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
Case No. 1:15-CV-00134-RP
The Honorable Robert Pitman, United States District Judge

BRIEF OF THE NATIONAL BEER WHOLESALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND FOR REVERSAL OF THE DISTRICT COURT JUDGMENT AND IN OPPOSITION TO PLAINTIFFS-APPELLEES CROSS MOTION FOR APPEAL

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The National Beer Wholesalers Association is a Virginia non-profit corporation. It does not have any parent corporation and there is not any publicly held corporation that owns 10% or more of its stock.

RULE 29(a)(4) STATEMENT OF COMPLIANCE

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties through their respective counsel. No party or party's counsel authored this brief in whole or in part or contributed money intended to fund its preparation or submittal. No person other than *Amicus* or their members contributed money to fund its preparation or submittal.

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INTERESTS OF *AMICUS CURIAE*

Since 1938, the NBWA has served as the national membership organization of the beer distributing industry representing over 3,000 family-owned independent licensed beer distribution entities, including beer distributors in Texas. Its members reside in all fifty states, employing over 130,000 individuals.

This case implicates the interests of NBWA and their members. Specifically, the trial court's decision narrowly restricts the authority of a state to regulate alcohol and thereby undermines a state's ability to effectively regulate retail liquor licensees. By implication, the case calls into question many state laws that regulate the alcohol industry. Promulgated pursuant to the states' primary authority under the Twenty-first Amendment, these laws regulate the importation of alcohol into the state, structure a state's three-tier distribution system, specifically the requirement that all liquor must be sold through in-state, licensed distributors and retailers, and create an orderly, transparent, and accountable alcohol market in order to serve the states' substantial interest protecting the public health, safety, and welfare. The District Court decision is contrary to *Granholm vs. Heald*, 544 U.S. 460 (2005), other decisions of the United States Supreme Court, as well as numerous prior decisions of this Court.

NBWA supports the position of Defendants-Appellants Cross Appellees ("Defendants-Appellants") and urges the Court to reverse the decision invalidating

Tex. Alco. Bev. Code Ann. § 22.16(a) (which prohibits any entity controlled by a public corporation from holding a package store permit) (hereinafter referred to as the "Public Corporation Ban" or "Ban") and affirm the decision upholding Tex. Alco. Bev. Code Ann. § 22.04 (which limits a package store permittee from holding no more than five permits) (hereinafter referred to as the "Five-Permit Limit" or "Limit").

ARGUMENT

I. Introduction.

This appeal arises out of a legal challenge by Plaintiffs-Appellees (hereinafter referred to as "Appellees") to four Texas Statutes, including the Public Corporation Ban (22.16) and the Five-Permit Limit (22.04). The District Court struck down the Public Corporation Ban as violative of the dormant Commerce Clause. The District Court upheld the Five-Permit Limit under the dormant Commerce Clause and the Equal Protection Clause.

NBWA submits this Amicus Brief in support of Defendants-Appellants (hereinafter referred to as "Appellants") and in opposition to the cross appeal filed by Plaintiffs-Appellees (hereinafter referred to as "Appellees"). NBWA urges the Court to reverse the District Court decision striking down the Public Corporation

Ban and affirm the decision upholding the Five-Permit Limit.[1] In the interest of avoiding the repetition of many of the arguments made persuasively by Appellants, this Brief will focus on the policies that underlie the challenged statute, the reversible error in failing to consider the Twenty-first Amendment in assessing the constitutionality of the statute, and the reasons why, under applicable law, the Public Corporation Ban does not run afoul of the dormant Commerce Clause.

II. Policy Underlying the Challenged Texas Statute.

Since the dawn of recorded history, alcohol has enriched our culinary experiences, social gatherings, and lives. When abused, however, it has also occasioned great harm. According to the federal government's Centers for Disease Control and Prevention, alcohol contributes to over 88,000 deaths each year in this country, and the estimated economic cost of excessive drinking in the United States is over $224 billion annually.[2] Few, if any, publicly-available products embody a similar potential to create such great societal harm.

[1] The majority of NBWA's brief is devoted to the constitutional validity of the Public Corporation Ban. However, the dormant Commerce Clause and Equal Protection analysis supporting the Ban applies with even greater force to the Five Permit Limit. S*ee Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F.Supp.2d 200, 213 (D. Mass. 2006); *see Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 54 (1st Cir. 2005); *see also Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 1, 15-16 (1st Cir. 2007); *Maxwell's Pic-Pac v. Dehner*, 739 F.3d 936 (6th Cir. 2014) (upholding a Kentucky law that prohibited grocery stores and convenience stores from obtaining a license to sell package liquor and wine but permitted drugstores and exclusive liquor stores to do so)

[2] CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/alcohol/fact-sheets/prevention.htm (last visited Sept. 4, 2018).

Federal, state, and local governments have attempted to mitigate the detrimental impacts of alcohol abuse through regulation of the alcohol industry and the consumer. Alcohol has always been, and remains, a heavily regulated products in the United States. It is also unique in terms of its status in law.[3] It is the only commercial product that has been the subject of two constitutional amendments: the Eighteenth, which instituted national Prohibition, and the Twenty-first, which not only repealed Prohibition but assigned primary responsibility for alcohol regulation in the states.[4]

All state alcohol regulatory systems strive to achieve moderation in both the consumption and sale of intoxicating liquor. The ultimate goal of state regulation of the alcohol industry is to create an "orderly" market that balances competition with appropriate control. The keystones of alcohol regulation in this country are three-tier and tied-house laws. Pursuant to their plenary authority under the Twenty-first Amendment, states regulate alcohol within their respective borders through a three-tier system with licensed and structurally separate producers, distributors, and retailers. "Tied-house" laws further support a three-tier system by prohibiting suppliers and distributors, within narrow exceptions, from providing items of value

[3] See Public Law 114-255 Stop Underage Drinking Act "Alcohol is a unique product and should be regulated differently than other products by the States and Federal Government. States have primary authority to regulate alcohol distribution and sale, and the Federal Government should support and supplement these State efforts."
[4] U.S. CONST. amends. XVIII, XXI.

to or ownership in retailers. The purpose of the system is, in part, to avoid the harmful effects of vertical integration in the industry by restricting these market participants to their respective service functions.[5]

Texas regulates the sale and distribution of alcohol within its borders through a "three-tier system" of licensed and structurally separate producers, distributors, and retailers. *See* Tex. Alco. Bev. Code Ann. §§ 102.01 & 102.07.[6] The American historical experience has proven that vertical integration and "tied houses" lead to excessive retail capacity, cutthroat competition for market share, and overstimulated sales which ultimately leads to intemperate consumption. [7] It is widely recognized

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[5] Large retailers were also identified as responsible for the excessive marketing and promotion of alcohol in the Pre-Prohibition days. In support of what would become Section 205 of the Federal Alcohol Administration Act, 27 U.S.C. § 205 (2012), the House Ways and Means Committee noted:

> It has been brought to the attention of the committee that certain large buyers are in such a strategic position with respect to sellers that they often have sufficient economic power to compel the sellers to deal with them on a consignment or return basis. Buyers less powerful are unable to exact such terms from the seller.

See Fed. Alcohol Control Admin., Legislative History of the Federal Alcohol Administration Act 1, 64 (1935).

[6] The Federal Alcohol Administration Act, 27 USC 205 *et.seq.*, embodies similar tied-house provisions.

[7] In *Toward Liquor Control,* Fosdick and Scott noted that "tied-houses" lead to a "multiplicity of outlets":

The 'tied house' system also involved a multiplicity of outlets, because each manufacturer had to have a sales agency in a given locality.

Raymond B. Fosdick and Albert Scott, *Toward Liquor Control*, Harper & Brothers, at 43 (1933). Federal officials have noted a correlation between the number and density of retail outlets, on the one hand, and consumption patterns and abuse, on the other. *See Preventing Excessive Alcohol Consumption: Regulation of Alcohol Outlet Density*, COMMUNITY GUIDE, https://www.thecommunityguide.org/findings/alcohol-excessive-consumption-regulation-alcohol-outlet-density (last visited Sept. 4, 2018).

that prior to prohibition, "tied houses" were a root cause of alcohol abuse and related problems because retailers were pressured to sell product by any means including selling to minors, selling after hours, and overselling to intoxicated customers. [8]

The United States Supreme Court has expressly recognized that the three-tier system is "unquestionably legitimate." *See Granholm v. Heald*, 544 U.S. 460, 488-89 (2005). The underlying policy was elaborated upon more extensively in *Manuel v. State of Louisiana*, 982 So.2d 316, 330 (La. Ct. App. 2008):

> Under the three-tier system, the industry is divided into three tiers, each with its own service focus. No one tier controls another. Further, individual firms do not grow so powerful in practice that they can out-muscle regulators. In addition, because of the very nature of their operations, firms in the wholesaling tier and the retailing tier have a local presence, which makes them more amenable to regulation and naturally keeps them accountable. Further, by separating the tiers, competition, a diversity of products, and availability of products are enhanced as the economic incentives are removed that encourage wholesalers and retailers to favor the products of a particular supplier (to which wholesaler or retailer might be tied) to the exclusion of products from other suppliers.

(emphasis added). *See also* Raymond B. Fosdick and Albert Scott, *Toward Liquor Control*, Harper & Brothers, at 43 (1933) (republished by Center for Alcohol Policy 2011).

[8] These remain a concern of policymakers to this day. *See*, for example, "Preventing Excessive Alcohol Consumption," The Community Guide, Centers for Disease Control and Prevention, http://www.thecommunityguide.org/alcohol. Pressure to over-market, over-promote, and perhaps violate the law may not be applied by suppliers and distributors alone, it could also result from the marketing and promotion practices of very large retail chains.

For more than fifteen years, the Fifth Circuit Court of Appeals has recognized the importance of effectively regulating alcohol through a three-tier system:

> Similar to the regulatory regimes in many other states, the TABC creates a three-tier system that strictly separates ownership and operations between manufacturers, wholesalers, and retailers. The vertical integration of the manufacture, distribution or sale of alcoholic beverages is strictly prohibited. And, with rare exceptions, manufacturers are permitted to sell only to wholesalers; wholesalers only to retailers; and retailers only to consumers. This tripartite functional division of firms that participate in the alcoholic beverages industry is designed to aid Texas in the regulation and control of alcohol consumption, and "prevents companies with monopolistic tendencies from dominating all levels of the alcoholic beverage community."

Dickerson vs. Bailey, 336 F.3d 388, 399 (5th Cir. 2003) (footnotes omitted)

By promulgating the Public Corporation Ban, the Texas Legislature has avoided the regulatory nightmare of trying to unravel the myriad ownership interests in a publicly-owned retail company to ascertain whether a manufacturer or distributor has acquired a prohibited interest in the publicly-owned retail company holding the retail permit.[9] Because public companies deploy resources that dwarf those of family-owned, independent retailers, the Ban also inhibits "companies with monopolistic tendencies from dominating all levels of the alcoholic beverage community." *Id.* In this way, the Ban helps maintain an orderly alcohol market and a level retail playing field. Finally, in enacting the Ban, the Legislature recognized that family-owned, independent retailers rooted in their communities are more likely

[9] This is not a theoretical concern of the TABC. *See Cadena Commercial USA Corp. v. Texas Alcoholic Beverage Commission,* 518 S.W.3d 318 (Tex. 2017).

to be responsive to social concerns and more amenable to effective enforcement measures. As the Eighth Circuit Court of Appeals stated in *Southern Wine & Spirits vs. Division of Alcohol and Tobacco Control*:

> The legislature legitimately could believe that a wholesaler governed predominantly by Missouri residents is more apt to be socially responsible and to promote temperance, because the officers, directors, and owners are residents of the community and thus subject to negative externalities—drunk driving, domestic abuse, underage drinking—that liquor distribution may produce. Missouri residents, the legislature sensibly could suppose, are more likely to respond to concerns of the community, as expressed by their friends and neighbors whom they encounter day-to-day in ballparks, churches, and service clubs. The legislature logically could conclude that in-state residency facilitates law enforcement against wholesalers, because it is easier to pursue in-state owners, directors, and officers than to enforce against their out-of-state counterparts.

731 F.3d 799, 811 (8th Cir. 2013).[10]

III. The District Court Failed to Consider the Application of the Twenty-first Amendment, the *Granholm* Decision and other court decisions that would prevent or alter the application of the Dormant Commerce Clause Challenge to the Public Corporations Ban.

[10] Similarly, there are several public policies underlying the Five-Permit Limit. As documented by numerous studies, there is an undisputed correlation between the number and density of retail outlets, on the one hand, and consumption patterns and abuse, on the other. *See* n. 7 *supra*. In order to prevent any party from monopolizing the limited number of retail permits or from destabilizing the retail market, Texas has passed the Five -Permit Limit. *See* n. 8 *supra*. The limit also fairly allocates the limited retail permits among many applicants. Similar to the Public Corporations Ban, a retail permit limit "aims at controlling the tendency toward concentration of power in the liquor industry; preventing monopolies; avoiding practices such as indiscriminate price cutting and excessive advertising; and preserving the right of small, independent liquor dealers to do business." *Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F.Supp.2d 200, 213 (D. Mass. 2006).

The Supreme Court has acknowledged that the "Twenty-first Amendment grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Granholm v. Heald*, 544 U.S. 460, 488-89 (2005) (citations omitted). Accordingly, the Twenty-first Amendment either shields state liquor laws regulating distributors and retailers from dormant Commerce Clause challenge or at least alters dormant Commerce Clause analysis of state law governing the importation of liquor and the structure of the distribution system within the state. *Id*. at 460. Specifically, the Court has held that states may "funnel sales through the three-tier system" which, it has recognized, is "unquestionably legitimate." *Granholm v. Heald*, 544 U.S. 460, 488-89 (2005) (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)). While holding that facially discriminatory state liquor laws pertaining to producers and products are subject to dormant Commerce Clause challenge, the *Granholm* Court specifically noted that "state policies are protected under the Twenty-first Amendment when they treat liquor produced out-of-state the same as its domestic equivalent." *Id*. at 489.

As presciently recognized by this Court two years before the *Granholm* decision, the Twenty-first Amendment immunizes at least certain state liquor laws from Commerce Clause scrutiny, including laws that fall within the "core concerns" of the Twenty-first Amendment. *Dickerson vs. Bailey*, 336 F.3d 388, 404 (5th Cir.

2003). After *Granholm*, the Second, Fourth, Fifth, and Eighth Circuits further fleshed out the boundaries of the Twenty-first Amendment vis-à-vis the Commerce Clause. *See Granholm*, 544 U.S. at 488-89 (limiting its holding to facially discriminatory state liquor laws pertaining to producers and products); *Arnold Wines, Inc. vs. Boyle*, 571 F.3d 185, 191 (2d Cir. 2009) (shielding from commerce clause scrutiny laws which differentiate between out-of-state unlicensed retailers and in-state licensed retailers but do not create discriminatory exceptions to the three-tier system); *Brooks vs. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) ("[A]n argument that compares the status of an in-state retailer with an out-of-state retailer – or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart – is nothing different that an argument challenging the three-tier system itself."); *Southern Wine & Spirits vs. Division of Alcohol and Tobacco Control*, 731 F.3d 799, 811 (8th Cir. 2013) ("[S]tate policies that define the structure of the liquor distribution system while giving equal treatment to in-state and out-of-state liquor products and producers are 'protected under the Twenty-first Amendment' . . . . such policies are "protected" against constitutional challenges based on the Commerce Clause.") (citations omitted); *Wine Country Gift Baskets.com vs. Steen*, 612 F.3d 809, 821 (5th Cir. 2010) ("*Granholm* prohibited discrimination against out-of-state *products* or *producers.* Texas has not tripped over that bar by allowing in-state *retailer* deliveries.").

Granholm and its progeny delineated the often-conflicting boundaries of the States' primary authority under the Twenty-first Amendment to regulate alcohol within their borders and Congress' primary authority under the Commerce Clause to regulate interstate commerce. *See generally*, Michael D. Madigan, *Control Versus Competition: The Courts' Enigmatic Journey in the Obscure Borderland Between the Twenty-First Amendment and Commerce Clause*, Mitchell Hamline L. Rev, Vol. 44-5 (April 6, 2018). If a challenged state liquor law regulates the importation of alcohol into the state or structures the distribution and sale of alcohol within the state, it falls within the State's core Twenty-first Amendment concerns and is shielded from traditional Commerce Clause scrutiny unless it discriminates against out-of-state producers or their products. If such a law does so discriminate, it is subject to traditional Commerce Clause analysis. In this way, the Fifth Circuit has balanced the federal interest in facilitating interstate commerce with the state interest in regulating alcohol within its borders.

The decision below failed to consider the application of *Granholm* or its progeny to the case at bar. ROA.9413-24. In derogation of this Court's *Dickerson* decision, it failed to examine whether the Public Corporations Ban fell with the "core concerns" of the Twenty-first Amendment and was thereby either shielded entirely from dormant Commerce Clause challenge or at least was entitled to far greater deference under traditional dormant Commerce Clause analysis. ROA.9413-24;

Dickerson vs. Bailey, 336 F.3d 388, 404 (5th Cir. 2003). Instead, the District Court seemingly relied almost exclusively upon *Cooper vs McBeath*, 11 F.3d 547 (5th Cir. 1994)[11] and *Family Winemakers of California v. Jenkins*, 592 F.3d 1 (1st Cir. 2010)[12], both of which are clearly distinguishable from the case at bar. ROA.9416; ROA.9421.

This Court has prudently taken an incremental approach to defining the extent to which the Twenty-first Amendment shields or extends greater deference to state liquor laws under traditional dormant Commerce Clause challenge. In *Dickerson*, the Court adopted the "core concerns" test outlined in *Bacchus Imports v. Diaz*, 468 U.S. 263 (1984), "which entails assessing whether the state statutes reflect the 'central purpose' or 'core concern' of the Twenty-first Amendment, *viz.*, the promotion of temperance." *Dickerson*, 336 F.3d at 404.

In *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 821 (5th Cir. 2010), the first Twenty-first Amendment case analyzed by the Fifth Circuit after *Granholm*, the Court acknowledged that *Granholm* altered dormant Commerce Clause analysis regarding state liquor regulations governing retailers:

Our read of *Granholm* is that the Twenty-first Amendment still gives each

[11] The District Court's analysis of *Cooper* below was limited to its conclusion that the Public Corporations Ban was promulgated with a discriminatory purpose because it was allegedly enacted to negate *Cooper's* invalidation of the durational residency requirement on the owners of a retailer. ROA.9416. However, the public policies underlying a Public Corporations Ban are clearly different than those underlying a durational residency requirement on the owners of a retail license. The trail court erred in characterizing the former simply as a substitute for the latter.

[12] *See* pages 20-22 *infra*.

> State quite broad discretion to regulate alcoholic beverages. The dormant Commerce Clause applies, but it applies differently than it does to products whose regulation is not authorized by a specific constitutional amendment. Regulating alcoholic beverage retailing is largely a State's prerogative.

Id. at 820 ("*Granholm* prohibited discrimination against out-of-state *products* or *producers.* Texas has not tripped over that bar by allowing in-state *retailer* deliveries.") (emphasis in original). This holding reflects the Court's recognition that the Twenty-first Amendment confers upon states the primary authority to structure the alcohol distribution system within its borders free from traditional Commerce Clause scrutiny.

Finally, in *Cooper v. Texas Alcoholic Beverage Commission*, 820 F.3d 730 (5th Cir. 2016) (hereinafter referred to as "*Cooper II*"), the Court reexamined its 1994 *Cooper* decision where it decreed that a three-year retail residency requirement *on the owners* of a retail license was unconstitutional and issued an injunction prohibiting its enforcement. The court below dismissed the action on the basis that there was no case or controversy and that the Plaintiff lacked standing. The Fifth Circuit Panel (with Judge Jones dissenting on the finding of standing) reversed the decision below finding that there was jurisdiction to hear the action and issued an order denying the vacation of the injunction on the merits, finding that its issuance was not unjust in light of *Granholm vs. Heald*. In upholding the injunction, the Panel Majority stated as follows:

> Because of the Twenty-first Amendment, states may impose a physical-residency requirement on retailers and wholesalers of alcoholic beverages despite the fact that the residency requirements favor in-state over out-of-state businesses. The Twenty-first Amendment does not, however, authorize states to impose a durational-residency requirement on the *owners* of alcoholic beverage retailers and wholesalers.

Cooper II, 820 F.3d at 743 (emphasis in original) (citations omitted).[13]

Appellees will undoubtedly attempt to conflate the issues by arguing that the Public Corporations Ban does not fall within the "central purpose" or "core concerns" of the Twenty-first Amendment, that *Granholm* and its progeny only shield state liquor laws which are "inherent" or "integral" aspects of the three-tier system, and that the Public Corporations Ban does not fall within their ambit. The facts of this case, the text and constitutional history of the Twenty-first Amendment, and the prior decisions of this Court, however, belie those arguments. *See* U.S. CONST. Amend. XXI; *Wine Country*, 612 F.3d at 821; *see generally* Michael D. Madigan, *Control Versus Competition: The Courts' Enigmatic Journey in the Obscure Borderland Between the Twenty-First Amendment and Commerce Clause*, Mitchell Hamline L. Rev, Vol. 44-5 at 12 – 20 (April 6, 2018).[14]

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[13] This decision can perhaps be best understood as the Court's attempt to reconcile a 22-year-old precedent and long-standing injunction with evolving Twenty-first Amendment jurisprudence.

[14] The Twenty-first Amendment was ratified by both Congress and state constitutional conventions. It represented perhaps the most profound legal and political expression of the American people. *Swedenburg v. Kelly*, 358 F.3d 223, 232-33 (2d Cir. 2005), overruled *Granholm vs. Heald*, 544 U.S. 460 (2005). The express language of the Amendment exclusively conferred on the states the authority to regulate the "transportation and importation" of intoxicating liquors within their borders. U.S. CONST. amend XXI, § 2. The language of the Amendment did not limit the states' power to regulate alcohol within the state nor did it render states subservient to

Unique in our constitutional scheme, the Twenty-first Amendment confers upon the states' primary authority to control importation and regulate the alcohol market *within their borders*, including, without limitation, establishing the regulatory structure and licensing requirements pertaining to distributors and retailers.[15] The exercise of the states' primary authority, and the constitutional deference to which it is entitled, is not limited to legislative enactments which merely require that suppliers must sell to distributors who in turn must sell to retailers. As instructed by *Dickerson*, the appropriate inquiry is whether the challenged statute relates to a "core purpose" or "central concern" of the Twenty-first Amendment. Structuring the regulatory system within the state and establishing the requirements for obtaining a retail license within that system clearly relates to a core purpose of the Amendment. If the statute falls within those purposes and concerns, it is either entirely shielded from dormant Commerce Clause scrutiny or at least is entitled to

federal power under the Commerce Clause. See, e.g., *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). Clearly, such a profound legal expression must mean something and, if it is to mean anything, it must mean that there are significant limits on federal power under the Commerce Clause over state liquor laws. There is absolutely no support in the constitutional history of the Amendment for the proposition that it was **only** intended to shield the essential components of a three-tier law. After all, there is no question that the Amendment would permit a state to ban the sale of liquor altogether, an act that would clearly "burden" interstate commerce.

[15] As originally proposed, Section 3 of the Twenty-first Amendment conferred upon Congress concurrent power to regulate alcohol sales, but that language was **not** adopted. *See generally* Sidney J. Spaeth, *The Twenty-first Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, note 20, at 180 (1991). Senators Blaine and Wagner objected to the section, explaining that the concept of concurrent power was inconsistent with the grant of primary state power conferred under Section 2. *Id.* at 181–82.

greater deference than is ordinarily accorded under dormant Commerce Clause analysis.

Pursuant to its primary power under the Twenty-first Amendment, Texas passed the Public Corporations Ban (1) to avoid the regulatory nightmare of trying to unravel the myriad ownership interests in a public company in an effort to ascertain whether a manufacturer or distributor has acquired a prohibited interest in the public company holding the retail permit; (2) to inhibit "companies with monopolistic tendencies" from dominating all levels of the alcoholic beverage community; (3) to maintain an orderly alcohol market and a level, retail playing field; and (4) to ensure that retailers are rooted within the communities in which they sell in order to make them more likely to be responsive to long-term social concerns and more amenable to effective enforcement measures. This Court wisely viewed "local deliveries as a constitutionally benign incident of an acceptable three-tier system." It should view the Public Corporations Ban similarly. *Wine Country*, 612 F.3d at 820.

As discussed in detail below, with respect to the Equal Protection challenge, the District Court specifically and correctly found that the Public Corporations Bans was rationally related to the creation of an orderly, accountable, transparent alcohol market, the prevention of violations of the tied-house laws, and the facilitation of compliance with state alcohol laws and effective enforcement. All of those

"legitimate governmental interests" fall within the State's Twenty-first Amendment core purposes. Accordingly, contrary to the District Court's ruling, the Ban is shielded from ordinary dormant Commerce Clause scrutiny, is entitled to great deference, and should be upheld.

IV. Assuming Arguendo that the Public Corporations Ban is Subject to Ordinary Commerce Clause Scrutiny, the District Court Inappropriately Applied Strict Scrutiny.

A state alcohol law may run afoul of the dormant Commerce Clause in several ways. It can facially discriminate against interstate commerce by conferring a benefit on an in-state supplier that is denied to an out-of-state supplier or it can enact a facially neutral law which has a discriminatory purpose and effect. If a state law does facially discriminate or if it is enacted with a discriminatory purpose and effect, it is subject to strict scrutiny, is virtually per se invalid and will only be upheld if the state can demonstrate "that it has no other means to advance a legitimate local interest." *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007).

Applying the four-factor test set forth in *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977)[16], the District Court concluded

[16] The burden of establishing that a challenged statute has a discriminatory purpose under the Commerce Clause falls on the party challenging the provision. *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007). In summary, the four factors are:

> (1) whether a clear pattern of discrimination emerges from the effect of the state action; (2) the historical background of the decision, which may take into account any history of discrimination by the decision-making body; (3) the specific sequence of events leading up the challenged decision, including departures from normal procedures; and (4) the

that the purpose of the Ban was to discriminate against out-of-state companies. ROA.9415-19. The District Court's analysis, however, was fundamentally flawed in several respects.

First, although the Court found a discriminatory purpose, it specifically found that there was no discriminatory effect to the Ban. ROA.9419-24. As such, contrary to the conclusion of the District Court, there could be no "clear pattern of discrimination [that] emerges from the *effect* of the state action". ROA.9415. (emphasis added).

Second, the Court concluded that the purpose of the Ban was to negate the invalidation of the durational residency requirement on the owners of a retail license by the *Cooper* decision. ROA.9417. However, as explained above, the public policies underlying a Public Corporations Ban are clearly different that those underlying a durational residency requirement applicable to the owners of a retailer and, accordingly, the Legislative purpose motivating their respective enactments are not comparable. Furthermore, the Ban must be viewed in the context of the Texas three-tier, tied-house laws, specifically inhibiting the monopolization of the retail tier. Viewed from this perspective, the "historical background," subsequent

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> legislative or administrative history of the state action, including contemporary statements by decisionmakers.

Id.

"sequence of events," and "legislative history" pertaining to the Ban do not support a finding of discriminatory purpose.

Third, the District Court's application of a strict scrutiny standard runs afoul of the Supreme Court's holding in *Exxon vs. Governor of Maryland*, 437 U.S. 117 (1978) (ban on oil refiners owing retail gas stations upheld) and two subsequent decisions of this Court. ROA.9418-19. *See Allstate Insurance Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007) (ban on insurance companies obtaining an interest in a body shop upheld); *Ford Motor Corp. v. Texas Department of Transportation*, 264 F.3 493,498 (5th Cir. 2001) (ban on auto manufacturers selling their vehicles directly through their website upheld). In each of those cases, the applicable courts concluded that the Commerce Clause does not protect "the particular structure or methods of operation in a retail market." *Exxon*, 437 U.S. at 127. The Public Corporations Ban is indistinguishable from the bans upheld in those cases. In the interest of creating an orderly, accountable, transparent alcohol market, preventing a violation of the tied-house laws, and facilitating compliance and effective enforcement, the Ban was created as an aspect of "structuring" the retail alcohol market within the State's borders. It applies equally to in-state and out-of-state public companies. There is no favoritism for Texas public corporations over out of state public corporations. All public ownership is banned. A state regulation that arguably burdens some interstate companies "does not, by itself, establish a claim of

discrimination against interstate commerce." *Id.* at 126 (footnote omitted). Accordingly, strict Commerce Clause scrutiny is not applicable.

Finally, the District Court relied most heavily on the First Circuit decision of *Family Winemakers of California v. Jenkins*, 592 F.3d 1 (1st Cir. 2010). ROA 9421. However, that case is clearly distinguishable from the case at bar for several reasons. *Family Winemakers* involved a challenge to a facially neutral Massachusetts statute that allowed any winery producing less than 30,000 gallons of wine a year to ship direct to consumers but prohibited any winery producing more than that from doing so. Out-of-state wineries challenged the law under the dormant Commerce Clause on the basis that it discriminated against out-of-state wineries in purpose and effect. The House sponsor of the Bill stated that its purpose was to give "an inherent advantage indirectly to the local wineries." *Id*. at 7. The Senate sponsor of the Bill urged passage of the Bill on the basis that "the agricultural industry here in Massachusetts is really strong and should be preserved." *Id.* Also, every single Massachusetts winery produced under 30,000 gallons so discriminatory effect was clearly evident. Based upon that wholly distinguishable set of facts, the First Circuit found producer and product discrimination in both purpose and effect and invalidated the law.

Unlike *Family Winemakers* which involved clear admissions regarding a discriminatory purpose and evidentiary support for a finding of discriminatory effect

on out-of-state producers and products, the case at bar concerns a statute pertaining to regulatory requirements to obtain a retail permit and applies equally to Texas companies and out-of-state companies. Accordingly, as appropriately found by the District Court, the Ban does not have a discriminatory effect. As such, *Family Winemakers* has no application here.

The Court of Appeals case that is arguably more applicable here is *Blackstar Farms LLC v. Oliver*, 600 F.3d 1225 (9th Cir. 2010). *Blackstar Farms* involved a challenge to a facially neutral Arizona statute that allowed any winery producing less than 20,000 gallons of wine a year to ship direct to consumers but prohibited any winery producing more than that from doing so. Unlike *Family Winemakers*, however, there was no direct evidence of discriminatory purpose by the legislative body and there were two Arizona wineries that produced more than 20,000 gallons a year. Notwithstanding that the law regulated producers and their products, the Ninth Circuit concluded that it was not enacted with a discriminatory purpose nor did it have a discriminatory effect and upheld the law on that basis. *Id.* at 1232-1235.[17] Similar to the Arizona wine production limit that applied equally to in and out of state suppliers, the Texas Five-Permit Limit and Public Corporation Ban

[17] The District Court decision reached the anomalous conclusion that although the Legislature had a discriminatory purpose in enacting the Public Corporations Ban, the Ban failed to achieve a discriminatory effect. In light of the fact that the Commerce Clause exists to protect the free flow of goods in interstate commerce, how can the Ban be said to run afoul of the Clause when it was not successful in achieving the alleged discriminatory goal of the Legislature?

applies equally to both in and out of state retailers and therefore passes muster under the dormant Commerce Clause. Furthermore, the Public Corporations Ban does not embody the problematic production limit which survived scrutiny in *Blackstar Farms* but not in *Family Winemakers*.

V. Assuming Arguendo that the Public Corporations Ban is Subject to Commerce Clause Scrutiny, the District Court Erred in Concluding that the Public Corporations Ban Failed the *Pike* Balancing Test.

A state law that does not facially discriminate or is not discriminatory in purpose and effect may still impose "incidental" burdens on interstate commerce and run afoul of the dormant Commerce Clause. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In *Pike*, the Supreme Court held that "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142.

It is unclear whether a *Pike* challenge to a state liquor law was ever viable or at least survived *Granholm*. There have been no such challenges to state liquor laws reviewed by the Court since the *Granholm* decision in 2005. In the opinion of the authors of this Brief, the most reasonable conclusion is that it does not. *Granholm* stands for the proposition that state liquor laws are either shielded from a dormant Commerce Clause challenge or entitled to extraordinary deference **unless** they

discriminate against out-of-state producers or their products. By definition, however, a *Pike* challenge involves a law that is not facially discriminatory nor discriminatory in purpose and effect. As such, it is likely that such a challenge no longer survives.

Even if it does survive, the challenged statute is certainly entitled to a "strong presumption of validity." *North Dakota v. United States*, 495 U.S. 423 (1990). It is incumbent upon the party challenging the statute to bear the burden of proving that the incidental burdens outweigh the local benefits. Here, the District Court reached the anomalous conclusion that although the Ban was rationally related to the State's legitimate public purpose of avoiding the artificial inflation of alcohol prices, moderating the consumption of alcohol, and reducing liquor-related externalities, and thereby passed muster under the Equal Protection Clause, it nonetheless failed the *Pike* Balancing test and ran afoul of the dormant Commerce Clause. These conflicting conclusions are not compatible nor is the Court's conclusion that the "incidental" burden outweighs the local benefits sustainable in light of the strong presumption of validity, the finding that the Ban did not result in a discriminatory effect, and the acknowledged rationally related public policy justification for the Ban.

In the application of *Pike* balancing and rational basis tests, the need for caution in the exercise of judicial review is particularly critical concerning alcohol

regulations for two reasons. First, by its nature, all alcohol regulation fundamentally represents a balance between unfettered competition and availability, on the one hand, and strict control, on the other. State Legislatures, according to local norms and standards, must determine how that balance should be achieved and where the appropriate balance point should be fixed – an exercise "where the legislature must necessarily engage in a process of line-drawing." *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (involving the classification of governmental beneficiaries). That subjective judgment, forged within the give and take of the political arena, by the community's local, elected representatives should not be set aside unless there is no "conceivable basis which might support it." *Lehnhausen v. Lake Shore Auto Parts, Co.*, 410 U.S. 356, 364 (1973). Second, these particular legislative judgments enjoy a special status by virtue of the Twenty-first Amendment and, accordingly, are entitled to the greatest deference by any reviewing Court.

The highly deferential "rational basis" and *Pike* standard of review is premised upon the separation of powers doctrine and is designed "to preserve to the legislative branch its rightful independence and its ability to function." *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993) (quoting *Lehnhausen.*, 410 U.S. at 365). Nowhere should such review be exercised more carefully than when examining a classification enacted pursuant to the Twenty-first Amendment regulating the alcohol market within the state's borders.

As noted in *United States Railroad Retirement Bd. v. Fritz*, defining the class of persons subject to a regulatory requirement "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." 449 U.S. at 179. This conclusion applies with equal force to a classification which "delineates the bounds of the regulatory field." *FCC v. Beach Communications, Inc*., 508 U.S. 307, 316 (1993). Such legislative line-drawing "renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the Legislature must be allowed to approach a perceived problem incrementally." *Id*.; s*ee also Williamson v. Lee Optical of Okla., Inc*., 348 U.S. 483, 489 (1955); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

The judgment of the Texas Legislature to prohibit public corporations from holding a retail permit or prohibit any entity from holding more than five permits fall into this category. While the Court, in its subjective judgment, might draw that line differently, NBWA respectfully suggests that it should not interfere with this legislative prerogative and the Legislature should be permitted to construct or deconstruct liquor regulations on an incremental basis as it sees fit. In light of the "strength" of the Twenty-first Amendment relative to this legislative enactment and

the subjective nature of these particular social and economic classifications, Appellee's *Pike* and Equal Protection Challenges fail.

CONCLUSION

NBWA respectfully submits that the District Court decision on public ownership law (22.16) be overruled and the five-store limitation (22.04) be upheld.

Respectfully submitted,

Dated: September 7, 2018

/s/ Michael D. Madigan

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2018, this brief of *Amicus Curiae* National Beer Wholesalers Association was electronically filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit and served on all registered counsel via CM/ECF.

Date: September 7, 2018 */s/ Michael D. Madigan*
Signature of Filing Party

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,495 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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No. 18-50299 Wal-Mart Stores, Incorporated, et al v. TX Alcoholic Beverage Cmsn, et al
USDC No. 1:15-CV-134

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The following pertains to your brief electronically filed on September 5, 2018.

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Case No. 18-50299

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

United States Court of Appeals

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No. 18-50299 Wal-Mart Stores, Incorporated, et al v. TX Alcoholic Beverage Cmsn, et al
USDC No. 1:15-CV-134

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