

# BATTLE AGAINST LIQUOR: WILL WAL- MART SOON BE AT THE U.S. SUPREME COURT?

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## INTRODUCTION

The Texas Tribune summarized the issue addressed in this article like this:

In many other states you can get booze at Walmart and Costco. Not in Texas. Thanks to powerful lobbying from homegrown liquor store interests, Texas is the only state in the nation that bars publicly traded corporations from holding liquor permits. You can thank the powerful package store owners for that. . . .

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Critics have said the law is an example of an unnecessary cap on the ownership of liquor stores.

But in a brief filed to the U.S. Fifth Circuit Court of Appeals, the association of package stores—another name for liquor stores in the state law—said the law helps reduce the negative consequences of higher per-capita liquor consumption by limiting where liquor can be sold.<sup>1</sup>

The Texas Tribune reporter used the term “publicly traded corporation,” a term we all probably associate with large companies whose stock is publicly traded, but the law at issue (commonly called the “public corporation ban”) is actually broader.<sup>2</sup> The law prevents not only publicly traded corporations, but also privately-owned entities with more than thirty-five owners, from being able to obtain what is known as a package store permit from the Texas Alcohol Beverage Commission (TABC), which means they cannot own liquor stores or sell liquor.<sup>3</sup> Believing the public corporation ban was unconstitutional, Wal-Mart brought suit against the TABC in U.S. District Court.<sup>4</sup> The Texas Package Store Association (TPSA), a trade organization, was allowed to intervene.<sup>5</sup>

The public corporation ban was declared unconstitutional by a U.S. District Court in an opinion issued on March 20, 2018.<sup>6</sup> The case was then appealed to the U.S. Fifth Circuit Court of Appeals, where oral arguments were held on April 29, 2019.<sup>7</sup> The Fifth Circuit issued a decision on August 15, 2019, vacating in part the U.S. District Court’s decision because it determined a remand was

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<sup>1</sup> Catherine Marfin, *Closed on Sundays: A Guide to Some of Texas’ Confusing Alcohol Regulations*, Tex. Trib. (Apr. 16, 2019, 12:00 AM), <https://www.texastribune.org/2019/04/16/texas-alcohol-regulations-explained/#:~:text=While%20restaurants%2C%20bars%2C%20and%20grocery,other%20days%20of%20the%20week> [https://perma.cc/S8TJ-A7L8].

<sup>2</sup> See TEX. ALCO. BEV. CODE ANN. § 22.16(b) (West, Westlaw through 2019 Reg. Sess.). See also discussion *infra* Part I.

<sup>3</sup> TEX. ALCO. BEV. CODE ANN. § 22.16(b) (West, Westlaw through 2019 Reg. Sess.).

<sup>4</sup> Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n, 313 F. Supp. 3d 751, 756 (W.D. Tex. 2018).

<sup>5</sup> *Id.* at 757.

<sup>6</sup> *Id.* at 786.

<sup>7</sup> Docket Entry for Apr. 29, 2019, Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n, 945 F.3d 206 (5th Cir. 2019) (No. 18-50299).

warranted.<sup>8</sup> Then, on December 9, 2019, the Fifth Circuit withdrew the original opinion and reissued a new opinion.<sup>9</sup> In the reissued opinion, with respect to whether the public corporation ban has a discriminatory purpose, the Fifth Circuit vacated the lower court's decision and remanded in part.<sup>10</sup> With respect to whether the public corporation ban has a discriminatory effect, the Fifth Circuit agreed with the lower court that it did not.<sup>11</sup> On June 5, 2020, Wal-Mart filed its petition for writ of certiorari with the U.S. Supreme Court.<sup>12</sup> On November 23, 2020, the U.S. Supreme Court denied certiorari, which meant the case was to return back to the federal district court, but in April of this year Wal-Mart moved to dismiss the case and the order of dismissal was signed on April 12, 2021.<sup>13</sup> So the question posed in the title of this Article as to whether Wal-Mart will soon be at the U.S. Supreme Court, while once a maybe, is now not anytime soon. On June 29, 2021, Wal-Mart filed Plaintiffs' Amended Petition, Application for Injunctive Relief, and Request for Disclosure, in state district court in Travis County, Texas, asserting that the public corporation ban violates provisions of the Texas Constitution.<sup>14</sup> The state court litigation is not discussed in this article.

The argument for why the public corporation ban is needed had to do in part with perceived accountability problems.<sup>15</sup> Even if there are accountability issues that need to be addressed, this Article seeks to show that there are better ways to address accountability concerns rather than completely foreclosing a certain group of businesses from being able to sell liquor based on

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<sup>8</sup> Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n, 935 F.3d 362, 381 (5th Cir. 2019).

<sup>9</sup> Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n, 945 F.3d 206, 210 (5th Cir. 2019), *cert. denied*, No. 19-1368, 2020 WL 6829069 (Nov. 23, 2020).

<sup>10</sup> *Id.* at 226.

<sup>11</sup> *Id.* at 220.

<sup>12</sup> Petition for Writ of Certiorari, Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n, No. 19-1368 (U.S. appeal docketed June 12, 2020).

<sup>13</sup> Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n, No. 19-1368, 2020 WL 6829069 (Nov. 23, 2020).

<sup>14</sup> Amended Petition, Application for Injunctive Relief & Request for Disclosure, Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n, No. D-1-GN-15-000617 (Dist. Ct. Tex. June 29, 2021).

<sup>15</sup> Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n, 313 F. Supp. 3d 751, 761. (W.D. Tex. 2018). *See also* discussion *infra* Part II.

the arbitrary factor of number of owners.<sup>16</sup> That is, the issue can be addressed in a more narrowly tailored way. As support, this Article looks to the wine industry and how the Texas Legislature and the TABC have addressed accountability concerns with out-of-state wineries that obtain the required permit to ship wine directly to Texas consumers.<sup>17</sup>

## I. BACKGROUND

In many states, you can walk into your local Wal-Mart or other large retailer and buy liquor.<sup>18</sup> However, this is not the case in Texas.<sup>19</sup> While you can buy beer and wine from these large retailers,<sup>20</sup> a Texas law prohibits public corporations from selling liquor.<sup>21</sup> This law is commonly referred to as the “public corporation ban” and this Article will oftentimes refer to it by that name.<sup>22</sup>

As background, in order to sell liquor in Texas, one must first obtain what is called a “package store permit.”<sup>23</sup> The prohibition against public corporations being able to obtain a package store permit to sell liquor or own a liquor store comes from Section 22.16 of the Texas Alcoholic Beverage Code, which provides:

A package store permit may not be owned or held by a public corporation, or

by any entity which is directly or indirectly owned or controlled, in whole or in part, by a public corporation, or by

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<sup>16</sup> See discussion *infra* Part IV.

<sup>17</sup> See discussion *infra* Part IV.

<sup>18</sup> See, e.g., Jay Root, *Judge's Ruling Would Let Texas Consumers Buy Booze from Walmart and Costco*, TEX. TRIB. (Mar. 21, 2018, 1:00 PM), <https://www.texastribune.org/2018/03/21/judges-ruling-would-let-consumers-buy-booze-walmart-and-costco/> [<https://perma.cc/8MSA-D2HH>]. See also Marfin, *supra* note 1.

<sup>19</sup> See Marfin, *supra* note 1.

<sup>20</sup> *Wal-Mart Stores, Inc.*, 313 F. Supp. 3d at 757 (stating that “Wal-Mart currently sells beer and wine in Texas at 668 locations”).

<sup>21</sup> TEX. ALCO. BEV. CODE ANN. § 22.16(a) (West, Westlaw through 2019 Reg. Sess.).

<sup>22</sup> See *Wal-Mart Stores, Inc.*, 313 F. Supp. 3d at 758.

<sup>23</sup> TEX. ALCO. BEV. CODE ANN. § 22.01 (West, Westlaw through 2019 Reg. Sess.). The holder of a package store permit is allowed to sell distilled spirits (*i.e.*, liquor), as well as wine and ale for off-premises consumption. See *id.*; see also *Wal-Mart Stores, Inc.*, 313 F. Supp. 3d at 757.

any entity which would hold the package store permit for the benefit of a public corporation.<sup>24</sup>

The term “public corporation” does not just mean corporations with publicly traded stock.<sup>25</sup> The term is defined in the statute more broadly to mean not only “any corporation or other legal entity whose shares or other evidence of ownership are listed on a public stock exchange,” but also “any corporation or other legal entity in which more than 35 persons hold an ownership interest in the entity.”<sup>26</sup> Thus, it is not only publicly traded corporations, such as Wal-Mart, that cannot sell liquor in their stores, the prohibition also extends to any entity (including privately owned corporations, limited liability companies, or limited partnerships) having more than thirty-five owners.<sup>27</sup>

Believing that the public corporation ban was unconstitutional under the dormant Commerce Clause and the Equal Protection Clause of the United States Constitution, Wal-Mart Stores, Inc. and three of its subsidiaries (collectively referred to herein as “Wal-Mart”) brought suit against TABC in U.S. District Court.<sup>28</sup> The

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<sup>24</sup> TEX. ALCO. BEV. CODE ANN. § 22.16(a) (West, Westlaw through 2019 Reg. Sess.).

<sup>25</sup> See *infra* notes 26-27 and accompanying text.

<sup>26</sup> TEX. ALCO. BEV. CODE ANN. § 22.16(b) (West, Westlaw through 2019 Reg. Sess.).

<sup>27</sup> See *id.*

<sup>28</sup> Wal-Mart Stores, Inc. v. Tex. Alcohol Beverage Comm’n, 313 F. Supp. 3d 751, 756-57 (W.D. Tex. 2018). Wal-Mart is a publicly traded corporation that operates approximately 5,000 retail stores in the United States. See *id.* at 757. It currently sells liquor in 31 states. See *id.* It sells beer and wine in 47 states, and in Texas it sells beer and wine at 668 locations. See *id.* TABC was created by the Texas Legislature in 1935 (it was formerly called the Texas Liquor Control Board). See, e.g., *Internal Audit of the Enforcement Administration as of January 14, 2014 at the Texas Alcoholic Beverage Commission*, Monday N. Rufus, P.C., at 4, [https://www.tabc.state.tx.us/publications/agency\\_report\\_archives/InternalAuditEnforcement2014.pdf](https://www.tabc.state.tx.us/publications/agency_report_archives/InternalAuditEnforcement2014.pdf) [<https://perma.cc/HH4S-7W6V>]. It is the state agency in charge of regulating the Texas alcoholic beverage industry. See *id.* The duties of the TABC include regulating sales of alcoholic beverages, as well as taxes, imports, manufacturing, transport, and advertising. See *id.*; see also *Annual Report of Nonfinancial Data for Fiscal Year 2017*, TEXAS ALCOHOLIC BEVERAGE COMMISSION, ANNUAL REPORT OF NONFINANCIAL DATA FOR FISCAL YEAR 2017 TABC-21 (Dec. 31, 2017), [https://texashistory.unt.edu/ark:/67531/metapht1114395/m2/1/high\\_res\\_d/UNT-0004-0156.pdf](https://texashistory.unt.edu/ark:/67531/metapht1114395/m2/1/high_res_d/UNT-0004-0156.pdf) [<https://perma.cc/E2QA-CLYG>] (citing TEX. ALCO. BEV. CODE ANN. § 5.31). These duties of the TABC statutorily come from Section 5.31 of the Texas Alcoholic Beverage Code, which prescribes the general powers and duties of the Commission. See TEX. ALCO. BEV. CODE ANN. § 5.31 (West, Westlaw through 2019 Reg. Sess.). The statute provides: “The Commission may exercise all powers, duties, and functions conferred by this code, and all powers incidental, necessary, or convenient to

TPSA, a trade organization, was allowed to intervene.<sup>29</sup> On March 20, 2018, in what was described as a landmark ruling, a U.S. District Court (sometimes referred to herein as the “District Court” issued an opinion (sometimes referred to herein as the “District Court Wal-Mart opinion”) striking down the public corporation ban.<sup>30</sup> The District Court found that the public corporation ban violated the dormant Commerce Clause, but not the Equal Protection Clause.<sup>31</sup> The U.S. Court of Appeals for the Fifth Circuit vacated and remanded in part, and also reversed in part, and after the U.S. Supreme Court denied certiorari in November 2020, Wal-Mart moved to dismiss the case and the order of dismissal was signed on April 12, 2021.<sup>32</sup> On June 29, 2021, Wal-Mart filed Plaintiffs’ Amended Petition, Application for Injunctive Relief, and Request for Disclosure, in state district court in Travis County, Texas, asserting that the public corporation ban violates provisions of the Texas Constitution.<sup>33</sup> The state court litigation is not discussed in this article.

Section 22.05 of the Texas Alcoholic Beverage Code was also at issue in the case.<sup>34</sup> This provision (now repealed, as discussed below) was commonly known as the consanguinity exception.<sup>35</sup> This provision provided an exception to the general “five-permit limit” rule, which prohibited package store permit holders from holding more than five package store permits.<sup>36</sup> The consanguinity rule granted an exception to the five-permit limit for certain family-

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the administration of this code. It shall inspect, supervise, and regulate every phase of the business of manufacturing, importing, exporting, transporting, storing, selling, advertising, labeling, and distributing alcoholic beverages, and the possession of alcoholic beverages for the purpose of sale or otherwise. It may prescribe and publish rules necessary to carry out the provisions of this code.” *Id.* § 5.31(a).

<sup>29</sup> *Wal-Mart Stores, Inc.*, 313 F. Supp. 3d at 757.

<sup>30</sup> *See id.* at 766; *see also* Root, *supra* note 18 (stating that a “landmark ruling issued by a federal court in Austin” could let “Texas consumers buy booze from Walmart and Costco”).

<sup>31</sup> *Wal-Mart Stores, Inc.*, 313 F. Supp. 3d at 766-82.

<sup>32</sup> *See supra* notes 6-13 and accompanying text.

<sup>33</sup> Amended Petition, Application for Injunctive Relief & Request for Disclosure, *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n*, No. D-1-GN-15-000617 (Dist. Ct. Tex. June 29, 2021).

<sup>34</sup> *Wal-Mart Stores, Inc.*, 313 F. Supp. 3d at 758.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

owned businesses.<sup>37</sup> The exception stated that if “two or more persons related within the first degree of consanguinity have a majority of the ownership in two or more legal entities holding package store permits, they may consolidate the package store businesses into a single legal entity.”<sup>38</sup> The statute then further stated that the consolidated entity “may then be issued permits for all the package stores, notwithstanding any other provisions of this code.”<sup>39</sup>

The effect of the public corporation ban, along with the consanguinity exception, could be described as protectionist because, by and large, it could give preference to privately-held family-owned businesses.<sup>40</sup> The Texas Tribune summarized it this way: “[The law] forbids publicly traded businesses from owning liquor stores while allowing family-owned companies to grow into giant chains without fear of competition from large national or international corporations.”<sup>41</sup> It has been reported that large family-owned chains dominate the Texas retail liquor market.<sup>42</sup>

In addition to finding that the public corporation ban violated the U.S. Constitution, the District Court also found that the consanguinity exception was inconsistent with the Equal Protection Clause because the practical effect of it was to make the five-permit limit apply only to permittees lacking an individual owning a majority of the business and permittees whose majority owner lacks a child, sibling, or parent who can assist with the permit consolidation process.<sup>43</sup>

Notably, in the 2019 Texas legislative session, the Texas Legislature repealed the consanguinity exception and raised the five-permit limit to 250.<sup>44</sup> These changes in the law took effect on

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 768-69. *See also infra* note 41 and accompanying text.

<sup>41</sup> *See Root, supra* note 18.

<sup>42</sup> *See* Travis Thomas, *Texas Legislature Should Reform Unconstitutional Liquor Laws*, TRIBTALK (Aug. 14, 2018), <https://www.tribtalk.org/2018/08/14/texas-legislature-should-reform-unconstitutional-liquor-laws/> [<https://perma.cc/P968-BE7M>].

<sup>43</sup> *Wal-Mart Stores, Inc.*, 313 F. Supp. 3d at 783-86.

<sup>44</sup> H.B. 1545 §§ 82, 85, 86th Leg., Reg. Sess. (Tex. 2019). *See also* *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n*, 945 F.3d 206, 226 (5th Cir. 2019).

September 1, 2019.<sup>45</sup> The five-permit limit and consanguinity exception are not discussed in detail in this Article.

## II. FINDINGS OF FACT DETERMINED BY THE U.S. DISTRICT COURT RELATING TO THE PUBLIC CORPORATION BAN

The Findings of Fact in the District Court Wal-Mart opinion set forth an extensive amount of facts relating to the history of public corporation ban.<sup>46</sup> This Part II provides a summary of these facts. Several direct quotes from the District Court Wal-Mart opinion are provided. Although direct quotes oftentimes create disjointedness in prose, it seemed appropriate here in order to provide the reader with historical information relating to the enactment of the public corporation ban.

The public corporation ban was not always the law in Texas.<sup>47</sup> Prior to its enactment, Texas instead had what was known as a residency law, which allowed alcoholic beverage permits to be held only by Texas residents and businesses that were majority-owned by Texans.<sup>48</sup> This residency law was declared unconstitutional under the dormant Commerce Clause of the U.S. Constitution in a 1991 U.S. District Court decision, which was affirmed by the Fifth Circuit Court of Appeals in 1994 (referred to herein as the “*Cooper* litigation” or the “*Cooper* case”).<sup>49</sup>

In 1993, after the 1991 lower court decision was issued in the *Cooper* litigation but before the Fifth Circuit Court of Appeals issued its opinion in 1994, the Texas Legislature passed House Bill 1445.<sup>50</sup> House Bill 1445 “reduced the length of time that the holder of an alcoholic-beverage permit was required to be a resident of Texas (from three years to one) and eliminated the requirement altogether for mixed beverage permits and beer-and-wine permits (but not for package store permits).”<sup>51</sup> With respect to the purpose of House Bill 1445, the District Court stated:

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<sup>45</sup> *Wal-Mart Stores, Inc.*, 945 F.3d at 226.

<sup>46</sup> *Wal-Mart Stores, Inc.*, 313 F. Supp. 3d at 757-65.

<sup>47</sup> *Id.* at 759-62.

<sup>48</sup> *Id.* at 759.

<sup>49</sup> *Id.* (citing *Wilson v. McBeath*, No. A-90-CA-736, 1991 WL 540043, at \*11 (W.D. Tex. June 13, 1991), *aff'd sub nom.* *Cooper v. McBeath*, 11 F.3d 547, 554 (5th Cir. 1994) (striking down TEX. ALCO. BEV. CODE ANN. § 109.53).

<sup>50</sup> *Wal-Mart Stores, Inc.*, 313 F. Supp. 3d at 759.

<sup>51</sup> *Id.* (citation omitted).

The purpose of H.B. 1445 was to prevent the Fifth Circuit from issuing a merits decision in *Cooper*. This purpose was revealed during a floor debate on an amendment proposed by Representative Mark Stiles. The Stiles Amendment would have retained the residency requirement for all permits. During the House debate on this amendment, Representative Stiles noted that the *Cooper* lawsuit was the “real reason” for H.B. 1445’s partial elimination of the residency requirement. He urged his colleagues to “try to settle their lawsuit” (referring to the *Cooper* litigation) rather than “take the whole baby and throw it out with the bath water.” Representative Stile’s opponents argued that H.B. 1445 would actually save most of the state’s residency requirements because, by eliminating the residency requirement for mixed-beverage permits, the bill would prevent the Fifth Circuit from reaching a broader merits holding in *Cooper* that would strike down the residency requirement for all permits, including specifically package store permits. Some Representatives also stated that a ‘deal’ had been made with the *Cooper* plaintiffs, in which those plaintiffs had pledged to dismiss their case if H.B. 1445 became law.<sup>52</sup>

House Bill 1445 was passed by the Texas Legislature and signed into law on June 19, 1993.<sup>53</sup> The law became effective on September 1, 1993.<sup>54</sup> After the passage of House Bill 1445, the plaintiffs in the *Cooper* litigation moved to dismiss the case based on it becoming moot with the passage of House Bill 1445.<sup>55</sup> However, the Fifth Circuit Court of Appeals disagreed, opting not to dismiss.<sup>56</sup> The Fifth Circuit Court of Appeals issued its decision in the *Cooper* case on January 13, 1994, affirming the lower court’s decision that struck down the residency requirement.<sup>57</sup> The Fifth

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<sup>52</sup> *Id.* at 759-60 (citations omitted). The District Court opinion stated in the Findings of Fact: “TPSA viewed the *Cooper* litigation as part of a ‘tug of war between the legislature and the federal courts over the residency requirement.’” *Id.* at 759 (citation omitted). TPSA, which is the trade association of package stores in Texas, opposed the amendment proposed by Representative Stiles. *Id.* at 757, 760 (citation omitted). TPSA supported House Bill 1445. *Id.* at 759 (citation omitted).

<sup>53</sup> See H.B. 1445, 73rd Leg., Reg. Sess. (Tex. 1993).

<sup>54</sup> *Id.*

<sup>55</sup> *Wal-Mart Stores, Inc.*, 313 F. Supp. 3d at 760.

<sup>56</sup> *Id.*

<sup>57</sup> See *id.*

Circuit's opinion contained broad language that seemed to apply to all Texas alcohol retail permits.<sup>58</sup>

It was in 1995, in the next Legislative session, that a bill was filed containing the public corporation ban.<sup>59</sup> With respect to the bill, the District Court found this finding of fact:

TPSA conceived, drafted and supported the public corporation ban because the TPSA feared that *Cooper* would be applied to strike down the residency requirement for package store permits. This fear was the "very, very strongest" reason why TPSA drafted the public corporation ban. Without the residency requirement, TPSA was "afraid" that "very large stores could disrupt what had been a very stable business climate" for TPSA's members. TPSA feared the "Wal-Martization" of the Texas package store market. TPSA considered Wal-Mart to be "the poster child" for the idea that "big stores had come into Texas" and "had driven out of business mom-and-pop and local businesses."<sup>60</sup>

The District Court further found that "credible evidence demonstrates that, if not for the Fifth Circuit striking down Texas's residency requirement, TPSA would not have proposed, and the Legislature would not have enacted, the ban on public corporations holding package store permits."<sup>61</sup>

At the time the public corporation ban was passed and became law, no incumbent package store permittees (all of whom were Texas residents or majority-owned by Texas residents) were affected.<sup>62</sup> And even if there were any Texas-owned public corporations (public corporations meaning as defined in the statute)<sup>63</sup> holding package store permits at the time House Bill 1445 was to become effective, they would still not be impacted by the new law because the statute contained a grandfather clause.<sup>64</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Wal-Mart Stores, Inc.*, 313 F. Supp. 3d at 760 (citations omitted).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 760-61. The Findings of Fact stated: "TPSA was not aware of any (Texas-owned) public corporations that held package store permits in 1995." *Id.* at 761 (citation omitted).

<sup>63</sup> *See supra* notes 18-27 and accompanying text.

<sup>64</sup> *Wal-Mart Stores, Inc.*, 313 F. Supp. 3d at 761. TEX. ALCO. BEV. CODE, Section 22.16(f) (West, Westlaw through 2019 Reg. Sess.), provides

Trial testimony indicated that “the purpose of the public corporation ban was to preserve a favorable ‘business climate’ for TPSA’s members.”<sup>65</sup> However, lobbying efforts at the time the bill was being debated in the Texas Legislature suggested a different rationale.<sup>66</sup> Lobbying efforts suggested that the public corporation ban “was needed to promote ‘accountability,’ or the need ‘to have real human beings who are easily identifiable, who are close to the business, and who ultimately bear personal responsibility for the actions of the package stores.”<sup>67</sup> With respect to this accountability argument, the District Court disagreed and stated:

In light of the absence of any evidence in the record indicating that TPSA was concerned about promoting corporate accountability and . . . testimony that TPSA’s chief concern was maintaining the business climate created by the residency requirement, the Court concludes that the proffered ‘accountability’ rationale was pretextual. TPSA, in its testimony to the Legislature, speculated that the public corporation ban would promote corporate accountability in order to conceal the ban’s actual discriminatory purpose (to protect Texas package store owners from out-of-state competition).<sup>68</sup>

The District Court also stated the following with respect to testimony at the floor debate related to the bill:

The Senate sponsor of the public corporation ban, Senator Kenneth Armbrister, confirmed the discriminatory purpose of the law during the Senate floor debate. When asked to explain the ban’s purpose, Senator Armbrister’s first answer was that the ban means that “you can’t have a package store inside a Walmart” and “Walmart can’t own the package store.” Senator

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This section shall not apply to a corporation:

- (1) which was a public corporation as defined by this section on April 28, 1995; and
- (2) which holds a package store permit on April 28, 1995, or which has an application pending for a package store permit on April 28, 1995; and
- (3) which has provided to the commission on or before December 31, 1995, a sworn affidavit stating that such corporation satisfies the requirements of Subdivisions (1) and (2).

<sup>65</sup> *Id.* (citation omitted).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* (citation omitted).

<sup>68</sup> *Id.*

Armbrister later agreed with a colleague's statement that the Legislature "wanted to have *somebody from Texas* with the license that you get hold of to enforce the Code."<sup>69</sup>

It is true that the public corporation ban, strictly on its face, applies to disallow public corporations (as defined in the statute),<sup>70</sup> both in Texas and outside of Texas, from obtaining a package store permit.<sup>71</sup> Thus, strictly on its face, the statute does not appear discriminatory.<sup>72</sup> However, on this point the District Court found:

Certainly, the statute has the effect of preventing both some in-state and some out-of-state firms from entering the Texas retail liquor market. Yet, only a very small percentage of the in-state firms that would otherwise serve this market are prevented from doing so by the public corporation ban. On the other hand, a very large percentage of the out-of-state companies that would otherwise serve this market are blocked. In fact, the credible evidence suggests that the overwhelming majority of out-of-state companies that would otherwise sell liquor in Texas cannot do so because of the public corporation ban.<sup>73</sup>

Although evidence was presented countering this, suggesting that the public corporation ban did not disproportionately impact out-of-state companies, the District Court did not find it persuasive.<sup>74</sup>

It was also argued that the purpose of the public corporation ban was really to disallow large companies (both out-of-state and in-state) from obtaining package store permits rather than to

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<sup>69</sup> *Id.* at 761-62 (citations omitted).

<sup>70</sup> *See supra* notes 18-27 and accompanying text.

<sup>71</sup> *See* TEX. ALCO. BEV. CODE § 22.16(a) (West, Westlaw through 2019 Reg. Sess.); *see also Wal-Mart Stores, Inc.*, 313 F. Supp. 3d at 762.

<sup>72</sup> *See Wal-Mart Stores, Inc.*, 313 F. Supp. 3d at 762.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 762-64. The District Court stated:

Because we know that, with the public corporation ban, the market is overwhelmingly served by companies wholly owned by Texans, it follows that the ban has blocked the majority of potential out-of-state entrants. At the same time, it is clear that the ban has blocked only a handful of potential in-state entrants. For that reason, the Court concludes that the public corporation ban disproportionately burdens out-of-state companies.

*Id.* at 764.

disallow out-of-state-companies from obtaining package store permits.<sup>75</sup> The District Court also did not find this argument persuasive.<sup>76</sup> The District Court stated:

TPSA argues that much of the evidence of discriminatory purpose can be construed as evidence of intent to discriminate against large companies, not out-of-state companies. The Court is not persuaded. As explained above, the weight of the evidence indicates the Legislature specifically intended to exclude out-of-state companies in order to benefit incumbent, locally owned package stores. Moreover, TPSA's insistence that the public corporation ban was motivated by concerns about the role of large businesses is belied by TPSA's repeated efforts to defend the consanguinity exception, which serves to remove any cap on the growth of most locally-owned package stores companies. If the Legislature, in enacting the ban, was motivated primarily by a desire to limit the size of package store companies, it is difficult to conceive why it would maintain a provision that prevents the imposition of a limit on the size of most package store companies.<sup>77</sup>

Ultimately, the District Court found in favor of Wal-Mart, finding the public corporation ban to be in violation of the dormant Commerce Clause of the U.S. Constitution for two reasons.<sup>78</sup> First, the District Court found that the purpose of the statute was to discriminate against out-of-state companies.<sup>79</sup> Because of this finding, the District Court applied the strict scrutiny standard whereby a discriminatory law can survive only if it is also found that there is no other way but for the law to advance legitimate local

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<sup>75</sup> See *id.* at 768.

<sup>76</sup> *Id.* at 768-69.

<sup>77</sup> *Id.* See also *supra* notes 35-45 and accompanying text relating to the consanguinity exception.

<sup>78</sup> *Wal-Mart Stores, Inc.*, 313 F. Supp. 3d at 766-78.

<sup>79</sup> *Id.* at 766-69. The District Court stated:

The Court concludes that the public corporation ban was enacted with discriminatory intent: one of the legislature's primary purposes in passing the ban was to exclude out-of-state companies from participating in the Texas retail liquor market. Neither TABC nor TPSA argues that the ban can survive the rigorous scrutiny applied to discriminatory statutes. The ban's discriminatory purpose renders it inconsistent with the dormant Commerce Clause and therefore unconstitutional.

*Id.* at 766.

interests.<sup>80</sup> Neither TABC nor TPSA argued that the public corporation ban met this burden.<sup>81</sup> Second, the District Court also found that the public corporation ban violated the dormant Commerce Clause under the less rigorous balancing analysis of *Pike v. Bruce Church, Inc.*<sup>82</sup> Under the *Pike* balancing analysis, a law will be upheld unless it imposes burdens on interstate commerce that are clearly excessive relative to generally considered local benefits.<sup>83</sup> Although the District Court found that the public corporation ban did provide some local benefits and did have a legitimate local purpose, the District Court also found that these benefits could easily and more directly be achieved in other ways, such as with the imposition of excise taxes.<sup>84</sup> Thus, the District Court held that the public corporation ban could not survive the *Pike* balancing analysis because the burdens placed on interstate commerce by it were excessive relative to the local benefits.<sup>85</sup>

The District Court, however, did not find that the public corporation ban was in violation of the Equal Protection Clause of the United States Constitution.<sup>86</sup> Wal-Mart argued that the public corporation ban was in violation of the Equal Protection Clause because the statute mandates different treatment of similarly situated businesses.<sup>87</sup> With respect to the Equal Protection Clause analysis, because Wal-Mart is not part of a protected class and also because the statute did not infringe upon a fundamental constitutional right, rational basis review was performed.<sup>88</sup> Rational basis review allows a statute to survive if the law is found

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<sup>80</sup> *Id.* at 766.

<sup>81</sup> *Id.* at 769.

<sup>82</sup> *Id.* at 773-78 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

<sup>83</sup> *Id.* at 766. The District Court stated: "A law that does not directly discriminate against interstate commerce may still offend the dormant Commerce Clause if it fails the *Pike* balancing test. *Pike* provides a standard for assessing state laws that regulate 'even-handedly' but nonetheless impose 'incidental' burdens on interstate commerce." *Id.* at 773 (citing *Pike*, 397 U.S. at 142). The District Court further stated: "A law reviewed under *Pike* balancing 'will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Id.* at 773-74 (citation omitted).

<sup>84</sup> *Id.* at 775-78.

<sup>85</sup> *Id.* at 778.

<sup>86</sup> *Id.* at 779-82.

<sup>87</sup> *Id.* at 779.

<sup>88</sup> *Id.*

to be “rationally related” to a “legitimate state purpose.”<sup>89</sup> The District Court found that the public corporation ban was related to a legitimate state purpose, that being the reduction of both the consumption and availability of liquor.<sup>90</sup>

### III. U.S. FIFTH CIRCUIT APPEAL AND LEGISLATIVE EFFORTS

Because the U.S. District Court found the public corporation ban to be in violation of the dormant Commerce Clause, the court imposed an injunction on TABC from enforcing the public corporation ban found in Section 22.16 of the Texas Alcohol and Beverage Code.<sup>91</sup>

The case was then appealed to the U.S. Fifth Circuit Court of Appeals.<sup>92</sup> Oral arguments were held on April 29, 2019.<sup>93</sup> The Fifth Circuit issued a decision on August 15, 2019, vacating the District Court’s decision concerning the public corporation ban because it determined a remand was warranted.<sup>94</sup> Then, on December 9, 2019, the Fifth Circuit withdrew the original opinion and reissued a new opinion.<sup>95</sup> In the reissued opinion, with respect to whether the public corporation ban has a discriminatory purpose, the Fifth Circuit vacated the lower court’s decision and remanded in part.<sup>96</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 780. The District Court also found that the five-permit limit and other statutes at issue in the case (not discussed in this Article) served the same legitimate purpose of “reducing the availability and consumption of liquor” and, accordingly, found these statutes not to be in violation of the Equal Protection Clause. *See id.* It was also argued that there was a legitimate purpose in the public corporation ban related to promoting small businesses and ensuring corporate accountability. The District Court did not address these arguments because the court found it unnecessary due to moderating alcohol consumption being a sufficient rationale alone to cause the public corporation ban to survive rational basis review. *Id.* (stating “[b]ecause the state’s interest in moderating the consumption of liquor provides the public corporation ban adequate support to survive rational basis review, the Court need not address the other proffered rationales (which include promoting small businesses and corporate accountability)”).

<sup>91</sup> *Id.* at 786.

<sup>92</sup> *See* Docket Entry for Apr. 16, 2018, *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n*, 945 F.3d 206 (5th Cir. 2019) (No. 18-50299).

<sup>93</sup> *See* Docket Entry for Apr. 29, 2019, *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n*, 945 F.3d 206 (5th Cir. 2019) (No. 18-50299).

<sup>94</sup> *Wal-Mart Stores, Inc. v. Tex. Alcoholic Bev. Comm’n*, 935 F.3d 362, 381 (5th Cir. 2019).

<sup>95</sup> *Wal-Mart Stores, Inc. v. Tex. Alcoholic Bev. Comm’n*, 945 F.3d 206 (5th Cir. 2019).

<sup>96</sup> *Id.* at 226.

The Fifth Circuit concluded that the District Court erred in its findings relating to the public corporation ban having a discriminatory purpose, some findings being held infirm.<sup>97</sup> The Fifth Circuit acknowledged that “Texas has a history of discriminating against out-of-state alcohol retailers” and the record contained circumstantial evidence that could support the conclusion that the public corporation ban was enacted with a discriminatory purpose, but the Fifth Circuit concluded that the District Court erred in finding that there was direct evidence of a purpose to discriminate against interstate commerce, stating “[t]here is no direct evidence of a discriminatory purpose in the legislative history; Plaintiffs rely on circumstantial evidence.”<sup>98</sup> With respect to factual findings relating to TPSA, the Fifth Circuit held that the actions of the TPSA did not control the inquiry.<sup>99</sup> The Fifth Circuit also concluded some findings were not the best or not sufficient indicia of legislative intent or appropriate context relating to certain findings was not provided.<sup>100</sup> Accordingly, the Fifth Circuit held a remand was appropriate for a reweighing of the evidence on the issue of discriminatory purpose, acknowledging that Texas’ history of discriminating against out-of-state retailers “has significant ‘probative value in connection’ with the discriminatory purpose inquiry.”<sup>101</sup> With respect to the District Court’s *Pike* analysis, the Fifth Circuit reversed the lower court.<sup>102</sup>

On June 12, 2020, Wal-Mart filed its writ of certiorari with the U.S. Supreme Court.<sup>103</sup> On November 23, 2020, the U.S. Supreme Court denied certiorari, which meant the case was to return back to the federal district court.<sup>104</sup> However, Wal-Mart moved to dismiss the case in April 2021 and the order of dismissal was signed on April 12, 2021.<sup>105</sup> On June 29, 2021, Wal-Mart filed Plaintiffs’

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<sup>97</sup> *Id.* at 211, 214.

<sup>98</sup> *Id.* at 216, 218.

<sup>99</sup> *Id.* at 214, 216 & n.9.

<sup>100</sup> *Id.* at 215.

<sup>101</sup> *Id.* at 214, 218.

<sup>102</sup> *Id.* at 221.

<sup>103</sup> See Petition for Writ of Certiorari, *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n*, No. 19-1368 (U.S. appeal docketed June 12, 2020).

<sup>104</sup> *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n*, No. 19-1368, 2020 WL 6829069 (Nov. 23, 2020).

<sup>105</sup> *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n*, No. 1:15-CV-00134-RP (Apr. 12, 2021).

Amended Petition, Application for Injunctive Relief, and Request for Disclosure, in state district court in Travis County, Texas, asserting that the public corporation ban violates provisions of the Texas Constitution.<sup>106</sup> The state court litigation is not discussed in this article.

In addition to the litigation in the Wal-Mart case, the public corporation ban was also the subject of a bill filed in the 2019 Texas legislative session.<sup>107</sup> House Bill 3713 sought to repeal the statute.<sup>108</sup> The bill was short and direct. It simply stated: “Sections 22.05 and 22.16, Alcoholic Beverage Code, are repealed.”<sup>109</sup> The bill did not receive a public hearing and did not become law.<sup>110</sup>

#### IV. ACCOUNTABILITY AND WHAT CAN BE LEARNED FROM THE WINE INDUSTRY?

In the Wal-Mart litigation it was argued that the public corporation ban was needed in part for accountability reasons.<sup>111</sup> The accountability argument involves the idea that large businesses are less accountable compared to small businesses.<sup>112</sup> The District Court disagreed by finding:

The credible evidence demonstrates that public corporations are not less accountable than firms with fewer than 35 owners. Dr. Elzinga testified that the ten largest BQ permittees<sup>113</sup> (including Wal-Mart) had fewer TABC violations per store than

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<sup>106</sup> Amended Petition, Application for Injunctive Relief & Request for Disclosure, Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n, No. D-1-GN-15-000617 (Dist. Ct. Tex. June 29, 2021).

<sup>107</sup> See *infra* Part II.

<sup>108</sup> See H.B. 3713, 86th Leg., Reg. Sess. (Tex. 2019), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB3713> [<https://perma.cc/3E8T-HHZC>]; see also Marfin, *supra* note 1.

<sup>109</sup> See H.B. 3713, 86th Leg., Reg. Sess. (Tex. 2019), <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB3713> [<https://perma.cc/3E8T-HHZC>].

<sup>110</sup> See *id.*

<sup>111</sup> Wal-Mart Stores, Inc. v. Tex. Alcoholic Bev. Comm’n, 313 F. Supp. 3d 751, 761-62, 765. (W.D. Tex. 2018). See also *supra* notes 64-91 and accompanying text.

<sup>112</sup> *Wal-Mart Stores, Inc.*, 313 F. Supp. 3d at 761, 765.

<sup>113</sup> A BQ permit is a “Wine and Beer Retailer’s Off-Premise Permit” which authorizes the permit holder to sell wine, ale, and beer for consumption off-premises. See *id.* at 757-58.

did the ten largest P permittees.<sup>114</sup> Moreover, he testified that there is no support in the academic literature for the notion that public corporations are less accountable to regulators than privately held corporations. To the contrary, the literature indicates public corporations tend to be very concerned with compliance and reputation. Dr. Elzinga's opinion was not rebutted by the TABC's or the TPSA's experts.

TABC already holds public corporations accountable for their sales of beer and wine at retail, for their sales of spirits in hotels, and for their sales of mixed beverages in bars and restaurants. Neither TABC nor TPSA has shown a single instance in which the state has been unable to contact or hold accountable a public corporation.<sup>115</sup>

In addition to the reasons set forth by the District Court, there are other reasons why large businesses should not be considered less accountable than smaller businesses. For example, larger businesses have more employees, and more employees can mean more manpower to dedicate to TABC compliance issues. Larger businesses also may be more likely to have websites that contain contact information where TABC can locate the appropriate individuals to contact in the event there are permit problems. Moreover, publicly traded corporations are required to make quarterly and annual filings with the Securities Exchange Commission (SEC) that are available to the public on the Internet.<sup>116</sup> These publicly available filings contain information about the companies, including audited financial statements, general information about the business, number of employees, working capital, certain risk factors (including legal and regulatory), certain legal proceedings and contingencies, and the names of certain executive officers.<sup>117</sup>

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<sup>114</sup> A P permit is a "Package Store Permit," which is the type of permit at issue in this case. A P permit authorizes the permit holder to sell distilled spirits, wine, and ale for consumption off-premises. *See id.* at 757.

<sup>115</sup> *Id.* at 765 (citations omitted).

<sup>116</sup> *See, e.g., What We Do*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/Article/whatwedo.html#laws> [<https://perma.cc/NV8D-3JVA>] (last visited Oct. 4, 2020).

<sup>117</sup> *See, e.g., SEC Form 10-K General Instructions*, available at <https://www.sec.gov/files/form10-k.pdf> [<https://perma.cc/7FDN-8RX5>].

The remainder of this Article will focus on the accountability argument and what can be learned from recent developments in the wine industry.<sup>118</sup> The recent developments in the wine industry that will be discussed lend support to the conclusion that even if accountability concerns with package store permits need to be addressed, there are better ways to address such concerns than not allowing large-sized businesses the ability to obtain package store permits. Further, it seems based on TABC's regulation of smaller versus larger out-of-state wineries that the more stringent regulation of "larger" package store permit holders should be based on volume of sales rather than number of owners. For example, assume there is a package store permit holder having 38 owners (Package Store A)<sup>119</sup> that makes a relatively small number of sales per quarter and a package store permit holder having 10 owners (Package Store B) that has an extremely large number of sales per quarter. Is it really Package Store A that needs more regulation or not even be allowed to obtain a package store permit in the first place because of accountability concerns?<sup>120</sup>

In the end, this analysis seeks to show that there are alternative ways to hold larger versus smaller businesses accountable to the TABC that would be more narrowly tailored.<sup>121</sup>

#### A. *Background: Granholm v. Heald*

Some background on the wine industry is in order first. The production and sale of wine (as well as liquor) involves a manufacturer, distributor, and retailer, which are the three parties that comprise what is commonly known as the "three-tier system" of alcohol distribution.<sup>122</sup> This system was implemented by many states when Prohibition ended.<sup>123</sup> Prohibition was repealed in 1933 when the Twenty-first Amendment to the U.S. Constitution was

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<sup>118</sup> See *infra* Parts IV(A)-(C).

<sup>119</sup> This is the type of business that is disallowed from obtaining a package store permit. See *supra* notes 18-27 and accompanying text.

<sup>120</sup> See discussion *supra* Part I.

<sup>121</sup> *Id.*

<sup>122</sup> See, e.g., RICHARD MENDELSON, WINE IN AMERICA: LAW AND POLICY 29, 207 (2011); Madeline Puckette, *Taxes and the 3-Tier System (Why Wine Costs So Much!)* (Aug. 29, 2014), WINE FOLLY, <http://winefolly.com/update/three-tier-system/> [<https://perma.cc/DB9M-4GDQ>].

<sup>123</sup> See MENDELSON, *supra* note 122, at 13-19.

passed.<sup>124</sup> The Twenty-first Amendment did two things.<sup>125</sup> It repealed prohibition and also gave states power to regulate their alcohol markets (to the point of forbidding the sale of alcohol and remaining dry if they so desired).<sup>126</sup>

When states began to exercise their right to regulate alcohol, states fell into one of two buckets: (i) control states; and (ii) open license states.<sup>127</sup> In control states, state governments control the sale of alcohol through state agencies at the distributor and/or retail level.<sup>128</sup> In open license states, states maintain licensing systems for private businesses to engage in the sale and distribution of alcohol through the three-tier system.<sup>129</sup>

Under the three-tier system, manufacturers, distributors, and retailers are separated into distinct tiers, and a license holder in one tier generally cannot hold a license within another tier.<sup>130</sup> Tier One encompasses manufacturers, such as wineries and distilleries.<sup>131</sup> Under the three-tier system, manufacturers are allowed to sell their products only to Tier Two distributors.<sup>132</sup> Distributors must then only sell to retailers, such as restaurants, bars, and retail stores.<sup>133</sup> Retailers are generally the only tier allowed to sell to end-user consumers.<sup>134</sup>

States believed the three-tier system was necessary to guarantee a system of checks and balances, which would, among other things, help secure market access and prohibit the situation

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 195.

<sup>127</sup> *Id.* at 15-19; Billy Hamilton, *State Liquor Taxes: Still Crazy After All These Years*, 75 STATE TAX NOTES 519, 519-20 (2015).

<sup>128</sup> *See, e.g.*, MENDELSON, *supra* note 122, at 17.

<sup>129</sup> *See* Hamilton, *supra* note 127, at 519-20. *See, e.g.*, MENDELSON, *supra* note 122, at 15.

<sup>130</sup> *See, e.g.*, MENDELSON, *supra* note 122, at 206-07; *The Three-Tier System: A Modern View*, NAT'L ALCOHOL BEVERAGE CONTROL ASS'N 1 (June 15, 2017), [https://www.nabca.org/sites/default/files/assets/files/ThreeTierSystem\\_Mar2015.pdf](https://www.nabca.org/sites/default/files/assets/files/ThreeTierSystem_Mar2015.pdf) [<https://perma.cc/NK37-3JM3>] (describing general scheme and indicating that the specifics of the licensing regimes in each of the open states vary); Hamilton, *supra* note 127, at 520 (noting that under the three-tier system “[e]verybody had a piece of the pie, but nobody got more than one piece”).

<sup>131</sup> *See* MENDELSON, *supra* note 122, at 206-07.

<sup>132</sup> *See id.*

<sup>133</sup> *See id.*

<sup>134</sup> *See id.*

of what was called a “tied house.”<sup>135</sup> Further, it was thought that the three-tier system was necessary to ensure the efficient payment of excise taxes (*i.e.*, accountability) and to prevent alcohol from getting into the hands of underage individuals.<sup>136</sup>

With respect to wineries, one disadvantage to the three-tier system is that it did not accommodate consumers who wanted to purchase wine directly from a winery by making online purchases. Although some states began allowing wineries to ship directly to consumers, even though it seemingly eroded the traditional three-tier system, the rules put in place by some states discriminated against out-of-state wineries as compared to in-state wineries.<sup>137</sup> Richard Mendelson, in his book *WINE IN AMERICA*, described the situation like this:

By 2003, 30 states permitted winery direct-to-consumer shipments within the state. Of this number, 24 states also allowed some form of direct interstate shipping. Thirteen of these 24 passed “reciprocity” laws that granted out-of-state wineries the right to ship a certain amount of wine per month to an in-state consumer on the express condition that the winery’s home state must afford wineries in the destination state a similar direct-to consumer privilege. Some of the remaining 11 states allowed direct shipping by out-of-state wineries, but placed restrictions on their interstate shipments that were not imposed on intrastate shipments. Still, approximately half the states allowed no direct interstate shipments at all, and some of these states made it a felony for out-of-state wineries to ship wine to in-state consumers.<sup>138</sup>

As to the restrictions placed on interstate shipments that were not imposed on intrastate shipments, Richard Mendelson points out in *WINE IN AMERICA*: “[t]he states made these decisions under the authority of the Twenty-first Amendment, presumably without

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<sup>135</sup> See Gordon Eng, Comment, *Old Whine in a New Battle: Pragmatic Approaches to Balancing the Twenty-First Amendment, the Dormant Commerce Clause, and the Direct Shipping of Wine*, 30 *FORDHAM URB. L.J.* 1849, 1863 (2002); Hamilton, *supra* note 127, at 520.

<sup>136</sup> See, *e.g.*, NAT’L ALCOHOL BEVERAGE CONTROL ASS’N, *supra* note 130, at 2-3.

<sup>137</sup> See MENDELSON, *supra* note 122, at 206-15.

<sup>138</sup> *Id.* at 207-08 (footnotes omitted).

considering the requirements of the dormant Commerce Clause.”<sup>139</sup> States argued that they could discriminate against interstate commerce under the theory that the Twenty-first Amendment gave them broad power to regulate alcohol which trumped the Commerce Clause.<sup>140</sup>

This led to the U.S. Supreme Court case of *Granholm v. Heald*.<sup>141</sup> *Granholm* involved state laws in Michigan and New York that allowed in-state wineries to ship directly to consumers but not out-of-state wineries.<sup>142</sup> The discriminatory treatment was easy to spot with the Michigan law.<sup>143</sup> The Michigan law allowed in-state wineries to ship directly to consumers as long as they obtained a license and met certain requirements, but out-of-state wineries were not allowed the same opportunity.<sup>144</sup> New York’s law was different. It did not disallow shipments by out-of-state wineries entirely.<sup>145</sup> Rather, out-of-state wineries could obtain a shipping license like an in-state winery, but only if the out-of-state winery established a New York physical presence by establishing a branch office or warehouse in New York.<sup>146</sup> The requirement of physical presence effectively established a system where New York wineries had direct-shipping access to in-state consumers on a preferential basis.<sup>147</sup>

The Court summarized the result of New York’s law this way:

In-state producers, with the applicable licenses, can ship directly to consumers from their wineries. Out-of-state wineries must open a branch office and warehouse in New York, additional steps that drive up the cost of their wine. For most wineries, the expense of establishing a bricks-and-mortar distribution operation in 1 State, let alone all 50, is prohibitive.

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<sup>139</sup> *Id.* at 208.

<sup>140</sup> *Id.* at 206-15 (citing *Granholm v. Heald*, 544 U.S. 460 (2005)).

<sup>141</sup> *Granholm*, 544 U.S. at 460.

<sup>142</sup> *Id.* at 465-66; MENDELSON, *supra* note 122, at 209.

<sup>143</sup> *See Granholm*, 544 U.S. at 468-70, 473-74.

<sup>144</sup> *Id.*

<sup>145</sup> *See id.* at 470-71, 474-76.

<sup>146</sup> *See id.*, 544 U.S. at 470, 474-75.

<sup>147</sup> *See id.*, 544 U.S. at 474.

It comes as no surprise that not a single out-of-state winery has availed itself of New York's direct shipping privilege.<sup>148</sup>

The Supreme Court in *Granholm* held that the shipping laws in both Michigan and New York discriminated against interstate commerce.<sup>149</sup> The focus of the case was the argument of the states that they were permitted to discriminate because of Section Two of the Twenty-first Amendment.<sup>150</sup> The Supreme Court disagreed, concluding "the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers."<sup>151</sup>

In deciding the case, the Supreme Court also had to determine whether the state laws "advance[d] a legitimate local purpose that [could not] be adequately served by reasonable nondiscriminatory alternatives."<sup>152</sup> The states argued there was a legitimate local purpose under two theories: (1) keeping alcohol from underage individuals; and (2) facilitating the collection of taxes.<sup>153</sup> The tax collection issue is relevant to this Article as it relates to accountability. The states argued that their laws were necessary because without them taxes would go unpaid resulting in lost revenue.<sup>154</sup> The Supreme Court did not agree.<sup>155</sup> Instead, the Supreme Court stated "New York could protect itself against lost tax revenue by requiring a permit as a condition of direct shipping."<sup>156</sup> This was the method taken by New York for in-state wineries and the State put forth no reason as to why such a system would prove to be unsuccessful for out-of-state wineries.<sup>157</sup> After obtaining a permit, licensees would be subject to oversight and "be required to submit regular sales reports" and remit taxes.<sup>158</sup>

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<sup>148</sup> *Id.* at 474-75 (citations omitted).

<sup>149</sup> *Id.* at 476.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 486.

<sup>152</sup> *Id.* at 489 (citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 491.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

After *Granholm*, states could go in one of two directions with respect to direct winery shipping. States could either do what was called “level down” and prohibit all winery direct shipping, both in-state and out-of-state, or states could do what was called “level up” and allow in-state and out-of-state direct winery shipping on equal terms.<sup>159</sup> Most states have taken the “level up” approach.<sup>160</sup> As of 2020, the only states not allowing direct-to-consumer shipping are Utah, Arkansas, Mississippi, Alabama, Kentucky, Delaware, and Rhode Island.<sup>161</sup>

The “level up” approach may involve states requiring that both in-state and out-of-state wineries obtain a permit in order to obtain direct shipping privileges.<sup>162</sup> The permit, in turn, imposes certain requirements on the permittee. For example, the National Conference of State Legislatures’ Model Direct Shipping Act, provides in relevant part:

All Wine Direct Shipper Licensees shall:

- Not ship more than twenty-four (24) 9-liter cases of wine annually to any person for his personal use and not for resale.
- Not ship to any address in an area identified by the Department as a “dry” or local option area.
- Ensure that all containers of wine shipped directly to a resident in this state are conspicuously labeled with the words “CONTAINS ALCOHOL: SIGNATURE OF PERSON AGE 21 OR OLDER REQUIRED FOR DELIVERY.”

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<sup>159</sup> Maureen K. Ohlhausen & Gregory P. Luib, *Moving Sideways: Post-Granholm Developments in Wine Direct Shipping and Their Implications for Competition*, 75 ANTITRUST L.J. 505, 506 (2008); William C. Green, *Creating a Common Market for Wine: Boutique Wines, Direct Shipment, and State Alcohol Regulation*, 39 OHIO N.U. L. REV. 13, 39-40 (2012).

<sup>160</sup> See Ohlhausen, *supra* note 159, at 547 tbl. 1.

<sup>161</sup> See, e.g., *Direct-to-Consumer Shipping Laws for Wineries*, WINE INSTITUTE, <https://wineinstitute.compliance/rules.org/state-map/> [https://perma.cc/7KZL-3NAJ] (last visited Sept. 19, 2020).

<sup>162</sup> *Granholm*, 544 U.S. at 491-492. See also *infra* notes 164-68 and accompanying text.

- If located outside of this state, report to the Department annually the total amount of wine shipped into the state the preceding calendar year.
- If located outside of this state, annually pay to the [State Revenue Agency] all sales taxes and excise taxes due on sales to residents of [State] in the preceding calendar year, the amount of such taxes to be calculated as if the sale were in [State] at the location where delivery is made.
- If located within this state, provide the [State Revenue Agency] any additional information deemed necessary beyond that already required for retail sales from the winery tasting room to ensure compliance with this section.
- Permit the Department or the [State Revenue Agency] to perform an audit of the Wine Direct Shipper Licensees records upon request.
- Be deemed to have consented to the jurisdiction of the Department or any other state agency and the [State] courts concerning enforcement of this section and any related laws, rules or regulations.<sup>163</sup>

### *B. Decision to Level Up After Granholm*

Texas is one of the level up states.<sup>164</sup> In order to become a level up state, the Texas Legislature passed Senate Bill 877 in 2005.<sup>165</sup> This legislation was signed into law on May 9, 2005.<sup>166</sup>

Texas Form L-DS-I, Out-of-State Winery Direct Shipper's Permit, outlines various requirements that an out-of-state winery must adhere to in order to obtain the permit necessary to ship wine directly to Texas residents:

This permit may only be issued to a person who:

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<sup>163</sup> *Model Direct Shipping Bill*, FREE THE GRAPES!, <http://freethegrapes.org/model-direct-shipping-bill/> [<https://perma.cc/WJ3W-NJX4>] (last visited Sept. 19, 2020).

<sup>164</sup> See *infra* notes 166-68.

<sup>165</sup> S.B. 877, 79th Leg., Reg. Sess. (Tex. 2005); 2005 Tex. Gen. Laws 49.

<sup>166</sup> See 2005 Tex. Gen. Laws 49.

- Does not hold a winery permit in the State of Texas;
- Operates a winery located in the United States and holds all state and federal permits necessary to operate the winery at the permitted location, including the federal winemaker's and blender's basic permit;
- Holds a Texas Sales Tax Permit;
- Expressly submits to personal jurisdiction in Texas state and federal courts and expressly submits to venue in Travis County, Texas, as proper venue for any proceeding that may be initiated by or against the commission; and
- Does not directly or indirectly have any financial interest in a Texas wholesaler or retailer as those terms are used in Section 102.01 of the Alcoholic Beverage Code.<sup>167</sup>

Furthermore, Texas law requires that wine be shipped in a package that is clearly and conspicuously labeled showing that it contains wine.<sup>168</sup> The shipment can also only be delivered to the purchaser of the wine, who must be at least twenty-one years old, or someone else who is at least twenty-one years old and is an advance designee or at the delivery address.<sup>169</sup> In order for delivery of the wine to be made, the person accepting the package must present valid proof of identity and age showing that the person is twenty-one years or older.<sup>170</sup>

There are also certain reporting and recordkeeping requirements. Section 54.06 requires that “the holder of an out-of-state winery direct shipper’s permit . . . maintain records of all sales and deliveries made under the permit.”<sup>171</sup> Section 54.06 goes on to

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<sup>167</sup> Application for Out-of-State Winery Direct Shipper’s Permit, TEXAS ALCOHOLIC BEVERAGE COMM’N, <https://www.tabc.texas.gov/static/cc1a35967d61b9dc00a2b621ddaf9e1f/application-for-out-of-state-winery-direct-shippers-permit-form-l-ds.pdf> [https://perma.cc/JQH4-84N2] (last visited Sept., 19, 2020).

<sup>168</sup> TEX. ALCO. BEV. CODE ANN. § 16.09(b)(1) (West, Westlaw through 2019 Reg. Sess.).

<sup>169</sup> *Id.* §§ 16.09(c)-(d) (Westlaw).

<sup>170</sup> *Id.* § 16.09(d) (Westlaw).

<sup>171</sup> *Id.* § 54.06(a) (West, Westlaw through 2019 Reg. Sess.).

provide that the direct shipper must maintain these records “for at least five years from the date of sale.”<sup>172</sup>

With respect to the filing of reports, Section 54.06 states: “The commission shall establish rules requiring the holder of an out-of-state winery direct shipper’s permit to periodically file reports providing the commission with such information as the commission may determine is needed to more efficiently and effectively enforce the state laws applicable to the permit holder.”<sup>173</sup> Reporting rules were adopted by the Texas Alcoholic Beverage Commission and are located in Title 16, Chapter 41, Subchapter C of the Texas Administrative Code.<sup>174</sup> Reports are required to be filed:

on or before the fifteenth day of the month following the end of the reporting period and must show:

(1) the reporting period and year for which the report is made, the permit number and the name and address of the winery; and

(2) the invoice date, invoice number, customer name, city, total wine gallons per invoice, and carrier name and tracking number for each sale and delivery.<sup>175</sup>

The out-of-state winery must also attach to these reports: (i) names and addresses of the individuals to which wine was shipped; (ii) the product brand shipped and the quantity of each brand; (iii) the amount charged for each brand; (iv) the licensed common carrier that was used; and (v) the tracking number used by the licensed common carrier.<sup>176</sup> Alternatively, instead of copies of invoices showing this information, the out-of-state winery can provide a list of the information in the report.<sup>177</sup>

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<sup>172</sup> *Id.* § 54.06(b) (Westlaw).

<sup>173</sup> *Id.* §54.06(c) (Westlaw).

<sup>174</sup> 16 TEX. ADMIN. CODE §§ 41.56(c)-(d) (2020). This administrative rule became effective November 17, 2005. *See* 30 TEX. REG. 7469 (Nov. 11, 2005). It has been amended three times since the original rule was adopted, in 2008 (33 TEX. REG. 1323 (Feb. 15, 2008)), in 2013 (38 TEX. REG. 7303 (Oct. 24, 2013)), and in 2018 (43 TEX. REG. 6832 (Oct. 12, 2018)).

<sup>175</sup> 16 TEX. ADMIN. CODE § 41.56(c) (2020).

<sup>176</sup> *Id.* § 41.56(d).

<sup>177</sup> *Id.*

The frequency of reporting required depends on the volume of gallons shipped by the out-of-state winery.<sup>178</sup> A permit holder that shipped 5,000 gallons or more annually to Texas consumers during the previous calendar year is required to file monthly reports.<sup>179</sup> Permit holders shipping less than 5,000 gallons to Texas consumers during the previous calendar year are instead only required to file reports on a quarterly basis.<sup>180</sup>

For reference, the number of direct shipping permits issued by TABC to out-of-state wineries is listed below for each of the noted fiscal years:

- Fiscal year ended August 31, 2017: 840<sup>181</sup>
- Fiscal year ended August 31, 2016: 689<sup>182</sup>
- Fiscal year ended August 31, 2015: 681<sup>183</sup>
- Fiscal year ended August 31, 2014: 581<sup>184</sup>
- Fiscal year ended August 31, 2013: 659<sup>185</sup>
- Fiscal year ended August 31, 2012: 518<sup>186</sup>
- Fiscal year ended August 31, 2011: 585<sup>187</sup>

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<sup>178</sup> *Id.* § 41.56(g)-(h).

<sup>179</sup> *Id.* § 41.56(g).

<sup>180</sup> *Id.* § 41.56(h).

<sup>181</sup> *Annual Report of Nonfinancial Data for Fiscal Year 2017*, TEXAS ALCOHOLIC BEVERAGE COMM'N TABC-27 (Dec. 31, 2017), [https://www.tabc.state.tx.us/publications/agency\\_report\\_archives/NFR2017.pdf](https://www.tabc.state.tx.us/publications/agency_report_archives/NFR2017.pdf) [<https://perma.cc/AL5J-PXK8>] The total active DS permits at the end of business on August 31, 2017 was 1,471. *Id.* at TABC-29.

<sup>182</sup> *Annual Report of Nonfinancial Data for Fiscal Year 2016*, TEXAS ALCOHOLIC BEVERAGE COMM'N TABC-26 (Dec. 31, 2016), [https://www.tabc.state.tx.us/publications/agency\\_report\\_archives/NFR2016.pdf](https://www.tabc.state.tx.us/publications/agency_report_archives/NFR2016.pdf) [<https://perma.cc/2FCF-7C7P>]. Total active DS permits at the end of business on August 31, 2016 was 1,356. *Id.* at TABC-28.

<sup>183</sup> *Annual Report of Nonfinancial Data for Fiscal Year 2015*, TEXAS ALCOHOLIC BEVERAGE COMM'N TABC-24 (Dec. 31, 2015), [https://www.tabc.state.tx.us/publications/agency\\_report\\_archives/NFR2015.pdf](https://www.tabc.state.tx.us/publications/agency_report_archives/NFR2015.pdf) [<https://perma.cc/3TRJ-QQPM>].

<sup>184</sup> *Annual Report of Nonfinancial Data for Fiscal Year 2014*, TEXAS ALCOHOLIC BEVERAGE COMM'N TABC-27 (Dec. 31, 2014), [https://www.tabc.state.tx.us/publications/agency\\_report\\_archives/NFR2014.pdf](https://www.tabc.state.tx.us/publications/agency_report_archives/NFR2014.pdf) [<https://perma.cc/SA28-LXLZ>].

<sup>185</sup> *Annual Report of Nonfinancial Data for Fiscal Year 2013*, TEXAS ALCOHOLIC BEVERAGE COMM'N TABC-25 (Dec. 31, 2013), [https://www.tabc.state.tx.us/publications/agency\\_report\\_archives/NFR2013.pdf](https://www.tabc.state.tx.us/publications/agency_report_archives/NFR2013.pdf) [<https://perma.cc/TQS4-P64P>].

<sup>186</sup> *Annual Report of Nonfinancial Data for Fiscal Year 2012*, TEXAS ALCOHOLIC BEVERAGE COMM'N TABC-24 (Dec. 31, 2012), [https://www.tabc.state.tx.us/publications/agency\\_report\\_archives/NFR2012.pdf](https://www.tabc.state.tx.us/publications/agency_report_archives/NFR2012.pdf) [<https://perma.cc/MKY7-F5QM>].

<sup>187</sup> *Annual Report of Nonfinancial Data for Fiscal Year 2011*, TEXAS ALCOHOLIC BEVERAGE COMM'N TABC-29, [https://www.tabc.state.tx.us/publications/agency\\_report\\_archives/NFR2011.pdf](https://www.tabc.state.tx.us/publications/agency_report_archives/NFR2011.pdf) [<https://perma.cc/2DRZ-9HA9>].

- Fiscal year ended August 31, 2010: 494<sup>188</sup>
- Fiscal year ended August 31, 2009: 861<sup>189</sup>
- Fiscal year ended August 31, 2008: 685<sup>190</sup>

With the exception of 2010, the number of direct shipping permits issued by Texas has stayed relatively constant since 2008, and there was a slight uptick in 2017.<sup>191</sup>

### *C. Importance to Wal-Mart Litigation*

This is relevant to the Wal-Mart litigation because if there is concern about accountability and alcohol sales, then why did the Texas Legislature enact legislation allowing Texas to become a level up state? Especially in a situation where monitoring would be of businesses that are not even located in Texas.

The answer could be that the Texas Legislature was not as concerned with sales of wine as compared to sales of liquor.<sup>192</sup> However, the answer could also be that the Texas Legislature believed any accountability issues could be properly addressed by statute and rulemaking whereby appropriate reporting rules could be put in place.<sup>193</sup>

The 2005 legislation related to out-of-state wine shipping imposed various requirements on out-of-state wineries in order for them to obtain a direct shipping permit. One of those requirements relates to reports and recordkeeping. The legislation requires:

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<sup>188</sup> *Annual Report of Nonfinancial Data for Fiscal Year 2010*, TEXAS ALCOHOLIC BEVERAGE COMM'N TABC-27 (Dec. 15, 2010), [https://www.tabc.state.tx.us/publications/agency\\_report\\_archives/NFR2010.pdf](https://www.tabc.state.tx.us/publications/agency_report_archives/NFR2010.pdf) [<https://perma.cc/5NDZ-4MKZ>].

<sup>189</sup> *Annual Report of Nonfinancial Data for Fiscal Year 2009*, TEXAS ALCOHOLIC BEVERAGE COMM'N TABC-29 (Dec. 29, 2009), [https://www.tabc.state.tx.us/publications/agency\\_report\\_archives/NFR2009.pdf](https://www.tabc.state.tx.us/publications/agency_report_archives/NFR2009.pdf) [<https://perma.cc/L898-EDRM>].

<sup>190</sup> *Annual Report of Nonfinancial Data for Fiscal Year 2008*, TEXAS ALCOHOLIC BEVERAGE COMM'N TABC-29 (Dec. 15, 2008), [https://www.tabc.state.tx.us/publications/agency\\_report\\_archives/NFR2008.pdf](https://www.tabc.state.tx.us/publications/agency_report_archives/NFR2008.pdf) [<https://perma.cc/TZ6P-8RXW>].

<sup>191</sup> *See supra* notes 181-90 and accompanying text.

<sup>192</sup> *See, e.g.*, Response and Reply Brief of Appellant at 2, *Wal-Mart Stores, Inc. v. Tex. Alcohol Beverage Comm'n*, 935 F.3d 362 (5th Cir. 2019) (No. 18-50299) (“[T]he Texas retail liquor marketplace is less dominated by the larger companies—whether owned in-state or out-of-state—that typically dominate a retail marketplace for products such as alcoholic beverages. Texas’s rational economic regulation of retail sales of liquor with its higher alcohol content is a remarkable legislative success story.”).

<sup>193</sup> *See infra* notes 195-232 and accompanying text.

(b) The holder of an out-of-state winery direct shipper's permit shall maintain complete sales and delivery records for all sales and deliveries made under the permit for at least five years from the date of sale. These records shall be made available upon request for inspection by the commission or any other appropriate state agency.

(c) The commission shall establish rules requiring the holder of an out-of-state winery direct shipper's permit to periodically file reports providing the commission with such information as the commission may determine is needed to more efficiently and effectively enforce the state laws applicable to the permit holder.<sup>194</sup>

TABC thereafter proposed and adopted Texas Administrative Code Section 41.56 related to "Out-of-State Winery Direct Shipper's Permits." The original version of the rule in 2005 provided that out-of-state winery direct shipper permit holders were required to make monthly reports.<sup>195</sup> Reports required that the out-of-state wineries provide information related to invoices (date and invoice number), customer names, city where customers were located, total wine gallons delivered per invoice, information related to the delivery carrier, and freight bill number related to each delivery.<sup>196</sup> The preamble related to the rule adoption stated:

The 79th Texas Legislation created a new Chapter 54 of the Alcoholic Beverage Code, establishing a new permit by which out-of-state wineries may sell and ship product to Texas consumers. In order to accomplish its statutory mission of inspecting and supervising every aspect of the alcoholic beverage industry, to protect against diversion of alcoholic beverages into illicit channels, and to insure accurate tax assessment and collection it is necessary to establish a requirement that direct shippers make regular reports of

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<sup>194</sup> TEX. ALCOHOLIC BEV. CODE § 54.06 (b)-(c) (West, Westlaw through 2019 Reg. Sess.). See S.B. 877, 79th Leg., Reg. Sess. (Tex. 2005).

<sup>195</sup> 16 TEX. ADMIN. CODE § 41.56 (2005).

<sup>196</sup> *Id.* Out-of-state permit holders are required to file the report even if no sales or shipments are made during a reporting period. *Id.*

commercial activity in Texas. This rule accomplishes this purpose.<sup>197</sup>

As can be seen from the rule, the TABC originally believed monthly reports were appropriate. However, later in 2008, TABC amended Rule 41.56 to lessen the reporting requirement to fiscal year quarterly reports.<sup>198</sup> The preamble gives this reason for the change:

The public benefit that will result is increased efficiency in the administration and enforcement duties of the agency and a reduction in the reporting requirements by permittees and licensees to the commission without any reduction in permittee/licensee accountability and payment of taxes to the state.<sup>199</sup>

In 2013, the TABC again changed the reporting requirement, this time implementing a bifurcated approach with different reporting frequency for “small wine shippers” versus “large wine shippers.”<sup>200</sup> The amended rule required out-of-state wineries shipping 4,000 gallons or more to Texas consumers in the previous calendar year to file quarterly reports.<sup>201</sup> In contrast, out-of-state wineries shipping less than 4,000 gallons annually to Texas consumers in the previous calendar year were given a less stringent reporting requirement whereby reports were only required on an annual basis.<sup>202</sup> The preamble relating to the rule change stated that the reason for lessening the reporting burden for “small wine shippers” was “to reduce[] the reporting requirement for small out-of-state winery direct shippers, [to adjust] the reporting periods for

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<sup>197</sup> 30 Tex. Reg. 7469 (Nov. 11, 2005). The final rule was adopted in 2005. *See* 16 TEX. ADMIN. CODE § 41.56 (2005).

<sup>198</sup> 16 TEX. ADMIN. CODE § 41.56 (2008). The quarterly reporting periods were: September 1–November 30; December 1–February 28 (or 29 in the case of a leap year); March 1–May 31; and June 1–August 31. *See id.* § 41.56(f).

<sup>199</sup> 32 Tex. Reg. 8247 (Nov. 16, 2007). The final adopted rule became effective in 2006. *See* 16 TEX. ADMIN. CODE § 41.56 (2008).

<sup>200</sup> 16 TEX. ADMIN. CODE § 41.56 (2013).

<sup>201</sup> *Id.* The quarterly periods were: January 1–March 31; April 1–June 30; July 1–September 30; and October 1–December 31. *Id.* For these “large wine shippers,” although their reporting continued to be quarterly, the quarterly reporting periods changes from fiscal year quarters to calendar year quarters. *Id.*

<sup>202</sup> *Id.* § 41.56(g).

larger out-of-state winery direct shippers, and [to clarify] excise tax payment arrangements.”<sup>203</sup>

In 2018, the TABC again changed the reporting requirements, including changing the frequency requirement for filing reports.<sup>204</sup> Under the revised rule, “large wine shippers” are required to file monthly.<sup>205</sup> The definition of a “large wine shipper” was also amended to mean an out-of-state winery that shipped 5,000 gallons or more annually to Texas consumers during the previous calendar year.<sup>206</sup> “Small wine shippers” are required to file reports quarterly rather than yearly.<sup>207</sup> The definition of “small wine shipper” was amended to mean out-of-state wineries shipping less than 5,000 gallons annually to Texas consumers during the previous calendar year.<sup>208</sup> The change in the threshold gallon limit for being a small wine shipper versus a large wine shipper came from a comment in the rulemaking process from the Wine Institute.<sup>209</sup> The underlying rationale was to make the threshold more reasonable for smaller wineries as well as for those that do not make large shipments to Texas consumers.<sup>210</sup>

The 2018 rule amendments also added new reporting requirements. It began to require out-of-state wineries report (either by attaching copies or creating a list) additional information related to invoices, including the name and addresses of customers, the brands of products shipped and the quantities of each brand, the price charged for each brand, the licensed common carrier used to make the delivery, and the tracking number used by the licensed common carrier.<sup>211</sup>

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<sup>203</sup> 38 Tex. Reg. 5163 (Aug. 16, 2013).

<sup>204</sup> 16 TEX. ADMIN. CODE § 41.56 (2018).

<sup>205</sup> *Id.* § 41.56(g).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* § 41.56(h).

<sup>208</sup> *Id.*

<sup>209</sup> 43 Tex. Reg. 6832 (Oct. 12, 2018).

<sup>210</sup> *Id.* (“Comments were received from Wine Institute suggesting that the cutoff between shippers who will be required to submit reports monthly versus those who will be required to submit reports quarterly be moved from 4,000 gallons annually (in the rule as proposed) to 5,000 gallons annually. Wine Institute said [*sic*] ‘Adopting this reasonable standard would allay some of the reporting burden for smaller wineries and those wineries that do not ship large amounts of wine directly to Texas consumers.’ The commission agrees with Wine Institute’s comments and makes the requested change in subsections (g) and (h) of the rule.”).

<sup>211</sup> 16 TEX. ADMIN. CODE § 41.56 (2018).

The 2018 rule amendments also added provisions related to shipping requirements.<sup>212</sup> Out-of-state wineries are required to obtain an adult signature at delivery and are also required to notify the carrier that the shipment contains alcohol.<sup>213</sup> Out-of-state wineries are also required to ensure that the shipping fulfillment center or delivery service requires an adult signature at delivery.<sup>214</sup> These identification requirements are consistent with Texas Alcoholic Beverage Code Section 54.05.<sup>215</sup>

A provision was also added in the 2018 rule providing that failure to comply with the requirements of the rule is cause for cancellation or suspension of a shipping permit.<sup>216</sup> The addition of this provision is consistent with the statutory language in Texas Alcoholic Beverage Code Section 11.61.<sup>217</sup>

Thus, in order accomplish its mission of inspecting and supervising all aspects of the alcoholic beverage industry, the TABC put into place accountability measures through reporting requirements that out-of-state wine shippers must adhere to in order to obtain and maintain the ability to ship wine directly to Texas consumers.<sup>218</sup> And where TABC felt more or less oversight was needed as it monitored out-of-state wine shippers beginning in 2005, it has amended the reporting requirements throughout the years.<sup>219</sup> When TABC determined more oversight was needed, it correspondingly increased the accountability measures in place.<sup>220</sup>

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> See TEX. ALCO. BEV. CODE ANN. § 54.05 (West, Westlaw through 2019 Reg. Sess.).

<sup>216</sup> 16 TEX. ADMIN. CODE § 41.56(j) (2018).

<sup>217</sup> See TEX. ALCO. BEV. CODE ANN. § 11.61 (West, Westlaw through 2019 Reg. Sess.).

In addition to these regulatory rule amendments that have occurred throughout the years, the Texas Legislature also amended Section 54.02 of the Texas Alcoholic Beverage Code in 2009, making it easier for out-of-state wineries to ship wine directly to consumers. See H.B. 1084, 81st Leg., Reg. Sess. (Tex. 2009). Beginning on September 1, 2009, out-of-state wineries became allowed to ship up to nine gallons of wine to a Texas consumer per calendar month as long as the total volume shipped to the consumer by each winery does not exceed thirty-six gallons (approximately fifteen cases) per calendar year. See *id.* Previous law was more restrictive because it imposed a three gallon per consumer limit per thirty days. See *id.* See, e.g., *Texas Improves Direct Shipping Laws!*, WINE INSTITUTE (June 26, 2009), [https://wineinstitute.com/liancerules.org/state\\_alerts/texas-improves-direct-shipping-laws/](https://wineinstitute.com/liancerules.org/state_alerts/texas-improves-direct-shipping-laws/) [<https://perma.cc/8QEW-8R6R>].

<sup>218</sup> See *supra* notes 174-217 and accompanying text.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

And, on the other hand, when TABC felt the original accountability measure put in place in 2005 ended up being too stringent, it lessened those requirements.<sup>221</sup>

For example, with respect to making the accountability requirements more stringent, in 2018, the TABC amended Rule 41.56 to require permittees to include in their reports the name of the common carrier and unique common carrier tracking number for each shipment.<sup>222</sup> The 2018 rule change also began to require more frequent reporting (on a monthly basis) for out-of-state wineries who were “large wine shippers” shipping 5,000 gallons or more to Texas consumers during the previous calendar year.<sup>223</sup> And with respect to lessening accountability requirements, in 2018, TABC lessened the reporting requirement for smaller wineries by increasing the gallon requirement for the large winery designation from 4,000 to 5,000.<sup>224</sup>

It was beginning in 2013 that the TABC instituted different accountability standards for “small wine shippers” versus “large wine shippers.” Large wine shippers must report to the TABC more frequently than small wine shippers.<sup>225</sup> However, instead of the designation of large versus small focusing on the number of owners the business has, it is dependent on the volume of sales being made to Texas customers.<sup>226</sup> This bifurcated approach as between small versus large wine shippers continues today.<sup>227</sup>

In short, the Texas Legislature could have passed legislation back in 2005 that would have made Texas a “level down” state where Texas would have prohibited all wineries from being allowed to make shipments directly to customers, both in-state wineries and out-of-state wineries.<sup>228</sup> If accountability was a concern, especially with respect to out-of-state businesses, then that would have been a way to address those concerns.<sup>229</sup> However, instead, Texas was one of the first states to “level up,” passing legislation in 2005, the

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *See supra* notes 204-10 and accompanying text.

<sup>225</sup> *See supra* notes 200-210 and accompanying text.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *See supra* notes 164-73 and accompanying text.

<sup>229</sup> *Id.*

same year *Granholm* was argued at the Supreme Court and the opinion was issued.<sup>230</sup> Instead of foreclosing the ability of wineries being able to ship directly to customers, the Texas Legislature felt confident accountability issues could be addressed with reporting requirements and by giving the TABC the regulatory authority to implement the reporting requirements in a manner that would allow it to carry out its duty of supervising and administering the alcohol laws of the State of Texas.<sup>231</sup>

The same approach could be taken with respect to package permit holders and the selling of liquor. If accountability is a concern with respect to large businesses holding package store permits, instead of a total ban on large businesses being able to sell liquor, a better approach could be for the Texas Legislature to repeal the public corporation ban and allow the TABC to implement regulations containing special/additional reporting requirements for large size businesses. Under this approach, it would seem that any more stringent regulation of “larger” package store permit holders should be based on volume of sales rather than number of owners.<sup>232</sup> Going back to the hypothetical posed earlier, assume there is a package store permit holder having thirty-eight owners (Package Store A)<sup>233</sup> that makes a small number of sales per quarter and a package store permit holder having ten owners (Package Store B) that makes an extremely large volume of sales per quarter. Is it really Package Store A that needs to be more stringently regulated by TABC?

This Article does not dismiss the importance of supporting small businesses. However, the public corporation ban does not seem to have the purpose of supporting small businesses. This is because the public corporation ban, in conjunction with the consanguinity exception (prior to its recent repeal), have allowed a large number of privately-held family companies to develop into large chain liquor stores in Texas.<sup>234</sup> Moreover, there are other ways to provide support to small businesses. For example, the

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<sup>230</sup> *Id.*

<sup>231</sup> *See supra* notes 174-217 and accompanying text.

<sup>232</sup> *Id.*

<sup>233</sup> This is the business that is disallowed from obtaining a package store permit. *See* discussion *supra* Part I.

<sup>234</sup> *See* discussion *supra* Part I.

Texas Franchise Tax Code contains provisions related small businesses.<sup>235</sup> Related to alcohol regulation, just like the TABC did with small wineries, it could reduce the reporting requirements for small-volume liquor stores.<sup>236</sup>

#### CONCLUSION

In the Wal-Mart litigation it was argued in part that there was need for the public corporation ban because of accountability concerns with large businesses, with large being defined by number of owners.<sup>237</sup> However, if there are accountability concerns with large versus small businesses, instead of foreclosing a broad class of entities based solely on number of owners from being able to obtain the required permit to sell liquor, a better approach could be to address any accountability concerns with a more narrowly-tailored approach involving regulatory reporting. This was the approach taken by the Texas legislature in 2005 when it decided to give out-of-state wineries the ability to sell and ship wine directly into Texas.<sup>238</sup> Any regulatory reporting requirements adopted could require more frequent and more rigorous reporting for larger liquor stores.<sup>239</sup> As addressed in this Article, this is exactly what has happened with Texas's regulation of out-of-state winery shipping.<sup>240</sup> In conclusion, there is a more narrowly-tailored way to address accountability concerns with respect to package store permits and the Texas legislature should consider this in determining whether the public corporation ban should be repealed.

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<sup>235</sup> See TEX. TAX CODE ANN. § 171.002(d).

<sup>236</sup> See discussion *supra* Part IV.

<sup>237</sup> See discussion *supra* Part II.

<sup>238</sup> See discussion *supra* Part IV.

<sup>239</sup> However, any delineation between small and large businesses would seem to make more sense if it were based on volume of sales rather than number of owners.

<sup>240</sup> *Id.*