No. 18-50299

In the
United States Court of Appeals
For the Fifth Circuit

WAL-MART STORES, INCORPORATED; WAL-MART STORES TEXAS, L.L.C.; SAM'S EAST, INCORPORATED; QUALITY LICENSING CORPORATION,
Plaintiffs – Appellees Cross-Appellants

v.

TEXAS ALCOHOLIC BEVERAGE COMMISSION; KEVIN LILLY, Presiding Officer of the Texas Alcoholic Beverage Commission; IDA CLEMENT STEEN,
Defendants – Appellants Cross-Appellees

TEXAS PACKAGE STORES ASSOCIATION, INCORPORATED,
Movant – Appellant Cross-Appellee

On Appeal from the United States District Court
for the Western District of Texas, Austin Division
No. 1:15-cv-00134-RP, Robert Pitman, Judge Presiding

PRINCIPAL BRIEF OF APPELLANT TEXAS PACKAGE STORES ASSOCIATION

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Certificate of Interested Parties

No. 16-50041

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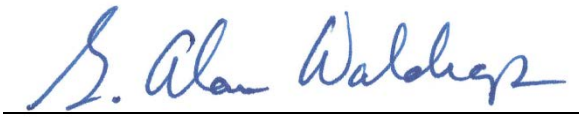
The undersigned counsel of record certifies that the following listed persons and entities as described in Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

The Texas Package Stores Association (the "TPSA") is an Appellant and Cross-Appellee in this appeal, and is the Intervenor in this cause. In addition, every person with a permit from the Texas Alcoholic Beverage Commission to make retail sales of distilled spirits for off-premise consumption throughout the State of Texas, whether or not a member of the TPSA, is financially interested in, and directly affected by, the outcome of this litigation.

The TPSA is represented by G. Alan Waldrop and Ryan D. V. Greene of Terrill & Waldrop.

Wal-Mart Stores, Inc. and its subsidiaries Wal-Mart Stores Texas, LLC, Sam's East, Inc., and Quality Licensing Corp. (collectively, "Wal-Mart") are Plaintiffs in the below lawsuit and are Appellees and Cross-Appellants on this appeal. Wal-Mart is represented by Neal Manne, Alex Kaplan, Chanler Langham, Michael Kelso, and Steven M. Shepard of Susman Godfrey LLP, and by Mark T. Mitchell and Frederick W. Sultan of Gardere Wynne Sewell LLP.

The Texas Alcoholic Beverage Commission, Kevin J. Lilly in his official capacity as Presiding Officer of the Texas Alcoholic Beverage Commission, and Ida Clement Steen in her official capacity as Commissioner of the Texas Alcoholic Beverage Commission (collectively, "TABC") are Defendants in the below lawsuit and are also Appellants and Cross-Appellees on this appeal. TABC is represented by John Clay Sullivan and Adam N. Bitter in the Office of the Attorney General of Texas, as well as Attorney General Ken Paxton, First Assistant Attorney General Jeffrey C. Mateer, Deputy Attorney General James E. Davis, and Solicitor General Scott A. Keller.



G. Alan Waldrop
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is warranted here because the district court erroneously enjoined three Texas laws that have been in force for decades and have successfully maintained Texas among the 10 states with the lowest per capita liquor consumption in the country. Reversal of the judgment is of critical importance both to the hundreds of retail store owners operating in Texas, and to the millions of Texas residents who depend on the State of Texas's chosen statutory structure for regulating retail liquor sales and protection against the negative externalities generated by alcohol consumption. In fact, one of the Texas statutes that the district court permanently enjoined has been the law since 1935 and was even found by the district court to be constitutional.

Oral argument is also warranted given the important legal issues in this appeal. Neither the Supreme Court nor this Court has ever held a statute unconstitutional under the dormant Commerce Clause based solely on the purported subjective motives of a state legislature, and yet the district court did precisely that. Neither the Supreme Court nor this Court has ever struck down an alcohol regulation based on *Pike* balancing in the face of the application of the Twenty-First Amendment, and yet the district court did precisely that. The resolution of the issues in this case will be an influential addition to the federal

case law concerning state alcohol regulation, the dormant Commerce Clause, as well as the Equal Protection Clause.

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JURISDICTIONAL STATEMENT

Wal-Mart filed this lawsuit against TABC, asserting Commerce Clause and Equal Protection Clause challenges to three[1] Texas statutes that have governed the retail sale of distilled spirits in Texas for decades. *See* 28 U.S.C. § 1331. On March 20, 2018, the district court entered judgment, permanently enjoining the three Texas statutes. (ROA.9397-9448.) On April 12, 2018, the TPSA, having previously intervened, filed its notice of appeal. (ROA.9475-77.) This Court has jurisdiction over this appeal of the final judgment disposing of all parties' claims. *See* 28 U.S.C. § 1291.

[1] Wal-Mart challenged a fourth statute—Texas Alcoholic Beverage Code section 22.06—which is not at issue on this appeal.

STATEMENT OF ISSUES

1. *Did the district court err in holding Texas Alcoholic Beverage Code section 22.16 unconstitutional under the dormant Commerce Clause?*

2. *Did the district court err in holding Texas Alcoholic Beverage Code section 22.05 unconstitutional under the Equal Protection Clause?*

3. *Did the district court err in permanently enjoining enforcement of Texas Alcoholic Beverage Code section 22.04 after expressly finding the statute constitutional?*

The answer to each question is "Yes." The district court's judgment must be reversed, and judgment rendered that sections 22.16, 22.05, and 22.04 are not unconstitutional and should not be enjoined.

STATEMENT OF THE CASE

This appeal involves the TPSA's and TABC's defense of the constitutionality of three statutes that have been Texas law for decades (one statute since the end of Prohibition and another since 1951). These statutes govern what types of entities may hold permits for the retail sale of distilled spirits—"liquor"—in Texas for off-premise consumption and the number of permits those entities may hold. Retail liquor sales in Texas occur in "package stores," and require a "P permit" issued by the TABC for each location.

Texas employs a uniquely-effective method of regulating liquor sales and controlling the negative externalities associated with liquor consumption. Texas regulates the size and type of corporate entity that may hold a P permit and the number of permits that a permittee can hold. The result of Texas's chosen means of regulating liquor sales is that Texas has the third lowest excise tax among the 50 states (ROA.10346:21 – 10347:2) and yet consistently remains among the 10 states with the lowest per capita liquor consumption in the country, as the TPSA's Exhibits I-38, I-39, and I-54 (included in the TPSA's Record Excerpts) demonstrate. (ROA.14662-63, 73.)

The first reason for this legislative success is Texas Alcoholic Beverage Code section 22.16, which bars any company from holding a P permit if it has more than 35 owners or is publicly traded (the "public corporation ban"). *See* TEX.

ALCO. BEV. CODE § 22.16. The second reason is section 22.04, which caps the number of P permits a company can hold at five (the "five-permit cap"). *See id.* § 22.04. Texas allows a limited means of exceeding five P permits pursuant to section 22.05, which allows the consolidation of P permits held by qualifying companies with a majority owner, or by majority owners sharing a parent, sibling, or child (the "consanguinity rule"). *See id.* § 22.05.

Meanwhile, Texas allows any beer-and-wine retailer to be a public corporation and to hold more than five "BQ permits." Thus, Texas has chosen to regulate alcohol sales in a way that allows a higher per capita beer-and-wine consumption while shifting sales—and thus consumption—away from liquor with its higher alcohol content. (ROA.14047:3-24, 14664.) The largest beer-and-wine retailers hold hundreds of BQ permits—*e.g.*, Dollar General (959 permits), Wal-Mart (647 permits), and Walgreens (646 permits). (ROA.12432.)

The TPSA's Exhibit I-41 (see the Record Excerpts) illustrates the results. As the number of beer-and-wine outlets in Texas increased, per capita beer-and-wine consumption increased, while as the number of package (liquor) stores remained relatively constant across Texas, so did per capita liquor consumption. (ROA.14665.)[2]

[2] The accuracy of these exhibits and the data presented in the exhibits are not controverted by any party in this case.

Exhibit I-72 (in the Record Excerpts) is also revealing. As the presence of megacorporations such as Wal-Mart in an alcohol market increases, the lowering of prices and increase in purchasing convenience for consumers corresponds to an increase in per capita alcohol consumption, along with negative externalities such as drunk driving. Texas's higher per capita total alcohol consumption is consistent with companies like Wal-Mart's strong presence in the beer-and-wine marketplace;[3] and Texas's lower per capita liquor consumption is consistent with the exclusion of very large companies like Wal-Mart from the Texas liquor market. (ROA.15972.)

Wal-Mart's national strategy is to increase its U.S. sales of alcoholic beverages. In Florida, for instance, Wal-Mart employed 30 lobbyists in an attempt to remove the separate-premises law and sell liquor on its shelves with other products. (ROA.10003:18 – 10005:6.) In Texas, Wal-Mart lobbied the Legislature to repeal sections 22.16, 22.05, and 22.04. (ROA.10007:22 – 10008:1.) Wal-Mart's admitted goal is to maximize its profit from alcohol sales, which would include liquor sales in Texas. (ROA.10005:7-20.) However, the Texas Legislature has repeatedly rejected attempts to open those floodgates. In response to their legislative defeats, Wal-Mart in February 2015 sued TABC in federal court to try to eliminate the three Texas statutes judicially. (ROA.63-86.)

[3] Wal-Mart is the number one seller of beer and wine in Texas. (ROA.10029:19-25.)

Wal-Mart challenges Texas Alcoholic Beverage Code sections 22.16, 22.05, and 22.04 under the dormant Commerce Clause and the Equal Protection Clause. *See* U.S. CONST. art. I, § 8 & amend. XIV. Section 22.04 (five-permit cap) was enacted in 1935, shortly after Prohibition ended (ROA.11660); section 22.05 (consanguinity rule) was enacted 16 years later in 1951 (ROA.11882); and section 22.16 (public corporation ban) was enacted in 1995 (ROA.14536-38), after this Court struck down a Texas-residency requirement in *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994).

The TPSA is an association of Texas package store owners that conduct their business in accordance with Texas Alcoholic Beverage Code chapter 22. In November 2015, because its members' livelihoods depend upon the longstanding statutory framework established by the Texas Legislature, the TPSA filed a motion to intervene in this lawsuit. (ROA.416-26.)

However, the district court denied the TPSA's intervention. (ROA.619-28.) The TPSA appealed to this Court, and in August 2016, this Court reversed, granting the TPSA's intervention. *See Wal-Mart Stores v. Tex. Alcoholic Bev. Comm'n*, 834 F.3d 562 (5th Cir. 2016). In so ruling, this Court recognized that Texas's liquor retail market is "a directly and tightly regulated market that will be significantly disrupted if Wal-Mart prevails," and that the TPSA's members "are

threatened not with a minor change but with the threatened end of their viability." *Id.* at 568 n.6.

A one-week bench trial was held in June 2017. Nine months later, in March 2018, the district court entered judgment striking down as unconstitutional sections 22.16 (public corporation ban) and 22.05 (consanguinity rule), and permanently enjoining the enforcement of those two statutes and section 22.04 (five permit cap). (ROA.9447-48.)

The TPSA appeals.[4] (ROA.9475-77.) Sections 22.16 and 22.05 are constitutional under both the dormant Commerce Clause and the Equal Protection Clause. In addition, there is no legal basis to permanently enjoin the enforcement of section 22.04, which the district court conceded was constitutional.

[4] TABC has also appealed (ROA.9478-80), and Wal-Mart has cross-appealed (ROA.9484-87).

SUMMARY OF THE ARGUMENT

This Court's analysis should begin with the public corporation ban of Texas Alcoholic Beverage Code section 22.16. If section 22.16 is constitutional, then Wal-Mart cannot hold a P permit, and has no standing to challenge section 22.04's five-permit cap or section 22.05's consanguinity rule. A conclusion by this Court that section 22.16 is constitutional would decide this case in favor of Appellants without requiring any analysis of section 22.04 or 22.05.

The district court correctly held that section 22.16 does not violate the Equal Protection Clause. Excluding public corporations helps keep liquor prices higher, reduce the convenience of one-stop shopping, and lower the number of outlets selling liquor. As a matter of economics, these factors lower per capita liquor consumption, which, as a matter of public health, lowers the negative externalities of liquor availability and consumption.

The district court also correctly held that section 22.16 does not discriminate for purposes of a Commerce Clause challenge. Both the Supreme Court (*Exxon v. Maryland*) and this Court (*Allstate v. Abbott*) hold that a statute which distinguishes among types of retailers, in a residence-neutral fashion, does not run afoul of the dormant Commerce Clause. The evidence is undisputed that both in-state and out-of-state retailers hold P permits and participate in the Texas retail liquor market, while there are both in-state and out-of-state retailers (public

corporations) barred from doing so. Section 22.16 is residence-neutral, treating all in-state and out-of-state retailers identically.

The district court erred, however, in concluding that section 22.16 violates the dormant Commerce Clause based, first, on the Texas Legislature supposedly having an intent to discriminate against out-of-state firms when it enacted section 22.16 in 1995 and, second, based on a conclusion under *Pike v. Bruce Church* that the Legislature should have chosen other methods of reducing liquor consumption.

First, there are numerous fatal flaws with the district court's imputation of a discriminatory intent to the 1995 Texas Legislature. Contrary to this Court's holding that post-enactment legislative history is infirm for purposes of discerning legislative intent, the district court relied extensively on lobbyists' statements made over 10 years later. Contrary to this Court's caution against relying on "stray protectionist statements," the district court pinned its finding on two Texas senators' colloquial floor commentary.[5] Contrary to this Court's presumption that a state legislature complies with this Court's opinions, the district court surmised that the Legislature's secret goal in 1995 was to defy this Court's 1994 opinion striking down the Texas-residence requirement (*Cooper v. McBeath*) rather than to comply with it. Contrary to this Court's holding that a statute may distinguish among types of retailers in a residence-neutral manner, the district court used that

[5] Which, as a matter of literal fact, related to different laws.

very effect to "prove" a discriminatory intent against out-of-state firms. After correcting for these legal errors, there is *no* evidence of a discriminatory legislative intent on the part of the 1995 Texas Legislature.

Moreover, there is a significant legal problem with the district court's relying on the Texas Legislature's supposed secret motives, without more, to hold section 22.16 unconstitutional. The Supreme Court has declared that the dormant Commerce Clause regulates "effects, not motives." This Court has declared that rendering otherwise lawful conduct unconstitutional based on subjective intent is contrary to sound constitutional policy. Neither the Supreme Court nor this Court has held a law unconstitutional based on discriminatory intent alone. If a state law does not discriminate, it cannot be struck down as discriminatory regardless of the "intent" of the legislature.

Second, the district court's *Pike* analysis is also fatally flawed on a number of levels. The district court failed to address whether the burden of section 22.16 on interstate commerce outweighed its local benefits—the very essence of the *Pike* balancing test. The district court also ignored the absence of evidence that the district court's preferred policy options would burden interstate commerce any less than section 22.16 supposedly does. The district court even ignored this Court's opinions concluding that distinguishing between individual interstate firms does not equate to a burden on interstate commerce for purposes of the *Pike* test in the

first place. Tellingly, Wal-Mart never even *pleaded* that section 22.16 violates the dormant Commerce Clause under a *Pike* theory.

Moreover, there is a critical legal problem with the district court's application of *Pike* here. Neither the Supreme Court nor any other federal appellate court has held a state law unconstitutional under *Pike* when the law governs the sale of alcoholic beverages and, thus, is found to be within the scope of the Twenty-First Amendment. The Supreme Court announced in *Pike* that its balancing test would not apply when the propriety of local regulation has long been recognized, and in the case of liquor, the propriety of local regulation is not only recognized but engrafted within the Constitution itself. Section 22.16, therefore, is not even subject to a *Pike* analysis.

Accordingly, the district court's judgment must be reversed in its entirety. However, even if section 22.16 could be found unconstitutional, there are also independent flaws in the district court's conclusions with respect to sections 22.05 and 22.04.

The district court erred in concluding that section 22.05's consanguinity rule violates the Equal Protection Clause. The rational basis test is a high bar. The district court failed to require Wal-Mart to negate every conceivable rational basis. First, Wal-Mart—and the district court—did not even respond to certain proffered rational bases for section 22.05. Second, Wal-Mart failed to produce evidence to

negate that section 22.05 promotes family businesses, tempers rapid expansion of liquor retailers and outlets, and accommodates urban retailer density while protecting "mom-and-pop" retailers in rural areas of the State.

The district court also erred in enjoining section 22.04's five-permit cap. The court upheld section 22.04 as constitutional and yet, stunningly, permanently enjoined its enforcement. Even assuming sections 22.16 and 22.05 could be held unconstitutional, this was error. To strike down section 22.04, the district court ignored clear Texas law regarding severability of statutes. Given that section 22.04 is constitutional, then, it cannot be effectively struck down through a permanent injunction based on the declared unconstitutionality of a different, separate, and severable law.

The district court repeatedly failed to address and apply governing precedent. A federal district court may disagree with the policy choices made by the Texas Legislature, and may disagree with how the Texas Legislature regulates the sale of liquor in Texas, but these choices are not a federal court's to make. The district court was required to follow the precedents of this Court and the Supreme Court. The district court did not do so. Review here is de novo, and this Court must reverse the district court's judgment. Under governing law, and given the evidentiary record in this case, Texas Alcoholic Beverage Code sections 22.16, 22.05, and 22.04 cannot be held unconstitutional or enjoined.

ARGUMENT

I. The district court erred in holding section 22.16 unconstitutional under the Commerce Clause based on a finding that the 1995 Legislature acted with discriminatory intent.

The threshold question in a dormant Commerce Clause challenge is whether the state law discriminates against interstate commerce. *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007). Review is de novo. *Id.* Texas Alcoholic Beverage Code section 22.16 does not discriminate on its face or by effect against out-of-state interests—as the district court correctly concluded. (ROA.9419-24.) However, the district court erred by nonetheless holding section 22.16's public corporation ban unconstitutional based on a finding that the Texas Legislature had an "intent to discriminate" when the statute was enacted. (ROA.9415-19.)

A. Legislative intent is irrelevant without actual discrimination.

Even assuming there was any record evidence—at all—of a discriminatory legislative intent, held by any one or more of the 181 Texas legislators in 1995, this Court should hold that a statute which does not *actually* discriminate—whether facially or by effect—cannot be held unconstitutional based on legislators' purported motives alone. The district court concluded that this Court's precedent "precludes a finding of discriminatory effect" from section 22.16. (ROA.9424.) It was legal error, then, to strike down section 22.16 by concluding the Legislature harbored an unexpressed "discriminatory purpose." (ROA.9418.)

It is true that this Court has stated, as a general matter, that a statute violates the dormant Commerce Clause if it discriminates against interstate commerce "either facially, by purpose, or by effect." *See Allstate*, 495 F.3d at 160. However, this Court in *Allstate* was not dealing with—and has never dealt with—a situation in which a statute is struck down based on "discriminatory" intent even though there is neither facial discrimination nor discrimination by effect.[6]

Can discriminatory intent, *alone*, render a statute unconstitutional under the Commerce Clause? The Supreme Court has indicated the answer is "No." According to the Supreme Court, "under settled principles the purpose of Congress … is not a basis for declaring … legislation unconstitutional." *United States v. O'Brien*, 391 U.S. 367, 382-83 (1968). A federal court should not strike down an otherwise constitutional statute solely on the basis of an alleged legislative motive. *Id.* at 383.

The converse is equally true. If a statute discriminates by effect, it cannot be saved by the absence of discriminatory intent. *See Associated Indus. v. Lohman*, 511 U.S. 641, 653 (1994). This is why the Supreme Court has focused its Commerce Clause analysis on "whether a challenged scheme is discriminatory in

[6] The first factor in finding discriminatory purpose, under *Allstate*, is "whether a clear pattern of discrimination emerges from the *effect* of the state action." *Allstate*, 495 F.3d at 160 (emphasis added). This is an indication by this Court that discriminatory purpose includes both discriminatory intent and discriminatory effect. Discriminatory intent *alone* is insufficient to have a statute declared unconstitutional.

'effect.'" *Id.* at 654. The resolution of what a legislature's ultimate purpose was "would not be relevant." *See Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978). The relevant inquiry, instead, is whether the statute discriminates "on its face and in its plain effect." *Id.* at 626-27. Indeed, in a recent dormant Commerce Clause case, the Supreme Court stated definitively:

> The Commerce Clause regulates effects, not motives, and it does not require courts to inquire into voters' or legislators' reasons for enacting a law that has a discriminatory effect.

Comptroller of Treasury v. Wynne, 135 S. Ct. 1787, 1801 n.4 (2015); *see Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 100 (1994) ("the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory").

To hold otherwise would lead to absurd results. Suppose two states pass identical statutes that accomplish identical nondiscriminatory objectives. If one of the state legislatures were found to have acted with discriminatory intent (but was simply unsuccessful in accomplishing the intended discrimination), one statute could be constitutionally sound, while the other—identical—statute could be deemed unconstitutional. Constitutional law cannot work this way.

A legislature might have an unconstitutional purpose in mind, but then fail to enact a statute that, in fact, accomplishes that purpose. If the statute does not actually do anything unconstitutional, the statute does not transgress the constitution and must be upheld. The fact that a legislature attempted to act

unconstitutionally, but failed, cannot invalidate a statute. Certainly a statute that actually helps out-of-state interests could not be struck down because the legislature had *meant* to hurt them. *See Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 36 n.3 (1st Cir. 2005) ("[T]here is some reason to question whether a showing of discriminatory purpose alone will invariably suffice to support a finding of constitutional invalidity under the dormant Commerce Clause."); *Puppies 'N Love v. City of Phoenix*, 116 F. Supp. 3d 971, 993 (D. Ariz. 2015) ("The dormant Commerce Clause is aimed at deflecting *acts* of economic protectionism, not mere intent."); *Wal-Mart Stores v. City of Turlock*, 483 F. Supp. 2d 987, 1013 (E.D. Cal. 2006) (rejecting "proposition that alleged discriminatory purpose alone will invalidate a statute").

When the Supreme Court has held a statute unconstitutional under the dormant Commerce Clause, it has found discrimination facially or by effect. *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 138 (1986) ("discriminates on its face"); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) (effect was "clearly discriminatory"); *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) ("on its face discriminates"); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350-51 (1977) ("practical effect" of discrimination). "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional

statute on the basis of an alleged illicit legislative motive." *O'Brien*, 391 U.S. at 383.

Wal-Mart has cited two cases from other Circuits in which discrimination against out-of-state interests was discerned based on legislative intent alone. *See S.D. Farm Bureau v. Hazeltine*, 340 F.3d 583, 596-97 (8th Cir. 2003); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 341, 345 (4th Cir. 2001). The TPSA respectfully submits that this Court should not follow these holdings, in light of the contrary Supreme Court authority on the issue and the plain lack of logic of striking down a statute based only on legislative intent regardless of the statute's actual effect. Indeed, this Court has held that rendering otherwise lawful conduct unconstitutional based on subjective intent alone is contrary to sound constitutional policy. *See United States v. Causey*, 834 F.2d 1179, 1180 (5th Cir. 1987). As a matter of constitutional law, it is improper to strike down section 22.16 under the Commerce Clause based purely on a conclusion regarding the Legislature's intent, without evidence the statute is, in fact, discriminatory. Yet, this is what the district court did in this case.

"The Commerce Clause regulates effects, not motives." *Wynne*, 135 S. Ct. at 1801 n.4. If there is no evidence a statute discriminates, how can it be held to be discriminatory? Section 22.16's public corporation ban had been in effect for almost 22 years as of the June 2017 trial. (ROA.14533-40.) If the statute

discriminates against out-of-state interests, that effect has happened and needed to be demonstrated. Wal-Mart failed to do so, and the district court acknowledged this fact. (ROA.9424.) This is claim-dispositive. The district court erred in striking down section 22.16 based solely on a conclusion that Texas legislators acted with a discriminatory motive in 1995. (ROA.9418-19.)

B. The district court relied on infirm evidence of legislative intent.

Moreover, the Court need not even reach the question of whether a legislature's "intent to discriminate," by itself, can strike down a statute, because the district court's finding of such an intent by the Texas Legislature in enacting section 22.16 is, itself, reversible error. To make its finding, the district court relied on conjecture to divine what *really* must have motivated the Texas Legislature back in 1995. In doing so, the district court disregarded this Court's precedent both on what presumption is proper and on what evidence is reliable for purposes of discerning legislative intent.

Section 22.16 distinguishes between large and small companies. It does not distinguish between in-state and out-of-state companies. Section 22.16's plain language says nothing about a public corporation's domicile. The statute bars entities "whose shares or other evidence of ownership are listed on a public stock exchange" or "in which more than 35 persons hold an ownership interest"—

regardless of where they reside or have their principal office. TEX. ALCO. BEV. CODE § 22.16.

The legislative record confirms section 22.16—enacted as part of Senate Bill 1063 in 1995 ("SB 1063")—was intended to be residence-neutral and distinguish between large and small companies. The "Supporters Say" portion of SB 1063's Texas House bill analysis—which is part of the actual legislative history—states:

> The prohibition against public corporation ownership would also prevent the takeover of the package liquor store market by large corporations. By preventing corporate and chain store takeover, the bill would foster competition in the package liquor store market to keep prices reasonable.

(ROA.14580.) Likewise, the "Opponents Say" portion of the bill analysis said nothing about harm to out-of-state interests, but instead asked whether the statute might actually help larger businesses.

> This bill would allow the established monopolies to keep their market share by preventing the up-and-coming package stores from forming alliances or coordinating operations to compete with the big package store chains.

(ROA.14580.) The issue before the Texas Legislature, in enacting section 22.16, was small versus large, not in-state versus out-of-state.

The district court insists the TPSA's motive in 1995 for lobbying for section 22.16 was to discriminate against out-of-state companies in favor of in-state companies, but the record reveals no such motive. Fred Niemann, in-house lawyer for the TPSA, was the individual who crafted section 22.16's language prior to

SB 1063 being filed in the Legislature. (ROA.10796:20 – 10797:12.) Niemann is the only individual at the trial who testified regarding section 22.16's genesis. Before detailing the district court's legal errors in finding discriminatory legislative intent, then, it is helpful to summarize Niemann's trial testimony (ROA.10754:9 – 10830:6), notwithstanding that the *TPSA's* motives are technically irrelevant to the *Legislature's* intent.

In 1994, this Court had struck down an in-state residence requirement for alcohol permit holders. *See McBeath*, 11 F.3d at 553-54. Looking to the 1995 legislative session, the TPSA concluded that opening the doors to out-of-state firms need not also allow "very large stores [to] disrupt what had been a very stable business climate for small businesses." (ROA.10791:12-19.) The TPSA observed how, in other industries, big stores had driven mom-and-pop stores out of business, especially in rural areas. (ROA.10791:20 – 10792:20.) The TPSA thought through the problem and realized that the issue was not in-state versus out-of-state, but size and closely-held ownership structures.

> Q. But that's the real reason the TPSA went to all this trouble to draft this bill, to make sure that the owners of package stores remained Texas residents, right?
>
> A. No. Actually, exactly the opposite…. [W]e said, okay, what's really happening here? The residency law has accidentally prevented huge megastores from putting our mom-and-pop small businesses out of the business. Now, is there a way that we can accomplish the same thing that does not discriminate between … in-state and out-of-state owners.

> [W]e had to assume is there some way you can get the same benefits that does not treat in-state and out-of-state owners differently.
>
> We said, wait a minute. The real problem here is size, the bigness.
>
> And so we – we crafted a bill that said … small stores with less than 35 owners can operate in Texas. That will keep it at a human scale. But we prohibit larger corporations, whether they be in-state or out-of-state, from holding package store permits. [M]y assignment was do something that does not treat in-state and out-of-state businesses differently, to shift the focus from that to size, numbers of owners.

(ROA.10819:19 – 10820:18.)

The whole point of section 22.16—from its inception—was to create categories that *lacked* any purpose or effect of treating similarly-situated in-state and out-of-state firms differently. Niemann testified, "[T]hat was my assignment, something that didn't touch in-state, out-of-state ownership top[,] side[,] or bottom." (ROA.10825:15-16.)

Closely connected with this desire to foster a beneficial business climate for smaller and family-owned businesses was the recognition that as a company expands, so does its remoteness, as Niemann noted:

> [T]he ability of [T]ABC to pick up a phone and call a real live human being who ran the business and get a quick answer or commitment, we felt was a benefit for conforming with local standards and enforcing the law.
>
> And with a big corporation, it is much more difficult – first of all, contacting the actual owners is virtually impossible because it's diffused over so many people. Finding who in the bureaucracy can

> make a long-term commitment can also be difficult. [S]ometimes just getting an answer from the big company is tougher now. It's not saying it can't be done, but it's much easier when you know John Smith owns Smith's Liquor Store and you can talk to him and get a pretty firm answer of what the business will do or won't do to fix a problem.

(ROA.10823:2-22.)

In order to draw the line between small, closely-held organizations and large, bureaucratic organizations, the TPSA borrowed from tax law. In 1995, a "closely held corporation" had less than 35 shareholders and no shares listed on a public stock exchange. *See* Small Bus. Job Prot. Act of 1996, Pub. L. No. 104-188, § 1301 (1996) (increasing Subchapter S shareholder cap from 35 to 75); TEX. BUS. ORGS. CODE § 21.563 (continuing to cap "closely held corporation" at 35 shareholders).

> It wasn't in-state and out-of-state ownership. It was small versus big. And we asked ourselves are there any other provisions in the law where small businesses with a limited number of owners are treated differently than big businesses. And what came to our mind was the Subchapter S provision of the Internal Revenue Code.

(ROA.10828:9-25.)

Ensuring that package stores are run by smaller and family-owned businesses rather than megacorporations and large firms was the TPSA's consistent message to the Texas Legislature in 1995. (ROA.14555, 87, 95-96, 98-99.) As Niemann summarized to House committee members in 1995:

> This bill provides that package stores may not be owned by public corporations, where ownership is diluted, possibly among many thousands of different people. It requires that package stores be owned by identifiable human beings who are responsible for the actions of that store.

(ROA.14568.)

The only time in the entire 1995 legislative record when an in-state notion was even potentially alluded to was when Senator Henderson on the Senate Floor was "recall[ing] back" to a bill that had been enacted *in 1979*. While Senator Armbrister took up SB 1063 on the Floor, Senator Henderson recalled the "fakeroo" that had allowed Walgreens to have a package store. (ROA.14023:5 – 14024:16.) Such a "subterfuge" had been dealt with in 1979 while the residency restriction was still in effect. (ROA.11901-02.)[7] In contrast, section 22.16 has nothing to do with that "local licensee" issue which had been addressed in 1979. As Senator Armbrister in 1995 clarified on the Senate Floor, unlike any other potential legislation, SB 1063, enacting section 22.16, was *not* a bill resisting foreign ownership of package stores. (ROA.14024:17 – 14025:4.)

There is no suggestion in the legislative record that the 1995 Legislature's actual motivation in enacting section 22.16 was protectionism against out-of-state interests. However, rejecting the express legislative history, the district court decided the TPSA's "real" motive was to exclude out-of-state businesses

[7] Senator Don Henderson was a Texas House Representative in 1979.

(ROA.9405), and then *imputed* that motive to the Texas Legislature, referencing only the two senators' colloquial floor discussion of a bill from 1979 (ROA.9417-18). This is not how courts are to discern legislative intent. A court cannot strike down a law by finding that every actual statement of intent was a cover-up or pretext and then declaring the entire legislature's "true" motives without actual evidence of those "true" motives. Yet, the district court did precisely that. Instead, a court must rely on evidence of discriminatory intent that is credible and competent. *See Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 726 (5th Cir. 2004) (requiring something "in the legislative history to suggest that the Texas Legislature intended to discriminate between similarly situated interests"). There is no such evidence here.

First, the district court appears to make a finding of "a clear pattern" of discriminatory effect from section 22.16 on "nearly all" out-of-state companies "with the scale and capabilities necessary to serve the Texas retail liquor market." (ROA.9415.) However, this is not the test under the Commerce Clause, nor is it legally meaningful that a statute prevents firms of a certain size from participating in the Texas liquor market.[8] Under Supreme Court precedent, distinguishing

[8] Although the district court in Paragraph 60 of its Order appears to find "a clear pattern of discrimination emerges from the effect" of section 22.16 (ROA.9415), the district court goes on in Paragraph 79 of its Order to expressly conclude that section 22.16 "does not have a discriminatory effect as defined by controlling precedent" (ROA.9424). If section 22.16 does not have a discriminatory effect as defined by controlling precedent, it does not have a discriminatory effect for the purposes of constitutional analysis under the Commerce Clause. It

among types of retailers, when in-state and out-of-state interests are treated identically, is not a discriminatory effect under the Commerce Clause. *See Exxon Corp. v. Maryland*, 437 U.S. 117, 125-28 (1978); *Allstate*, 495 F.3d at 162-63. After conceding section 22.16's effect is not discriminatory under controlling precedent (ROA.9424), the district court was not at liberty to turn around and conclude that section 22.16's *effect* proves a discriminatory *intent*. Under this Court's precedent, a legislature cannot discriminate by intending the very effect this Court has held non-discriminatory. *See Bray*, 372 F.3d at 726 (finding evidence not indicative of discriminatory effect equally not indicative of discriminatory intent); *see also United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("[W]e have historically assumed that Congress intended what it enacted.").

Second, the district court claimed a "history of discrimination" and "specific sequence of [discriminatory] events" leading up to section 22.16's enactment. (ROA.9415-16.) This is also incorrect. Any such "history" predates this Court's 1994 *McBeath* opinion. Under this Court's precedent, the Legislature's pre-*McBeath* actions cannot prove post-*McBeath* discrimination. This is because the

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also cannot have a "clear pattern" of discriminatory effect for the purposes of finding a discriminatory purpose under the elements of *Village of Arlington Heights v. Metro. Housing Development Corp.*, 429 U.S. 252 (1977). The district court's "finding" for purposes of discerning a discriminatory purpose is plainly inconsistent with its holding that section 22.16 does not have a discriminatory effect.

Court must presume that a Legislature acts constitutionally. *See Ala. State Fed'n of Teachers v. James*, 656 F.2d 193, 195 (5th Cir. 1981);[9] *see also McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex. 1942) (Texas statutes are presumed enacted with full knowledge of, and in harmony with, decisions of the courts). In order to find a history of discrimination, the district court inferred that the Legislature's goal after 1994 was to act *in violation of* the Commerce Clause to pursue a residency requirement, rather than to *comply* with *McBeath* and develop a new, constitutional means of accomplishing Texas's goals of liquor regulation. (ROA.9416.) Yet, the uncontroverted legislative history is entirely consistent with the 1995 Legislature adopting the latter approach, which is residence-neutral. (ROA.14595.) Because a constitutional motive *could be* discerned, the court was not at liberty to infer an unexpressed unconstitutional motive. Otherwise, every legislative response to a court ruling could be struck down simply because it was done in response to the ruling.

The Supreme Court has recently ruled it error to rely on evidence of alleged past (here, pre-1994) discriminatory intent to prove present discriminatory intent (here, 1995). *See Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018) (placing burden on plaintiff challenging a 2013 legislative act "to overcome the presumption of legislative good faith and show that the 2013 Legislature acted with invidious

[9] The district court failed to address *James* and ignored the presumption that *James* requires, despite the TPSA's briefing. (ROA.9180.)

intent"). The district court erred, therefore, in concluding the Texas Legislature's pre-*McBeath* use of residency as the dividing line for P permits somehow created a "discriminatory taint" on the Legislature's post-*McBeath* use of corporate size and status as the dividing line. *See id.* This resulted in a "fundamentally flawed" approach that "demands reversal." *See id.* at 2326. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018) ("[B]ecause there is persuasive evidence that the [law] has a legitimate grounding … we must accept that independent justification."). Not only did the district court fail to presume the Texas Legislature acted in good faith, but the court affirmatively presumed—without any evidence other than the juxtaposition of events—that the Texas Legislature acted in bad faith.

The district court acknowledged it was rational for the Texas Legislature to have believed in 1995 that "excluding public corporations from the retail liquor market would artificially inflate prices, thereby moderating the consumption of liquor and reducing liquor-related externalities." (ROA.9439.) Given this established fact, it was incumbent on the district court to presume that the Legislature had this very intent in mind in 1995 when it enacted section 22.16. It was error for the district court not to apply this presumption.

Third, while insisting its finding of discriminatory legislative intent "does not turn" on subsequent repeal efforts and/or post-enactment evidence, the district court declared that, to determine the Legislature's intent in 1995, lobbyists'

statements over 13 years later could be "appropriately considered." (ROA.9417.) This is directly contrary to this Court's precedent. The district court—over the TPSA's objections—admitted into evidence several exhibits with lobbying statements by the TPSA and members of the TPSA made in 2009 or 2013 while opposing efforts to repeal sections 22.04 and 22.05 (ROA.14040-14162, 14321, 14388-91), and one exhibit from 2015 opposing efforts to also repeal section 22.16 (ROA.14322). The district court's admission and consideration of these statements was not appropriate. This Court recently confirmed that evidence of post-enactment history from subsequent legislative sessions is "unreliable" and "infirm." *See Veasey v. Abbott*, 830 F.3d 216, 234 (5th Cir. 2016). This has long been the law.

> What happened after a statute was enacted may be history and it may come from members of the Congress, but it is not part of the legislative history of the original enactment.
>
> ….
>
> When uttered five years later, it is mere commentary.

Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1080, 1082 (5th Cir. 1980).[10] The district court erred by overruling the TPSA's objections to the relevance of all such evidence. (ROA.9836:4-22, 9871:21 – 9875:11, 9878:2-11.)

[10] The district court failed to address this Court's en banc *Veasey* opinions and *Rogers*, despite the TPSA's briefing. (ROA.8363, 9181.)

Fourth, all that remains, then, in the district court's analysis from the entire 1995 legislative history, to support a supposedly discriminatory legislative intent, are the brief comments by two legislators, Senators Armbrister and Henderson, on the Senate Floor. (ROA.9416, citing ROA.14020, 24.) Even if these two senators' comments had communicated protectionism of the worst kind, the district court erred in discerning legislative intent based on the comments. This Court has expressly rejected finding legislative intent based on "stray protectionist remarks" of individual legislators. *See Allstate*, 495 F.3d at 161; *Jones v. City of Lubbock*, 727 F.2d 364, 371 n.3 (5th Cir. 1984) (declining to judge legislature's intent from statements made by one member).[11]

Moreover, neither of the Senators' comments on which the district court relied actually communicate what the district court ascribed to the comments in its analysis. First, Senator Armbrister observed that a package store could not be "in a Wal-Mart." (ROA.14020.) Even if this said anything about section 22.16—it was actually a reference to section 22.14's separate premises requirement—it says nothing about Wal-Mart being an out-of-state firm. *See Nat'l Ass'n of Optometrists & Opticians v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009) (rejecting district court's interpretation of "large business interests" as if it equated with "out-of-state interests"). Second, Senator Henderson commented regarding a desire to

[11] The district court failed to address *Jones* and this statement from *Allstate*, despite the TPSA's briefing. (ROA.9181.)

have "somebody from Texas … that you get hold of." (ROA.14024.) Even if this said anything about section 22.16—it was actually a reference to legislation from 1979—it says nothing discriminatory against out-of-state companies. It is entirely appropriate to insist that a retailer have a Texas *location*. This Court has held that while the Legislature cannot require Texas residence, the Legislature can require a retailer's Texas presence. *See Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 821 (5th Cir. 2010).

Tellingly, after imputing an unjustified sinister meaning to the portion of the two senators' comments that the district court elected to quote, the district court ignored the two senators' immediate clarification on the record that SB 1063 was not intended to "keep[] foreign ownership from coming in and getting licensed." (ROA.14024-25.) In short, the district court ignored every existing, express statement of non-discriminatory purpose for section 22.16, so that it could infer an unexpressed, secret discriminatory purpose. This is not the proper approach for federal courts dealing with the issue of legislative intent.

In any event, the district court's finding of discriminatory intent—when the only basis in the entire legislative record is two senators' colloquial floor commentary—is directly contrary to binding Supreme Court authority:

> It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it…. We

> decline to void … legislation … which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

O'Brien, 391 U.S. at 383-84.[12]

> In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill…. We have eschewed reliance on the passing comments of one Member … and casual statements from the floor debates.

Garcia v. United States, 469 U.S. 70, 76 (1984).

Whatever the district court's view of Supreme Court precedent—*Exxon*, *Fritz*, *O'Brien*, and *Garcia*—and this Court's precedent—*Bray*, *James*, *Veasey*, *Rogers*, *Allstate*, *Jones*, and *Steen*—the district court was bound to follow them. Instead, the district court ignored these decisions and precedents. The district court erred in declining to follow the governing case law, in order to infer an unstated and unrecorded discriminatory intent to section 22.16. Once the correct presumption is applied, and once infirm evidence is excluded, *no evidence* supports any intent, secret or otherwise, by the Texas Legislature to discriminate against out-of-state interests when it enacted the residence-neutral public corporation ban at section 22.16.

[12] The district court failed to address *O'Brien*, despite the TPSA's briefing. (ROA.8362, 8972.)

II. The district court erred in holding section 22.16 unconstitutional under the Commerce Clause under *Pike*.

The district court also found section 22.16 unconstitutional under the *Pike* balancing test. (ROA.9425-32.) This is reviewed de novo. *Allstate*, 495 F.3d at 160. Under *Pike*, when a statute does not discriminate, the statute is valid under the dormant Commerce Clause *unless* it imposes a burden on interstate commerce that is "clearly excessive" in relation to its local benefits. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). The district court's *Pike* analysis is untethered from the governing law and the evidentiary record, and must be reversed.

A. The Twenty-First Amendment overrides *Pike* balancing.

As an initial matter, there is an inherent legal flaw in the district court's *Pike* analysis. The Supreme Court in *Pike* announced that a statute could not fail the balancing test in an area "where the propriety of local regulation has long been recognized." *Id.* at 143. The Twenty-First Amendment reserves to the States power to impose burdens on interstate commerce with respect to liquor that otherwise "would clearly be invalid under the Commerce Clause." *See* U.S. CONST. amend. XXI; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). True, the Supreme Court has held that the Twenty-First Amendment does not insulate a statute that discriminates, *see Granholm v. Heald*, 544 U.S. 460, 493 (2005), or that directly regulates sales in other states, *see Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 585 (1986). However, *Pike*

balancing is a different matter. *See Crisp*, 467 U.S. at 713 (identifying retail sale of liquor as core concern of Twenty-First Amendment); *Steen*, 612 F.3d at 820 ("Regulating alcoholic beverage retailing is largely a State's prerogative.").[13]

Because of the Twenty-First Amendment, a state could constitutionally ban retail sales of liquor outright. It must be, therefore, that any *non*-discriminatory regulation of alcoholic beverage retailing within a state is shielded from the dormant Commerce Clause based on its non-discriminatory effect on interstate commerce. Otherwise, even an outright ban of alcohol sales could be challenged under *Pike*. Since the dormant Commerce Clause cannot prevail over the Twenty-First Amendment in every instance, it must be that *Pike* balancing is unavailable to strike down alcoholic-beverage-retailing laws.

To affirm the district court's judgment, this Court would be the first Circuit Court of Appeals to strike down a State's regulation of liquor under *Pike* in the face of the Twenty-First Amendment. *See Lebamoff Enters., Inc. v. Huskey*, 666 F.3d 455, 460-61 (7th Cir. 2012); *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 19 n.27 (1st Cir. 2010); *but see Baude v. Heath*, 538 F.3d 608, 612 (7th Cir. 2008) (striking down statute under *Pike* without addressing Twenty-First

[13] *See* Gregory E. Durkin, *Note, What Does* Granholm v. Heald *Mean for the Future of the Twenty-First Amendment, the Three-Tier System, and Efficient Alcohol Distribution?*, 63 WASH. & LEE L. REV. 1095, 1108 n.72 (2006) (arguing that nondiscriminatory state laws advancing core concern of Twenty-First Amendment cannot be invalidated under *Pike*).

Amendment).[14] This Court should not effectively erase the Twenty-First Amendment in this manner.

B. Section 22.16's local benefits outweigh any possible burden on interstate commerce.

Even if the Twenty-First Amendment did not exist, the district court's *Pike* analysis cannot be affirmed. The whole point of the *Pike* balancing test is to determine whether the statute's burdens on interstate commerce are "clearly excessive" in relation to its local benefits. *See Pike*, 397 U.S. at 142. Assuming section 22.16's even-handed regulation of permissible types of retailers could constitute a burden on interstate commerce, the district court failed even to *ask* whether section 22.16's local benefits outweighed any such burden. (ROA.9429-32.) This alone requires reversal.

The record here explains the lack of the required balancing analysis. The statute's local benefits easily outweigh any possible impact on interstate corporations. The local benefits—the district court expressly found—include a reduction of liquor consumption along with its negative societal consequences. (ROA.9429.) These consequences include "liver disease, heart disease, strokes, and cancer" and "drinking and driving, child and spousal abuse, homicides, and

[14] The court in *Baude* did not cite or reference the Twenty-First Amendment. It does not appear that the application of the Twenty-First Amendment was put at issue in *Baude*. Thus, *Baude* is not authority on the interplay between the *Pike* balancing test and the Twenty-First Amendment. No federal appellate court has *both* concluded the Twenty-First Amendment applied *and* struck down the statute under *Pike*.

suicides." (ROA.9411.) Statistically, Texas benefits from its exclusion of large corporations from its liquor market. (ROA.15972.) Could any court, then, rationally conclude that the ability of large multi-national corporations like Wal-Mart to profit from liquor sales in Texas "clearly outweighs" reducing cancer, drunk driving, and child abuse? The answer is plainly "No."

This is the end of the inquiry on *Pike*. A court cannot analyze legislative alternatives until the challenged statute's burden on interstate commerce is first found to clearly outweigh its local benefits. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981).[15] The district court simply did not do this analysis or address the correct question.

C. There is no evidence of legislative alternatives with a lesser impact on interstate commerce.

Even if Wal-Mart did not have to prove section 22.16's impact on interstate commerce outweighed its local benefits, but could rely on supposed legislative alternatives, the district court's *Pike* analysis still must be reversed. The district court identified its preferred "alternative regulatory measures" (ROA.9429-32), but there is no record evidence—as is required—that any such alternatives are less burdensome on interstate commerce.

[15] The Fourth Circuit case cited by the district court did not consider legislative alternatives until first concluding the statute's burden outweighed its benefits. *See Yamaha Motor Corp. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 573 (4th Cir. 2005).

Wal-Mart testified that section 22.16 disproportionately affects out-of-state firms (ROA.10068:8-16), but produced no evidence that any alternatives would burden interstate commerce *less*. A finding that alternatives exist with a lesser impact on interstate activities "requires evidence" of such lesser impact. *See Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 525-26 (1989); *see also Baude*, 538 F.3d at 612-13 (requiring evidence of "the magnitude of both burdens and benefits"). There is no such evidence here.

No lay witness testimony, no expert testimony, no document, no evidence of any kind in this record purports to suggest that any alternative to the Texas public corporation ban—such as an excise tax—would burden interstate commerce less than the public corporation ban. The district court simply declared it so without an evidentiary basis. (ROA.9432.) There is no record evidence of any regulatory alternative's effect on interstate commerce. The district court's unsupported declaration on this point cannot be the basis to overturn decades of Texas regulatory law.

Another flaw in this portion of the district court's analysis merits attention—the court's preferred alternatives themselves. The district court first refers to "manner-of-sale regulations." (ROA.9430.) However, Texas already requires

separate premises, and already enforces "blue laws" governing liquor sales.[16] *See* TEX. ALCO. BEV. CODE §§ 22.14, 105.01. There is no record evidence that those laws would sufficiently restrict liquor consumption absent the public corporation ban. In fact, Wal-Mart's expert witness had no opinion whatsoever on what is causing Texas's low per capita liquor consumption. (ROA.10346:12-20.) This Court has rejected a district court's ability to divine which existing measures should be retained versus discarded under a *Pike* analysis. *See Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 336 (5th Cir. 2007).

The district court's other preferred means of moderating liquor consumption is "the imposition of excise taxes." (ROA.9430.) However, this is contrary to the Supreme Court's admonition that the "Constitution does not require the States to subscribe to any particular economic theory." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92 (1987). Dr. Stephen Magee, an economics expert and long-time professor at the University of Texas at Austin, testified that section 22.16 reflects a "small-firm theory of regulation," which does not rely on price limits or taxes, and which turns out to be "an incredibly efficient market-based way of regulating liquor."[17] (ROA.11440:1 – 11450:6, 14633-57.) Yet, according to the

[16] Ironically, Wal-Mart admits to lobbying *against* these very state laws the district court endorses. (ROA.10002:5 – 10005:24.)

[17] The district court ignored Dr. Magee's testimony entirely, other than citing it for the proposition that excise tax is one method of reducing liquor consumption. (ROA.9412.)

district court, if the Texas Legislature wants to reduce liquor consumption, it must reject that economic model and instead increase taxes. This is not how the Commerce Clause works. The Texas Legislature gets to select its economic theory, not the federal courts.

Pike balancing is supposed to be deferential to legislative choices. In contrast, under the district court's framework, any state law could be struck down based on a judge's personal preferences. Under the district court's approach, if an out-of-state company is affected by a state law, and the goal of the law could be accomplished with a different policy mechanism that such company (or the court) prefers, the state law can be struck down under *Pike*. This is not how *Pike* balancing works.

D. Section 22.16 does not burden interstate commerce.

Moreover, under the governing law, section 22.16 does not impose a burden on interstate commerce so as to trigger *Pike* balancing in the first place. A statute imposes a burden on interstate commerce when it inhibits the flow of goods interstate. *See Pike*, 397 U.S. at 141-42. Wal-Mart concedes section 22.16 does not inhibit the flow of goods. (ROA.9257.)

Section 22.16, by its unambiguous terms, merely establishes which retailers may participate in the liquor market regardless of whether they are in-state or out-of-state. *See* TEX. ALCO. BEV. CODE § 22.16. This is critical, because the Supreme

Court has rejected the notion that the Commerce Clause protects the particular structure or methods of operation in a market. *See CTS Corp.*, 481 U.S. at 93-94; *Exxon*, 437 U.S. at 125-28. "[I]nterstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." *Exxon*, 437 U.S. at 127.[18] In this case, just as in *Exxon*, while section 22.16 causes business to shift away from public corporations, the Commerce Clause does not protect the "particular structure" of public corporations from such a regulation. *Id*. at 128.

Following *Exxon* and *CTS Corporation*, this Court in *Allstate* held that as long as *some* interstate retail chains can enter and operate in Texas, a residence-neutral statute does not impose a burden on interstate commerce. *See Allstate*, 495 F.3d at 163-64.[19] The evidence is uncontroverted that out-of-state companies (Total Wine a/k/a Fine Wines and Spirits of North Texas and others) are participating in the Texas retail liquor market (ROA.12083, 13735), and that multiple in-state companies (H-E-B and others) are barred from the Texas retail liquor market (ROA.14281-85, 87). Thus, as in *Allstate*, section 22.16 "does not prohibit [non-public-corporations] from operating in, or entering, the Texas

[18] The district court failed to address *Exxon* in its discussion of *Pike*, despite the TPSA's briefing. (ROA.8979-80.)

[19] The district court failed to address *Allstate* in its discussion of *Pike*, despite the TPSA's briefing. (ROA.8360-61, 8980, 9183.)

market," and "several interstate [liquor retailers] operate in the state." *Allstate*, 495 F.3d at 164. Likewise, "[a] reasonable legislator could have believed that [SB 1063] would further legitimate interests in protecting consumers." *Id.* Under *Exxon* and *Allstate*, a residence-neutral law that picks and chooses between various *structures* of retailers does not implicate a *Pike* problem.

This Court earlier reached the same conclusion. *See Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491 (5th Cir. 2004). The district court below quotes that opinion's concern regarding a "disparate impact," but this Court's actual holding was that no "disparate impact" exists, under *Exxon*, when the effect is on "particular interstate firms," not "the interstate market." *Id.* at 502-03. A statute does not burden interstate commerce under *Pike* when it does not inhibit the flow of goods interstate and when it treats similarly-situated in-state and out-of-state companies identically. *Id.*

The First Circuit has applied *Exxon* in an almost identical case to this one. *See Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1 (1st Cir. 2007). Rhode Island had barred chain store organizations from holding licenses to make retail liquor sales since 1933, and expanded the chain-store definition to encompass franchise-type arrangements in 2004. *Id.* at 5. A corporation sued the State, and a retailer trade association intervened as a defendant. *Id.* The plaintiffs asserted a Commerce Clause claim, contending that the statutes were "designed to

achieve economic protectionism by advantaging independently owned Rhode Island liquor stores." *Id.* at 12. The First Circuit rejected the plaintiffs' claim because there was no evidence of a debilitating impact on competition—in general or on out-of-state enterprises in particular. *Id.* at 14. The First Circuit properly held, in reliance on *Exxon*, that the challenged laws survived a *Pike* analysis.

> The Supreme Court previously has rejected the notion that the dormant commerce clause protects particular business structures or methods of operation in retail markets. The plaintiffs' argument that consumers would be advantaged by unregulated competition in retail liquor sales, like the argument rejected in *Exxon*, "relates to the wisdom of the statute, not to its burden on commerce."

Id. at 15-16 (quoting *Exxon*, 437 U.S. at 127-28); *see also Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 209 (2d Cir. 2003) ("a burden … survives *Pike* as long as it affects intrastate and interstate interests similarly"); *Wal-Mart Stores*, 483 F. Supp. 2d at 1013 ("The Commerce Clause does not protect retail formats.").

The district court's finding that section 22.16 imposes a burden on interstate commerce is foreclosed by *Exxon*, *Allstate*, *National Solid Waste*, and *Wine & Spirits Retailers*. Section 22.16 is residence-neutral, does not impose any burden on the flow of interstate goods, and merely distinguishes between particular business types in a retail market. The Supreme Court has declared it irrelevant as a legal matter whether a statute's burden "falls solely [or mostly] on interstate companies," as long as similarly-situated in-state and out-of-state companies are

treated identically. *See Exxon*, 437 U.S. at 125-26. Section 22.16 undisputedly treats in-state and out-of-state companies identically.

Moreover, even if—contrary to binding precedent—a law could burden interstate commerce based on a "disparate impact on out-of-state companies" (ROA.9426-27), section 22.16 still cannot be found to burden interstate commerce for purposes of *Pike*. This is because there is no record evidence that section 22.16 impacts out-of-state firms any differently than in-state firms.

The district court identified what it considered the "proper comparison" for purposes of its "disparate impact" theory. (ROA.9426-28.) Wal-Mart, the district court concludes, would need to "measure the effect the public corporation ban has on the in-state and out-of-state companies that would otherwise serve the market if not for the ban." (ROA.9428.) Even if correct, the problem, of course, is Wal-Mart failed to provide any evidence on this "proper comparison." This is why the district court, in declaring that it "readily concludes" such a disparate impact exists, does not cite to any evidence or anything at all in the record to support that conclusion. (ROA.9428.) To affirm the district court's declaration of a disparate impact, there must be supporting evidence in the record. There is none.

First, one might try to prove disparate impact based on which firms are *excluded* from the retail liquor market. Wal-Mart's expert, Kenneth Elzinga, created a list of every public corporation that is supposedly a potential entrant

excluded by section 22.16—only 31 total—and testified that 90% were out-of-state (28 out of 31).[20] (ROA.10284:6 – 10285:2, 14286-87.) However, as the district court conceded, for that impact to be "disparate," there has to be a "proper comparison" to demonstrate whether 90% is higher than it should be. The TPSA's expert Dr. Devrim Ikizler explained why a control group is necessary to understand whether 90%—if assumed to be a correct figure—has any meaning. (ROA.11338:7 – 11339:15, 14658-61.) To illustrate, the TPSA's experts used both population and top retailers as examples of control groups, and showed that Wal-Mart's 90% figure was actually in line with 92.2% of the U.S. population being out-of-state and 90% of Top 100 U.S. retailers being out-of-state. (ROA.11339:16 – 11341:2, 14672.) The district court accused the TPSA of using the wrong control groups. (ROA.9427-28.) However, *Wal-Mart* had the burden of proof, not the TPSA, and there is no evidence of what the percentage would be with any unidentified "correct" control group.

Second, one might try to prove disparate impact based on which firms are *included* in the retail liquor market. TABC, in line with *Allstate*, demonstrated that there are out-of-state firms participating in the Texas retail liquor market,

[20] The real percentage is much lower than 90%, because, obviously, there are more than *three* Texas firms excluded across the entire state. First, Mr. Elzinga admitted to omitting every Texas convenience store, including 7-Eleven, Stripes, and Valero, from his excluded list, despite including convenience stores like Circle K among the 28 excluded out-of-state firms. (ROA.10302:13 – 10309:19.) Second, Mr. Elzinga omitted Texas firms from his excluded list if *he* lacked personal knowledge about their number of owners. (ROA.10282:2-18.)

identifying 40 out of the current 1,765 P permit holders as having out-of-state ownership. (ROA.12075, 12083.) This equates to 2.27%. The district court used this percentage to declare a disparate impact. (ROA.9426.) However, once again, no comparison was performed to evidence disparate impact. There are 9,009 BQ permit holders. (ROA.12432-12623.) How many of the 9,009 BQ permit holders have out-of-state ownership? There would need to be more than 204 (2.27% of 9,009) for even a possibility of arguing section 22.16 creates a disparate impact. Yet, Wal-Mart's evidence reveals only *15* BQ permit holders (0.17% of 9,009) with out-of-state ownership. (ROA.14281-86.)[21]

Rather than examine *all* permit holders to attempt to prove discrimination—as would be required—Wal-Mart's expert Mr. Elzinga created lists of the "top 10" beer-and-wine retailers and "top 10" liquor retailers within five Texas metropolitan areas based on their supposed "share" in those markets. (ROA.14281-85.) Wal-Mart used this analysis to argue that 10 out-of-state retailers were selling beer and wine but only one out-of-state retailer was selling liquor. (ROA.14281-85.) The key problem, of course, was that Wal-Mart utterly *ignored* 8,991 (99.8%) of the BQ permit holders and 1,725 (97.7%) of the P permit holders operating in Texas. The "top 10" comparison is meaningless, absent evidence that any

[21] Those 15 companies are: (1) variety stores Wal-Mart/Sam's Club, Target, Costco, Dollar General, and Family Dollar; (2) grocery stores Kroger, Albertsons/Randalls, Winco, Aldi, and Trader Joes; (3) pharmacies Walgreens and CVS; and (4) convenience stores Circle K, Quiktrip, and Racetrac.

disparate impact section 22.16 might have among the "top 10" retailers is not balanced out by a disparate impact the *opposite* direction among the ignored 8,991 BQ permit holders and 1,725 P permit holders across Texas. Wal-Mart produced no such evidence.

Interestingly, another critical flaw with this "top 10" comparison is what the "market shares" actually are. The "market shares" were calculated by a Wal-Mart lobbyist in reliance on personal property tax filings. (ROA.10421:24 – 10428:10.) Personal property includes inventory, computers, and trucks, for example, and is not separated out by product. Thus, for liquor retailers, the "market shares" would actually include their beer-and-wine inventory, and for beer-and-wine retailers such as Wal-Mart, their "market shares" would include groceries, auto parts, furniture, and pharmaceuticals. (ROA.10433:24 – 10436:6.)[22] In other words, the comparison does not actually compare liquor to beer and wine at all. (ROA.11368:9 – 11369:8.)

It is unsurprising, then, that the district court did not actually cite to any evidence when it "resolved the threshold inquiry of whether the public corporation ban places a burden on interstate commerce." (ROA.9428-29.) No such record evidence exists. Once the district court identified what a proper comparison would

[22] For example, the 10th listed beer-and-wine retailer in the "Dallas-Fort Worth MSA," Randalls, is a large grocery store chain with over 50 grocery stores across that area, while the 10th listed liquor retailer, King's Liquors, has three liquor store locations in the entire state. (ROA.14285.)

be, the court needed to insist that Wal-Mart undertake such proper comparison.[23] The district court did not do so. Therefore, the district court's finding of a burden on interstate commerce is error, both as a matter of law under *Exxon*, and as a matter of fact for failure of proof.

E. Wal-Mart did not even plead a *Pike* balancing analysis.

There is a simple explanation why the district court's discussion of *Pike* is so divorced from the actual trial record. Wal-Mart did not litigate *Pike* balancing in this case. Wal-Mart pleaded discrimination, but did not plead section 22.16's burden on interstate commerce was clearly excessive in view of the statute's local benefits. (ROA.82-83.) Likewise, Wal-Mart's expert witness opined regarding discrimination, but had no opinion on whether section 22.16's burden on interstate commerce was clearly excessive in view of the statute's local benefits. (ROA.10061:17 – 10292:14.) During the entire trial, there was no mention of "*Pike*," or any "excessive," "outweighing," or "lesser" burdens. Wal-Mart did not rely on *Pike* until after the evidence closed, at which time Wal-Mart devoted a mere three pages of briefing to *Pike* but, tellingly, did not once cite to any *evidence* in the record. (ROA.9105, 9126-27, 9230, 9257-59.)

[23] Before trial, the district court had advised Wal-Mart it would "need some help" with its disparate impact theory. (ROA.9734:15 – 9735:8.) Wal-Mart failed to supply that "help" in the form of evidence.

Wal-Mart failed to plead or prove that section 22.16 fails the *Pike* balancing test. The failure to so plead, alone, merits reversal. *See Vizio, Inc. v. Klee*, 886 F.3d 249, 258-60 (2d Cir. 2018). In any event, there is (1) no evidence of any burden on interstate firms not also placed on intrastate firms, (2) no evidence any such burden could outweigh section 22.16's undeniable local benefits, and (3) no evidence of a lesser burden on interstate commerce that could be imposed by using some other regulatory method of lowering per-capita liquor consumption.

III. The district court's permanent injunction against enforcing sections 22.04 and 22.05 must be reversed.

The district court permanently enjoined TABC from enforcing section 22.04 (five-permit cap) and section 22.05 (consanguinity rule). (ROA.9448.) This was reversible error.

A. Wal-Mart lacks standing to challenge sections 22.04 and 22.05.

Once this Court rules against Wal-Mart on its claims that section 22.16 is unconstitutional, Wal-Mart's complaints regarding sections 22.04 and 22.05 must be dismissed for lack of standing. An injury traceable to the challenged statutes is required for standing purposes. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). If section 22.16 is upheld, Wal-Mart cannot hold a P permit. Thus, it suffers no injury from sections 22.04 and 22.05's regulations capping how many P permits one permittee can hold. *See* TEX. ALCO. BEV. CODE §§ 22.04(a), 22.05, 22.16(a)-(b).

B. With the burden of proof correctly placed, section 22.05 survives rational basis review.

Even if Wal-Mart had standing to challenge section 22.05, the district court's judgment enjoining section 22.05 must be reversed. In an Equal Protection challenge, the *plaintiffs* have the burden to negate every conceivable basis which might support the challenged statutes. *See Heller v. Doe*, 509 U.S. 312, 319-21 (1993).[24] A state statute's classifications are accorded a strong presumption of validity. *Id.* at 319. A statute needs only a reasonably conceivable state of facts that could provide a rational basis for its classifications. *Id.* at 320. A court cannot use the rational basis test as an excuse to sit as a "superlegislature" on the wisdom of a state statute. *Id.* at 319. The rational basis test is reviewed de novo. *Simi Inv. Co. v. Harris County*, 236 F.3d 240, 249 (5th Cir. 2000).

First, contrary to the law, neither Wal-Mart nor the district court negated all of the TPSA's proffered rational bases for section 22.05. Wal-Mart's own trial exhibit showed numerous, possible rational bases identified by the TPSA. (ROA.14380-81.) For instance, the Legislature in 1951 could have desired to allow a person at retirement to transfer her package store operations to her children or siblings who already own package stores. (ROA.14381.) Wal-Mart made no attempt to negate this rational basis. The district court ignored this rational basis,

[24] The district court surmised that strict scrutiny *might* apply, but there is no precedent for such a test applying to a statute that benefits any individual who has a parent, sibling, or child.

only attempting to negate the rational bases that "TABC offers." (ROA.9442.) This Court requires plaintiffs to negate *any* rational basis for a law. *See Integrity Collision Ctr. v. City of Fulshear*, 837 F.3d 581, 589 (5th Cir. 2016). This Court had to intervene for the TPSA to be party to this lawsuit. *See Wal-Mart Stores*, 834 F.3d at 570. The district court could not opt to ignore the TPSA's defenses of the challenged statutes.

Second, section 22.05 must be upheld based on the rational basis that the consanguinity rule promotes family businesses. The district court observed that there was "not a scintilla of evidence" suggesting section 22.05 has any effect on the number of businesses that are family businesses. (ROA.9443.) Wal-Mart, not Defendants, has the burden of proof. The question is not whether TABC or the TPSA offered evidence that showed how the proffered rational basis affects the number of family-owned businesses in Texas. The question is whether Wal-Mart showed section 22.05 does *not* promote family businesses. The district court inverted the burden of proof on this issue. Wal-Mart failed to negate the proffered rational basis of promoting family businesses, and the district court did not have the discretion to solve this problem by re-assigning the burden of proof.

The district court misconstrues the effect of section 22.05, surmising that it cannot promote family businesses because the consolidating family member cannot be a co-owner. This overlooks *how* section 22.05 fosters family businesses. A

company which is majority-owned by an individual or individuals with a shared parent, sibling, or child (the prerequisite to section 22.05 consolidation) is more likely to be a family business than a company that does not share this characteristic. The results speak for themselves. Each P permit holder with more than 5 permits whose testimony Wal-Mart proffered *is a family business*. Spec's is owned by John Rydman and his wife. (ROA.8555:10-12.) Twin Liquors is owned by David Jabour and his sister. (ROA.11199:6-10.) Gabriel's Wine & Spirits is owned primarily by three Gabriel family members. (ROA.10895:21-24.) In response, Wal-Mart produced *no* evidence—as would be required to meet its burden of negating all rational bases—that family businesses would be equally or more successful in the absence of section 22.05. The district court certainly disagrees with the wisdom of the statute, but that disagreement plays no role in the constitutional analysis. Because there is no evidence negating section 22.05's promotion of family businesses, the statute must be upheld.

The district court equally ignored the societal benefits of family businesses in the specific context of liquor sales. The district court recognized that the consanguinity rule allows certain firms to increase their permits, but failed to note *which* firms can increase their permits. Under the statute's plain language, firms with diffuse ownership structures cannot gain more than five permits, while family businesses like Spec's, Twin Liquors, and Gabriel's can expand. *See* TEX. ALCO.

BEV. CODE § 22.05. The economic benefit is "a soft regulatory limit" on liquor sales. (ROA.11447:13 – 11448:12.) Dr. Magee explained that family firms tend to have lower efficiency, and tend to have less access to capital for expansion, which equates to a less draconian legislative method of tempering market growth while maintaining product availability. (ROA.11447:13 – 11449:15.) The result is that the largest seller of liquor in Texas is a medium-sized firm like Spec's rather than a giant firm like Wal-Mart. (ROA.11459:11 – 11461:11.) This is a rational basis for section 22.05. *See Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412, 426-27 (1937) (holding that state may regulate in favor of small stores over larger chain stores).

In lieu of a hard five-permit cap with no exceptions, the consanguinity rule allows some, but not all, firms to expand. The practical benefit is reflected in the current state of the Texas market, where the larger firms are concentrated in metropolitan areas to meet urban demand, while rural areas are served by mom-and-pop stores rather than the Wal-Marts and convenience-store corporations presently limited to beer and wine sales. (ROA.10925:1 – 10926:11, 10927:5-14, 11444:10 – 11447:12.) Wal-Mart failed to negate this rational basis, arguing only that section 22.05 by its *language* did not limit where companies expanded, but making no attempt to challenge that this market state is an *economic* result of the

statute. After all, retail stores with "economies of scope" can expand into rural areas far more easily than the package store chains such as Spec's.[25]

The district court's demand that the Legislature "create a tailored exception" to the five-permit cap (ROA.9444) is contrary to the law. *See Heller*, 509 U.S. at 321 (not demanding that statute's classification be made with mathematical nicety or result in no inequality); *Fritz*, 449 U.S. at 179 ("[T]he fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration."). Nor can a court overturn a statute under the Equal Protection clause by an *ipse dixit* declaration that a proffered rational basis "beggars belief." (ROA.9444.)

To overturn section 22.05, there must be evidence negating each rational basis proffered. *See Heller*, 509 U.S. at 320-21. The record evidence does not negate the rational basis that section 22.05 promotes family businesses, tempers the growth of package store enterprises, and accommodates municipal expansion to meet demand while preserving small businesses outside the metropolitan areas.

C. Section 22.04 cannot be permanently enjoined.

Unable to strike down section 22.04's five-permit cap under the Commerce Clause or the Equal Protection Clause (ROA.9432-34, 41), the district court

[25] Wal-Mart, for instance, divides its products into 98 different departments. (ROA.9993:1-20.) It plainly has the ability to expand into rural areas. The district court refused to allow Dr. Magee to testify that 75% of Wal-Mart stores are located outside the top 5 metropolitan areas. (ROA.8300, 15952.)

nonetheless granted Wal-Mart injunctive relief against section 22.04. The court permanently enjoined the enforcement of section 22.04—after finding it constitutional—under the theory that the benefit of exceeding five permits should be extended to an otherwise-aggrieved class rather than withheld from an otherwise-benefited class. (ROA.9445.) The district court's determination on this point is entitled to no deference. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 235-40 (1991).

The brevity of the district court's discussion on this point betrays its lack of merit. The goal of fashioning the proper remedy is not to accomplish what a court deems prudent, but what the Legislature would desire. *See United States v. Booker*, 543 U.S. 220, 246 (2005). If the Legislature has spoken to the proper remedy, then the court must follow course. *See Bowsher v. Synar*, 478 U.S. 714, 735 (1986).

The district court erred, therefore, by ignoring Texas law. The Texas Legislature has stated that if one Texas statute is declared invalid, while the other Texas statute "can be given effect without the invalid provision," then the other statute is not affected by its companion statute's invalidity. *See* TEX. GOV'T CODE § 311.032(c).[26] The district court was bound to keep section 22.04 intact, because

[26] The district court failed to address Texas Government Code section 311.032 in its discussion of the appropriate relief, despite the TPSA's briefing. (ROA.9190.)

severability is a question of state law, not judicial preference. *See Leavitt v. Jane L.*, 518 U.S. 137, 139-40 (1996).

The district court failed to ask what the Texas Legislature's preference might be. Plainly the Legislature would not choose to *eliminate* the permit cap, rather than removing or modifying one of the cap's exceptions. Numerous states impose permit caps. (ROA.12318-21.) In Texas, the five-permit cap was enacted in 1935, sixteen years before the consanguinity rule was added in 1951.

The district court also applied the wrong presumption. In many cases, extension, not nullification, is the proper course. *See Califano v. Westcott*, 443 U.S. 76, 89 (1979). However, when the general provision is constitutional, and an exception that grants favorable treatment is found discriminatory, the appropriate remedy is to strike the unconstitutional exception, not to remove the general provision. *See Sessions v. Morales-Santana*, 198 L. Ed. 2d 150, 173 (2017); *Villegas-Sarabia v. Duke*, 874 F.3d 871, 882-83 (5th Cir. 2017).

The district court also ignored the relevant factors. A court "should 'measure the intensity of commitment to the residual policy'—the main rule, not the exception—'and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.'" *Morales-Santana*, 198 L. Ed. 2d at 173-74 (quoting *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984)). Here, both factors weigh against enjoining section 22.04. The five-

permit cap has been in place since 1935, shortly after the end of Prohibition, and has never even been modified—the cap has always been at five. It would be far more disruptive to the Texas liquor marketplace to suddenly allow all P permit holders to expand without limitation (enjoining section 22.04), rather than halting P permit holders' further expansion (enjoining section 22.05), at least until the Texas Legislature has had the opportunity to reconsider permit caps in Texas.

Even if a court could extend the benefit of section 22.05, the district court misidentified the aggrieved class in doing so. Section 22.05's allegedly discriminatory benefit is to majority owners who have a parent, sibling, or child, such that the aggrieved class is majority owners who lack a parent, sibling, or child. *See* TEX. ALCO. BEV. CODE § 22.05. A proper extension of section 22.05's benefit, then, would be to allow any permit holder that *has a majority owner* to add permits held by a different permit holder with a majority owner, regardless of consanguinity. It was improper to instead remove the majority-ownership requirement altogether, allowing any and every permit holder to have more than five permits, no matter how diffuse its ownership structure. The district court did not extend the benefits of section 22.05 to other permit holders, but instead eliminated the permit cap altogether.[27]

[27] Striking down the public corporation ban without eliminating the five-permit cap would be something of a pyrrhic victory for Wal-Mart. Wal-Mart is not interested in opening five liquor outlets in Texas; it is interested in opening hundreds.

The district court's permanent enjoinder of a constitutional statute makes no sense in this context. Now, if the Texas Legislature *does* want a permit cap, what does it do? Can the Legislature enact a section "22.04-A," containing identical language as section 22.04, which language has been found constitutional, such that two identical statutes sit side by side, one constitutional, but the other permanently enjoined? Alternatively, if the Legislature elects to repeal section 22.05, will section 22.04 still be permanently enjoined? Is Texas now barred from any permit cap at all while other states are free to implement them? As these hypotheticals illustrate, given that section 22.04 is fully constitutional, it is improper to enjoin enforcement of that statute when it can readily exist independently of section 22.05.

Therefore, even if the district court's judgment striking down sections 22.16 and 22.05 were affirmed, the injunction against section 22.04 must be reversed. There is no valid basis for permanently removing the 83-year-old statutory five-permit cap based on an exception to the cap in a separate 67-year-old statute being held unconstitutional.

PRAYER

Appellant Texas Package Stores Association prays that this Court reverse the district court's judgment, and render judgment that Plaintiffs take nothing on their claims, that Texas Alcoholic Beverage Code sections 22.04, 22.05, and 22.16 are not inconsistent with the dormant Commerce Clause or the Equal Protection Clause of the United States Constitution, that Plaintiffs' claims regarding Texas Alcoholic Beverage Code sections 22.04 and 22.05 are dismissed with prejudice for lack of standing, and that TABC is not permanently enjoined from enforcing Texas Alcoholic Beverage Code sections 22.04, 22.05, or 22.16, and then remand for further proceedings on TABC's and the TPSA's entitlement to attorneys' fees in defense against Plaintiffs' claims, and for all further relief to which the TPSA may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2018, I electronically filed this Brief of Appellant Texas Package Stores Association with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that counsel for Plaintiffs and Defendants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

G. Alan Waldrop

CERTIFICATE OF COMPLIANCE

Pursuant to Fifth Circuit Rule 32.2 and 32.3, the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and the typeface requirements of Fed. R. App. P. 32(a)(6).

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August 30, 2018

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No. 18-50299 Wal-Mart Stores, Incorporated, et al v.
TX Alcoholic Beverage Cmsn, et al
USDC No. 1:15-CV-134

Dear Counsel,

The following pertains to your brief electronically filed on August 29, 2018.

We filed your brief. However, you must make the following corrections within the next 14 days.

You need to correct or add:

Certificate of interested persons has incorrect case number, see 5TH CIR. R. 28.2.1.

Statement of the issues presented for review, see FED. R. APP. P. 28(a)(5). The text must be double spaced, see FED. R. APP. P. 32(a)(4).

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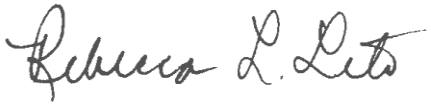

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No. 18-50299 Wal-Mart Stores, Incorporated, et al v. TX Alcoholic Beverage Cmsn, et al
USDC No. 1:15-CV-134

Dear Mr. Waldrop,

We have reviewed your electronically filed appellant's brief and it is sufficient.

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

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