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
No. 1:15-CV-134-RP, Robert Pitman, Judge Presiding

REPLY BRIEF FOR PLAINTIFFS-APPELLEES WAL-MART STORES, INCORPORATED, *ET AL.*

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INTRODUCTION

"[E]conomic protection" is not "a legitimate governmental purpose." *St. Joseph Abbey, et al. v. Castille, et al.*, 712 F.3d 215, 222 (5th Cir. 2013). Yet TABC's and TPSA's principal defense of Texas's public corporation ban is based on just this rationale. TABC and TPSA are asking this Court to hold that economic protection *is* a legitimate governmental purpose, so long as the people being protected are in the business of selling alcohol. According to TABC and TPSA, any law—no matter how bizarre—will satisfy the Equal Protection Clause so long as the law protects alcohol retailers from competition, and thereby makes it possible to imagine that those retailers will charge higher prices or will sell at fewer locations. TABC and TPSA cite no case so holding, and do not even attempt to distinguish *St. Joseph Abbey*.

The ban is also irrational: It does not reduce liquor consumption, increase prices, or decrease the number of outlets. The empirical data show that consumption *rose* after the ban was enacted, and basic economic principles demonstrate that the ban cannot affect prices, or the number of outlets, in a market that, like Texas's, is already in competitive equilibrium. Texas's market is fully competitive. The large package-store chains compete vigorously on price, convenience, selection, and everything else. This means that there is no unmet demand for liquor and that banning some entrants (public corporations) does not

affect prices or the number of outlets. This real-world fact—namely, the fact that the Texas market is already fully competitive— cannot be wished out of existence by TABC's and TPSA's "post hoc hypothesized facts" about one might imagine the market to be. *St. Joseph Abbey*, 712 F.3d at 223.

TABC and TPSA also contend that the ban promotes "small" or "family" businesses, though they refuse to define those terms. The District Court did not rule on these contentions, and TABC and TPSA do not and cannot cite a single case holding that a state may "promote" a particular class of firms by ***entirely excluding everyone else*** (the non-"small," non-"family" firms). These arguments are an exercise in rebranding—an attempt to give a different name to illegitimate economic protection.

Texas's arbitrary permit limit, which allows certain favored firms to acquire unlimited permits, violates the Dormant Commerce Clause. Under the governing *Arlington Heights* framework, discriminatory purpose is properly found where, as here, an old law is *maintained* for a discriminatory purpose. There is ample evidence that the arbitrary permit limit has been maintained for the purpose of excluding out-of-state entrants. TPSA Executive Committee members trumpeted this purpose, over and over again, in sworn testimony to the Legislature in which they successfully opposed efforts to repeal the law.

The arbitrary permit limit also fails *Pike* balancing because it has no local benefits. The law hinders, rather than promotes, "family" firms, because the consolidating family member (i.e., the straw buyer of the additional, "consolidated" permits) must have ***no involvement*** in the firm. TABC, unable to bring itself to defend such a scheme, now contends (for the first time) that the law does not work this way. However, repeated sworn testimony by TABC's own most knowledgeable employees proves otherwise. The other putative local benefits—fostering "strategic growth" in rural areas or assisting with "estate planning"—are also nonexistent.

For these reasons, Walmart is entitled to a declaratory judgment that: (a) the public corporation ban violates the Equal Protection Clause; and (b) the five-permit limit and its consanguinity exception together violate the Commerce Clause.

ARGUMENT

I. The Public-Corporation Ban Violates the Equal Protection Clause

A. Rational Basis Scrutiny Demands a Rational Link, Based on Actual Facts, Between the Law and Its Hypothetical Goal

This Court's decision in *St. Joseph Abbey* sets the controlling standard for rational basis review. The proffered governmental purpose for a challenged statute "cannot be fantasy," and the "chosen means must rationally relate" to that purpose in the real world, without recourse to "post hoc hypothesized facts." *St. Joseph*

Abbey, 712 F.3d at 223. This Court will "examine [TABC's and TPSA's] rationale[s] informed by the setting and history of the challenged" statute, and Walmart may "negate a seemingly plausible basis for the law by adducing evidence of irrationality." *Id.*

TPSA ignores *St. Joseph Abbey* entirely, and TABC cites the case just once. Instead, both rely heavily on *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993), but that case does not lead to a different result. *Beach* reviewed an agency determination regarding which transmission systems were subject to regulation as "facilities" under the federal Cable Act. *Id.* at 311. *Beach* did not consider an absolute deprivation of the right to do business, like the public corporation ban. Nor did *Beach* consider a statute that discriminated on the basis of *who the regulated firms were*. Instead, the Cable Act drew a line between which *systems* would be regulated as "facilities" and which *systems* would not. *Id.* at 316 ("Congress had to draw the line somewhere"). Here, by contrast, public corporations are discriminated against not because of *what or how they sell* but rather because of *who they are* (i.e., because they have more than 35 owners).

Moreover, TABC's and TPSA's misplaced reliance on *Beach* was thoroughly refuted in the Institute for Justice's amicus brief. IJ Br. 9-11.

B. The Ban Is Not Rationally Related to Reducing Liquor Consumption

TABC and TPSA's principal defense of the public corporation ban amounts to this: Any law that might conceivably result in Texans drinking less liquor (because liquor is made more expensive, or liquor stores made more scarce) is constitutional—no matter how bizarre the law, or how indirect and tenuous its connection to Texas consumers' drinking choices. TABC thus argues: "'alcohol follows the basic law of demand. If you raise the price, people drink less, if the price goes down, people drink more.'" TABC Resp. Br. 30. TPSA makes the argument even more explicit: "economic protectionism" is just fine "with liquor," because less competition might mean "lower consumption." TPSA Resp. Br. 13.

There are three errors in this reasoning. First, the empirical data shows that public corporations' presence (or absence) has no effect on consumption, price, or the number of outlets. Second, basic economic theory confirms that no such effect is conceivable where, as here, the market is fully competitive. Third, even if an indirect effect on consumption were conceivable, that effect would be so "attenuated" from the ban as to render the law "arbitrary." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

The District Court erred by considering TABC's and TPSA's hypothetical goals—decreasing consumption by increasing price or reducing the number of

outlets—in the abstract, rather than by considering the "setting and history" of the ban and the "evidenced adduced" of its irrationality in the real world. *St. Joseph Abbey*, 712 F.3d at 223. The District Court made no factual finding that the ban actually achieves these goals, and made no finding that the ban even *could* achieve them in Texas's already competitive market. *See* ROA.9436-37.

1. Empirical Evidence Demonstrates That the Ban Does Not Affect Liquor Consumption, Prices, or the Number of Liquor Outlets

i) Consumption

TABC and TPSA contend that Texas's comparatively low per-capita consumption of liquor, compared to the national average, is evidence that the ban reduces consumption. TPSA declares "something is at work" and then asserts that this "something" must be the ban.

In fact, ***Texas's per capita liquor consumption has increased since the ban was passed***. WM Br. 46 (displaying chart at ROA.14220). In response, TPSA now contends that this increase "was the result of national trends." TPSA Resp. Br. 13-14. This contention actually makes Walmart's point: The public corporation ban does nothing to prevent Texans' liquor consumption from following trends in consumer preferences, national or otherwise. Moreover, Texas's per capita liquor consumption has ***increased even as compared to the***

national average. This trend is observable even on the TPSA's charts (and even with TPSA's distorted scaling). ROA.14664 (lower line is "spirits").

The ban's ineffectiveness at reducing consumption is further demonstrated by the Texas beer-and-wine market. The beer-and-wine residency requirement was repealed in 1993, which allowed out-of-state corporations (including public corporations) to sell beer and wine at retail. WM Br. 47 n.10. Since then, Texas's per capita beer consumption, historically among the *highest* in the country, has *decreased*. *See* ROA.11392-96 (testimony), ROA.14221 (chart). Similarly, Texas's per capita wine consumption, historically much *lower* than the national average, has *remained low* since 1993. ROA.11392-96. These trends are even more striking in comparison with the United States as a whole: Texas's per-capita consumption of beer and wine, in relation to the national average, has *decreased* since 1993—as shown on TPSA's own chart. ROA.14664 (upper line is "beer & wine").

In short, allowing public corporations to sell beer and wine has been correlated with *decreased* consumption, rather than increased consumption; meanwhile, banning public corporations from selling liquor has been correlated with *increased* consumption, rather than decreased consumption. This undisputed empirical data demonstrates that the ban is not rationally related to decreasing

consumption, at least in the "setting" of Texas's market. *St. Joseph Abbey*, 712 F.3d at 223.

ii) Price

Walmart does not sell spirits at lower prices than liquor superstores like the Texas chains. ROA.10129-32 (discussing studies showing that liquor superstores sell at a "substantial differential" below other retailers such as Walmart); *see also* ROA.10125–28 (Walmart's prices are "about in the middle"); ROA.14239 (chart showing share of units sold below Walmart's price).

TPSA misleadingly suggests that Walmart's expert "conceded" that "Wal-Mart would sell liquor at lower prices than the smaller P permit holders," TPSA Resp. Br. 11, but that is incorrect. In the portion of the record TPSA cites, Walmart's expert responded to a question from TPSA's lawyer about whether Walmart could potentially sell at a lower price than "***single store*** P permit holders." ROA.10437 (emphasis added). Of course, Walmart can do *that*—and so can Spec's, Western Beverages, and the other large chains. Walmart's expert never conceded that Walmart can sell liquor at lower prices than the chains—he testified just the opposite. ROA.10129-32.

iii) Number of Liquor Outlets

TABC and TPSA also hypothesize that the ban may reduce the number of retail liquor outlets. This hypothesis, too, is contradicted by the data. In 1992, one

year before out-of-state public corporations entered the beer-and-wine market, Texas had 17,787 beer and wine outlets. ROA.11402-03. Twelve years later, the number of beer-and-wine outlets had *decreased* to 15,524. *Id.* Once again, under TABC and TPSA's theory, the opposite should have happened—the number of retail outlets should have shot up—but it did not.

In Florida, the third-largest state by population behind California and Texas and a state that (like Texas) has a separate-premises requirement for liquor outlets, Walmart sells liquor at just 118 of its stores, fewer than Spec's 158 outlets in Texas. ROA.9907:11-14, ROA.13735. The notion that, were the public corporation ban repealed, Walmart would open many more outlets in Texas than current retailers have is unsupported by the record.

2. Basic Economic Principles Demonstrate that the Ban Cannot Affect Prices, or the Number of Outlets, In a Fully Competitive Market

In addition to the empirical data, basic economic principles also demonstrate that the ban does not affect liquor prices or the number of liquor outlets. The key fact, proved at trial, is that Texas's retail liquor market is *already* in competitive equilibrium. The District Court found that the chains "compete vigorously" to offer the lowest prices, to "be the most convenient to their customers" and "to offer the largest selection" of products. ROA.9401. The chains now "have a very large share of the Texas market." *Id.* This means that the chains already expand to meet

consumer demand by offering the lowest prices, and greatest convenience, possible. WM Br. 50.

Consider this example: If an opportunity were to appear to profitably sell liquor by opening a new store in a particular neighborhood in Southwest Houston, then the Texas chains would open an outlet there to meet that demand (and make those profits) by selling liquor to those un- or under-served consumers. There is no legal, practical, or economic barrier to stop the chains from doing so. And this is just what the chains do: As the District Court found, over the years the chains "have greatly increased their number of stores, and their volume of sales." ROA.9401. The chains now dominate the Texas market. *Id.*; *see* ROA.14225. Excluding public corporations does nothing to prevent that new store from opening or from selling those consumers every bottle of liquor they wish to buy. ROA.10145-46. The only thing the ban accomplishes is to determine *who does the selling*—it ensures that the protected incumbent chains keep this new business among themselves.

TABC and TPSA ask this Court to ignore the fact that the Texas market is already competitive. TPSA contends that "[a]n increase in authorized sellers can cause the supply curve to shift to the right, resulting in a higher quantity demanded (and lower prices)." TPSA Resp. Br. 15. That would be true only if the market were not already competitive, i.e., only if the existing chains were unable to

expand to meet consumer demand. WM Br. 50. TPSA's contention therefore relies on a "post hoc hypothesized fact" (namely, the hypothesized fact that the Texas market is not already fully competitive). Hypothesized facts are not sufficient to find a rational basis. *St. Joseph Abbey*, 712 F.3d at 223. The Equal Protection Clause requires that the law "rationally relate to the state interests" in the real world. *Id.*

TPSA misleadingly contends that "Wal-Mart *admits* that striking down the statutes will increase the number of outlets selling liquor in Texas." TPSA Resp. Br. 11. Walmart does not admit this, and Walmart's expert testified that the ban has no effect on the number of outlets. TPSA cites a confusing section of TPSA's cross-examination of Walmart's corporate representative, who actually testified: "I don't agree with that statement." ROA.10026.

Even if the Texas market was not fully competitive in 1995 when the ban was enacted, it is fully competitive today. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.").

In addition to basic economic principles, there are also other laws on the books, relevant to the ban's "setting," *St. Joseph Abbey*, 712 F.3d at 223, which

further demonstrate that the ban does not increase prices or reduce the number of outlets:

- Unlike other products, Walmart (and other public corporations) cannot buy liquor directly from the manufacturer. Texas's three-tier regulations require all retailers to buy from licensed wholesalers. ROA.9944.
- Unlike other products, Walmart (and other public corporations) cannot leverage national buying power in price negotiations with liquor wholesalers. Retailers must negotiate prices "at the local level." ROA.9945.
- All price discounts that wholesalers offer to Walmart (and other public corporations) must also be offered to every other retailer. ROA.9947.
- Walmart (and other public corporations) cannot warehouse liquor in their distribution centers (i.e., warehouses) because Texas prohibits retailers from transferring alcoholic beverages after delivery. ROA.9945-46.
- Like every other retailer, Walmart (and other public corporations) must build "separate premises"—apart from the main stores—in which to sell liquor. ROA.9398; Tex. Alco. Bev. Code § 22.15.

3. Any Effect on Liquor Consumption Is "Attenuated" from the Ban Itself

Even if it were possible to conceive (despite the empirical data, despite Texas's already competitive market, and despite the other laws that hinder public corporations from selling liquor at lower prices) that the ban somehow indirectly reduces liquor consumption, the ban would still violate the Equal Protection Clause because it is so "attenuated" from this indirect benefit "as to render the distinction arbitrary." *Cleburne*, 473 U.S. at 446.

Walmart asked in its Principal Brief: Could Texas ban all business-school graduates? All high-school graduates? All persons previously employed by Walmart? TABC calls these "Chicken Little scenarios" but refuses to answer the question. TABC's answer must be yes: TABC is asking this Court to hold that the Legislature may ban *any group of people* who might be imagined to be more likely to succeed at retail, and therefore able to sell liquor at lower prices or with increased convenience.

TPSA claims that "Wal-Mart's straw-man hypothetical of banning educated owners or former Wal-Mart employees from holding P permits would not likely have any rational relationship to any of these effects." TPSA Resp. Br. 17, n.10. Why not? In the same sentence to which that footnote is appended, TPSA defends the ban on the assumption that firms with more owners will "have a more efficient

business model." The same assumption would apply to owners with business degrees or prior retail experience.

In short, TABC's and TPSA's principal argument is that any economic protection of liquor retailers is constitutional, so long as the people being excluded are conceivably more likely to succeed at retail. There is no legal support for this. Excluding a class of persons because they might be more successful in lawful economic competition is not a legitimate governmental purpose. It is, by definition, "economic protection." *St. Joseph Abbey*, 712 F.3d at 222.

C. The Ban Does Not Promote "Small" Businesses

TABC and TPSA also contend that the ban promotes "small" businesses—though neither party defines what they mean by "small." TABC and TPSA do not cite any case that upholds economic protection—excluding competitors from the market—on the grounds that the protected actors are all "small," and therefore are being "promoted" by the exclusion of non-"small" competitors.

TABC's and TPSA's cited cases do not consider (much less, endorse) a blanket exclusion like the ban. *Great Atlantic & Pacific Tea Company v. Grosjean* upheld a progressive "occupation" tax, which increased with the number of stores operated by the taxpayer. 301 U.S. 412, 418-19 (1937). That tax was rationally related to the firm's actual operations (the number of its stores) rather than being based, like Texas's ban, on the firm's identity (its number of owners). Moreover,

the differential treatment was a mere tax distinction, not an absolute ban. *Ray Baillie Trash Hauling, Inc. v. Kleppe* concerned a federal program that gave preferences, when awarding government procurement contracts, to small businesses "owned by . . . disadvantaged persons." 477 F.2d 696, 699 (5th Cir. 1973). This Court upheld that program, over a due process challenge, because the government has broad power "to determine those with whom it will deal" when "mak[ing] needed purchases." *Id.* at 709. *California Retail Liquor Dealers Association v. Midcal Aluminum* is even further afield. 445 U.S. 97 (1980). That decision struck down, under the Sherman Act, a California statute requiring all liquor retailers (small, large, and in-between) to sell at identical prices set by the state. *Id.* at 113-14. The case's only mention of the Equal Protection Clause was to reaffirm that states may not "insulate the liquor industry from the Fourteenth Amendment's requirements of equal protection." *Id.* at 108.

In short, TABC's and TPSA's cases all address laws that attempted to "equalize[e] economic advantages" between smaller and larger businesses, *Grosjean*, 301 U.S. at 778, by providing tax breaks, by giving preferences in the award of government contracts, or by preventing price discounts. Texas's ban does none of those things. Instead, the ban excludes an entire class of firms from the market. This law does not "level the playing field"; instead, it prevents anyone except the home team from taking the field to play.

Moreover, this hypothetical, indirect benefit (promoting "small" firms) is a "fantasy" when considered in the actual "setting" of the Texas liquor market. *St. Joseph Abbey*, 712 F.3d at 223. Texas's market is dominated by chains, like Spec's, that are "large" by any reasonable definition. There is no rational basis to believe that banning only *some* "large" firms (public corporations) benefits "small" firms in the real world. Walmart's Principal Brief asked: How is a one-permit, sole-proprietor liquor store any better off if the large competitor opening across the street is Spec's 159th store instead of Walmart's first? TABC and TPSA give no answer, aside from claiming that Spec's, with 158 permits, still counts as "small."

Finally, the ban is so "attenuated" from this indirect benefit "as to render the distinction arbitrary." *Cleburne*, 473 U.S. at 446. Neither TABC nor TPSA make any response to this argument.

D. The Ban Does Not Promote "Family" Businesses

TABC asserts that the ban promotes "family" businesses, but TABC does not define that term and does not cite any case upholding a law that excludes firms from a market because they are non-"family."

Furthermore, the ban has no rational relationship to "family" businesses, under any definition. "Family" firms are equally prohibited from taking on more than 35 investors, like everyone else. And non-"family" firms, with fewer than 35

owners, are just as protected from competition (from public corporations) as everyone else.

E. The Speculation That Retailers With More Owners Are Less "Accountable" Is "Pure Fantasy"

TABC now contends that a firm with more than 35 owners might be less "accountable," meaning less willing and able to obey the law. TABC Resp. Br. 4. The District Court found this speculation false. ROA.9412-13. Tellingly, TABC never made this contention below. *See* ROA.14327-28, 30-31 (TABC interrogatory responses).

TPSA distorts the record when it now contends that "[t]he evidence shows that TABC's process of holding permit holders accountable is less efficient with public corporations." TPSA Resp. Br. 16. The evidence shows nothing of the sort, and the District Court found just the opposite. ROA.9412-13. At trial, TABC's then-licensing director testified that she deals with public corporations "all the time" and that TABC always gets the information it needs from public corporations. ROA.10743. In fact, contrary to TABC and TPSA's "accountability" theory, TABC's licensing director struggled at trial to name contact persons at small, single-permit package stores, ROA.10742–43, but immediately knew Walmart's corporate officer in charge of licensing and how to contact her. ROA.10744.

Texas allows public corporations to hold ***every other alcoholic beverage permit*** in Texas, including permits to sell beer and wine at retail (for both on- and off-premises consumption) and to sell liquor at retail (for on-premises consumption, e.g., in bars). ROA.10639. TABC and TPSA do not identify a single instance in which TABC was unable to hold any of these public corporations "accountable."

Furthermore, the District Court found that "the ten largest BQ permittees (including Wal-Mart) had ***fewer*** TABC violations per store than did the ten largest P permittees." ROA.9412 (emphasis added). TPSA now contends that "the correct question" is instead "what is the *percentage* of inspections in which violations were found," TPSA Resp. Br. 16, but this criticism makes no sense. The relevant question is whether permittees obey the law, not whether TABC conducts more or fewer inspections. Moreover, TPSA's quibble comes far too late. At trial, Walmart's evidence was "not rebutted by the TABC's or the TPSA's experts," ROA.9412, even though the data was available to TPSA.

Next, TABC now for the first time cites a Kansas statute and a repealed Oklahoma constitutional provision, and contends that these two "other states" have "decided to prevent corporations from holding package store permits." TABC Resp. Br. 2, 13. But these laws are materially different from Texas's ban because these laws barred all corporations, that is, they forbade the corporate form, and the

limited shareholder liability that comes with it. Kan. Stat. Ann. § 41-311(6); Okla. Const. art. XXVIII, § 4 (repealed).

Texas, by contrast, does not bar the corporate form. Five of Texas's ten largest chains are corporations. *See* WM Br. 6. A Texas package-store corporation's shareholders are not required to have any role in or control over the corporation's operations, or to have any personal liability for the corporation's torts, crimes, or contracts. Tex. Bus. Orgs. Code § 21.223. Moreover, the Texas ban is not limited to *corporations*—it also bars general partnerships with more than 35 partners. In short, is not the corporate *form* that Texas has banned, it is the *number of owners*. No other state does this. The law is as unique as it is bizarre, and it has nothing to do with the "accountability" of owners.

TABC's and TPSA's "accountability" argument is just the sort of "fantasy" that *St. Joseph Abbey* held insufficient. 712 F.3d at 223. In *St. Joseph Abbey*, the funeral directors argued that if *anyone* were allowed to sell a casket, then *some* sellers might defraud grieving customers. *Id.* This Court observed that *there were already laws on the books* preventing such deception. *Id.* So too, here: TABC already has ample enforcement powers, including the power to revoke the permits of any retailer that violates the Code. Tex. Alco. Bev. Code § 11.61. An unfounded suspicion that some entities with more than 35 owners might break the

law, in ways that TABC somehow cannot address with the enforcement tools it already has, is a similar "fantasy," like the funeral directors' argument.

F. The Ban Merits Heightened Scrutiny

1. "Absolute Deprivation"

Although the public corporation ban fails even rational basis review, the ban also merits heightened scrutiny, for two reasons. First, the ban is "an absolute deprivation of the desired benefit." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 23 (1973) ("absolute deprivation" of education would require heightened scrutiny).

TABC and TPSA contend that the "absolute deprivation" case law is limited to deprivations of "fundamental rights." Not so. In *Rodriguez*, the Supreme Court rejected "the District Court's finding that education is a fundamental right" as "unpersuasive," 411 U.S. at 37, and yet still recognized that an "absolute deprivation" of access to education would trigger heightened scrutiny, *id.* at 23-25.

2. Animus

The ban also merits heightened scrutiny because it bears the hallmarks of "animus" against public corporations. It is a "wide-ranging and novel deprivation[] upon the disfavored group" that "strays from the historical territory of the lawmaking sovereign just to eliminate privileges that a group would

otherwise receive." *Bishop v. Smith*, 760 F.3d 1070, 1100 (10th Cir. 2014) (Holmes, J., concurring).

The ban is "wide-ranging" because (a) it operates as an "absolute deprivation" of access to the Texas market and because (b) it bars firms not only from holding a permit but also from taking any ownership interest (even a minority stake) in a permit holder.

The ban is also "novel," both within Texas (where public corporations may hold any other kind of permit), and across the United States. *See supra*, at 18 (TABC's cited laws, from Kansas and Oklahoma, are materially different).

Neither TABC nor TPSA disputes that the ban meets Judge Holmes's test for animus. Instead, TABC and TPSA offer conclusory assertions that the test should not be applied. Judge Holmes's test for animus is compelling, grounded in Supreme Court caselaw, and should be adopted.

II. The Arbitrary Permit Limit Violates the Dormant Commerce Clause

The district court correctly held that Texas's arbitrary permit limit violates the Equal Protection Clause. The arbitrary permit limit also violates the Dormant Commerce Clause for two reasons: (a) it has been maintained for a discriminatory purpose and (b) it fails *Pike* balancing.

A. The Arbitrary Permit Limit Has Been Maintained for a Discriminatory Purpose

TABC contends that because the *original* purpose of the arbitrary permit limit is lost to the ages, therefore federal courts are powerless to find a discriminatory purpose today. Not so. Under the *Arlington Heights* framework, a law that has been "*maintained* for [an] invidious purpose" (i.e., excluding out-of-state competitors) merits strict scrutiny. *Rogers v. Lodge*, 458 U.S. 613, 622-25 (1982) (emphasis added) (election methods adopted more than sixty years earlier, during a period of overt racial discrimination, now "serve[d] to maintain the [racial] status quo" and therefore had a discriminatory purpose even though "neutral on their face") (affirming *Lodge v. Buxton*, 639 F.2d 1358 (5th Cir. 1981)).

Here, the arbitrary permit limit is being "maintained for an invidious purpose." *Rogers*, 458 U.S. at 622. TPSA's Executive Board members—owners of the largest chains in Texas—repeatedly testified to the Legislature that the arbitrary permit limit "keep[s]" the liquor business "in the hands of families in the state," ROA.14150; "discourage[s] . . . out of state big box stores from entering the Texas liquor store market," ROA.14051-52; and that repealing the arbitrary permit limit would "open it up for [firms] outside Texas to come in." WM Br. at 72-73 (quoting ROA.14148, 14150-52).

Rather than attempt to distinguish *Rogers*—a decision of this Court, affirmed by the Supreme Court, applying the *Arlington Heights* framework—TABC instead contends, for the first time, that "use of the *Arlington Heights* factors should be rejected." TABC Resp. Br. 9. TABC's contention is directly contrary to this Court's decision in *Allstate Ins. Co. v. Abbott*, which followed the Fourth Circuit in adopting the *Arlington Heights* framework for use in Dormant Commerce Clause cases. 495 F.3d 151, 160 (5th Cir. 2007). TABC's new argument is also waived: Before the District Court, TABC agreed that the *Arlington Heights* factors were "germane to an analysis of discriminatory intent under the dormant commerce clause." ROA.9195-96 (quoting *Allstate* and citing *Arlington Heights*).

B. The Arbitrary Permit Limit Fails the *Pike* Balancing Test

1. *Pike* Applies to Alcohol Retailing

The arbitrary permit limit also fails *Pike* balancing, because its burdens on interstate commerce are "clearly excessive in relation to" its nonexistent "local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see* WM Br. 73-75.

TPSA contends that *Pike* does not apply to alcohol regulations, but then cites a dozen cases from the Supreme Court, this Court, and other Circuit Courts holding just the opposite: *Pike* does apply. TPSA Resp. Br. 38-39. TPSA attempts to confine those holdings to the facts of each case, but none of the cited decisions was

so limited. Rather, these cases (a) held that the Dormant Commerce Clause applies to alcohol regulations and then (b) articulated the *Pike* test as part of the applicable analysis. *See* WM Br. 52-54.

TPSA's discussion of *Baude v. Heath* is especially misleading. 538 F.3d 608 (7th Cir. 2008). TPSA contends that *Baude*, which struck down a state alcohol regulation under *Pike*, "fail[ed] even to mention the Twenty-First Amendment." TPSA Resp. Br. 39. But *Baude* cited, discussed, and applied *Granholm v. Heald*, 544 U.S. 460 (2005), the Supreme Court's leading precedent on the interaction between the Twenty-First Amendment and the Dormant Commerce Clause. *See* 538 F.3d at 611-12.

TPSA also contends that any law regulating "retailers" "must also be protected by the Twenty-First Amendment." TPSA Resp. Br. 39. This Court has rejected this argument twice already—first, in *Cooper I*, which held that the Dormant Commerce Clause prohibits Texas from requiring alcohol retailers to be Texas residents, 11 F.3d at 555, and then again in *Cooper II*. *Cooper v. Tex. Alco. Bev. Comm'n*, 820 F.3d 730, 743 (5th Cir. 2016).

TABC contends that *Pike* cannot apply because "a complete ban on alcohol would be the ultimate burden on interstate commerce and Appellees' theory would invalidate it under *Pike*." TABC Resp. Br. 20. This argument fails at the very outset: "a complete ban on alcohol" would *not* violate the Dormant Commerce

Clause (nor trigger *Pike*), because a complete ban would not create disparate treatment of out-of-state retailers—everyone, everywhere, would equally be barred from selling alcohol to Texans.

TABC also cites *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608 (6th Cir. 2018), *cert granted*, 139 S. Ct. 52 (2018), but *Byrd* supports Walmart's position. In *Byrd*, the Tennessee statute imposed residency requirements on the officers, directors, *and shareholders* of package-store firms. The provision most relevant to this case is the requirement that even shareholders be Tennessee residents. As to that provision, even the dissent agreed with the majority that requiring shareholders to be Tennessee residents was invalid under *Pike*. 883 F.3d at 625 (majority); *id.* at 635 (dissent). Before the Supreme Court, the Tennessee retailers have now dropped any attempt to defend the shareholder residency requirement against *Pike*. *See* Brief for Petitioner, No. 18-96, 2018 WL 5962887, at *17 (filed Nov. 13, 2018).

2. Walmart Litigated *Pike*

TPSA again contends that *Pike* was not litigated below. TPSA Resp. Br. 44-45. That is incorrect. *See* WM Br. 54 (collecting record citations). Moreover, as Walmart pointed out in its Principal Brief, TPSA waived this argument by not raising it below. *Id*. TPSA does not respond to this point, and thus concedes that its waiver argument is waived.

3. The Arbitrary Permit Limit Has No Local Benefits

The evidence—including repeated, sworn legislative testimony from TPSA's Executive Committee members—demonstrates that the arbitrary permit limit has a disparate impact on interstate retailers. WM Br. 73-75. Therefore, the arbitrary permit limit must be struck down if its burden on interstate commerce is "clearly excessive in relation to" its local benefits. *Pike*, 397 U.S. at 142. This test is met because the arbitrary permit limit has no local benefits.

i) The Arbitrary Permit Limit Does Not Confer any Local Benefit of Promoting "Family" Businesses

Even assuming that promoting "family" businesses were a legitimate local interest, the arbitrary permit limit does nothing to achieve it. In fact the arbitrary permit limit makes it *harder* for family members to work together because, as the District Court found, "under the consanguinity exception, the consolidating relative may not be employed by the current permittee or have any ownership in the permittee's business." ROA.9443.

TABC cannot bring itself to defend this law as it actually is; instead, TABC now disputes the District Court's factual finding, and contends that "[f]amily 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." TABC Resp. Br. 26. TABC is flat wrong.

As TABC's then-licensing director testified at trial, the consolidating relative (i.e., the straw buyer) is "*not allowed* to be an owner or agent, servant or employee" of the chain to which the new permits will be consolidated. ROA.10660 (emphasis added). The trial record also contains testimony to the Legislature, from the daughter of the owner of a package store firm. She testified that her family "has struggled to grow our business because there's a law that limits some people to owning only five stores." ROA.14127-28. The daughter was unable to serve as the consolidating relative because she "work[ed] at the liquor stores," and TABC had told her family that "if the [new] package store permit came in under [her] name [she] could no longer be employed by" her family's firm. ROA.14131. The daughter's experience was no aberration. At the same legislative hearing, TABC's own representative testified: "The family member who acquires the additional package stores to be consolidated has to be completely separate [from the existing firm]." *Id.*

The consanguinity exception therefore impedes, rather than assists, real "family" businesses, that is, businesses in which all the family members work for or own the business. If such a "family" business wants to grow beyond five stores, then at least one family member must give up her ownership, or her employment, so that she can serve as the "consolidating relative" (i.e., the straw buyer for additional permits).

There is no putative local benefit, relating to promoting "family" businesses, that is served by restricting true "family" businesses to five permits, while allowing other package store firms to acquire unlimited permits so long as their owners have a family member who is ***not*** involved with the firm. Any such benefit could be achieved without burdening interstate commerce—for example, through favorable tax treatment, as Walmart proposed below. ROA.9127.

ii) Discriminating on the Basis of Family Status Does Not Confer any Local Benefit of "Strategic Growth"

TABC also contends that the arbitrary permit limit serves the local benefit of promoting "strategic, but limited, growth" of package stores in "urban areas," "while leaving rural areas to other, smaller retailers." TABC Resp. Br. 27. This argument, as the District Court found, "simply beggars belief." ROA.9444. The consanguinity exception allows the same (unlimited) growth in rural areas as in urban areas. Nothing in the statute or in TABC's application of it makes any distinction between rural and urban areas. TABC and TPSA offered only one example of a "rural area" at trial, and this area was (contrary to TABC's contention), served by Western Beverages, which is one of the largest chains in Texas. ROA.10932-33.

The record proves the obvious: discriminating against firms whose owners lack a "consolidating relative" does not achieve any local benefit of "strategic

growth." Any such benefit could be achieved without burdening interstate commerce—for example, by imposing a cap on the number of permits issued in rural areas, as Walmart proposed below. ROA.9127.

iii) The Arbitrary Permit Limit Does Not Confer any Local Benefit Relating to "Estate Planning"

TABC contends that the consolidation procedure confers a local benefit relating to estate planning, but cites no evidence of any such actual benefit. TABC Resp. Br. 26-27.

The consanguinity exception does not address estate planning. Instead, the exception allows a (living) relative to apply for and then consolidate permits an unlimited number of times, without any requirement that the relative do anything at all (e.g., open a store) before "consolidating" the permit. ROA.11243.

TABC does not cite a single instance where the five-permit limit was exceeded for purposes of "estate planning." *See* TABC Resp. Br. 26-27. Instead, TABC cites testimony from TABC's then-licensing director, who testified that families occasionally consolidate *fewer than five permits*. *Id.* (citing ROA.10717). By contrast, the record is full of examples of large chains using the consanguinity exception to have the same (living) relative serve, over and over again, as a straw buyer to obtain and then "consolidate" huge numbers of permits, for reasons having nothing to do with estate planning. ROA.10885-86; ROA.11241-42.

Moreover, Texas already has a law that governs the transfer of alcoholic beverage permits upon their holder's death (no surprise—they go to his successor). Tex. Alco. Bev. Code § 11.10. TABC gives no explanation of what (if any) additional local benefit is provided by "consolidation" that is not already conferred by this existing law. Any such benefit could be achieved without burdening interstate commerce—for example, by amending the existing law on how permits are transferred after death.

CONCLUSION

The judgment of the District Court denying declaratory relief should be REVERSED and REMANDED with instructions to issue a judgment declaring (a) that Section 22.16 violates the Equal Protection Clause; and (b) that Sections 22.04 and 22.05 together violate the Commerce Clause.

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Respectfully submitted,

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This is to certify that on December 27, 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.

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 Trend Micro Office Agent, version 12.0.4456, and is free of viruses.

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