No. 18-50299

In the United States Court of Appeals for the Fifth Circuit

WAL-MART STORES, INCORPORATED; WAL-MART STORES TEXAS, L.L.C.; SAM'S EAST, INCORPORATED; QUALITY LICENSING CORPORATION,

Plaintiffs – Appellees / Cross-Appellants

v.

TEXAS ALCOHOLIC BEVERAGE COMMISSION; KEVIN LILLY, PRESIDING OFFICER OF THE TEXAS ALCOHOLIC BEVERAGE COMMISSION; IDA CLEMENT STEEN,

Defendants – Appellants / Cross-Appellees

and

TEXAS PACKAGE STORES ASSOCIATION, INCORPORATED,

Movant – Appellant / Cross-Appellee

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

RESPONSE AND REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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Summary of the Argument

I. "The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987). Texas's alcohol permitting law does not discriminate against businesses based on any interstate element. The corporation ban is aimed at large corporations both within and without the State—just ask H-E-B or Whole Foods Market. Since it treats all corporations the same, and since it does not prevent out-of-staters from holding liquor permits, it does not discriminate and thus does not violate the Constitution. *Id.* at 87-88.

Recognizing the law's neutrality, Appellees cling to a disparate impact theory, arguing that the law has the effect of hampering a select group of companies from selling liquor in Texas. But most companies are hampered from conducting business in the State—the Texas Legislature cannot be blamed for geography. The fact that Appellees' business happens to be one that would not be hindered by geography does not make the corporation ban discriminatory. The question is whether the law treats similarly-situated entities similarly. Because the corporation ban here does, Appellees' argument fails. *See id.*; *Exxon Corp. v. Gov. of Maryland*, 437 U.S. 117, 126 (1978).

At most, the challengers can only provide evidence that the Legislature *meant* to discriminate. This fails for two reasons. First, the only "evidence" of discriminatory intent are the stray statements of a single legislator that are easily explained as non-discriminatory true statements about the law. Statements made by the TPSA years after the law's passage are no evidence at all. Second, while the district court

accepted this narrative, woven again throughout Appellees' brief, it is irrelevant for legal purposes. A law that does not actually discriminate against out-of-state commerce does not violate the dormant Commerce Clause. *See Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 499 (5th Cir. 2001) ("In reviewing state regulations on interstate commerce under the dormant Commerce Clause, 'the first step is to determine whether it regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce.'" (quoting *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994) (internal quotation marks and citation omitted)). The district court's result was concededly "bizarre" precisely because it has never happened before.

Though some would disagree on the policy, Texas—and Texans—wish to maintain strict control over the alcohol trade within the State. When the public corporation ban was passed in 1995, it was with that goal in mind. Like other states—including its neighbor Oklahoma, which has the provision in its state constitution—Texas decided to prevent corporations from holding package store permits. Okla. Const, art XXVIIIA, § 4(A). This allows the State to pursue its legitimate goals without "the illegitimate means of a flat proscription of non-Texans." *Cooper v. McBeath*, 11 F.3d 547, 554 (5th Cir. 1994) (*Cooper I*). Because it does not discriminate against out-of-staters, the corporation ban is exactly the type of regulation anticipated by the Twenty-first Amendment.

This case highlights the difficulty in "pit[ting] the twenty-first amendment, which appears in the Constitution, against the 'dormant commerce clause,' which

does not." *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000). Under Appellees' expansive view of dormant Commerce Clause doctrine, States would be stripped of any power to regulate alcohol sales outside of what the Supreme Court has explicitly blessed. And lower courts would be left not only questioning the policy and means/end fit of all alcohol regulations, but also having to examine the consciences of individual legislators in search of any secret discriminatory animus toward out-of-state companies. Such a regime is contrary to both the Constitution and the precedent this Court uses to apply it.

II. The consanguinity exception should also stand because it is rationally related to legitimate Texas goals in regulating alcohol. To succeed in challenging a law under rational basis review, Appellees were required to "adduc[e] evidence of irrationality." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (2013). Far from irrational, the evidence shows that the Texas Legislature developed the consanguinity exception precisely to counter increased permitting restrictions that were believed to be harmful to family businesses.

Contrary to Appellees' representation (at 9), the district court did not find that the permit limit violated the Equal Protection Clause. ROA.9441 (finding the permit limit "rationally related to the state's legitimate interest in limiting the number and density of retail liquor outlets in order to reduce the availability and increase the price of liquor"). What Appellees seek to do is conflate the permit limit and the consanguinity exception, and have the Court treat it as one piece. This would be wrong for two reasons. First, the two sections are separate laws. Second, the permit limit was enacted long before the consanguinity exception and has been the centerpiece of

Texas alcohol regulation from the outset. This shows why extending the "benefit" makes no sense in this case—the exception, even if one wrongly believed that it swallowed the rule, is a separate law that stands or falls on its own. Enjoining a separate section of the Texas Code to remedy the invalidation of another is unprecedented and would fail to account for the Legislature's obvious goal in curbing alcohol sales. If the consanguinity exception is invalidated, the correct remedy is to enjoin the invalid law that creates the exception and leave the constitutional law in place.

III. Appellees' cross-appeal arguments fare even worse. First, the public corporation ban does not violate the Equal Protection Clause because it is only measured under a rational basis standard and that standard is met by the desire to keep liquor consumption low. There is no animus toward corporations and no economic protectionism in wanting to maintain reasonable liquor prices to reduce drinking. And the Chicken Little scenarios of people being banned for having a business degree or previously working at Wal-Mart ring hollow in the face of obvious shipping and pricing advantages that large, public corporations have. Moreover, it is rational to assume that larger corporations will, on the whole, be less accountable than smaller retailers. Second, the permit limit—which is applied to every business, in-state and out-of-state—cannot violate the dormant Commerce Clause. Appeals to the discriminatory motives of the TPSA are neither relevant nor reflect the actual law passed by the Texas Legislature.

The district court's rulings enjoining State alcohol regulations should be reversed.

ARGUMENT

I. Appellees Have Not Shown The Discriminatory Purpose Or Discriminatory Effect Required For A Dormant Commerce Clause Violation.

Texas's ban on corporations holding liquor permits does not discriminate against out-of-state companies—it treats all corporations the same. Thus there is no dormant Commerce Clause violation. Contrary to the district court's ruling, discriminatory intent, standing alone, would not be enough to violate the Constitution. A discriminatory purpose analysis only accounts for actual discrimination that is taking or will take place. But even if intent were enough, the evidence in this case does not provide the support envisioned by Appellees. The alternative basis for affirmance offered—discriminatory effect—has even less support as the facts show in-state businesses being banned from holding the liquor permits that out-of-state businesses currently enjoy. Finally, any attempt to use *Pike* balancing to show a dormant Commerce Clause violation—even if that test should be applied in the alcohol context at all—fails because of the lack of disparate treatment of out-of-state interests and the leeway given to States in the arena of alcohol regulation.

A. A Dormant Commerce Clause Violation Requires Actual Discrimination.

"To evaluate whether a state statute comports with the dormant Commerce Clause, [this Court] begin[s] by asking whether the statute impermissibly discriminates against interstate commerce or regulates evenhandedly with only incidental effects on interstate commerce." *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 725 (5th Cir. 2004), opinion corrected on denial of reh'g, 380 F.3d 231 (5th Cir. 2004).

Under the first part of that analysis, a statute violates the dormant Commerce Clause only when it actually discriminates—or will discriminate—against out-of-state economic interests. *Brown-Forman Distillers Corp. v. N. Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986) ("[The] effect of the statute on both local and interstate activity" is "the critical consideration."). While Appellees accuse the State (at 31) of wanting "this Court to become the first federal appellate court to hold that discriminatory purpose does not require strict scrutiny," that is not accurate. Appellants are arguing that there should be *no* scrutiny when a law does not discriminate, either in its text or in its effect. It is Appellees who fail to cite a single appellate decision where a law that does not discriminate (if enforced) has been struck down for discriminatory intent alone. Under that theory, the dormant Commerce Clause inquiry would devolve into a search for the already elusive "legislative intent" in *every* case since intent would be a stand-alone trigger for the violation—the text of the law and its effect could both be jettisoned. This theory does not comport with precedent or common sense.

As Appellants explained previously (at 19-23), the "discriminatory purpose" and "discriminatory effect" labels must be examined in context. In *Bacchus*, the origin of this formulation, the law facially discriminated by exempting locally-sourced alcohol from a tax. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984). On that basis, the Court observed that the discriminatory law had a discriminatory purpose before also noting its discriminatory effect. *Id.* at 271. In other words, the law discriminated in its text for a reason (discriminatory purpose) and it was working (discriminatory effect).

Here, the facial neutrality of the law is undisputed—it does not discriminate in its text. The lack of a textual indication of discrimination ("facial, by purpose") leaves only the "effect" portion of the inquiry. *See Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007). But because, as the district court acknowledged, there was no discriminatory effect under this Court's precedents, there is no dormant Commerce Clause violation. ROA.9424. Supposed intent, by itself, is insufficient if not actually carried out in a law's operation. *Cf. Palmer v. Thompson*, 403 U.S. 217, 224 (1971) ("[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.") (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810)).

Appellees' appeals (at 32) to *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316 (4th Cir. 2001), and *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003), miss the point. As Appellants argued previously (at 21-22), those cases are inapplicable here because they were in a pre-enforcement posture. The courts there looked to the text of the statute to see if there was discrimination "facially, by purpose." There was no measure of effect, but only because the laws had not yet gone into effect. That did not mean that the courts could not see the discriminatory purpose in the text of the statute. But as with this Court's cases, there was not a consideration of purpose without actual discrimination that would be taking place. A legislative *intent to discriminate* is not the same thing as "*discriminat[ing]* against interstate commerce . . . by purpose." *Allstate*, 495 F.3d at 160 (emphasis added).

Unsurprisingly, there is no precedent for the admittedly "bizarre" holding that the dormant Commerce Clause has been violated by the secret motives of the Legislature. Even more unclear would be what percentage of legislators would have to possess an illicit motive to trigger a constitutional violation or if the culpable legislators would have to possess the same illicit motive. After all, once the text of the statute is irrelevant, there is no longer something to which the legislative intent may be attributed and so constitutionality would fall on the intent of the individual legislators. This would be an exercise in futility, of course, since legislators are known for passing laws for their own reasons. *See* Antonin Scalia, A Matter of Interpretation 32 (1997). Thus the district court's unprecedented conclusion must be rejected.

B. The Record Does Not Reflect a Discriminatory Purpose Behind the Public Corporation Ban.

Even if a discriminatory intent were sufficient to show "discriminatory purpose," no such intent was proven here. While Appellees continue to advance the narrative that Texas meant to discriminate against out-of-staters in the liquor business when enacting the corporation ban, they have yet to show evidence of discrimination "on the basis of some interstate element." *Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1794 (2015). Moreover, references to the arguments of the TPSA and its lobbyists cannot be used against the State here, and the isolated statements of a single Senator—that were not actually discriminatory—are of no use either.

1. Appellees' primary argument (at 12-18) is that discrimination is shown by the corporation ban meeting the *Arlington Heights* factor requiring "a clear pattern

of discrimination." This is so because of the disparate impact the ban has on "potential out-of-state entrants" to the liquor market. There are four problems with this argument: (1) *Arlington Heights* cannot be used to *overcome* dormant Commerce Clause jurisprudence; (2) disparate impact is the wrong test here; (3) Appellees (and the district court) do not use the correct comparison groups; and (4) Appellees (and the district court) would apply the disparate impact test incorrectly.

First, while this Court has said the *Arlington Heights* factors are "relevant" in the dormant Commerce Clause context, *Allstate*, 495 F.3d at 160, that test is not a work-around for traditional dormant Commerce Clause precedent. The first prong of an *Arlington Heights* test roughly corresponds to the "discriminatory effect" prong of a normal dormant Commerce Clause inquiry. But the district court held otherwise. *Compare* ROA.9415 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977)); *with* ROA.9424 (recognizing that the corporation ban "does not have a discriminatory effect as defined by controlling precedent"). If there is no "discriminatory effect" under dormant Commerce Clause precedent, there can be no "clear pattern of discrimination" under *Arlington Heights*. At the least, it cannot be true that *Arlington Heights* establishes dormant Commerce Clause discrimination where the dormant Commerce Clause jurisprudence would not allow it. The district court, and now Appellees, have pitted the first *Arlington Heights* factor against this Court's jurisprudence concerning "discriminatory effect," and use of the *Arlington Heights* factors should be rejected in this case for that reason alone.

Second, this Court has not sanctioned use of a disparate impact test to establish discrimination in the dormant Commerce Clause context. *Allstate* indicates the opposite. 495 F.3d at 163 ("[A] state statute impermissibly discriminates only when it discriminates between similarly situated in-state and out-of-state interests."). Indeed, the *Arlington Heights* test will *look* for disparate impact—applying its discrimination factors against the backdrop of a suspect class—while dormant Commerce Clause jurisprudence *expects* disparate impact. *CTS Corp.*, 481 U.S. at 88 (noting that state statute would "apply most often to out-of-state entities"). Appellees' citation (at 35) to *Churchill Downs* for support here is wrong. The quotation is the district court's view and is a reference to a *Pike* incidental burdens test, not a discrimination analysis. *See Churchill Downs, Inc. v. Trout*, 589 F. App'x 233, 237 (5th Cir. 2014) (per curiam). Thus, to the extent the *Arlington Heights* factors are relevant here, that does not automatically trigger a disparate impact exploration.[1]

Indeed, the examination of incidental external effects naturally belongs in a *Pike* balancing analysis, *see Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 501 (5th Cir. 2004), and this Court has recognized the divide between a "discriminatory effects" case and an "incidental burdens" (or *Pike* balancing) case on multiple occasions. *Bray*, 372 F.3d at 725; *Churchill Downs*, 589

[1] Although this Court will look to *Arlington Heights*, comparing national corporations to racial minorities, Appellees' Br. at 14, is inapt for a Commerce Clause analysis. Notably, the Court adopted the *Arlington Heights* factors in *Allstate* without the parties having briefed *Arlington Heights*, and may wish to revisit that line of jurisprudence.

Fed. App'x at 235. Unsurprisingly, then, it is in the *Pike* analysis that the district court situated its full consideration of disparate impact. ROA.9425-28. But this same disparate impact analysis apparently motivated the court's finding of a "clear pattern of discrimination" in the discriminatory purpose section. *See* ROA.9415 (quoting *Arlington Heights*, 429 U.S. at 266-68). Such an analysis is misplaced when examining a statute for purposeful discrimination in the dormant Commerce Clause context. *See CTS Corp.*, 481 U.S. at 88; *see also Bray*, 372 F.3d at 726 ("That *all or most* affected businesses are located out-of-state does not tend to prove that a statute is discriminatory." (emphasis added)).

Third, assuming a disparate impact analysis were appropriate, Appellees (and the district court) use the wrong groups. Wal-Mart argues that the test for "discriminatory effect" under *Arlington Heights* is strictly whether the law "disproportionately affects out-of-state companies" in the field, *Churchill Downs*, 589 F. App'x at 235, 237, but even then disparate impact cannot be shown by focusing on only a subset of those out-of-state companies that the Legislature did not isolate. The similarly situated businesses to be considered are all corporations—both in-state and out-of-state—that are banned under the law. Appellees' critical move is to shift the "protected class" in the dormant Commerce Clause analysis from out-of-state companies to *potential* out-of-state entrants to the liquor market. Once the goalposts are moved, disparate impact is claimed. But that's not how the dormant Commerce Clause works. *See Exxon*, 437 U.S. at 126 ("The fact that the burden of a state regulation falls on *some* interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." (emphasis added)). The Constitution does not

make "potential entrants" to a market a protected class. The analysis looks at similarly situated businesses, even if an incidental burden happens to fall on those out-of-state. *CTS Corp.*, 481 U.S. at 87-88. The dormant Commerce Clause does not turn on which companies outside the State consider themselves likely to enter the market or not; that is based on their expansion capabilities, not Texas law.

Fourth, even if the expert testimony on which Appellees rely (at 15-18) to show disparate impact were accurate, the real problem is how this information is used. The expert's comparison numbers are suspect since he excluded three out of six in-state corporations from his calculations because of unknown variables, ROA.14287, but included seventeen out-of-state corporations that may not even be banned under the statute, ROA.14286. But there is no disparate impact even on Appellees' terms. That is because Wal-Mart failed to show that 28 of 31 companies being excluded from the market is statistically significant. *See* ROA.14672. It should also be relevant that out-of-state companies represent a higher percentage of liquor permit holders (2.27%, ROA.12075, 12083) than do the BQ permit holders that sell both wine and beer (0.17%, ROA.14281-86). Again, though, assuming there is a disparate impact on out-of-state companies, it is not Texas's fault that only 28 companies have allegedly been found with both the capital and desire to enter the Texas liquor market. That's a function of other companies' bank accounts and growth strategies, not Texas law.

2. Appellees next argue (at 18-27) that history—and specifically the legislative history here—shows discrimination against out-of-staters. These arguments fail for three reasons: (1) the residency requirements at issue in *Cooper I*—though held unconstitutional—were a measure of liquor control, not discrimination; (2) relatedly,

the history of litigation in *Cooper I* does not show an improper discriminatory motive; and (3) post-enactment statements by lobbyists and the remarks of one legislator—which should be read as objectively true and not subjectively discriminatory—do not evince the Legislature's intent in passing the corporation ban.

First, the corporation ban serves as a control on the liquor industry and not a protectionist measure. The law is hardly unique and is comparable to the law in other states such as Kansas, which has both a corporation ban and a residency requirement on the books. *See* Kan. Stat. Ann. § 41-311(b)(1) & (6). The existence of such laws is not evidence of discrimination, especially since States were expected to have tight liquor laws following Prohibition.[2]

Second, even if the corporation ban were passed because of this Court's decision in *Cooper I*—which the district court found, ROA.9416—that would only indicate the Legislature's "intent" to maintain strict control over the alcohol trade, not a desire to discriminate against out-of-staters. The law was specifically drafted to not discriminate against out-of-staters while still maintaining strict order in the liquor trade. That was why it was based on a business form rather than place of domicile, and is thus constitutional. *See Allstate*, 495 F.3d at 161 ("[M]uch of Allstate's evi-

[2] While residency requirements were banned by this Court in *Cooper I*, the Supreme Court has granted certiorari to determine whether a durational residency requirement is constitutional under the dormant Commerce Clause and Twenty-first Amendment. *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608 (6th Cir. 2018), *cert granted sub nom.*, *Tennessee Wine & Spirits Retailers Ass'n v. Byrd,* 139 S. Ct. 52 (2018).

dence of 'discrimination' towards out-of-state companies is simply evidence of a legislative desire to treat differently two business forms . . . a distinction based not on domicile but on business form."). At most, then, passage of the corporation ban would have been just a safety net for the measure of alcohol control eliminated in *Cooper I*.

Third, as Appellants showed, the legislative history does not reflect discrimination against out-of-staters. Appellants' Br. at 27-31. Appellees again rely (at 22-25) on the statements of a TPSA lobbyist and one Senator that are taken out of context. But the legislative history only contains one formal statement made about the law: it was passed to "prevent the takeover of the package liquor store market by large corporations." ROA.14580. Appellees attempt (at 26) to discredit the reliability of this statement, but it is in the public record and needs no evidentiary foundation for these purposes. Moreover, the "supporters" statement that the bill would foster competition is precisely in line with Appellants' arguments concerning the Legislature's purpose—allowing large corporations to enter the market would shutter smaller stores and effectively eliminate the competition. The only reliable "legislative history" is thus against Wal-Mart. *See* ROA.9197 (highlighting the legislative history showing a distinction between large (public) corporations and small (private) businesses).

Appellees' focus on statements by the TPSA fare no better, and the best case for relying on lobbyist statements as probative of legislative intent actually works against them. In *Maine v. Taylor*, the Supreme Court rejected statements made long after a statute's passage as "weak" evidence of protectionism. 477 U.S. 131, 150 (1986).

That is in line with this Court's treatment of post-enactment testimony as dubious at best. *See Veasey v. Abbott*, 830 F.3d 216, 234 (5th Cir. 2016) (en banc).

Appellees again lean heavily (at 24-25) on the statements of Senator Armbrister, but Appellants have previously explained why these are of no use to the challengers. Appellants' Br. at 29-30. The two statements by the Senator—the only statements by any legislator on the topic—align with what has already been conceded: the Legislature was looking for a way to prevent liquor proliferation, not to discriminate against out-of-staters. There is no reason to assume that the law was passed with a discriminatory purpose when a non-discriminatory rationale is at least as readily available. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018) ("[B]ecause there is persuasive evidence that the [law] has a legitimate grounding . . . we must accept that independent justification."). Thus these statements should not be taken as indicative of a legislative intent to discriminate. *See Veasey*, 830 F.3d at 234 ("While probative in theory, even those (after-the-fact) stray statements made by a few individual legislators voting for SB 14 may not be the best indicia of the Texas Legislature's intent."). Yet even if they were, it would not approach what was said, and overlooked, in *Allstate*. 495 F.3d at 156 n.4 ("Because I'm a small businessman . . . , there's nothing that angers me more than when the big guy comes in and just . . . run[s] you out of town. . . . It's kind of the Wal-Mart scenario." (alterations in original)).

The "Additional Factors"—Appellees' Br. at 27-29—do not show discriminatory purpose either. First, Texas departed from its practice of granting alcohol permits to public corporations only in the arena of liquor and only for retail sales, not

bars or hotels. Instead of viewing that as a legislative compromise to give corporations some room to participate in the field, Wal-Mart claims this is evidence of an attempt to "bar the most likely out-of-state entrants." Appellees' Br. at 28. This makes little sense given the fact that the corporations can own other types of permits—just not the one the Legislature, with good reason, was afraid could lead to the most abuse. Second, the district court found that the *TPSA's* "accountability" rationale was pretextual. ROA.9405-06. This does not speak to the Texas Legislature's rationale. Third, the "grandfather clause" is a common tool used to prevent existing businesses from suffering from a change in the law. It does not show discrimination. Allowing a Texas-based store, already familiar to the agency and without accountability issues, to keep its permits does not undermine the overall motive of increased accountability through smaller businesses owning permits. Finally, the treble damages provision is in line with many statutes which allow for private attorneys general to assist the government with enforcement. It is just as applicable to violations by Texas corporations and thus does not indicate discriminatory purpose.

All of this historical evidence is subordinate, however, to the realities of the *objective* legislative history. Texas passed the corporation ban while a different residency requirement was still in effect and being enforced. In fact, it was thought that the amended residency requirement might moot *Cooper I* but that a residency requirement would continue to be enforced either way. Passing a ban on corporations holding liquor permits at the same time would be an odd way to purposefully discriminate against out-of-staters who are already excluded from the market. *Cf.* Kan.

Stat. Ann. § 41-311(b)(1) & (6) (banning both non-residents and corporations). Instead, the corporation ban is rightly viewed as a way to maintain control over pricing and to increase accountability in liquor law enforcement.

C. As Evidenced by Out-of-State Companies Routinely Participating in the Texas Liquor Market, the Corporation Ban Does Not Have a Discriminatory Effect.

In light of the dubious nature of the discriminatory purpose holding, Appellees offer discriminatory effect as an alternate means to affirm the district court. Appellees' Br. at 34-38. But under Texas law, out-of-staters both can and do hold liquor permits. ROA.9424. In fact, Total Wine—based in Maryland—has been able to not just exist but even thrive in the Texas liquor market. A law that allows out-of-state companies to enter the Texas market, while also excluding Texas-based companies, can hardly be said to discriminate against out-of-staters in its effect. That is why the district court was forced to admit that there was no discriminatory effect under this Court's precedents. ROA.9424.

To counter these inconvenient facts, Appellees attempt to use the same claim of disparate impact on select out-of-state companies (at 12-18) for a discriminatory effect analysis (at 35-36). This fails for two reasons. First, as noted above, *supra* at 10-11, this Court has not sanctioned a disparate impact analysis for showing discriminatory effects. Indeed, *Churchill Downs* shows that such an inquiry is in line with *Pike* balancing. At the same time, Appellees' reliance on *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), is also misplaced. There, it was not just that "the challenged statute has the practical effect of . . . burdening interstate sales

of Washington apples"—it was "also discriminating against them." *Id.* at 350. *Hunt* is not an example of a disparate impact analysis. The *Exxon* footnote—argued at 36-37—is of no help, either, since it is referencing the flow of goods, not the companies themselves. After all, *Exxon* upheld a statute with burdens that fell "solely on interstate companies." 437 U.S. at 125. This is why *Allstate* declined to extend *Exxon* in the manner suggested here by Appellees. 495 F.3d at 162-63. Second, as noted before, *supra* at 11-12, both the district court and Appellees would use the wrong groups to undertake a disparate impact analysis. The Constitution does not protect "potential out-of-state entrants" to a market. It looks at similarly situated businesses to see if the challenged law differentiates between them based on domicile.

The correct approach, eventually adopted by the district court, is to define "discriminatory effect much more narrowly." ROA.9421. To qualify as different treatment of similarly situated entities, the differentiation must turn on "out-of-state status"—and it does not in this case. *Bray*, 372 F.3d at 726. Evenhanded legislation is upheld, even if an incidental burden happens to fall on those out-of-state. *CTS Corp.*, 481 U.S. at 87-88; *Bray*, 372 F.3d at 726; *Ford*, 264 F.3d at 500-02. A disparate impact analysis continually fails in this Court, *Ford*, 264 F.3d at 500-02, and it should here, too.

D. *Pike* Does Not Invalidate the Non-Discriminatory Corporation Ban.

Appellees next turn to *Pike* balancing, arguing (at 52-54) that it is applicable to alcoholic beverage laws and (at 39-52) that the burdens of the corporation ban outweigh its benefits. The former is incorrect and would have this Court become the

first to strike down an alcohol regulation using *Pike*. The latter fails because of the wide latitude given to states, even assuming *Pike* applies, to regulate alcohol. Additionally, as *Pike* itself recognized, a statute should be upheld "where the propriety of local regulation has long been recognized." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970).

1. *Pike* balancing cannot invalidate state alcohol regulations.

Appellees are correct that this Court has referenced *Pike* balancing in addressing alcohol regulation on multiple occasions. *See, e.g.*, *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 741 (5th Cir. 2016) (*Cooper II*); *Dickerson v. Bailey*, 336 F.3d 388, 396-97 (5th Cir. 2003). The same is true of the Supreme Court's cases touching on alcohol regulation. *See, e.g.*, *Brown-Forman Distillers Corp.*, 476 U.S. at 579; *Bacchus*, 468 U.S. at 270.

What Appellees miss, however, is that in each instance, the citation to *Pike* was gratuitous because the statute at issue was either upheld or else invalidated because it was discriminatory (and thus outside the incidental effects inquiry that *Pike* undertakes). The only instance of an alcohol regulation allegedly being struck down under *Pike* failed to mention the Twenty-first Amendment. *Baude v. Heath*, 538 F.3d 608 (7th Cir. 2008). And even then, a close read of *Baude* reveals that the statute had a discriminatory effect and thus the court did not need *Pike* to invalidate it. *Id.* at 612; *see also Lebamoff Enters., Inc. v. Huskey*, 666 F.3d 455, 467-68 (7th Cir. 2012) (Hamilton, J., concurring in the judgment) ("[T]he invalidation of the wholesaler bar [in *Baude*] is better understood as simply an application of *Granholm* to a state statute

that had discriminatory effects, not an application of *Pike* to a statute with only incidental burdens on interstate commerce.").

Appellees thus ask this Court to become the first to invalidate a non-discriminatory alcohol regulation under *Pike* in the face of the Twenty-first Amendment. That would run counter to this Court's approach in *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 820 (5th Cir. 2010), where the Court did not mention *Pike* even though the statute was found non-discriminatory and the parties had briefed the *Pike* question. This Court correctly recognized that the dormant Commerce Clause "applies differently" in these situations, *id.*, and should decline the present invitation to extend the law.

As Appellants showed previously, using *Pike* to strike down a non-discriminatory alcohol regulation makes little sense. Appellants' Br. at 32-36. And so rather than providing a theoretical basis for the Court to do so, Appellees pay lip service to alcohol regulation cases that have invoked *Pike* while ignoring the fact that those opinions do the same thing to *Pike* itself. *See Lebamoff*, 666 F.3d at 467 (Hamilton, J., concurring) ("What we do not find is a case applying *Pike* balancing and holding that a non-discriminatory state alcohol law flunks."). Again, a complete ban on alcohol would be the ultimate burden on interstate commerce and Appellees' theory would invalidate it under *Pike*. But such a ban would be constitutional, *Granholm v. Heald*, 544 U.S. 460, 488-89 (2005), indicating that Appellees' theory is wrong.[3]

[3] The arguments surrounding the "three-tier system" (Appellees' Br. at 53-54) are simply inapplicable since the statute at issue does not draw a distinction between in-state and out-of-state retailers.

Pike's own recognition that a statute should be upheld "where the propriety of local regulation has long been recognized" 397 U.S. at 143, casts further doubt on its use against alcohol regulations. But it is ultimately irrelevant if this Court holds either that is *Pike* inappropriate for alcohol regulations altogether or that *Pike* applies but that the Twenty-first Amendment always lets the statute survive. Either way, Texas should not be obliged to justify its neutral legislative decisions regarding alcohol beyond the rational bases offered here.

2. The public corporation ban survives *Pike*.

The *Pike* claims against the corporation ban are three-fold: first, that it has a disparate impact on out-of-state businesses, Appellees' Br. at 39-40; second, that there are "alternative means" for accomplishing the State's goals, *id.* at 40-42; and third, that the ban does not achieve any legitimate local benefits, *id.* at 42-51. The first argument fails here for the reasons set forth above, supra at 11-12. There is no disparate impact on interstate commerce because the similarly-situated entities—large, public corporations—are all treated the same. *Ford*, 264 F.3d at 500. Consequently, the statute places no burdens on *inter*state commerce that it does not place on *intra*state commerce, and there is no burden under *Pike* to balance against the off-setting benefits. *Nat'l Solid Waste Mgmt. Ass'n*, 389 F.3d at 502.

The second argument regarding the alternative means for accomplishing the State's goals has two errors. First, there is no record evidence indicating that an alternative means—like an excise tax—would accomplish all the goals of the Texas Legislature that the corporation ban does. Just because excise taxes do not violate the dormant Commerce Clause does not mean they are in line with the Legislature's

goals, and thus Appellees would have been required to put on evidence to prove this claim. *See* Appellees' Br. at 41. Second, the argument makes an unfounded assumption: that a State is *required* to use alternative means when possible. This is not the case. In *Service Machine & Shipbuilding Corp. v. Edwards*, the law impeded the free-flow of non-alcoholic goods and the government officials had conceded that the benefits in question were "somewhat illusory," virtually inviting the Court to search for alternative means. 617 F.2d 70, 76 (5th Cir. 1980). And while *National Solid Waste Management Ass'n*, 389 F.3d at 501, highlights alternative means as a *Pike* consideration, it is not a requirement. This is even more true in the realm of alcohol regulation, where State regulation is afforded a higher presumption of validity in light of the Twenty-first Amendment. *See North Dakota v. United States*, 495 U.S. 423, 433 (1990).

The third argument concerning the benefits of the law begins with a faulty assumption—that the State must prove an actual benefit will be achieved under the statute. Appellees' Br. at 42-43. While Appellees ask this Court to depart from its decisions in *Bray* and *Ford* in order to adopt this rule, the basis offered for doing so is unsound. In *Department of Revenue of Kentucky. v. Davis*, the Supreme Court cast doubt on a court being able to evaluate evidence under *Pike* whatsoever. 553 U.S. 328, 354-56 (2008). And in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, the "years of discovery" cited by Appellees applied to the lower courts' search for disparate impact, not a necessary time to find a benefit. 550 U.S. 330, 346 (2007). Neither case provides any support for setting aside this Court's prior jurisprudence.

The district court's recognition of the "reasonable belief" that the ban would reduce liquor consumption by raising prices and lowering availability is sufficient to satisfy the "*putative* local benefits" portion of the *Pike* analysis. *Cf. FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."). Nevertheless, the State did provide expert testimony indicating these exact things, ROA.11004-05, and Wal-Mart's arguments on this point (at 45-50) are moot. The claim (at 51) that preventing corporations from owning permits does not promote accountability misses the point. Even if that were not true, the State held a rational belief that the law would increase accountability, and it has held that belief for some time. *See* ROA.9197, 10823. Notably, other courts treat increased accountability as a rational basis for liquor regulation. *See S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 802-03 (8th Cir. 2013).

Judge Sutton has recognized that it is "difficult to imply a restriction on state authority (to regulate commerce) expressly created in another constitutional provision (to regulate retail sales of alcohol)." *Byrd*, 883 F.3d at 632 (Sutton, J., concurring in part and dissenting in part). If "[r]egulating alcoholic beverage retailing is largely a State's prerogative," *Wine Country Gift Baskets.com*, 612 F.3d at 820, this Court should not accept the invitation to use *Pike* against an alcohol regulation. Since the interests of "promoting temperance" and "ensuring orderly market con-

ditions" fall within the "core of the State's power under the Twenty-first Amendment," *North Dakota*, 495 U.S. at 432, the corporation ban should be upheld even if *Pike* applies.

II. There Is No Basis For Enjoining The Five-Permit Limit.

The five-permit limit does not violate the Equal Protection Clause, and neither does the separate law creating an exception to the limit for family members. This inquiry is controlled by *FCC v. Beach Communications, Inc.*, and Appellees still cannot overcome the Supreme Court's directive that a non-discriminatory statute that does not infringe 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." 508 U.S. at 313. As noted previously, the consanguinity exception has multiple rational bases underlying it and thus does not violate the Equal Protection Clause. Appellants' Br. at 40-47. Yet even if that were not the case, the proper remedy would be simply to enjoin the exception to the permit rule, not the rule itself. Appellees' arguments do not show otherwise.

A. The Consanguinity Exception Does Not Violate Equal Protection.

As the district court noted, the five-permit limit has a rational basis, ROA.9436-39—the question was whether the consanguinity exception does as well. In arguing against the permit limit (at 54-60), Appellees conflate the two statutes into one. *See* Appellees' Br. at 55 ("Texas's permit limit discriminates based on family status."). This chimera is necessary since there is no argument that the five-permit limit, on its own, lacks a rational basis. In fact, rather than challenge the district

court's holding that the State has a "legitimate interest in limiting the number and density of retail liquor outlets in order to reduce the availability and increase the price of liquor," ROA.9441, Appellees concede (at 41) that outlet density is a legitimate goal. That concession confirms the legitimacy of the permit limit. And because the five-permit limit and the consanguinity exception are two separate statutes, passed at two separate times, Appellees' request to conflate them should be denied.

Appellees not only continue to lump the consanguinity exception with the permit limit, they miss the arguments the State has advanced in favor of the exception. Appellants' Br. at 40-47. Their focus is on four areas identified previously but many arguments are ignored and, most importantly, Appellees do not even attempt to account for *Beach Communications*. The reality is that economic regulations often favor some groups over others—if a protected class is not involved, there need only be a rational reason to do so. Because the reasons given for the consanguinity exception are "reasonably conceivable," they must be accorded deference (the burden of proof is on the challenger) and the exception should be upheld.[4]

First, contrary to Wal-Mart's protestations (at 57), the permit limit promotes small businesses. And such an interest is legitimate for the State. *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412, 426-27 (1937). While Appellees would focus on

[4] Appellees' contention (at 54-55) that the five-permit limit requires heightened scrutiny is incorrect. First, the permit limit makes no distinction based on family or anything suspect. Second, the consanguinity exception's use of family status does not make it suspect to any increased level of review. This law is no different than a tax law that does not deal with a protected class.

the very few large chain liquor stores, there are thousands of small shops across the State that would be driven out of business by large corporations. Even Spec's would be no match for H-E-B or Wal-Mart. Moreover, Appellees provide no response to the point that the Legislature was looking to promote small businesses due to the social ills and excesses of the tied-house era. Appellants' Br. at 42.

Relatedly, the State also previously pointed out the Legislature's interest in enacting the exception to benefit family businesses—in part because they tend to be smaller—and that the result has been a success. Appellants' Br. at 42-45. Appellees' only answer to this argument—other than the rhetorical trick of restating it as a burden to business owners without family members—is to misstate the law. Appellees' Br. at 59. The exception does not "forbid[] family members from having any 'involvement in the package store.'" *Id.* (quoting ROA.9442). Family members may, of course, participate in the family business—the district court was merely saying that they did not have to in order to take advantage of the exception. And Appellees have no answer for the fact that the exception was passed in an effort to lessen the unintended harm on family businesses from the tightening of alcohol provisions that had taken place just two years prior. *See* ROA.14380.

Second, as noted previously, the exception can be useful in transferring and consolidating permits within a family. Appellants' Br. at 45-46. Appellees charge (at 59) that this assumes what it is trying to prove and that it does not provide a rational basis for denying the exception to business owners that do not have a close family member. This response misunderstands either the argument or rational basis review. Far from begging the question, the Legislature's rationale was set forth and shown to have

actually worked. ROA.10717. This showing was superfluous, though, as the Legislature is under no obligation to prove that its rationale will be effective or the best solution. *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993) ("A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification."). And Appellees have failed, in all events, to offer any evidence to contradict the exception being effective as an estate planning device.

Third, Appellees' argument (at 58) against the *TPSA's* small firm theory does nothing to answer the *State's* claim related to strategic, but limited, growth. *See* Appellants' Br. at 46-47. While noting the TABC's recognition that the law does not mandate strategic growth with its consanguinity exception, Appellants' Br. at 46, Appellees fail to answer the argument: that the law does precisely what was intended without having to mandate it. The family-chain stores grow the market in urban areas based on their increased (but relatively limited) distribution capabilities while leaving rural areas to other, smaller retailers. In other words, it is good evidence of the reasonableness of the State's position that the result worked out as envisioned.

At base, Appellees offer only a few "simple arguments of perceived unfairness" that are unable to negate the State's rational basis for the consanguinity exception. *Abdullah v. Comm'r of Ins.*, 84 F.3d 18, 20 (1st Cir. 1996). Wal-Mart seems to think that a few exceptions—like Spec's—can undermine the rationale and effectiveness of the entire system. This is exactly opposite of how the Legislature governs, taking into account the whole picture and not isolated examples. The consanguinity exception should be upheld.

B. Enjoining the Constitutional Five-Permit Limit is Inappropriate.

Appellees conclude their response by arguing that the district court's injunction of the five-permit limit was the proper remedy for a constitutional violation by the consanguinity exception. Appellees' Br. at 60-66. As part of this allegedly proper solution, Appellees concede that the Legislature is free to enact a "nondiscriminatory limit on permits." Appellees' Br. at 60. But that is exactly what the Legislature did—and now it has been enjoined. This highlights the district court's mistake in fashioning an overbroad remedy for the perceived constitutional violation. Striking the consanguinity exception would bring about the exact situation that even Appellees admit is constitutional: a nondiscriminatory limit on permits.

As explained previously, Appellants' Br. at 48-49, the cases where courts have expanded the "benefit" involved matters such as receipt of Social Security payments or other government benefits. *See Califano v. Westcott*, 443 U.S. 76, 78 (1979); *Cox v. Schweiker*, 684 F.2d 310, 316-17 (5th Cir. 1982). Even assuming that Appellees are correct (at 62) about the preferred remedy in the typical case, this is not the typical case. The "benefit" is an exemption from an otherwise-applicable regulation and extending it to everyone would undermine the goals for which both the limit and the exemption were created. The statutory scheme should not be read to defeat itself.

Under Texas law, when a statute has an invalid provision, it is severed and the valid provision is given effect. Tex. Gov't Code § 311.032(c). The only way a provision is retained is if "it cannot be presumed the legislature would have passed the one without the other." *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 844 (Tex. 1990)

(quoting *W. Union Tel. Co. v. State*, 62 Tex. 630, 634 (1884)). Because the five-permit limit was passed prior to, and wholly separate from, the consanguinity ban, it cannot be said that the Legislature would not have passed the ban without the exception. Consequently, under either federal or State law, the appropriate remedy is to strike the exception and leave the five-permit limit in place. *See Villegas-Sarabia v. Duke*, 874 F.3d 871, 882-83 (5th Cir. 2017) (finding that extension of a benefit is generally preferred but will be overcome if it will "undermine the legislative intent").

Appellees' contention (at 62-63) that striking the statutory exemption would lead to the current chains being entrenched in the market is unsubstantiated, not to mention unlikely. Wal-Mart recognizes (at 63) that the Legislature can act at any time, but assumes that both the Legislature and the TABC would leave the status quo in place were the consanguinity exception struck. Further, Appellees speculate (at 65) that striking the consanguinity exception would substitute one set of constitutional problems for another. Those future problems, however, are only hypothetical and there is no constitutional problem with the TABC not granting additional permits under the consanguinity exception any longer.

III. The Cross-Appeal Arguments Fail, Too.

Appellees make two claims in the cross-appeal. First, that the public corporation ban violates the Equal Protection Clause. Appellees' Br. at 67-71. Second, that the permit limit violates the dormant Commerce Clause. Appellees' Br. at 72-75. Neither argument merits serious consideration.

A. The Corporation Ban Does Not Violate Equal Protection.

Initially, Appellees seek heightened scrutiny for their Equal Protection claim because the ban is an "absolute deprivation" of the benefit they seek. Appellees' Br. at 67. Whatever strength that claim has for suspect classes in fundamental rights cases, it has none here where an economic regulation is at issue. *See Beach Commc'ns.*, 508 U.S. at 313. Moreover, the alleged animus against public corporations cannot sustain using heightened scrutiny either. The remainder of the claim is spent reworking the same arguments made previously concerning the alleged irrationality of the permit limit. These have largely been addressed already, *see supra* Part II.A, and fail here as well. Wal-Mart attempts to undercut the rationales offered for the ban, but still wants to focus on special cases—rather than the whole—and is still unable to answer *Beach Communications*. 508 U.S. at 315 ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.").

The State offered expert testimony to show that "alcohol follows the basic law of demand. If you raise the price, people drink less, if the price goes down, people drink more." ROA.11004-05. This means that the corporation ban is related to liquor consumption (as well as the factors that animate the Supreme Court's blessing of states establishing three-tier systems or similar control structures). Again, the issue here is not "economic protectionism." It is alcohol control—a legitimate purpose under the Twenty-first Amendment that is allowed more leeway than other economic regulation. The corporation ban, like the permit limit, also promotes small, family businesses—another legitimate goal for the State given the excess and

vice associated with large tied houses previously. Finally, it is rational to believe that smaller businesses, unlike public corporations, will be more responsive to TABC inquiries, and that those small businesses will be more likely to follow the rules, thus increasing accountability.

B. The Permit Limit Does Not Violate the Dormant Commerce Clause.

Appellees begin their dormant Commerce Clause claim with the charge (at 72-73) that the permit limit has a discriminatory purpose. This claim is the easiest of which to dispose because it deals with a completely neutral statute and relies exclusively on TPSA's arguments to the Legislature. The only way to uphold this challenge would be to find that dormant Commerce Clause violations need no actual discrimination, and that at least half of the Texas Legislature had a discriminatory intent in *not* voting to repeal a constitutional law, and that the Legislature's intent could then be applied to the statute that had been passed decades before.

The final argument (at 73-75) is that the permit limit fails *Pike* balancing. For all the reasons discussed above, this argument can be quickly rejected. It relies solely on TPSA testimony and an assumption that the permit limit contributes to a disparate impact on interstate commerce. Appellees' Br. at 73. The discriminatory motives of the TPSA, however, do not reflect the actual law passed by the Texas Legislature. Here, no incidental effects are shown that would trigger a *Pike* analysis—it is just presumed that the effects are taking place and that it is the fault of the admittedly constitutional law because the Legislature did not vote to repeal it. So Wal-Mart again tries to combine the five-permit limit and the consanguinity exception into one

law when complaining that certain businesses can gain more than five permits. Appellees' Br. at 74-75. At the same time, Appellees seek to move the goalposts for which entities would be similarly situated for a disparate impact analysis. These arguments have been addressed previously and are no more persuasive here.

CONCLUSION

The Court should reverse the district court's injunction of State law.

Respectfully submitted.

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Certificate of Service

On November 26, 2018, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8644 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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