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

and

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
Case No. 1:15-cv-00134-RP

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No. 18-50299

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

and

Texas Package Stores Association, Incorporated,
Movant–Appellant / Cross-Appellee.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 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.

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STATEMENT REGARDING ORAL ARGUMENT

Because this case involves dormant Commerce Clause and Equal Protection Clause challenges to Texas law, and because of the complexity of the arguments surrounding those claims, Appellants believe that oral argument may assist the Court and respectfully request permission to participate in oral argument.

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INTRODUCTION

The dangers of alcohol are beyond dispute. Thus the public good, as recognized by the Texas Legislature, is served by establishing barricades—such as the "three-tier system" and various permitting requirements—that purposefully impede the free-flow of alcohol across the State. This supervisory regime flows, of course, from Texas's ability to regulate (even prohibit) alcohol sales within its borders under the Twenty-first Amendment. Alcohol "is the only consumer product identified in the Constitution. Only its regulation by States is given explicit warrant." *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 813 (5th Cir. 2010).

The State's control is even more pronounced when it comes to hard liquor, since it is known to exacerbate many of the problems associated with drinking. Because consumption is related to availability, Texas limits the number of permits that businesses can hold to sell distilled spirits—*i.e.*, liquor—for off-premises consumption to five. This law, in place since the end of Prohibition, practically limits the total number of businesses that retail liquor to the public and thus decreases total consumption.

Because consumption is also related to price, and price is affected by distribution capabilities, the Legislature additionally prevents large public corporations from using their economies of scale to sell hard liquor at a lower price. State law prohibits large corporations—both in and outside Texas—from holding liquor store permits. Those same corporations are not denied the ability to sell beer or wine, just the products that are most easily abused and that subsequently translate into the most negative externalities for the State. This law, passed almost twenty-five years ago, allows

Texas to remain near the bottom of the list in annual liquor consumption while also maintaining uncharacteristically low excise taxes.

The district court limited the State's ability to regulate liquor sales, accepting arguments under both the Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment to invalidate State alcohol laws. But while the so-called "dormant" or "negative" aspect of the Commerce Clause is still applicable in the arena of alcohol regulation, it does not work against states in the same way that it does in other areas of commerce. In fact, if the text of the Twenty-first Amendment is to have any weight, alcohol regulation cannot be subject to the same strictures of normal dormant Commerce Clause precedent. After all, state regulations are constantly impeding on commerce there to an extent not allowed in any other area.

Thus, although states cannot discriminate against out-of-state commerce, any "balancing" done on laws that incidentally affect alcohol commerce must come out in favor of the state (as has happened in every case prior to this one). Likewise, because neither a suspect class nor a constitutional right is at issue here, there need be only a rational basis for Texas's liquor regulations—a low threshold for the State, especially considering the deference states are given in regulating alcohol. And it is Plaintiffs who must show that there is no rational basis for the law; this they cannot do.

The judgment of the district court enjoining State law should be reversed.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1291.

Issues Presented

1. Whether an operative state law that does not discriminate against out-of-state commerce can nevertheless violate the dormant Commerce Clause solely by an alleged intent to discriminate.
2. Whether a state law regulating alcohol may be invalidated under the dormant Commerce Clause using *Pike* balancing, even though it treats similarly situated businesses—both in and out of state—in the same way.
3. Whether a 70-year old exception to a state alcohol regulation, drafted to benefit family businesses, has no rational basis and thus violates the Equal Protection Clause of the Fourteenth Amendment; and whether invalidation of the exception should trigger an invalidation of the regulation itself.

Statement of the Case

I. Statutory and Factual Background

When the Twenty-first Amendment brought an end to Prohibition in 1933, it proscribed "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the law thereof." U.S. Const. amend. XXI, § 2. Since that time, the State of Texas has been responsible for "combat[ing] the perceived evils of an unrestricted traffic in alcoholic beverages" in its borders. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984). This case centers around several provisions of the Texas Alcoholic Beverage Code (Code) enacted to monitor and restrict liquor sales and consumption in the State.

The Code uses a series of permits to designate what types of alcohol may be sold where. Four types of "off-premises" permits or licenses—meaning the alcohol is sold for consumption elsewhere—are relevant here:

- "P" permits or "Package Store Permits" are for stand-alone stores that retail distilled spirits, wine, and ale (*i.e.*, liquor stores). Tex. Alco. Bev. Code §§ 22.01; 22.14.
- "Q" permits authorize the sale of wine and ale—a "Wine Only Package Store Permit." *Id.* § 24.01.
- "BF" licenses authorize the sale of beer. *Id.* § 71.01.
- "BQ" permits—also known as a "Wine and Beer Retailer's Off-Premise Permit"—serve (with some minor differences) as a combination of the "Q" and "BF" permits, allowing the sale of wine and beer, and are typically held by grocery stores throughout the State. *Id.* § 26.01.[1]

Plaintiffs challenged four provisions of Chapter 22, the portion of the Code devoted to Package Store Permits (*i.e.*, permits necessary for stores to sell liquor). First, § 22.04 says that "[n]o person may hold or have an interest, directly or indirectly, in more than five package stores or in their business or permit." § 22.04(a). The five-permit cap on "P" permits was passed in 1935, just after Prohibition ended. ROA.11660.

[1] Wal-Mart, for instance, holds 647 "BQ" permits in Texas. ROA.12432.

Second, § 22.05 serves as a limited exception to the five-permit cap in § 22.04. It provides that if "two or more persons related within the first degree of consanguinity have a majority of the ownership in two or more legal entities holding package store permits, they may consolidate the package store business into a single legal entity. That single legal entity may then be issued permits for all the package stores . . . ." Tex. Alco. Bev. Code § 22.05. This allows close relatives to combine their individual permits into one business that holds more than five permits. This "consanguinity exception" to the five-permit cap was passed in 1951 as a measure to encourage family businesses. ROA.11882.

Third, § 22.06 prevents businesses holding a "P" permit from also having a "BQ" permit to sell both wine and beer. Tex. Alco. Bev. Code § 22.06(a)(2). Thus, to hold package store permits for selling liquor, any business holding "BQ" permits would have to abandon them and, instead, obtain separate "BF" licenses and "Q" permits for all of its stores that sell only beer and wine.

Fourth, § 22.16 is known as the public corporation ban. It says that "[a] package store permit may not be owned or held by a public corporation, or by any entity which is directly or indirectly owned or controlled, in whole or in part, by a public corporation." *Id.* § 22.16(a). The Code defines a public corporation as either "(1) any corporation or other legal entity whose shares or other evidence of ownership are listed on a public stock exchange; or (2) any corporation or other legal entity in which more than 35 persons hold an ownership interest in the entity." *Id.* § 22.16(b). This statute was passed in 1995. ROA.14536-38.

There are currently 2578 active "P" permits for package stores in Texas. ROA.9401. In addition to the Texas owners, 36 out-of-state residents own package store permits in Texas. ROA.12083. Roughly one-fifth of all package stores—574—are owned by a business that uses the consanguinity exception in § 22.05 to hold six or more "P" permits. ROA.9401, 13735. There are 21 such businesses, including Fine Wine & Spirits of North Texas, L.L.C., headquartered in Bethesda, Maryland, which owns 23 permits. ROA.9401, 12083, 13735.

At present there are approximately six or seven (perhaps more) corporations in Texas that would hold a "P" permit but for § 22.16. ROA.9409, 14287, 14672. This includes businesses such as the grocery store chain H-E-B. ROA.14281-87. At the same time, there are 28 public corporations outside the State that potentially would be interested in holding "P" permits if the ban were not in place. ROA.14286. While Texas comprises 8% of the national population, more than 17% of the businesses affected by the public corporation ban are from Texas. ROA.14672.

II. Procedural History

Plaintiffs sued the Texas Alcoholic Beverage Commission (TABC) to challenge the constitutionality of §§ 22.04, 22.05, 22.06(a)(2), and 22.16 of the Code. As relevant here, Wal-Mart argued that the statutes violated the dormant Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment. ROA.9397. Plaintiffs sought a declaration that the statutes were unconstitutional and a permanent injunction against their enforcement. ROA.9397-98. After the Texas Package Store Association (TPSA) intervened, ROA.9398, the district court held a bench trial and enjoined enforcement of the corporation ban, the five-permit cap, and the

consanguinity exception (though the exception would be rendered a nullity absent the cap anyway). ROA.9446. The court left in place the prohibition against "P" permit holders also having "BQ" permits. ROA.9446.

A. Dormant Commerce Clause Analysis

The district court began its legal analysis with the dormant Commerce Clause, concluding that the corporation ban was unconstitutional while the five-permit limit and consanguinity exception were not (at least under the dormant Commerce Clause). ROA.9414-15.

1. Public Corporation Ban

i. First, using the four factors set out in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977), the district court held that the corporation ban was unconstitutional because its purpose was to discriminate against out-of-state companies. ROA.9415. While the court admitted that it "[could not] conclude that the public corporation ban has a discriminatory effect," ROA.9414, it still found that the first *Arlington Heights* factor was met—"'a clear pattern of discrimination emerges from the effect of the' public corporation ban." ROA.9415 (quoting *Arlington Heights*, 429 U.S. at 266). This determination was based primarily on the fact that most package stores are Texas-owned, ROA.9415, and was offered prior to the district court's explicit consideration of "discriminatory effect" later in the opinion that acknowledged the corporation ban's lack of effect on interstate commerce under governing precedent. ROA.9419-24.

The district court then looked to prior Texas law prohibiting out-of-staters from owning package stores to satisfy the "history of discrimination" factor. ROA.9415-

16 (citing *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007)). This was the residency requirement previously in place for alcohol permit owners struck down by this Court in *Cooper v. McBeath*, 11 F.3d 547, 552 (5th Cir. 1994) (*Cooper I*).

Next the court recited the history surrounding the *Cooper* litigation and the passage of the law to hold that "the 'specific sequence of events leading up to the challenged decision' evinces discriminatory purpose." ROA.9416 (quoting *Allstate*, 495 F.3d at 160). The court had noted that someone from TPSA later said that they had been worried that "very large stores could disrupt what had been a very stable business climate" for their members if *Cooper* struck down the residency requirement. ROA.9403-04. The district court found that it was only because of *Cooper* that the law was enacted. ROA.9404, 9416.[2]

The district court held the final factor—"the legislative . . . history of the state action"—to have been fulfilled by Senator Armbrister's comments about the law. ROA.9416 (quoting *Allstate*, 495 F.3d at 160). According to the court, Armbrister agreed that the purpose of the law was "to make sure that package stores are owned by 'somebody from Texas' and to guarantee that 'you can't have a package store inside a Wal-Mart.'" ROA.9416 (quoting portions of dialogue with another Senator).[3] Based solely upon "[t]he Legislature's discriminatory purpose in enacting the

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[2] While *Cooper* was pending, the Legislature amended the residency requirement from three years to one year for certain permits (including "P" permits), and that requirement continued to be enforced in Texas until 2007. ROA.9402, 9410, 9416.

[3] The court also found legislative history support from the lobbyist's statement about a "stable business climate," ROA.9416, and the TPSA's statements in lobbying against repealing the public corporation ban decades later. ROA.9416-17.

public corporation ban," the district court held that strict scrutiny applied and invalidated the law. ROA.9418-19.

ii. The district court next examined the alleged "discriminatory effect" of the corporation ban and concluded that it did not have such an effect. ROA.9419-24. Though the court found "some support" for Wal-Mart's argument "that a disproportionate impact on out-of-state companies is a sufficient basis to find a discriminatory effect," ROA.9419-21, the court adopted the "contrary line of cases that define discriminatory effect much more narrowly . . . uph[olding] state regulations as consistent with the dormant Commerce Clause because the regulations treat similarly situated in-state and out-of-state companies the same, even when those regulations disproportionately affect out-of-state companies." ROA.9421-22. Because "a law does not discriminate in effect unless the law differentiates between similarly situated in-state and out-of-state companies on the basis of the companies' ties to the state," the public corporation ban had no discriminatory effect. ROA.9424. After all, "[p]ublic corporations are banned from the market whether or not they are based in Texas or owned by Texans," and while "some Texas companies are blocked from selling liquor in the state, . . . at least one significant out-of-state company has successfully entered the Texas market." ROA.9424. The district court recognized "that this result—finding that the law intentionally discriminates (or at least attempts to discriminate) against out-of-state businesses but does not produce the effect intended—may seem bizarre." ROA.9424 n.4.

iii. Lastly, the court found that the public corporation ban also violated the dormant Commerce Clause under the balancing analysis of *Pike v. Bruce Church, Inc.*,

397 U.S. 137, 142 (1970). ROA.9425. The court thought it appropriate to apply *Pike* since it "provides a standard for assessing state laws that regulate 'even-handedly' but nonetheless impose 'incidental' burdens on interstate commerce." ROA.9425. The district court found that the ban "places a substantial burden on interstate commerce" as seen by the fact that around 98% of the package stores are Texas companies. ROA.9426.

This was in line with the district court's prior findings discounting the need for the corporation ban. The court had noted the benefits of alcohol regulation and the fact that "policies limiting the number of retail outlets selling alcohol can be effective in reducing alcohol consumption." ROA.9411. The district court had also recognized that "[i]n enacting the public corporation ban, the Texas Legislature could have reasonably believed that allowing public corporations to sell liquor in the state would lead to large corporations entering the market, increasing the total supply of liquor and putting downward pressure on prices." ROA.9411. Moreover, not only would it increase sales, the "scale advantage" of large corporations "would allow them to sell liquor at a discount." ROA.9411-12. The district court went on, however, to find that the State could achieve its goals in avoiding those outcomes through other measures, such as excise taxes. ROA.9412.

2. Five-Permit Limit and Consanguinity Ban

The district court next found that the five-permit limit and consanguinity exception did not offend the dormant Commerce Clause. ROA.9432. The only evidence concerning their purpose was found in the arguments made by lobbyists against re-

peal and nothing in the history or sequence of events leading up to their passage suggested a discriminatory purpose. ROA.9432-33. The court also noted that neither statute had a discriminatory effect and neither burdened interstate commerce. ROA.9433. Because the statutes did not exclude out-of-state companies, the district court did not apply *Pike*—though it did note that such an inquiry would be like the rational basis review it later conducted anyway. ROA.9434.

B. Equal Protection Analysis

The district court then considered each of the laws challenged under the Equal Protection Clause of the Fourteenth Amendment. ROA.9434. The court held that the corporation ban, the five-permit limit, and the prohibition on "P" permit holders also having "BQ" permits all survived rational basis review, while the consanguinity exception did not. ROA.9436-41.

1. Public Corporation Ban

With respect to the corporation ban, the district court concluded that "there is a conceivable relationship between prohibiting public corporations from retailing liquor and the state's legitimate interest in discouraging the consumption of liquor." ROA.9436. The court recognized that "the state could reasonably believe that excluding public corporations would reduce the total number of firms participating in the market, shift the supply curve, and, as a matter of economic principle, drive up prices." ROA.9437. Also, "the state could reasonably believe that public corporations have the necessary scale and capital to offer aggressive discounts"—just as Wal-Mart had argued in its complaint. ROA.9437. Because "Texas could reasonably believe that excluding public corporations from the retail liquor market would

artificially inflate prices, thereby moderating the consumption of liquor and reducing liquor-related externalities," Wal-Mart could not show the State's theory to be pure "fantasy" and the corporation ban thus does not offend the Equal Protection Clause. ROA.9439 (quoting *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013)).

2. "BQ" Permit Holder Restriction

The district court next examined § 22.06(a)(2), the provision that prevents "P" (package store) permit holders from also having "BQ" permits, finding that there was no Equal Protection problem for two reasons. ROA.9439. First, the law applied equally to everyone—the choice of whether to get a "BQ" permit, or else get a separate "BF" license (for beer) and "Q" permit (for wine), is put to everyone who may also have an interest in getting a "P" permit. ROA.9440. Second, the court held that the statute is "rationally related to limiting the number of retail liquor outlets and moderating liquor consumption." ROA.9440. Retailers can choose to get a streamlined "BQ" permit or go through the more onerous process of getting both a "BF" license and a "Q" permit, and Wal-Mart's argument that the process of changing all of its permits would be a costly and time-consuming process only underscores that the law discourages retailers from entering both markets. ROA.9440. This, in turn, provides a rational belief that the number of retailers in the State liquor market—and thus total consumption—will be less because of the law. ROA.9440.

3. Five-Permit Limit

The district court disposed of the rational basis argument against the five-permit limit quickly, noting that it "is rationally related to the state's legitimate interest in

limiting the number and density of retail liquor outlets in order to reduce the availability and increase the price of liquor." ROA.9441. The court recognized that other states have such laws and that this Court upheld a similar Atlanta ordinance in *Parks v. Allen*, 426 F.2d 610, 614 (5th Cir. 1970). ROA.9441.

4. Consanguinity Exception

The district court turned last to the consanguinity exception, holding that it failed rational basis review. ROA.9441. The court first rejected TABC's argument that the exception promotes family business because there are potential loopholes that may be exploited by businesses and it may not accomplish its stated goals in every situation. ROA.9442. The district court then rejected the argument that the exception promotes small business since it lets some entities exceed the limit and grow large package store chains. ROA.9443. Finally, the court found that there was no relationship between the exception and estate planning, and that the exception did not necessarily mean that package store companies would grow in targeted areas where growth was needed. ROA.9443-44.

After determining that the consanguinity exception failed rational basis review, the district court considered the remedy for the violation. ROA.9445. The court reasoned that the exception's extension of benefits to a certain class of persons, while withholding it from another class, meant that "the appropriate remedy is to 'extend the coverage of the statute to include those who are aggrieved by the exclusion.'" ROA.9445 (quoting *Califano v. Westcott*, 443 U.S. 76, 89 (1979)). The court thus enjoined enforcement of both the consanguinity exception and the five-permit limit. ROA.9446.

SUMMARY OF THE ARGUMENT

I. The doctrine of the dormant Commerce Clause was developed to prevent states from discriminating against out-of-state commerce for economic protectionist reasons. It should thus be axiomatic that an alleged on-going violation of the dormant Commerce Clause would require, at a minimum, discrimination against out-of-state commerce. As the district court here admitted, though, the Texas law that prevents large corporations from holding liquor licenses does not prefer in-state commerce to out-of-state commerce. Small businesses outside the State hold liquor licenses while public corporations inside the State are prohibited from holding such licenses.

Despite these facts, the district court pieced together stray statements—primarily from lobbyists after the statute had been passed—about the true "intent" behind the law, and invalidated the law based on an *assumed* illicit goal of discriminating. And this even though no actual discrimination takes place under the statute. To be clear, Plaintiffs did not show discriminatory purpose on the part of the Texas Legislature. At most, they proved only that *the TPSA* was interested, years later, in keeping out-of-state competition at bay. Evidently, though, the Texas Legislature enacted a discriminatory law—so defined by the "stray protectionist remarks" of two Texas Senators that were not actually protectionist—but the members weren't smart enough to make the scheme work as intended. Even the district court was forced to recognize the "bizarre" result of striking down a non-discriminating statute because the Legislature supposedly wanted to discriminate. But the Commerce Clause is not concerned with the secret motives of legislators, and the cases cannot support such a holding.

The district court's backstop of *Pike* balancing fails, too. The dormant Commerce Clause applies when there is discrimination against out-of-state commerce and, normally, where there is a burden on commerce created by a neutral law that is greater than the benefit of the law. Alcohol is different. Because the Twenty-first Amendment allows states to regulate extensively in this area—up to, and including, prohibiting sales altogether—the usual Commerce Clause analysis cannot apply. In other words, a state regulation on alcohol does not violate the dormant Commerce Clause simply for imposing a burden on commerce since states have the authority to foreclose that arena altogether (thus preventing courts from making the policy judgments attendant to *Pike* balancing on the "value" of State alcohol regulations). Instead, what emerges from the caselaw is a rule that a state alcohol regulation will only be struck down if it discriminates against out-of-staters. Because that does not take place here, there is no dormant Commerce Clause violation.

II. The five-permit cap has been the centerpiece of Texas liquor law since the end of Prohibition. Because it does not discriminate against out-of-staters, the district court was forced to conclude that it did not violate the dormant Commerce Clause or the Equal Protection Clause. Yet the court thought it appropriate to enjoin the permit cap on equal protection grounds because of an exception in the law that allows family members to combine their permits under one legal entity. The benefits associated with combining permits, however, could rationally be thought to promote the family's business interests by reducing overhead costs or by growing the business for a parent to hand down to his child. The fact that the district court can imagine other scenarios, even ones where exploitation of the law would not promote family

business (at least in a limited sense), does not negate the rational basis for the law. And because the burden of proof is on the challengers, the district court's misunderstanding of other rationales should not count against the State either.

But even if this exception to the cap were unconstitutional—and it is not—the logical remedy would be to invalidate the narrow exception and not the otherwise lawful cap. Enjoining the centerpiece of Texas liquor law because of a limited exception turns the whole statutory scheme on its head. After all, the district court recognized multiple times the rationality behind the State's actions taken to curb liquor retail sales. That goal is the true impetus behind the liquor-control regime and should be promoted. To the extent that goal is compromised by a limited exception, the correct remedy is to enjoin the exception and leave the constitutional law in place. That alteration is certainly preferable to overturning the entire scheme.

The district court's rulings enjoining State alcohol regulations should be reversed.

STANDARD OF REVIEW

"The standard of review for a bench trial is well established: findings of fact are reviewed for clear error and legal issues are reviewed de novo." *Bd. of Trs. New Orleans Emp'rs Int'l Longshoremen's Ass'n v. Gabriel, Roeder, Smith & Co.*, 529 F.3d 506, 509 (5th Cir. 2008) (quoting *Water Craft Mgmt., LLC v. Mercury Marine*, 457 F.3d 484, 488 (5th Cir. 2006)). "A finding is clearly erroneous if it is without substantial evidence to support it, the court misinterpreted the effect of the evidence, or this court is convinced that the findings are against the preponderance of credible testimony." *Id.*

ARGUMENT

I. Because The Ban On Corporations Holding Liquor Permits Does Not Discriminate On The Basis Of An Interstate Element, It Does Not Violate The Dormant Commerce Clause.

The dormant Commerce Clause prevents states from "discriminat[ing] between transactions on the basis of some interstate element." *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1794 (2015) (quoting *Boston Stock Exch. v. State Tax Comm'n,* 429 U.S. 318, 332 n. 12 (1977)) (alteration in original). Its focus is to regulate "effects, not motives." *Id.* at 1801 n.4. In the arena of alcohol regulation, states transgress the dormant Commerce Clause by engaging in purely economic protectionist legislation—*i.e.*, discrimination that is not tied to the powers reserved by the Twenty-first Amendment. *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 741 (5th Cir. 2016) (*Cooper II*). Because the laws at issue here do not discriminate against out-of-staters—and, indeed, impose just as much on equivalent in-state businesses—there can be no constitutional violation.

The district court's determination that the corporation ban violated the dormant Commerce Clause was incorrect for three reasons. First, a discriminatory intent in enacting a statute is not enough, by itself, to create a violation. Second, the challengers here were unable to show that the Legislature—not the lobbyists—had a discriminatory intent in passing the corporation ban. Third, to the extent it is applicable, the State prevails under any sort of balancing test both because the statutes here relate to alcohol regulation and because there is no discriminatory effect on interstate commerce anyway.

A. Alleged Discriminatory Intent—Standing Alone—Does Not Offend the Dormant Commerce Clause.

A statute violates the dormant Commerce Clause when it discriminates—or will discriminate—against out-of-state economic interests. *Brown-Forman Distillers Corp. v. N. Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). Because a legislative intent to discriminate, standing alone, is insufficient to trigger a dormant Commerce Clause violation, the non-discriminatory Texas law here is constitutional.

While the literal terms of the Commerce Clause "speak only of powers bestowed upon Congress, the clause also contains a 'dormant' facet that serves as 'a substantive restriction on permissible state regulation of interstate commerce.'" *Cooper I*, 11 F.3d at 552 (quoting *Dennis v. Higgins*, 498 U.S. 349, 447 (1991)). That "negative" aspect of the Commerce Clause prevents states from enacting purely economic protectionist measures against out-of-state commerce. *Id.* If "a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," it will be struck down "without further inquiry." *Brown-Forman*, 476 U.S. at 579. If the "statute has only indirect effects on interstate commerce and regulates evenhandedly, [a court will] examine[] whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Id.* (citing *Pike*, 397 U.S. at 142). "In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Id.* (citing *Raymond Motor Trans., Inc. v. Rice*, 434 U.S. 429, 440-41 (1978)).

If the state law at issue does not alter the interstate nature of commerce, it cannot stand in the way of the federal government's power to regulate the same. Yet the district court, while acknowledging that the public corporation ban did not have a discriminatory effect on interstate commerce, held that a discriminatory purpose, by itself, was enough to invalidate the law and applied the *Arlington Heights* factors to judge whether a violation had taken place. ROA.9415. The district court's error was triggered by a misunderstanding of "discriminatory purpose" in the dormant Commerce Clause jurisprudence.

This Court has recognized that "[a] statute violates the dormant Commerce Clause where it discriminates against interstate commerce either facially, by purpose, or by effect." *Allstate*, 495 F.3d at 160. This formulation represents the different approaches a court may need to take in determining what a state has done. The language of a statute, even while appearing facially neutral, may have purposefully created a discriminatory regime against out-of-state commerce.

The analysis comes from *Bacchus*, 468 U.S. at 270, where the Supreme Court noted that the "economic protectionism" that violates the Commerce Clause can be seen in either "discriminatory purpose" or "discriminatory effect." There, without using language that expressly discriminated against out-of-staters, the Hawaiian legislature had specifically exempted its locally-sourced alcohol from an otherwise applicable tax in order to help its local industry. *Id.* It was thus unnecessary for the Court to "guess at the legislature's motivation, for it is undisputed that the purpose of the exemption was to aid Hawaiian industry." *Id.* at 271. The Court also noted that "the effect of the exemption is clearly discriminatory, in that it applies only to

locally produced beverages, even though it does not apply to all such products." *Id.* Importantly, though, while the Court acknowledged that "discriminatory purpose" was a basis for finding economic protectionism, it did so because there was actual discrimination against out-of-state commerce in the statutory text. *Id.* at 268 ("[T]he tax exemption here at issue seems clearly to discriminate on its face against interstate commerce by bestowing a commercial advantage on [local alcohol].").

Limiting inquiries of "discriminatory purpose" to instances where actual discrimination is taking place aligns with the Supreme Court's admonition that, at both steps of the dormant Commerce Clause analysis, the "effect of the statute on both local and interstate activity" is "the critical consideration." *Brown-Forman*, 476 U.S. at 579. Likewise, as the *Arlington Heights* factors themselves denote, the first step in determining whether there is "purposeful discrimination" is to consider whether there is a "clear pattern [of discrimination that] emerges from the effect of the state action." 429 U.S. at 266. If there is no discriminatory effect caused by the statute, there can be no pattern of discrimination and thus no reason to consider legislative purpose. Under the dormant Commerce Clause, it takes discrimination to trigger an inquiry into discriminatory purpose.

And so, while a court may look for a discriminatory purpose in evaluating a state law, there is a difference between discriminating on purpose and taking an action that does not discriminate even though a state legislature may have wanted to. A discriminatory intent cannot, standing alone, prove discriminatory purpose under the dormant Commerce Clause because pure intent is not reflected in the statutory text. The correct order of the inquiry is thus to see if there is (or will be) discrimination at

all before determining if that discrimination is purposeful. As in *Bacchus*, *see* 468 U.S. at 268-69, consideration of a legislature's intent makes sense only when the text of a law distinguishes between in-state and out-of-state commerce "facially, by purpose." *Allstate*, 495 F.3d at 160.

This is why the finding of a "discriminatory purpose" is always accompanied by a present or prospective discriminatory effect. Demonstrating a focus on effect, the Supreme Court has stated that the inquiry is not limited to a statute's name, description, or characterization when considering its purpose—the Court can determine the "practical impact" of the statute for itself. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). Thus, the determination of a statute's discriminatory purpose sheds light upon its discriminatory impact—whether present or future—thereby evidencing the statute's impermissible discrimination under the dormant Commerce Clause.

Accordingly, the only instances in which a circuit court has struck down a statute under the dormant Commerce Clause based on its "purpose" involved statutes that had either a prospective or present discriminatory effect. In *Waste Management Holdings, Inc. v. Gilmore*, the Fourth Circuit affirmed summary judgment for the plaintiffs based on the discriminatory purpose underlying three challenged statutes. 252 F.3d 316, 340, 343-44, 345 (4th Cir. 2001). Analyzing the recently enacted provisions, the Fourth Circuit acknowledged that there was a genuine issue of material fact regarding whether the provisions were discriminatory in effect. *Id.* at 335.[4] But

[4] The language in the court's discriminatory-effect analysis indicates that the parties were relying on evidence of prospective discrimination. *See, e.g.*, *Waste Management Holdings*, 252 F.3d at 334 (explaining the plaintiffs' contention that "the . .

because "an inherent component" of the defendants' "proffered purpose of [the] statutory provisions at issue [was] discrimination," the court found that there was no genuine issue of fact regarding the statutes' discriminatory purpose. *See id.* at 340, 349. Recognizing the prospective discriminatory effect of the provisions, enacted with a discriminatory purpose, the Fourth Circuit affirmed the district court's grant of summary judgment. *Id.* at 349.

Similarly, the Eighth Circuit struck down a state constitutional provision based on its discriminatory purpose when the provision would have an inherently discriminatory effect. *See S.D. Farm Bureau v. Hazeltine*, 340 F.3d 583, 596, 598 (8th Cir. 2003). The challenged provision was invalidated based on "the evidence in the record of a discriminatory purpose." *Id.* at 593. But, as numerous plaintiffs stated, the provision would clearly discriminate against out-of-staters once it went into effect. *See id.* at 588-89. The court seemed to take this as a given and, although it declined to explicitly address the amendment's discriminatory effect, the court's discriminatory-purpose analysis thus implicitly accounted for the future effect of the provision.

Here, the district court acknowledged that the corporation ban does not discriminate. ROA.9419. And with good reason. The statute treats in-state and out-of-state public corporations the same—all are "banned from the market whether or not they

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. [p]rovision *would* discriminate" and burden out-of-state waste "if the . . . [p]rovision [was] allowed to take effect . . . ") (emphasis added); *id.* at 335 (stating the plaintiffs' argument that the provisions, "if enforced, *would* have a discriminatory impact . . . ") (emphasis added).

are based in Texas or owned by Texans." ROA.9424. At the same time, small corporations that do not meet the statutory threshold "are allowed to sell liquor in the state whether or not they are based in Texas or owned by Texans." ROA.9424. The law blocks some Texas companies from participating in the market while there are out-of-state companies that currently sell liquor in Texas. ROA.9424. Section 22.16 realistically prohibits around 34 businesses from entering the Texas liquor market. ROA.9409, 14287, 14672. Of these 34, however, six (or more) are Texas firms. ROA.9409, 14287, 14672. Accordingly, while Texas residents comprise a mere 8% of the United States population, over 17% of the businesses affected by § 22.16 are Texas-based. ROA. 14672. Among these are well-known Texas-based interstate (and even international) businesses such as 7-Eleven, Valero, H-E-B, and Whole Foods Market, among others, who cannot own a package store permit. ROA.14287; 10505.

Under the dormant Commerce Clause, a legislative intent to discriminate is different than "*discriminat[ing]* against interstate commerce . . . by purpose." *Allstate*, 495 F.3d at 160 (emphasis added). Because Texas' ban on public corporations prevents both in-state companies and out-of-state companies from entering the liquor retail market, there is no discrimination in the statute and thus no reason to consider legislative purpose.

B. The Record Does Not Reflect That Texas Had a Discriminatory Purpose in Enacting the Public Corporation Ban.

Even if the law allowed the "bizarre" result of finding that a statute "intentionally discriminates" when it doesn't even discriminate at all, ROA.9424 n.4, the record here reveals that the plaintiffs did not carry their burden of showing that the law had a "discriminatory purpose." *Allstate*, 495 F.3d at 160 ("The burden of establishing that a challenged statute has a discriminatory purpose under the Commerce Clause falls on the party challenging the provision."). The Legislature's intent, an already elusive target, was not put on display here. The only evidence—and what the district court relied on—was declarations and actions of the TPSA representatives, made after the law was passed, along with isolated statements from a legislator taken out of context, even though this Court has repeatedly held that the remarks of one or two legislators cannot impute ill motive to the State law at issue. Most telling, however, is the fact that the district court departed from its own analytical framework taken from *Arlington Heights*. The court concluded that a "clear pattern of discrimination emerges from the effect" of the law, ROA.9415, even while admitting that the public corporation ban "does not have a discriminatory effect as defined by controlling precedent." ROA.9424. Indeed, the fact that the first *Arlington Heights* factor was assumed to be met prior to the discriminatory effect analysis undercuts the court's *Arlington Heights* determination altogether.

To begin, the first element of the *Arlington Heights* test for purposeful discrimination is only met when there is "a clear pattern, unexplainable on grounds other than [those prohibited], emerges from the effect of the state action even when the

governing legislation appears neutral on its face." 429 U.S. at 266. The corporation ban does not meet the criteria for this prong of the test for two independent reasons. First, there is no discriminatory effect—as the district court concluded, ROA.9424—and thus there can be no pattern of discrimination emerging from the effect of the state action.[5] Second, the rationales behind the statute show that it is explainable on grounds other than a prohibited reason, and thus the first *Arlington Heights* factor is not satisfied for that reason too.

The corporation ban is explained by at least two non-discriminatory reasons. One, unlike the provision in *South Dakota Farm Bureau*, the ban has a non-discriminatory purpose in regulating the liquor industry in a manner that promotes accountability and temperance—through price. As the State's expert Dr. Chaloupka testified, "alcohol follows the basic law of demand . . . . If you raise the price, people drink less. If the price goes down, people drink more." ROA.11004. Between wine, beer, and liquor, liquor consumption is the most responsive to these price changes. ROA.11004-05. And as a large corporation, Wal-Mart has prices that are below its

[5] The lack of discriminatory effect is only underscored by the package store permits owned by the 36 out-of-state businesses. *See, e.g.*, ROA.12083. Perhaps the district court was attempting to substitute a perceived *disparate* effect of a facially neutral law for a *discriminatory* effect. *See* ROA.9426-27 (attempting a disparate impact analysis to establish a burden on interstate commerce under *Pike*). Even if that satisfied the *Arlington Heights* test—which it does not—the analysis there was incorrect and there is no disparate impact on similarly situated out-of-state businesses. *See* Part I.C.2 (addressing interstate burden analysis under *Pike*). It is to be expected that most Texas alcohol retailers would be Texas owned, even absent any regulation.

competitors' average price 70.1% of the time. ROA.10972-73. Should Wal-Mart continue this trend by pricing liquor lower than its competitors, Texas could expect an increase in liquor consumption. That is why the House Research Organization bill analysis stated that "the bill would foster competition in the package liquor store market to keep prices reasonable." ROA.12037. In 2010, the economic costs for excessive drinking in Texas were around $18.8 billion. ROA.11007. Texas therefore has a legitimate interest in promoting a low level of alcohol consumption and the corporation ban furthers the State's goal of maintaining reasonable liquor prices, thereby promoting temperance.

Two, when the Texas Legislature considered § 22.16, "the need still remain[ed] to have real live human beings who are easily identifiable . . . who ultimately bear personal responsibility for the actions of the package store." ROA.14392. And as the Explanations and Arguments provided for the corporation ban warned, publicly traded corporations have "ownership [that] may be diluted among many thousands of different people and in which there is no one who is ultimately personally responsible." ROA.14392. Accordingly, Senator Armbrister explained that corporation ban was an attempt to help track the ownership of package stores. ROA.12027-28. Thus there is substantial evidence, contemporaneous with its passage, that § 22.16 was enacted to ensure the accountability of liquor stores in addition to regulating prices.[6]

[6] The Legislative history repeatedly shows a distinction between large (public) corporations and small (non-public) businesses. *See* ROA.9197 (summarizing available contemporaneous legislative history).

Tellingly, Wal-Mart did not offer probative evidence of a discriminatory purpose. Instead, Wal-Mart relied upon post-enactment statements by third-parties—statements that are not reflective of the Legislature's intent. *Allstate*, 495 F.3d at 161; *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1082 (5th Cir. 1980). Specifically, Wal-Mart pointed to trial testimony of Mr. Niemann, the challenged bill's witness, as direct evidence of discriminatory intent. ROA.9120. But Mr. Niemann's testimony, explaining *TPSA's* "many reasons" for favoring the bill, sheds no light upon the *Legislature's* intention in passing the bill. ROA.10808. In fact, TPSA's desire to "preserve a stable business climate," which Wal-Mart characterizes as discriminatory, was not even conveyed to the Legislature. ROA.10808.

In addition, Wal-Mart derives "indirect evidence of discriminatory purpose" from an examination of the bill's true purpose—accountability. ROA.9121. Since Texas-owned corporations were previously allowed to hold package store permits, and out-of-state corporations were previously allowed to sell spirits in bars, Wal-Mart assumes that there had been no prior accountability problem to prompt such action. ROA.9121. But the dormant Commerce Clause prohibits statutes that discriminate, not statutes that a Plaintiff can argue are premature. Accordingly, in the discriminatory-purpose inquiry, this Court aims at ferreting out discrimination in challenged legislation, not whether the statute has a confirmed utility. *See Allstate*, 495 F.3d at 161. Since Wal-Mart has offered neither direct nor indirect evidence that may be credited to suggest that the Legislature enacted the corporation ban with a discriminatory purpose, its discriminatory-purpose claim fails. *See id.* at 160 (placing burden for showing discriminatory purpose on the party challenging the statute).

The district court, however, held that the statute was passed with a discriminatory purpose based primarily on assumptions made about statements from a single legislator. Senator Armbrister agreed that the purpose of the law was "to make sure that package stores are owned by 'somebody from Texas' and to guarantee that 'you can't have a package store inside a Wal-Mart.'" ROA.9416 (quoting portions of Senator Armbrister's conversation with Senator Henderson, ROA.14021, 14024). Both of these statements have a rationale other than protectionism, though, and thus cannot be used to show an illicit legislative intent.

First, the statement about having "somebody from Texas" that you can get in touch with was a statement related to a prior version of the law, not the corporation ban under discussion at the time. *See* ROA.14024. But more importantly, as noted above, having "somebody from Texas" is important to increasing both accountability and responsiveness to attempts to work out potential regulatory violations. *See* ROA.10823 (explaining the accountability value in preventing large corporations, no matter their origin, from entering the market). Indeed, the very next thing said in the transcript was that the legislators wanted to be able to get ahold of someone "to enforce the Code." ROA.14024. While this sort of accountability argument may not be sufficient to save a law from a dormant Commerce Clause challenge to the direct out-of-state discrimination present in *Cooper I*, 11 F.3d at 553, it is certainly not a protectionist rationale—just an accountability rationale. Accountability for adherence to liquor statutes has been held elsewhere to be a sufficient rationale for defeating a dormant Commerce Clause challenge to a residency requirement. *See S. Wine & Spirits of Am., Inc. v. Div. of Alcohol and Tobacco Control*, 731 F.3d 799, 802-

03 (8th Cir. 2013). Because that is so, it certainly should not be able to represent a discriminatory purpose.

In the district court's view, though, this statement related directly to the State losing its ability to keep out-of-staters from entering the market through its residency requirement in *Cooper I*. But even assuming the Legislature only adopted the corporation ban in response to *Cooper I*, that fact is irrelevant. The Legislature is allowed to have a non-protectionist rationale for adopting a law that it fears may be undermined when a separate statute that violates the dormant Commerce Clause is struck down. *See* ROA.10819-20 (explaining the realization that preventing large corporations from entering the market, no matter their origin, was important). In fact, the Legislature changed the residency requirement from three years to one while *Cooper I* was pending, and also adopted the corporation ban—both of which were enforced simultaneously. This meant that the Texas corporations began to be banned under § 22.16 even while the out-of-state corporations were already banned by a residency requirement. The *only* companies affected by the corporation ban—both when it was adopted and for the decade following—were Texas companies. If the Legislature had a discriminatory purpose in the corporation ban, it was *only* against Texas businesses.

Second, as Senator Armbrister noted, the corporation ban indeed guarantees that "you can't have a package store inside a Wal-Mart." But that is both (1) merely a true statement since, even if Wal-Mart had "P" permits, there is a separate premises requirement for liquor stores; and (2) a statement about the desire to keep large

retail corporations—of which Wal-Mart is an archetype—out of the liquor retail industry. The Senator could have just as easily substituted in H-E-B or 7-Eleven (both Texas corporations) as a token representative of a large corporation. Referencing Wal-Mart was just the usage of a ready example, not a protectionist screed. The problem was the district court's fixation on the statements from and evidence surrounding the TPSA lobbyists that were made long after the passage of the law. Those statements say nothing, of course, about the intent at the time of the 181 Texas legislators who voted on the bill, but they colored the district court's interpretation of Senator Armbrister's statements. Yet because the two "smoking gun" statements from the Senator must be read one way instead of another to assume discriminatory motive, they are insufficient to use for legislative intent. *See United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("[A court] will not strike down an otherwise constitutional statute on the basis of an *alleged* illicit legislative motive." (emphasis added)).

But even if Senator Armbrister's comments were assumed to be protectionist, and that type of "evidence" were admissible to this analysis, the statements would still fall far short of meeting the threshold for imputing legislative intent to a law. This Court has held that "stray protectionist remarks of certain legislators are insufficient to condemn" a statute. *Allstate*, 495 F.3d at 161. At the most, the comments used by the district court are paradigmatic stray protectionist remarks. Nevertheless, the court relied on such stray remarks, along with the post-enactment statements of lobbyists, to find § 22.16's accountability purpose "pretextual." ROA.9405-06. Such a use of "legislative history"—if it can even be called that—lacks boundaries, inviting subjective inferences from selective pieces of evidence. It

is no wonder the Supreme Court has labeled the subjective inquiry used to invalidate a statute based solely on legislative history a "hazardous matter." *O'Brien*, 391 U.S. at 383. It should be rejected here. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("As a general rule, 'legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.'" (quoting *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961))).

Without a credible way to show the alleged "discriminatory purpose" of the Texas Legislature in adopting the corporation ban, there is no dormant Commerce Clause violation.

C. The Non-Discriminatory Corporation Ban Survives Any Attempt at a Balancing Analysis.

As a backstop for its discriminatory purpose analysis, the district court also deployed the *Pike* balancing test to find that the public corporation ban violated the dormant Commerce Clause. ROA.9425-26. The court held that § 22.16 "imposes a severe burden on interstate commerce" and that "[w]hile the statute has some putative benefits, those benefits can be easily and more directly achieved through a variety of alternative regulatory measures." ROA.9432. The mistake was two-fold. First, even assuming *Pike*'s applicability, a state alcohol regulation cannot fail that test. Second, the corporation ban survives *Pike* balancing both because it treats similarly situated entities the same and because there are good reasons for having the regulation in place (as seen in the district court's equal protection analysis, ROA.9436-39). Even *Pike* itself recognized that a statute should not fail "where the

propriety of local regulation has long been recognized." 397 U.S. at 143. State alcohol regulation is just such an area and there is no reason to depart from that guidance here.[7]

1. *Pike* balancing is no obstacle for state alcohol regulations.

A court engaged in the *Pike* analysis for a state alcohol regulation is asking the wrong question. That is because the normal two-pronged dormant Commerce Clause test is supplemented in those cases with a consideration of "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Bacchus*, 468 U.S. at 275-76 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)). In other words, some discrimination (or at least differentiation) in commerce is to be expected with state alcohol regulation. As this Court reiterated in *Cooper II*, the Commerce Clause is applicable to state alcohol regulations. 820 F.3d at 743. Even so, "it applies differently than it does to products whose regulation is not authorized by a specific constitutional amendment." *Wine Country Gift Baskets.com*, 612 F.3d at 820.

The Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of laws thereof, is hereby prohibited."

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[7] When Wal-Mart argued for *Pike* balancing after the close of evidence, there was no evidence offered concerning the burden created by the law or how it weighed against putative local benefits. ROA.9105, 9126-27, 9230, 9257-59.

U.S. Const. amend. XXI, § 2. This provision "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Accordingly, state liquor-control policies "are supported by a strong presumption of validity and should not be set aside lightly." *North Dakota v. United States*, 495 U.S. 423, 433 (1990) (plurality op.). While the Twenty-first Amendment "does not supersede other provisions of the Constitution," *Granholm v. Heald*, 544 U.S. 460, 486 (2005), it certainly gives Texas the power "to control sales of liquor in [the State]," *Brown-Forman*, 476 U.S. at 585.

Pike, on the other hand, looks at any regulation challenged under the dormant Commerce Clause to see if it incidentally burdens interstate commerce, and then weighs any "putative local benefits" of the law against the burdens placed on interstate commerce. 397 U.S. at 142. As the district court's resolution here showed, applying *Pike* is "quite intrusive . . . put[ting] courts in an uncomfortable and almost legislative role." *Lebamoff Enters., Inc. v. Huskey,* 66 F.3d 455, 468 (7th Cir. 2012) (Hamilton, J., concurring). Hence Justice Scalia's admonition that *Pike* "is ill suited to the judicial function and should be undertaken rarely if at all." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring). Indeed, it puts a court in the position of estimating how "severe" the burden on interstate commerce is and then weighing that against the statute's "putative benefits" with an eye toward how "those benefits can be easily and more directly achieved through a variety of alternative regulatory measures." ROA.9432. It is hard to see how this does not violate the separation of powers, let alone constitutes good jurisprudence. But if that

is true in the context of ordinary commerce, it is doubly the case in the arena of alcohol regulation, where states are given greater latitude in their legislative determinations. *North Dakota*, 495 U.S. at 433.

In light of the Twenty-first Amendment's recognition of state alcohol regulations, it is questionable to what extent *Pike* should apply at all here. Indeed, "[t]his case pits the twenty-first amendment, which appears in the Constitution, against the 'dormant commerce clause,' which does not." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000). And while *Granholm* prohibits *express* discrimination against out-of-state alcohol producers under the Commerce Clause, 544 U.S. at 485-86, the Supreme Court has never actually endorsed using the *Pike* balancing test for potential violations in the realm of alcohol regulation. As the district court noted, however, *Pike* is cited in Supreme Court alcohol cases such as *Brown-Forman*, 476 U.S. at 579, and *Bacchus*, 468 U.S. at 270. ROA.9425 n.5. This Court has also referenced *Pike* balancing in such cases. *See, e.g.*, *Cooper I*, 11 F.3d at 553. A close analysis, however, reveals that *Pike* was not what resolved the issue in those cases. *See, e.g.*, *Lebamoff*, 666 F.3d at 466-68 (Hamilton, J., concurring). And for good reason.

The Supreme Court's recognition that the Twenty-first Amendment "created an exception to the normal operation of the Commerce Clause," *Capital Cities Cable*, 467 U.S. at 712, undermines the idea that *Pike* balancing should coexist with the accepted state of alcohol regulation. *See Lebamoff*, 666 F.3d at 468 (Hamilton, J., concurring) ("If [*Pike*] were applied more broadly to state alcohol laws, there would be little left of states' power under section 2 of the amendment."). While states cannot regulate what companies beyond their borders do, *Capital Cities Cable*, 467 U.S. at

714, or discriminate against out-of-staters, *Bacchus*, 468 U.S. at 273, 276, they retain "virtually complete control" over their own liquor distribution systems. *Granholm*, 544 U.S. at 488. For example, it is undisputed that states can ban alcohol altogether, *id.*, and the three-tiered systems for alcohol distribution are "unquestionably legitimate," *id.* at 489. In no case, however, has a court even attempted to balance the state goals underlying the burdens these laws place on interstate commerce. It would be a nonsensical exercise. Indeed, a complete ban on alcohol would place the most severe burden on interstate commerce and could not survive a true *Pike* balancing approach. But such a ban would be constitutional. *Id.* at 488-89.

It is unsurprising, then, that this Court has never used *Pike* to analyze a dormant Commerce Clause challenge to an alcohol regulation. Even when a regulation differentiates between in-state and out-of-state retailers, but has been found to be non-discriminatory under step one of the dormant Commerce Clause, *Pike* is not deployed. *Wine Country Gift Baskets.com*, 612 F.3d at 820. That is because the dormant Commerce Clause "applies differently" to alcohol regulations. *Id.*[8]

All this leads to the conclusion that *Pike* is either wholly inappropriate for state alcohol regulations or that the Twenty-first Amendment provides a thumb on the balancing scale that always tips in favor of the state when *Pike* would otherwise be

[8] The parties briefed, and at oral argument the challengers specifically asked the Court to invoke, the *Pike* analysis. Oral Argument at 12:05, *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809 (5th Cir. 2010) (No. 08-10146). That balancing test does not appear in the opinion upholding the Texas regulation that differentiated between in-state and out-of-state retailers.

used. Either way, the district court's novel use of *Pike* is unsupported. *See Lebamoff*, 666 F.3d at 467 (Hamilton, J., concurring) ("What we do not find is a case applying *Pike* balancing and holding that a non-discriminatory state alcohol law flunks."). There is no basis for applying a least restrictive means test to the corporation ban as the district court did here, and Texas is not obliged to justify its neutral legislative decisions regarding alcohol beyond the rational basis underlying them.

2. The public corporation ban would survive *Pike* anyway.

Even if state alcohol regulations are subject to an actual *Pike* balancing analysis, the public corporation ban would satisfy that low threshold here for two reasons. First, the law in question does not burden interstate commerce more than intrastate commerce. Second, the Twenty-first Amendment makes regulation of liquor retail sales "largely a State's prerogative" when it comes to promoting temperance. *Wine Country Gift Baskets.com*, 612 F.3d at 820.

As this Court has held, "[t]o succeed in a challenge to a regulation under the *Pike* balancing test, the challenging party must show that the regulation has 'a disparate impact on interstate commerce.'" *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 502 (5th Cir. 2004) (quoting *Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 75 (2d Cir. 1998)). The "incidental burdens to which *Pike* refers are the burdens on interstate commerce that exceed the burdens on intrastate commerce." *Id.* (quoting *Automated Salvage*, 155 F.3d at 75). Yet Wal-Mart has only identified costs and burdens that fall equally on all prospective package store owners, no matter their home state. Because

the statute places no burdens on *inter*state commerce that it does not place on *intra*-state commerce, there is no burden under *Pike* to balance against the off-setting benefits. *Nat'l Solid Waste Mgmt. Ass'n*, 389 F.3d at 502.

To establish an incidental burden against out-of-state commerce by a facially neutral law, the appropriate inquiry is to see how the law treats similarly situated individuals or groups. *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 500 (5th Cir. 2001) (noting, in applying the *Pike* analysis, that Supreme Court "jurisprudence finds discrimination only when a State discriminates among similarly situated in-state and out-of-state interests"). But in weighing the effects of the corporation ban on in-state versus out-of-state businesses, the district court made a critical switch in comparing the groups of businesses in question. Instead of in-state and out-of-state corporations, the district court compared in-state and out-of-state "realistic potential entrants" to the liquor market. ROA.9409. Because the ban had blocked the majority of potential out-of-state businesses that would enter the market, but only a few Texas businesses, "the [c]ourt conclude[d] that the public corporation ban disproportionately burdens out-of-state companies." ROA.9411.

This sleight of hand compares the wrong things. While the ban likely affects at least six corporations in Texas, ROA.9409, the district court sought to compare those six *corporations* to the total number of *companies* likely to do business in Texas, or six out of almost 2000—a very small percentage of companies affected. ROA.9409. At the same time, the district court artificially deflated the number of comparators for Wal-Mart, refusing to count any company assumed not to be large enough to actually attempt to enter the Texas market. That meant that the out-of-

state *corporations* were only compared against *companies that would probably enter the market*, which was then defined as large, out-of-state *corporations*. In so crafting the comparison group, the district court arrived at a 28 out of 28 number—a very large percentage of companies affected. ROA.9409.

The problem with the district court's assumptions, of course, is that not all of those companies are similarly situated. Large corporations, for reasons that make it rational for Texas to exclude them, are only similarly situated with other large corporations. The appropriate inquiry is to compare the 100% of large, public corporations in Texas that are blocked from entering the market with the 100% of large, public corporations from out-of-state that are prevented from selling liquor in Texas. Once the correct comparators are used, it is clear that the corporation ban treats similar entities the same and thus does not differentiate under *Pike*. *Ford Motor Co.*, 264 F.3d at 500.

But not only would the regulation survive a normal *Pike* analysis, the inquiry could not account for the measure of deference the Supreme Court has instructed is appropriate for alcohol regulations. It is obviously "difficult to imply a restriction on state authority (to regulate commerce) expressly created in another constitutional provision (to regulate retail sales of alcohol)." *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608, 632 (6th Cir. 2018) (Sutton, J., concurring in part and dissenting in part). Addressing the tension between the Commerce Clause and the Twenty-first Amendment, this Court has recognized that "[r]egulating alcoholic beverage retailing is largely a State's prerogative," and that the dormant Commerce Clause "applies differently" to the regulation of alcoholic beverages. *Wine Country Gift*

Baskets.com, 612 F.3d at 820. That "different" application means that the Commerce Clause applies "to a *lesser extent* when the [challenged] regulations concern the retailer . . . tier as distinguished from the producer tier." *Cooper II*, 820 F.3d at 743 (emphasis added). Thus the dormant Commerce Clause applies less forcefully to state regulations of alcoholic-beverage retailers.

To analyze a challenged alcoholic-beverage regulation, this Court asks "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Id.* at 741 (quoting *Capital Cities Cable*, 467 U.S. at 714). Moreover, the interests of "promoting temperance" and "ensuring orderly market conditions" fall within the "core of the State's power under the Twenty-first Amendment." *North Dakota*, 495 U.S. at 432. Section 22.16 implicates Texas's interest in controlling the sale of liquor within the state—and thus an interest in promoting temperance. Since the dormant Commerce Clause less forcefully applies to § 22.16, and § 22.16 implicates the Twenty-first Amendment's core concern of promoting temperance, the statute should be upheld.

II. Texas's Longstanding Rules For Permit Limits Cannot Be Enjoined On Equal Protection Grounds.

Economic regulations—like the liquor permit limit regime challenged here under the Equal Protection Clause—are subject to rational basis review. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). This "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Id.* In fact, when it comes to

economic policy, a non-discriminatory statute that does not infringe fundamental constitutional rights "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* (collecting cases). And on top of this is the Supreme Court's instruction that state liquor control policies receive an even higher presumption of validity in light of the Twenty-first Amendment. *See North Dakota*, 495 U.S. at 433. The statutes at issue here thus pass rational basis review without difficulty.[9]

The district court's use of the Equal Protection Clause to enjoin the entire permit cap regime was wrong for two reasons. First, the consanguinity exception has multiple rational bases underlying it that were both misunderstood by the district court and unrebutted factually by the Plaintiffs. Second, even if the consanguinity exception could not clear the low bar of rational basis review, the proper remedy—based on the structure of the statutory scheme—would be simply to enjoin the exception to the permit rule, not the rule itself.

A. The Multiple Rationales Underlying the Consanguinity Exception Confirm its Constitutionality.

Texas—like other jurisdictions across the country—saw the excesses that pervaded the alcoholic beverage industry leading up to and during Prohibition, and the State's early restrictions on package-store permits responded to these immediate

[9] Unless the public corporation ban (§ 22.16) is found unconstitutional, Plaintiffs have no injury stemming from the five-permit limit (§ 22.04) and consanguinity exception (§ 22.05), and thus no standing to challenge them. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

concerns. In the wake of the Twenty-first Amendment's passage, the Legislature adopted the five-permit limit. ROA.11660. The consanguinity exception was passed fifteen years later. ROA.11882. As the district court noted, there was nothing in the legislative history that would suggest either statute had a discriminatory purpose, ROA.9432-33, and neither statute has a discriminatory effect nor burdens interstate commerce, ROA.9433-34. This left only the Equal Protection Clause claims, primarily against the consanguinity exception since the five-permit limit obviously limits alcohol availability and consumption.

Critically, though the district court found no equal protection violation with the corporation ban and the five-permit limit, the court failed to recognize that the same rationale also applies to the consanguinity exception—large corporations are unable to use the exception because they are large corporations, the very type of business that the Legislature looked (with good reason) to exclude from the market. *See* ROA.9436-39; 9441. To be sure, the consanguinity exception treats businesses with close family members differently than those without—but the Equal Protection Clause does not forbid such differentiation. *Nordlinger*, 505 U.S. at 10. And "legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *Id.* (quoting *McGowan*, 366 U.S. at 425-26). The "fit" between a law's means and ends need not be perfect, *Harris v. Hahn*, 827 F.3d 359, 365 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 650 (2017) (citation omitted), and it matters not whether a legislature chose the "fairest or most rational scheme," *Dandridge v. Williams,* 397 U.S. 471, 485 (1970), or the most direct means, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813-14 (1976). In an equal

protection challenge, it is not the judiciary's role to "decide if such policy considerations are superior." *Alford v. City of Lubbock,* 664 F.2d 1263, 1267 (5th Cir. 1982).

Here, the multiple rationales for the Legislature enacting the consanguinity exception in § 22.05 preclude an equal protection violation. First, along with the five-permit limit, § 22.05 promotes small retailers and family businesses. The consanguinity exception grew out of an organic process in which the Legislature was modifying the five-permit limit and then reacting to unintended consequences of that change. In 1949, when the permit limit was made more restrictive, the Legislature allowed exempted entities to consolidate their package-store permits into one legal entity. *See* ROA.14380. Two years later, in an effort to lessen the unintended harm on family businesses from the tightening of the provisions, the State expanded the consolidation provision to allow persons related within the first degree of consanguinity to consolidate their permits. *See* ROA.14380. The State had long been concerned with avoiding the "monopolistic" tendencies of tied-houses—and by 1951, it had seen entities like Walgreens seek creative ways to escape the five-permit limit. ROA.11809-11. Given this historical setting, it was rational for the Legislature to determine that small businesses—particularly those that were family-operated, like many of largest package-store permittees in Texas today—were the most suitable to lead any controlled expansion of the Texas retail liquor market. That is, history suggested that Texas could more effectively guard against the social ills and excesses of the tied-house era by favoring small retailers, like those owned by families.

The district court rejected TABC's argument that the exception promotes family business, reasoning that it only promotes businesses with certain types of family

members and that a package store owner could use the exception to obtain more permits even if the family members had no involvement in the company whatsoever. ROA.9442. Going further, the court argued that the statute could even have the practical effect of discouraging family members from being part of the business because, in doing so, they would be unable to get additional permits that could then be consolidated. ROA.9443. While those arguments are plausible—and certainly policy considerations for Wal-Mart to use in their continued lobbying efforts—they (1) have no evidentiary basis in the record; and (2) do not defeat the facts that are included in the record indicating that many families have used the consanguinity exception to grow family businesses. Indeed, all of the liquor store chains in Texas are just that: family businesses. ROA.8555, 10895, 11199. Plaintiffs wishing to challenge a law under rational basis review must "adduc[e] evidence of irrationality." *St. Joseph Abbey*, 712 F.3d at 223. The only evidence adduced concerning family businesses and the consanguinity exception indicates that it has been a success.

Moreover, when the Legislature passed the exception, it would have considered the practical benefits of permit consolidation for a family business, ROA.14380-81, rather than the potential for exploiting a potential loophole that the district court has pointed out. The Texas Legislature simply uses consanguinity as a proxy for close association (as it is for most people). *See, e.g.*, Tex. Alco. Bev. Code § 11.13 (preventing, in some circumstances, those within a fourth degree of consanguinity of someone who has lost an alcohol permit from obtaining a permit at the same location). Thus it is rational to use consanguinity to suppose close association between those consolidating permits and let it be of assistance to a small business. Again, the

Legislature need not have chosen the "fairest or most rational scheme." *Dandridge,* 397 U.S. at 485. And a court's ability to develop counter-factual hypotheticals (based on no evidence from the challengers to the law) that could arguably undermine the Legislature's goal does not mean that the goal is not met in the mine run of cases—the "fit" between a law's means and ends need not be perfect. *Harris*, 827 F.3d at 365. Most importantly, the challengers have not shown that it was unreasonable for the Legislature to believe it was helping family businesses at the time the law was passed and thus there is a "reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Commc'ns*, 508 U.S. at 313.

The district court also rejected the argument that the exception promotes small business since it places a ceiling on the growth of any one package store company while letting others get around the limit and grow large package store chains. ROA.9443. While there is one package store chain in Texas that owns over 150 stores, many small businesses either own (or have the potential to own) six to ten permits. The provision lets small businesses grow, especially across the State in areas where the larger package store chains do not operate. The district court may be correct (even though it was not shown here) that small businesses would profit even more if every package store permit owner were capped at five. That is not how rational basis review works. The State is allowed to balance multiple interests—such as small business growth versus sufficient distribution across the State versus preserving its three-tier distribution system—and arrive at a solution that is always free to be reworked through the political process. *Vance v. Bradley,* 440 U.S. 93, 97 (1979)

("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.").

Second, § 22.05 can be upheld as providing a succession mechanism that would allow package-store permittees to maintain multiple permits within their family. The record reflects that permittees have consolidated their permits with family members for estate planning purposes. ROA.10717. Yet the consolidation process does not have to result in permittees holding more than five permits—*i.e.*, the "chain stores" that are the sole focus of Wal-Mart's challenge to the consanguinity provision. Indeed, § 22.05 has been utilized as a succession mechanism in instances where the permittees have less than five permits. ROA.10717. Wal-Mart adduced no evidence to show that it would be impermissible to apply § 22.05 in this scenario—even though its facial challenge requires it to do so. *See Reno v. Flores*, 507 U.S. 292, 301 (1993). Nor has Wal-Mart established that it would have been irrational for the Legislature to have adopted this kind of regulatory mechanism.

The district court was "unclear" how the permit consolidation process might help with estate planning and held that there was no rational relationship between the two. ROA.9443-44. But this is as simple as allowing a father who is retiring or about to die to transfer package store permits to a daughter who already holds permits of her own. ROA.14381. The permits then stay in the family and the family business grows. Without the exception, those permits could not be held by the daughter and the father's business would die with him. Though the district court

found this rationale to "border[] on nonsensical," ROA.9444, the overall scheme—aimed at promoting family business—would be advanced through the consanguinity exception to the five-permit limit. And even if the district court were correct that "there are many tools available to a package store owner who wants to ensure her business assets are appropriately transferred after her death," ROA.9444, the Legislature is not obligated to make such an owner use other tools when the one provided most efficiently and easily transfers the asset in question under the liquor regulation regime: the permit.

Third, § 22.05 can be upheld as a providing an opportunity for limited growth of the retail liquor marketplace in those areas where it is needed—namely, the State's larger cities. The record evidence establishes that the consanguinity exception is an appropriate market-based approach to regulating distilled spirits sales in Texas, allowing for some expansion of retailers without altering the State's low consumption levels. ROA.11440-49. Indeed, the State's per-capita liquor consumption has remained consistently low for decades even with § 22.05 in place. ROA.11310-11.

The district court discounted this rationale too, arguing that the exception did not necessarily mean that package store companies would grow in targeted areas where growth was needed. ROA.9443-44. The court was correct that the law does not mandate such strategic growth, but that is exactly what has happened. As the State correctly predicted, the chain package stores are more concentrated in the more populated areas. This stems from the fact that they may be larger than other package store businesses, but they still do not approach the distribution capacity—

and thus the smaller market saturation capability—of the large corporations such as H-E-B and Wal-Mart that proliferate throughout the State. That means the larger family businesses—*i.e.*, the chain package stores—provide more liquor in concentrated urban areas without widening out to the outlying areas. The district court thought that using the consanguinity exception as a targeted growth strategy "simply beggars belief." ROA.9444. Not only does that overlook the practical economic realities in the Texas liquor market, it is a conclusory assumption that cannot support overturning a state law on rational basis grounds.

Because of these rational bases, Wal-Mart's equal protection challenge to § 22.05 should be rejected. The plaintiff bears a heavy burden to prevail on an equal protection claim and must "negative every conceivable basis which might support" a challenged law, whether or not that basis has a foundation in the legislative record. *Beach Commc'ns*, 508 U.S. at 313-15. This high threshold of proof demands more than "simple arguments of perceived unfairness." *Abdullah v. Comm'r of Ins.*, 84 F.3d 18, 20 (1st Cir. 1996). And, in a facial challenge, the plaintiff must establish there is no set of circumstances under which the statues could validly apply. *Flores*, 507 U.S. at 301. Those difficult burdens for the challengers have not been met here.

B. The Appropriate Remedy for a Violation by the Consanguinity Exception Would be to Strike the Exception, Not the Constitutional Five-Permit Limit.

In the law, it is generally disfavored to let the exception swallow the rule. This case is no different. Relying on this Court's decision in *Cox v. Schweiker*, 684 F.2d 310, 317 (5th Cir. 1982), the district court determined that "the appropriate remedy

is to 'extend the coverage of the statute to include those who are aggrieved by the exclusion.'" ROA.9445 (quoting *Califano*, 443 U.S. at 89). The court thus enjoined enforcement of both the consanguinity exception and the five-permit limit. ROA.9445.

It would have been more appropriate to enjoin the exception rather than to enjoin the five-permit limit. To begin, the cases supporting the injunction—involving the issuance of federal financial-assistance benefits—are factually distinguishable from Plaintiffs' suit here. And none supports eliminating an eighty-year-old permit limit that the district court itself upheld against constitutional challenge. *Califano*, for instance, involved Social Security benefits given to families whose dependent children were deprived of parental support because of the unemployment of the father but denied when it was because of the unemployment of the mother. 443 U.S. at 78. All the parties agreed at the trial court that extension of the benefits was the appropriate remedy, since it was a federal welfare program, and the Court approved that solution. *Id.* at 90-91. Likewise, in *Cox*, the remedy involved an extension of survivor's benefits on behalf of the illegitimate child of a deceased wage earner. 684 F.2d at 316-17. To the contrary, the consanguinity exception is not a stand-alone welfare benefit adopted to assist a needy group that others such as Wal-Mart must be included in to prevent a miscarriage of justice. After all, as Plaintiffs argue, the ones taking advantage of the consanguinity exception are large businesses themselves—not "innocent recipients of government largesse," *Califano*, 443 U.S. at 90, like the beneficiaries in the cases cited by the district court. ROA.9445.

In any event, "when a statute benefits one class . . . and excludes another from the benefit," the choice between declaring the statute a nullity and extending its coverage "is governed by the legislature's intent, as revealed by the statute at hand." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698–99 (2017); *see also Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006) ("[T]he touchstone for any decision about remedy is legislative intent . . . ."). Relevant to this analysis is "the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Sessions*, 137 S. Ct. at 1700 (quoting *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984)). And a federal court has "more limited discretion" in this realm when it is "confronted with state statutes." *Black United Fund of N.J., Inc. v. Kean*, 763 F.2d 156, 161 (3d Cir. 1985).

From the beginning, the permit limit has been one of the centerpieces of Texas liquor regulation. To remove it would undermine the entire system. Moreover, the five-permit cap was in place for some time prior to the limited exception instituted by the consanguinity exception. ROA.11660, 11882. And the permit limit was the piece of the statutory scheme that the Legislature was concerned about when it began the revision process, tightening the requirements for permitting, that later triggered a concern for family businesses. ROA.14380. If protecting family business was an irrational concern—as the district court postulated—then only the tightening of the permit requirements remains, and the appropriate remedy is severing the exception rather than enjoining the rule.

Conclusion

The Court should reverse the district court's injunction of State law.

Respectfully submitted.

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On August 29, 2018, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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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. Sullivan,

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