IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WAL-MART STORES, INC., WAL-MART STORES TEXAS, LLC, SAM'S EAST, INC., and QUALITY LICENSING CORP.,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. 1:15-cv-00134-RP
	§	**ORAL ARGUMENT REQUESTED**
TEXAS ALCOHOLIC BEVERAGE COMMISSION; JOSÉ CUEVAS, JR., in his official capacity as Presiding Officer of the Texas Alcoholic Beverage Commission; STEVEN M. WEINBERG, in his official Capacity as Commissioner of the Texas Alcoholic Beverage Commission; IDA CLEMENT STEEN, in her official Capacity as Commissioner of the Texas Alcoholic Beverage Commission,	§	
Defendants.	§	

DEFENDANTS' MOTION TO DISMISS
PLAINTIFFS' ORIGINAL COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF
AND INCORPORATED MEMORANDUM OF LAW

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Defendants Texas Alcoholic Beverage Commission, José Cuevas, Jr., in his official capacity as Presiding Officer of the Texas Alcoholic Beverage Commission, Steven M. Weinberg, in his official capacity as Commissioner of the Texas Alcoholic Beverage Commission, and Ida Clement Steen, in her official capacity as Commissioner of the Texas Alcoholic Beverage Commission (collectively, "Defendants") move to dismiss the Original Complaint for Declaratory and Injunctive Relief ("Complaint") of Plaintiffs Wal-Mart Stores, Inc., Wal-Mart Stores Texas, LLC, Sam's East, Inc., and Quality Licensing Corp. (collectively, "Plaintiffs" or "Wal-Mart") pursuant to Federal Rule of Civil Procedure 12(b)(6). In support thereof, Defendants would show the Court as follows:

INTRODUCTION

This lawsuit is no more than a thinly-veiled attempt to substitute Wal-Mart's policy preferences for the State's long-standing regulatory framework governing package stores — the only type of retailer allowed to sell liquor in Texas. Indeed, Wal-Mart's complaint can be distilled to one overarching theme: it disagrees with the Legislature's decision to closely regulate the Texas retail liquor market and require Texans to purchase distilled spirits from package stores. But the U.S. Constitution does not entitle the multinational retailer to sell liquor in Texas — much less to maximize profits by selling distilled spirits pursuant to a specific business model. To the contrary, the Twenty-First Amendment explicitly vests the states with broad power to regulate the retailing of alcoholic beverages. And, as established here, Texas has exercised that power appropriately for decades.

In its quest to profit from the Texas liquor market, Wal-Mart attempts to create a problem of constitutional magnitude, and challenges four provisions central to the issuance of package store permits. Specifically, Wal-Mart alleges that these provisions improperly exclude it from the liquor

market and thus constitute a violation of the Equal Protection Clause, the dormant Commerce Clause, and the Privileges and Immunities Clause of the U.S. Constitution. Wal-Mart is wrong.

The Legislature's decision to limit the type of businesses eligible to sell liquor and the number of package stores in Texas falls squarely within the State's police power, and does not offend the U.S. Constitution. *First*, economic legislation is presumed valid under the Equal Protection Clause as long as it is grounded on a rational basis, and as shown in detail below, there are numerous conceivable rational bases for restricting access to the local liquor retail market. *Second*, the State has reasonably drawn the entrance line to the liquor market at business *form* — not corporate domicile — and under binding Fifth Circuit precedent, there can be no dormant Commerce Clause violation in excluding a type of business from qualifying for a package store permit. *Finally*, the Privileges and Immunities Clause does not extend to corporations, and Wal-Mart cannot assert a cognizable cause of action under this provision.

At bottom, Wal-Mart is asking this Court to second-guess the judgment of the State's legislators, and find a constitutional problem where none exists. This policy debate is best addressed by the Legislature, and Wal-Mart should seek redress in that forum, not before this Court. Because Wal-Mart cannot establish a constitutional violation as to any of its claims, its Complaint should be dismissed in its entirety as a matter of law.

SUMMARY OF REGULATORY FRAMEWORK

The Twenty-First Amendment vests in the states the power to regulate the transportation and importation for delivery or use of all intoxicating liquors. U.S. Const. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."). Texas ratified the Twenty-First Amendment in 1933. Two years later, in a special

session, the Texas Legislature passed the Texas Liquor Control Act as "an exercise of the police power of the state for the protection of the welfare, health, peace, temperance, and safety" of its citizens. TEX. ALCO. BEV. CODE ANN. § 1.03 (West 2007); *see also id.* § 5.31. The Act was codified into the Alcoholic Beverage Code (the "Code") in 1977. *Id.* § 1.01.

Chapter 22 of the Code regulates the issuance of package store permits. *Id.* §§ 22.01-22.16. A package store permit allows the holder to "sell liquor in unbroken original containers . . . for off-premises consumption."[1] *Id.* § 22.01. A package store owner may also hold a local distributor's permit entitling the permittee to sell and distribute liquor, as well as equipment and supplies used in dispensing distilled spirits, to local restaurants and bars. *See id.* §§ 23.01(a), 23.03.

In this lawsuit, Wal-Mart challenges the constitutionality of four sections of the Code that regulate the issuance of package store permits:

- Section 22.04, which limits to five the number of package store permits in which any "person may hold or have an interest, directly or indirectly," *id.* § 22.04;[2]

- Section 22.05, which allows for the consolidation of package store permits into a single legal entity "[i]f one person or 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," *id.* § 22.05;

- Section 22.06, which, in relevant part, prohibits any person who "holds a package store permit or owns an interest in a package store" from having a "direct or indirect interest" in "a wine and beer retailer's, wine and beer retailer's off-premise, or mixed beverage permit," *id.* § 22.06(a)(2); and

- Section 22.16, which provides that a package store permit cannot 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," *id.* § 22.16(a), and defines

[1] The Code defines liquor as "any alcoholic beverage containing alcohol in excess of four percent by weight, unless otherwise indicated." TEX. ALCO. BEV. CODE ANN. § 1.04(5).

[2] Section 22.04 does not apply "to the stockholders, managers, officers, agents, servants, or employees of a corporation operating hotels, with respect to package stores operated by the corporation in hotels." TEX. ALCO. BEV. CODE ANN. § 22.04(d).

a public corporation as any entity that is publicly-traded or in which more than 35 persons hold an ownership interest, *id.* § 22.16(b).

Specifically, Wal-Mart alleges that Sections 22.04, 22.05, 22.06, and 22.16 are "anti-competitive and unfair to consumers," representing "protectionist provisions that unlawfully discriminate against publicly traded companies," and as a result are "unconstitutional under the Equal Protection Clause, Commerce Clause, and Comity Clause of the U.S. Constitution." Compl. ¶ 4.

I. TEXAS HISTORICALLY HAS REGULATED PACKAGE STORES MORE STRICTLY THAN WINE AND BEER RETAILERS.

Texas has closely regulated the sale of liquor by package stores since the ratification of the Twenty-First Amendment, with these entities historically being subjected to more onerous obligations and restrictions than wine and beer retailers. For instance, the Code has since its inception imposed specific building and display obligations on package stores but not on wine and beer retailers. *See, e.g.*, Act of 1935 Regulating Manufacture, Sale and Transportation of Alcoholic Liquors ("1935 Act"), H.B. 77, 44th Leg., 2d Spec. Sess., ch. 467, art. I, § 15(g) (prohibiting package stores from having "curtains, hangings, signs or any obstruction which will prevent a clear view at all times of the interior of the store"). Today, the Code requires that package stores be completely separated from the premises of another business "by a solid, opaque wall from floor to ceiling, without connecting doors, shared bathroom facilities, or shared entry foyers." TEX. ALCO. BEV. CODE ANN. § 22.14(a). Beer and wine retailers, which include supermarkets and convenience stores, are not bound by similar restrictions, and may independently choose the layout of their retail outlets.

Similarly, Texas has for decades strictly regulated opening hours and customer access to package stores selling liquor. *See, e.g.*, Act of 1937 Revising Texas Liquor Control Law ("1937

Act"), H.B. 5, 45th Leg., Reg. Sess., ch. 448, art. I, § 32 (making it unlawful to sell or deliver liquor all day on Sunday and between midnight and 7:00 a.m. all other days). For example, under the current Code, package stores must remain closed all day on Sundays and on weekdays after 9 p.m. (*see* TEX. ALCO. BEV. CODE ANN. § 105.01; *see also id.* § 22.14(e)); by contrast, beer and wine retailers can sell until at least midnight on all days, and on Sunday are only prohibited from selling beer and wine before noon (*see id.* §§ 105.04, 105.05). Package stores also are forbidden from allowing any person under 21 years of age inside their premises without a parent, guardian, adult spouse, or adult custodian, *see id.* §§ 106.01, 109.53, and generally cannot employ anyone under 21 years of age, *see id.* § 22.13(a). No similar prohibitions apply to wine and beer retailers, which are permitted to both employ and allow unaccompanied minors onto their premises.

Consistent with these strictures, Texas has at all times regulated the issuance of package store permits more strictly than the issuance of wine and beer permits. *Compare id.* §§ 22.01-22.16, *with id.* §§ 26.01-26.08. As set forth in detail below, the Code explicitly restricts the type of businesses that can hold a package store permit (*see id.* §§ 22.06, 22.16), and the number of permits a specific business may hold (*see id.* §§ 22.04, 22.05). No similar limitations are placed on retailers selling beer and wine exclusively.

II. TEXAS HISTORICALLY HAS LIMITED THE TYPE AND NUMBER OF BUSINESSES THAT CAN HOLD A PACKAGE STORE PERMIT.

Many of the ownership restrictions at issue in this case date back to 1935 — when Texas legally became a wet state after prohibition. For instance, at all times since then, Texas has forbidden package store permittees from owning or holding an interest in a beer and wine retail permit. *See* 1935 Act art. I, § 15(r) (current version at TEX. ALCO. BEV. CODE ANN. § 22.06(a)(2)). Similarly, the Legislature has at all times restricted the number of permits a package store permittee may hold to five. *See* 1935 Act art. I, § 15(g) ; Act of 1949 Amending Texas Liquor Control Act

("1949 Act"), H.B. 84, 51st Leg., Reg. Sess., ch. 543, § 7 (extending the five-permit limitation to include corporations but excluding hotels). Only narrow exceptions have been allowed to the five-store cap.[3] Since 1951, Texas has permitted "persons related within the first degree of consanguinity" to consolidate their permits under one legal entity and thus hold more than five permits. Act of 1951 Amending Texas Liquor Control Act ("1951 Act"), H.B. 202, 52d Leg., Reg. Sess., ch. 66, § 2 (current version at TEX. ALCO. BEV. CODE ANN. § 22.05). But this exception, as its wording suggests, only applies to an individual who otherwise qualifies for at least two package store permits, and requires that the issued permits stay in a specific county. *See id.*

The Legislature also has historically restricted the types of businesses that can hold a package store permit within the State. For instance, the Code has banned public corporations from holding a package store permit for decades. TEX. ALCO. BEV. CODE ANN. § 22.16(a). The Code defines public corporations as publicly-traded corporations and private entities with over 35 shareholders. *Id.* § 22.16(b). This ban — which applies to in-state and out-state entities — followed the Fifth Circuit's decision striking down the requirement that permittees be citizens of Texas. *Cooper v. McBeath*, 11 F.3d 547, 555 (5th Cir. 1994). Thus, Texas has at all times excluded certain types of businesses from the liquor retail market.

III. REPEATED LEGISLATIVE CHALLENGES TO THE OWNERSHIP RESTRICTIONS HAVE FAILED.

These restrictions — on the type of businesses that may sell liquor and the number of permits that each such business can hold — have been subjected to numerous legislative

[3] Starting in 1949, hotels — which along with drugstores were the only types of businesses allowed to hold a package store permit from 1935 to 1937 — were permitted to hold over five permits as long as the package stores were located inside the hotel and were serving the hotel guests. *See* 1935 Act art. I, § 15(g); 1937 Act art. I, § 31; 1949 Act § 7. Today, under Section 51.06, a hotel holding a mini-bar permit is prohibited from holding a package store permit, and a package store may not be located at a hotel if the hotel has a mini-bar permit. TEX. ALCO. BEV. CODE ANN. § 51.06.

challenges. In fact, since 1995, almost a dozen separate bills (including several during the current legislative session) have been introduced seeking to repeal all or some of these provisions. *See, e.g.*, H.B. 2451, 74th Leg. (1995) (seeking to repeal Section 22.05); S.B. 1066, 74th Leg. (1995) (seeking to repeal Section 22.05); H.B. 2998, 75th Leg. (1997) (seeking to repeal Section 22.05); H.B. 1933, 81st Leg. (2009) (seeking to repeal Sections 22.04 and 22.05); S.B. 1216, 81st Leg. (2009) (seeking to repeal Sections 22.04 and 22.05); H.B. 668, 83d Leg. (2013) (seeking to repeal Sections 22.04 and 22.05); S.B. 598, 83d Leg. (2013) (seeking to repeal Sections 22.04 and 22.05); H.B. 1225, 84th Leg. (2015) (seeking to repeal Sections 22.04, 22.05, and 22.16, and amend 22.06(a)(2)); S.B. 609, 84th Leg. (2015) (seeking to repeal Sections 22.04, 22.05, and 22.16, and amend 22.06(a)(2)); H.B. 1870, 84th Leg. (2015) (seeking to repeal Sections 22.04 and 22.05); S.B. 526, 84th Leg. (2015) (seeking to repeal Sections 22.04 and 22.05). Each of these attempts, however, has so far failed. And to date, the Chapter 22 provisions challenged in this lawsuit remain intact.[4]

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss all or part of a complaint for "failure to state a claim upon which relief can be granted." To survive a motion to dismiss, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While "[t]he 'court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff,'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)), a plaintiff must plead specific facts and cannot rely merely on "labels and conclusions" or a "formulaic recitation of the elements of a cause of action."

[4] The bills introduced during the current legislative session all remain pending.

Twombly, 550 U.S. at 555. Where, as here, Wal-Mart has done little more than offer "conclusory allegations, unwarranted factual inferences, [and] legal conclusions," the Court should grant the motion and dismiss the lawsuit with prejudice. *Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005) (citing *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004)).

Moreover, FRCP 12(b)(6) "authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (citations omitted); *accord Turner v. AmericaHomeKey Inc.*, 514 F. App'x 513, 516 (5th Cir. 2013) (per curiam). "This procedure, operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless discovery and factfinding." *Neitzke*, 490 U.S. at 326-27. Because the Court may resolve some of Wal-Mart's claims on a dispositive question of law, the Court should grant this motion.

ARGUMENT

Wal-Mart's constitutional challenges fail as a matter of law. As established below, the allegations in the complaint do little more than describe what Wal-Mart believes to be the optimal retail model for selling liquor in Texas. *See, e.g.*, Compl. ¶¶ 15, 28-29, 45-46. But Wal-Mart's policy preferences are not entitled to constitutional protection. The Legislature has devised a legal framework that limits access to liquor by restricting the types of businesses that can hold a package store permit and the number of permits that those businesses may hold. That scheme is constitutionally sound and should not be overturned simply because it deprives Wal-Mart of the opportunity to profit from the Texas liquor market.

As the United States Supreme Court and the Fifth Circuit Court of Appeals have recognized, the burden on one seeking to enjoin the enforcement of a state law is a formidable one,

and courts must resort to "every reasonable construction . . . in order to save a statute from unconstitutionality." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594 (2012); *see also Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013) ("A federal court should not lightly enjoin the enforcement of a state statute."). The complaint here does not allege a problem of constitutional magnitude. And Wal-Mart has not, and will not be able to, plead facts entitling it to the remedies it seeks. Defendants thus ask the Court to grant their motion, and uphold all the challenged ownership provisions as constitutionally valid.

I. THE EQUAL PROTECTION CLAIM FAILS AS A MATTER OF LAW.

Wal-Mart's assertion that Sections 22.04, 22.05, 22.06 and 22.16 give rise to an Equal Protection Clause violation fails as a matter of law.

The rules for reviewing economic legislation are well-settled. A business regulation that does not interfere with a fundamental right or discriminate against a suspect class is "presumed to be valid" and will be sustained as long as the "classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (citations omitted); *see also Spudich v. Smarr*, 931 F.2d 1278, 1281 (8th Cir. 1991) (explaining that the presumption of validity holds true even if "in practice, [the] laws result in some inequality" (citation and internal quotation marks omitted)). That presumption of validity applies with special force to laws regulating the liquor industry because the State is vested with "broad power to regulate the times, places, and circumstances under which it will permit the sale of liquor." *Spudich*, 931 F.2d at 1280 (citing *N.Y. State Liquor Auth. v. Bellanca*, 452 U.S. 714, 715 (1981) (per curiam)); *see also North Dakota v. United States*, 495 U.S. 423, 433 (1990) (plurality opinion) ("Given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not

be set aside lightly." (citation omitted)); *California v. LaRue*, 409 U.S. 109, 118-19 (1972) (finding that there is an added presumption of validity in the area of liquor control). And although that power is not absolute, *see Spudich*, 931 F.2d at 1280-81, it is only "subject to minimal demands of the Fourteenth Amendment's . . . equal protection requirements." *Parks v. Allen*, 426 F.2d 610, 613 (5th Cir. 1970) (adopting district court's conclusions of law).

To overcome this strong presumption of validity, a plaintiff would have to negate "every conceivable basis which might support [the legislative arrangement], whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (citation and internal quotation marks omitted). That is, Wal-Mart would have to show that there is no conceivable set of facts to support a rational relationship between the four challenged ownership restrictions and a legitimate governmental policy goal. *See, e.g., F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). This Wal-Mart cannot do.[5]

A. <u>The State Has A Legitimate Interest In Restricting Access to Liquor.</u>

Texas "indisputably maintains a legitimate interest in reducing access to products with high alcohol content." *Maxwell's Pic-Pac, Inc. v. Dehner*, 739 F.3d 936, 940-41 (6th Cir. 2014) (reasoning that "the 21st Amendment's express grant of authority to the states, if it [is to] mean[] anything . . . , [must] provide[] legitimacy to the state's interest in restricting access to alcohol" (citation omitted)); *see also Marusic Liquors, Inc. v. Daley*, 55 F.3d 258, 260-62 (7th Cir. 1995) (upholding city ordinances "freezing the number of liquor licenses in particular neighborhoods" because "[i]f the City could shut down liquor businesses entirely, then the 'kinder, gentler'

[5] To the extent that Wal-Mart seeks to bring an "as applied challenge," its Equal Protection Clause claim fails because Wal-Mart has failed to identify — and will not be able to identify — an equally situated publicly-traded corporation that has been treated differently. *See Gallegos-Hernandez v. United States*, 688 F.3d 190, 195 (5th Cir. 2012).

regulation accomplished by a freeze . . . must be permissible" under the Twenty-First Amendment). The reasons why the Legislature may want to restrict access to liquor are manifold, including the desire to protect "the welfare, health, peace, temperance, and safety" of its citizens.[6] TEX. ALCO. BEV. CODE ANN. § 1.03; Raymond B. Fosdick & Albert L. Scott, Toward Liquor Control ix, 19-23 (Center for Alcohol Policy 2011) (1933) (explaining that states may use their control systems to limit access to products with higher alcohol content, while also steering society to lower alcohol forms).

B. Texas May Lawfully Restrict Access to Liquor By Limiting the Number and Type of Businesses That Can Hold a Package Store Permit.

The State may restrict access to liquor by capping "the *number* of places that supply it" and/or by limiting "the *types* of places that supply it." *Maxwell's Pic-Pac*, 739 F.3d at 941 (emphasis in original). This is precisely what the ownership restrictions here do: they restrict access to beverages with high alcohol content by restricting the *number* of outlets and *type* of businesses that are permitted to sell these products within the State of Texas. *See* TEX. ALCO. BEV. CODE ANN. §§ 22.04 (capping the number of permits for qualifying permittees at five), 22.05

[6] The State of Texas is not limited to the grounds found in the Code. In enacting the ownership restrictions, the Legislature may have also sought to ensure orderly market conditions, avoid discounting or significant reductions in the price of liquor, or achieve increased accountability from permit holders. *See, e.g.*, *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 814 (5th Cir. 2010) ("The goals of 'promoting temperance, ensuring orderly market conditions, and raising revenue' are met through regulation of the production and distribution of alcoholic beverages." (quoting *North Dakota*, 495 U.S. at 432 (plurality opinion)); *Johnson v. Martignetti*, 375 N.E.2d 290, 297 (Mass. 1978) (explicitly recognizing the desire to avoid "practices such as indiscriminate price cutting and excessive advertising; and preserving the right of small, independent liquor dealers to do business" as legitimate state interests); *Grand Union Co. v. Sills*, 204 A.2d 853, 859 (N.J. 1964) ("In fixing its policy, the Legislature accepted widely held views . . . that the consumption of liquor is elastic . . . that price cuttings and their advertisement . . . are undesirable in the liquor field as tending to stimulate consumption, and that . . . domination of retail establishments by . . . economically powerful interests . . . would intensify the dangers of sales stimulations and . . . would be inimical to temperance and trade stability.").

(expanding the number of allowable permits for a specific, narrow type of permittee), 22.06(a)(2) (limiting the type of businesses by banning wine and beer (BQ) retailers from owning a package store), 22.16, (limiting the type of business by excluding publicly-traded corporations and private corporations with more than 35 shareholders). Wal-Mart therefore cannot establish that the challenged provisions offend the Equal Protection Clause because they are rationally related to a legitimate state interest.

Indeed, virtually every court to consider similar regulations on the type of business or number of outlets authorized to sell alcohol has upheld the legislation as permissible under the Equal Protection Clause. *See, e.g., Maxwell's Pic-Pac*, 739 F.3d at 941 (upholding Kentucky statute banning supermarkets and convenience stores from selling wine or liquor, while permitting drugstores to sell such items); *Spudich*, 931 F.2d at 1281 (upholding state regulation allowing the sale of liquor at bowling alleys and soccer stadiums on Sundays, while excluding billiard parlors from this group); *Parks*, 426 F.2d at 614 (upholding Georgia's two-license limit); *McCurry v. Alcoholic Beverage Control Div.*, 4 F. Supp. 3d 1043, 1047 (E.D. Ark. 2014) (upholding Arkansas statute limiting package store owners to one permit); *Johnson v. Martignetti*, 375 N.E.2d 290, 296-97 (Mass. 1978) (upholding statute restricting to three the number of liquor licenses held by an individual or business); *Granite State Grocers Ass'n v. State Liquor Comm'n*, 289 A.2d 399, 402 (N.H. 1972) (upholding a two-license limit and finding that "[r]egulations against concentration in the alcoholic beverage business necessarily discriminate against chain stores"); *Grand Union Co. v. Sills*, 204 A.2d 853, 859 (N.J. 1964) (upholding a two-license limit). This Court should follow suit.

Texas's statutory scheme to control access to liquor is not arbitrary. The Legislature may reasonably require citizens to travel to a package store to purchase distilled spirits and limit the

number of outlets offering those products. Because Wal-Mart has not met — and cannot meet — its burden to negate every conceivable legitimate governmental purpose, the Court need not wait for factual development to dismiss the Equal Protection claim. *See Beach Commc'ns*, 508 U.S. at 315 ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." (citations omitted)); *Lee v. Whispering Oaks Home Owners' Ass'n*, 797 F. Supp. 2d 740, 752 (W.D. Tex. 2011) ("[W]hen truth is not the issue, we can understand how using discovery procedures to develop facts showing the state's true reason for its action could be, for all practical purposes, both inefficient and unnecessary." (quoting *Mahone v. Addicks Util. Dist. of Harris Cnty.*, 836 F.2d 921, 936 (5th Cir. 1988))). The claim should be dismissed as a matter of law.

II. THE COMMERCE CLAUSE CLAIM FAILS AS A MATTER OF LAW.

The Court should also dismiss Wal-Mart's dormant Commerce Clause challenge as a matter of law. *First*, the Fifth Circuit has held that alcohol regulation enacted pursuant to the state's power under the Twenty-First Amendment is afforded special deference, and that a state may differentiate between in-state and out-of-state entities where that treatment is inherent to the regulation of alcohol. *See Wine Country*, 612 F.3d at 820. *Second*, the Fifth Circuit has repeatedly found that an economic regulation that excludes a *type* of business from entering the local market does not offend the dormant Commerce Clause as long as both in-state and out-of-state entities within that class are treated identically. As established below, the challenged provisions do not distinguish between domestic and foreign interests and Wal-Mart has not (and cannot) allege any facts to the contrary. Accordingly, binding Fifth Circuit law preludes Wal-Mart's dormant Commerce Clause challenge under either analytical rubric.

A. The Twenty-First Amendment Vests Texas with Considerable Power to Regulate the Sale of Liquor.

Wal-Mart's dormant Commerce Clause challenge fails because, under binding Fifth Circuit law, a state's regulation of alcoholic retailing is afforded special deference, and even tolerates a level of differential treatment between in-state and out-of-state entities inherent to the regulation of alcohol. *See id.*

As the Supreme Court and the Fifth Circuit have recognized, liquor holds a special status in American law. *Granholm v. Heald*, 544 U.S. 460, 488-89 (2005); *Wine Country*, 612 F.3d at 813. This special status appropriately reflects that "[i]ntoxicating liquor is the only consumer product identified in the Constitution. Only its regulation by States is given explicit warrant." *Wine Country*, 612 F.3d at 813. *In Granholm*, the Supreme Court recently emphasized the breadth of that power, when it noted:

> The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation . . . . States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system.

Granholm, 544 U.S. at 488-89 (citations and internal quotation marks omitted). Although the line between the permissible exercise of a state's power under the Twenty-First Amendment and impermissible discrimination under the dormant Commerce Clause has not always been clear, the Fifth Circuit has found that alcohol laws that regulate the retailing of alcohol are constitutional — even if they may result in differential treatment of in-state and out-of-state companies. *Wine Country*, 612 F.3d at 820.

In *Wine Country*, the three-judge panel upheld Code provisions that allowed an in-state retailer to deliver alcohol to consumers in the county where the retailer has a store, but prohibited

out-of-state retailers from delivering or shipping alcohol to consumers anywhere in the state. *Id.* at 820-21. Because "[r]egulating alcoholic beverage retailing is largely a State's prerogative," the *Wine Country* court reasoned that the Texas's differential treatment of out-of-state retailers was not discriminatory under the dormant Commerce Clause. *Id.* at 820 ("Our read of *Granholm* is that the Twenty-first Amendment still gives each State quite broad discretion to regulate alcoholic beverages. The dormant Commerce Clause applies, but it applies differently than it does to products whose regulation is not authorized by a specific constitutional amendment.").[7] Rather, the Texas law was a "constitutionally benign incident of an acceptable three-tier system." *Id.*

The current case is even more "constitutionally benign" than *Wine Country* in that the challenged provisions make no distinction between out-of-state and in-state retailers — unlike the section of the Code upheld in *Wine Country* — and do not in any way differentiate between domestic and foreign products and producers. Because the *Granholm* Court explicitly held that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent," 544 U.S. at 489, and because Sections 22.04,

[7] The Fifth Circuit is not alone in its interpretation of the interaction between these two constitutional provisions and the state's power to regulate alcohol retailing. *See, e.g.*, *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 191 (2d Cir. 2009) (upholding statute that allowed New York-licensed retailers, but not out-of-state retailers, to deliver alcohol directly to New York residents; reasoning that the system "treats in-state and out-of-state liquor the same, and does not discriminate against out-of-state products or producers"); *Brooks v. Vassar*, 462 F.3d 341, 355 (4th Cir. 2006) (upholding Virginia law that allowed its state's residents to import one gallon or four liters of wine for personal consumption; finding that it did not constitute economic protectionism of local wine industry); *cf. S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 809-10 (8th Cir. 2013) (upholding Missouri law requiring that alcohol wholesalers be residents of the state for at least three years before obtaining license; concluding that "state policies that define the structure of the liquor distribution system while giving equal treatment to in-state and out-of-state liquor products and producers are protected under the Twenty-first Amendment" (citation and internal quotation marks omitted)).

22.05 and 22.16 are consistent with this directive, Wal-Mart's dormant Commerce Clause Claim fails under *Granholm* and *Wine Country*.[8]

B. The Ownership Provisions Are Lawful Under Well-Established Dormant Commerce Clause Principles.

Even if the Fifth Circuit did not afford alcohol regulation special deference, Wal-Mart's dormant Commerce Clause claim would fail nonetheless because the complaint does not state a claim for which relief can be granted.

A statute violates the dormant Commerce Clause if it "discriminates against interstate commerce either facially, by purpose, or by effect." *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007). For purposes of establishing discrimination under the dormant Commerce Clause, it is not enough to show merely that a state law "'burdens some out-of-state interest while benefitting some in-state interest.'" *Churchill Downs Inc. v. Trout*, 589 F. App'x 233, 234 (5th Cir. 2014) (quoting *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 725 (5th Cir. 2004)). A statute "'impermissibly discriminates only when a [s]tate discriminates among similarly situated in-state and out-of-state interests.'" *Churchill Downs*, 589 F. App'x at 234 (quoting *Int'l Truck & Engine Corp*, 372 F.3d at 725 (alteration in original)). If, as here, "the statute does not discriminate, then the statute is valid unless the burden imposed on interstate commerce is 'clearly excessive' in relation to the putative local benefits." *Allstate*, 495 F.3d at 160 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

As set forth below, Wal-Mart's complaint is bereft of any factual allegation — save for conclusory statements and generalizations — that the provisions it challenges discriminate against interstate commerce either facially, by purpose, or by effect. Nor could Wal-Mart allege such facts

[8] Wal-Mart does not challenge Section 22.06 under the dormant Commerce Clause.

given that the provisions apply equally to in-state and out-of-state businesses and do not in any manner "'prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market.'" *Allstate*, 495 F.3d at 162 (quoting *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978)). The absence of any of these factors is fatal to Wal-Mart's dormant Commerce Clause claim, *Allstate*, 495 F.3d at 162-63, and the allegations that Texas treats public corporations differently from other types of companies are insufficient to state a dormant Commerce Claim. Where the allegations are devoid of the hallmarks of a dormant Commerce Clause violation — as they are here — the claim should be dismissed as a matter of law.

1. *The Ownership Provisions Do Not Facially Discriminate Against Out-of-State Interests.*

As a threshold matter, the three ownership restrictions challenged under the dormant Commerce Clause — Sections 22.04, 22.05 and 22.16 — are facially neutral. Section 22.16, for instance, precludes publicly-traded corporations, such as Wal-Mart, as well as private corporations with over 35 shareholders, from owning or holding (directly or indirectly) a package store permit. TEX. ALCO. BEV. CODE ANN. § 22.16(a)-(b), That prohibition applies equally to a certain *type* of business — namely, public corporations as defined under the statute regardless of the corporations' citizenship. *See id.* Thus, under Section 22.16, a publicly-traded retailer headquartered in Austin and a privately-held grocery store with more than 35 shareholders based in Tyler will both be ineligible for a package store permit. By its very terms, then, Section 22.16 excludes a large swath of businesses (both local and foreign) from entering the state's liquor market — it does not favor local businesses at the expense of out-of-state corporations.

Sections 22.04 and 22.05 — which are also facially neutral — similarly limit liquor retailers operating in Texas by regulating the number of permits they may hold. Section 22.04

bans permittees from owning or holding an interest (directly or indirectly) in more than five package stores, *id.* § 22.04(a)-(b), and Section 22.05 allows for the consolidation of package store interests in certain narrow circumstances, *id.* § 22.05. Wal-Mart contends that these provisions discriminate against interstate commerce because "[o]ut-of-state competitors — particularly out-of-state public corporations — are extremely unlikely to have a qualifying 'blood relative.'" Compl. ¶ 64. Not so.

Under the Code, a package-store permittee is limited to five permits, regardless of the entity's citizenship. And a package store permittee who lacks relatives within the first degree of consanguinity is ineligible for consolidation, regardless of corporate domicile. Thus, under Section 22.05 not only would the Austin-based publicly traded corporation and the privately-held Tyler grocer fail to qualify for the consanguinity exception, but a sole proprietor based in Houston with no qualifying blood relatives also would be ineligible for consolidation. Conversely, a sole proprietor in Oklahoma (or a similarly situated non-resident) owning a majority interest in two or more package stores with qualifying relatives could lawfully consolidate those entities under Section 22.05. The Code treats local and foreign interests identically. *See Amerada Hess Corp. v. Dir., Div. of Taxation*, 490 U.S. 66, 78 (1989) (holding that a tax did not discriminate against interstate commerce where the disparate treatment between businesses "results solely from differences between the nature of their businesses, not from the location of their activities").

2. *The Ownership Provisions Do Not Discriminate in Effect Against Interstate Commerce.*

Wal-Mart's attempt to ignore these critical facts misses the mark. Rather than aver how each of the challenged ownership provisions treats Wal-Mart differently from a similarly situated in-state public corporation, *see, e.g.*, Compl. ¶¶ 30-35, Wal-Mart seeks to blur the line between these three sections of Chapter 22 by alleging that the public corporation ban "create[s] separate

classes of retailers," Compl. ¶ 18, and that when combined with the provisions of Sections 22.04 and 22.05 results in a "a few favored companies" being allowed "to create large package store chains that dominate regional markets and limit consumer choice," *id.* ¶ 38; *see also id.* ¶¶ 26-41. But even under this formulation, Wal-Mart's allegations fall short of alleging a discriminatory effect. At most they confirm a "legislative desire to treat differently two business forms" — a distinction the Fifth Circuit has repeatedly held does not offend the dormant Commerce Clause. *Allstate*, 495 F.3d at 161; *see also Int'l Truck & Engine Corp*, 372 F.3d at 725-26; *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 502 (5th Cir. 2001).

As the Fifth Circuit concluded in *Allstate*, a state may distinguish among businesses based on their corporate form as long as in-state and out-of-state entities sharing that business form are treated identically. *See Allstate*, 495 F.3d at 161-63. In *Allstate*, the court considered a challenge to a Texas law banning car insurers from owning or acquiring an interest in an auto-repair shop. *Id.* at 157. The Fifth Circuit there found that the statute did not discriminate against interstate commerce because the regulation sought to prevent a type of business (i.e., insurance companies) from entering the collision repair services market. *Id.* at 161-63. In reaching its conclusion, the court reasoned that the law did not raise any barriers to "out-of-state body shops entering the Texas market so long as [the body shops] are not owned by insurance companies." *Id.* at 163. Similarly, in *Ford*, the Fifth Circuit upheld a state law banning car manufacturers from engaging in retail automobile sales because the manufacturer's domicile was irrelevant under the statute. *Ford*, 264 F.3d at 502. There, the Fifth Circuit also concluded that the sole reason why Ford was being excluded from the Texas car retail market was because of its status as a car manufacturer, and not because it was an out-of-state corporation. *Id.*

Sections 22.04, 22.05, and 22.16 operate in the same manner as the regulations in *Allstate* and *Ford*. Just like the economic regulations banning certain business forms from entering the local car retailer and collision repair services markets, Section 22.16 bans a specific *business form* — i.e., public corporations — from the Texas retail liquor market. Conversely, Section 22.05 affords another type of *business form* the benefit of consolidation, but does so without regard to the businesses' location or citizenship.[9] That sort of differentiation lies at the heart of the State's police power to enact economic regulation, and does not violate the dormant Commerce Clause.

Wal-Mart cannot save its dormant Commerce Clause claim by pointing to the treatment afforded to entities like Spec's Family Partners Ltd. and Twin Liquors LP under the challenged provisions, Compl. ¶ 38., because those entities represent a different type of business form and thus are not similarly situated to Wal-Mart. *See Allstate*, 495 F.3d at 163. Indeed, the absence of any facts in the Complaint alleging that the challenged Code provisions treat Wal-Mart differently from any similarly situated in-state business — the *sine qua non* of a dormant Commerce Clause violation — is fatal to its claim.

"The dormant Commerce Clause 'protects the interstate market, not particular interstate firms.'" *Allstate*, 495 F.3d at 163 (quoting *Exxon*, 437 U.S. at 127-28). Wal-Mart is not constitutionally entitled to profit from the Texas liquor market, merely because others are doing so. Texas has not erected barriers to entry against *all* out-of-state retailers, prohibited the flow of interstate products in any way, or treated equally situated in-state and out-of-state retailers

[9] Wal-Mart is not entitled to consolidation merely because the state has decided to offer this option to a specific group — namely, family-owned businesses. *See Parks*, 426 F.2d at 614 (upholding district court's finding that the test for determining the validity of alcoholic beverage regulation was "the reasonableness of the ordinance as relates to the business licensed and not the reasonableness as it relates to a particular applicant"; thus, the mere fact that an applicant did not qualify for a license "by virtue of birth is no bar, even though it might create a personal hardship").

differently. *See Allstate*, 495 F.3d at 162. Wal-Mart does not allege any facts to the contrary, and thus no discovery is needed to conclude that the hallmarks of a dormant Commerce Clause violation are not present here. *See, e.g.*, *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 191 (2d Cir. 2009) (upholding dismissal of dormant Commerce Clause challenge on motion to dismiss); *McCurry*, 4 F. Supp. 3d at 1046 (dismissing a dormant Commerce Clause challenge on a motion to dismiss). The Court should grant Defendants' motion to dismiss with prejudice.[10]

III. WAL-MART'S PRIVILEGES AND IMMUNITIES CLAIM FAILS AS A MATTER OF LAW.

Likewise, Wal-Mart's claim that Sections 22.04, 22.05, and 22.16 violate the Privileges and Immunities Clause is fatally flawed. U.S. Const. art. IV, § 2, cl. 1. ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). The Privileges and Immunities Clause has been interpreted to "prevent a State from imposing unreasonable burdens on citizens of other States . . . ." *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 383 (1978) (citations omitted). Corporations, however, are not considered "citizens" under the Privileges and Immunities Clause. *See, e.g.*, *Paul v. Virginia*, 75 U.S. 168, 180 (1868); *Blake v. McClung*, 172 U.S. 239, 258 (1898); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 884 (1985). Even if they were, the privileges at issue in this lawsuit are not the type of privileges

[10] Because Wal-Mart has failed to plead a colorable dormant Commerce Clause claim, the Court need not tarry long, if at all, on *Pike* balancing. Even if Wal-Mart can allege that the challenged provisions inhibit its ability to participate in the Texas liquor retail market, those same provisions plainly do *not* prohibit other interstate entities from "operating in, or entering, the Texas market," *Allstate*, 495 F.3d at 164. Thus, any burden that the challenged provisions impose on interstate commerce cannot be "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. All of this presupposes, of course, that *Pike* balancing should even be applied when alcoholic beverage regulations are challenged under the dormant Commerce Clause —an approach that the Supreme Court has never adopted or instructed lower courts to adopt. *See Lebamoff Enters., Inc. v. Huskey*, 666 F.3d 455, 467 (7th Cir. 2012) (Hamilton, J., concurring) (noting that the Supreme Court has neither "used *Pike* balancing to strike down any state alcoholic beverage laws" nor "signaled that the lower courts should apply *Pike* balancing" to such laws).

"bearing upon the vitality of the Nation" that are protected by the U.S. Constitution. *Baldwin*, 436 U.S. at 383 ("Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally."). Accordingly, the protections afforded by the Privileges and Immunities Clause do not extend to Wal-Mart or any other corporate entity, and Wal-Mart's challenge must be dismissed as a matter of law.

CONCLUSION

In sum, Defendants respectfully submit that the Legislature, in deciding to restrict access to liquor by limiting the number and type of business authorized to sell this product, made a legitimate policy choice that is not forbidden by the United States Constitution. Defendants therefore ask that this Court grant their motion and dismiss the lawsuit in its entirety.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

ROBERT O'KEEFE
Division Chief
Financial Litigation, Tax, and Charitable Trusts Division

/s/ María Amelia Calaf
MARIA AMELIA CALAF
Attorney-in-Charge
State Bar No. 24081915
Telephone: (512) 475-4298
maria.calaf@texasattorneygeneral.gov
ADAM N. BITTER
Assistant Attorney General
State Bar No. 24085070
Telephone: (512) 936-2422
adam.bitter@texasattorneygeneral.gov

Financial Litigation, Tax, and Charitable Trusts Division
P.O. Box 12548
Austin, Texas 78711-2548
Telecopier: (512) 477-2348
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 2015, a true and correct copy of the foregoing *Defendants' Motion to Dismiss Plaintiffs' Original Complaint for Declaratory and Injunctive Relief and Incorporated Memorandum of Law* has been served on the following via the Court's CM/ECF system, and/or electronic mail:

Neal Manne
Alex Kaplan
Chanler Langham
SUSMAN GODFREY LLP
1000 Louisiana Street, Suite 5100
Houston, Texas 77002
Telephone: (713) 651-9366
Facsimile: (713) 654-6666
nmanne@susmangodfrey.com
akaplan@susmangodfrey.com
clangham@susmangodfrey.com

Steven M. Shepard
SUSMAN GODFREY LLP
560 Lexington Avenue, Fifteenth Floor
New York, New York 10022-6828
Telephone: (212) 336-8330
Facsimile: (212) 336-8340
sshepard@susmangodfrey.com

Mark T. Mitchell
Frederick W. Sultan
GARDERE WYNNE SEWELL LLP
One American Center
600 Congress Avenue
Austin, Texas 78701
Telephone: (512) 542-7000
Facsimile: (512) 542-7100
mmitchell@gardere.com
fsultan@gardere.com

Counsel for Plaintiffs

/s/ María Amelia Calaf
MARIA AMELIA CALAF