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
No. 1:15-CV-134-RP, Robert Pitman, Judge Presiding

PRINCIPAL AND RESPONSE BRIEF FOR PLAINTIFFS-APPELLEES WAL-MART STORES, INCORPORATED, *ET AL.*

Neal S. Manne
Alexander L. Kaplan
Chanler A. Langham
Michael C. Kelso
SUSMAN GODFREY LLP
1000 Louisiana Street, Suite 5100
Houston, Texas 77002
Tel.: (713) 651-9366

Steven M. Shepard
SUSMAN GODFREY LLP
1301 Avenue of the Americas
32nd Floor
New York, NY 10019-6023
Tel.: (212) 729-2010

Mark T. Mitchell
Frederick W. Sultan
FOLEY GARDERE
Suite 3000
600 Congress Avenue
Austin, TX 78701-000
Tel.: (512) 542-7065

CERTIFICATE OF INTERESTED PERSONS

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.

Plaintiff–Appellee Wal-Mart Stores, Inc., is a Delaware corporation that is publicly traded on the New York Stock Exchange, with its headquarters in Bentonville, Arkansas. Effective February 1, 2018, Wal-Mart Stores, Inc., changed its legal name to Walmart Inc. Walmart Inc. has no parent corporation. Alice L. Walton, Jim C. Walton, the John T. Walton Estate Trust, S. Robson Walton, Walton Enterprises, LLC, and the Walton Family Holdings Trust, each have a greater than 10% beneficial ownership of stock issued by Walmart Inc.

Plaintiff–Appellee Wal-Mart Stores Texas, LLC, is a Delaware limited liability company and a wholly-owned, indirect subsidiary of Walmart Inc. with its headquarters in Bentonville, Arkansas.

Plaintiff–Appellee Sam's East, Inc. is an Arkansas corporation and a wholly owned-indirect subsidiary of Walmart Inc. with its headquarters in Bentonville, Arkansas.

Plaintiff–Appellee Quality Licensing Corp. is a Texas corporation and a wholly-owned, indirect subsidiary of Wal-Mart Stores Texas, LLC.

Plaintiffs–Appellees are represented in the district court by Neal S. Manne, Alexander L. Kaplan, Chanler A. Langham, Steven M. Shepard, and Michael C. Kelso of Susman Godfrey L.L.P. and Mark Mitchell and Frederick Sultan of Foley Gardere.

Defendants–Appellees are represented by Adam Bitter and John Sullivan of the Texas Attorney General's Office.

The Texas Package Stores Association is the Intervenor–Appellant in this case.

Intervenor–Appellant the Texas Package Stores Association is represented by G. Alan Waldrop and Ryan D.V. Greene of Terrill & Waldrop.

/s/ Steven M. Shepard
Steven M. Shepard

Counsel of Record for Plaintiffs–Appellees and Cross-Appellants

STATEMENT REGARDING ORAL ARGUMENT

Walmart respectfully submits that oral argument will be helpful to the Court and is appropriate. This appeal involves a lengthy factual record developed during a one-week bench trial. The District Court enjoined discriminatory and irrational Texas statutes that violate the United States Constitution. The court's order vindicated important rights of Walmart and other retailers.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Federal Statutes

Federal Rules

Texas Constitutional Provisions

State Statutes

ISSUES PRESENTED FOR REVIEW IN THE PRINCIPAL APPEAL

1. Did the District Court correctly hold that Texas's law forbidding "public corporations" from obtaining a package-store permit violates the Commerce Clause?

2. Did the District Court correctly hold that Texas's arbitrary limit on the number of package-store permits an entity may obtain violates the Equal Protection Clause?

3. Did the District Court act within its discretion when it remedied the Equal Protection violation by extending benefits to the excluded class?

STATEMENT OF THE CASE

In 1995, the Texas Legislature enacted a public-corporation ban that forbids any entity with more than 35 owners from obtaining a permit to operate a "package store" (liquor store). The ban is unique to Texas—no other state has such a prohibition. The ban's purpose was to preserve the discriminatory effect of Texas's residency requirements, which had long restricted package-store permits to Texans only. That discriminatory effect needed preserving because of this Court's decision in *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994). In *Cooper*, this Court struck down Texas's residency requirements as violating the Dormant Commerce Clause. The ban was a response to *Cooper*, and the law's purpose was to exclude, from the Texas liquor market, as many potential out-of-state entrants as possible.

The ban achieved that purpose. Because of the ban, 98% of Texas's package-store permits are still held by firms that are 100% Texan-owned, twenty-four years after *Cooper*.

Texas also imposes an arbitrary limit on the number of permits that a package-store firm may obtain. If the firm's owner has a close family member (a parent, child, or sibling), then there is no limit. But if the firm's owner lacks such a family member, then the firm is limited to five permits. This arbitrary scheme, like the public-corporation ban, is unique to Texas. Though a handful of other States limit the number of permits that a package-store firm may obtain, those other States apply their limits equally to all permittees.

Walmart brought suit under 42 U.S.C. § 1983, seeking injunctive and declaratory relief from these laws. The District Court held a week-long bench trial. Seven fact witnesses and five experts testified. The District Court found that the public-corporation ban violated the Dormant Commerce Clause for two reasons: First, because it was enacted with a discriminatory purpose; and second, because its burden on interstate commerce was clearly excessive in comparison to its hypothetical (but unproven) "benefit" of indirectly reducing liquor consumption. The District Court found that the arbitrary permit limit violated the Equal Protection Clause. The court enjoined the enforcement of these statutes.

I. The Parties

Plaintiffs are Walmart Inc. and three affiliates. Walmart sells beer and wine in Texas at approximately 668 locations. ROA.9398. Walmart has a plan to open package stores near some of its Texas stores. *Id.* The challenged laws prevent Walmart from carrying out that plan. *Id.*

Defendants are the Texas Alcoholic Beverage Commission ("TABC") and its two commissioners. TABC is the agency charged with issuing permits and enforcing the Texas Alcoholic Beverage Code. *Id.*

Intervenor is the Texas Package Stores Association ("TPSA"), a trade association of Texan-owned package-store firms. *Id.*

II. The Challenged Statutes

The challenged statutes are printed in the Addendum at the end of this brief.

A. Section 22.16: The Public-Corporation Ban

Section 22.16 bars "any entity which is directly or indirectly owned or controlled, in whole or in part, by a public corporation," from obtaining a package-store permit. Tex. Alco. Bev. Code § 22.16(a). "Public corporation" means "any . . . entity" with more than 35 owners. *Id.* § 22.16(b). Thus, the law also bars partnerships with more than 35 partners. *Id.*

Section 22.16 does not bar the corporate form. Shareholders in a package-store firm may enjoy the protection of limited liability, so long as their number does not exceed 35. Tex. Bus. Orgs. Code § 21.223.

Section 22.16 was enacted in 1995 and has not been substantively amended.

Section 22.16 is unique to Texas. Texas is the "only state that bars public corporations from selling liquor solely because of their status as public corporations." ROA.9400.

Section 22.16 is also unique within Texas law. Public corporations may hold every one of the other 74 kinds of permits issued by TABC. *Id.* Public corporations may distill liquor, wholesale liquor, and serve liquor at retail and in bars. ROA.10639-41. Public corporations may operate package stores in hotels. *Id.*

B. Sections 22.04 and 22.05: The Arbitrary Permit Limit

Section 22.04 supposedly limits a package store permittee to no more than five package-store permits. Tex. Alco. Bev. Code § 22.04. A separate permit is required for each location where alcohol is sold. ROA.9399.

The five-permit limit is swallowed by its "consanguinity exception," codified in Section 22.05. Tex. Alco. Bev. Code § 22.05. The "consanguinity exception" allows a package-store permittee to obtain "unlimited" numbers of permits by "consolidating" permits held by a relative within the "first degree of

consanguinity"—meaning, a child, sibling, or parent. *See* ROA.10647-53, ROA.14367.

Section 22.05 forbids the "consolidating" relative from working in the permittee's package-store business. ROA.9399.

Together, Sections 22.04 and 22.05 have the following "practical effect": "[T]he five-permit limit applies only to the following classes of package-store permittees: (1) permittees who lack an individual who owns a majority of the business, and (2) permittees whose majority owner lacks a child, sibling, or parent who is willing and able to assist with the consolidation process." ROA.9400.

III. The Texas Retail Liquor Market

The Texas retail liquor market is dominated by package-store "chains," meaning, firms that have more than five permits.

These chains "have a very large share of the Texas market." ROA.9401. Every chain except one is "Texas-owned." ROA.9408. The largest chains control seven of the nine seats on the TPSA's executive committee. ROA.10902.

The ten largest chains are:

The Ten Largest Package-Store Chains			
Chain	**Number of Permits[1]**	**Texas-Owned?[2]**	**Seat on TPSA's Executive Committee?[3]**
Spec's Family Partners, Ltd.	158	Yes	Yes
Twin Liquors LP	84	Yes	Yes
Western Beverages Liquors of Texas Inc.	62	Yes	Yes
Gabriel Investment Group Inc.	49	Yes	Yes
Goody Goody Liquor Inc.	31	Yes	Yes
Fine Wines & Spirits of North Texas LLC (doing business as "Total Wine & More")	23	No	No
Pinkie's Inc.	20	Yes	Yes
D-Z Liquor Co.	19	Yes	No
Goose Cap Enterprises LLC	17	Yes	No
Sigel's Beverages L.P.	16	Yes	Yes
Zipps Liquor Inc.	14	Yes	No

"Many of" the chains "operate large stores with broad selections of products and hundreds of employees." ROA.9401.

[1] ROA.13735.
[2] ROA.12083.
[3] ROA.10902.

Total Wine & More, Austin

Spec's, Austin

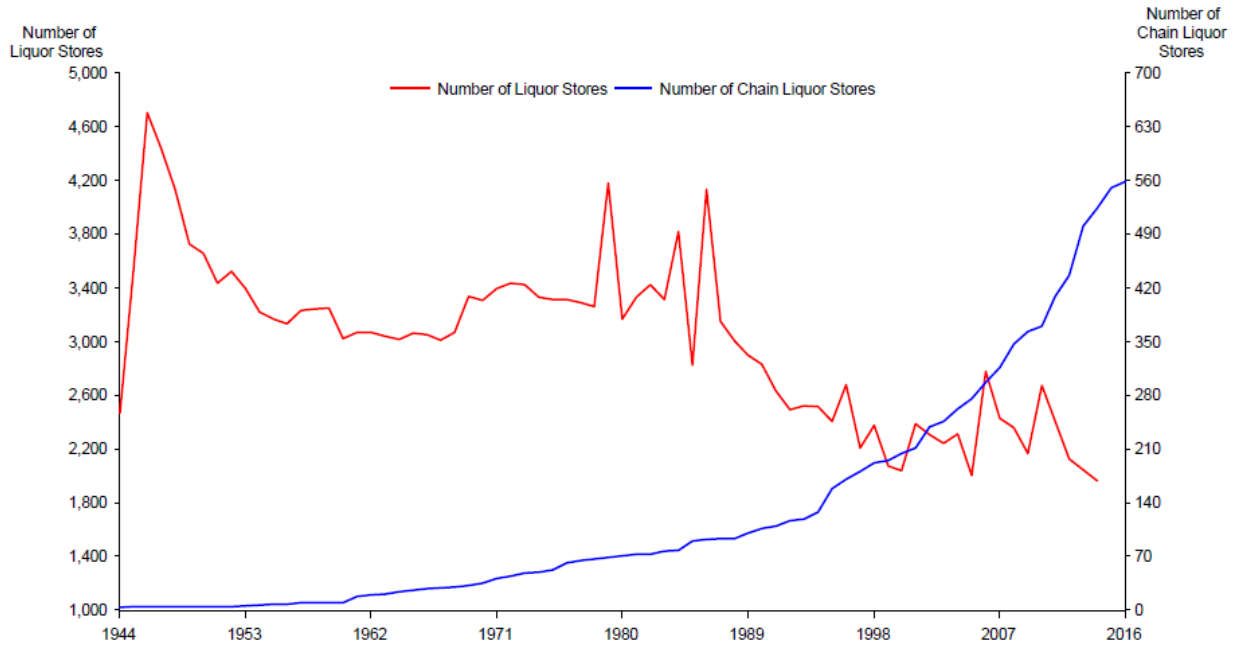
Goody Goody, Houston

Twins, Austin

ROA.14226; *see also* ROA.14229-38 (photographs of products within chain stores).

The chains have "greatly increased their number of stores, and their volume of sales, even as the total number of package stores has stayed approximately the same." ROA.9401.

Exhibit 1.A: Number of Store Locations Owned by "Chain" Liquor Stores vs All Liquor Store Locations in Texas
1944 – 2016



ROA.14209.

The chains "compete vigorously" and "offer extensive promotions and discounts" on liquor. ROA.9401.

SUMMARY OF THE ARGUMENT

The District Court did not clearly err in finding that the public-corporation ban was enacted for a discriminatory purpose. The ban has had its intended effect: an enormous disparate impact on out-of-state firms. The ban's discriminatory purpose is confirmed by all of the relevant factors considered in the *Arlington Heights* framework.

The District Court's finding of discriminatory purpose alone is sufficient to trigger strict scrutiny, which the ban cannot withstand. TABC and TPSA contend that discriminatory effect is also required in order to trigger strict scrutiny, but that contention is contrary to binding precedent of this Court and the Supreme Court, and would create a direct split with the Fourth and Eighth Circuits.

Even if discriminatory effect were required, that effect is proven here. The District Court found that the ban has caused a "severe burden" on interstate commerce. But the District Court applied an unduly narrow test for "discriminatory effect." Under the proper "disproportionate burden" test, the District Court would have found discriminatory effect. Discriminatory effect is therefore an alternative ground to affirm.

Furthermore, the District Court also correctly held that the ban violates the less rigorous *Pike* balancing test. The ban's burden on out-of-state entrants is clearly excessive in relation to the ban's hypothetical (but unproven) benefit of indirectly reducing liquor consumption. TABC, TPSA, and their amici contend that *Pike* does not apply to alcohol regulation, but this contention is contrary to binding precedent from this Court and the Supreme Court, and would create a direct split with the Seventh Circuit.

As for the arbitrary permit limit, the District Court correctly held that it violates the Equal Protection Clause. The law discriminates based on an owner's

family status (and therefore merits heightened scrutiny) but is not rationally related to any legitimate purpose. The law *discourages* family members from working in the same package-store firm because the "consolidating" relative must have no involvement with the firm. The law does nothing to help "small" businesses because it allows many firms to grow as large as they please and swallow up their rivals.

The District Court did not abuse its discretion when it remedied the arbitrary permit limit by enjoining both parts of the law: Section 22.04, which sets the nominal five-permit limit, and Section 22.05, which contains the "consanguinity exception" that swallows the rule. This remedy has the effect of extending the benefit (an ability to obtain unlimited permits) to the previously excluded class (owners without family members). This is the typical remedy for Equal Protection violations and has been repeatedly affirmed by this Court and the Supreme Court. TABC's and TPSA's alternative remedy would allow the current chains to retain their permits but limit every other applicant to five. That arbitrary result would perpetuate, not remedy, the constitutional violation.

ARGUMENT

I. The Public-Corporation Ban Was Enacted for a Discriminatory Purpose

A. Standard of Review

"[A] district court's finding of fact on the question of discriminatory intent is reviewed for clear error." *Abbott v. Perez*, 138 S. Ct. 2305, 2326 (2018); *see* Fed. R. Civ. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless *clearly erroneous*, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." (emphasis added)).

B. Legal Standard: The *Arlington Heights* Framework

In finding that the Legislature acted with discriminatory purpose, the District Court correctly applied the *Arlington Heights* framework. *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007) (applying, to Dormant Commerce Clause analysis, the factors applied in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266–68 (1977)). Under *Arlington Heights*, the ultimate factual question is whether discriminatory purpose was "a substantial or motivating factor behind enactment of the law." *Veasey v. Abbott*, 830 F.3d 216, 231 (5th Cir. 2016) (en banc). It is not necessary that discrimination be the "dominant" or "primary" purpose. *Arlington Heights*, 429 U.S. at 265.

Arlington Heights held that various "factors" are "relevant" to the finding of discriminatory purpose. *Allstate*, 495 F.3d at 160 (restating factors).

When applying these factors, the District Court "may consider" "circumstantial evidence." *Veasey*, 830 F.3d at 235. Circumstantial evidence is necessary because "discriminatory motives are often cleverly cloaked in the guise of propriety." *Id.* at 230 n.12.

C. Ample Evidence Supports the District Court's Finding of Discriminatory Purpose

The District Court correctly applied the *Arlington Heights* framework to find that "the purpose of the [public-corporation] ban was to discriminate against out-of-state companies." ROA.9415. The District Court's decision was correct based on the record and in no event was "clear error." *Perez*, 138 S. Ct. at 2326; Fed. R. Civ. P. 52(a)(6).

1. The Ban Has a Disparate Impact on Potential Out-of-State Entrants

One *Arlington Heights* factor is "whether a clear pattern of discrimination emerges from the effect of the state action." *Allstate*, 495 F.3d at 160. This factor is met by showing that the law has a disparate impact on the protected class. *United States v. Texas Ed. Agency (Austin Indep. Sch. Dist.)*, 564 F.2d 162, 171 (5th Cir. 1977) (applying *Arlington Heights* to find a pattern of discrimination based on disparate impact because, "[o]f the school district's 61 elementary

schools, only 23 have enrollments that are not over 80 percent Anglo or 80 percent minority").

Disparate impact is a factual finding reviewed for "clear error." *Veasey*, 830 F.3d at 256.

i) The District Court correctly compared the ban's impact on potential Texan entrants to its impact on potential out-of-state entrants

To assess disparate impact, the District Court compared (a) the impact of the ban on *Texan* firms that might enter the Texas liquor market, to (b) the impact of the ban on *out-of-state* firms that might enter this market. ROA.9407-08, 26-27. The ban has an impact on "[o]nly a very small percentage of" Texan firms. ROA.9407. That is because Texan firms (unlike potential out-of-state entrants) do not require as much "capital and scale" to open a store in Texas. ROA.9404. Out-of-state firms require much more "capital and scale" to do this. ROA.9409. "Firms with the required capital and scale are almost always firms that have diffuse ownership" and thus are blocked by the public-corporation ban. *Id.* The ban thus blocks "the majority of potential out-of-state entrants." ROA.9411. Therefore, the ban has a disparate impact on potential out-of-state entrants.

TABC contends the District Court should have instead compared (a) the impact of the ban on Texan public corporations (100%), to (b) the impact on out-of-state public corporations (100%). But that contention is the equivalent of

saying, in an employment-discrimination case, that the right way to measure the disparate impact of a promotion exam is to compare (a) the effect of failing the exam on the favored group (e.g., white candidates) (100%) to (b) the effect of failing the exam on the protected group (e.g., minority candidates) (100%). That is not how disparate impact analysis works.

The right way to assess disparate impact is to do what the District Court did: determine what the protected group is (potential out-of-state entrants, minority candidates), and then to assess whether the challenged practice (the ban, the test) has a greater impact on that group than on the favored group (potential in-state entrants, white candidates). For purposes of the Dormant Commerce Clause, the protected group is the class of potential out-of-state entrants. *Family Winemakers of California v. Jenkins*, 592 F.3d 1, 4, 13 (1st Cir. 2010) (finding "discriminatory effect" of law allowing "small" wineries—in-state or out-of-state—to ship directly to consumers while forbidding "large" wineries from doing so, because the law "impos[ed] disproportionate burdens on out-of-state" wineries); *Cachia v. Islamorada*, 542 F.3d 839, 843 (11th Cir. 2008) (finding "discriminatory effect" of ordinance barring all "formula restaurants"—whether in-state or out-of-state—because the law "disproportionately targets restaurants operating in interstate commerce").

ii) The District Court did not abuse its discretion by crediting Elzinga over TPSA's experts

The District Court's factual finding of disparate impact is supported by Walmart's expert analyses. "An appellate court owes great deference to the findings of the trial court with respect to duly admitted expert testimony." *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 279 (5th Cir. 2008) (affirming trial court's finding of disparate impact based on expert statistical analysis). Walmart's expert, Dr. Kenneth Elzinga, presented two analyses demonstrating disparate impact.

a) Analysis of potential entrants

Elzinga analyzed data on "thousands and thousands" of retailers to identify the out-of-state firms that are the most likely potential entrants to the Texas liquor market. ROA.9408; *see* ROA.10278-88, 295-96 (testimony); ROA.14286 (exhibit). All twenty-eight of the most likely potential entrants are blocked by the ban. ROA.9408. TABC and TPSA did not identify a single plausible out-of-state entrant (other than Total Wine) that is *not* blocked. By contrast, the ban blocks "only a handful of potential in-state entrants." ROA.9409; ROA.14287 (exhibit).

TPSA's experts responded by citing population statistics. According to TPSA, because Texas is home to 8% of the nation's population, and 10% of the

"Top 100 Retailers," Texas may exclude 90% of potential out-of-state entrants without causing a disparate impact.

The District Court found that population data, and "Top 100 Retailer" data, are not valid proxies because the Texas liquor market is "not a perfect microcosm of the national economy." ROA.9428. TPSA's only response, on appeal, is to point out that Walmart bore the burden of proof below. That argument is not sufficient to show that the District Court's "decision to credit one expert over another" was an "abuse of discretion." *McClain*, 519 F.3d at 279.

b) Analysis of the "related" beer-and-wine market

Elzinga also assessed disparate impact by comparing the liquor market (where the ban applies) to the "related" beer-and-wine market (where the ban does *not* apply). ROA.9408. TPSA agrees that the beer-and-wine market is a valid basis for comparison. TPSA Br. 4-5 (using beer-and-wine market as comparator).

There is a stark difference between these related markets. In Texas's five largest metropolitan statistical areas, the ten largest package-store firms (as measured by numbers of permits) are all Texan, with just one out-of-state exception. ROA.9408. By contrast, *half* of the ten largest beer-and-wine firms in these areas are out-of-state firms. *Id.*; *see* ROA.10274-78 (testimony); ROA.14281 (exhibit). This disparity is further evidence of the disparate impact caused by the

public-corporation ban, which applies to the liquor market but not the beer-and-wine market.

TPSA asserts that this analysis is based on "market share" as measured by property taxes, but that is not correct. Elzinga estimated market share using the number of permits held by each firm. ROA.14281; ROA.10418-19.

TPSA also contends that Elzinga's beer-and-wine comparison is "meaningless" because Elzinga did not analyze the residency of *all* the owners of Texas's 23,000 beer-and-wine permits. *See* ROA.11403. But Elzinga chose the firms that have the largest market shares in the largest metropolitan statistical areas. TPSA presented no evidence that this is not a valid sample of data with which to make the comparison.

iii) Ninety-eight percent of package-store permits are held by Texan-owned firms

As a result of the ban's disparate impact, 98% of Texas's 2,579 package-store permits are held by firms entirely owned by Texans. ROA.9408. Only 53 permits (2%) are held by a firm that has even *one* out-of-state owner. *Id.*

For the first time on appeal, TPSA attempts to counter this statistic by claiming that only 0.17% of beer-and-wine permits are held by a firm with an out-of-state owner. This claim is untimely and inaccurate. TPSA's figure simply assumes (with no evidence) that every beer-and-wine permittee, other than the

twenty-one large firms analyzed by Elzinga, *see* ROA.14281-05, is wholly Texas-owned. Moreover, TPSA's figure counts *firms* not *permits*, and therefore incorrectly assumes that the effect on commerce of allowing entry to 7-Eleven (with 604 beer-and-wine permits, ROA.14783) is equivalent to the effect of allowing entry to a sole-proprietor convenience store (with one permit).

2. Texas Has a "History of Discrimination" Against Out-of-State Package-Store Firms

The District Court also found "undeniable" evidence of another *Arlington Heights* factor: the "history of discrimination" against out-of-state package-store firms. ROA.9415-16. This evidence stretches from the end of Prohibition to the present.

i) 1935-1991

Since 1935, Texas law has contained various "residency requirements" that facially discriminate against non-residents. *E.g.*, Tex. Alco. Bev. Code § 109.53. These requirements have never been repealed.

ii) 1991-1994

TPSA and the Legislature took extraordinary steps to defend Texas's residency requirements from the federal courts.

In June 1991, the Western District of Texas ruled in favor of two out-of-state plaintiffs who sought a "mixed beverage" permit to open a Texas bar. The court

struck down the residency requirements as violating the Dormant Commerce Clause. *Wilson v. McBeath*, No. CIV. A-90-CA-736, 1991 WL 540043 (W.D. Tex. June 13, 1991), *aff'd sub nom. Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994). TPSA and the Legislature were aware of the *Cooper* litigation and wanted to stop it. ROA.9402; *see* ROA.10788 (testimony).

Soon after the district court entered its injunction in 1991, the Legislature enacted House Bill (H.B.) 1445. This bill attempted to moot the *Cooper* litigation and prevent this Court from issuing a merits opinion in the appeal. ROA.9402 (citing ROA.13815). To accomplish that goal, H.B. 1445 partially repealed some of the residency requirements for the mixed-beverage permit sought by the *Cooper* plaintiffs, while keeping the residency requirements for package-store permits.

An audio recording of the House deliberations on H.B. 1445 was played at trial. ROA.10780-81 (trial transcript); ROA.13898 (legislative transcript). These debates confirmed the Legislature's intent to prevent this Court from issuing an opinion. ROA.9403. During these deliberations, some Representatives stated that a "deal" had been reached with the *Cooper* plaintiffs, whereby they would dismiss their lawsuit if H.B. 1445 became law. *Id.*

Soon after the Governor signed H.B. 1445, the *Cooper* plaintiffs moved to dismiss the appeal as moot. *Cooper*, 11 F.3d at 550. But this Court denied that

motion and struck down the residency requirements in language broad enough to apply to all alcohol permits. *Id.* at 550-51, 554.

iii) 1994-2016

TABC and TPSA strove to undermine this Court's decision in *Cooper*. Their opposition took several forms. *First,* for twelve more years, TABC misinterpreted *Cooper* as applying only to mixed-beverage permits. TABC continued to enforce the residency requirement for package-store permits. It took another federal lawsuit to put a stop to that. ROA.9416. More recently, TPSA tried to lift the injunction. *Cooper v. TABC*, 820 F.3d 730, 743 (5th Cir. 2016) ("*Cooper II*") (denying TPSA's motion).

Second, TPSA defended the public-corporation ban against efforts to repeal it by making "consistent reliance on protectionism." ROA.9417; *see* ROA.14388. TPSA also made "blatant[]" appeals to protectionism when opposing efforts to repeal the other law challenged here—the arbitrary permit limit. *Infra*, at 72-75.

TPSA now contends the District Court erred by considering these post-enactment statements. TPSA Br. 28-30. But the Supreme Court has held that such statements are relevant circumstantial evidence. *Maine v. Taylor*, 477 U.S. 131, 149 (1986) (in assessing whether a law enacted in 1959 had discriminatory purpose, considering the statements made by those who opposed an unsuccessful repeal effort in 1981). TPSA cites this Court's decision in *Rogers v. Frito-Lay*, but

that case presented a question of statutory interpretation—it did not consider whether the Legislature had a discriminatory purpose and thus did not apply the *Arlington Heights* framework. 611 F.2d 1074, 1080 (5th Cir. 1980) (interpreting the Rehabilitation Act of 1973 as not creating a private right of action). Moreover, the District Court made clear that its finding of discriminatory purpose "does not turn" on TPSA's efforts to prevent repeal. ROA.9417.

3. The "Specific Sequence of Events Leading Up to the" Enactment of the Public-Corporation Ban Indicates Discriminatory Purpose

Another *Arlington Heights* factor is the "specific sequence of events leading up to" the law's enactment. *Allstate*, 495 F.3d at 160. Here, the "specific sequence" includes the Legislature's failed attempt to moot *Cooper* (during the 1993 session) and the Legislature's enactment of the ban in response to *Cooper* (during the next session in 1995). The District Court found: "If not for the *Cooper* decision, the public corporation ban would never have been conceived, drafted or enacted." ROA.9416. This "sequence of events" indicates that the ban's purpose was to undo the expected effect of *Cooper* by excluding the most likely out-of-state entrants.

4. The "Legislative History" Contains Direct Evidence of Discriminatory Purpose

Another *Arlington Heights* factor is the "legislative . . . history of the state action, including contemporary statements by decisionmakers." *Allstate*, 495 F.3d at 160. TABC and TPSA direct most of their attention to this factor, even though it is just one of many, and even though discriminatory purpose can be found even without any "smoking gun" legislative history. *Lodge v. Buxton*, 639 F.2d 1358, 1363 & n.8 (5th Cir. 1981) (finding discriminatory purpose without any legislative history), *aff'd sub nom. Rogers v. Lodge*, 458 U.S. 613 (1982); *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 229 (4th Cir. 2016) (finding discriminatory purpose even though the legislative history was "of limited value").

i) Statements by Niemann

Fred Niemann, Jr., was a lawyer and lobbyist for TPSA who specialized in legislative affairs. ROA.9403. At TPSA's direction, Niemann drafted the bill containing the ban, drafted fliers to be distributed to legislators explaining the bill, and served as the sole witness at committee hearings. *Id.* (citing ROA.10796-97, ROA.10808-10). TPSA played a "critical role in the bill's enactment." *Id.* (citing ROA.5968, 89).

Courts routinely rely on statements by non-legislators like Niemann when determining legislative purpose. *See, e.g., Veasey*, 830 F.3d at 236 & n.21

(considering testimony of non-legislator witness); *Allstate*, 495 F.3d at 161 (same); *S. Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 596–97 (8th Cir. 2003) (finding discriminatory purpose based on statements made by law's non-legislator proponents); *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 443 (6th Cir. 2000) (considering such evidence).

In 1995, Niemann told the Legislature that the public-corporation ban was a response to the *Cooper* decision. ROA.9404 (citing ROA.14395, ROA.14032, ROA.14012). Niemann also told the Legislature that the purpose of the ban was to promote "accountability." ROA.9405.

At trial, Niemann admitted that he had been "speculating" when he told the Legislature that public corporations might be less "accountable." *Id.* Niemann's testimony to the Legislature contained no evidence of "any actual problems with corporate accountability." *Id.* (citing ROA.10822-24).

Niemann also admitted, at trial, that the *real* reason TPSA conceived, drafted, and lobbied for the public-corporation ban was to protect the "stable business climate" that TPSA's members had enjoyed before *Cooper*. *Id.* (citing ROA.10791-92). According to Niemann's trial testimony, TPSA conceived, drafted, and lobbied for the public-corporation ban because TPSA, after *Cooper*, feared the "Walmartization" of the package-store market. *Id.*

ii) Statements by legislators

The District Court found that Senator Kenneth Armbrister, the sponsor of the ban, "confirmed the discriminatory purpose of the law during the Senate floor debate" in 1995. ROA.9406. The District Court heard the audio of this debate. ROA.10814-20 (trial transcript); *see* ROA.14018 (debate transcript). TABC and TPSA offer various excuses for, and alternative interpretations of, what Armbrister said. However, their excuses and alternatives do not come close to showing clear error. *See Guzman v. Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031, 1036 (5th Cir. 2015) ("where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous").

TPSA and TABC also characterize Armbrister's remarks as "stray." They were not. He was the bill's sponsor explaining the bill's purpose to the full Senate. The District Court cited his answers to direct (and repeated) questions from another Senator, asking "Why?" the bill banned public corporations.

Speaking slowly, and with many pauses, Armbrister gave five different answers—*none of which* is an answer that TABC or TPSA now gives to the same question. Armbrister's first answer was that the ban meant that "you can't have a package store inside a Walmart" and that "Walmart can't own the package store." ROA.14021. Later, Armbrister agreed that the purpose of the bill was to "have

somebody from Texas with the license that you get hold of to enforce the Code." ROA.14024.

TPSA claims that Armbrister "clarified" that the public-corporation ban "was not intended to 'keep foreign ownership from coming in.'" TPSA Br. 30 (partially quoting ROA.14204). TPSA's selective quotation misstates the record. This exchange indicates that there was some *other* bill, still "pending in committee," that would have been even more exclusionary. ROA.14025. If that other bill's existence proves anything, it is that the Senate was so intent upon undoing *Cooper* that its members had also drafted, and were considering, another bill that *facially* discriminated against out-of-state firms.

TPSA contends that Armbrister's remarks must be disregarded because he was only one legislator. But TPSA cites no case decided under the *Arlington Heights* framework that supports this contention. In *Allstate*, this Court reaffirmed that remarks by individual legislators are relevant evidence. 495 F.3d at 161 (weighing the "protectionist remarks of certain legislators"). Those remarks did not control the result in *Allstate*—but that is because the *Allstate* court conducted an "independent review" of the "legislative record" and found other evidence that "provided a more than adequate and legitimate basis" for the Legislature's decision. *Id.* There is no such evidence here. TPSA's other cases do not apply *Arlington Heights.*

iii) The "House Research Organization bill analysis" does not negate the evidence of discriminatory purpose

TABC and TPSA cite just one contemporaneous piece of evidence: A "House Research Organization bill analysis." ROA.14577. No witness testified about this document. The District Court did not rely on it, and for good reason: No foundation was laid to establish its evidentiary value (if any). The document names no author. It is dated May 16, 1995, *after* the Senate had already voted.

TABC and TPSA rely on the least probative section of the document: A series of anonymous hearsay statements that purport to be what "supporters say" and "opponents say" about the bill. ROA.14579-80. Far from supporting TABC's and TPSA's current theory of the ban's purpose, this section *contradicts* it. The section claims that unnamed "supporters say" the public-corporation ban would "foster competition." ROA.14580. "Foster[ing] competition" is the *opposite* of TPSA's and TABC's current theory of the Legislature's purpose. TABC and TPSA now claim the ban's real purpose was to *prevent* competition, that is, to avoid "disrupt[ing]" the "very stable business climate" of TPSA's members. TPSA Br. 20-21.

If this document proves anything, it is the Legislature's discriminatory purpose. The document reports that "supporters say" the bill would prevent two

likely out-of-state entrants ("Sam's [Club] or Walgreens") from "monopolizing the package liquor store market." ROA.14580.

5. Additional Factors Show Discriminatory Purpose

i) The public-corporation ban is a "substantive departure" from Texas's approval of public corporations

Another *Arlington Heights* factor is a "[s]ubstantive departure" from established policy. 429 U.S. at 267; *see McMillan v. Escambia Cty., Fla.*, 638 F.2d 1239, 1245-46 (5th Cir. 1981) (applying *Arlington Heights* to find discriminatory purpose because of the "abrupt, unexplained departure" from the school board's 40-year "substantive policy which favored single-member districts"), *partially vacated on other grounds*, 688 F.2d 960 (5th Cir. 1982).[4]

The public-corporation ban was an "abrupt, unexplained departure" from Texas's history of granting alcohol permits to public corporations. *McMillan*, 638 F.2d at 1246. "[P]ublic corporations had been able to obtain package store permits since 1935." ROA.9405. Public corporations are still eligible for all 74 of Texas's *other* alcohol permits, including permits to serve liquor in bars, ROA.9400, and permits for package stores in hotels. Tex. Alco. Bev. Code § 22.16(d). This

[4] The partial vacatur applied only to the "portion of our original opinion concerning the *County Commission*." 688 F.2d at 961 (emphasis added). The vacatur did not affect the holding cited here, which concerned the method for electing the *School Board*.

"substantive departure" is further evidence that the Legislature's purpose was to bar the most likely out-of-state entrants.

ii) TPSA's stated "accountability" purpose was pretext intended to disguise the true discriminatory purpose

Where a law is only "tenuously related" to the Legislature's "stated purpose," that is circumstantial evidence of discriminatory purpose. *Veasey*, 830 F.3d at 237; *see also Hazeltine*, 340 F.3d at 594 (finding discriminatory purpose, in part, because legislators had "no evidence that a ban on corporate farming would effectively preserve family farms or protect the environment"); *McNeilus*, 226 F.3d at 443 (the lack of "complain[ts] about any problems the [law] ostensibly cured" is evidence that law's purpose was discriminatory).

Here, the "stated purpose" of the ban was the supposed desire to ensure "accountability" of package-store firms. The District Court found that this stated purpose was "pretextual." ROA.9405-06. This pretext was intended to "conceal the ban's actual discriminatory purpose." ROA.9406.

iii) The "grandfather clause" is further evidence of discriminatory purpose

The ban's "grandfather clause" is further evidence of discriminatory purpose. *Walgreen Co. v. Rullan*, 405 F.3d 50, 55 (1st Cir. 2005) (finding discriminatory purpose based on grandfather clause that "exempted all existing pharmacies" from the challenged law, where "ninety-two percent" of then-existing

pharmacies were "locally owned"). At the time the Legislature passed the bill, Texas's residency requirements were still enforced for package-store permits. Therefore, all of Texas's package-store firms were Texan. Every single one was exempted from the ban. Tex. Alco. Bev. Code § 22.16(f) (grandfather clause); *see* ROA.10873, 77 (Gabriel's is a grandfathered public corporation holding 48 permits). If the Legislature's purpose were to fix problems with public corporations' "accountability," then why would the Legislature allow all of the then-existing public corporations to escape the ban?

iv) The ban's breadth and its triple-damages provision are evidence of discriminatory purpose

The ban's text shows it was meant to be a weapon for TPSA to use against potential entrants to the market. The ban forbids public corporations from "directly or indirectly" "own[ing] or control[ling]" "in whole or in part" any package-store permittee (except a hotel). Tex. Alco. Bev. Code § 22.16(a). Public corporations may not obtain even a minority ownership stake in a permittee, even if that permittee has all the attributes TABC and TPSA now claim the Legislature intended to promote. The ban also provides a harsh private enforcement mechanism. Any package-store firm that "is injured in [its] business" may obtain "triple damages plus . . . attorney's fees." *Id.* (e).

D. The District Court Applied the Presumption of Good Faith

The presumption of legislative good faith is an evidentiary presumption. It keeps the burden of proof on plaintiffs to prove discriminatory purpose even where, as here, there is a history of discrimination. *Perez*, 138 S. Ct. at 2325 (district court failed to apply presumption when it "impos[ed] on the State the obligation of proving that the 2013 Legislature had . . . 'engage[d] in a deliberative process to . . . cure[] any taint from the 2011 [districting] plans'"); *Alabama State Fed'n of Teachers, AFL-CIO v. James*, 656 F.2d 193, 195 (5th Cir. 1981) (presumption means that the State has no "burden" to "articulat[e] through a competent witness its legitimate interests").

The District Court did not violate this presumption because it did not shift the burden to TABC and TPSA to show that the Legislature had "cure[d]" the "taint" of Texas's residency requirements. *Perez*, 138 S. Ct. at 2325. If the District Court *had* shifted the burden in this way, then its opinion would have been much shorter. The record is clear: The Legislature took no steps to "cure" that "taint."

* * *

The evidence summarized above was more than sufficient for the District Court to conclude that discriminatory purpose was "a substantial or motivating factor behind enactment of the law." *Veasey*, 830 F.3d at 231. That factual finding

should be affirmed because it was correct. At a minimum, even if judges on this Court may view the evidence differently, the District Court's finding should be affirmed because it was certainly a *permissible* or *plausible* view of the evidence. It is therefore not clear error. *See Cooper v. Harris*, 137 S. Ct. 1455, 1468 (2017) ("[T]he very premise of clear error review is that there are often two permissible—because two plausible—views of the evidence." (internal marks omitted)); *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."); *GIC Services, LLC v. Freightplus USA, Inc.*, 866 F.3d 649, 663 (5th Cir. 2017) (applying the deferential clear error standard under *Anderson*).

II. Discriminatory Purpose Triggers Strict Scrutiny

TABC and TPSA invite this Court to become the first federal appellate court to hold that discriminatory purpose does not require strict scrutiny. Neither TABC nor TPSA cites a single appellate decision that upheld a law enacted with a discriminatory purpose.

The Supreme Court has repeatedly held that strict scrutiny applies "either" if the law has a discriminatory purpose "or" if it has a discriminatory effect. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 n.6 (1992); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981).

This Circuit has held the same. *Allstate*, 495 F.3d at 160; *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 725 (5th Cir. 2004).

The Fourth and Eighth Circuits have applied strict scrutiny based on discriminatory purpose alone, without a finding of discriminatory effect. *Hazeltine*, 340 F.3d at 596–97; *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 341, 345 (4th Cir. 2001). TPSA concedes this. TPSA Br. 17. TABC invents hypothetical opinions that TABC believes these courts should have written, which would have found a discriminatory effect in addition to discriminatory purpose. But that is not what the Fourth and Eighth Circuits did. *Hazeltine* held: "*Because we conclude that Amendment E was motivated by a discriminatory purpose*, we must strike it down as unconstitutional unless the Defendants can" meet strict scrutiny. 340 F.3d at 596 (emphasis added). *Waste Management* affirmed summary judgment for plaintiffs on the challenged "Cap Provision" based on discriminatory purpose alone, even though "a genuine issue of material fact exists

regarding whether the Cap Provision discriminates in its practical effect." 252 F.3d at 335, 349.

TABC and TPSA argue that the Supreme Court overruled all these cases in a footnote in *Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1801 n.4 (2015). But *Wynne* was decided based on the discriminatory *effect* of Maryland's tax-credit regime. *Id.* at 1803-05. Footnote 4 merely rejected the state's argument that *both* discriminatory purpose *and* discriminatory effect must be shown. *Id.* at 1801 n.4. This footnote reaffirms the longstanding rule that *either* purpose *or* effect suffices.

TABC and TPSA also cite *United States v. O'Brien*, 391 U.S. 367 (1968). But *O'Brien* was not a Commerce Clause case. In *O'Brien*, a criminal defendant sought to invalidate the statute that made draft-card burning a crime, on the ground that Congress's purpose was to burden free speech. Neither the Supreme Court nor this Circuit has applied *O'Brien* in a Commerce Clause case. Moreover, even within free speech jurisprudence, *O'Brien* was overruled long ago. *See Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1529 (11th Cir. 1993).

TPSA invents a hypothetical scenario: Two states enact identical laws, but only one state acts with discriminatory purpose. Will only one of the two laws receive strict scrutiny? TPSA claims "[c]onstitutional law cannot work this way."

TPSA Br. 15-16. TPSA is wrong. Not only does Dormant Commerce Clause doctrine work this way, as attested by the above-cited authorities, so too does Free Exercise doctrine. Federal courts strike down a law either if it is not "neutral" (i.e., its purpose is to burden religion) or if it is not "generally applicable" (i.e., it has discriminatory effect). *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (applying *Arlington Heights* to find violation of baker's Free Exercise rights because the "Commission's consideration . . . was neither tolerant nor respectful of [his] religious beliefs").

III. The Public-Corporation Ban Also Has a Discriminatory Effect

Even if discriminatory effect were required to trigger strict scrutiny, that effect was proven in this case. The ban's discriminatory effect is an independent ground to affirm the District Court.

The District Court found that the "ban's effects are felt disproportionately by out-of-state companies, which are largely barred from selling liquor in Texas." ROA.9421. The District Court stated that, if it had applied the disproportionate-burden test, then it "would easily [have found]" a "discriminatory effect." *Id.*

However, the District Court did not apply the "disproportionate burden" test for "discriminatory effect." Instead, the District Court "define[d] discriminatory effect much more narrowly." *Id.* Under the District Court's narrow test, "discriminatory effect" exists only if the law "differentiates between similarly

situated in-state and out-of-state companies *on the basis of the companies' ties to the state.*" ROA.9424 (emphasis added). The District Court acknowledged that under this narrow interpretation, the test for discriminatory effect requires "something close to facial discrimination." ROA.9423.

A. The Correct Test In This Case Is Disproportionate Burden

This Circuit recently applied the disproportionate-burden test. *Churchill Downs Inc. v. Trout*, 589 F. App'x 233, 235, 237 (5th Cir. 2014) (criticizing doctrine as "a mess," but noting that one test for "discriminatory effect" is whether the law "disproportionately affects out-of-state companies"). This test should also be applied here.

The Supreme Court applied the disproportionate-burden test in *Hunt v. Washington State Apple Advertising Commission* to find that North Carolina's grading system for apples had a discriminatory effect. 432 U.S. 333, 350–51 (1977). Although the grading system applied to all growers alike (whether in-state or out-of-state), the Court nevertheless found that the system's "practical effect" was to "rais[e] the costs of doing business in the North Carolina market for Washington apple growers," who (unlike local growers) were "forced to alter their marketing practices in order to comply." *Id.* at 351.

The First,[5] Sixth,[6] Seventh,[7] and Eleventh Circuits[8] have applied the disproportionate-burden test to find "discriminatory effects" of laws that applied equally to in-state and out-of-state firms.

B. *Exxon* Holds That Disproportionate Burden May Be Evidence of a Discriminatory Effect

In an important footnote, the Supreme Court's *Exxon* decision endorses the disproportionate-burden test that should control here: "If the effect of a state

---

[5] *Family Winemakers*, 592 F.3d at 13 (finding "discriminatory effect" of law allowing "small" wineries—in-state or out-of-state—to ship directly to consumers because the law "impos[ed] disproportionate burdens on out-of-state" wineries); *Rullan*, 405 F.3d at 56 (finding "discriminatory effect" of certification process that applied to all new pharmacies—both local and out-of-Commonwealth—because "[t]he statistical evidence" "strongly indicates" that the process "has limited competition in favor of the predominantly local group of existing pharmacies").

[6] *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 431 (6th Cir. 2008) (finding "discriminatory effect" of Kentucky law allowing consumers to purchase wine "in store" from all wineries—whether in-state or out-of-state—because the law caused "most"—but not all—of the potential out-of-state sales to be "economically and logistically infeasible"); *McNeilus*, 226 F.3d at 442 (state law requiring a binding agreement between retailer and manufacturer discriminated "in effect" because "in-state dealers and remanufacturers benefit" to "the exclusion of" some "out-of-state remanufacturers").

[7] *Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1279 (7th Cir. 1992) (finding that state's ban on "backhauling"—using the same truck to haul both waste and commercial goods—"discriminate[d] in practical effect" against interstate commerce because the law's "practical impact" was to "reduce very significantly the inflow of out-of-state waste").

[8] *Cachia*, 542 F.3d at 843 (finding "discriminatory effect" of ordinance barring all "formula restaurants"—whether in-state or out-of-state—because the law "disproportionately targets restaurants operating in interstate commerce").

regulation" is to give local businesses "a larger share" of the "total market," then "the regulation may have a discriminatory effect on interstate commerce." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 n.16 (1978).

In *Exxon*, there was no evidence of disproportionate burden. The law at issue barred "producer[s] or refiner[s]" (wherever located) from operating a retail gas station in Maryland. 437 U.S. at 119. This law therefore excluded very few potential entrants to the retail market, all of whom could "be promptly replaced by other interstate" firms who were not producers or refiners. *Id.* at 127. Here, by contrast, *all* entities with diffuse ownership are barred. That is a much broader category of exclusion that includes almost all potential out-of-state entrants. ROA.9409.

This Court's decision in *Allstate* acknowledged that disproportionate burden could demonstrate a discriminatory effect. 495 F.3d at 162 (quoting the *Exxon* footnote). The disproportionate-burden test was not met in *Allstate*, however, or in its predecessor *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 501 (5th Cir. 2001), because in those cases there was no evidence of any burden, let alone a disproportionate burden. The exclusions were very narrow. In *Allstate*, only insurers were barred from owning auto body shops. 495 F.3d at 163. There was no evidence that this exclusion disproportionately burdened out-of-state firms. *Id.* ("[T]he record does not support Allstate's bare allegation that business will

shift . . . to in-state providers."). In *Ford*, only manufacturers were barred from operating car dealerships. 264 F.3d at 501. There was no significant evidence of burden. *Id.* at 502 (Ford's only evidence of burden was that Ford's "Showroom" would close).

C. The Ban's Burden Is Disproportionate

The District Court did not clearly err in finding that the ban's burden on potential out-of-state entrants is "severe." ROA.9432. Elzinga's analysis demonstrated that nearly *all* potential out-of-state entrants are barred. *Supra,* at 12-18. All but two percent of package-store permits are held by firms wholly owned by Texans. *Id.* Elzinga's analysis of the related beer-and-wine market indicates that, absent the ban, many more permits would be held by out-of-state entrants. *Id.*

IV. TABC and TPSA Concede That the Public-Corporation Ban Cannot Withstand Strict Scrutiny

If this Court finds that the District Court did not clearly err in finding discriminatory purpose, or if this Court rules that disproportionate burden is the correct test for "discriminatory effect" in this case, then strict scrutiny applies. *Allstate*, 495 F.3d at 160. TABC and TPSA concede the ban cannot meet this standard. ROA.9419.

V. The Public-Corporation Ban Fails the *Pike* Balancing Test

A. Legal Standard

A law that has a "disparate impact" on interstate commerce must satisfy "the *Pike* balancing test." *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 501 (5th Cir. 2004) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)). In applying *Pike*, this Court considers (1) "the nature of the local interest," and (2) "whether alternative means could achieve that interest with less impact on interstate commerce." *Id.* If those considerations indicate that the law's "burden . . . on interstate commerce is 'clearly excessive in relation to the putative local benefits,'" then the law must be struck down. *Id.*

B. The Ban Has a Disparate Impact

The District Court did not clearly err in finding disparate impact. *Supra*, at 12-18.

TABC and TPSA cite several *Pike* decisions in which plaintiffs failed to prove disparate impact. For example, in *National Solid Waste*, plaintiffs failed to prove disparate impact because their "only evidence of an interstate burden" was the law's effect on plaintiffs' own contracts. *Nat'l Solid Waste*, 389 F.3d at 502; *see also Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 14 (1st Cir. 2007) (no disparate impact because of the "lack of evidence" that state's strict one-permit limit, which forbade any "franchise" arrangements between permittees, had

"favor[ed] in-state interests"); *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 212-213 (2d Cir. 2003) (no disparate impact because plaintiffs' sole "evidence" was the "difficult[y]" that "they themselves would face" in "establishing a retail outlet in New York"). Those decisions have no relevance here. Whether disparate impact was proven, or not, on some *other* factual record is beside the point.

C. "Alternative Means" Would Reduce Liquor Consumption "With Less Impact on Interstate Commerce"

In its *Pike* analysis, the District Court identified just one "conceivable" benefit that the ban "might" achieve: indirectly reducing "consumption of liquor." ROA.9429, -37. This is the *only* putative benefit identified in TABC's and TPSA's appellate briefs. TABC Br. 39; TPSA Br. 34-35.

If Texas wished to actually reduce liquor consumption, "alternative means" would achieve this more effectively and with "less impact on interstate commerce." *Nat'l Solid Waste Mgmt.*, 389 F.3d at 501; *see also Serv. Mach. & Shipbuilding Corp. v. Edwards*, 617 F.2d 70, 76 (5th Cir.) (holding that Louisiana worker-registration scheme failed *Pike* because "this court's tolerance of the registration system's burden on interstate commerce dwindles in light of other alternatives open to the parish"), *aff'd*, 449 U.S. 913 (1980).

Liquor prices could be raised through "the imposition of an excise tax." ROA.9412. Outlet density could be reduced by "directly control[ling] how and where liquor can be sold and how many outlets are allowed to sell liquor" in specific areas. *Id.* All five experts testified that these measures are effective. *Id.* TABC could exercise its authority to prevent excessive discounts. ROA.10644.

TPSA contends that there is "no evidence" that an excise tax "would burden interstate commerce less than the public corporation ban." TPSA Br. 36. But no evidence is required for such an obvious proposition. It has long been a "truism" that excise taxes do not violate the Dormant Commerce Clause. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977); *see also Wynne*, 135 S. Ct. at 1799 (collecting cases).

If evidence for this point were required, the record contains it. Texas imposes a higher excise tax on beer than on liquor, ROA.10115, and yet out-of-state companies can and do compete vigorously in the retail beer-and-wine market, ROA.14281–85. All but two states impose higher excise taxes on liquor than Texas, ROA.10115, and yet Walmart sells liquor in thirty-one of those states, ROA.9888–89, as do other firms operating in interstate commerce. ROA.10161–62; ROA.14286.

TPSA cites *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326 (5th Cir. 2007), in which this Court upheld a "blanket prohibition" on the

sale of horsemeat. But plaintiffs in that case failed to show any alternative that would achieve the goal (stopping people from eating horsemeat) better than a total ban. Indeed, plaintiffs did not point to *any* alternative that Texas had not already tried. Here, by contrast, all the experts agreed that there are effective means to reduce liquor consumption that Texas has not yet tried—first among them, raising the excise tax.

D. The Ban Does Not Achieve Any Legitimate Local Benefits

1. Legal Standard

Pike balancing also requires the court to find that the challenged law actually achieves a "local benefit." Actual evidence of actual benefit is required. *Service Machine*, 617 F.2d at 75 (worker-registration scheme failed *Pike* because the evidence at trial showed that the supposed benefits were "somewhat illusory").

TABC and TPSA contend that no evidence is needed and that the Court may apply *Pike* balancing based on speculation about what the Legislature might have believed the "local benefit" of the ban would be—an evidentiary standard akin to the rational-basis test. The District Court, too, believed that this was the appropriate standard. ROA.9429. The District Court derived this standard from this Circuit's 2004 opinion in *International Truck*, 372 F.3d 717, and its 2001 opinion in *Ford*, 264 F.3d 493. *Id.*

For three reasons, this Court should disregard *International Truck*'s and *Ford*'s articulation of the *Pike* standard for proving a local benefit. *First*, "sufficient contrary authority from the Supreme Court has intervened." *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193 (5th Cir. 1981) (finding that intervening Supreme Court precedent required panel to disregard circuit precedent). Since 2004, the Supreme Court has twice held that courts should consider the evidence of a challenged statute's actual local benefits when applying *Pike*. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 354 (2008) (holding that *Pike* does not apply to "differential tax schemes" because *Pike*'s evidentiary requirement, i.e., the requirement that courts evaluate evidence of the law's actual benefits, would be too difficult); *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (finding, after "years of discovery," that the law did achieve an actual benefit, and therefore satisfied *Pike*, because the law was "a convenient and effective way to finance . . . waste disposal services").

Second, *International Truck* and *Ford* erred by adopting Justice Brennan's concurring opinion in *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 681 (1981). *See International Truck*, 372 F.3d at 728 (quoting this concurrence); *Ford*, 264 F.3d at 504 (same). This was error because the plurality

opinion, not Justice Brennan's concurrence, was the controlling opinion.[9] The plurality made clear that *Pike* demands evidence of the law's actual benefits. *Kassel*, 450 U.S. at 672-73 (because evidence at trial showed that the banned 65-foot "double trucks" were "at least as safe" as the state's preferred 55-foot "single trucks," banning the 65-foot trucks did not achieve an actual local benefit and therefore the law failed *Pike*).

Third, at least four other Circuits have held that *Pike* demands evidence of the law's actual local benefit. *Fla. Transp. Servs., Inc. v. Miami-Dade Cty.*, 703 F.3d 1230, 1261 (11th Cir. 2012) (though Miami's supposed interests in regulating stevedores were "legitimate," there was no evidence that the "actual permitting processes" achieved those interests); *Baude v. Heath*, 538 F.3d 608, 612 (7th Cir. 2008) (mere speculation that law "may help" the state to "monitor" wine wholesalers was insufficient evidence under *Pike*); *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 573 (4th Cir. 2005) (speculation that distant dealerships "might receive some protection on their investment" was not sufficient

[9] Justice Brennan would have decided *Kassel* on the broader ground: He would have found that the law had a discriminatory purpose and was therefore subject to strict scrutiny. *Id.* at 686. The plurality decided the case based on *Pike*. Because the *Pike* standard of scrutiny is lower, the plurality's opinion is narrower and therefore controls. *Harris v. Hahn*, 827 F.3d 359, 366 n.9 (5th Cir. 2016) (applying *Marks v. United States*, 430 U.S. 188 (1977)).

evidence of actual benefit to satisfy *Pike*); *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731, 735 (8th Cir. 2002) (speculation that requiring propane retailers to maintain a large "tank" in the state might "prevent propane shortages" was not sufficient evidence of actual benefit).

Even if this Court determines that it is bound by the evidentiary standard set forth in *International Truck* and *Ford*, that standard nevertheless still demands *some* evidence. Those cases require "an examination of the evidence before or available to the lawmaker" of the putative benefit. *International Truck*, 372 F.3d at 728.

2. The Ban Does Not Reduce Liquor Consumption

The District Court did *not* find that the ban actually reduces liquor consumption. Nor did the District Court find that the Legislature actually had "before or available to it" any such evidence. *International Truck*, 372 F.3d at 728.

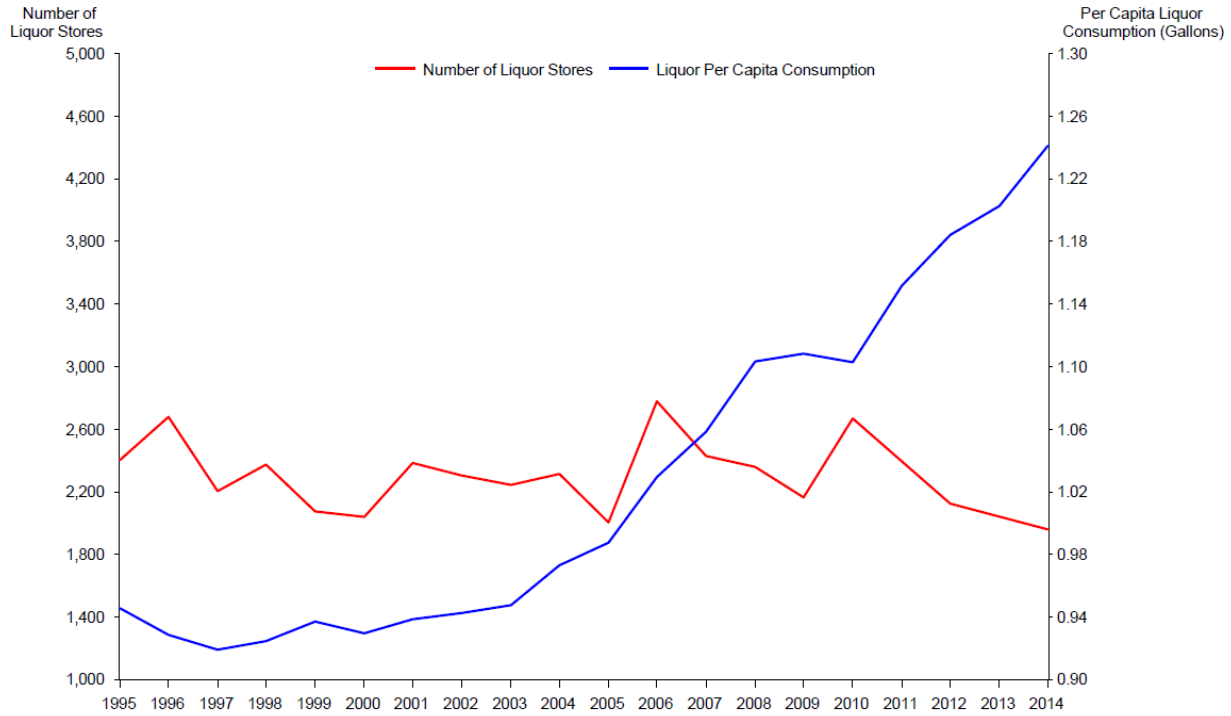
i) There is no evidence that the ban reduces liquor consumption

The evidence at trial showed no correlation between the presence of public corporations and the per-capita consumption of alcohol.

TPSA claims that per-capita liquor consumption has "remained relatively constant" and that this fact is "not controverted." TPSA Br. 4. TPSA is wrong.

The District Court made no such finding, and the evidence shows that Texas's per-capita liquor consumption has *increased* since the ban was enacted in 1995:

Exhibit 7: Number of Stores and Per Capita Liquor Consumption in Texas
1995 – 2014

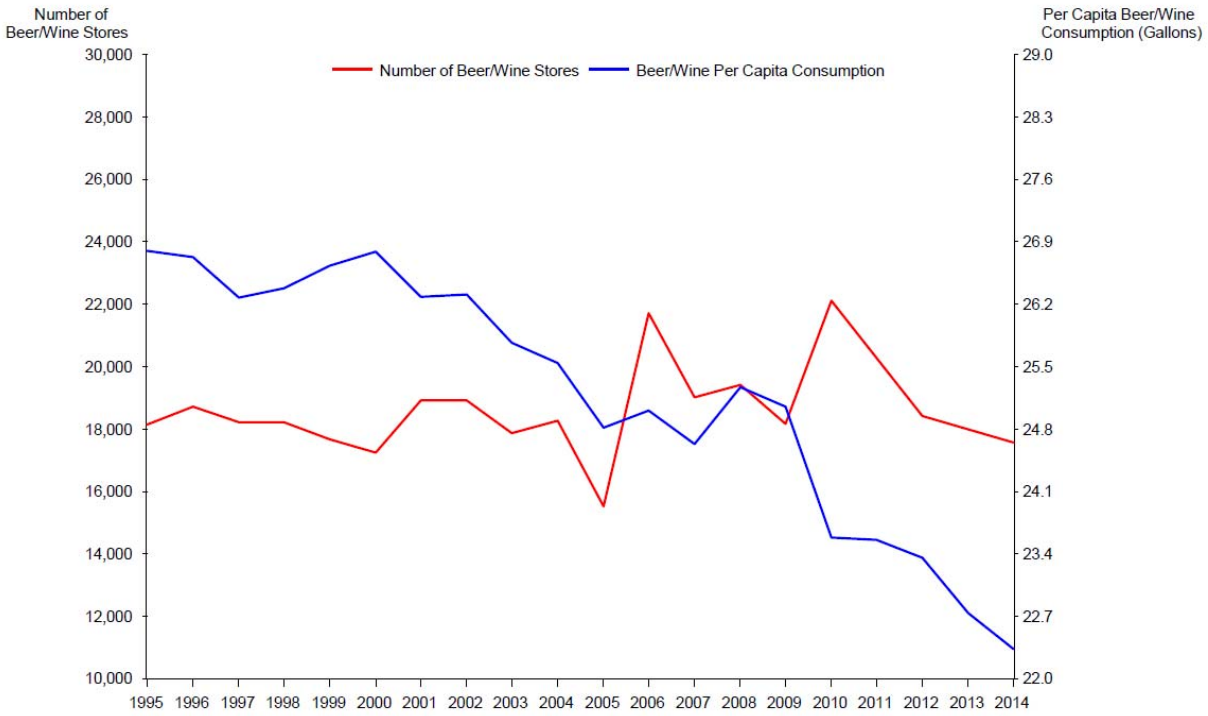


ROA.14220; *see* ROA.10258 (testimony). This increase in Texas's per-capita liquor consumption is in line with similar increases in states where Walmart sells liquor. ROA.14222.

The hypothesis that banning public corporations will decrease consumption is also refuted by evidence of what happened in Texas's related beer-and-wine market. In 1993, out-of-state public corporations were allowed to enter that market

for the first time.[10] Since then, per-capita consumption of these beverages has *decreased*, despite the presence of out-of-state public corporations in this market:

Exhibit 8: Number of Stores and Per Capita Beer/Wine Consumption in Texas
1995 – 2014



ROA.14221; *see* ROA.10259 (testimony). This evidence from the beer-and-wine market refutes the hypothesis that public corporations, if allowed to enter a retail market, cause an increase in alcohol consumption.

TPSA claims that public corporations' presence in a liquor market is correlated with lower prices and increased externalities. TPSA Br. 5. The District

[10] Allowing out-of-state corporations to enter the beer-and-wine market was one of the changes made by H.B. 1445. *Supra*, at 18-20. That law removed the 51% ownership requirement for certain permits, including beer licenses (BF) and beer-and-wine permits (BQ). ROA.13815, ROA.10821-22.

Court made no such finding, and TPSA's expert's analysis is unreliable because it arbitrarily excludes many key states. ROA.11407-12.

ii) There is no evidence that the ban raises liquor prices

Applying the rational-basis standard, the District Court held that the Legislature could have believed that a public-corporation ban might indirectly reduce consumption by raising liquor prices. ROA.9429. However, the District Court made no factual finding that the ban actually raises prices, and there is no indication in the record of any such evidence "before or available to" the Legislature. *International Truck*, 372 F.3d at 728.

The evidence at trial proved that the ban does not raise prices. The existing package-store chains "have a very large share of the Texas market," "compete vigorously," and "offer extensive promotions and discounts." ROA.9401; *see* ROA.10879–80 (Gabriel's competes on price and offers discounts); ROA.11206–07, 10–15 (same for Twin Liquors); ROA.8802–03, 8805–06 (same for Spec's); ROA.10118-19 (Elzinga: "very aggressive" "head-to-head price competition"). The chains' advertisements confirm this price competition, showing discounting and promises to match each other's prices. ROA.14294 (Twin Liquors' ads); ROA.14308 (Gabriel's ads).

Moreover, Texas's three-tier system prevents public corporations, however "large," from cutting out the middleman and negotiating lower prices from manufacturers. ROA.9943–47.

Because of all this vigorous competition, and the inability of retailers to cut out the middleman, banning public corporations does not cause prices to be any higher than they otherwise would be if public corporations were allowed to enter. This is a basic economic principle of how markets work. ROA.10067.

In addition to theory, Elzinga also presented a rigorous analysis of pricing data. Elzinga demonstrated that Walmart's liquor prices (in the states where it is permitted to sell) are *higher* than the prices offered by large liquor "superstores" like the Texas chains. ROA.10125–28 (Walmart's prices are "about in the middle"); ROA.14239 (chart showing share of units sold below Walmart's price); ROA.10129 ("the big [liquor] chains sell at lower prices than Wal-Mart").

TABC cites its expert's testimony that Walmart's prices are below competitors' average prices 70.1% "of the time." TABC Br. 25-26. This analysis is deeply flawed because (1) it does not account for the *volume* of units sold at each price, ROA.11025-28, 32-34, and (2) TABC's expert did not analyze the prices (much less, the volume) offered by liquor "superstores" like the Texas chains. ROA.11039-41.

iii) There is no evidence that the ban decreases the number of stores

The District Court also held that the Legislature might "have reasonably believed" that the ban indirectly reduces liquor consumption by decreasing the "total number" of liquor stores. ROA.9412. Here again, the District Court did not find that the ban actually does this, nor that any evidence of this supposed effect was "before or available to" the Legislature. *International Truck*, 372 F.3d at 728.

Texas law puts no upper limit on the number of permits that may be issued in any location. ROA.10636. Because the existing package-store chains already compete vigorously, with no limit on their growth or their sales, there is no economic evidence of "unmet demand" in the Texas liquor market. ROA.10145–46 (Elzinga: "chang[ing] the challenged regulations" would not "somehow expand market demand such that the market would sustain or welcome hundreds and hundreds of new retail entrants"). Moreover, after out-of-state public corporations were allowed to enter the beer-and-wine market in 1993,[11] the total number of beer-and-wine permits did not increase. Instead, the number of beer-and-wine outlets *decreased* from 17,787 in 1992 to just 15,524 in 2005. ROA.11402:11-21; ROA.14221. That refutes the hypothesis that banning public corporations decreases the number of outlets.

[11] *Supra*, at 47 n.10.

3. The Ban Does Not Promote "Accountability" or the Three-Tier System

Neither TABC nor TPSA contends that the ban achieves the local benefits of improving package-store firms' "accountability" or enforcing Texas's three-tier system. These arguments are therefore waived.

The District Court found that the ban does not "promote corporate accountability." ROA.9412-13. The District Court made no finding as to whether the public-corporation ban benefits Texas's three-tier system because neither TABC nor TPSA identified that purported benefit in response to Walmart's interrogatories. TPSA raised this argument for the first time when cross-examining Elzinga. ROA.10576-80, ROA.14323, ROA.14431, ROA.2906.

The ban is unlike laws that require professional-service firms to be owned by licensed professionals. Such laws may have, as a byproduct, the effect of barring public corporations from owning these firms. Texas's ban is different for at least two reasons. First, the ban does not restrict *who* may own a package-store. Anyone may do so, provided that he has 34 or fewer co-owners and no "non-qualifying" criminal history. ROA.10707-08. Second, retailing liquor is not a profession with extensive training and licensing requirements.

E. The Ban's "Burden" Is "Clearly Excessive"

The ban's disparate impact on out-of-state entrants "is clearly excessive in relation to the putative"—but unproven— "local benefit" of reducing consumption. *Pike*, 397 U.S. at 142. Texas could more effectively reduce consumption through non-discriminatory means, like increasing the excise tax. The ban fails *Pike* balancing. *Serv. Mach.*, 617 F.2d at 76.

F. *Pike* Applies to Alcoholic Beverage Laws

In *Cooper II*, this Court quoted the *Pike* balancing test and then held that "this framework" applies "regardless of whether the state regulation deals with alcohol." 820 F.3d at 741; *see also Dickerson v. Bailey*, 336 F.3d 388, 396–97 (5th Cir. 2003) (quoting *Pike*, and rejecting Texas's argument that the Twenty-First Amendment exempts alcohol laws from *Pike*). The argument that *Pike* does not apply is therefore foreclosed by Circuit precedent.

The Supreme Court, and other Circuits, have also held that *Pike* applies to alcohol laws. *Brown Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *Bacchus*, 468 U.S. at 270; *Cherry Hill*, 553 F.3d at 433; *Family Winemakers*, 592 F.3d at 9 n.9. In *Baude*, the Seventh Circuit applied *Pike* to invalidate a law regulating "direct sales" by wineries. 538 F.3d at 612.

No appellate court has held that *Pike* does not apply to alcohol. *Lebamoff Enterprises, Inc. v. Huskey*, 666 F.3d 455, 460 (7th Cir. 2012) (collecting cases).

The sole authority for this proposition is the concurring opinion in *Lebamoff*. But that opinion's rationale is contrary to this Circuit's precedent.

This Circuit has held that the Twenty-First Amendment's exception, to the Dormant Commerce Clause, is narrow. "Distinctions between in-state and out-of-state retailers . . . are permissible *only* if they are an inherent aspect of the three-tier system." *Cooper II*, 820 F.3d at 743 (emphasis added). The *residency* of a package-store firm's owner is not an "inherent aspect" of the three-tier system. *Id.*; *Byrd v. Tennessee Wine & Spirits Retailers Ass'n*, 883 F.3d 608, 622 (6th Cir. 2018), *cert. granted*, No. 18-96, 2018 WL 3496882 (U.S. Sept. 27, 2018).

So, too, the *number* of a package-store firm's owners is not an "inherent aspect" of the three-tier system. The three-tier system has been in place in many states for many years, yet TABC, TPSA, and their amici cannot point to a single state that ever excluded a firm from the three-tier system based on the number of the firm's owners.

To determine whether a challenged law is an "inherent aspect" of the three-tier system, this Court asks whether the law regulates "*what* . . . retailers do." *WineCountryGiftBaskets.com v. Steen*, 612 F.3d 809, 812, 819-21 (5th Cir. 2010) (emphasis added) (holding that Texas may require a retailer to have an in-state physical location and may also authorize the retailer to make home deliveries to "proximate consumers" within the retailer's "county"). Under this test, the public-

corporation ban is not an "inherent aspect" of the three-tier system because the ban does not regulate the manner in which retailers ply their trade. Instead, the ban "discriminate[s] among retailers" based on *who* they are, not *what* they do. *Id.* That kind of discrimination does not come within the Twenty-First Amendment's narrow exception to the Dormant Commerce Clause. *Id.*; *see Granholm v. Heald*, 544 U.S. 460, 489 (2005) ("attempts to discriminate in favor of local" firms are not "saved by the Twenty-first Amendment").

G. Walmart Did Not Waive *Pike*

TPSA claims "Wal-Mart did not litigate *Pike*." TPSA Br. 46. Not true. *Pike* was litigated at every stage, including motions to dismiss, ROA.162, ROA.202, and summary judgment, ROA.6546, ROA.3841, ROA.7391–92, ROA.8313. Moreover, TPSA and TABC never raised Walmart's supposed waiver below. ROA.8968–72; ROA.9176–211. The waiver argument is itself waived.

VI. The Arbitrary Permit Limit Violates the Equal Protection Clause

A. Legal Standard: Because the Permit Limit Discriminates Based on Family Status, Heightened Scrutiny Applies

The District Court was "sympathetic" to Walmart's argument that family-based discrimination demands heightened scrutiny, but did not decide the issue because the Texas law "fails even rational basis review." ROA.9435.

Because Texas's permit limit discriminates based on family status, the law is invalid unless it "bears 'an evident and substantial relation to the particular state interests [it] is designed to serve.'" *Cox v. Schweiker*, 684 F.2d 310, 320 (5th Cir. 1982) (applying heightened standard to strike down law making it more difficult for illegitimate children to inherit); *Trimble v. Gordon*, 430 U.S. 762, 772 (1977) (same); *see also Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 n.25 (2017) ("Distinctions based on parents' marital status . . . are subject to . . . heightened scrutiny.").

Heightened scrutiny is appropriate because discrimination based on family status is "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility." *Trimble*, 430 U.S. at 769.

TABC concedes that Texas "treats businesses with close family members differently." TABC Br. 41. Some package-store owners, through no fault of their own, do not have close family members and therefore cannot use "consolidation." The "practical effect" is to place the burden of the five-permit limit on those family-less owners. ROA.9400.

TABC cites no case holding that heightened scrutiny should not apply to a law that "treats businesses with close family members differently." TABC Br. 41. Instead, TABC cites *Nordlinger v. Hahn*, a tax case. 505 U.S. 1 (1992). At issue in *Nordlinger* was California's exemption, from its system of reassessing property

tax values, for the "transfer[] of a principal residence . . . between parents and children." *Id.* at 5. The *Nordlinger* Court upheld that exemption by relying on the principle that "narrow exemptions from a general scheme of taxation" do not "necessarily render the overall scheme invidiously discriminatory." *Id.* at 16-17. *Nordlinger* does not control here because the consanguinity exception is not a "narrow exemption" from a "scheme of taxation." Texas's family-based discrimination allows numerous favored owners to obtain as many permits as they wish—provided they have a close family member willing to sign a piece of paper. Some of these favored owners now dominate the state's liquor market, thanks to this family-based discrimination. Such overt discrimination, based on family status, demands heightened scrutiny.

B. The Arbitrary Permit Limit Is Irrational

Texas's arbitrary permit limit cannot withstand even rational-basis scrutiny. TABC and TPSA attempt to show a rational relationship between the family-based discrimination and four hypothetical purposes. In all four attempts, TABC and TPSA invent "hypothesized facts"—which is not permitted under rational-basis review. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) (law prohibiting anyone except funeral directors from selling caskets was not rationally related to consumer protection). The real facts, found by the District Court,

demonstrate a "total disconnect" between these four purposes and what the law actually does. *Veasey*, 830 F.3d at 262.

1. The Law Is Not Related to Promoting "Small Businesses"

The law promotes large businesses, not small ones. "Because of" the law's family-based discrimination, "Texas has several large package store chains." ROA.9443. By taking advantage of the family-based discrimination, a larger firm may swallow up a smaller firm in a single acquisition—a takeover known as a "bulk buy." ROA.10649–57; ROA.14369; *see also* ROA.10885-86 (Gabriel's used bulk buys to acquire smaller, unrelated package-store firms); ROA.10903.

TABC and TPSA point out that some smaller package-store firms still manage to survive. That fact does not provide a rational basis to believe that the family-based discrimination had anything to do with their survival. No Texas law places any limit on how large a package-store firm may grow. Evidence at trial proved that package-store chains continue to increase their numbers of permits and their sales. ROA.10108-11; ROA.14209-12. There is no rational relationship between the family-based discrimination and the survival of smaller firms. ROA.10067.

2. The Law Is Not Related to TPSA's "Small Firm Theory of Regulation"

TPSA contends that the arbitrary permit limit is a "small firm theory of regulation." TPSA Br. 37. It is hard to understand what tangible benefit the "small firm theory" is supposed to provide, and impossible to believe that family-based discrimination is related to achieving it. ROA.9444 (this theory "beggars belief").

For its "small firm" theory, TPSA relies on Dr. Stephen Magee, whose opinions have been excoriated by two federal courts.[12]

Magee's "small firm theory" is that family-based discrimination allows "limited" expansion in urban areas but prevents expansion in rural areas. Magee did not explain how family-based discrimination could possibly affect rural areas differently from urban areas. TABC concedes that the "law does not mandate such strategic growth." TABC Br. 46. Chains can and do open stores in rural areas and anywhere else profits are to be made. ROA.10932–33.

[12] ROA.11482-85; *see Adrea, LLC v. Barnes & Noble, Inc.*, No. 13-cv-4137, ECF 156 at 897:9–23 (S.D.N.Y. Nov. 5, 2014) (Rakoff, J.) (excluding Magee's opinions because they were "completely methodologically unsound," the equivalent of "two plus two equals eight"); *Core Wireless Licensing S.A.R.L. v. LG Electronics, Inc.*, No. 14-cv-911, 2016 WL 4440255, at *13 (E.D. Tex. Aug. 23, 2016) (Gilstrap, J.) (granting new trial because Magee's opinions were "conclusory and wholly unsupported by the evidence").

3. The Law Is Not Related to Promoting "Family Businesses"

The TABC and TPSA contend that the permit limit promotes "family" businesses. This is just another way of saying that the law burdens all businesses whose owners do not have close family members. Excluding those people, based on their lack of family, is not a legitimate state interest. *Trimble*, 430 U.S. at 772.

Moreover, this law does not promote "family businesses." Instead, it "favors businesses that are owned by people with certain types of family members." ROA.9442. The law forbids family members from having any "involvement in the package store." *Id.* The law thus "*discourages* family members from becoming involved in the business." *Id.*

4. The Law Is Not Related to "Estate Planning"

TABC's "estate planning" argument assumes the very thing it is supposed to prove—namely, that there is a rational basis for allowing owners with close family members to obtain unlimited permits while others cannot. Having assumed that, TABC then hypothesizes that the "consolidation" procedure might be more convenient for these favored owners (before a relative's death) than some other transfer mechanism (after death). But this hypothetical does not answer the question: What is the rational basis for denying this procedure to an owner *without* a close family member? After all, "the owners of package store companies that do

not have a child, sibling or parent who is able to assist in the consolidation process also have estates that require resolution." ROA.9444.

VII. The District Court Properly Remedied the Family-Based Discrimination

The District Court remedied the discrimination by extending benefits to the excluded class. Because of the injunction, firms whose owners lack close family members will be able to obtain package-store permits on the same terms as other applicants—unless the Legislature takes action.

The District Court's declaratory relief was narrower than its injunctive relief. The District Court did *not* declare that a nondiscriminatory limit on permits would violate the Constitution. ROA.9445. Therefore, the District Court's remedy leaves the Legislature free to enact such a law.

A. Standard of Review

This Court reviews the grant of an injunction for abuse of discretion. *United States Sec. & Exch. Comm'n v. Kahlon*, 873 F.3d 500, 508 (5th Cir. 2017).

TPSA relies on *Salve Regina Coll. v. Russell*, 499 U.S. 225 (1991), to contend that "no deference" is owed. But *Salve Regina* did not review an injunction or any other remedy. Instead, *Salve Regina* held that an appellate court reviews *de novo* the district court's substantive interpretation of state law. *Id.* at 231. Here, the interpretation of the challenged statutes is not in dispute.

B. The District Court Acted Within Its Discretion by Extending Benefits

The District Court was within its discretion to extend benefits to the excluded classes. In cases like this one, where a federal court "address[es] discriminatory burdens," the preferred "remedy" is to "extend[] . . . equal benefits" to the "Plaintiffs [who have] sued to obtain" them. *Dickerson*, 336 F.3d at 407 (affirming remedy of ordering TABC to allow out-of-state wineries to sell directly to Texas consumers); *see Cox*, 684 F.2d at 318 (ordering the state to extend benefits to the excluded illegitimate child).

Traditional concerns of equity guide this remedial decision. Two concerns are paramount: First, "it is not the function of litigants seeking redress for violations of their constitutional rights" to "seek the imposition of affirmative burdens on other parties competing in the marketplace." *Dickerson*, 336 F.3d at 408. Second, enjoining *only* the consanguinity exception would "impose hardship" on Texans with close family members "whom [the Legislature] plainly meant to protect." *Califano v. Westcott*, 443 U.S. 76, 90 (1979) (important "equitable consideration" in extending benefits is to avoid imposing this hardship).

For these reasons, extending benefits is by far the most common remedy for constitutional violations like the arbitrary permit limit. In 2015, the Second Circuit reviewed the caselaw and determined that there had been, to that point, *no case* in

which the Supreme Court "contracted, rather than extended, benefits when curing an equal protection violation." *Morales-Santana v. Lynch*, 804 F.3d 520, 537 (2d Cir. 2015) (relying on this caselaw to extend the benefit—a shorter residency period for qualifying for U.S. citizenship—to children of unwed U.S. fathers), *rev'd sub nom. Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017).

TPSA and TABC now rely on the Supreme Court's decision to reverse the Second Circuit in *Morales-Santana*. But the Supreme Court's opinion reaffirmed the well-established rule that "the preferred [remedy] in the typical case is to extend favorable treatment" to the excluded class. 137 S. Ct. at 1701. *Morales-Santana*, however, was "hardly the typical case." *Id.* Two factors, not present here, made *Morales-Santana* the exception to the rule. *First*, extending the benefit of a shorter residency requirement would have been contrary to the long-recognized principle of the "importance of residence in this country as the talisman of dedicated attachment." *Id.* at 1700. Second, extending this benefit would have caused the irrational (and likely unconstitutional) result that children of *unwed* parents had a shorter path to citizenship than the children of *wedded* parents. *Id.*

C. TABC's and TPSA's Preferred Remedy Would Arbitrarily Entrench the Current Chains' Dominant Market Position

TABC's and TPSA's preferred remedy would lock in the dominant market position of the current chains. The current chains would retain their many

hundreds of permits, while all future applicants would be limited to five. The chains would be safer from competition than ever before. This bizarre result would perpetuate, not remedy, the Equal Protection violation. It would also violate Texas's constitutional prohibition against "special law[s]" because it would selectively benefit the current chains. Tex. Const. art. III, § 56.

D. The District Court's Remedy Leaves Discretion to the Legislature

"If the Texas legislature wishes to impose burdens equally—as opposed to granting benefits equally—then that is its prerogative, not" the federal courts'. *Dickerson*, 336 F.3d at 408–09. Under the District Court's remedy, the Legislature is free to consider whether to enact a new permitting scheme that sets a non-arbitrary permit limit. In the "public debate—more realistically, the lobbying—that should and almost certainly shall occur" in the Legislature, the "democratic process" will determine whether Texas wishes to limit all package-store firms to a set number of permits, or instead allow all package-store firms to acquire as many permits as they see fit. *Id.* Notably, in this "democratic process" the Legislature could *not* choose the remedy TPSA seeks here—permanent entrenchment of the current chains' permits and only their permits—because that would be a "special law." Tex. Const. art. III, § 56.

E. Texas Law on Severability Does Not Limit the District Court's Power to Issue Injunctive Relief

TPSA—but not TABC—contends that Texas's "severability" statute requires this Court to adopt TPSA's preferred remedy. Tex. Gov't Code § 311.032(c). According to TPSA, this statute limits federal courts' equitable powers. TPSA is wrong, for three reasons.

First, the District Court's declarative relief already does what TPSA asks. The District Court did *not* declare that Section 22.04 (the five-permit limit) is unconstitutional. Therefore, Texas is free to enact a new and even-handed permit limit. The District Court's remedy is therefore not inconsistent with *Leavitt v. Jane L.*, a case in which the lower court erred by declaring unconstitutional more of the statute than was required. 518 U.S. 137 (1996) (per curiam) (summarily reversing lower court's declaration that all of Utah's law banning abortions was unconstitutional, even the portion banning late-term abortions). Moreover, TPSA's brief fails to acknowledge that *Leavitt* was a per curiam summary reversal, decided without the benefit of full briefing and oral argument. Summary decisions' precedential weight is limited to the "precise issues presented and necessarily decided." *Price v. Warden*, 785 F.3d 1039, 1042 (5th Cir. 2015). *Leavitt* did not discuss, much less alter, the remedial principle applicable here,

which is that the proper remedy for unconstitutional discrimination is to extend benefits to the excluded class.

Second, a federal court's equitable power to remedy constitutional violations is not limited by state statute. *Dickerson*, 336 F.3d at 409 (extending benefits because that "is the prudential way for federal courts to perform their constitutional surgery" on Texas's alcohol laws, and rejecting TABC's argument that Texas law required severance[13]); *Cox*, 684 F.2d at 318 (extending benefits because "in determining the rights of citizens" this Court "must give effect to federal constitutional principles"); *see also Westcott*, 443 U.S. at 90 ("equitable considerations" guide federal courts' remedial decision to extend benefits).

Third, Texas law supports the District Court's remedy in any event. Texas courts will not sever one portion of a law if doing so would "present the risk of substituting one set of constitutional problems for another." *Auspro Enterprises, LP v. Texas Dep't of Transportation*, 506 S.W.3d 688, 704-06 (Tex. App. 2016) (extending rights to erect billboards), *review granted, judgment vacated as moot* (Apr. 6, 2018). TPSA's preferred remedy, of entrenching the chain's current permits and market positions, would cause just such "constitutional problems"

[13] In *Dickerson*, TABC asked the Court to sever the unconstitutional provisions rather than extend benefits, citing the same Texas "severability" statute that TABC relies on here. TABC Br., 2002 WL 32255785, *56.

under both the Federal and the Texas Constitutions. Moreover, in determining the proper remedy, Texas courts, like federal courts, consider the need to provide "relief" for the plaintiffs who "assert[] a constitutional right." *Id.*

VIII. Walmart Has Standing

Walmart has a concrete business plan to sell liquor at more than five locations. ROA.13736. Walmart is "prevented from implementing its plan by the statutes challenged in this lawsuit." ROA.9398. Therefore a "case or controversy" exists as to all of Walmart's claims. *Speaks v. Kruse*, 445 F.3d 396, 399 (5th Cir. 2006).

CROSS-APPEAL

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 because Walmart asserted claims under a federal statute, 42 U.S.C. § 1983. Walmart's cross-appeal was timely filed on April 26, 2018, within 14 days after the first notice of appeal. ROA.9477, ROA.9484. This cross-appeal is taken from a final judgment disposing of all claims. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW IN THE CROSS-APPEAL

1. Does the public-corporation ban violate the Equal Protection Clause?

2. Does the arbitrary permit limit violate the Dormant Commerce Clause?

SUMMARY OF ARGUMENT

The District Court should have granted additional declaratory relief. The public-corporation ban should be declared in violation of the Equal Protection Clause. The arbitrary permit limit should be declared in violation of the Dormant Commerce Clause.

ARGUMENT

I. The Public-Corporation Ban Violates the Equal Protection Clause

A. Legal Standard

The ban merits heightened scrutiny for two reasons. First, the ban is "an absolute deprivation of the desired benefit." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 23 (1973) ("absolute deprivation" of education would require heightened scrutiny). The Supreme Court has applied heightened scrutiny to laws that cause the absolute denial of a benefit due to an applicant's *poverty*. *E.g.*, *Bullock v. Carter*, 405 U.S. 134 (1972) (applying heightened scrutiny to strike down, under Equal Protection Clause, Texas's filing fee for primary elections). Heightened scrutiny should also apply to a law that imposes an "absolute deprivation" of a benefit because of the applicant's supposed *wealth*.

Second, the ban bears the hallmarks of "animus" against public corporations. It is a "wide-ranging and novel deprivation[] upon the disfavored group" that "strays from the historical territory of the lawmaking sovereign just to eliminate

privileges that a group would otherwise receive." *Bishop v. Smith*, 760 F.3d 1070, 1100 (10th Cir. 2014) (Holmes, J., concurring). *See supra*, at 18-29 (describing evidence of animus).

B. The Ban Is Irrational

The ban cannot withstand even rational-basis scrutiny. In post-trial briefing, TABC and TPSA identified four bases for the ban. ROA.9054-58, ROA.8980-86. All four are "total[ly] disconnect[ed]" from what the ban actually does. *Veasey*, 830 F.3d at 262.

1. The Ban Is Not Related to Reducing Liquor Consumption

The District Court held that it is "conceivable" that the ban might indirectly reduce liquor consumption by reducing the number or the "convenience" of liquor stores or by increasing liquor prices. For three reasons, this was legal error.

First, this hypothetical causal chain is made of lawful links. Selling liquor is lawful. Opening liquor stores in convenient locations is lawful. Price competition is lawful. Excluding a class of persons because they might be more successful in lawful economic competition is not a legitimate purpose. That is "economic protectionism" by another name. "[E]conomic protectionism" is *not* "a legitimate governmental purpose." *St. Joseph Abbey*, 712 F.3d at 222.

Second, because there are many links in this hypothetical causal chain, the ban is so "attenuated" from the benefit "as to render the distinction arbitrary." *City*

of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) (striking down, on Equal Protection grounds, ordinance requiring a special use permit for home for the disabled). In other words, the rationale proves too much. It would justify banning any group the Legislature might conceivably believe would be more successful at retail. Could Texas ban all business-school graduates? All high-school graduates? All persons previously employed by Walmart? Under TABC's and TPSA's rationale, the answer would be "yes" to all three.

Third, this hypothetical causal chain is contrary to basic economic truth. Excluding a subset of potential entrants does not increase price, or decrease supply, where the market is competitive. *Supra*, at 45-51.

2. The Ban Is Not Related to Promoting "Small" or "Family" Businesses

TABC and TPSA claimed the ban is rationally related to promoting "small" or "family" businesses—which terms were never defined. The District Court did not rule on this argument. It fails for three reasons.

First, the ban does not provide any *direct* benefits. It is unlike the subsidies for smaller businesses that were upheld in the cases TABC and TPSA cited below. The ban's supposed benefit is the *indirect* result of excluding others.

Second, this hypothetical, indirect benefit is a "fantasy." *St. Joseph Abbey*, 712 F.3d at 223. Texas's market is dominated by chains that are "large" by any

reasonable definition yet are unaffected by the ban. There is no rational basis to believe that banning only a subset of "large" firms would benefit "small" firms in the real world. Why is the "small" liquor store any better off, if the large competitor opening down the street is Spec's 159th store instead of Walmart's first?

Third, the ban is so "attenuated" from this hypothetical, indirect benefit "as to render the distinction arbitrary." *Cleburne*, 473 U.S. at 446.

3. The Ban Is Not Related to "Accountability"

TABC and TPSA claimed that the ban is rationally related to making package-store firms more "accountable," i.e., law-abiding. Though the District Court did not rule on this argument, the court did find that "public corporations are *not* less accountable than firms with fewer than 35 owners." ROA.9412 (emphasis added) (citing ROA.10261-69, ROA.14280).

The ban does nothing to make owners of a package-store firm "accountable" for the firm's operation. Texas allows a package-store corporation's shareholders to live anywhere, to have no role in the corporation's operations, to have no control over the corporation, and to have no personal liability for the corporation's torts, crimes, or contracts. Tex. Bus. Orgs. Code § 21.223.

TPSA claimed that a "large" firm's "faceless bureaucracy" might reduce "accountability." But the ban does not regulate a firm's officers, employees, or

"bureaucracy." The ban only limits the number of owners. A firm with hundreds of employees may be just as "faceless" (or not) regardless of the number of owners.

TPSA also claimed that the ban makes liquor "the business" of package stores and thus "encourage[s]" "compliance." ROA.8986. But nothing in Texas law requires package-store firms to sell only liquor. The chains can and do sell other products. ROA.10645, ROA.10878, ROA.11205, ROA.8797-98.

4. The Ban Is Not Related to the Three-Tier System

For the first time in its post-trial brief, TPSA contended that the ban is related to the three-tier system's rule against a retailer owning a wholesaler or manufacturer. ROA.8986. This argument was not considered below because it was untimely raised. ROA.10576-80, ROA.14323, ROA.14431, ROA.2906. Remand would be required before upholding the ban on this basis. Remand is not necessary, however, because this argument depends on hypothetical facts that are pure "fantasy." Beer-and-wine retailers are subject to the same three-tier ownership rules, ROA.10642, and yet 41% of beer-and-wine permits are held by public corporations, ROA.10748.

II. The Arbitrary Permit Limit Violates the Dormant Commerce Clause

A. The Arbitrary Permit Limit Has a Discriminatory Purpose

Whatever the *original* purpose of the arbitrary permit limit may have been, it has been "maintained for an *invidious* purpose" (i.e., excluding out-of-state competitors) and thus merits strict scrutiny. *Rogers*, 458 U.S. at 622-25 (emphasis added) (election methods "serve[d] to maintain the [racial] status quo" and therefore had a discriminatory purpose even though "neutral on their face").

TPSA has repeatedly defeated repeal efforts by making "blatant" appeals to economic protectionism. ROA.9406. In 2009, the Legislature considered House Bill 1933 and Senate Bill 1216. These bills would have repealed the consanguinity exception and the five-permit limit, but make no other changes. *See* ROA.9094 (internet links to the bills). Under oath,[14] TPSA's representatives told the Legislature:

- The arbitrary permit limit "keep[s]" the liquor business "in the hands of families in the state." ROA.14150.
- One "reason for [the] 100 percent Texas ownership [of package stores] is the five store limit and the consanguinity exception," which "discourage . . . out of state big box stores from entering the Texas liquor store market." ROA.14051-52.

[14] Tex. Gov't Code § 301.022(a).

In written materials distributed to the Legislature, ROA.10905, TPSA stated:

- "All 2,300 [Texas package stores] are owned by Texas residents. The reason? The Texas five-store limit and the family exception." ROA.14390–91.

- "The 5-store law is a TEXAS-FIRST law." ROA.14321.

In 2013, the Legislature again considered a repeal of the arbitrary permit limit. House Bill 668 and Senate Bill 598 were identical to the bills considered in 2009. Again, TPSA representatives testified:

- If the arbitrary permit limit were repealed, "there would be out of state – there would be the ability for nonfamily members to enter the business, i.e., not locally controlled, locally state owned." ROA.14108-09.

- Repeal would "open it up for [firms] outside Texas to come in." ROA.14148.

B. The Arbitrary Permit Limit Fails the *Pike* Balancing Test

Because the arbitrary permit limit causally contributes to the disparate impact found by the District Court, the law must satisfy the *Pike* test. It fails.

The TPSA legislative testimony just quoted, which was made under oath, is powerful evidence that the arbitrary permit limit causally contributes to the disparate impact on interstate commerce. TPSA, as the industry trade association, well knows the impact of the arbitrary permit on its market. TPSA told this Court as much in 2016, when TPSA appealed the denial of its motion to intervene. In its briefs, TPSA claimed it could "offer evidence" based on its "direct[]

involve[ment]" with the challenged laws,[15] and that it was "uniquely suited" to do so.[16]

At trial, TPSA's Executive Director agreed that removing the arbitrary permit limit "would open the door wide for non-Texas businesses, whereas the current law encourages . . . ownership by Texas families." ROA.10907. A TPSA Executive Committee member confirmed at trial that his legislative testimony, on the causal effect of the arbitrary permit limit, was accurate. ROA.14051-52; ROA.11247-48.

Based on Walmart's expert evidence, the District Court found that the "[f]irms with the required capital and scale" to expand into Texas from another state "are almost always firms that have diffuse ownership." ROA.9409. This fact not only supports the District Court's finding that the public-corporation ban causes a disparate impact, *id.*, but also demonstrates that the arbitrary permit limit contributes to this disparate impact. As TPSA states in its brief: "[F]irms with diffuse ownership structures"—that is, the firms that are the most likely out-of-state entrants—"cannot gain more than five permits, while . . . Spec's, Twin Liquors, and Gabriel's can expand." TPSA Br. 50. Walmart's expert testified that

[15] TPSA Opening Br. 2016 WL 1130156, *13-14, *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562 (filed Mar. 17, 2016).
[16] TPSA Reply Br., 2016 WL 2621104, *5 (filed May 2, 2016).

the arbitrary permit limit contributed to the disparate impact. ROA.10062-65, ROA.10068, ROA.10111, ROA.10278. This evidence should have been credited.

Because the arbitrary permit limit contributes to the disparate impact found by the District Court, the law must satisfy the *Pike* balancing test. The arbitrary permit limit fails *Pike* because it is not rationally related to achieving any legitimate local benefit, for the reasons described above. *Supra*, at 55-61. Therefore, the law's burden on interstate commerce is clearly excessive.

CONCLUSION

This Court should AFFIRM the judgment of the District Court (a) enjoining the enforcement of Sections 22.16, 22.04, and 22.05; (b) declaring that Section 22.16 violates the Commerce Clause; and (c) declaring that Section 22.05 violates the Equal Protection Clause. The judgment of the District Court denying declaratory relief should be REVERSED and REMANDED with instructions to issue a judgment declaring (a) that Section 22.16 violates the Equal Protection Clause; and (b) that Sections 22.04 and 22.05 together violate the Commerce Clause.

DATED: October 26, 2018

Respectfully submitted,

By: */s/ Steven M. Shepard*

Neal S. Manne
(TX Bar No. 12937980)
Alexander L. Kaplan
(TX Bar No. 24046185)
Chanler A. Langham
(TX Bar No. 24053314)
Michael C. Kelso
(TX Bar No. 24092617)
SUSMAN GODFREY LLP
1000 Louisiana Street, Suite 5100
Houston, Texas 77002
Telephone: (713) 651-9366
Facsimile: (713) 654-6666
nmanne@susmangodfrey.com
akaplan@susmangodfrey.com
clangham@susmangodfrey.com
mkelso@susmangodfrey.com

Steven M. Shepard
(NY Bar No. 5291232)
SUSMAN GODFREY LLP
1301 Avenue of the Americas
32nd Floor
New York, NY 10019-6023
Telephone: (212) 729-2010
Facsimile: (212) 336-8340
sshepard@susmangodfrey.com

Counsel for Plaintiffs-Appellees Cross-Appellants

Mark T. Mitchell
(TX Bar No. 14217700)
Frederick W. Sultan
(TX Bar No. 00797524)
GARDERE WYNNE SEWELL LLP
One American Center
600 Congress Avenue,
Austin, Texas 78701
Telephone: (512) 542-7000
Facsimile: (512) 542-7100
mmitchell@gardere.com
fsultan@gardere.com

Counsel for Plaintiffs-Appellees Cross-Appellants

ADDENDUM: TEXT OF THE CHALLENGED STATUTES

§ 22.04. Limitation on Package Store Interests

(a) No person may hold or have an interest, directly or indirectly, in more than five package stores or in their business or permit.

(b) For the purpose of this section:

(1) a person has an interest in any permit in which his spouse has an interest; and

(2) as to a corporate permittee, the stockholders, managers, officers, agents, servants, and employees of the corporation have an interest in the permit, business, and package stores of the corporation.

(c) The limitations prescribed in this section do not apply to an original or renewal package store permit issued before May 1, 1949, and in effect on that date. The commission or administrator shall renew each permit of that type on proper application if the applicant is otherwise qualified. If a person who holds or has an interest in more than five package store permits under the authority of this subsection has one of the permits cancelled, voluntarily or for cause, he may not obtain an additional permit in lieu of the cancelled permit. No person who has more than five package store permits may place any of the permits in suspense with the commission.

(d) This section does not apply to the stockholders, managers, officers, agents, servants, or employees of a corporation operating hotels, with respect to package stores operated by the corporation in hotels.

§ 22.05. Consolidation of Permits

If one person or 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 businesses into a single legal entity. That single legal entity may then be issued permits for all the package stores, notwithstanding any other provision of this code. After the consolidation, none of the permits may be transferred to another county.

§ 22.16. Ownership by Public Corporations Prohibited

(a) 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, or by any entity which would hold the package store permit for the benefit of a public corporation.

(b) For purposes of this section, a public corporation means:

(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.

(c) Before the commission may renew a package store permit, an individual who is an owner or officer of the permittee must file with the commission a sworn affidavit stating that the permittee fully complies with the requirements of this section.

(d) This section shall not apply to a package store located in a hotel.

(e) Any package store permittee who is injured in his business or property by another package store permittee or by any other person by reason of anything prohibited in this section may institute suit in any district court in the county where the violation is alleged to have occurred to require enforcement by injunctive procedures and to recover triple damages plus costs of suit including reasonable attorney's fees.

(f) This section shall not apply to a corporation:

(1) which was a public corporation as defined by this section on April 28, 1995; and

(2) which holds a package store permit on April 28, 1995, or which has an application pending for a package store permit on April 28, 1995; and

(3) which has provided to the commission on or before December 31, 1995, a sworn affidavit stating that such corporation satisfies the requirements of Subdivisions (1) and (2).

CERTIFICATE OF COMPLIANCE

1. This Principal and Response Brief complies with the type volume limit of Federal Rule of Appellate Procedure 28.1(e)(2)(B), because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 15,137 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally space typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Steven M. Shepard
Steven M. Shepard

Counsel for Plaintiffs–Appellees and Cross-Appellants

CERTIFICATE OF SERVICE

This is to certify that on October 26, 2018, a true and correct copy of the foregoing instrument was filed electronically with the Court and was served electronically on all counsel of record via the Court's CM/ECF system.

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 Trend Micro Office Agent, version 12.0.4456, and is free of viruses.

/s/ Steven M. Shepard
Steven M. Shepard

Attorney of Record for Plaintiffs–Appellees and Cross-Appellants