a "blatant violation[] of the Commerce Clause." The Court should grant certiorari and confirm the point, lest the Courts of Appeals follow the Fifth Circuit and Texas's lead and read *Tennessee Wine* as a good-for-one-state-only condemnation of a discriminatory commercial ban.

Second, §22.16(a) produces discriminatory effects on interstate commerce by facially discriminating against commercial entities with an inherently

interstate form. By definition, companies listed on national stock exchanges raise capital from across the country. That itself is interstate commerce, as is securities trading on those exchanges: Securities trades that "take place across state lines ... would themselves be interstate commerce." *Edgar v. MITE Corp.*, 457 U.S. 624, 641-42 (1982) (plurality op.); *see also North Am. Co. v. SEC*, 327 U.S. 686, 694-95 (1946) ("selling securities to residents of every state in the nation" is "commerce which concerns more states than one"); *Freeman v. Hewit*, 329 U.S. 249, 258-59 (1946) (securities trade on national exchange is interstate commerce), *overruled on other grounds by Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288-89 (1977); *Smolowe v. Delendo Corp.*, 136 F.2d 231, 240 (2d Cir. 1943) ("[T]ransactions on national security exchanges have taken on an interstate character"); *Oklahoma-Texas Tr. v. SEC*, 100 F.2d 888, 890 (10th Cir. 1939) (securities are "subjects of interstate commerce").

What's more, state regulations that penalize companies for "'participat[ing] in interstate commerce'" are facially discriminatory and thus *per se* unconstitutional—even if they do not directly target out-of-state firms or goods. *Camps Newfound*, 520 U.S. at 578 (citing *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 (1996)). That's why, for example, a state cannot tax corporate stock based on "the degree that [the stock's] issuing corporation participates in interstate commerce." *Fulton Corp.,* 516 U.S. at 333. That type of regulation would "favor[] domestic corporations over their foreign competitors in raising

capital among" the taxing state's "residents and tends, at least, to discourage domestic corporations from plying their trades in interstate commerce." *Id.*

Yet that's exactly what §22.16(a)'s public-corporation ban does. It facially disqualifies from its permitting process companies that choose to raise capital from across the country by participating in the interstate securities markets—that is, on national exchanges. *Camps Newfound* and *Fulton Corp.* cannot countenance that result. The Court should grant certiorari and confirm that discrimination against public companies *because* they are public companies *is* unconstitutional facial discrimination against interstate commerce.

Third, the Court should grant the petition to preserve a Fifth Circuit plaintiff's right to challenge economic discrimination based on its corporate form. Though—as just discussed—§22.16 facially discriminates against public corporations, the Fifth Circuit held that the Commerce Clause tolerates *that* kind of facial discrimination. For under circuit precedent, "evidence that legislators" enacted a law that discriminates "based on company form alone is insufficient to meet the purpose element of a dormant Commerce Clause claim." Pet.App.51a.

Petitioner cogently explains why that line of circuit precedent finds no support in *Exxon Corp. v. Maryland*, 437 U.S. 117 (1978). *See* Pet. 17-23. In particular, the Chamber endorses Petitioner's arguments (at 17-18) that the Fifth Circuit's effects test cannot be right, for it prevents a finding of

discriminatory effects unless the benefits and burdens of a state law line up *perfectly* along in-state and out-of-state economic interests. That erroneous view would improperly limit the Clause's scope to banning just "forthright" discrimination, instead of also banning "ingenious" discrimination, as the Court has long held it does. *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940).

To those errors in the Fifth Circuit's cases discussed in the petition, the Chamber adds one more: Nothing about this Court's cases suggests that cognizable Commerce Clause discrimination depends on the form or identity of the state's target.

On the contrary, this Court's precedents affirmatively establish otherwise, teaching that unconstitutional discrimination against interstate commerce does not depend on the plaintiff's identity or form. Discriminatory state laws get no free pass because they target individuals instead of corporations; "it is hard to see why the dormant Commerce Clause should treat individuals less favorably than corporations." *Wynne*, 135 S. Ct. at 1797. And "[f]or purposes of Commerce Clause analysis, any categorical distinction between the activities of profit-making enterprises and not-for-profit entities is … wholly illusory." *Camps Newfound*, 520 U.S. at 586. In short, "[p]rotectionism" is "forbidden under the dormant Commerce Clause"—"whether targeted at for-profit entities" or anyone else. *Id.* at 588.

That a plaintiff's Commerce Clause rights do not rise or fall based on its form or identity follows from the Clause's purpose. "[T]he Clause prohibits state discrimination against all out-of-state economic *interests*." *Tennessee Wine*, 139 S. Ct. at 2471 (cleaned up). "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic *interests* over out-of-state *interests*," this Court has "generally struck down the statute without further inquiry." *Granholm*, 544 U.S. at 487 (internal quotation marks omitted; emphasis added); *see also New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988) ("This 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic *interests* by burdening out-of-state *competitors*.") (emphasis added).

In sum, the Commerce Clause "create[s] an area of free trade among the several States," *Boston Stock Exchange*, 429 U.S. at 328 (internal quotation marks omitted), where actors of every type—individuals, for-profit corporations, public corporations, non-profit corporations—may pursue their economic *interests* equally unburdened by protectionist state laws. The Court should grant the petition and confirm that the Commerce Clause tolerates no state laws excluding economic actors from its protections solely because of their identity or form.

II. Upholding laws that discriminate against public corporations threatens widespread economic harms that the Framers designed the Commerce Clause to prevent.

If not reviewed, the decision below threatens to make §22.16's artifice a roadmap for states looking to skirt the Commerce Clause's demands. 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.

Public companies as a group are indispensable to America's economic engine. In 2018, 4,397 companies were publicly traded in this country. *USA: Listed Companies*, TheGlobalEconomy.com, https://bit.ly/2YxzEL5 (citing World Bank data). That placed America second in the world in 2018 for the number of public companies, behind only India. *Listed Companies — Country Rankings*, TheGlobalEconomy.com, https://bit.ly/3kYIhYt (citing World Bank data). So state laws targeting this particular corporate form subject the economic activities of thousands of American firms to unconstitutional discrimination.

Public companies' indispensable contributions account for a huge share of the American economy. As of June 30 of this year, the total market capitalization

of publicly traded companies in the United States was over $35.5 trillion. *Total Market Value of U.S. Stock Market*, Siblis Research (June 30, 2020), https://bit.ly/2E7HYKm. The Fortune 500 alone[2] have $14.2 trillion in revenue—a whopping two-thirds of U.S. economic output. *Fortune 500*, Fortune (2020), https://fortune.com/fortune500/.

Public companies put that value to work in ways whose importance cannot be overstated. The rest of this brief focuses on just three of them: public companies' roles as vital (1) employers, (2) innovators, and (3) investments. Those contributions to America's collective economic benefit arise precisely *because* public companies are publicly traded. And combined, those benefits let public companies unleash their scaled-up capital to provide essential goods and services to American consumers in interstate commerce efficiently and cheaply. State laws like §22.16—which facially discriminate against publicly traded companies—disincentivize and undermine all those outcomes.

Public companies as vital employers. Because public companies produce an outsized share of the nation's economic output, it's perhaps no surprise that they constitute some of the nation's largest employers. Some estimates have them employing "nearly one-third of the American workforce." Dane Stangler & Same Arbesman, *What Does Fortune 500 Turnover*

[2] The Fortune 500 includes some private companies that report their data publicly. *Methodology for Fortune 500*, Fortune (2020), https://bit.ly/2EgnPS0.

Mean? Ewing Marion Kauffman Foundation (June 2012), https://bit.ly/3hdRjyr (citing Steven J. Davis & James A. Kahn, *Interpreting the Great Moderation: Changes in the Volatility of Economic Activity at the Macro and Micro Levels*, 22 J. of Econ. Perspectives, vol. 155, 173 (2008)).

Public companies' ready access to capital markets is one reason they employ disproportionately more people than their raw numbers suggest they could. Selling capital stock on public markets through initial public offerings (when a company first goes public) or secondary equity offerings (after it has already gone public) "allow[s] publicly traded companies to raise capital, grow, and increase employment." *Sources of Capital and Economic Growth: Interconnected and Diverse Markets Driving U.S. Competitiveness*, Ctr. for Capital Markets Competitiveness 21 (2011), https://bit.ly/34aZ8kZ. Indeed, "[t]he number of publicly traded companies and the amount of capital that they raise are both good indicators of the health of the economy and the prospects for future employment." *Id.* at 20-21. For instance, one study found that the companies that went public between 1996 and 2010 employed 5.062 million people before they went public, and 7.334 million people in 2010—an increase of 2.272 million jobs. Martin Kenney et al., *Post-IPO Employment and Revenue Growth for U.S. IPOs, June 1996-2010: Report for the Kauffman Foundation*, Kauffman 1 (2012), https://bit.ly/3gkZlVf. Another study found that "92 percent of job growth for young companies occurs after their initial public offerings." Nat'l Venture Capital

Ass'n, *Venture Impact: The Economic Importance of Venture Capital-Backed Companies to the U.S. Economy* 4 (6th ed. 2011), https://bit.ly/34bVbfT.

Public companies not only create disproportionately more jobs than expected but also have important tools to retain their employees. They can compensate their employees with shares of company stock—equity or ownership interests that "help[] with employee motivation and retention." *Sources of Capital*, *supra*, at 26. Consider Microsoft in the 1990s, which compensated its employees with shares of stock whose value rose rapidly. This important economic incentive helped the company to attract and retain high-quality talent. *Id.* This trend continues: according to one study, of the 25 most attractive employers in America, all but three[3] are publicly traded—and one of those three, Airbnb, recently announced its intentions to go public this month.[4] Courtney Connley, *These Are the 25 Most Attractive Employers in America, According to LinkedIn*, CNBC (Apr. 3, 2019), https://cnb.cx/2Q8vZhR.

Protectionist state laws like §22.16 disincentivize companies from going public and prevent public companies from expanding. Removing those barriers

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[3] Determined by cross-referencing those top 25 with the Forbes Global 2000 database. Andrea Murphy et al., *Global 2000: The World's Largest Public Companies*, Forbes (May 13, 2020), https://bit.ly/3aFFGy1.

[4] Corrie Driebusch et al., *Airbnb Plans to File for IPO in August,* Wall St. J. (Aug. 11, 2020), https://on.wsj.com/3kYICup.

is always important but is especially so during the current pandemic, when unemployment is high and American consumers have increasingly relied on online purchases from public retailers for the timely delivery of essential goods. *See, e.g.*, Sarah Chaney, *Unemployment Rate Fell to 10.2% in July, U.S. Employers Added 1.8 Million Jobs*, Wall St. J. (Aug. 7, 2020), https://on.wsj.com/2FJv4CV (reporting that "[t]he U.S. now has about 13 million fewer jobs than in February, the month before the coronavirus hit the U.S. economy"); Gillian Friedman, *Big-Box Retailers' Profits Surge as Pandemic Marches On*, N.Y. Times (Aug. 19, 2020), https://nyti.ms/3hj87nL (reporting that "Walmart and Target reported record sales in the second quarter, driven by the convenience of one-stop shopping and their e-commerce operations").

Public companies as vital innovators. "The benefits that accrue to our economy and the jobs market when more companies are willing to go public" extend beyond the (critical) benefits of job creation. *Expanding the On-Ramp: Recommendations to Help More Companies Go and Stay Public*, Ctr. for Capital Markets Competitiveness 4 (2018), https://bit.ly/319sheb. "[P]ublicly traded equity provides greater liquidity and typically has a lower cost of capital associated with it than private equity." *Sources of Capital*, *supra*, at 26. That lower-cost "pooling [of] cash and capital from a large number of investors" lets public companies "undertake major enterprises." Guillermo C. Jimenez & Elizabeth Pulos, *Good Corporation, Bad Corporation: Corporate Social Responsibility in the Global Economy* Ch. 1 (Milne

Publishing 2017), https://bit.ly/3aIgo2i. That's one reason publicly traded American companies launch products and services that change the world.

Publicly traded companies are responsible for a vast proportion of innovation. Using patents obtained as one measure of innovation, 45 of the 50 domestic and foreign companies with the most patents[5] are publicly traded.[6] Beyond that, "public capital markets are also dynamic and help spur innovation through competition." *Expanding the On-Ramp*, *supra*, at 5. Their dynamism "force[s] businesses to change with the times or be replaced by new entrants with innovative ideas and products that meet the needs of consumers and an ever-changing marketplace." *Id.* "In other words, the public capital markets facilitate the fast pace of innovation that has long defined the American economy and improved our standard of living." *Id.*

Examples abound of publicly traded companies fundamentally shaping our modern world. Many carry an example on them every day: Apple's iPhone. Few products have shaped society over the last decade as much as the smartphone. Smartphones not only affect "almost every facet of our lives"—they have transformed and created entire industries: "You can go through every feature of the phone and think of

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[5] Samuel Stebbins, *The World's 50 Most Innovative Companies*, USA Today (Jan. 12, 2018), https://bit.ly/3haMrdC.

[6] Determined by cross-referencing those top 50 with the Forbes Global 2000 database. Andrea Murphy et al., *Global 2000*, *supra* n.3

billion-dollar companies that have been created around them," from "[t]he camera and Instagram … [to] Google Maps, to food delivery like Grubhub[,] [to] mobile banking … [and] YouTube." Kif Leswing, *The iPhone Decade: How Apple's Phone Created and Destroyed Industries and Changed the World*, CNBC (Dec. 16, 2019), https://cnb.cx/2YiQ0Xv (quoting Loup Ventures founder Gene Munster). Amazon is another example: that publicly traded company is a "shipping company, an advertiser, a television producer, and grocery store"—among other things—that not only "disrupted the retail industry by making online shopping fast and convenient" but also "ushered in a new era of IT, by developing cloud computing in 2006." Clare Duffy, *How Jeff Bezos Changed the World*, CNN Business, (Aug. 16, 2019), https://cnn.it/3gcKU5u.

Protectionist bans like §22.16 disincentivize companies from going (and staying) public and prevent public companies from expanding, thereby stifling innovation.

Public companies as vital investments. Public companies create value not just for their employees and customers but also for their owners—their shareholders. They provide accessible investment opportunities, allowing Americans to accumulate wealth and save for retirement.

"On the whole, ownership of a corporate interest in the form of stocks is more freely and easily transferable than ownership of an interest in a sole proprietorship or partnership." Jimenez & Pulos, *supra* at Ch. 1. "This ease of transferability also

encourages people to invest in stock instead of in other businesses, because it is so easy to sell corporate stock as needed." *Id.* And shareholders benefit financially from growing and profitable corporations by receiving dividends (proportionate distribution of profits) or by increased stock prices. *Id.*

Investing in a public company's stock thus creates "many advantages" Americans might not otherwise have. *Id.* We "can own stock without having to personally take part in the management of the company"; we "can sell all or part of []our ownership when [we] need the funds"; and, "if the corporation is very successful, it will not only pay a steady revenue stream—through dividends—but []our shares will become more valuable over time." *Id. See also* Ann M. Scarlett, *Shareholder Derivative Litigation's Historical and Normative Foundations*, 61 Buff. L. Rev. 837, 840 (2013) (publicly traded stock allow investors to "purchase shares in corporations on a public stock exchange" without needing to "play [an] active role in the management of those corporations").

Apart from owning shares of stock in an individual corporation, Americans can invest and save for retirement by buying in stock-based mutual funds. And they have: as of 2016, 52% of American families "have some level of investment in the [stock] market," either by owning individual stocks or mutual funds. Kim Parker & Richard Fry, *More Than Half of U.S. Households Have Some Investment in the Stock Market*, Pew Research Center (Mar. 25, 2020), https://pewrsr.ch/32nbfJh. "Most of this comes in the form of retirement accounts such as 401(k)s." *Id.* And

families across all demographic categories participate in the stock market. For example, "about one-in-five" families "with annual family incomes of less than $35,000" have "assets in the stock market," as do "31% of non-Hispanic black and 28% of Hispanic households" and 41% of "families headed by a young adult (those under 35)." *Id.*

Discriminatory bans like §22.16 disincentivize companies from going public and prevent public companies from expanding, thereby hampering Americans' efforts to build financial independence. The Court should grant review to ensure that §22.16 doesn't become a blueprint for other protectionist state laws that artificially depress the returns on one of Americans' crucial retirement investments.

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This discussion just begins to describe how public companies add value to America and to our economy. Much more could be said about how, for example, public corporations give tens of *billions* of dollars annually to charitable causes, *see* Chelsea Greenwood, *10 of the Companies That Give the Most to Charity in the US*, Business Insider (Nov. 14, 2018), https://bit.ly/34cRt5D, or "further humanitarian and other altruistic objectives," *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 711-12 (2014). The conclusion remains sound without belaboring the point: Public companies create outsized economic value. Refusing to consider rules like the Fifth Circuit's—which exclude them from the Commerce Clause's protections precisely because they are public

companies—threatens harms to virtually every part of America's economy.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the judgment of the Fifth Circuit.

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