No. 18-50299

In the United States Court of Appeals For the Fifth Circuit

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

v.

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

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

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

RESPONSE AND REPLY BRIEF OF APPELLANT TEXAS PACKAGE STORES ASSOCIATION

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Certificate of Interested Parties

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

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

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

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

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

G. Alan Waldrop
Counsel for Appellant Texas Package Stores Association

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1. *Did the district court correctly hold that Texas Alcoholic Beverage Code section 22.16 satisfies the Equal Protection Clause?*
2. *Did the district court correctly hold that Texas Alcoholic Beverage Code section 22.05 satisfies the dormant Commerce Clause?*

The answer to each question is "Yes." Judgment must be rendered that sections 22.16, 22.05, and 22.04 are not unconstitutional and should not be enjoined.

SUMMARY OF THE ARGUMENT IN REPLY

Texas Alcoholic Beverage Code section 22.16's public corporation ban and section 22.05's consanguinity rule are not only unique—they're uniquely effective. By those statutes' regulation of the size and type of corporate entity that may hold a P permit and the number of permits that a permittee may hold, Texas has both facilitated the growth of family-owned businesses in lieu of large corporations in the retail liquor market, and achieved the unprecedented success, state-wide, of low excise taxes matched with low per capita consumption. Even Wal-Mart's own expert could offer no economic explanation for these results other than sections 22.05 and 22.16.

Contrary to Wal-Mart's cross-appeal, the district court correctly held that section 22.16 has a rational basis, satisfying the Equal Protection Clause. As Exhibits I-38, I-39, I-41, I-42, I-54, and I-72 demonstrate (ROA.14662-66, 14673, 15972), excluding public corporations has successfully lowered per capita liquor consumption in Texas. Likewise, as Exhibits I-43, I-44, and I-45 demonstrate (ROA.14667-69), the Texas retail liquor marketplace is less dominated by the larger companies—whether owned in-state or out-of-state—that typically dominate a retail marketplace for products such as alcoholic beverages. Texas's rational economic regulation of retail sales of liquor with its higher alcohol content is a remarkable legislative success story.

Also, contrary to Wal-Mart's cross-appeal, the district court correctly held that section 22.16 does not discriminate by effect for purposes of a Commerce Clause challenge. Both the Supreme Court and this Court have consistently held that a statute which distinguishes among types of retailers, in a residence-neutral fashion, does not run afoul of the dormant Commerce Clause. Section 22.16 is residence-neutral, treating all in-state and out-of-state retailers identically. Moreover, even if Wal-Mart's disproportionate-impact theory were adopted in this Circuit, Wal-Mart failed to present any evidence that the make-up of the Texas retail liquor market (in-state firms versus out-of-state firms) is disproportionate in comparison to any other industry or state from which public corporations are not excluded.

Next, as explained in the TPSA's initial brief, the district court erred in concluding that section 22.16 violates the dormant Commerce Clause based solely on the Texas Legislature supposedly having an intent to discriminate against out-of-state firms when it enacted section 22.16 in 1995. As an initial matter, given the absence of discriminatory effect, a purported discriminatory intent cannot—by itself—be the basis to invalidate a statute under the dormant Commerce Clause. The Supreme Court recently confirmed that the dormant Commerce Clause regulates "effects, not motives." Holding a state law unconstitutional based on discriminatory intent, in the absence of any actual discriminatory effect, is

unsound, and contrary to Supreme Court precedent. Moreover, Wal-Mart fails to rebut the fatal flaws with all of the district court's attempts to impute a discriminatory intent to the 1995 Texas Legislature. All of the "evidence" relied on by the district court is infirm and unreliable for purposes of proving a legislature's intent.

Also as explained in the TPSA's initial brief, the district court erred in concluding section 22.16 violates the dormant Commerce Clause based on a conclusion under *Pike v. Bruce Church* that the Legislature should have chosen other methods of reducing liquor consumption. As an initial matter, this Court should hold, as a matter of first impression, that a state law cannot be held unconstitutional under *Pike* balancing when the law governs the sale of alcoholic beverages and, thus, is within the scope of the Twenty-First Amendment. The *Pike* balancing test does not apply when the propriety of local regulation has long been recognized. Moreover, Wal-Mart fails to rebut the fatal evidentiary flaws in the district court's *Pike* analysis. Indeed, Wal-Mart never litigated a *Pike* balancing test in the first place. There is no evidence of a burden on interstate commerce, no evidence any such burden would outweigh section 22.16's local benefits, and no evidence that the district court's preferred policy options would burden interstate commerce any less than section 22.16 supposedly does.

Accordingly, the district court's judgment must be reversed in its entirety. If section 22.16 is constitutional, then Wal-Mart cannot obtain a P permit, and has no standing to challenge sections 22.04 or 22.05, which govern how many P permits an entity can hold.

The district court's permanent injunction against section 22.05's consanguinity rule (enacted in 1951) is independent error. The district court erred in concluding that section 22.05 violates the Equal Protection Clause. Wal-Mart simply failed to produce evidence to negate every conceivable rational basis for the statute. Also, contrary to Wal-Mart's cross-appeal, the district court correctly held that section 22.05 satisfies the dormant Commerce Clause. Wal-Mart simply failed to produce any evidence of a discriminatory purpose, effect, or burden.

The district court's permanent injunction against section 22.04's five-permit cap (enacted in 1935) is also independent error. The district court upheld section 22.04 as constitutional. In order to strike down section 22.04, then, the district court violated clear Texas law regarding severability of its statutes. The five-permit cap has no constitutional infirmity, and cannot be enjoined simply to assist Wal-Mart's business model.

Repeatedly, the district court in its opinion failed to address and apply governing precedent. Under this Court's governing precedent, and given the

evidentiary record in this case, Texas Alcoholic Beverage Code sections 22.16, 22.05, and 22.04 cannot be held unconstitutional or enjoined.

ARGUMENT

I. The district court correctly held that section 22.16 does not violate the Equal Protection Clause.

With respect to Wal-Mart's cross-appeal, the district court correctly rejected Wal-Mart's Equal Protection challenge to section 22.16. (ROA.9436-39.) The record *evidence* here—under any view of the rational-basis test—overwhelmingly supports the statute. It is not even close.

Wal-Mart initially seeks to save its Equal Protection claim by asking this Court to apply strict scrutiny instead of the rational-basis test—based on "absolute deprivation" or "animus." The "absolute deprivation" case law involves recognized fundamental rights, as opposed to state economic regulations such as section 22.16. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20-24 (1973) (right to education); *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (right to vote). Similarly, Wal-Mart's "animus" authority is a Tenth Circuit concurring opinion, *see Bishop v. Smith*, 760 F.3d 1070, 1096-1109 (10th Cir. 2014) (Holmes, J., concurring), and the Tenth Circuit has held that such doctrine—which has been applied only to certain suspect or quasi-suspect classes—"does not apply to state economic regulation." *See Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1048 (10th Cir. 2009).

> In areas of social and economic policy, 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.

F.C.C. v. Beach Commc'ns., Inc., 508 U.S. 307, 313 (1993). There is no authority from any court in the country for Wal-Mart's proposed strict scrutiny doctrines to apply in this economic regulatory context. The largest retailer in the world does not belong to a protected class. The rational-basis test applies here, and section 22.16 easily satisfies that test.

First, it is a legitimate state interest to favor small businesses over larger ones. *See Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 113-14 (1980); *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412, 426-27 (1937); *Ray Baillie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696, 709 (5th Cir. 1973). The evidence is undisputed that small businesses in small towns may be harmed by the entry of large corporations such as Wal-Mart, Walgreens, and HEB into the Texas retail liquor market. (ROA.8562:24 – 8564:7; ROA.10924:19 – 10927:14.) Importantly, Wal-Mart only analyzed the existing chains' supposed domination *within the largest cities*. (ROA.14213-19, 14225-38, 14281-85, 14288-90.) Wal-Mart utterly failed to present any evidence to this Court on the market's make-up outside the five largest cities in Texas. This is a fatal gap in Wal-Mart's evidence. There is no evidence to negate the possibility that section 22.16 promotes small businesses in small towns in Texas—a sufficient rational basis for upholding section 22.16. *See Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th

Cir. 2013) (facial challenge requires that statute be shown invalid under "all of its applications").

Wal-Mart further failed to conduct any state-wide analysis. Indeed, this Court has already observed in this case that existing firms in the Texas retail liquor market are threatened with the "end of their viability" by Wal-Mart's goals in this case. *See Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 568 n.6 (5th Cir. 2016). Because public corporations participate in the beer-and-wine marketplace, comparing the state-wide numbers of BQ and P permits is demonstrative. The largest three beer-and-wine retailers in Texas are Dollar General (959 permits), Wal-Mart (647 permits), and Walgreens (646 permits), all three of which are major public corporations. There are *29 more* retailers with over 50 BQ permits. (ROA.12432.) In contrast, the three largest liquor retailers in Texas are Spec's (158 permits), Twin Liquors (84 permits), and Western Beverages (62 permits), all three of which are family-owned companies, and not public corporations. *No more* retailers hold over 50 P permits. (ROA.13735.) Wal-Mart is the number one retailer in the world. (ROA.9999:1-3.)[1] It is no surprise, then, that since Wal-Mart can sell beer and wine in Texas, Wal-Mart has

[1] Wal-Mart's feigned inability to differentiate between itself versus Spec's as "large" firms lacks credibility and is simply not consistent with reality. While being the largest of the liquor retailers in Texas, Spec's is not even remotely on a par with major retailers such as Wal-Mart, Dollar General, any of the major grocery retailers, or the national convenience store chains. The fact that closely-held and family-owned Spec's, with only 158 permits and natural economic limitations on its ability to expand, is the *largest* liquor retailer in Texas is the point of the Texas liquor regulatory system.

become the number one retailer of both beer and wine in Texas. (ROA.10029:19 – 10030:2.) The data (Exhibits I-43, I-44, and I-45) definitively supports this rational basis for section 22.16. (ROA.14667-69.)

Second, it is certainly a legitimate state interest to reduce liquor consumption. *See N.D. v. United States*, 495 U.S. 423, 432 (1990); *Cal. Retail Liquor Dealers Ass'n*, 445 U.S. at 113-14. Wal-Mart so admits. (ROA.14678-79, Admissions 12-13.) There is also no dispute that consumption can be reduced by (1) raising prices, (2) reducing accessibility, or (3) reducing convenience. Section 22.16 accomplishes all three, given the record evidence—and, indeed, common sense.

Section 22.16 keeps liquor prices higher. Wal-Mart admits it will draw customers as a result of its low prices. (ROA.10017:2-4.) Wal-Mart also admits section 22.16 keeps the price of spirits "artificially high." (ROA.12258-60.) Wal-Mart's *own pleadings*—never superseded—affirmatively assert that section 22.16 "negatively impacts Texas consumers, who are forced to pay non-competitive prices because fair competition is prevented." (ROA.72.)[2] This was the conclusion of TABC's expert witness Dr. Chaloupka. (ROA.10951:1-17, 10966:15-23, 11004:3 – 11005:3.) This was also the conclusion of the TPSA's expert witnesses Dr. Magee and Dr. Ikizler. (ROA.11334:13-18, 11369:9 –

[2] Wal-Mart at trial disclaimed its pleading, but cannot deny such a pleaded allegation is *rational*.

11370:16; ROA.11453:7-23.) After lengthy cross examination, even Wal-Mart's expert witness finally conceded that lower prices could increase consumption, and that public corporations such as Wal-Mart would sell liquor at lower prices than the smaller P permit holders. (ROA.10437:1-11.)

Section 22.16 makes liquor less accessible. As early as 1937, the Texas Legislature understood that more outlets equates to more consumption.

> The history of the liquor traffic, ever since repeal, shows that in Texas, as throughout the nation, the more outlets the State licenses, the more liquor is sold and consumed. This, of course, is not the desire of Texas people.

(ROA.14608.) The data since 1937 provides remarkable proof. (ROA.14665.) Wal-Mart *admits* that striking down the statutes will increase the number of outlets selling liquor in Texas. (ROA.10026:19-25; ROA.10397:15-18.)[3] While post-enactment legislative history is not relevant to the original intent, it is interesting that the impact of section 22.16 on outlet density was pointedly explained to the Texas Legislature in 2009 by a proponent of its repeal:

> Texas ranks forty-fifth per capita in distilled spirit sales, 13[th] in beer, as of 2007. The reason is not culture, as some people would try and have you believe, it's the disparity in the number of retail selling points that interact with consumers…. Something is not working right here…. Plain and simple, the marketplace is not being served in the current license structure.

[3] There are 2,532 total retail outlets selling liquor in Texas. (ROA.12431.) The total number of beer-and-wine retail outlets is 18,374—over 7 times greater. (ROA.12623.) The top four BQ permit holders *alone* sell beer and wine from 2,857 retail outlets in Texas. (ROA.12432.) Such disparity exists because public corporations hold BQ permits, but cannot hold P permits.

(ROA.14047-48.)[4]

Section 22.16 reduces the convenience of purchasing liquor. Unlike the existing package stores, public corporations such as Wal-Mart "offer a convenient one-stop shopping experience" due to their vast economies of scope. (ROA.10005:7-10.) It is a prominent message *of Wal-Mart* in this litigation that section 22.16 reduces consumer convenience. (ROA.10019:1-9; ROA.12258-63.) The evidence is uncontroverted that one-stop shopping increases convenience, which, in turn, increases consumption. (ROA.11323:5 – 11324:4, 11359:2 – 11360:1; ROA.14666.)

The proof is in the results. Texas has the third lowest excise tax of the 50 states, which should correlate to higher per capita liquor consumption. (ROA.10291:18-24, 10346:21 – 10347:2.) Yet, Texas consistently is in the bottom of per capita liquor consumption compared to other states. (ROA.14663.) Texas is currently ranked the 9th lowest. (ROA.14662.) Something is at work. Tellingly, Wal-Mart had no economic explanation for Texas's low liquor consumption. (ROA.10346:16-20.) The true explanation is not obscure, but is plainly set out in the previous three paragraphs.

All the arguments made in response fall short. Wal-Mart argues that the proven causes and effects described above are "attenuated" or "indirect."

[4] Of course, it is the Legislature that decides whether fewer outlets and lower consumption are "working right" in Texas. (ROA.8600:7-16.)

However, any law that seeks to reduce or limit consumption (*e.g.*, quotas, permit caps, excise tax) accomplishes its goal indirectly. There is no constitutional requirement that a law accomplish its goals "directly." All that is required for constitutional analysis is some rational relationship between the classification and a legitimate goal. *See Heller v. Doe*, 509 U.S. 312, 319-21 (1993).

Amicus curiae Institute for Justice oddly overlooks *all* of the above-described evidence, none of which is "abstract" or "hypothetical," and then complains that other TABC permits do not involve a public corporation ban. Yet, as any valid "guidance on how to apply the rational-basis test" would recognize, "a statute is not invalid under the Constitution because it might have gone farther than it did." *City of New Orleans v. Dukes*, 427 U.S. 297, 305 (1976).

Wal-Mart (and amici curiae Pacific Legal Foundation and Retail Litigation Center) argues that excluding low-price outlets is mere "economic protectionism." This is contrary to governing precedent, *see Grosjean*, 301 U.S. at 426-27, but even if it were not, such argument cannot be true with liquor, when the result is lower consumption, which in turn reduces liver disease, heart disease, strokes, and cancer, as well as drinking and driving, child and spousal abuse, homicides, and suicides. (ROA.11006:3-25; ROA.11114:1 – 11116:25.)

Wal-Mart argues that per capita liquor consumption has actually *increased* in Texas since 1997. (ROA.14220.) Wal-Mart fails to mention that this was the

result of national trends, not Texas's regulatory structure failing in comparison to other states, as Exhibits I-39 and I-54 reveal. (ROA.14663, 14673.)[5] Section 22.16 has preserved Texas's low *ranking* in liquor consumption, even as such consumption has increased nationwide. (*Id.*)

Wal-Mart argues that Texas's three-tier system would prevent lowered prices. Wal-Mart does not mention that its own expert witness admitted large corporations such as Wal-Mart *would* have an economies-of-scale advantage in the Texas liquor market (ROA.10382:14-20), or that it actually requested a finding that the existing largest package store firms "use their economies of scale … to out-compete smaller package store businesses" (ROA.9089).

Wal-Mart argues that Dr. Chaloupka's detailed pricing analysis—which proved that corporate entry will lower prices—was "deeply flawed." On the contrary, Wal-Mart's attempts to cross-examine Dr. Chaloupka on his pricing analysis only served to *strengthen* his opinion's credibility, and undermine Dr. Elzinga's questionable pricing analysis. (ROA.11017:18 – 11043:6.)[6]

Wal-Mart argues that corporate entries into the Texas liquor market would be irrelevant when the market is already "competitive" or lacks "unmet demand."

[5] In discussing recent statistics, Wal-Mart ignores national trends for beer and wine as well.

[6] The opposite can be said of the cross examination of Wal-Mart's expert Dr. Elzinga, which discredited his economic theories. (ROA.10293-10448, 10618-32.) This is likely why amici curiae Pacific Legal Foundation and Retail Litigation Center only cite Dr. Elzinga's expert *report* as "convincing," which was not admitted into evidence and is not in the trial record, rather than Dr. Elzinga's trial testimony, which did not stand up on cross examination.

This is contrary to basic economics. An increase in authorized sellers can cause the *supply* curve to shift to the right, resulting in a higher quantity demanded (and lower prices). (ROA.11369:16 – 11370:20; ROA.11455:3-14.) Indeed, it turns out that Wal-Mart's presence in an alcoholic beverage market is a statistically significant indicator of high per capita consumption, as Exhibit I-72 shows. (ROA.15972.)[7] Wal-Mart concedes that both Oklahoma and Texas prohibit corporations such as Wal-Mart from selling liquor and that Arkansas allows only one Wal-Mart store to sell liquor. (ROA.10045:22 – 10046:15.) It is little surprise, then, that among the states which do not run a state monopoly for liquor sales, those very states are the *three lowest states* in per capita liquor consumption. (ROA.14662.)

If public corporations were to enter the liquor market, there are only three possibilities regarding outlet density. Either the number of outlets will increase, thereby increasing consumption, or existing outlets will close, thereby harming smaller businesses, or some combination. There are also only three possibilities regarding market share. Either the corporate entrants will cause overall sales to increase, thereby increasing consumption, or existing outlets will lose sales,

[7] Wal-Mart points out that Exhibit I-72 excludes nine states (ROA.15972), but fails to mention the reason. Exhibit I-72 uses Wal-Mart's own categorization of its "presence" in a state's liquor market, which omits those same nine states. (ROA.11407:11 – 11412:18.)

thereby harming smaller businesses, or some combination. In *any* conceivable scenario, then, section 22.16 is supported by rational bases.

Of course, there are yet more rational bases for section 22.16 that Wal-Mart failed to negate. (ROA.8986, 9189.) For example, Wal-Mart failed to negate the rational basis of increased seller accountability.[8] The evidence shows that TABC's process of holding permit holders accountable is less efficient with public corporations. (ROA.10721:3-10, 10733:5-8, 10743:13-22.) This is precisely what the TPSA had testified at the Legislature in 1995. (ROA.10823:2-22; ROA.14555.) The TPSA continues to tout this reality today. (ROA.8558:2 – 8561:7, 8596:22 – 8598:19.) Wal-Mart's only rebuttal was that the top ten P permit holders had more violations, on average, than the top ten BQ permit holders. (ROA.14280.) Even if a top-ten analysis alone has any meaning, Wal-Mart failed to ask the correct question. Because the number of inspections of different permit holders (P vs. BQ) can vary, what is the *percentage* of inspections in which violations were found? The information required to answer that question was readily available, but Wal-Mart declined to obtain it, and thus failed to negate this rational basis as well. (ROA.10729:18 – 10731:10.)

[8] Wal-Mart accuses the TPSA of waiving this rational basis, but it was Wal-Mart itself that identified accountability as a potential rational basis. (ROA.10064:11-15.)

In sum, the more owners a retailer has, the more likely the retailer has sufficient access to capital to expand more rapidly and dominate more readily,[9] and the more likely it will have more outlets, and the more likely it will have economies of scale so as to offer lower prices, and the more likely it will have economies of scope so as to increase convenience for consumers, and the more likely it will have a more efficient business model that can drive its smaller competitors out of business.[10] These are basic economic principles and facts. It is not the judiciary's responsibility to decide whether section 22.16 is wise, whether it is the best method to fulfill social or economic objectives, or whether a "better" approach could be devised. *See Heller*, 509 U.S. at 319. This Court is not to engage in a process, as Wal-Mart invites it to do, of deciding what Texas ought to be doing in regulating retail liquor sales, and thereby substituting its policy judgments for those of the Texas Legislature. This Court's constitutional task is to decide whether Wal-Mart negated every conceivable rational basis. Wal-Mart plainly failed to do so.

II. The district court correctly held that section 22.16 does not discriminate against interstate commerce by effect.

With respect to Wal-Mart's Commerce Clause challenge to section 22.16, the district court was right to reject Wal-Mart's claim of discrimination by effect.

[9] *See* ROA.8596:9-18; ROA.11459:11 – 11461:10.

[10] Unlike the public corporation ban, Wal-Mart's straw-man hypothetical of banning educated owners or former Wal-Mart employees from holding P permits would not likely have any rational relationship to any of these effects.

(ROA.9424.) Such rejection is correct both as a matter of law, and as a matter of fact for failure of proof.

First, as a matter of law, contrary to Wal-Mart's arguments, both this Court and the Supreme Court have rejected Wal-Mart's disproportionate-burden theory. The Supreme Court has rejected the notion that the Commerce Clause protects the particular structure or methods of operation in a market. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92-94 (1987); *Exxon Corp. v. Maryland*, 437 U.S. 117, 125-28 (1978). Wal-Mart argues that the Supreme Court in a footnote in *Exxon* contemplated that "a larger share" shifted to local businesses could constitute a discriminatory effect. This is incorrect. The Supreme Court was referring solely to "local goods" constituting a larger share in the state market, which would indicate a burden on "the interstate flow of goods." *See Exxon*, 437 U.S. at 126 n.16. Importantly, with respect to the companies themselves, the Supreme Court upheld the statute even though its burden fell "*solely* on interstate companies." *See id.* at 125 (emphasis added). Just as in *Exxon*, then, section 22.16 has no discriminatory effect, because "it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market." *See id.* at 126.[11]

[11] In contrast, the law in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), placed additional costs on interstate goods. *See Exxon*, 437 U.S. at 126.

The Supreme Court returned to the issue in *CTS Corp*. The plaintiff in that case insisted that the challenged state statute "will apply most often to out-of-state entities." *See CTS Corp.*, 481 U.S. at 88. Even if true, this was irrelevant, according to the Court, because the statute's effect was identical for an interstate business as it was to a local business. *See id.* at 87-88.

This Court in *Allstate* followed *CTS Corp.* and *Exxon*. Contrary to Wal-Mart's theory that exclusions must be "very narrow" to survive the dormant Commerce Clause, this Court held that a "state statute impermissibly discriminates only when it discriminates between similarly situated in-state and out-of-state interests." *See Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 163 (5th Cir. 2007). In so holding, this Court rejected Wal-Mart's expansive interpretation of the *Exxon* footnote. Instead, this Court agreed, under *Exxon*, that a state statute does not discriminate by effect as long as it does not prohibit the flow of interstate goods or services, place additional costs upon them, or distinguish between in-state and out-of-state companies in the retail market. *See id.*

This Court in *Churchill Downs* did not conclude otherwise. In that case, the district court had responded to the plaintiff's proposed disproportionality test by holding *both* that there was no evidence to support disproportionality and that the Supreme Court "has made clear that it is irrelevant if a law, as applied, would affect more out-of-state entities than in-state entities so long as the law imposes the

same effect on all similarly situated operations." *See Churchill Downs Inc. v. Trout*, 979 F. Supp. 2d 746, 752 (W.D. Tex. 2013) (citing *CTS Corp.*, 481 U.S. at 88). This Court on appeal did not disagree with the latter point, and made no endorsement of the disproportionate-burden test, but simply agreed there was no evidence of disproportionality in the first place. *See Churchill Downs Inc. v. Trout*, 589 Fed. App'x 233, 237 (5th Cir. 2014). As this Court further acknowledged, "the Supreme Court has yet to endorse the broad view of discriminatory effects" as relied on here by Wal-Mart. *Id.* at 235-36. Thus, this Court has not departed from *CTS Corp.*, *Exxon*, and *Allstate*.

It remains the law in this Circuit, then, that as long as a statute applies equally to similarly-situated companies, it is irrelevant as a legal matter if the law's burden falls disproportionately—or even solely—on out-of-state companies. Wal-Mart's own expert witness testified that section 22.16 satisfies the governing test:

> Q. All right. So I want to get this clear. We can agree, you and I, Mr. Elzinga, that under Section 22.16 of the Texas Alcoholic Beverage Code similarly situated in-state and out-of-state business types are treated identically, correct?
>
> A. The answer is yes.

(ROA.10314:6-11.) Section 22.16 is residence-neutral. The evidence is undisputed that there are in-state public corporations barred from holding a P permit by section 22.16. (ROA.14287.) The evidence is also undisputed that

out-of-state residents hold P permits (ROA.12075, 83), including Total Wine and More, which as of the trial date was the sixth largest firm in the Texas liquor market (ROA.13735). Section 22.16 treats similarly-situated interests identically.[12]

In short, Wal-Mart—and every other non-Texas-based retailer in the United States—would be in the exact same position if it were incorporated, domiciled, and located entirely inside Texas. As a constitutional matter, that is the end of the inquiry regarding discrimination under the dormant Commerce Clause.

Second, even if—contrary to binding precedent—a law could have a discriminatory effect based on a "disproportionate" impact on out-of-state companies, section 22.16 still cannot be found discriminatory. This is because there is no record evidence that section 22.16 itself creates a disproportionate impact on out-of-state firms. Wal-Mart failed to present any statistical comparison that might show Texas's retail liquor market's composition (in-state versus out-of-state) was disproportionate as compared to any other market.

Wal-Mart's first attempt to show disparate impact is its expert Dr. Elzinga's list of every company that is supposedly a potential entrant excluded by section

[12] Wal-Mart's hypothetical on employment discrimination misses the mark. The dormant Commerce Clause is not akin to racism. Under Supreme Court dormant Commerce Clause law, a law does not discriminate against interstate commerce when the flow of interstate goods is not impaired and when similarly-situated firms (*e.g.*, corporations, whether in-state or out-of-state) are treated identically.

22.16—only 31 total—for which 90% were out-of-state (28 out of 31).[13] (ROA.10284:6 – 10285:2; ROA.14286-87.) However, as the district court acknowledged, absent a control group, there is no way to know whether 90% is disproportionately high. For instance, Wal-Mart's 90% figure is actually in line with 92.2% of the U.S. population being out-of-state and 90% of Top 100 U.S. retailers being out-of-state. (ROA.11339:11 – 11341:2; ROA.14672.) Wal-Mart had the burden of proof to compare its 90% figure to a control group, but utterly failed to do so. Dr. Elzinga's 90% statistic, by itself, is meaningless.

Wal-Mart's second attempt to show disparate impact is based on TABC's evidence that 40 out of the current 1,765 P permit holders have out-of-state ownership. (ROA.12075, 83.) This equates to 2.27%, and Wal-Mart argues that 98% P permit holders being in-state is too high. Once again, however, Wal-Mart fails to compare 98% to a control group. For instance, there are 9,009 BQ permit holders, and thus there would need to be more than 204 (2.27% of 9,009) for even a possibility of arguing section 22.16 creates a disparate impact. Yet, Wal-Mart's evidence reveals only *15* BQ permit holders (0.17% of 9,009) with out-of-state ownership. (ROA.14281-86.) Wal-Mart had the burden of proof to compare the

[13] This 90% figure lacked credibility. The number (3) of in-state firms is vastly understated. *See* TPSA's Initial Br. at 42-43 n.20. In addition, the number (28) of out-of-state firms is vastly overstated, since Dr. Elzinga conceded that 17 of the 28 firms selected may not even be public corporations at all. (ROA.14286 at Note 1.) Dr. Elzinga ignored 3 out of 6 in-state firms because he did not know their owner numbers (ROA.14287 at Note 3), but included 17 out of 28 out-of-state firms despite not knowing their owner numbers (ROA.14286 at Note 1).

98% figure with a control group, but utterly failed to do so. Wal-Mart's 98% statistic, by itself, is meaningless.

In response, Wal-Mart claims its omission of a control group is somehow an "untimely" attack. This is false. Wal-Mart's 98% statistic was not part of its expert reports (ROA.2016-18), and was not disclosed as a disproportionate-impact theory until post-trial briefing (ROA.9096-97, 9123). The TPSA immediately in its responsive post-trial briefing focused on Wal-Mart's failure to examine the in-state percentage of BQ permit holders. (ROA.9179.) Ironically, while accusing the TPSA of advancing an untimely argument, Wal-Mart now insists that focusing on firms instead of permit numbers is "inaccurate," and yet Wal-Mart never made this argument at the trial court. Wal-Mart's 98% statistic at the trial court was based on package store *firms* (ROA.9097 & n.28)—as it must be, since disproportionality would involve firms, not locations. Wal-Mart's continued search for a viable disproportionate-impact theory—long after evidence has closed—is fruitless.

Wal-Mart's third and final attempt to show disparate impact was Dr. Elzinga's lists of the "top 10" beer-and-wine retailers and "top 10" liquor retailers within five Texas metropolitan areas based on their "permit share" in

those markets. (ROA.14281-85.)[14] The fatal flaw with this analysis is immediately apparent. The analysis ignores 8,991 (99.8%) of the BQ permit holders and 1,725 (97.7%) of the P permit holders operating in Texas. Wal-Mart's only response is the "TPSA presented no evidence that [top 10] is not a valid sample of data." Once again, Wal-Mart seeks to avoid the consequences of failing to put on evidence by shifting the burden of proof. It was Wal-Mart's burden to show its "top 10" analysis was a valid sample, with evidence, but it did not do so. Indeed, it is obvious why Dr. Elzinga used this small, very selective group. Wal-Mart's case is based on its complaint that out-of-state firms with "capital and scale" are the ones excluded from P permits, and thus Wal-Mart's expert limited his analysis to the top 10 largest firms out of thousands. Wal-Mart's "top 10" comparison is meaningless, absent some evidence that any disparate impact section 22.16 might have among "top 10" retailers is not balanced out by a disparate impact the *opposite* direction among the remaining majority of permit holders across Texas. Again, there is no such evidence.[15]

[14] Wal-Mart no longer relies on personal property tax filings to estimate market share, as it did in the trial court, but now relies solely on "permit share." However, an accurate statistical analysis of "permit share" would compare similarly-situated permit holders across the entire state, not "top 10s" in large municipalities. Such an apples-to-apples comparison *was* done—by the TPSA—and actually reveals (at Exhibit I-47) a *larger* percentage of out-of-state entities holding P permits (10%) than those holding BQ permits (only 6%). (ROA.11335:11 – 11338:5; ROA.14671.)

[15] Throughout Wal-Mart's brief, when there is no record evidence for a stated proposition, Wal-Mart instead cites to the district court's opinion. Such citations only further demonstrate the absence of record evidence to support the district court's findings.

In sum, there is no discriminatory effect, both as a matter of law under *CTS Corp.*, *Exxon*, and *Allstate*, and as a matter of fact for complete failure of proof. The district court's holding in the *Churchill Downs* case is equally applicable here: "Not only is the record devoid of any evidence … but … the Supreme Court has made clear that it is irrelevant." *Churchill Downs*, 979 F. Supp. 2d at 752.

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

The district court erred, however, by holding section 22.16's public corporation ban unconstitutional based on a purported legislative "intent to discriminate" in 1995. This is reversible error.

A. Legislative intent is irrelevant without actual discrimination.

This Court should be the first Circuit Court of Appeals to expressly hold that discriminatory "intent" by a state legislature alone, absent any actual discriminatory effect, cannot be the basis to invalidate a state statute under the dormant Commerce Clause. Such a holding would be constitutionally sound, and would correct the errors of the Fourth and Eighth Circuits in this area of the law.

The better-reasoned reading of Supreme Court precedent is that the Court never intended for intent alone to mandate invalidating a state statute in the dormant Commerce Clause context. This can be demonstrated in two ways. First, while sometimes speaking in terms of "purpose" and "motivation" prior to 1994,

every actual Supreme Court holding of discrimination against out-of-state interests was made in the context of a statute that either facially discriminated or had a shown discriminatory effect. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986) ("discriminates on its face"); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) (effect was "clearly discriminatory"); *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) ("on its face discriminates"); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350-51 (1977) ("practical effect" of discrimination). Second, since 1994, the Supreme Court has observed that it is the effect which actually matters. *See Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1801 n.4 (2015) ("The Commerce Clause regulates effects, not motives"); *Associated Indus. v. Lohman*, 511 U.S. 641, 653-54 (1994) (focus is on "whether a challenged scheme is discriminatory in 'effect'"); *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 100 (1994) (legislature's justification for law "has no bearing" on the inquiry). Intent alone is insufficient to invalidate legislative action under the dormant Commerce Clause.

To its credit, Wal-Mart concedes the accuracy of the TPSA's hypothetical: under the district court's holding, if two states passed identical statutes accomplishing identical *non*discriminatory objectives, one statute could be upheld as constitutionally sound, while the other identical statute could be deemed unconstitutional by a federal court reaching back decades and imputing improper

motives to that state legislature. If legislative intent alone were dispositive of the constitutional issue, the exact same statute would be constitutional and enforced in one state and struck down as unconstitutional in another state. Such an absurd result, however, cannot be the law under dormant Commerce Clause jurisprudence.

It is true that *O'Brien* is not a Commerce Clause case, but its approach to constitutional law is sound and should be imported into the Commerce Clause context. "It is a familiar principle of constitutional law that this Court will not strike down an *otherwise constitutional* statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 382-83 (1968) (emphasis added). The point is that that motive *alone* cannot be sufficient. Even under the Supreme Court's jurisprudence in other constitutional contexts, motives are not relevant unless a discriminatory effect can first be discerned. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1730-31 (2018) (applying *Arlington Heights* factors in Free Exercise context only after finding "disparity in treatment"); *Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985) (applying *Arlington Heights* factors in racial discrimination context only after finding "disproportionate effects"); *see also Schoenefeld v. Schneiderman*, 821 F.3d 273, 280-81 (2d Cir. 2016) (Privileges and Immunities Clause requires both disparate effect and protectionist purpose, while Commerce Clause regulates "effects, not motives").

Amici curiae Pacific Legal Foundation and Retail Litigation Center complain that a legislature might try to mask a statute's effect of excluding out-of-state entrants. That is precisely the point. The Court's job is not to "un-mask" the secret, subjective motives of legislators. If a statute does not facially show it will exclude out-of-state entrants, but its *effect* is, in fact, to exclude out-of-state entrants, then the plaintiff must *prove that effect*. It is immaterial—under the dormant Commerce Clause—whether the plaintiff believes a majority of the legislature subjectively intended that effect.

This Court has already held that rendering *otherwise lawful* conduct unconstitutional based solely on subjective intent is contrary to sound constitutional policy. *See United States v. Causey*, 834 F.2d 1179, 1180 (5th Cir. 1987). The Court should do so once again.

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

Even if intent, standing alone, had any legal impact, the district court's imputation of discriminatory motives to the 1995 Texas Legislature is clear error. The only statement of section 22.16's purpose in the formal legislative history of SB 1063 in 1995 shows a residence-neutral dividing line between large and small companies: "The prohibition against public corporation ownership would also prevent the take over of the package liquor store market by large corporations."

(ROA.14580.)[16] The only lobbying message to the legislature in 1995 was a residence-neutral dividing line between large and small companies: "This bill provides that package stores may not be owned by public corporations, where ownership is diluted, possibly among many thousands of different people." (ROA.14568.) The only explanation provided by the individual (Fred Niemann) who crafted section 22.16's language, prior to SB 1063 being filed in the Legislature in 1995, was a residence-neutral dividing line between large and small companies: "my assignment was do something that does not treat in-state and out-of-state businesses differently, to shift the focus from that to size, numbers of owners." (ROA.10820:16-18.)

Under governing law, the district court was not empowered to reject all of the actual legislative history in favor of the court's own revisionist determination of what *really* must have motivated the Texas Legislature 22 years ago. The district court's findings must be disregarded under this Court's precedent both on what presumption is proper and on what evidence is reliable for purposes of discerning legislative intent. *See Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 726 (5th Cir. 2004) (requiring that legislature's discriminatory intent between similarly situated interests be found "in the legislative history").

[16] Wal-Mart is wrong that such legislative document requires any foundation. The House Research Organization's bill analyses are legislative history, relevant to legislative purpose. *See, e.g.*, *Marsh U.S., Inc. v. Cook*, 354 S.W.3d 764, 779 (Tex. 2011); *In re Mo. Pac. R.R. Co.*, 998 S.W.2d 212, 218 & n.40 (Tex. 1999); *Mid-Am. Indem. Ins. Co. v. King*, 22 S.W.3d 321, 325 (Tex. 1995).

First, the district court's apparent finding of "a clear pattern" of discriminatory effect based on section 22.16's alleged impact on "nearly all out-of-state companies with the scale and capabilities necessary to serve the Texas retail liquor market" is clear error. (ROA.9415.) Both the district court and Wal-Mart ignore this Court's *Bray* opinion. In that case, the plaintiff had contended that "the purportedly discriminatory effect" of the challenged statute was "evidence of its protectionist purpose." *See Bray*, 372 F.3d at 726 n.11. However, this Court concluded that the alleged evidence of discriminatory effect was governed by *Exxon* and *Allstate* and, therefore, "does not tend to prove that a statute is discriminatory." *Id.* at 726. As in *Bray*, then, the district court below was not at liberty, after conceding section 22.16's effect is not discriminatory under *Exxon* and *Allstate*, to turn around and conclude that very same effect proved a discriminatory intent. *See id.* As a matter of law, if this Court agrees section 22.16's effects are non-discriminatory, *see supra* at pp. 17-25, then such effects are *no evidence* that the 1995 Texas Legislature had a discriminatory intent. *See United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("[W]e have historically assumed that Congress intended what it enacted.").

Second, the district court's claims of a "history of discrimination" and "specific sequence of [discriminatory] events" leading up to section 22.16's enactment are clear error. (ROA.9415-16.) There is no evidence of any alcohol

laws based on residency enacted by the Texas Legislature following this Court's 1994 *McBeath* opinion—in 1995 or in any subsequent legislative session. The Legislature's pre-*McBeath* actions cannot prove post-*McBeath* discrimination, because prior to *McBeath*, this Court had not struck down alcohol laws based on residency. *See Cooper v. McBeath*, 11 F.3d 547, 554-55 (5th Cir. 1994). Post-*McBeath*, the Texas Legislature made no attempts to re-enact any such residency laws. The bare fact that the public corporation ban was enacted in the legislative session following *McBeath* is no evidence the statute was enacted in an attempt to defy *McBeath*. *See Ala. State Fed'n of Teachers v. James*, 656 F.2d 193, 195 (5th Cir. 1981) (statutory classifications will be set aside only if no grounds can be conceived to justify them); *McBride v. Clayton*, 166 S.W.2d 125, 128 (Tex. 1942) (Texas statutes are presumed enacted with full knowledge of, and in harmony with, decisions of the courts).

Wal-Mart offers no response to the Supreme Court's recent 2018 decisions, which hold more than simply that the plaintiff has the burden of proof. Under *Abbott v. Perez*, Wal-Mart cannot rely on pre-1994 legislative conduct without proof that the 1995 legislative acts themselves involved discriminatory intent. *See* 138 S. Ct. 2305, 2325 (2018). Likewise, any such pre-1994 legislative conduct cannot be held to create some "discriminatory taint" on the 1995 legislature's use of corporate size and status as the dividing line in lieu of residency. *See id.* at

2326. As the Supreme Court held in *Trump v. Hawaii*, "because there is persuasive evidence that the [law] has a legitimate grounding … we must accept that independent justification." *See* 138 S. Ct. 2392, 2421 (2018).

Because it was rational for the Texas Legislature to have believed in 1995 that "excluding public corporations from the retail liquor market would artificially inflate prices, thereby moderating the consumption of liquor and reducing liquor-related externalities" (ROA.9439), under governing precedent, the district court was required to presume that the Legislature had this very intent in mind in 1995 when it enacted section 22.16. *See Perez*, 138 S. Ct. at 2324 ("the presumption of legislative good faith [is] not changed by a finding of past discrimination").

Third, the district court's admitted reliance on lobbyists' statements over 13 years later is clear error. (ROA.9417.) This Court recently confirmed—*en banc*—that evidence of post-enactment history from subsequent legislative sessions is "unreliable" and "infirm." *See Veasey v. Abbott*, 830 F.3d 216, 234 (5th Cir. 2016). Wal-Mart offers no response to *Veasey*. Moreover, it is immaterial that this Court's *Rogers* opinion was in the statutory-interpretation context, as that opinion's discussion of what constitutes "legislative history" was not so limited. *See Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1080, 1082 (5th Cir. 1980) (declaring that post-enactment legislative statements are "not part of the legislative history of the original enactment" and are nothing more than "mere commentary"). The only

case the district court and Wal-Mart cite to argue that post-enactment lobbyist statements might be relevant—*Maine v. Taylor*—actually *rejected* the plaintiff's attempt to rely on agency comments made 22 years later as "weak" and unpersuasive, and neither held as the district court claimed that such evidence is "appropriately considered," nor held as Wal-Mart claims that it is "relevant circumstantial evidence." *See Maine*, 477 U.S. at 149-50.

Fourth, all that remains, then, in the district court's analysis to support a supposedly discriminatory legislative intent, are comments by two (out of 181) legislators, Senators Armbrister and Henderson, on the Senate Floor in 1995. This Court can review the two senators' entire colloquy on the Senate floor, and will find no support for the district court's finding of discriminatory intent. (ROA.14019-25.) Indeed, the senators' discussion revealed that, whatever their understanding of the public corporation ban, they believed there was another pending (not enacted) bill which "keeps foreign ownership from coming in and getting licensed," but that SB 1063 was *not* that bill. (ROA.14024-25.)

Moreover, even if these two senators' comments had communicated protectionism of the worst kind, it would be an error of law to discern legislative intent based on their comments. The Supreme Court, "under well-settled criteria," declines to void a facially constitutional statute "on the basis of what fewer than a handful of Congressmen said about it." *O'Brien*, 391 U.S. at 383-84. The

Supreme Court focuses on formal legislative history, not "passing comments of one Member" or "casual statements from the floor debates." *Garcia v. United States*, 469 U.S. 70, 76 (1984). This Court has twice rejected reliance on "stray protectionist remarks" of individual legislators or "statements" of a single member, in the context of the *Arlington Heights* framework, when faced, as here, with a broader legislative record that betrays no discriminatory motive. *See Allstate*, 495 F.3d at 161, *Jones v. City of Lubbock*, 727 F.2d 364, 371 n.3 (5th Cir. 1984). This case law is dispositive.

All other arguments made in response fall short. Wal-Mart claims Mr. Niemann's testimony reveals some clandestine motive to discriminate against out-of-state firms. This Court can review Mr. Niemann's entire testimony, and will find no support for the district court's finding of discriminatory intent. (ROA.10754:1 – 10830:11.) Contrary to Wal-Mart's briefing, Mr. Niemann did not admit to "speculating" in his 1995 legislative testimony, but quite clearly described his common sense analysis of the market. (ROA.10823:2 – 10824:5.) Also contrary to Wal-Mart's briefing, the "stable business market" that Mr. Niemann testified the TPSA was seeking to protect was expressly depicted as a "stable business climate for small businesses"—not for in-state businesses. (ROA.10791:12-19, 10807:14 – 10808:18.) Wal-Mart's out-of-context quotes from Mr. Niemann's testimony do not support a discriminatory legislative intent.

Wal-Mart argues the public corporation ban was a "substantive departure" from established policy of not excluding public corporations from other TABC permits. However, such departure was explained by Mr. Niemann: "The residency law has accidentally prevented huge megastores from putting our mom-and-pop small businesses out of the business. Now, is there a way that we can accomplish the same thing that does not discriminate between … in-state and out-of-state owners." (ROA.10820:1-5.) Thus, the departure actually disproves any intent to exclude out-of-state entrants, because it was a departure *from* excluding out-of-state entrants. The only evidence of intent by Mr. Niemann is that he intended to draft a law that *complied* with this Court's ruling in *McBeath*. A court is not at liberty to simply declare the only evidence in the record not credible and a pretext. There must be some evidence that it is not credible and that it is a pretext. There is no such evidence in this record.

Wal-Mart argues the accountability rationale for the public corporation ban was tenuous. On the contrary, not only is it common sense that owners of small businesses are more identifiable and responsive (ROA.10823:2 – 10824:5), but TABC's representative at trial specifically testified that holding permit holders accountable is less efficient with public corporations (ROA.10721:3-10, 10733:5-8, 10743:13-22).

Wal-Mart argues section 22.16's grandfather clause demonstrates discrimination against out-of-state firms. Section 22.16, enacted in May 1995, has an exception for firms that had already applied for a P permit as of April 28, 1995. *See* TEX. ALCO. BEV. CODE § 22.16(f). However, such exception was explained by Mr. Niemann. It was not part of the overall intent for SB 1063, but was added solely due to the lobbying efforts of an individual owner of Gabriel's Wine and Spirits. (ROA.10829:1-25.) In any case, there are a total of only two firms today (both are Gabriel's companies) covered by such exception. (ROA.10705:23 – 10706:1.) Such a grandfather clause does not render an otherwise constitutional statute void. *See Dukes*, 427 U.S. at 305 (grandfather clause causing only recent entrants to be barred "is not constitutionally impermissible"); *Lindquist v. City of Pasadena*, 669 F.3d 225, 236 (5th Cir. 2012) (finding it rational to address perceived ill by only preventing new entrants).

Finally, Wal-Mart argues that "a harsh private enforcement mechanism" demonstrates discriminatory intent. There is no legal basis for such argument. Section 22.16's enforcement mechanism would apply regardless whether the entrant were an out-of-state firm such as Wal-Mart or an in-state firm such as the grocery store chain HEB. *See* TEX. ALCO. BEV. CODE § 22.16(a), (c), (e).

A court cannot strike down a law by finding that every actual statement of intent was a cover-up or pretext and then declaring the entire legislature's "true"

motives without actual evidence of those "true" motives. Yet, the district court did precisely that. The district court ignored every existing, express statement of non-discriminatory purpose for section 22.16, so that it could infer an unexpressed, undocumented, and secret discriminatory purpose.

In discerning a supposedly discriminatory legislative intent, the district court ignored and declined to follow Supreme Court precedent—*Exxon*, *Fritz*, *O'Brien*, and *Garcia*—and this Court's precedent—*Bray*, *Allstate*, *James*, *Veasey*, *Rogers*, and *Jones*. This is reversible error. Once the correct presumption is applied, and once infirm evidence is properly discounted, *no evidence* supports any intent, secret or otherwise, by the Texas Legislature to discriminate against out-of-state interests when it enacted the residence-neutral public corporation ban in section 22.16.

IV. The district court erred in holding section 22.16 unconstitutional under the Commerce Clause based on a *Pike* balancing test.

The district court's *Pike* analysis is equally untethered from the governing law and the evidentiary record, and must be reversed. Even if *Pike* applies, Wal-Mart failed to produce any evidence of a burden on interstate commerce, and certainly no burden that is "clearly excessive" in relation to section 22.16's local benefits. *See Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

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

Contrary to Wal-Mart's claims, no federal appellate court has ever affirmed the striking down of a State's alcohol regulation under a *Pike* balancing analysis in the face of the Twenty-First Amendment. The reason this Court should not do so is straightforward. Retail sales of liquor are a core concern of the Twenty-First Amendment. *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984). Thus, regulating those retail sales must remain a State's prerogative, *see Pike*, 397 U.S. at 142-43, as long as the State's laws do not discriminate against interstate commerce (*Granholm*) or directly regulate sales in other states (*Brown-Forman*).

None of Wal-Mart's (or amici curiae Pacific Legal Foundation's and Retail Litigation Center's) cited cases conclude that *Pike* balancing applies to a state law protected by the Twenty-First Amendment. Instead, their cited cases fall into four categories:

(1) Addressing the Twenty-First Amendment in the context of a statute held to directly regulate sales in other states. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986).

(2) Addressing the Twenty-First Amendment in the context of a statute found discriminatory in effect. *See Granholm v. Heald*,

544 U.S. 460 (2005); *Bacchus Imports*, 468 U.S. 263 (1984); *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608 (6th Cir. 2018), *cert. granted*, No. 18-96 (U.S. Sept. 27, 2018); *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730 (5th Cir. 2016); *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809 (5th Cir. 2010); *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1 (1st Cir. 2010); *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423 (8th Cir. 2008); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003).

(3) Failing even to mention the Twenty-First Amendment in striking down a statute under *Pike*. *See Baude v. Heath*, 538 F.3d 608 (7th Cir. 2008).

(4) Declining to address the Twenty-First Amendment because the statute would satisfy *Pike*. *See Lebamoff Enters. v. Huskey*, 666 F.3d 455 (7th Cir. 2012).

Just as the state law in *Steen* regulating retailers (found discriminatory by the district court) was held protected by the Twenty-First Amendment, section 22.16 (regulating the "eligibility requirements" for retailers in a non-discriminatory manner) must also be protected by the Twenty-First Amendment. *See Steen*, 612

F.3d at 818-21. Any other holding would effectively erase the Twenty-First Amendment.

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

Even if the Twenty-First Amendment were ignored, the district court's *Pike* analysis could not be affirmed. The district court failed even to *ask* whether section 22.16's local benefits outweighed any such burden. *See Pike*, 397 U.S. at 142. Indeed, the statute's local benefits easily outweigh any possible impact on interstate corporations.

As its own cited cases reveal, Wal-Mart is not correct that the Supreme Court or any Circuit Court of Appeals has rejected or departed from the deference owed to the asserted, putative local benefits of a law subjected to *Pike* balancing. *See, e.g.*, *Dep't of Revenue v. Davis*, 553 U.S. 328, 356 (2008); *Allstate*, 495 F.3d at 164. *Pike* is simply not an invitation to second-guess a state legislature.

In any case, regardless of what evidentiary standard would apply, such standard is easily met by the overwhelming record evidence of local benefits to the State of Texas. The same facts that satisfy the rational-basis test, *see supra* at pp. 7-17, also prove for *Pike* purposes that section 22.16 reduces per capita liquor consumption, along with its negative societal consequences. This ought to be the end of the inquiry on *Pike*. Even Wal-Mart would concede that if section 22.16 *does* reduce per capita liquor consumption—to any degree—the ability of large

multi-national corporations like Wal-Mart to profit from liquor sales in Texas does not "clearly outweigh" reducing cancer, drunk driving, and child abuse. With no evidence of section 22.16's burdens outweighing its benefits, section 22.16 satisfies a *Pike* balancing analysis.

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

Moreover, there is nothing in the record to indicate Wal-Mart's preferred legislative alternative—imposing additional excise taxes—would both burden interstate commerce less than a public corporation ban *and* maintain Texas's unprecedented success in tempering liquor consumption. Wal-Mart's declaration that "no evidence is required" is legally incorrect. *See Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 525-26 (1989); *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 336-37 (5th Cir. 2007).

Wal-Mart responds with the observation that in Texas's beer market, and in many other states' liquor markets, a higher excise tax is imposed and out-of-state firms compete. However, even if there were any evidence that these other markets involve a lesser burden on interstate commerce,[17] there is another fatal flaw with Wal-Mart's observation. In all such other markets, per capita consumption is *high*. To be relevant, a legislative alternative cannot be "less likely to be effective" at accomplishing the putative local benefit of the challenged regulation. *See*

[17] There is no such evidence. Wal-Mart did not compare the state-wide Texas liquor market with any other market.

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 474 (1981). It is undisputed, as Exhibit I-40 shows, that Texas has a high per capita consumption of beer. (ROA.11311:13-18; ROA.14664.) It is equally undisputed, as Exhibits I-38 and I-72 show, that the states with higher excise tax in which Wal-Mart is selling liquor have a higher per capita consumption of liquor than Texas. (ROA.14662, 15972.) There is simply no evidence that an increased excise tax would likely be as effective at reducing per capita consumption as Texas's uniquely-effective public corporation ban has consistently been.

Pike balancing is supposed to be deferential to legislative choices. The Texas Legislature gets to select its economic theory, not the federal courts, and certainly not Wal-Mart. *See CTS Corp.*, 481 U.S. at 92. With no evidence of equally-successful legislative alternatives with a lesser impact on interstate commerce, section 22.16 satisfies a *Pike* balancing analysis.

D. Section 22.16 does not burden interstate commerce.

In fact, under the governing law, section 22.16 does not impose a burden on interstate commerce so as to trigger *Pike* balancing in the first place. The same bases that prove section 22.16 does not discriminate in effect, *see supra* at pp. 17-25, also prove that section 22.16 does not impose any burden on interstate commerce.

First, the cases holding that a residence-neutral regulation of similarly-situated in-state and out-of-state companies does not equate to discriminatory effect also conclude those same laws satisfy *Pike* balancing. *See Exxon*, 437 U.S. at 127-28 ("We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market."); *Allstate*, 495 F.3d at 163-64 (upholding law under *Pike* that "does not prohibit" interstate companies not subject to a residence-neutral ban "from operating in, or entering, the Texas market"); *Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 502 (5th Cir. 2004) ("while the ordinances may have the effect of shifting some business away from plaintiffs … this result does not mean that the ordinances burden interstate commerce"). Section 22.16 is residence-neutral, having the same impact on an in-state company as it does on an out-of-state company.

Second, even if "disparate impact" between in-state companies versus out-of-state companies might be relevant for purposes of measuring a burden on interstate commerce, there would need to be actual evidence in the record of such a "disparate impact." None of Wal-Mart's three theories of disparate impact have evidentiary support. Wal-Mart's claim that 90% of potential entrants are out-of-state is meaningless absent some control group to demonstrate that 90% is disproportionately high. Wal-Mart's claim that 98% of the current P permit

holders have entirely in-state ownership is meaningless absent some control group to demonstrate that 98% is disproportionately high. Wal-Mart's claim that there are more out-of-state companies among the 18 BQ permit holders that are "top 10" in the five largest Texas cities than there are among the 40 P permit holders that are "top 10" within those cities is meaningless, absent some evidence that any such disparity is not balanced out by the composition of the remaining 8,991 BQ permit holders and 1,725 P permit holders across Texas.

The district court's finding of a burden on interstate commerce is error, both as a matter of law under *Exxon* and *Allstate*, and as a matter of fact for failure of proof. With no evidence of a burden on interstate commerce, section 22.16 necessarily satisfies a *Pike* balancing analysis.

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

Wal-Mart insists that it litigated *Pike* "at every stage." This is demonstrably not the case. Wal-Mart never introduced any evidence on *Pike*. First, Wal-Mart failed even to plead a *Pike* balancing test. (ROA.82-83.) Next, in response to TABC's motion to dismiss, Wal-Mart indicated it would address *Pike* "through discovery," but never did so. (ROA.202.) Then, in response to the TPSA's motion for summary judgment, Wal-Mart insisted there were "material disputes of fact" on *Pike*, but did not produce or cite any evidence on the matter. (ROA.6546.) In the trial record, there is no mention of "*Pike*," or any "excessive," "outweighing," or

"lesser" burdens. (ROA.9854-11565.) Lastly, post-trial, Wal-Mart insisted *Pike* applied, but barely even made any argument on the matter, and more important, once again did not cite to any evidence. (ROA.9105, 9126-27, 9230, 9257-59.)

The fact is that Wal-Mart *failed* to litigate *Pike* at every stage. There is neither pleading nor evidence to support a *Pike* analysis in this case. The district court's manufacturing of a *Pike*-based theory to strike down section 22.16 lacks any evidentiary support, and must be reversed.

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

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

Wal-Mart does not deny that its standing to challenge sections 22.04 and 22.05 depends on its claim that section 22.16 is unconstitutional. If, then, this Court reverses the district court's judgment that section 22.16 is unconstitutional, all of Wal-Mart's remaining claims must be dismissed.

B. With the burden of proof correctly placed, section 22.05 cannot be found unconstitutional.

The burden of proof is fatal to Wal-Mart's challenges to section 22.05. Wal-Mart's labeling the statute "arbitrary" (42 times in its brief) does not make it so. Wal-Mart failed to produce any *evidence* that section 22.05 is "arbitrary" or "invidious."

1. Equal Protection challenge.

First, Wal-Mart has no response to the fact that it failed to negate *all* of the TPSA's proffered rational bases for section 22.05. A plaintiff must negate every proffered rational basis for a law. *See Integrity Collision Ctr. v. City of Fulshear*, 837 F.3d 581, 589 (5th Cir. 2016). The TPSA (and TABC) identified numerous rational bases. (ROA.14380-81.) Given the governing evidentiary standard, then, section 22.05 satisfies rational-basis review.

Second, as to the rational bases that Wal-Mart does discuss in its brief, Wal-Mart continues its attempts to shift the burden of proof. The relevant question is not whether TABC or the TPSA offered evidence to support their proffered rational bases for section 22.05. Rather, the question is whether Wal-Mart proved section 22.05 does *not* promote small or family businesses. Wal-Mart failed to do so.

The impact of section 22.05 is straightforward. A company majority-owned by an individual (or individuals) with a shared parent, sibling, or child (the prerequisite to section 22.05 consolidation) is more likely to be a small or family business than a company that does not share this characteristic. By the statute's plain language, a firm with diffuse ownership structure cannot exceed five permits. *See* TEX. ALCO. BEV. CODE § 22.05. Section 22.05 encourages a smaller number of owners, and encourages a family relationship between those owners.

The real-world results bear this out. The only evidence on family businesses in the trial record is that the P permit holders holding more than 5 permits *are family businesses*. (ROA.10927:19 – 10929:8.)[18] Likewise, the relevant evidence on small businesses is that the largest seller of liquor in Texas is a medium-sized firm (*i.e.*, Spec's) rather than a giant-sized firm (*e.g.*, Wal-Mart). (ROA.11459:11 – 11461:11.)[19] This is a rational basis for section 22.05. *See Grosjean*, 301 U.S. at 426-27 (holding that a state may regulate in favor of small stores over larger chain stores). A statute's classifications are accorded a strong presumption of validity, which can only be overcome by negating—*with evidence*—every proffered basis that is at least reasonably conceivable. *See Heller*, 509 U.S. at 319-21.

Wal-Mart complains that the larger package store companies have employed "bulk buys" to increase in size, but can cite to no evidence that small businesses would have been any more successful in the absence of section 22.05. Wal-Mart finds Dr. Magee's small firm theory to be "impossible to believe," but can cite to no evidence that urban *or* rural areas would have seen identical or less chain-store expansion in the absence of section 22.05. The best Wal-Mart can do is negatively

[18] Of the businesses that gave testimony, Spec's is owned by John Rydman and his wife (ROA.8555:10-12), Twin Liquors is owned by David Jabour and his sister (ROA.11199:6-10), and Gabriel's is owned primarily by three Gabriel family members (ROA.10895:21 – 10896:15). Even Total Wine—the out-of-state company that has employed section 22.05—is a family business. (ROA.10716:8-10.) Wal-Mart fails to identify one single instance of section 22.05 being used by a non-family business.

[19] Wal-Mart's own exhibit shows that only one of the package store businesses made the "top ten" in beer and wine "share" in any one of the five largest Texas cities. (ROA.14281-85.)

portray the state of the liquor retail market. However, Wal-Mart cannot supply any record evidence negating that absent section 22.05, small or family businesses would have fared worse. It was Wal-Mart's burden to do so.

Third, Wal-Mart seeks to save its Equal Protection claim by asking this Court to apply strict scrutiny instead of the rational-basis test. Strict scrutiny does not apply here. Numerous laws, such as tax and inheritance, assign benefits based on family status. There is nothing suspect about granting benefits based on consanguinity—parent, child, or sibling. Under section 22.05, it matters not whether the child is legitimate or illegitimate, male or female, natural or adopted. Nor does it matter if the parent is married or divorced, straight or gay, biological or adoptive. *See* TEX. ALCO. BEV. CODE § 22.05. There is no judicial precedent for applying strict scrutiny to a law that ascribes benefits based on familial relationship, when such law does not discriminate based on race, religion, natural origin, sex, age, or marital status. *See Dukes*, 427 U.S. at 303 (local economic regulation is subject to rational-basis review); *cf.* 29 U.S.C. § 2601(b)(l) (federal law's purpose includes "economic security of families").

Moreover, the facts do not match Wal-Mart's rhetoric. Wal-Mart expresses concern for "family-less owners," but cites no evidence of any person stuck at 5 permits who would expand but lacks a parent, sibling, or child to do so. Indeed, there are only *three* (of 1,765) P permit holders in the entire state with exactly

5 permits. (ROA.12394, 13735.) Wal-Mart declares the exception "swallows" the rule, but only *twenty-one* (of 1,765) P permit holders exceed 5 permits. (ROA.13735.) As Dr. Magee explained in his testimony, section 22.05 turns out to be an ingenious solution for enabling small businesses to thrive in rural areas (Wal-Mart could not expand) while simultaneously meeting the increased urban demand (family-owned chain stores can expand). (ROA.11444:10 – 11448:25.)

2. Commerce Clause challenge.

With respect to Wal-Mart's cross-appeal, the district court correctly rejected Wal-Mart's Commerce Clause challenge to section 22.05. (ROA.9432-34.) First, section 22.05 neither discriminates facially nor by effect. *See Allstate*, 495 F.3d at 125-28 (holding that distinguishing among types of retailers, while treating in-state and out-of-state interests identically, is not a discriminatory effect under the Commerce Clause). Wal-Mart provides no argument to the contrary, and its expert witness agreed as much. (ROA.10320:5-20.)

Second, even if relevant, there is no evidence of a discriminatory purpose. Wal-Mart does not even reference the 1951 legislative session. Instead, Wal-Mart relies on testimony to legislative committees made over 50 years later (2009 and 2013) by lobbyists in opposition to attempts to repeal section 22.05. This Court has definitively declared that such evidence of post-enactment history is, at best, "unreliable," "infirm," and "mere commentary." *See Veasey*, 830 F.3d at 234;

Rogers, 611 F.2d at 1080-82. The legally-correct focus is on the contemporary (the time of enactment) statements by the decision-makers (the legislature). *See Allstate*, 495 F.3d at 160. Testimony *to* a legislative committee in 2009 or 2013 has no bearing on the Legislature's actual intent in 1951.

Third, section 22.05 does not fail *Pike* balancing, for the same reasons as section 22.16. Because retail sale of liquor is a core concern of the Twenty-First Amendment, section 22.05 is not subject to *Pike* balancing in the first place. *See Crisp*, 467 U.S. at 713; *Steen*, 612 F.3d at 820. Even if it were, this Court has held that residence-neutral regulation such as section 22.05 satisfies *Pike* balancing. *See Allstate*, 495 F.3d at 163-64. In addition, as the district court found, "there is no specific evidence in the record demonstrating that the consanguinity exception [absent the public corporation ban] disproportionately excludes out-of-state companies." (ROA.9434.) There is also no (or insufficient) evidence that any such burden would be "clearly excessive" in relation to section 22.05's local benefits, such as identified in Dr. Magee's testimony, *see Pike*, 397 U.S. at 142, or that any alternative regulatory measures would be less burdensome on interstate commerce, *see Nw. Cent. Pipeline Corp.*, 489 U.S. at 525-26.

As a practical matter, there was no reason for Wal-Mart to cross-appeal on its Commerce Clause challenge. To the extent section 22.05 survives an Equal

Protection rational-basis review, on this evidentiary record it would also survive a dormant Commerce Clause review. *See* Wal-Mart's Br. at 75.

C. Section 22.04 cannot be permanently enjoined.

Wal-Mart concedes on appeal that section 22.04's five-permit cap is constitutional, yet attempts to defend a permanent injunction against the constitutional statute's enforcement. The district court's injunction must be reversed. Sections 22.04 and 22.05 are separate statutes. A challenge to section 22.05 has no bearing on section 22.04.

Wal-Mart is incorrect that selection of remedy somehow defers to the district court's discretion. The proper remedy, when a Texas statute is declared unconstitutional, is a matter of state law. *See Leavitt v. Jane L.*, 518 U.S. 137, 139-40 (1996). This is why the "no deference" rule applies. *See id.* at 145 (citing *Salve Regina Coll. v. Russell*, 499 U.S. 225, 239-40 (1991)). This Court's review of the proper remedy to impose against the State of Texas (if section 22.05 is declared unconstitutional) is *de novo*.

The Texas Legislature has resolved the matter of severability by state law. Under Texas law, if one Texas statute is declared invalid, while the other Texas statute "can be given effect without the invalid provision," the latter statute is not affected by the former's invalidity. *See* TEX. GOV'T CODE § 311.032(c). Section 311.032(c)'s presumption cannot be ignored in order to fashion a contrary

equitable remedy. Under Texas law, the constitutional provision must be retained *unless* "it cannot be presumed the legislature would have passed the one without the other"—a bar that cannot be overcome here. *See Rose v. Doctors Hosp.*, 801 S.W.2d 841, 844 (Tex. 1990).

Moreover, even absent section 311.032(c), the district court relied on the wrong federal presumption. The three federal cases Wal-Mart cites each involve a general rule that was discriminatory, and thus that general rule could be struck down, thereby extending rather than nullifying the statutory benefits. *See Califano v. Westcott*, 443 U.S. 76, 89-90 (1979); *Dickerson*, 336 F.3d at 409; *Cox v. Schweiker*, 684 F.2d 310 (5th Cir. 1982). In contrast, a completely different equitable presumption applies when a *general restriction* is constitutional, but a *favorable exception* is found discriminatory. That would be the case here, and thus the appropriate remedy would be to strike the unconstitutional exception's benefit, not to remove the general restriction. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699-1700 (2017); *Villegas-Sarabia v. Duke*, 874 F.3d 871, 882-83 (5th Cir. 2017). Given this well-reasoned presumption, the district court's injunction against section 22.04 cannot stand.

The court's task is not, as Wal-Mart contends, to strike down every possibly-related statute and then sit back to see which ones the Legislature decides to re-enact. Instead, the court is to strike down only (1) unconstitutional provisions

and (2) constitutional provisions that are so intertwined with the former that the legislature could not—or would not—have enacted them without the former. In this case, section 22.04's permit cap originally enacted in 1935 (the general rule) is not dependent in any way on section 22.05's consanguinity rule enacted 16 years later in 1951 (the favorable exception). *See* TEX. ALCO. BEV. CODE § 22.04. Thus, the proper remedy regarding section 22.05 cannot involve the striking down of section 22.04.[20]

Wal-Mart wants to open hundreds of liquor outlets in Texas. (ROA.10005:7-20; ROA.12432.) This is no justification for permanently removing Texas's five-permit cap that was enacted in the State's very first legislative session following the end of Prohibition.

It is undisputed the Texas Legislature has imposed numerous barriers to obtaining a P permit—barriers not applied to other alcohol permits. The district court's chosen remedy of removing those barriers is improper. Such removal ignores Texas's longstanding commitment to P permit barriers, and would utterly disrupt the Texas retail liquor marketplace—just as this Court has observed. *See Wal-Mart Stores*, 834 F.3d at 568 n.6 ("the underlying lawsuit attacks … a comprehensive system of state law and the intervenors are threatened … with the

[20] Wal-Mart is incorrect that barring only *new* permits over the five-permit cap would violate Equal Protection, because such grandfathering is constitutional. *See Dukes*, 427 U.S. at 305; *Lindquist*, 669 F.3d at 236.

… end of their viability"). Therefore, even if the district court's judgment striking down sections 22.16 and 22.05 could be affirmed, the injunction against section 22.04 must be reversed.

CONCLUSION

The district court erred in holding unconstitutional—and permanently enjoining—Texas Alcoholic Beverage Code sections 22.04, 22.05, and 22.16. All three statutes are residence-neutral, and are rationally related both to the encouragement of smaller and family-owned businesses in the Texas retail marketplace, and to the maintenance of Texas's longstanding low per capita consumption of liquor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2018, I electronically filed this Brief of Appellant Texas Package Stores Association with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that counsel for Plaintiffs and Defendants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

G. Alan Waldrop

CERTIFICATE OF COMPLIANCE

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

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