

**Case No. 18-50299**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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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*

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On Appeal from the United States District Court  
For the Western District of Texas, Austin Division  
No. 1:15-CV-134-RP, Robert Pitman, Judge Presiding

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**PLAINTIFFS-APPELLEES CROSS-APPELLANTS WAL-MART STORES,  
INCORPORATED, ET AL.'S CONSOLIDATED RESPONSE IN  
OPPOSITION TO AMERICAN BEVERAGE LICENSEES AND  
PRESIDENTS' FORUM OF THE DISTILLED SPIRITS INDUSTRY  
MOTION FOR LEAVE TO FILE AN AMICI CURIAE BRIEF AND SPEC'S  
FAMILY PARTNERS, LTD.'S MOTION FOR LEAVE TO FILE AN  
AMICUS BRIEF**

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Plaintiffs–Appellees and Cross-Appellants Wal-Mart Stores Inc., Wal-Mart Stores Texas, L.L.C., Sam’s East, Inc., and Quality Licensing Corp. (collectively, “Walmart”) file this consolidated opposition to American Beverage Licensees (“ABL”) and Presidents’ Forum of the Distilled Spirits Industry’s Motion for Leave to File an Amici Curiae Brief in Support of Defendants–Appellants and Movant–Appellant on Appeal for Reversal of the District Court (the “ABL Motion for Leave”) and Spec’s Family Partners, Ltd.’s (“Spec’s”) Motion for Leave to File Amicus Brief (the “Spec’s Motion for Leave”).

“Whether to permit a nonparty to submit a brief, as amicus curiae, is, with immaterial exceptions, a matter of judicial grace.” *In re Halo Wireless, Inc.*, 684 F.3d 581, 596 (5th Cir. 2012) (quoting *Nat’l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000)). The Court should deny the ABL and Spec’s Motions for Leave here, because both organizations’ interests are already represented in this case by Appellant the Texas Package Stores Association (the “TPSA”). The TPSA is a state affiliate of the ABL.<sup>1</sup> Spec’s is the largest member of the TPSA and the largest liquor store chain in Texas, with more than 160 stores throughout the state. ROA.8797. Spec’s owner is the TPSA’s Executive Vice President and holds one of eight seats on the TPSA’s Executive Committee. ROA.10714 (identifying John Rydman as the owner of Spec’s); ROA.10902

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<sup>1</sup> American Beverage Licensees, *Find an ABL State Affiliate* (last accessed Sept. 12, 2018), <https://www.ablusa.org/membership/find-an-abl-state-affiliate/>.

(stating Spec's sits on the TPSA's Executive Committee); Texas Package Stores Association, *Leadership: Executive Committee* (last accessed Sept. 12, 2018), <http://www.texaspackage.com/leadership> (identifying John Rydman as the Executive Vice President of the TPSA). The TPSA is more than capable of presenting the views of its national affiliate and of the company run by its Executive Vice President, and the Court should thus deny the motions for leave. *Halo Wireless*, 684 F.3d at 596 (holding that “[a]n amicus brief should normally be allowed when a party is not represented competently or is not represented at all”).

The ABL suggests that the Court should disregard the fact that its state-affiliate is a party to the case and allow it to file a separate brief because “TPSA did not draft any part of the proposed amici curiae brief.” ABL Mot. at 4. First, the ABL's statement that the TPSA did not “draft” the brief says nothing about whether the ABL consulted (or coordinated) with the TPSA about the arguments in its brief. More fundamentally, even assuming the TPSA and the ABL did not discuss their briefs, the ABL's inefficient choice not to work with its state-affiliate to ensure its position was included in the principal brief does not justify the ABL's filing a separate 4,000 word brief. Finally, the ABL suggests it should be able to file a separate brief from its state affiliate because “the Presidents' Forum is also a party to the proposed brief.” ABL Mot. at 4. But the ABL's motion is notably vague on its description of what the Presidents' Forum is or its interest in this case,

saying only that it is “a group of leading companies” representing “about 55% of all distilled spirits sales in the United States.” ABL Mot. at 3. Even with that meagre description, it seems more probable than not that many Presidents’ Forum members are also TPSA members and may be part of the TPSA’s executive leadership. Again, those entities are adequately represented by the TPSA.

ABL’s Motion for Leave and Spec’s Motion for Leave should both be denied.

DATED: September 14, 2018

Respectfully submitted,

By: /s/ Michael C. Kelso

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## CERTIFICATE OF COMPLIANCE

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*/s/ Michael C. Kelso*

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### **CERTIFICATE OF SERVICE**

This is to certify that on September 14, 2018, a true and correct copy of the foregoing instrument was filed electronically with the Court and was served electronically on all counsel of record via the Court's CM/ECF system.

*/s/ Michael C. Kelso*

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