No. 18-50299

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WAL-MART STORES, INC., et al.,

Plaintiffs – Appellees / Cross-Appellants,

v.

TEXAS ALCOHOLIC BEVERAGE COMMISSION, et al.,

Defendants – Appellants / Cross-Appellees,

and

TEXAS PACKAGE STORES ASSOCIATION, INC.,

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

BRIEF AMICI CURIAE OF PACIFIC LEGAL FOUNDATION AND RETAIL LITIGATION CENTER IN SUPPORT OF WAL-MART STORES, INC., et al.

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DISCLOSURE STATEMENT

No. 18-50299

Wal-Mart Stores, Inc. et al.,
v.
Texas Alcoholic Beverage Commission, et al.

Pacific Legal Foundation (PLF) is a non-profit corporation, exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). It has no parent corporation, and no publicly held company has a 10% or greater ownership interest in PLF.

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

No. 18-50299

Wal-Mart Stores, Inc. et al.,
v.
Texas Alcoholic Beverage Commission, et al.

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that no persons or entities other than those in the parties' briefs have an interest in the outcome of this case.

- Pacific Legal Foundation and Retail Litigation Center Inc., *Amicus Curiae*

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Pursuant to Federal Rule of Appellate Procedure 29(a), Pacific Legal Foundation (PLF) and the Retail Litigation Center Inc., (RLC) file this amici curiae brief in support of Plaintiffs-Appellees Wal-Mart, et al.

PLF was founded in 1973 to advance the principles of individual rights and limited government, representing the views of thousands of supporters nationwide. PLF frequently advocates for economic liberty in cases involving the Commerce Clause, equal protection, and substantive due process. For example, PLF attorneys were counsel of record in *Merrifield v. Lockyer*, 547 F.3d 978, 980 (9th Cir. 2008), *Minerva Dairy, Inc. v. Harsdorf*, No. 18-1520, 2018 WL 4763351 (7th Cir. Oct. 3, 2018), and *Bruner, et al. v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014), and participated as amicus curiae in *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), and *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281 (2d Cir. 2015). PLF urges this court to affirm the decision of the district court, which subjected Texas's protectionist alcohol licensing laws to meaningful scrutiny.

RLC is a public policy organization whose members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of

[1] Pursuant to Fed. R. App. P. 29(a), Amici has received consent from all parties to the filing of this brief.

consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as *amicus curiae* in more than 100 cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case represents the second time Texas has come before this Court to defend its protectionist liquor permit laws. In an earlier case over two decades ago, it claimed broad powers under the Twenty-First Amendment to forbid any out-of-state entities from holding liquor licenses. This Court rebuffed Texas and held that the State's efforts to erect a "statutory barrier" that "shield[ed] the State's operators from the rigors of outside competition" was unconstitutional. *Cooper v. McBeath*, 11 F.3d 547, 555 (5th Cir. 1994). Undeterred, Texas immediately revised its laws to more subtly achieve the same illicit protectionist goals. It enacted a ban on corporations with more than 35 shareholders from holding liquor permits (the "public corporations ban"), while allowing to remain on the books a consanguinity loophole that permitted many Texas corporations to expand indefinitely by sharing licenses among family members (the "consanguinity exception"). The impact of those laws has been entirely predictable. More than two decades after this Court invalidated

Texas's law, only two percent of the package store permits are held by a firm that has even one non-Texas owner.

Contrary to Texas's argument, the Twenty-First Amendment does not outweigh all other constitutional limitations on state power, and cannot be used to shield the public corporations ban or the consanguinity exception from meaningful scrutiny under the dormant Commerce Clause and Equal Protection Clause of the Fourteenth Amendment. The district court saw through Texas's veneer of neutrality and held that the public corporations ban was thinly veiled protectionism and that the consanguinity exception was illogical and arbitrary. Once again, this Court should affirm that Texas's efforts to protect the local liquor industry at the expense of out-of-state competitors are unconstitutional.

ARGUMENT

I. THE TEXAS STATUTES VIOLATE THE DORMANT COMMERCE CLAUSE

1. The Twenty-First Amendment Does Not Insulate State Liquor Laws from Constitutional Scrutiny

The Twenty-First Amendment expanded the power of states to regulate the "use, distribution, or consumption [of alcohol] within its borders." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964). But it does not override other constitutional limitations on state power. Indeed, the notion that the Twenty-First Amendment protects states from constitutional scrutiny is "a legal dinosaur that went

extinct long ago[.]" *Dickerson v. Bailey*, 336 F.3d 388, 406 (5th Cir. 2003). This Court and the Supreme Court have repeatedly emphasized that the Twenty-First Amendment cannot be used by a state "as a veil to hide from constitutional scrutiny its parochial economic discrimination against out-of-state [companies]." *Id.* at 407. That is true whether a law directly burdens interstate commerce and is subject to heightened scrutiny or a law indirectly burdens interstate commerce and is subject to *Pike* balancing. As the Supreme Court has explained, "there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church, Inc.*, [397 U.S. 137, 142 (1970)] balancing approach." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (applying *Pike* balancing to a liquor law); *See also* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1707 (1984) (explaining that *Pike* balancing serves as a vital "check against the possibility of covert protectionism").

Nor can a state "insulate the liquor industry from the Fourteenth Amendment's requirements of equal protection[.]" *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 108 (1980). The Supreme Court has aggressively invalidated state liquor laws that burden interstate commerce. *Granholm v. Heald*, 544 U.S. 460, 487 (2005); *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp.*, 476 U.S. 573. Most notably, in

Bacchus Imports, the Supreme Court invalidated Hawaii's excise tax which applied to the sale of liquor but excluded liquors that were made from indigenous fruit or shrubs. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). In invalidating the law, the Supreme Court emphasized that the "central purpose" of the Twenty-First Amendment "was not to empower States to favor local liquor industries by erecting barriers of competition." *Id.* at 276. This Court has similarly invalidated or closely scrutinized a variety of discriminatory liquor laws from Texas. In *Cooper*, it concluded that Texas's law prohibiting companies owned by a majority of non-residents from holding liquor permits did not further the "core concerns" of the Twenty-First Amendment. 11 F.3d at 555. And in *Dickerson*, it held that Texas's prohibition on direct-to-consumer sales by out-of-state wineries was invalid under the dormant Commerce Clause. 336 F.3d 388. In that case, the Court rejected Texas's argument that all regulations on the importation of alcohol necessarily implicated "core concerns." *Id.* at 404-05. Instead, the state was required to present evidence that the law in question was in furtherance of the core concerns of the Fourteenth Amendment. *Id.* at 406. Finally, in *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 818 (5th Cir. 2010), this Court upheld a Texas law which regulated the physical location of a distillery, but emphasized that it concerned "a critical component of the three-tier system" which was a narrow "caveat" to the ordinary rule. In contrast, laws such as the Texas law concerning "legal residence of

owners" did not involve "an inherent aspect of that system" and were therefore subject to full constitutional review. *Id.* at 821.

This case provides the Court with an opportunity to reaffirm that while laws concerning a "critical component of the three-tier system" may receive greater deference, liquor laws outside of that narrow exception do not. States may have a variety of legitimate interests in alcohol regulation that are not directed at a "critical" or "inherent" aspect of the three-tier system. Otherwise, the narrow exception would swallow the rule and insulate even the most attenuated state interest short of overt protectionism from scrutiny. For instance, a state could argue that its generalized interest in facilitating compliance with state alcohol laws shielded all of its enforcement efforts from constitutional scrutiny.

Neither the public corporation ban nor the consanguinity exception concern a "critical component of the three-tier system." As this Court explained in *Wine County*, laws concerning the "legal residence of owners" are not critical components of the system. Likewise, neither the number of owners, nor their relationship to each other, nor the publicly traded nature of a company can be said to be a "critical component of the three-tier system." A repeal of these provisions will not impact the division between producer, wholesaler and retailer. Likewise it will not impact Texas's ability to regulate the total number of retailers that can hold permits in an evenhanded fashion. Repeal would simply allow any company regardless of state of

origin or corporate structure to compete on an even playing field under the same ground rules and under the full weight of the three-tier system.

The Equal Protection Clause also applies in full force to liquor regulations. Under this clause, the states and the Federal Government are barred from enacting an "arbitrary" law that lacks "relation to the purpose for which it is made." *Smith v. Cahoon*, 283 U.S. 553, 567 (1931). That includes laws that are motivated by "mere economic protection of a particular industry." *St. Joseph Abbey*, 712 F.3d at 222. The Twenty-First Amendment does not give the states the authority to circumvent those protections and enact wholly arbitrary laws. Indeed, even the Supreme Court's broadest interpretations of the power bestowed on the States by the Twenty-First Amendment did not hold that liquor laws were immune from such scrutiny. *See Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 50 (1966) (applying rational basis review to an equal protection challenge to a New York liquor law), *abrogated by Healy*, 491 U.S. 324. In another case, the Supreme Court stated that "the Twenty-First Amendment does not in any way diminish the force of … the Equal Protection Clause." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996). And the Supreme Court's decision in *Granholm v. Heald* placed any doubts to rest by emphatically declaring that "the Twenty-first Amendment does not supersede other provisions of the Constitution." 544 U.S. 460 at 486. This Circuit's precedent is likewise unequivocal that liquor laws without a "reasonable basis" are

invalid under the Equal Protection Clause. *Parks v. Allen*, 426 F.2d 610, 613 (5th Cir. 1970)

2. Texas's Public Corporations Ban Is Invalid under the Dormant Commerce Clause

The Constitution was drafted and ratified amidst a backdrop of concern that the "interfering and unneighborly regulations of some States" were "contrary to the true spirit of the Union" and would result in "animosity and discord[.]" The Federalist No. 22 (Alexander Hamilton); *cf.* James Madison, *Preface to Debates in the Convention of 1787* (noting "the animosity kindled among the States by their conflicting regulations"). Indeed, avoiding "the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation" was one of the "immediate reason[s] for calling the Constitutional Convention." *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). The dormant Commerce Clause serves as a check against state laws that "place burdens on the flow of commerce." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995). Texas's corporation ban is precisely such a law. As the district court persuasively concluded, Texas's public corporations ban was enacted to exclude out-of-state competitors and has had a disproportionate effect on out-of-state entities. Likewise, the "putative local benefits" of the ban are clearly outweighed by its negative impact on commerce. *Pike*, 397 U.S. at 142.

a. The public corporation ban was clearly motivated by protectionism which means that heightened scrutiny applies

"A statute violates the dormant Commerce Clause where it discriminates against interstate commerce either facially, *by purpose*, or by effect." *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007) (emphasis added) (citing *Bacchus Imports*, 468 U.S. at 270). Such laws are subject to the "strictest scrutiny." *Hughes*, 441 U.S. at 337. The district court found that Texas enacted its public corporation ban with the unmistakable goal of excluding out-of-state competitors from the Texas liquor market for the purpose of protecting the local liquor industry from competition. In reaching that conclusion, it thoroughly applied the *Arlington Heights* factors that this Court adopted for dormant Commerce Clause review in *Allstate.* It found that "a clear pattern of discrimination emerges from the effect of the state action" since the ban had resulted in 98% of package stores being exclusively Texas-owned, despite several large out-of-state entrants such as Wal-Mart having expressed interest in entering the market. *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 313 F. Supp. 3d 751, 767 (W.D. Tex. 2018). It also found that the "history of discrimination by the decision making body" and the "specific sequence of events leading up to the challenged decision" strongly supported a conclusion of animus given Texas's history of enforcing an expressly discriminatory scheme for decades and enacting the public corporation ban in the immediate aftermath of the Fifth Circuit's decision in *Cooper*. *Id.* Finally, it explored "the legislative . . . history of

the state action" and found that key sponsors of the ban were anxious about out-of-state competitors and designed the law to frustrate them. *Id.* at 768. The Court also considered extensive protectionist rhetoric by lobbyists supporting the measure as well as protectionist rhetoric in debates surrounding a potential repeal of the ban. *Id.* at 768. The district court thus persuasively concluded that all of the *Arlington Heights* factors pointed to the conclusion that the public corporations ban was enacted with discriminatory purpose.

The Appellants argue that this evidence of discriminatory purpose is insufficient because discriminatory intent "alone" cannot invalidate a protectionist law. TABC Br. at 13-14. But their argument is unsupported by precedent, would neuter the protection of the dormant Commerce Clause, and is incompatible with the state of the law in other analogous areas such as equal protection or free exercise.

First, this Court has repeatedly emphasized that "[a] court may find discrimination based on evidence of discriminatory effect *or* discriminatory purpose." *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) (emphasis added); s*ee also Allstate*, 495 F.3d at 160. And other Courts including the Fourth and Eighth Circuit Courts of Appeals have invalidated laws due to discriminatory purpose under the Commerce Clause. *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252

F.3d 316, 341 (4th Cir. 2001); *S. Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 596 (8th Cir. 2003).

Second, the discriminatory intent prong serves as a vital check on legislators who craft seemingly neutral laws that are designed with the purpose of excluding out-of-state entrants while minimally burdening in-state businesses. Texas's public corporation ban is typical of this type of masked discrimination. The legislature was aware that few, if any, local interests would be harmed by the ban. Between a grandfathering clause which protected enfranchised Texas businesses—and Texas's residency restriction which this court invalidated in *Cooper* ensured that only Texas businesses would qualify—and a consanguinity exception which allows Texas businesses that were grandfathered to continue to grow despite permit limits, Texas's law was designed with precision to punish out-of-state interests while shielding in-state corporations from negative impact. Texas's statutory scheme is therefore imbued with "the economic protectionism that the Commerce Clause prohibits." *W. Lynn Creamery v. Healy*, 512 U.S. 186, 205 (1994).

Third, allowing challenges to laws that are motivated by a discriminatory purpose is consistent with controlling practice in other areas of constitutional law. In the equal protection context, the Supreme Court has emphasized that "[w]hen there is proof that a discriminatory purpose has been a motivating factor in the decision . . . judicial deference is no longer justified." *Vill. of Arlington Heights v.*

Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). That is true even when "the challenged action [does not] rest[] solely on racially discriminatory purposes." *Id.* Similarly, in the free exercise context, a purposefully discriminatory law that appears facially neutral and generally applicable, and therefore subject to rational basis review, will instead be subject to strict scrutiny because "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). Discriminatory intent also results in the invalidation of laws establishing religion. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 861 (2005). Indeed, "governmental purpose is a key element of a good deal of constitutional doctrine." *Id.* (noting that "discriminatory purpose [is] relevant to [a] dormant Commerce Clause claim"). *See* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1145 (1986) (drawing an analogy between the Equal Protection Clause case law and the dormant Commerce Clause and explaining why an inquiry into motive is important in both contexts).

In response, Appellants cite to *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968), a Free Speech Clause case. It is true that in the specific context of the Free Speech Clause legislative intent does not invalidate an otherwise even-handed speech restriction. But *O'Brien* predates *Arlington Heights*, *Lukumi*, *and McCreary*

Cty., as well as dormant Commerce Clause decisions such as *Bacchus* which reference discriminatory intent. In light of the role of intent as "a key element of a good deal of constitutional doctrine," *McCreary Cty.*, 545 U.S. at 861, *O'Brien* is best seen as an anomaly in an otherwise unbroken pattern. Here, strict scrutiny applies which results in "virtually *per se*" invalidation of the law. *Pike*, 397 U.S. at 142.

b. The public corporations ban is also invalid under *Pike* balancing

Even if the Court agrees with Appellants that *Pike* balancing is the applicable test in this case, it should affirm the district court's invalidation of the ban. *Pike* balancing involves a meaningful review of state action. The Supreme Court has emphasized that under this test courts must weigh "the extent of the burden . . . the nature of the local interest involved, and . . . whether it could be promoted as well with a lesser impact on interstate activities." *Id*. at 142. This court has described that test as a "flexible balancing approach." *Texas Manufactured Hous. Ass'n, Inc. v. City of Nederland*, 101 F.3d 1095, 1101 (5th Cir. 1996). *Pike* balancing has also been described as "deferential but not toothless." *Colon Health Centers of Am., LLC v. Hazel*, 733 F.3d 535, 545 (4th Cir. 2013). *Pike* itself is illustrative. In that case, the Supreme Court invalidated under *Pike* balancing an Arizona law which required all cantaloupe grown in Arizona to be packaged and labelled a certain way. *Pike*, 397 U.S. 137. While the law served the legitimate state interests of protecting

consumers from unfit goods and protecting the reputation of Arizona growers, it was unduly burdensome to firms that harvested the fruit in Arizona but packed it outside of the state. In effect, the law would either have prevented such growers from harvesting cantaloupes at all, or required extensive capital investments to build packing facilities in Arizona. The Court therefore concluded that the harm to interstate commerce outweighed any putative benefit.

Appellants argue that Texas's public corporation ban does not burden interstate commerce at all because it merely regulates "the particular structure or methods of operation" of liquor retailers. *Allstate Ins. Co.*, 495 F.3d 151 at 163. *cf Int'l Truck & Engine Corp.*, 372 F.3d 717 at 719. But the state has a history of decades of overt protectionism and express exclusion of competitors from Texas's market. And Texas law grandfathered established Texas public corporations and allowed them to grow without limits under the consanguinity exception. Meanwhile, as the district court found, the ban was crafted to exclude out-of-state competitors that might have the economy of scale necessary to compete against incumbent businesses that were the beneficiaries of express favoritism. And when an out-of-state competitor sought to enter into the Texas market, existing competitors fought a fierce, albeit ultimately unsuccessful, effort to block its entry, at least partially based on the public corporations ban. ROA.10893-95 (acknowledging that Gabriel's protest to Total Wine & More's entry raised the argument that Total Wine's entry

"violates or at least implicates . . . the public corporation ban"). When seen in that light, it is apparent that Texas's law is constitutionally suspect.

An especially rigorous application of *Pike* balancing is important "when the burdens [of the ban] fall predominantly on out-of-state interests." *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 569 (4th Cir. 2005). In this context, a rigorous application of *Pike* balancing is due. With ordinary legislation, "burdened in-state interests can be relied upon to prevent or rectify legislative abuse." *Id.* But "when there are few or no adversely affected in-state interests, *Pike* balancing serves as a check against legislative abuse." *Id.* That is the case with Texas's law.

Under *Pike,* Texas's law must be scrutinized to first identify the claimed local benefits and then evaluated as to whether those benefits are not outweighed by the harm that the law inflicts. With regard to the claimed local benefits, merely "'speculative' benefits will not pass muster." *Colon Health*, 733 F.3d at 545 (internal citations omitted). Nor can the reasons be protectionism in disguise. For instance, this Court has explained that a law cannot be justified by "preventing local economic disruption and the development of monopolies affecting the local market" because those are merely a reframing of protectionist motives that are impermissible under the dormant Commerce Clause. *Louisiana Dairy Stabilization Bd. v. Diary Fresh Corp.*, 631 F.2d 67, 70 (5th Cir. 1980), *aff'd sub nom. Louisiana Dairy Stabilization*

Bd. v. Dairy Fresh Corp., 454 U.S. 884 (1981); Similarly, a law cannot be supported by "boilerplate enabling language" such as generic support for "health, safety, welfare, morals and temperance" *Cooper*, 11 F.3d 547 at 554.[2] A state must at the very least make a "colorable showing" that its law actually furthers those objectives. *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 448 (1978).

The district court assumed that Texas had a legitimate interest in regulating alcohol permit holders. It did not however allow the state to rest on a generalized interest in reducing alcohol consumption or maintaining public health. Instead, it probed those interests and concluded that the Texas ban did not meaningfully serve those interests. In reaching that conclusion, the district court relied on the Fourth Circuit's decision in *Yamaha Motor Corp.*, 401 F.3d at 571. In that case, the Fourth Circuit invalidated a portion of Virginia's motorcycle dealership protection statute which allowed any existing dealer in the state to request evidentiary hearings to block (or substantially delay) the entry of new competitors. While the Court recognized that the state had an interest in preventing oversaturation of the retail market, it concluded that the law was "uniquely anti-competitive" and created "a significant barrier to market entry." *Id.* at 571. But the law had been enacted "in the absence of evidence that [this] protection . . . was needed" and that existing

[2] In *Cooper*, the Court applied strict scrutiny due to the overtly protectionist nature of Texas law, but its criticism of the "boilerplate" rationales adopted by Texas should nevertheless also be carried over to *Pike* balancing.

protections would not sufficiently guard the State's interest. *Id.* at 573; *see also Medigen of Kentucky, Inc. v. Pub. Serv. Comm'n of W. Virginia*, 985 F.2d 164, 167 (4th Cir. 1993) (invalidating a West Virginia law because the harm that the state sought to eliminate was "entirely speculative" and therefore "cannot justify restricting market entry"). Due to the law's "unnecessary and excessive breadth" its "burdens clearly exceeded its benefits." *Yamaha Motor Corp.*, 401 F.3d at 573.

Similarly, the district court found that Texas's public corporations ban is "uniquely anti-competitive" and creates a nearly complete "barrier to market entry." *Wal-Mart Stores, Inc.*, 313 F. Supp. 3d 751 at 777. And Wal-Mart's expert convincingly demonstrated that "there is no economic logic that links the challenged laws to the State's concerns of limiting access to liquor or the State's general concern for promoting temperance and protecting the health and safety of the citizenry." *Wal-Mart Stores, Inc., v. Texas Alcoholic Beverage Commission*, Expert Report of Kenneth G. Elzinga, 2016 WL 9227560 (Feb. 12, 2016 W.D.Tex.); ROA.1643. The testimony and evidence that Texas could have furthered its same goals in a variety of ways that were not anti-competitive and did not result in an excessive burden on interstate commerce was enough to condemn the Texas law. And significantly, no interest that Texas claims to be advancing can justify the inequity that arises from grandfathering in existing Texas-owned public corporations while refusing to allow similarly situated out-of-state competitors to enter the market. The district dourt

therefore correctly invalidated the public corporations ban as a violation of the Commerce Clause.

II. THE STATE'S PROTECTIONIST LAWS ARE INVALID UNDER THE EQUAL PROTECTION CLAUSE

In addition to its finding that the public corporation ban violated the dormant Commerce Clause, the district court concluded that the consanguinity exception violates the Equal Protection Clause. All too often, courts treat rational basis review as little more than a rubber stamp upon government action. In this case, the district court correctly engaged in meaningful rational basis review, examining each of the state's proffered rationales for a sufficient connection to the challenged statute. Finding no sufficient rationale for the consanguinity exception, the district court properly struck it down, and this Court should affirm that finding. However, the district court did not adequately review the state's purported rationale for the public corporations ban and this Court should find that the public corporations ban also violates the Equal Protection Clause.

1. Rational Basis Requires a Meaningful Review of Government Action

Rational basis review should not require judges to "cup [their] hands over [their] eyes and then imagine if there could be anything right with the statute." *Arceneaux v. Treen*, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring). When challenging an economic regulation, "the existence of facts

supporting the legislative judgment is to be presumed…*unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis*." *United States v. Carolene Prods. Co*., 304 U.S. 144, 152 (1938) (emphasis added). The rational basis test is deferential, but not insurmountable: it establishes a rebuttable presumption in favor of legislation that may be overturned by evidence showing that the purpose of the regulation is illegitimate or its foundation is irrational. *See, e.g.*, *Borden's Farm Prods. v. Baldwin*, 293 U.S. 194, 209 (1934) (Rational basis is "not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault."). Rational basis review is not "toothless." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). Plaintiffs challenging economic regulations bear the burden of proving the law is irrational, but rational basis review should not be applied in a manner that is "tantamount to no review at all." *FCC v. Beach Commc'ns*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring in result).

In the instant case, the district court's application of the rational basis test was deferential but not toothless with respect to the consanguinity exception. This meaningful review is consistent with the practice of the Supreme Court, which has struck down numerous laws under rational basis scrutiny because they lacked a sufficient connection to the government's stated legislative purpose.

For instance, in *Zobel v. Williams*, 457 U.S. 55, 56 (1982), the Court struck down an Alaska statute that established a program sharing oil revenue with state residents, where the payment amounts were determined by length of residence in the state. The Court held that neither of the state's justifications survived rational basis review. First, the Court held that there was no rational relationship between the state's desire to create financial incentives for people to reside in Alaska and the statute's distinction among beneficiaries based on their length of residency. *Id*. at 61. Second, the Court rejected as irrational any connection between the government's stated purpose of encouraging prudent management of the oil revenue fund and granting payments for 21 years of residency that predated the statute's enactment. *Id*. at 62-63. Therefore, *Zobel* shows that true rational basis review demands a logical connection between legitimate ends and the means chosen to accomplish those ends—a conclusion embodied in the instant case by the district court's finding that there was no logical connection between the consanguinity exception and any of the rationales advanced by the state.

In *Schware v. Bd. of Bar Examiners of State of N.M.*, 353 U.S. 232 (1957), the Court considered the New Mexico State Board of Bar Examiners' refusal to allow an applicant to take the state bar examination because of his past membership in the Communist Party. The Board's action failed rational basis review because evidence did not support the state's rationale that he was morally unfit to be a member of the

bar. *See id*. at 246 ("In the light of the [applicant's] forceful showing of good moral character, the evidence upon which the State relies . . . cannot be said to raise substantial doubts about his present good moral character.").

In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 447-50 (1985), the Court held that it was irrational for the city to require a special use permit for a group home for the mentally disabled when it did not require the same permit for other group homes. The permit scheme was ruled unconstitutional because the special permit requirement bore no logical connection, in fact, to the only justifications advanced by the city. *Id*. at 449-50.

The above cases, among many others, show that the Supreme Court's application of the rational basis test, while deferential to government action, is a meaningful standard of review under which plaintiffs prevail when they adduce facts to rebut the presumption of constitutionality. *See also Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty*., 488 U.S. 336 (1989) (tax assessor's practices which created significant disparity in assessment of similar properties not rationally related to the county's objective of assessing all real property at its true value); *Williams v. Vermont*, 472 U.S. 14 (1985) (statute giving favorable tax treatment to Vermont residents, but not non-residents, who registered vehicles purchased in other states not rationally related to purpose of road maintenance); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (law excluding households of unrelated people from

federal food stamp program not rationally related to stated purpose of safeguarding the health of the poor); *Mayer v. City of Chicago*, 404 U.S. 189 (1971) (court rule providing transcripts only to felony defendants had no logical reason for distinction between felony and non-felony offenses).

In the instant case, the district court properly considered Wal-Mart's evidence and found that there was no rational connection between the consanguinity exception and the State's proffered justifications. This Court should affirm that judgment, in line with its own precedent and the Supreme Court's precedent employing the rational basis test as a meaningful standard of review. The same is true for Wal-Mart's convincing evidence of irrationality of the public corporations ban.

2. Economic Protectionism Is Not a Legitimate Governmental Interest

In *St. Joseph Abbey*, this Court held that naked economic protectionism is not a rational basis for government activity. ("[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose…"). "Mindful that a hypothetical rationale, even post hoc, cannot be fantasy," this Court engaged in a thorough examination of the state's proffered purposes and the plaintiff's evidence of irrationality. *Id*. at 223. The Court rightly recognized that "[t]he great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for

regulation." *Id*. at 226. In so doing, the Court concluded that the state regulation at issue was simply "economic protection of the rulemakers' pockets," and bore no rational relation to a legitimate government interest. *Id*. at 227.

Economic protectionism has suffered a similar fate in other circuits. In *Craigmiles v. Giles*, the Sixth Circuit considered a Tennessee law requiring those who sell funeral merchandise to be licensed funeral directors. 312 F.3d 220 (6th Cir. 2002). At the outset, the court noted that "[c]ourts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate government purpose." *Id*. at 224. After scrutinizing each purpose proffered by the state, the court could find no rational relationship between the licensing law and the articulated purposes of the state—leaving the "more obvious illegitimate purpose to which the licensure provision is very well tailored." *Id*. at 228. Rejecting economic protectionism, the court held that the "naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from customers" is not a valid state interest. *Id*. at 229.

The Ninth Circuit struck down another protectionist statute in *Merrifield*, 547 F.3d at 980. In that case, the court found that a California pest control licensing scheme violated the Equal Protection Clause because it contained irrational exemptions "designed to favor economically certain constituents at the expense of others similarly situated." *Id*. at 991. The court concluded that "economic

protectionism, for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest." *Id*. at 991 n.15.

Among the circuit courts to consider the issue, the majority have faithfully applied the rational basis test as a rebuttable presumption in favor of legislation that may be overturned by evidence showing that the purpose of the legislation is illegitimate or its foundation is irrational. The Fifth Circuit rightly stands with this majority in rejecting economic protectionism as an illegitimate government interest.

3. The District Court Correctly Found That the Texas Consanguinity Law Cannot Survive Rational Basis

The district court decision in the instant case embraced this Court's approach in *St. Joseph Abbey* to also conclude that Tex. Alco. Bev. Code § 22.05 creates an "unusual and entirely arbitrary classification," which bore no relation to the promotion of small businesses, family businesses, or any of the state's other proffered interests. *Wal-Mart Stores*, 313 F. Supp. 3d at 785.

In its briefing, TABC and TPSA ask this Court to take a step backwards from *St. Joseph Abbey* and accept as rational nearly any conceivable justification it puts forward for the regulation. *See* TABC Br. 41-42; TPSA Br. 48. But as the district court showed, accepting these rationales would amount to judicial abdication in light of the real world impact of the law. *Wal-Mart Stores*, 313 F. Supp. 3d at 779.

For instance, the district court found no rational relationship between the consanguinity exception and promoting family businesses. *Id*. at 784. The court

pointed out that the statute does not favor family-owned businesses; it favors companies wholly owned by a single person who happens to have family members willing to complete the paperwork required to consolidate permits. *Id*. Going further, the consanguinity exception actually discourages family members from becoming involved in the family business, because any family member who is employed by the current permit holder or has any ownership in the permit holder's business cannot consolidate her permits with those of the permit holder. *Id*. The court's critical examination of the statute revealed the inherent irrationality of the TABC's articulated purpose.

The district court similarly found no facts to support the state's contention that the consanguinity exception promoted small businesses, aided in estate planning, or allowed package store companies to expand in targeted areas. *Wal-Mart Stores*, 313 F. Supp. 3d at 784-5. Because the consanguinity exception created "an unusual and entirely arbitrary classification" with no relation to a legitimate state interest, the district court correctly determined that it failed rational basis review. *Id*. at 785.

In refusing to close its eyes to the real-world effects of the consanguinity exception, the district court followed this Court's example in applying the rational basis test. By upholding the district court's conclusion, this Court will reinforce its own position that "neither precedent nor broader principles suggest that mere

economic protection of a particular industry is a legitimate governmental purpose." *St. Joseph Abbey*, 712 F.3d at 222.

4. The Public Corporation Ban Should Fail the Rational Basis Test

Despite lengthy factual findings that the origins of the Tex. Alco. Bev. Code § 22.16(a) public corporation ban is a blatant exercise in economic protectionism, the district court nonetheless concluded that the public corporations ban does not violate the Equal Protection Clause. *Wal-Mart Stores*, 313 F. Supp. 3d at 782. This Court should engage in the same careful search for truth as it did in *St. Joseph Abbey*, and which the district court below did with regards to the consanguinity exception, to find that there is no rational connection between the public corporation ban and a legitimate public interest.

CONCLUSION

As it has once before, this Court should again strike down Texas's protectionist liquor licensing laws and affirm the opinion of the district court.

DATED: November 2, 2018.

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