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

AMICUS CURIAE BRIEF OF SPEC'S FAMILY PARTNERS, LTD. IN SUPPORT OF TEXAS ALCOHOLIC BEVERAGES COMMISION AND TEXAS PACKAGE STORE ASSOCIATION FOR REVERSAL OF THE DISTRICT COURT

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DISCLOSURE STATEMENT

We know of no basis for recusal by any member of the court. Spec's was founded in 1962 by a husband and wife, C.B. Jackson and Carolyn Jackson. Both died in 1996. After probate Spec's has been owned by their only child Lindy Jackson Rydman and her husband of 47 years, John Rydman (98% individually and 2% through single purpose entities owned by Mr. and Mrs. Rydman). For almost fifty-five years it has been owned by a husband and wife: no public entity or any other person has any ownership.

SPEC'S INTERESTS

Spec's has sold distilled beverages for fifty-five years. Mr. Rydman was raised in Newton, Mrs. Rydman in Houston. As Texans owning a Texas company, they believe the district court's errors threaten the safety of Texans through an increase in drunk driving and alcoholism. They also believe the district court misapplied the law, thereby reaching the wrong conclusions.

The undersigned counsel authored this entire brief after reading what he hopes is every case ever decided under the 21st Amendment. He has been Spec's principal lawyer for thirty-five years. No other company or person contributed any financial support of any kind to this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Amendments

Statutes

SUMMARY OF THE ARGUMENT

The district court nullified three laws passed by the Texas legislature and replaced them with plans which even Congress cannot validly legislate.

Shortly after prohibition banned the manufacture, distribution or sale of alcohol, the people of this nation rose up. In less than a year, through Congress and state conventions, the people overwhelmingly passed the 21st Amendment vesting exclusive power over the local sale and distribution of alcohol at the state level. Congress has recently written that this is where the power should be. But the Order on appeal takes that power away from Texas and places it in the federal judiciary.

While almost completely ignoring the 21st Amendment the Order reverses three key components of Texas law regulating the sale of distilled beverages. After multiple rounds of briefing that ignored or minimized the 21st Amendment, an almost two-hour oral hearing on summary judgment in which the 21st Amendment was never mentioned, and a one-week trial in which it was almost completely ignored, the result was predictably erroneous. The 21st Amendment made a fleeting cameo

appearance in footnote 5 and was otherwise absent from a 50-page Order that turns limits on permits into an unlimited number of permits, opens the sale of all distilled spirits to thousands of new locations which can only flood the market and collapse prices, and eliminates a benefit that Texas permissibly chose to give to small or family owned retailers.

Texas' exceptional, transcendent, and overwhelming power over it's constitutionally exclusive zone of control to govern the sale of distilled beverages should be recognized, and the way to do that is to apply the correct presumptions and standards of review.

There is no evidence or legislative history to even hint at a discriminatory thought or purpose in the mind of one person in the 150-member Texas House of Representatives, the Lt. Governor, or the Governor from 1995 to today with respect to publicly owned companies having retail package store licenses. There is some evidence that one or two senators (out of 31) spoke some debatable words: that evidence is insufficient to prove discriminatory Senate intent. Coupled with no discriminatory effects, it is not grounds to set aside state legislation. The standards set forth by the US Supreme Court and this court for analyzing

a dormant Commerce Clause challenge to state liquor laws, when applied to the facts developed at trial, reveal that the dormant Commerce Clause was not violated.

Ignoring the 21st Amendment precedents specifically referring to states' rights to prefer small or family owners businesses in alcohol sales, and evidence that every "chain store" is family owned, the district court erroneously decided there is no rational basis for a 67 year-old law favoring small or family owned businesses.

Nothing gives a court the right to nullify a law the court finds to be constitutional.

ARGUMENT

1. The 21st Amendment.

The 21st Amendment is incredibly unique. It is the only provision in the U.S. Constitution that:

a. Grants power to states;

b. Overturns a separate amendment;

c. Passed by state conventions, the people acting directly rather than by legislature;

d. Was passed by the U.S. House, Senate, and 37 states in less than 10 months (ROA. 7372-73), and

e. Is limited to one consumer product.

The 21st Amendment allocates all of the governmental power to create a system to regulate local alcohol sales to the states. Thus, any challenge to that legislation must begin with an analysis of the 21st Amendment. "Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment…" *Joseph E. Seagram & Sons v. Hostetter*, 86 S.Ct. 1254, 1259 (1966); accord *Castlewood International Corp. v. Simon*, 596 F.2d 638 (5th Cir. 1979), cert granted 100 S.Ct. 2914, jmt. vacated and remanded, 626 F.2d 1200 (5th Cir. 1980).

When prohibition passed it repealed the dormant Commerce Clause as to alcohol. When prohibition failed miserably and was repealed by the 21st amendment, the dormant Commerce Clause was modified as to alcohol. Many states continued to ban the manufacture or sale of alcohol after the 21st amendment passed in 1933: for example, Mississippi banned all distilled beverages until 1966, and 33 states have dry counties today. That violates the dormant Commerce Clause, but it is unquestionably constitutional. Courts have tried to balance and harmonize the dormant Commerce Clause and the 21st amendment but the Order on appeal ignored almost all of the cases defining that balance, applies the wrong legal standards to the alcohol distribution laws under scrutiny, and therefore reached the wrong conclusions as to the dormant Commerce Clause and equal protection.

The district court went exactly where courts were warned not to go in 1944: the district court embarked on the "impossible task of deciding, instead of leaving it for legislatures to decide, what constitutes a 'reasonable regulation' of liquor traffic." *Carter v. Virginia*, 64 S.Ct. 464, 470-1 (1944, Frankfurter concurring).

In charting a course between their police powers, a constitutional provision that expressly grants power to regulate local alcohol sales, and another provision that impliedly limits those powers, Texas navigated a safe course. The tension and difficulties inherent in this area are properly resolved by reviewing all of the phenomenal powers granted to states against the rationales for restrictions. This reveals Texas' evenhanded, fair, non-discriminatory treatment of every bottle of alcohol, distiller, distributor, consumer and in-state or out-of-state retailer.

A. The 21st Amendment was ignored or marginalized in the district court.

Where you start frequently determines where your finish. This case started in the wrong place, took the wrong paths, stayed on the wrong paths, and therefore finished in the wrong places for the wrong reasons.

In February 2015 Wal-Mart filed a 24-page Original Complaint (ROA.63) seeking to set aside four Texas statutes passed between 1935 and 1995 pursuant to the authority the people of this country expressly gave only to the states. The Complaint refers to three provisions of the US

Constitution, six federal statutes, and the four Texas statutes in dispute without ever referencing the 21st Amendment.

Having started by never citing the 21st Amendment, Wal-Mart created a trend that continued throughout the case. In the almost two hour long oral argument on summary judgments no one (the judge or any lawyer) referred to the 21st Amendment. (ROA. 9714-9792). Of the 1,344 cases cited by all parties in all of their trial court briefing on the merits, 56% (752 of 1,344) dealt with farming, municipal solid waste, insurance companies, nursing homes, fishing licenses, telephones, securities, and dozens of other things completely separate and independent from the unique alcohol jurisprudence developed since 1933 under the 21st Amendment. A few of those 752 cases are certainly worthy of analysis (indeed, *Exxon v. Maryland* may be dispositive) but many contradict the significant body of law applicable only to alcohol. The legally correct analytical framework is to start with the unique structure of alcohol regulation jurisprudence, and only then to branch out to the occasional case that deals with some other product or subject matter and which can

properly be applied to an alcohol regulation dispute. For this reason, every case Spec's cited to the district court involved the 21st Amendment.

Spec's tried to solve the problem of neglect of the 21st Amendment, and therefore the application of the wrong legal standards, in its first amicus brief which began:

> "The failure of all three parties to start their analysis with the key constitutional provisions in issue prompted the filing of this amicus brief. The parties are applying the wrong standards of review and failing to analyze the unique aspects of constitutional law applicable to state alcohol regulation." (ROA. 7329).

Spec's filed three substantive amicus briefs in the district court in an effort to prevent the error of ignoring the 21st Amendment and applying the wrong legal standards as a result. (ROA. 7324-84, 8946-64, 9264-72).

B. Congress wants the power over local alcohol sales vested in the states.

In the early 1700s and 1800s a variety of states regulated the sale of alcoholic beverages. Before the Civil War the U.S. Supreme Court affirmed broad state authority over alcohol sales in *The License cases*, 5 How. 504, 579 (1847). The court decreased state authority to regulate the sale of alcohol in *Leisy v. Hardin*, 10 S.Ct. 681 (1890). Congress

immediately reacted by reinvigorating state authority through passage within a few months of the Wilson Act, 27 USC § 121 (1890); summarized in *Craig v. Boren*, 97 S.Ct. 451, 461 (1976). Congress eliminated a loophole in the Wilson Act with the later passage of the Webb-Kenyon Act. 27 USC § 122 (1913). It "took away the protection of interstate commerce from all receipt and possession of liquor prohibited by state law." *National Railroad Passenger Corp. v. Miller,* 358 F.Supp. 1321, 1326 (Kansas 1973). The 21st Amendment language was designed in part to constitutionalize the language of the Wilson and Webb-Kenyon Acts. *Craig*, 462; *Granholm v. Heald*, 125 S.Ct. 1885, 1902 (2005).

Congress has repeatedly, insistently, and unequivocally transformed power Congress might have over the distribution system for local alcohol sales into state power.

1. Wilson Act, 27 USC § 121 (1890),
2. Webb-Kenyon Act, 27 USC § 122 (1913),
3. Passage of the 21st Amendment (1933),
4. 18 USC § 1161 (1953), by which Congress authorized state regulation over Indian liquor transactions. *Rice v. Rehner*, 103 S.Ct. 3291, 3299 (1983),

5. 27 USC § 122a (2000), the 21st Amendment Enforcement Act, and
6. 42 USC § 290bb-25b (2006). ("Alcohol is a unique product and should be regulated differently than other products by the States and Federal Government. States have primary authority to regulate alcohol distribution and sale, and the Federal Government should support and supplement these State efforts.")

C. **The uniqueness of alcohol regulation.**

1. State police powers.

All states have police powers. They had them before the constitution was written, after the constitution was adopted, and then the 10th Amendment preserved them.

State regulation of liquor traffic is "one of the oldest and most untrammeled of legislative powers." *Goesaert v. Cleary*, 69 S.Ct. 198, 199 (1948). The state police power to regulate liquor precedes and is independent of the 21st Amendment's added powers. *Rice v. Rehner*, 105 S.Ct. 3291, 3298 (1983); *Commonwealth v. Stofchek*, 185 A. 840, 846 (Penn. 1936). State police powers over liquor were "extremely broad even prior to the Twenty-first Amendment." *Wisconsin v. Constantineau*, 91

S.Ct. 507, 509 (1971). "Legislative control has run broad and deep since colonial and provincial times." *Carling Brewing Co. v. Liquor Commissioner of N.H.*, 155 A.2d 808 (New Hampshire 1959).

2. Adding the 21st Amendment to state police powers creates unique, exceptional state powers.

The Constitution begins with its three most powerful words: "We the people…" Only one constitutional provision was created directly by the people: the 21st Amendment. The people of this country created it with phenomenal speed.

The unique aspects of the 21st Amendment plus state police powers combine to grant exceptional power to the states to regulate the local sale of alcoholic beverages. This exceptional power is expressed through various legal principles or phrases.

a. States have broad regulatory power in liquor.

US Supreme Court:

US v. Frankfort Distilleries, 65 S.Ct. 661, 664-665 (1945) "broad regulatory power" and "full authority"

Joseph E. Seagram & Sons v. Hostetter, 86 S.Ct. 1254, 1259 (1966) "broad regulatory power"

US v. State Tax Commission of Miss., 93 S.Ct. 2183, 2189 (1973) "broad regulatory authority"

New York State Liquor Authority v. Bellanca, 101 S.Ct. 2599, 2600 (1981) "broad power"

City of Newport, Ky. v. Iacobucci, 107 S.Ct. 383, 385 (1986) "broad regulatory powers"

US Circuit Courts of Appeals:

Hanf v. USA, 235 F.2d 710, 718 (8th Cir. 1956) "broad surveillance"

Parks v. Allen, 409 F.2d 210, 211 (5th Cir. 1969) "broad regulatory power"

US District Courts:

Sea Girt Restaurant and Tavern Owners Ass 'n., Inc. v. Borough of Sea Girt, N J, 625 F.Supp. 1482, 1485 (N.J. 1986) "broad powers"

State Courts:

Francis v. Fitzpatrick, 30 A.2d. 552, 554 (Conn. 1943) "scope of the legislature's power to regulate it is much broader."

State of Oregon v. Sitko, 538 P.2d 76 (Oregon Ct. App. 1975) "broad regulatory power"

Black v. Pike County Commission, 360 So.2d 303, 305-6 (Alabama, 1978) "scope of the state's power to regulate the liquor business is much broader"

Levendis v. Cobb County, 250 S.E.2d 460, 462 (Georgia 1978) "broad powers"

Colby Distributing Co., Inc. v. Lennen, 606 P.2d 102, 108-9 (Kan. 1980) "broad regulatory powers"

b. Broad regulatory powers include wide latitude.

U.S. Supreme Court:

Joseph E. Seagram & Sons, Inc. v. Hostetter, 86 Sct. 1254, 1259 (1966).

California Retail Liquor Dealers Assoc. v. Midcal Aluminum, 100 S.Ct. 937, 944 (1980) "wide latitude" afforded to state liquor regulation.

US Circuit Courts of Appeal:

Battipaglia v. New York State Liquor Authority, 745 F.2d 166, 169 (2nd Cir. 1984) 21st Amendment "demands wide latitude for regulation by the State."

US District Courts:

Krauss v. Sacrament Inn, 314 F.Supp. 171, 177 (E.D. Calif. 1970) 21st Amendment "demands wide latitude for regulation by the State."

State Courts:

Opinion of the Justices to the House of Representatives, 333 N.E.2d 414, 418 (Mass. 1975) "especially wide latitude in regulating the liquor industry."

Johnson v. Martignetti, 375 N.E.2d 290, 296 (Supreme Judicial Court of Mass. 1978) "particularly wide latitude"

c. Broad regulatory power, with wide latitude within the constitutionality sanctioned zone of state control, creates special, transcendent, exceptional, and overwhelming power in the states.

"Special Power"

California Retail Liquor Dealers Assoc. v. Midcal Aluminum, 100 S.Ct. 937, 944 (1980)

"Transcendent powers"

City of Rancho Cucamonga v. Warner Consulting Services, Ltd., 262 Cal. Rptr. 349, 351 (Ct. App. 4th Dist. 1989)

"Exceptional power"

National Railroad Passenger Corp. v. Miller, 358 F.Supp. 1321, 1326 (Kansas 1973)

"Overwhelming power"

Colby Distributing Co., Inc. v. Lennen 606 P2d 102, 108-9 (Kansas 1980).

d. The 21st amendment grants states virtually complete control over local alcohol sales.

> "The Twenty-first Amendment grants the States virtually complete control over ... how to structure the liquor distribution system."
>
> *California Retail Liquor Dealers Assoc. v. Midcal Aluminum*, 100 S.Ct. 937, 946 (1980)
>
> quoted and reaffirmed in
>
> *Capital Cities Cable v. Crisp*, 104 S.Ct. 2694, 2709 (1984).
> *324 Liquor Corp. v. Duffy*, 107 S.Ct. 720, 726 (1987),
> *North Dakota v. US*, 110 S.Ct. 1986, 1992 (1990), and
> *Granholm v. Heald*, 125 S.Ct. 1885, 1905 (2005).

There may be no area of constitutional law in which states have greater legislative control. There is no other product over which states have explicit constitutional authority. Congress has spent 128 years ceding legislative power over local liquor sales to states. But, long after the 21st Amendment made it constitutionally impossible for Congress to regulate local alcohol sales, the Order on appeal erroneously legislates local alcohol sales from a federal trial bench.

D. The correct legal standards to be applied in a dormant Commerce Clause analysis of local alcohol sales.

1. No federal policy conflicts with any challenged Texas laws, so there is no violation.

Dormant Commerce Clause jurisprudence springs from the implication that states cannot conflict with Congressional power and

impede the flow of interstate goods. It would be impossible for Congress to enact a regulation governing the sale of alcoholic beverages within a state as the 21st Amendment vests all of that power within each state. Since there is no federal policy in conflict with any of the four challenged Texas laws, they do not impede the flow of one bottle of distilled beverages from the other 49 states, and Congress cannot license local package stores or regulate local alcohol sales, Texas' four challenged laws do not violate the dormant Commerce Clause. For example, Rhode Island was "unable to discern (however) any paramount federal policy with which the Rhode Island price-advertising ban conflicts," and therefore held the state ban on advertising liquor did not offend the dormant Commerce Clause. *S&S Liquor Mart, Inv. v. Pastore*, 497 A.2d 729, 737 (R.I. 1985). All four challenged laws apply equally, both facially and in practice, to in-state and out-of-state liquor products, producers, individuals and retailers. Since they never discriminate based on state citizenship they comply with the dormant Commerce Clause. *McCurry v. Alcoholic Beverage Control. Div. of Arkansas*, 4 F.Supp.3d 1043, 1046 (E.D. Ark. 2014). In the

absence of Congressional action, local regulation is valid. *Carter v. Virginia*, 64 S.Ct. 464,467 (1944).

With no federal statute that contradicts any of the four challenged Texas statutes, Texas' police power is validly exercised.

> "While the commerce clause has been interpreted as reserving to Congress the power to regulate interstate commerce in matters of national importance, that has never been deemed to exclude the states from regulating matters primarily of local concern with respect to which Congress has not exercised its power, even though the regulation has some effect on interstate commerce."

Duckworth v. Arkansas, 62 S.Ct. 311, 313 (1941). The court concluded:

> "Where the power to regulate commerce for local protection exists, the states may adopt effective measures to accomplish the permitted end. The Arkansas statute does not conflict with any act of Congress. It does not forbid or preclude the transportation, or interfere with the free flow of commerce, among the states beyond what is reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor within the state. It does not violate the commerce clause." *Duckworth*, 314.

2. U.S. Supreme Court analysis and standards.

The Supreme Court has struck down a variety of state alcohol regulations under the dormant Commerce Clause. But all such state alcohol regulations struck down on dormant Commerce Clause grounds fit into these three categories:

a. They conflicted with a federal law or impinged on a federal area.

National parks.	*Collins v. Yosemite Park & Curry Co.*, 58 S.Ct. 1009 (1938)
International travel.	*Hostetter v Idlewild Bon Voyage Liquor Corp.*, 84 S.Ct. 1293 (1964)
Export-import clause.	*Dept. of Revenue v. James B. Beam Distiller Co.*, 84 S.Ct. 1247 (1964)
Military bases.	*US v. State Tax Commission of Mississippi*, 93 S.Ct. 2183 (1973) and 95 S.Ct. 1872 (1975).
Sherman antitrust.	*California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, *100 S.Ct. 937 (1980)*
	324 Liquor Corp. v. Duffy, 107 S.Ct. 720 (1987)
Cable television signal retransmission.	*Capital Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694 (1984)

b. They extended state regulation into other states.

Brown-Forman Distillers Corp. v. New York State Liquor Authority, 106 S.Ct. 2080 (1986)

Healy v. The Beer Institute, 109 S.Ct. 2491 (1989).

c. <u>They were economic protectionism</u>**.**

- Tax exemption for locally produced wine.

  Bacchus Imports, Ltd. v. Dias, 104 S.Ct. 3049 (1984)

- Ban on out-of-state winery direct shipments to consumers, while in state wineries could direct ship to consumers.
  Granholm v. Heald, 125 S.Ct. 1885 (2005).

None of those improper actions are in issue here.

The Commerce Clause and 21st Amendment are in one constitution and must be harmonized. The 21st Amendment creates an exception to the normal operation of the Commerce Clause. *Craig* 461; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum,* 100 S.Ct. 937, 945 (1980).

The U.S. Supreme Court has decided at least 29 cases involving alcohol regulation of some type in the last 84 years, but has not written on the 21st Amendment since the sweeping 2005 decision in *Granholm.* In *Granholm* the court emphasized these goals, purposes, and rules:

- No differential treatment of out-of-state economic interest p.1895
- No burdens on out-of-state producers p.1895

- States cannot be compelled to negotiate p.1895
- Minimize or eliminate state rivalries p.1895
- Avoid the proliferation of trade zones p.1895
- Cannot deprive citizens of access to markets p.1896
- States cannot require an out-of-state firm to become a resident p.1897
- No discrimination against imported liquor p.1898
- No impermissible burdens on interstate commerce p.1898
- In-state and out-of-state liquor must be treated on the same terms p.1900
- Non-discrimination against out-of-state goods. p.1902

Having emphasized these principles, goals, and rules, the court then wrote: "State policies are protected under the Twenty-First Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Id,* 1905. The correct conclusion is that the Texas liquor market treats producers, retailers, consumers, and products identically, creates no state rivalries or trade zones, and places no burdens on commerce. As a regulator, Texas places permissible burdens on retail

sellers – a core area of the 21st Amendment. The public entity ban has no discriminatory effect (ROA. 9414, finding 56) and is rationally related to a legitimate state interest (ROA. 9429, finding 88). Wal-Mart spent millions on an expert to prove the Texas liquor market is in competitive equilibrium, which reflects no discrimination against out-of-state liquor, producers, distillers, or any consumers.

3. 5th Circuit: a nine-step program.

This court adopted a nine-step analysis for a dormant Commerce Clause challenge to state alcohol permit legislation in *Cooper v. TABC*, 820 F.3d 730, 741 (5th Cir. 2016). The analysis is does the law under attack:

1. Directly regulate interstate commerce?
2. Directly discriminate against interstate commerce?
3. Have the effect of favoring state economic interests?

If "yes" to 1, 2, or 3, the law is struck down.

4. Have indirect effects on interstate commerce?
5. Regulate evenhandedly?

If "yes" to 4 and 5,

6. What is the state's interest?
7. Is the state's interest legitimate?
8. Does the burden on interstate commerce clearly exceed the state's benefits?

Then under the 21st Amendment ask:

9. Are the interests implicated by the law so closely related to the powers reserved by the 21st Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies?

After *Granholm* this court also noted that the dormant Commerce Clause applies "to a lesser extent when the regulations concern the retailer…" *Id*, 743.

This court has also correctly concluded that states may prevent "companies with monopolistic tendencies from dominating all levels of the alcoholic beverage industry." *S.A. Discount Liquor v. TABC*, 709 F.2d 291, 293 (5th Cir. 1983, see also fn 4). Wal-Mart has already tried to undermine the three-tier system with the capture of Oakleaf wine, "growing a distinctive label," generating "private label penetration," and "leveraging suppliers." (ROA. 9971-9987). If publicly traded entities can sell 190 proof Everclear heaven help us. No one in government has the capability to preclude distillers from covertly buying publicly traded retailer stock and secretly pressing them to act like the dreaded tied houses.

4. Other U.S. Circuit Courts of Appeal.

The dormant Commerce Clause only precludes favoritism to in-state producers.

> "Because the Twenty-First Amendment 'grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system'(citations omitted) and because the dormant Commerce Clause only prevents a State from enacting regulation that favors in-state producers and thus discriminates *against* interstate commerce…"

Brooks v. Vassar, 462 F.3d 341,354 (4th Cir. 2006, emphasis in original).

It does not compare in-state versus out-of-state retailers.

> "[A]n argument that compares the status of an in-state retailer with an out-of-state retailer- or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart- is nothing different than an argument challenging the three-tier system itself."

Brooks, 352.

The dormant Commerce Clause does not protect business structures. Burdening some interstate firms is not critical:

> "… a state regulation that burdens some interstate firms does not, by itself, establish a claim of discrimination against interstate commerce."

Wine and Spirits Retailers v. Rhode Island, 481 F.3d 1, 14-16 (1st Cir. 2007).

> "The dormant Commerce Clause isn't violated by a three-tier distribution system that treats all alcohol sales equivalently regardless of origin."

Indiana Petroleum Marketers and Convenience Store Assoc. v. Cook, 808 F.3d 318, 322 (7th Cir. 2015). The market's structure and method of operation are beyond the concern of the commerce clause.

> "The dormant Commerce Clause does not protect the rights of all wineries to engage in the same form of commerce; it prohibits states from treating in-state wineries differently from out-of-state wineries."

Freeman v. Corzine, 629 F.3d 146, 159, 163 (3rd Cir. 2010).

Federal courts cannot suggest that a state legislate differently.

> "The district court's suggestion that the State should serve its interest in some other way disparages the policy choices that Section 2 of the Twenty-first Amendment commits to the states. There doubtless are varying reasons why the State has not opted for an excise tax, and as a federal court, we are not authorized to look behind the regulation to decide whether such policy reasons are sufficiently compelling."

Costco Wholesale Corp. v. Maleng, 522 F.3d 874, fn 25 (2008).

States have to be evenhanded. *Jelovsek v. Bredesen*, 545 F.3d 431, 436 (6th Cir. 2008).

> "Because New York's three-tier system treats in-state and out-of-state liquor the same, and does not discriminate against out-of-state products or producers, we need not analyze the regulation further under Commerce Clause principles. Sections … of New York's ABC Law are an integral part of New York's

> three-tier system. Because New York's laws evenhandedly regulate the import and distribution of liquor within the state, we hold that they do not run afoul of the Commerce Clause."

Arnold's Wine, Inc. v. Boyle, 571 F.3d 185, 191-2 (2nd Cir. 2009).

5. Legislative intent regarding discrimination against out-of-state commerce.

Since 1933 no court has struck down a state law involving alcohol regulation solely based on intent, without discriminatory effect. Effect, not intent, controls. *Granite State*, 402. "The critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman Distillers Corp v. NY State Liquor Auth.*, 106 S.Ct. 2080, 2084 (1986). The burden on interstate commerce has to clearly exceed local benefits. *Brown*, supra. This has nothing to do with legislative intent in a vacuum. "It was not sufficient in *Bacchus* that the challenged statute was *discriminatory*; what was fatal was that it constituted *mere protectionism*." *Bainbridge v. Turner*, 311 F.3d 1104, 1113, (11th Cir. 2002, emphasis in original). The district court's decision is both unprecedented and erroneous. Every standard of review actually implemented by every court in 85 years of alcohol jurisprudence requires

proof of discriminatory effect on commerce: no court allows proof of intent alone or analyzes the structure of the market. Both are outside the boundaries of all the law developed since 1933. *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193 (DC Cir. 1996).

Spec's enunciated the flaws in Wal-Mart's plans to turn lobbyists' intent into legislative intent early in the case. (ROA.726-729).

The Texas House has 150 members, and there is no evidence that even one member had any discriminatory intent relating to the passage of any of the four challenged laws.

The Texas Senate has 31 members, and there is no evidence that even one member had any discriminatory intent relating to the passage of three of the challenged laws. For §22.16, the public company ban passed in 1995, the district court concluded there was evidence that two members had discriminatory intent and that lobbying decades later attempted to create protectionist sentiment. None of that is proof of legislative intent by the Senate in 1995.

For all four laws there is no evidence that the three most important players in Texas legislative events (the Speaker of the House, the Lt. Governor, and the Governor) had any impure motive.

E. The correct legal standards to be applied in an equal protection analysis of state legislation of alcohol sales.

1. No superlegislating.

It is fundamental that courts cannot supplant state legislative bodies and become superlegislators. The district court's analysis of §22.16 defies Supreme Court authority that it is not the place of the judiciary to proclaim legislative enactments as unwise, impractical, oppressive, immoral, illegitimate, or useless. *Joseph E. Seagram & Sons v. Hostetter*, 86 S.Ct. 1254, 1262 (1966). Not doing enough, not succeeding, or lacking perfection are not equal protection issues. *Seagram*, 1263-64. If a judge dislikes Texas' successful method of keeping per capita liquor consumption low and wants to instead impose excise taxes to directly achieve the same result the judge's remedy is to resign, get elected, and persuade legislative colleagues.

2. Factors and principles in favor of state economic legislation when analyzing an equal protection challenge.

In analyzing an equal protection challenge to an economic law, courts should properly evaluate the following factors and apply these principles as a starting point:

a. Courts have a duty to uphold the law if possible;
b. In the area of economic regulation every possible presumption is in favor of the validity of the law and all doubts are resolved in favor of the law;
c. Judicial review is limited to determining if the classification fails to further a legitimate state purpose;
d. The classification will be upheld if any reasonable basis justifies it;
e. The plaintiff has the burden of proof beyond "a reasonable doubt," "substantial doubt," "clearly overcome," or "clear proof to the contrary;"
f. The statutory classification does not have to:
    1. be perfect,
    2. solve or embrace all problems,
    3. be efficient, or
    4. be the best solution.

Federal Circuit Courts of Appeal:

Parks v. Allen, 409 F.2d 210 (5th Cir. 1969).

Castlewood International Corp. v. Simon, 596 F.2d 638 (5th Cir. 1979).

State Courts:

D.M Winter v. Pratt, 189 S.E.2d 7, 10-12 (S. Carolina 1972).

Johnson v. Martignetti, 375 N.E.2d 290, 296 (Supreme Judicial Court of Mass. 1978).

Black v. Pike County Commission, 360 So.2d 303, 305-6 (Alabama Supreme Court 1978).

Three K C v. Richter , 279 N.W.2d 268, 275 (Iowa 1979).

Miller Brewing Co. v. Minnesota, 284 N.W.2d 353, 356 (Minn. 1979).

City of Baxter Springs v. Bryant, 598 P.2d 1051, 1054-5, (Kansas 1979).

Gray v. Oklahoma, 601 P.2d 117 (Ok. Cr. App. 1979).

Indiana v. Baysinger , 397 N.E.2d 580 (Indiana 1979).

Colby Distributing Co., Inc. v. Lennen, 606 P.2d 102 (Kansas 1980).

Brunswick Corp. v. Liquor Control Commission, 440 A.2d 792, 797 (Conn. 1981).

In 85 years only one equal protection challenge to state alcohol regulation has jumped these six hurdles: Oklahoma improperly discriminated against 18 to 21 year old males. *Craig v. Boren*, 97 S.Ct. 451 (1976). The district court never cited *Craig* in the 50 page Order. But all four challenged Texas laws are economic, and "in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act,

which cannot stand consistently with the Fourteenth Amendment." *Haskell's v. Sopsic*, 306 N.W.2d 555, 558, revised 312 N.W. 2d 921. (Minn. 1981). Oklahoma and Arizona precluded any corporation (privately or publicly owned) from having any package store license, and courts concluded there was no equal protection violation. *Myerson v. Myerson,* 357 P.2d 133 (Ariz. 1960); *Brown Distributing Co. v. Oklahoma Alcoholic Beverage Control Board*, 597 P.2d 324 (Ok. 1979). *Myerson* emphasizes the goals of personal integrity of character and personal responsibility as linchpins of the Arizona public policy. Texas may achieve the same goals through a different method: in Texas corporate ownership is allowed as long as the pool of corporate owners is small enough to provide personal integrity and personal responsibility, and family owned businesses are preferred in the historically dangerous arena of selling distilled beverages.

The district court ignored or contradicted these six principles, erroneously applied the equal protection doctrine to invalidate Texas' 67 year old consanguinity rule, and thus limited Texas' police powers and 21st Amendment powers to regulate local alcohol sales.

States have legitimate power to protect and incentivize small or family-owned retailers. Texas has clearly announced it as one goal of the Alcoholic Beverage Code. Courts have acknowledged the legitimacy of this exercise of power. New Hampshire easily upheld protection of "the smaller retailer most liable to economic coercion" while also noting that every regulation preventing concentration in the alcohol market validly discriminates against larger companies if it serves a bona fide public purpose. *Granite State Grocers Ass'n v. State Liquor Commission*, 289 A.2d 399, 402 (New Hampshire 1973); accord *Opinion of the Justices to the House of Representatives*, 333 N.E.2d 414, 418 (Mass. 1975). The U.S. Supreme Court has specifically written about, "the legitimate state interests in temperance and the protection of small retailers…" *Calif. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 100 S.Ct. 937,947 (1980).

3. Equal protection: rational basis with added deference.

The district court applied the rational basis standard, as did the US Supreme Court in *Craig*, 451. However, all of the special powers

granted to states over local alcohol sales create a strong added presumption of validity and deference.

In analyzing a constitutional challenge involving the sale of alcoholic beverages the added presumption in favor of validity should be recognized, and additional deference is therefore due the state legislative choices. The starting point, states' traditional broad police power, is "augmented by the 21st Amendment." *Gray v. Oklahoma*, 601 P.2d 117, 121 (Ok. Cr. App. 1979, citing four cases for authority). The 21st Amendment "undoubtedly strengthens the case for upholding state regulation." *Allen v. State*, 604 S.W.2d 191, 192 (Tex. Cr. App. 1980). This includes "more than normal authority." *Allen*, 193. This court semantically straddled this fence, deciding that there is an added presumption of validity with state liquor regulation while the added presumption does not change the standard of review. *Lamar Outdoor Advertising v. Mississippi State Tax Commission*, 701 F.2d 314, 327, 330 (5th Cir. 1983). But seven years later the U.S. Supreme Court expressed the presumption this way: "Given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are

supported by a strong presumption of validity and should not be set aside lightly." *North Dakota v. US*, 110 S.Ct. 1986, 1993 (1990).

An example of a court applying added deference is *Joseph H. Reinfeld v. Schieffelin & Co.*, 466 A. 563 (N.J. 1983). In defeating an equal protection attack the court noted that liquor dealers are not a suspect class, liquor distribution is not a fundamental right, there is no right to sell liquor, the rational basis test is the proper standard, the legislature had "practically limitless power" to regulate liquor sales, and that these factors accentuated "the normal deference afforded by the 'rational basis' test." *Reinfeld*, 569. Classifications that relate to the states' regulatory function are permitted and, "viewed in this light the equal protection claim fails." *Reinfeld*, 569.

Other courts have applied their version of additional deference. A district court in Kentucky upheld legislation limiting liquor licenses, a core area of the 21st Amendment, as within "the strong presumption of validity." *Simms v. Farris*, 647 F.Supp. 119, 123-4 (E.D. Ky. 1987). A district court in Florida analyzed states' extraordinary power in liquor regulation and the 21st Amendment's "added presumption in favor of the

constitutionality of the state authority" in the area, noted in this core area state power "is at its zenith," applied the "added presumption" which the challenger conceded they would not overcome, and sustained the ordinance under attack. *WDC v. City of Jacksonville*, 710 F.Supp. 782, 784, 786, 789-90 (M.D. Florida 1989). The Alabama Supreme Court rebuffed an equal protection attack on state liquor regulations with references to states' "intrinsic power" as "fortified" by the 21st Amendment, "presumed state power," and the "heavy presumption of validity regarding regulatory liquor legislation." *Jefferson County v. Braswell*, 407 So.2d 115, 120 (Alabama 1981).

2. **The five permit limit, §22.05, which the court correctly found to be constitutional, cannot then be nullified**.

No court can nullify a statute held to be constitutional. Since 1803 American courts possess the power to nullify legislative enactments as unconstitutional. *Marbury v Madison*, 5 US (1 Cranch) 137 (1803). But no provision in Article III and no case authority allows any court to do the opposite and nullify a constitutional statute.

The concept of a court setting aside constitutional state legislation enacted pursuant to powers expressly granted to states is entirely foreign to the model of American governmental power allocation. When the people of this nation rise up with tremendous speed to amend the constitutional framework that controls their government, it is not the prerogative of any official to take powers expressly granted to states and relocate them into the federal judiciary.

Nothing in our constitution or laws gives any judicial officer power to regulate local alcohol sales: this is clearly beyond the constitutional capacity of any court. Yet this district court set aside a key Texas alcohol statute (after he correctly held it was constitutional) based on two erroneous theories: that he had the power to do so in fashioning a remedy, and that it was the wise thing to do.

The court cited three cases theoretically supporting the chosen remedy but none of them involved setting aside a constitutional law. By focusing on the fine legal point of exclusion or inclusion in severability situations the court missed the forest: the severability of these two laws (5 permit limit and consanguinity) is indisputable as they were passed 16

years apart (1935, 1951) and no judge can "include or exclude" by setting aside a constitutional law to achieve his desired result.

Cox v. Schweiker, 684 F.2d 310 (5th Cir. 1982), provides no support for the concept of nullifying a constitutional law as part of a judicial remedy. Nothing in the case even suggests nullifying a constitutional law under any circumstances.

In *Welsh v US*, 90 S.Ct. 1792 (1970), no law was held unconstitutional. The court decided that Mr. Welsh was a legitimate conscientious objector under the law. Justice Harlan, in concurring, wrote of "salvaging a congressional policy of long standing…" He also wrote of a "remarkable feat of judicial surgery," "judicially rewriting" statutes, preserving policy with "roots so deeply embedded in history," and courts being faithful to legislative goals. The district court in this case performed surgery with an axe blade on a constitutional law, destroyed Texas' comprehensive scheme for regulating package stores and favoring family owned businesses, nullified a 67-year-old constitutional law, and re-wrote the law creating the opposite effect: unlimited permits are now the rule.

In *Califano v Westcott*, 99 S.Ct. 2655 (1979), the Supreme Court reviewed the extension or exclusion remedial choice in cases involving unconstitutional laws held to be defective because of under inclusion. But no constitutional law was stricken to obtain the desired outcome. The four justices that concurred and dissented noted in their footnote 2 that courts should avoid "infringing legislative prerogatives" when choosing a remedy. Like every state with private liquor sales, Texas limited permits in some fashion. The district court substituted it's judgment for decades of Texas' judgment. A 5-store limit is now a no limit system until this court reverses the district court.

Certificate of Compliance

In accordance with FRAP 29(a)5 and 32 I certify that this brief complies with the FRAP and 5th Circuit rules. Applying the FRAP 32(f) exclusions, the brief contains 6,407 words, all in 14 point font or greater, with one inch or greater margins.

Harry Herzog

Certificate of Service

The brief was filed and served via CM/ECF on all counsel of record, with additional courtesy email direct to counsel, on September 5, 2018. The electronic submission shall be exactly equal to the paper document filed.

Harry Herzog

United States Court of Appeals

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September 20, 2018

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

Dear Mr. Herzog,

We have reviewed your electronically filed Amicus brief of SPEC's Family Partners and it is sufficient.

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

Sincerely,

LYLE W. CAYCE, Clerk

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