

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 BRIEF OF THE
WHOLESALE BEER DISTRIBUTORS OF TEXAS**

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ATTORNEYS FOR THE WHOLESALE BEER DISTRIBUTORS OF TEXAS

No. 18-50299

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Texas Alcoholic Beverage Commission; IDA CLEMENT STEEN,
Defendants – Appellants Cross-Appellees

CERTIFICATE OF INTERESTED PARTIES

This brief is filed with the consent of all parties.

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.

Wholesale Beer Distributors of Texas (“WBDT”) is a trade association of persons licensed to distribute beer and other malt beverages to retailers in the State of Texas. WBDT is organized as a nonprofit corporation.

The Texas Package Stores Association (“the TPSA”) is an Appellant and Cross-Appellee in this appeal, and is the Intervenor in this cause.

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, Adam N. Bitter, and Matthew Bohuslav in the Office of the Attorney General of Texas, as well as Attorney General Ken Paxton, Deputy Attorney General James E. Davis, and Division Chief Robert O'Keefe.

/s/ Michael L. Navarre

Michael L. Navarre

Counsel for Amicus the Wholesale Beer
Distributors of Texas

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STATEMENT OF ISSUES

1. *Did the district court err in holding Texas Alcoholic Beverage Code section 22.16 unconstitutional under the dormant Commerce Clause?*
2. *Regardless of the status of section 22.05 of Texas Alcoholic Beverage Code, should section 22.04 remain in place after expressly finding the statute constitutional?*

The answer to each question is “Yes.” The district court’s judgment must be reversed, and judgment rendered that sections 22.16, 22.05, and 22.04 are not unconstitutional and, even if the Court finds one or more statutes unconstitutional, enforcement of remaining constitutional statutes should not be enjoined.

STATEMENT OF THE CASE

This brief adopts the statement of the Case proffered by the State of Texas.

SUMMARY OF THE ARGUMENT

In *Wine Country Gift Baskets v. Steen*, this Court provided the strongest and most cogent legal analysis in all available case law regarding the application of the Supreme Court's decision in *Granholm* to commerce clause challenges of state law. The precedent set in *Wine Country* makes clear that absent intentional discrimination, the Courts should defer to the public policy decisions of the states, such as Texas, who utilize their rights under the 21st amendment to regulate alcoholic beverages in order to ensure the responsible sale to the public and to maintain an orderly market in an industry which historically moves quickly towards anti-competitive monopolies.

The district court's decision would severely disrupt a well-functioning Texas marketplace in favor of publicly traded companies with a fiduciary obligation to maximize shareholder profits potentially at odds with the public policy goals of the State of Texas. Texas law does not differentiate between in-state and out-of-state entities for the purpose of obtaining a package store permit. The legislative history and successful enforcement of Texas Alcoholic Beverage Code section 22.16 to prohibit in-state and out-of-state public corporations from obtaining a permit confirm the legitimate purpose of enacting the statute.

Package stores in Texas are highly regulated because they are the point of sale for the most potent forms of alcohol. Texas responsibly exercised its regulatory

authority under the 21st Amendment to ensure that it could easily identify the parties responsible for their obligations for responsible sales under the package store permit and to avoid the disruptive market forces associated with publicly traded retail package stores.

The WBDT strongly supports the arguments proffered by the State and TPSA that the district court improperly applied the *Pike* balancing test of intent to determine the constitutionality of 22.16 and will defer to their briefs on the legal analysis of the proper dormant commerce clause standard to apply. WBDT believes that regardless of what standard is applied, the prohibition against publicly traded entities owning package stores meets any constitutional commerce clause analysis as the prohibition reflects important public policy priorities designed to ensure the responsible sale of the most potent forms of liquor and to maintain an orderly marketplace. *Pike v. Bruce Church*, 397 U.S. 137 (1970).

As a major stakeholder in the continuation of an orderly and competitive marketplace in Texas, WBDT knows firsthand the disruption to the marketplace which will occur should the massive capital infusion brought by publicly traded retailers create a rapid proliferation of deep discounted mega-stores selling the most potent forms of liquor. Section 22.16 is one of several statutes designed to prevent potent spirits being sold in connection with one stop grocery shopping where sales

are often managed by a revolving platoon of short-time employees responsible only to a faceless corporate entity owned by millions of shareholders.

This brief will focus on the numerous public policy justifications to prohibit publicly owned corporations from being the point of sale for the most intoxicating forms of alcohol. While some judges may not like the legislative decisions of the elected officials of Texas, section 22.16 is residence-neutral, treating all in-state and out-of-state retailers identically, and no commerce clause test justifies a court placing its own public policy beliefs over that of the Texas legislative process.

Finally, the WBDT concurs with the State and TPSA's legal arguments regarding the validity of section 22.05. However, if this Court upholds the district court's findings on sections 22.05 and 22.04, it is imperative that the remedy be that 22.04 remain in place as a constitutional statute. Removing 22.04 would create chaos in the Texas marketplace and leave the Texas Legislature with no good options to restore any balance to what is currently a highly competitive, well-functioning retail marketplace. Striking down both laws would open Texas to unprecedented retail consolidation to the detriment of consumers and the legitimate public policy goals of the State of Texas.

ARGUMENT

I. Section 22.16 is constitutional under the Commerce Clause, and overturning it simply places the Court’s public policy determination over that of the Legislature.

A. No benefit to in-state entities and no burden to the out-of-state economic interests.

Since the Supreme Court’s decision in *Granholm*, this Court’s opinion in *Wine Country Gift Baskets v. Steen* is the seminal case in evaluating any commerce clause challenge which involves an activity subject to the 21st amendment. In that case, the Court quoted *Granholm*: “The Court said that ‘in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’”¹

There is simply no evidence that out-of-state publicly or privately-owned companies are treated any differently from in-state publicly owned or privately-owned companies. Texas is home to hundreds of publicly owned companies, with over 10% of all fortune 500 companies located in Texas.² None of those companies may acquire a package store permit in Texas.³

¹ *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 814 (5th Cir. 2010)

² See <https://businessintexas.com/sites/default/files/05/04/16/texasfortune500.pdf>

³ The District Court relies heavily on sparse evidence that the Legislature passed the law with discriminatory intent. WBDT agrees with the analysis of the State and TPSA that intent is not a proper analysis with no facial discrimination. Further, relying primarily on banter between two senators debating the bill is fundamentally flawed. If such evidence were determinative, any

Wal-Mart does not cite any precedent to a valid commerce clause challenge where there is no distinction in law or regulation between how in-state and out-of-state entities are treated. In cases involving alcoholic beverages, successful commerce clause challenges always involve separate legal or regulatory hurdles that do not apply to in-state entities.⁴

B. Even if section 22.16 is discriminatory, the prohibition serves a legitimate purpose with no reasonable alternatives.

In *Granholm*, the Supreme Court stated if there is a finding that a law is in fact discriminatory, the law is not invalid under the tenet of the dormant Commerce Clause that exempts laws that “advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Granholm* at 489. Section 22.16 serves multiple legitimate purposes which could not be reasonably achieved through alternative policies.

1. Publicly traded companies acquiring package stores pose a threat to the orderly markets in Texas.

legislator opposed to a bill could easily prime the bill for a future commerce clause challenge by suggesting discriminatory intent during a floor debate. Should the courts begin to see such banter as probative, it would open door to legislators seeding the debate with these types of inferences in hopes that the courts will deliver a public policy win that could not be accomplished in the legislative process.

⁴ See *Granholm v. Heald*, 544 U.S. 460 (2005). In *Granholm*, the discrimination was obvious in that shipments allowed for in-state wineries were barred for out-of-state wineries. *Id.* at 473. In striking down the New York law, the Court looked beyond the law and pointed to simpler permits for in-state wineries which could ship wine directly from the site of their production. *Id.* at 474.

The federal courts have long recognized that promoting orderly markets is a legitimate use of a state’s regulatory power under the 21st amendment. The courts recognized that the state regulatory structures are designed to “prevent[] companies with monopolistic tendencies from dominating all levels of the alcoholic beverage industry.” *S.A. Discount Liquor, Inc. v. Texas Alcoholic Beverage Commission*, 709 F.2d 291, 293 (5th Cir. 1983).

Reasonable people can debate how different a publicly traded company is from a privately traded company. Reasonable people did have that debate in the Texas Legislature when it enacted section 22.16 and determined that the differences were sufficient to prohibit the publicly traded from obtaining package store permits. Now, Wal-Mart wants this Court to disregard the public policy goals of the Legislature and ignore the valid purposes of the law in order to achieve its own public policy goals.

The debate regarding the influence of mega-retailers on orderly markets is not new and has evolved from threats to small town family owned businesses to much larger entities, being swept away by the evolution of e-commerce. Courts have long recognized that alcoholic products are not the typical widget, and the 21st amendment grants states the right to regulate the alcoholic beverage market in a manner that avoids the monopolistic tendencies that define the alcoholic beverage industry in unregulated markets throughout the world.

In enacting section 22.16, the Legislature made the decision that prohibiting publicly traded corporations from obtaining package store permits would prevent an influx of publicly funded capital and a proliferation of new package stores. The new law prevented a disruption to the marketplace and stifled anti-competitive price wars designed to create a market dominated by one or two retailers, limit consumer choice, and empower entities with fiduciary obligations to faceless investors with total control of the point of sale where consumers purchase the most intoxicating forms of alcohol.

2. Section 22.16 prevents the proliferation of cut-rate package stores.

Reducing the proliferation of easily available cheap liquor is unquestionably a valid public policy objective of alcoholic beverage regulation. Numerous studies confirm that reducing the price of alcohol adversely impacts public health and promotes irresponsible drinking.⁵

At the end of prohibition, most states turned to a study called Toward Liquor Control to determine the appropriate regulatory system for a product whose history demonstrated the quick formation of anti-competitive monopolies.⁶ Authors R. B.

⁵ See *The Effects of Price on Alcohol Consumption and Alcohol-Related Problems*, Frank J. Chaloupka, Ph.D., Michael Grossman, Ph.D., Henry Saffer, Ph.D. <https://pubs.niaaa.nih.gov/publications/arh26-1/22-34.htm>

⁶ “In establishing their regulatory systems, the states relied on a study by Raymond Fosdick and Albert Scott.” *Maxwell’s Pic-Pac, Inc. v. Dehner*, 739 F.3d 936, 939 (6th Cir. 2014).

Fosdick and A. L. Scott, extensively researched alcohol regulatory systems around the world to suggest two methods of alcohol control.⁷ In the control-state model, the state occupies the role of wholesaler/retailer. In the license model, closely regulated private entities fill those roles.

Rather than create state-owned package stores, Texas chose the license approach and maintained a strong interest in determining who could procure those permits and licenses. Package store permits require the closest scrutiny, because, as explained in *Toward Liquor Control*, “distilled liquors are in a class by themselves” as the most intoxicating forms of alcohol that merit different regulations. *Id* at 18.

A major driver for a company to become public is to fund rapid expansion.⁸ When new market forces create rapid proliferation, price competition can become fierce with mega-retailers, sufficiently capitalized by public investors having the ability to attract consumers on a scale that less capitalized entities cannot.⁹

⁷ See Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* (republished by Center for Alcohol Policy 2011).

⁸ “Why does a company go public? It’s simply a money-making move. The idea is to raise funds and have more liquidity or cash on hand by selling shares publicly. The money can be used in various ways, such as re-investing in the company’s infrastructure or expanding the business.” Initial Public Offering: CNBC Explains, <https://www.cnbc.com/id/47099278>

⁹ “By excelling in logistics and supply chain management and by using its volume to obtain discounted prices, Walmart can turn wholesale goods into retail goods for less money than anybody else. Those mom and pop stores (or inefficient retailers such as Sears) that get run out of business can then redeploy their time, talent, and capital to something at which they are better suited. Many small businesses compete against Walmart successfully by focusing on more specialized, custom-order products or product lines where their employees can use their knowledge to add value.” *The Unfair Trade Argument Is Exactly How People Criticize Walmart*, Jeffrey

Ultimately, these low prices may prove illusory as the market consolidates and becomes less competitive, but the medium term availability of artificially cheap spirits is a public health concern implicit with the allowance of publicly traded companies and a harm Texas legitimately avoids with section 22.16.

3. Section 22.16 promotes the responsible sale of alcohol.

Publicly traded companies are different from privately held entities in numerous ways. Texas Alcoholic Beverage Code section 5.32 empowers the TABC to require full disclosure of all ownership interest in a licensee or permittee. Tracking the persons and entities with control and influence is obviously much easier with a privately held entity where ownership structures are more easily identified than publicly traded entity owned through individual and institutional investors who will never be held personally responsible for the actions of the corporation.

Texas law places the responsibility for the responsible sale of alcohol on its retail tier. Package stores have the unique responsibility of ensuring the most intoxicating liquors are not sold to minors or inebriated persons. Section 22.16 serves to ensure that the State can readily identify all responsible parties for those transactions. A significant deterrence to irresponsible sales are the reputations of

Dorfman, Forbes, July 15, 2018, <https://www.forbes.com/sites/jeffreydorfman/2018/07/15/the-unfair-trade-argument-is-exactly-how-people-criticize-walmart/#562715073d44>

the individuals involved in the privately held entities, a consideration significantly less impactful when the entities' primary obligation is the fiduciary drive to maximize shareholder profits. The reputational forces of responsible sale have been affirmed as valid reasons to justify a statute's legitimacy under a commerce clause analysis. *See Southern Wine & Spirits, et al. v. Division of Alcohol and Tobacco, et al.* 2013 WL 5340391 (8th Cir. Sept. 25, 2013).

Section 22.16 supports numerous public policy goals of the state which could not reasonably be accomplished through other options.

II. The district court correctly found section 22.04 of the Texas Alcoholic Code to be constitutional, and its enforcement should not be enjoined.

The WBDT supports the arguments of the State of Texas and TPSA as to the validity of 22.05 (consanguinity), but has a deeper concern that the ruling against 22.05 was used to strike down the five store cap in section 22.04 which the district court correctly ruled to be constitutional. In a remarkable lack of deference to the 21st amendment, the court permanently enjoined the enforcement of section 22.04 to further the public policy goals that it sought in its own judgment were superior to the public policy goals of the Texas Legislature.

Alcohol is not a widget and the United States Constitution correctly recognizes the paramount importance of local regulation of the product. Any ruling which invalidates a portion of a state regulatory scheme should preserve as much as

possible of the existing regulation, especially, as with the case for 22.04, when deregulating will profoundly impact an otherwise orderly market.

A remedy in any situation must follow as closely as possible the goals of the Legislature, not separate public policy goals of the prevailing party. *See United States v. Booker*, 543 U.S. 220, 246 (2005). In this case, section 22.04 was enacted years before the enactment of 22.05, and there is simply no reason to tie the two together for purpose of enforcement other than to give Wal-Mart the ideal financial outcome it desires. The result for the state's marketplace would be a destabilizing and chaotic influx of new capital which would quickly change an orderly, competitive marketplace currently occupied primarily by family business into a market driven by a race for dominance by mega-retail chains seeking only to maximize the bottom lines of faceless shareholders.

The Texas Code Construction Act is clear on this subject. Texas Government Code section 311.032 provides that valid statutes should survive those that do not. *See TEX. GOV'T CODE § 311.032*. The Court should not enjoin enforcement of section 22.04 and allow the Legislature to determine the future of its wholly constitutional statutes.

CONCLUSION

The WBDT asks that this Court reverse the district court's judgment, and render judgment that Texas Alcoholic Beverage Code sections 22.04, 22.05, and

22.16 are constitutional and may continue to be enforced by the Texas Alcoholic Beverage Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 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 Appellants and Appellees are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Michael L. Navarre

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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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/s/ Michael L. Navarre

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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. Navarre,

We have reviewed your electronically filed amicus brief 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.

Also, an appearance form is required to be filed immediately.

Sincerely,

LYLE W. CAYCE, Clerk



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