No. 18-50299

In the United States Court of Appeals For the Fifth Circuit

WAL-MART STORES, INCORPORATED; WAL-MART STORES TEXAS, L.L.C.; SAM'S EAST, INCORPORATED; QUALITY LICENSING CORPORATION,
Plaintiffs – Appellees Cross-Appellants

v.

TEXAS ALCOHOLIC BEVERAGE COMMISSION; KEVIN LILLY, Presiding Officer of the Texas Alcoholic Beverage Commission; IDA CLEMENT STEEN,
Defendants – Appellants Cross-Appellees

TEXAS PACKAGE STORES ASSOCIATION, INCORPORATED,
Movant – Appellant Cross-Appellee

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

PETITION FOR PANEL REHEARING BY THE TEXAS PACKAGE STORES ASSOCIATION

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STATEMENT OF ISSUE

The Panel should reverse *and render* judgment in favor of Defendants on the Plaintiffs' claim of an impermissible burden under *Pike v. Bruce Church*. As the Panel rightly found, the record is "devoid" of evidence in support of the Plaintiffs' claims under *Pike*. While the Panel correctly reversed the district court's judgment under *Pike*, no remand on *Pike* is necessary given the complete absence of evidence that could demonstrate an impermissible burden under *Pike*.

ARGUMENT IN SUPPORT OF PETITION FOR PANEL REHEARING

The Texas Package Stores Association (the "TPSA"), by this Petition for Panel Rehearing, requests the Court to reconsider one aspect of its opinion. Specifically, the TPSA requests the Court reconsider the following portion of the Panel's opinion:

> The district court should have considered evidence addressing the public corporation ban's effect on the flow of interstate goods, or how the ban affects the flow of the potential market participant's goods to the Texas liquor retail market. The record is devoid of such evidence. Therefore, a remand is necessary to allow the trial court to find facts for proper application of the *Pike* test.

Slip op. at 23-24 (citations omitted).[1] The TPSA respectfully requests that the remand ordered by the Court is unnecessary given the ruling that the record contains no evidence to support any facts that the Texas public corporation ban runs afoul of the *Pike* test. The TPSA respectfully requests the Court render judgment on the *Pike* test in favor of the Defendants.

The TPSA understands that remand to the district court will be done on the "discriminatory purpose" test under the dormant Commerce Clause. *See* slip op. at 19. Even so, remand is not necessary on the *Pike* test under the dormant Commerce Clause, because, as the Court concluded, the "record is devoid" of evidence that would support Walmart's claims under *Pike*. *See id.*

[1] A copy of the Court's opinion is attached to this Motion.

If, after a full trial, there is no evidence on an element of the plaintiff's claim, then on appeal, judgment can be rendered in favor of the defendant on that claim. *See Veasey v. Abbott*, 830 F.3d 216, 229-30 (5th Cir. 2016) (reversing and rendering is "proper course" if record permits only one resolution of factual issue); *Allstate Ins. Co. v. Receivable Fin. Co.*, 501 F.3d 398, 414 (5th Cir. 2007) (reversing and rendering due to "insufficient evidence" when plaintiff "had a full and fair opportunity to present" its case); *Taita Chem. Co. v. Westlake Styrene*, 351 F.3d 663, 671 (5th Cir. 2003) (because there was "no evidence" of essential element of plaintiff's claim under correct legal theory, where plaintiff "chose to proceed" with an incorrect legal theory that would not have required such essential element, "we do not remand" but instead "render judgment" on appeal); *Bennett v. Total Minatome Corp.*, 138 F.3d 1053, 1062 (5th Cir. 1998) (reversing trial court's judgment in favor of plaintiff and rendering judgment in favor of defendant when there was "no evidence" to support trial court's judgment); *Odom v. Frank*, 3 F.3d 839, 850 (5th Cir. 1993) (finding district court's fact findings to be "clearly erroneous," and rendering judgment in favor of defendants, where plaintiff "failed to adduce forth sufficient evidence to demonstrate" discriminatory intent); *Abbott v. Equity Group*, 2 F.3d 613, 623-24 (5th Cir. 1993) (summary judgment against plaintiff is appropriate when "record is devoid" of evidence); *Moore v. Boating Indus. Ass'ns*, 819 F.2d 693, 712-13 (7th Cir. 1987) (because there was "no

evidence" sufficient to raise fact issue on element of plaintiff's claim, "proper disposition" was to "direct judgment on that claim for defendants").

In this case, regarding the *Pike* balancing test, Walmart had a full and fair opportunity to present evidence on the issue on which the Panel has indicated a remand may be appropriate—"the flow of interstate goods." *See* slip op. at 23-24. In fact, the TPSA, in its pretrial Motion for Summary Judgment, pointed out that a statute can impose a burden on interstate commerce "when it inhibits the flow of goods interstate," but that there was "no evidence of such a burden" with respect to the public corporation ban. (ROA.3841-42.) In its response, Walmart failed to produce any evidence of any inhibition on the flow of goods, but instead made an incorrect legal argument, asserting that "*Pike* is not limited, as TPSA claims, to laws that 'inhibit the flow of goods.'" (ROA.6546.) As a technical matter, the TPSA was—and still is—entitled to judgment as a matter of law on Walmart's *Pike* claims.

Walmart took the same approach during the discovery phase. The TABC served the following Request for Admission on Walmart: "Admit that Section 22.16 of the Texas Alcoholic Beverage Code does not prohibit the flow of goods across state lines." Walmart objected to this Request and refused to answer it on the basis that it "seeks admission or denial of facts that are *irrelevant* to any issue in this case." (ROA.4722-23 (emphasis added).) Walmart's stated position that

the flow of interstate goods is irrelevant to the case was a judicial admission that its *Pike* claim did not rely on an inhibition of the flow of interstate goods.

After a full bench trial, even though Walmart had been given every opportunity to produce evidence that the public corporation ban inhibited the flow of interstate goods, the record is devoid of any such evidence. The failure to produce evidence on this issue was a litigation choice by Walmart. In post-trial briefing to the district court, the TPSA pointed out, "There is no evidence the flow of goods is inhibited" (ROA.9183), and requested a finding of fact on that very point (ROA.8996). In response, Walmart sought no findings of fact regarding the flow of interstate goods (ROA.9105), but simply relied on an incorrect legal theory:

> The TPSA claims, wrongly, that *Pike* balancing applies only to laws that "inhibit[] the flow of goods interstate." TPSA Br. ¶24. That is incorrect. The Supreme Court has applied *Pike* to strike down laws that do not "inhibit" any "flow of goods."

(ROA.9257.) Therefore, a remand on *Pike* is unnecessary. The reason why the record is devoid of evidence on the pertinent issue is because Walmart did not attempt to adduce evidence on the issue. This was a choice Walmart made in trying its case to finality. If Walmart did not adduce evidence on an essential issue, after a full trial, Walmart should bear the consequence of that choice, not the TPSA and the TABC.

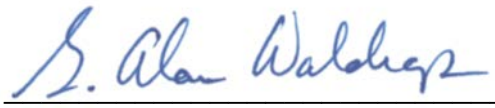
Rendering judgment is also consistent with the parties' appellate briefing. Both the Defendants and the TPSA argued that there was "no evidence" of an impermissible burden, and prayed that judgment be reversed and rendered. Walmart, in turn, did not argue there was any evidence of an impact on the flow of goods, and did not request a remand on its *Pike* claim.

At every stage, Plaintiff Walmart declined to litigate the issue of section 22.16's impact on the flow of interstate goods. The Defendants and the TPSA ought not be subjected to additional trial court proceedings on an evidentiary point when Walmart—the largest retailer in the world—voluntarily opted not to produce any evidence on that point through a full trial.[2] On rehearing, this Court should reverse and render on this point, because the record is devoid of evidence in support of Walmart's claim that section 22.16—the public corporation ban—imposes an impermissible burden on interstate commerce under *Pike*. The Defendants and the TPSA have been entitled to judgment as a matter of law on the issue of whether the public corporation ban fails the *Pike* test at every stage of this case—summary judgment, trial, post-trial, and now after appeal. The Defendants and the TPSA are still entitled to judgment on this issue based on no evidence. The TPSA respectfully requests the Court reconsider its remand on this issue and, instead, render judgment in favor of the Defendants and the TPSA.

[2] *Cf. Veasey*, 830 F.3d at 242 (remanding, but with instructions that "the district court should not take additional evidence").

WHEREFORE, Appellant Texas Package Stores Association prays that this Court grant this Petition for Panel Rehearing pursuant to Federal Rule of Appellate Procedure 40, and on rehearing render judgment that Texas Alcoholic Beverage Code section 22.16 survives the *Pike* balancing test in this suit.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2019, I electronically filed this Petition for Panel Rehearing of Appellant Texas Package Stores Association with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that counsel for Plaintiffs and Defendants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

G. Alan Waldrop

CERTIFICATE OF COMPLIANCE

Pursuant to Fifth Circuit Rule 32.2 and 32.3, the undersigned certifies that this petition complies with the type-volume limitations of Fed. R. App. P. 40(b) and the typeface requirements of Fed. R. App. P. 32(a)(6).

1. Exclusive of the exempted portions in Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2, the petition contains 1,391 words.

2. The petition has been prepared in proportionally spaced typeface using:

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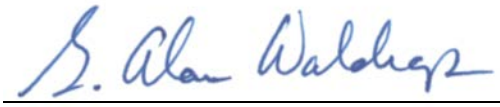
3. The undersigned understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 40(b), may result in the court's striking the brief and imposing sanctions against the person signing the brief.



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