

**National Conference of State Liquor Administrators**

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Thank you, Max. Thank you for the opportunity to spend a few minutes talking about what I regard as a serious threat to the three-tier system.

It's a controversial interpretation of the three-tier system that has recently emerged in my home state of Texas—what some people call the “one share rule.”

I want to begin by just briefly providing some context here.

As we all know, there are enemies of the three-tier system. They say the system is irrational and protectionist.

For those of us who believe in the three-tier system, and who want to preserve and protect it:

We must not do anything to give aid and comfort to those who want to dismantle this system.

To protect the three-tier system, we must operate it in a rational way—in a way that promotes real government interests.

I say this as someone who vigorously defended the three-tier system against attack—on behalf of the TABC—back when I served as our state's Solicitor General. To my mind, the three-tier system is as American as baseball and apple pie.

And now that I'm back in private practice, I continue to defend the rationality of the three-tier system, on behalf of the Texas Association of Business—our state's chamber of commerce—as well as companies who wish to defend and participate in the three-tier system, like McLane, based in Temple, Texas.

But you can't defend the rationality of the three-tier system—your friends can't defend the rationality of the system—if you operate the system irrationally.

Properly construed, the three-tier system forbids a person or entity from *controlling or influencing* businesses operating in two different tiers.

The TABC has recently testified, however, that they now think it's a violation for a person or business to own *even just a single share* in two companies operating in two different tiers—even if there is no dispute that the person does not control or influence two tiers.

Let's think about it. If you're a business in one tier, and you're publicly traded, anyone who owns your stock can get you into trouble, by also buying stock in another tier.

In a world of mutual funds and employee retirement funds, this amounts to a state of de facto Prohibition in the state of Texas.

Every TABC employee violates the one share rule, because every TABC employee participates in the state's retirement fund, which owns stock in multiple tiers.

The State of Texas itself violates the one share rule. Ever been to a UT football game? Can you imagine the protests if the TABC seriously took beer out of UT football games?

Indeed, let me ask everyone in the room to raise your hand if you're a publicly traded company who does business in Texas. On second thought, actually, don't raise your hand—because apparently, you'll be admitting to a crime. You should plead the Fifth instead.

I would submit that the one share rule is an extreme, absurd, and irrational interpretation of the three-tier system.

And truth be told, I think the TABC agrees. They've noted in the past that there's just no need to be this extreme. And they don't actually apply the one share rule to all licensees.

But that makes their policy even harder to explain. Because it's a policy of selective licensing.

The same rules should apply to everyone. Regulators shouldn't pick winners and losers.

It makes the three-tier system look like a total sham—like naked economic favoritism.

Yet that appears to be what's going on. One share violations are completely ignored, when they are committed by incumbent licensees. The one share rule is applied only to certain new applicants.

I've got one client who has been denied a license because of the one share rule. There are incumbent licenses who own the *exact same stock* as my client does—indeed, they own *more* of that stock. Yet they get to do business in Texas. Only my client is shut out of the Texas market.

Government picking winners and losers: It's arguably un-American. It's certainly un-Texan.

And so the Texas approach is forcing defenders of the three-tier system to make a difficult choice.

Do we defend the three-tier system as a system of prohibition? As a system of favoritism? Or as a system of rational regulation?

Between prohibition, favoritism, or rational regulation—this should be an easy choice. We shouldn't give enemies of the three-tier system the tools they need to destroy the system.

The system must be rational, if we want courts to continue to respect it.

There's no way that the Legislature contemplated this. If you think that the Legislature intended prohibition, then do prohibition. But there's no way the Legislature contemplated this kind of naked favoritism.

Not surprisingly, then, exactly one month ago today, our state's Supreme Court announced that it would hear a challenge to the one share rule—over the TABC's strenuous objections.

We are hopeful that the Texas Supreme Court will declare the one share rule wrong as a matter of Texas law. After all, the word “interest” is capable of different meanings. Just look at dictionaries and case law. When you have a term that is capable of multiple meanings, established canons of statutory interpretation teach us that you should pick the one that makes the most sense, in context. And the only meaning that is not absurd in *this* context is a “control or influence” standard.

Moreover, just this morning, the Texas Association of Business, joined by McLane, filed a new federal lawsuit—arguing that the one share rule is not just contrary to Texas law, it is also contrary to three different provisions of the U.S. Constitution. It is impermissible selective licensing under the Equal Protection Clause—irrational economic regulation under the Due Process Clause—and an unjustified burden on interstate commerce under the Dormant Commerce Clause.

In sum, the one share rule is a serious threat to the three-tier system. If you believe in the three-tier system, I hope you'll agree that we must defeat this threat.