RECORD 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-00134-RP, Robert Pitman, Judge Presiding

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFFS - APPELLEES AND CROSS-APPELLANTS

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Jeffrey Rowes (Institute for Justice)

Undersigned counsel further certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that *amicus curiae* Institute for Justice is not a publicly held corporation, does not have any parent corporation, and that no publicly held corporation owns 10 percent or more of its stock.

Dated: November 2, 2018

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit public-interest law firm that litigates for greater judicial protection of individual rights, including rights that are not currently deemed "fundamental" and are therefore subject to rational-basis review. The Institute routinely represents entrepreneurs *pro bono* in economic-liberty cases in federal court. The Institute litigated *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), the case about casket-making monks that the lower court and parties discussed extensively below.

ARGUMENT

The purpose of this brief is to provide the Court with guidance on how to apply the rational-basis test. It is often difficult to reconcile the deference of rational-basis review with the serious analysis that all constitutional claims deserve.

This brief proceeds in three sections. First, *amicus* demonstrates that the rational-basis test, as applied by the Supreme Court, is a

[1] No party or party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the *amicus curiae*—contributed money that was intended to fund preparing or submitting this brief. Pursuant to Federal Rule of Appellate Procedure 29(a), counsel for *amicus* states that counsel for all parties have consented to the filing of this brief.

meaningful standard that evaluates claims using record evidence and in statutory context. Second, *amicus* explains that the Fifth Circuit consistently follows Supreme Court authority and likewise treats rational-basis review as meaningful. Finally, *amicus* analyzes Wal-Mart's public-corporations-ban claim to illustrate how rational-basis review should proceed and why the lower court likely erred in upholding the ban.

I. The Supreme Court Has Been Clear That the Rational-Basis Test Is a Real Standard of Review.

As this section will show, the rational-basis test is not a rubber stamp. Plaintiffs routinely prevail when they prove that a law is not rationally related to any legitimate government interest.

Plaintiffs win rational-basis cases even though courts' *descriptions* of the test often suggest that the true, if unstated, standard is *the government always wins*. The Supreme Court, for example, frequently describes a plaintiff's burden as "to negative every conceivable basis" for a challenged law "whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320–21 (1993) (citations and internal

quotation marks omitted).[2] Taken at face value, this burden is insurmountable. If government justifications need not have any factual foundation, the only limitation on government power would be the limits of the human imagination. Such a standard would be meaningless.

But the government does not always win, so there must be more to rational-basis review than certain judicial descriptions of the test imply. Indeed, Plaintiffs have won more than 20 rational-basis cases before the Supreme Court since 1970.[3] The Supreme Court invalidates government action under rational-basis review in three circumstances: (1) the absence of a logical connection between the proffered government

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[2] *See also F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) ("[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

[3] *See United States v. Windsor*, 570 U.S. 744, 774 (2013); *id.* at 793-94 (Scalia, J., dissenting) (noting that the Court relied on rational-basis review); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *United States v. Morrison*, 529 U.S. 598, 614–15 (2000); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996); *United States v. Lopez*, 514 U.S. 549, 567 (1995); *Quinn v. Millsap*, 491 U.S. 95, 108 (1989); *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty., W. Va.*, 488 U.S. 336, 345 (1989); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449–50 (1985); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 623 (1985); *Williams v. Vermont*, 472 U.S. 14, 24–25 (1985); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985); *Plyler v. Doe*, 457 U.S. 202, 230 (1982); *Zobel v. Williams*, 457 U.S. 55, 61–63 (1982); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977) (per curiam); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *James v. Strange*, 407 U.S. 128, 141–42 (1972); *Lindsey v. Normet*, 405 U.S. 56, 77–78 (1972); *Mayer v. City of Chicago*, 404 U.S. 189, 196–97 (1971); *Reed v. Reed*, 404 U.S. 71, 76–77 (1971); *Turner v. Fouche*, 396 U.S. 346, 363–64 (1970).

interest and the law; (2) the law imposes a public harm that vastly outweighs any plausible public benefit; and (3) the law lacks a legitimate government interest. In addition, the Court does not apply the rational-basis test only in the abstract. Instead, the Court evaluates the challenged law in the context of the record and wider statutory background. As *Heller* recognized: "[E]ven the standard of rationality as we have so often defined it must find some footing in the realities of the subject addressed by the legislation." 509 U.S. at 321.

This section proceeds as follows. The first three subsections explain the three circumstances in which the Supreme Court invalidates a statutory classification under the rational-basis test. The last subsection demonstrates that the Supreme Court relies on evidence, not simply the human imagination, in evaluating challenged laws.

A. A Law Must Be Logically Connected to the Government Interest Offered to Support It.

To survive the rational-basis test, a law must be "*rationally related* to a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (emphasis added). Accordingly, the Supreme Court invalidates a statutory classification if there is no logical connection

between the classification and the government interest offered to support it. This is because an absence of logic renders a statute arbitrary.

Zobel v. Williams illustrates this principle. 457 U.S. 55 (1982). There, a state program distributed oil money to Alaskans based on the length of their state residency. Under the scheme, residents who lived in the state since long before the law was enacted received considerably more than those who moved to Alaska later. The Court struck down the program because Alaska's asserted rationales provided no logical support for the law. For example, Alaska justified the law, in part, by arguing that the statute would encourage settlement in the sparsely populated state. The Court rejected this justification because it was illogical to pay long-term residents more than recent ones if the goal was to encourage people to move to Alaska. *Id.* at 62.

The no-logical-connection principle underlies the Supreme Court's reasoning in other rational-basis decisions. In *City of Cleburne v. Cleburne Living Center*, for example, the Court recognized that a city could in some cases validly deny a permit to a proposed group home if the home was too big, but found no logical connection between that principle and the City's actions given that similarly-sized homes were routinely

granted permits. 473 U.S. 432, 449–50 (1985). And in *Williams v. Vermont*, Vermont taxed cars purchased out of state to encourage its residents to purchase cars in the state, but the Court found no logical connection between that interest and taxing cars that were purchased out of state *before* their owners moved to Vermont. 472 U.S. 14, 24–25 (1985).[4]

B. The Plausible Public Benefit of a Challenged Law Cannot Be Vastly Outweighed by the Demonstrable Public Harm.

A statutory classification also fails rational-basis review when the challenged law causes a public harm far larger than any plausible public benefit. For example, in *Plyler v. Doe*, the government argued that denying public education to the children of illegal immigrants could help save the government money. 457 U.S. 202 (1982). The Court rejected this argument, noting that the alleged benefit was "wholly insubstantial in

[4] *See also Quinn v. Millsap*, 491 U.S. at 108 (finding no logical connection between an individual's ability to understand politics and an individual's ownership or non-ownership of land); *Chappelle*, 431 U.S. 159 (same); *Moreno*, 413 U.S. at 534 (finding no logical connection between stimulating the agricultural economy and providing food stamps only to households containing people who are related to one another); *Mayer*, 404 U.S. at 196 (finding, where the government had adopted a policy that inability to pay was not a sufficient reason to deny a transcript to a felony defendant, there was no logical reason that policy should not extend to a misdemeanor defendant*); Turner*, 396 U.S. at 363–64 (finding no logical connection between fitness for political office and property ownership).

light of the costs involved to these children, the State, and the Nation" from creating a subclass of illiterates. *Id.* at 230. Similarly, in *Allegheny Pittsburgh Coal Co. v. County Commission*, the Court struck down a West Virginia statute that assessed property taxes based on the most recent sale price. 488 U.S. 336, 343–46 (1989). This method resulted in gross disparities in tax liability between similar properties based on how long ago the property had been sold. *Id.* at 344. The Court held that the tax violated the Equal Protection Clause because the asserted public benefit—administrative convenience for the government—was trivial compared to the manifest injustice of assigning tax liability arbitrarily.[5]

C. A Law Cannot Be Supported by Illegitimate Interests Alone.

Finally, a statute fails the rational-basis test when the only asserted government interest is illegitimate. This follows from the classic formulation of the rational-basis test: a law must be rationally related to

[5] *See also James v. Strange*, 407 U.S. at 141–42 (holding that the state funds saved by denying indigent defendants exceptions to the enforcement of debt judgments was grossly disproportionate to the harms it inflicted on debtors); *Lindsey v. Normet*, 405 U.S. at 77–78 (holding that the cost savings from deterring a few frivolous appeals were insufficient to justify a surety requirement that allowed many frivolous appeals, blocked many meritorious appeals, and showered a windfall on landlords); *Reed v. Reed*, 404 U.S. at 76–77 (holding that attempting to reduce the workload of the probate courts by excluding women from service as administrators in certain cases would be unconstitutionally arbitrary).

a *legitimate* government interest.[6] Economic protectionism, for example, is not a legitimate government interest. In *Metropolitan Life Insurance Co. v. Ward*, the Court invalidated an Alabama law that protected domestic insurance companies from out-of-state competition. 470 U.S. 869 (1985). The Court reviewed the law under the Equal Protection Clause and ultimately concluded that the law was naked economic favoritism with no rational connection to any valid public justification. *Id.* at 878.[7] When the government favors one group over another, it must justify the unequal treatment with something more than a naked desire to benefit the favored group.

Similarly, sheer animus against a disfavored group is not a legitimate government interest. In *Cleburne*, for example, the Supreme

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[6] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 706 (5th ed. 2015) ("Although the Court has phrased the test in different ways, the basic requirement is that a law meets rational basis review if it is rationally related to a legitimate government purpose."). *See also Dukes*, 427 U.S. at 303.

[7] The Supreme Court has sometimes upheld laws that clearly benefited some businesses at the expense of others. However, the Court does not uphold these laws because protectionism is a legitimate government interest in and of itself. Rather, the Court upholds such a law only if it is rationally related to a separate, legitimate government interest. In *Fitzgerald v. Racing Association of Central Iowa*, for example, the owners of racetracks challenged a law that legalized slot machines at race tracks but subjected them to higher taxes than slot machines on river boats. 539 U.S. 103 (2003). The Court found that the differential treatment of riverboats was justified not solely by a desire to financially benefit riverboats, but by the state's desire "to encourage the economic development of river communities." *Id.* at 109.

Court invalidated the permit-denial for the group home for the additional reason that naked prejudice against the mentally handicapped motivated the adverse government decision. *Cleburne*, 473 U.S. at 448.[8]

D. The Supreme Court Evaluates the Logic, Proportionality, and Legitimacy of Each Rationale in Light of Record Evidence.

The preceding subsections described the three circumstances under which the Supreme Court invalidates challenged laws under rational-basis review. This subsection explains that the Court uses record evidence when it applies the rational-basis test. This clarification is necessary because dicta describing the test sometimes suggest that, since purely imaginary justifications for a law are sufficient, actual facts do not matter. *Beach Commc'ns*, 508 U.S. at 315 ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."). However,

[8] *See also Windsor*, 570 U.S. at 774 (finding no legitimate interest in stigmatizing same-sex married couples); *id.* at 793-94 (Scalia, J., dissenting) (noting that the Court relied on rational-basis review); *Lawrence*, 539 U.S. at 578 (finding no legitimate interest in criminalizing consensual adult homosexual sex); *Romer v. Evans*, 517 U.S. at 635 (finding no legitimate interest in anti-gay animus); *Hooper*, 472 U.S. at 623 (finding no legitimate interest in creating different classes of bona fide residents); *Zobel*, 457 U.S. at 65 (finding no legitimate interest in creating permanent classes of bona fide residents); *Moreno*, 413 U.S. at 534 (holding that a "bare congressional desire to harm a politically unpopular group" is not a legitimate government interest).

judicial suggestions that actual facts are irrelevant under rational-basis review do not line up with how the Supreme Court adjudicates cases.

To be sure, the government does not have an affirmative evidentiary burden. The government need not present any evidence and can rely on hypothetical rationales alone. *Id.* But the Supreme Court allows plaintiffs to adduce evidence to refute the government's asserted justifications. As the Court stated in *Romer*, a classification must be "narrow enough in scope and *grounded in a sufficient factual context* for us to ascertain some relation between the classification and the purpose it served." 517 U.S. at 632–33 (emphasis added). In that case, as in other rational-basis decisions, the Supreme Court structured its analysis around the actual facts in the record, not just around imaginary possible facts asserted by the government.

The right to tender evidence that refutes purported rationales is a long-standing principle of rational-basis review. In *United States v. Carolene Products Co.*, a foundational rational-basis case studied by every law student, the Court stated that:

> Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a

> statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.

304 U.S. 144, 153 (1938) (internal citations omitted).[9]

II. The Fifth Circuit Applies Rational-Basis Review as the Supreme Court Does.

Following the Supreme Court, the Fifth Circuit has long recognized that rational-basis review is a meaningful standard.[10] This Court's recent opinion in *St. Joseph Abbey v. Castille* exemplifies the principles described above. 712 F.3d 215 (5th Cir. 2013). In *St. Joseph Abbey*, this Court struck down a Louisiana law prohibiting casket sales except by

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[9] *See also Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012) (the assumption that a law rests upon some rational basis may be precluded "in the light of the facts made known or generally assumed") (quoting *Carolene Products*, 304 U.S. at 152); *Cleburne*, 473 U.S. at 449 (citing the district court's post-trial findings of fact, as well as the appellate court's reliance on those findings of fact); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) ("In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation." (internal quotation marks omitted)); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.").

[10] *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 746 (5th Cir. 2008); *Simi Inv. Co., Inc v. Harris Cty.*, 236 F.3d 240, 251 (5th Cir. 2000); *Wheeler v. Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. 1981); *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029, 1039–4 (5th Cir. 1980); *Doe v. Plyler*, 628 F.2d 448, 459 (5th Cir. 1980); *Harper v. Lindsay*, 616 F.2d 849, 855 (5th Cir. 1980); *Thompson v. Gallagher*, 489 F.2d 443, 449 (5th Cir. 1973).

licensed funeral directors because the law was not rationally related to any legitimate government interest. *Id.* at 227. In reaching this conclusion, the unanimous panel applied the rational-basis test with appropriate deference, but also gave due attention to the validity of the government interests, the record and wider statutory context, and the logic of the government's asserted rationales.

First, this Court rejected Louisiana's argument that economic protectionism alone—a naked desire to enrich funeral directors at the expense of other entrepreneurs and the public—is a legitimate government interest. *Id.* at 222 ("[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose.").[11]

Second, before considering Louisiana's legitimate interests in consumer protection and public health and safety, the Court restated the

[11] *St. Joseph Abbey* was not the first Fifth Circuit opinion to recognize that economic protectionism is not a legitimate government interest. *See Greater Houston Small Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235, 240 (5th Cir. 2011) ("[N]aked economic preferences are impermissible to the extent that they harm consumers."). Not every federal circuit agrees with the Fifth Circuit's conclusion that economic protectionism is not a legitimate government interest. *Compare, e.g.*, *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (economic protectionism is *not* a legitimate government interest), *with Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 286 (2d Cir. 2015) (economic protectionism *is* a legitimate government interest). But, as discussed in Section I.C, *supra*, the Fifth Circuit's conclusion is consistent with Supreme Court precedent.

ground rules for the rational-basis inquiry. First, it recognized that the plaintiffs had a right to introduce evidence to rebut Louisiana's asserted rationale: "[A]lthough rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality." *Id.* at 223. Second, the Court also explained that its analysis would be "informed by the setting and history of the challenged rule." *Id.* This latter point is crucial because it illustrates that courts should not look at a government interest only in the abstract; for example, it is not enough under rational-basis review for a court to declare consumer protection a legitimate government interest and then uphold the ban on monks selling caskets because, hypothetically, it is possible that someone who is not a state-licensed funeral director might be dishonest.

Finally, the Court considered Louisiana's legitimate interests in consumer protection and public health and safety, but rejected those justifications because the evidence showed that there was no logical connection between the challenged licensing law and those interests. First, the Fifth Circuit considered the licensing board's assertion that the

law "restrict[ed] predatory sales practices by third-party sellers and protect[ed] consumers from purchasing a casket that is not suitable for the given burial space" and, although it observed that the argument was—on its face—a "perfectly rational statement of hypothesized footings for the challenged law," the Court nevertheless rejected the argument because it was "betrayed by the undisputed facts." *Id.* at 223. Notably, the court considered how the challenged law fit within the full "matrix of Louisiana law," *id.* at 225–26, and concluded that the "grant of an exclusive right of sale adds nothing to protect consumers and puts them at a greater risk of abuse including exploitative prices," *id.* at 226. Next, the court found that "no rational relationship exists between public health and safety and restricting intrastate casket sales to funeral directors," noting that, for example, Louisiana "does not even require a casket for burial." *Id.* at 226. This Court invalidated Louisiana's licensing statute because the facts and context demonstrated the absence of a logical connection between the challenged law and the only two government interests that were legitimate.

III. Preventing Public Corporations from Selling Liquor at Package Stores Likely Fails Rational-Basis Review.

Having set forth the proper approach, *amicus* now applies the rational-basis framework to the public-corporations ban. The purpose here is not to duplicate what Wal-Mart has already argued (indeed, *amicus* will not weigh in on Wal-Mart's other rational-basis claims). Rather, the purpose is to illustrate how *amicus* believes the rational-basis test should be applied in this case by examining a specific claim. *Amicus* hopes this analysis provides the Court with useful guidance.

In *amicus*' view, the district court likely erred in upholding the public-corporation ban. *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 313 F. Supp. 3d 751, 780–82 (W.D. Tex. 2018). The analysis should begin by situating the ban in its wider factual and statutory context. *St. Joseph Abbey*, 712 F.3d at 223 (stating that the analysis is "informed by the setting and history of the challenged rule"). Here, the public-corporation ban was enacted in 1995 in response to a 1994 decision of this Court striking down a residency requirement for liquor permits. *Wal-Mart Stores*, 313 F. Supp. 3d at 759–62. As the district court recognized in analyzing Wal-Mart's Commerce Clause claims, the "purpose of the public corporation ban is to discriminate against out-of-

state retailers in order to protect locally owned package stores." *Id.* at 768. In other words, the actual purpose of the ban is private economic protectionism, which is not a legitimate government interest and thus it cannot be the basis for upholding the ban. *St. Joseph Abbey*, 712 F.3d at 222.

The question, then, is whether the TABC and TPSA's hypothetical justifications for the public-corporations ban are logical in light of the statutory context and record evidence. Here, the proffered justifications likely do not survive rational-basis review because Wal-Mart has offered compelling evidence that the ban is not logically connected to a legitimate government interest.

The district court erred because it approached the analysis only as an exercise in abstract reasoning—it did not properly consider the fact-based refutations of the asserted rationales. For example, the trial court focused on how, in the abstract, a large retailer like Wal-Mart might be more efficient than a much smaller business and be able to offer liquor at lower prices, and that people buy more liquor when it is cheaper. The court theorized that restricting entry would "shift the supply curve, and, as a matter of economic principle, drive up prices" and that "public

corporations have the necessary scale and capital to offer aggressive discounts." *Wal-Mart Stores*, 313 F. Supp. 3d at 780–81. Given these abstract economic principles, the lower court then upheld the ban as rationally related to Texas' legitimate interest in reducing overconsumption of alcohol. *Id.* at 782 ("Texas could reasonably believe that excluding public corporations from the retail liquor market would artificially inflate prices, thereby moderating the consumption of liquor and reducing liquor-related externalities.").

But, when examined in context, this abstract reasoning loses whatever intuitive appeal it might otherwise have. First, the proposition that public corporations create a unique danger becomes implausible when the existing structure of Texas' retail liquor industry is considered. The Texas package-store industry is already dominated by large businesses with hundreds of employees operating supermarket-sized outlets across the state. *Wal-Mart Stores*, 313 F. Supp. 3d at 758–59. These companies already offer the type of "aggressive discounts" the district court worried public corporations like Wal-Mart might offer. *Id.* at 759 ("The credible evidence demonstrates that package store chains compete vigorously. Package stores offer extensive promotions and

discounts."). Indeed, Wal-Mart introduced evidence that, in states where public corporations like Wal-Mart are allowed to compete, large liquor "superstores" akin to the Texas chains actually sell their liquor at *lower* prices than Wal-Mart does. ROA.10125-29; ROA.14239. In other words, this case is not about whether Wal-Mart would adversely affect a market consisting of kindly moms and pops running old-fashioned corner stores. This case is about whether a public corporation would spur problem drinking in a competitive liquor market *already* dominated by massive businesses with their own economies of scale. Arguments that public corporations like Wal-Mart are uniquely positioned to aggressively sell low-priced liquor to Texans conflict with the record evidence.

Further, the "matrix of [Texas] law . . . sheds much light on the disconnect between the post hoc hypothesis" of reducing the harms of alcohol consumption and the public-corporation ban. *St. Joseph Abbey*, 712 F.3d at 226. Of the 74 alcohol permits the TABC issues, public corporations are prohibited from possessing only one—for the retail sale of liquor in package stores. Texas law does not prohibit public corporations from selling all alcoholic beverages at retail—they may sell wine and beer. Public corporations hold more than 41% of Texas' beer-

and-wine permits. ROA.10747. Wal-Mart, for example, sells beer and wine in Texas at 668 locations. ROA.9398. And Texas allows public corporations to distill liquor, wholesale liquor, serve liquor in bars, and operate retail liquor stores in hotels. ROA.10639-41. If Wal-Mart has already responsibly sold alcohol in Texas for two generations—selling beer and wine at reasonable prices that neither induce problem drinking nor undermine healthy competition—how could it be rational to believe that allowing Wal-Mart or any other public corporation to sell liquor in package stores would suddenly lead to excessive drinking? And if public corporations can own bars that legally serve shot after shot of liquor for immediate on-premises consumption, how could it be rational to believe that public corporations could not responsibly sell liquor in sealed containers to sober customers for off-premises consumption? When the regulatory backdrop of the public-corporation ban is properly considered, it becomes clear that the ban "adds nothing to protect consumers." *St. Joseph Abbey*, 712 F.3d at 226.

The notion that public corporations present grave dangers of overconsumption—but only for liquor sold at package stores—is belied by the fact that only Texas maintains such a ban. Surely if Texas' fear of

public corporations selling liquor at package stores were more than mere fantasy, some other legislature somewhere in the United States would have noticed. *Id.* at 223 ("[A] hypothetical rationale, even post hoc, cannot be fantasy."). Because it is not rational to believe that Wal-Mart's selling of liquor along with beer and wine in a competitive market already dominated by large liquor retailers would increase problem drinking, the public-corporations ban likely fails rational-basis review.

CONCLUSION

The Supreme Court and this Court have been clear that rational-basis review is a meaningful standard and that claims subject to rational-basis review warrant serious analysis. This Court should resist any appeals for blind deference, which are essentially calls for judicial abdication. With these principles in mind, it is likely that the public-corporations ban fails the rational-basis test because the record evidence logically demonstrates that the ban is arbitrary.

Dated: November 2, 2018

Respectfully submitted,

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Dated: November 2, 2018 /s/ Jeffrey Rowes
Counsel for Amicus Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 2nd day of November, 2018, I caused this Brief of *Amicus Curiae* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

Upon acceptance by the Clerk of the Court of the electronically filed document, the required number of bound copies of the Brief of *Amicus Curiae* will be filed with the Clerk of the Court via UPS Next Day Air.

/s/ Jeffrey Rowes
Counsel for Amicus Curiae