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.

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.

Civil Action No. 1:15-cv-00134-RP

ORAL ARGUMENT REQUESTED

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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Plaintiffs Wal-Mart Stores, Inc. and three of its subsidiaries (collectively, "Plaintiffs") respectfully submit this response to the Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) ("Motion") filed by Defendants Texas Alcoholic Beverage Commission ("TABC"), Jose Cuevas, Jr., Steven M. Weinberg, and Ida Clement Steen (collectively, "the State").

PRELIMINARY STATEMENT

Wal-Mart challenges three protectionist provisions in the Texas Alcoholic Beverage Code that prevent it from obtaining a package store permit and thus from selling distilled spirits in Texas. As explained below, each of these provisions contains exceptions, loopholes, and workarounds that protect existing package stores from competition by irrationally excluding virtually all public corporations from holding package store permits and making it nearly impossible for out-of-state retailers to compete. The challenged provisions are a thinly veiled attempt to circumvent a Fifth Circuit decision that was intended to allow out-of-state retailers to compete in the Texas liquor market.

The State urges the Court to defer to the Legislature because the challenged provisions are economic regulations, despite Wal-Mart's detailed allegations that the provisions irrationally protect certain favored local interests. This is contrary to controlling law, which requires this Court to strike down laws under the Equal Protection Clause that merely reward favored groups by eliminating competition. Wal-Mart has stated an Equal Protection Claim because the link between the challenged rules and the broad, amorphous interests posited by the State—reducing access to liquor, ensuring orderly market conditions, preventing excessive discounting, and increasing accountability—is so attenuated, particularly in light of statutory loopholes, that the challenged rules are irrational and mere pretexts for protection of incumbent local package store interests. Indeed, the State fails to describe any relationship between the challenged statutes and

the asserted interests, and the State's interests are more directly advanced by other (unchallenged) rules and are inconsistent with the legislative history and the TABC's practices.

Wal-Mart also has stated a claim for violation of the Dormant Commerce Clause, which imposes a more rigorous standard for the State than rational basis review, because the factual allegations in the Complaint demonstrate that the challenged provisions discriminate, in purpose and in effect, against out-of-state commerce. Indeed, supporters of the public corporation ban pushed for the ban expressly to circumvent a Fifth Circuit decision striking down a predecessor statute that banned out-of-state entities from holding package store permits, arguing that the "need" for a discriminatory scheme "still remain[ed]." Legislative attempts to end the discrimination have been unsuccessful precisely because entrenched local package store interests who favor the current anti-competitive laws have repeatedly told the Legislature that the laws—which they call "Texas preference" or "Texas first" laws—are necessary to ensure that 100% of package store permits continue to be held by Texas entities, a constitutionally illegitimate goal. The Twenty-First Amendment does not save the discriminatory laws, because that Amendment only shields local laws that are inherent in the three-tier system—which these laws are not.

At a minimum, both the Equal Protection and Dormant Commerce Clause analyses require factual development and cannot be decided on a motion to dismiss. The Fifth Circuit has emphasized the need for a factual record to assess whether the relationship between a challenged law and proffered state interest is rational under the Equal Protection Clause, and the Court must assess the practical impact of challenged laws to decide whether they are discriminatory, in effect or purpose, under the Dormant Commerce Clause. Wal-Mart has alleged specific facts indicating that the challenged provisions have both the purpose and effect of protecting a favored few local economic interests. Discovery, not dismissal, is the appropriate course.

FACTS AND REGULATORY BACKGROUND

Wal-Mart, which is the largest private employer in Texas, sells beer and wine in 546 stores in the state. Dkt No. 1 ("Complaint") ¶¶ 13–14. Wal-Mart has a business plan to expand its operations and open new "package store" facilities, adjacent to its existing Texas stores, which would sell distilled spirits. *Id.* ¶ 45. But Wal-Mart cannot do so because three unconstitutional and irrational laws—motivated by a desire to protect a few favored local retailers—prohibit Wal-Mart from acquiring the necessary package store permits, even though it already is one of the largest sellers of beer and wine in the state.

Section 22.16: Section 22.16 of the Texas Alcoholic Beverage Code ("the Code") prohibits any "public corporation, or . . . any entity which is directly or indirectly owned or controlled, in whole or in part, by a public corporation, or . . . any entity which would hold the package store permit for the benefit of a public corporation" from holding a package store permit. The Code defines "public corporation" as an entity listed on a public stock exchange or an entity with more than 35 owners. TEX. ALCO. BEV. CODE ANN. § 22.16(b).

This ban on public corporations has two loopholes. The first exempts hotels: A hotel may hold a package store permit even if it is owned by a public corporation. *Id.* § 22.16(d). The second is a grandfather clause: The ban does not apply to public corporations in existence and holding package store permits on April 28, 1995. *Id.* § 22.16(f). Those public corporations may continue operating package stores and acquiring new permits for new stores. *Id.* Neither the ban nor its loopholes bears any rational relationship to a legitimate governmental interest.

The Legislature enacted Section 22.16 in response to a 1994 Fifth Circuit decision that struck down a long-standing residency requirement restricting package store permits to Texas residents. The Court held that law unconstitutional under the Dormant Commerce Clause.

Complaint ¶¶ 19–23 (citing *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994)). In the legislative session immediately following *Cooper*, and at the behest of the Texas Package Store Association ("TPSA") (a lobbying organization of Texas package store owners), the Legislature replaced the unconstitutional express residency requirement with Section 22.16, which was designed to achieve the same result. The only witness the Legislature heard testify about Section 22.16 was a lawyer for the TPSA—all of the members of which would be protected from Section 22.16 by the grandfather clause. In explaining the supposed need for Section 22.16's ban on public corporations, the TSPA lawyer cited the Fifth Circuit's decision eliminating the unconstitutional laws and contended there was a "need" that "still remain[ed]" after the decision. Complaint ¶ 22.

Section 22.16 was intended to and does achieve indirectly precisely what the Fifth Circuit declared Texas may not do directly: decrease competition from out-of-state retailers. The ban effectively shuts the door that the Fifth Circuit required the State to open for out-of-state corporations. Meanwhile, the grandfather clause ensures that Texas public corporations—necessarily, the only public corporations that held package store permits before *Cooper*—could continue to do business and obtain additional package store permits. Thus, as discovery in this case will show, the vast majority of—if not all—package store permits continue to be owned by Texans, Texas partnerships, and domestic Texas companies—just as before *Cooper*.

Sections 22.04 and 22.05: Section 22.04 of the Code forbids any entity from holding more than five package store permits. TEX. ALCO. BEV. CODE ANN. § 22.04(a). Like the public corporation ban, the five-store limit contains gigantic loopholes designed to insulate protected local interests from its effect. The first loophole allows hotels to hold an unlimited number of permits. *Id.* § 22.04(d). The second loophole is a grandfather clause: Entities that held package store permits before 1949 may exceed the five-store limit. *Id.* § 22.04(c).

The third loophole, found in Section 22.05, is a "consolidation" procedure that has allowed ***some*** local entities to amass enormous chains of package stores while limiting these entities' competitors to a maximum of five permits. TEX. ALCO. BEV. CODE ANN. § 22.05. Section 22.05 allows "persons related within the first degree of consanguinity" who "have a majority of the ownership in two or more legal entities holding package store permits" to "consolidate the package store businesses into a single legal entity. That single legal entity may then be issued permits for all the package stores, notwithstanding [the five-store limit]." *Id.* Using this loophole, a package store owner can obtain unlimited permits with the assistance of a child, parent, or sibling. Complaint ¶¶ 37–40. After the child, parent, or sibling is granted a package store permit, he or she then "consolidates" that permit with the owner's pre-existing permits. *Id.* The consolidated entity then holds all the permits, the owner's relative holds none, and the process may be repeated until the owner has as many permits as desired. *Id.* The consolidation loophole has allowed only a chosen few Texas package store chains to obtain dozens, in some cases even hundreds, of permits. *Id.* ¶ 38. For example, Spec's Family Partners Ltd. holds ***160*** permits and Twin Liquors LP holds ***76*** permits. *Id.*

The consolidation loophole, by its nature, is not available to public corporations. To "consolidate," a public corporation would need a 51% owner who is a natural person, which Wal-Mart, like most public corporations, lacks. *Id.* ¶ 33. Only the relative of a natural person who is a 51% owner of a corporation may consolidate permits with that corporation. *Id.* Thus, Wal-Mart could not utilize the consolidation loophole even if it were able to hold (five) permits.

Section 22.06: Section 22.06 prohibits an entity from holding a package store permit if that entity also holds even a single Wine and Beer Retailer's Off-Premise Permit (termed a "BQ" permit). Many grocery stores like Wal-Mart hold "BQ" permits to sell beer and wine. Section

22.06 forbids such stores from obtaining a package store permits to sell spirits at any location (even a separate package store). The practical effect of Section 22.06 is to create an arbitrary, and irrational, increase in the cost to such stores of obtaining a package store permit.

To sell all three beverages (beer, wine, and spirits) the holder of "BQ" permits must abandon all of its BQ permits and replace each BQ permit with two separate permits: one solely for its wine sales (the Package Store (Wine Only) Permit, termed a "Q" permit); and a second permit solely for its beer sales (the Retail Dealer's Off-Premise License, termed a "BF" license). Those two, unlike the BQ permit, *may* be held simultaneously with a package store permit. There is no other material difference between holding a BQ permit and the Q-and-BF combination.

Section 22.06 places an enormous and irrational burden on a grocer who, like Wal-Mart, holds dozens of BQ permits. To obtain even a single package store permit, the grocer would have to abandon ***all*** of its BQ permits and incur the enormous and pointless expense and administrative burden of applying for two new, separate permits, for each store—all to make the same wine and beer sales as the BQ permit allowed. *Id.* ¶ 44.

Wal-Mart challenges Sections 22.16, 22.04, 22.05, and 22.06 (collectively, "the challenged statutes") under the Equal Protection Clause of the U.S. Constitution and challenges all but Section 22.06 under the Dormant Commerce Clause and the Comity Clause. Wal-Mart does not challenge any other provision of the Code and does not challenge any part of the "three-tier system"—that is, the State's prohibition on cross-ownership between alcohol producers, wholesalers, and retailers. Nor does Wal-Mart challenge any laws restricting the time, place, or manner of alcohol sales. Wal-Mart will comply with all such restrictions: Spirits will be sold in separate premises that are closed to unaccompanied minors; will be sold during the same hours as existing package stores; and will not be sold near churches or schools. *Id.* ¶¶ 49–50.

LEGAL STANDARD

A motion under Rule 12(b)(6) should be granted only if the Complaint does not allege enough facts—which must be taken as true—to state a claim that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court is limited to the facts pleaded in the Complaint, incorporated in the Complaint, or contained in judicially noticeable documents. *Wilson v. Birnberg*, 667 F.3d 591, 600 (5th Cir. 2012) (reversing dismissal of rational basis claim because "courts must limit their inquiry to the facts stated in the complaint and the documents either attached to or incorporated in the complaint"); *see also* Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity"*, 25 GEO. MASON U. CIV. RTS. L.J. 43 (2014) (12(b)(6) standard is no different in rational basis cases).

Both rational basis review—which requires courts to consider whether the State's purported purpose is legitimate and whether the challenged statutes bear a rational relationship to that purpose—and the Dormant Commerce Clause—which requires consideration of whether challenged statutes have a discriminatory purpose or effect—require factual development beyond the pleadings. Addressing Rule 12(b)(6) motions and rational basis review, the Fifth Circuit has held that while a "legitimate purpose can be hypothesized, ***the rational relationship must be real.*** Consequently, the determination of the fit between the classification and the legitimate purpose—the search for rationality—may also require a factual backdrop." *See Mahone v. Addicks Util. Dist. of Harris Cnty.*, 836 F.2d 921, 937 (5th Cir. 1988) (emphasis added).

ARGUMENT

I. The True Purpose of The Challenged Statutes is Economic Protectionism, Which is Not a Legitimate State Interest

Wal-Mart has alleged and will prove at trial that the purpose and effect of the challenged statutes is to protect the Texas package store industry from economic competition. Complaint

¶¶ 4, 29. The State's Motion—while proposing a number of state interests that the Legislature did not actually consider—never confronts the protectionist reality of the statutory scheme.

In *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir.), *cert. denied*, 134 S. Ct. 423 (2013), the Fifth Circuit held that "mere economic protection of a particular industry" is not a "legitimate governmental purpose." The Court thus held that a licensing scheme that restricted casket sales to funeral home operators failed rational basis review. *Id.* In contrast to the total judicial abdication urged by the State in its Motion, the Fifth Circuit in *St. Joseph Abbey* stressed the importance of judicial intervention to eliminate protectionist laws. "The great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation." *Id.* at 226–27; *see also Brantley v. Kuntz*, No. 13-872, 2015 WL 75244, at *5 (W.D. Tex. Jan. 5, 2015) (applying the "nuanced articulation and application of the rational basis test" in *St. Joseph Abbey* to strike down onerous Texas laws regulating hair braiding schools).

Other circuits have likewise invalidated laws that merely protect favored interests from competition. The Sixth Circuit, for example, applied rational basis review to strike down a Tennessee law allowing only licensed funeral directors to sell caskets, because the law was "nothing more than an attempt to prevent economic competition." *Craigmiles v. Giles*, 312 F.3d 220, 224–25 (6th Cir. 2002) ("Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose."). Similarly, the Ninth Circuit struck down a California statute that forbade anyone but licensed pest controllers from performing non-pesticide extermination of mice, rats, or pigeons, because that law "was designed to favor economically certain constituents at the expense of others similarly

situated." *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008). Courts routinely eliminate legislation motivated by mere protectionism. *See Craigmiles*, 312 F.3d at 224.

The challenged statutes' grandfather clauses provide further indication that these laws protect existing local business from competition rather than serve legitimate state purposes.[1] *See Delaware River Basin Comm'n v. Bucks Cnty. Water & Sewer Auth.*, 641 F.2d 1087, 1096 (3d Cir. 1981) ("Requiring the legislature to make known its reasons for adopting a 'grandfather' clause would provide the reviewing court with some assurance that the provision does not represent political exploitation of one group at the expense of another."); *Burstyn v. City of Miami Beach*, 663 F. Supp. 528, 533–34 (S.D. Fl. 1987) (grandfather provision shows "inconsistent treatment [that] belies the conclusion that the city considers the four-story height restriction to be a reasonable way to promote the objective of fire safety"). Thus, the challenged statutes, which are "riddled with exceptions," are subject to particular skepticism, even on rational basis review. *See HBP Associates v. Marsh*, 893 F. Supp. 271 (S.D.N.Y. 1995) (allowing Equal Protection challenge to a moratorium on sewer line extensions because plaintiff alleged that the moratorium was "riddled with exceptions" that undermined the state's purported bases).

If more proof were needed, one need only look at the failed attempts at reforming the challenged statutes. *See* Motion at 6–7 (listing them). These attempts failed precisely because the TPSA forcefully invoked the need for economic protectionism.[2] *See* Section IV, below.

[1] Grandfather clauses are not suspect when they phase in a new regulation. For example, where the government is trying to phase out vendors in certain areas, it may ban the vendors but grandfather in existing vendors, who will eventually retire or die, making the ban 100% effective. In contrast, where, as here, the grandfather clause confers a permanent benefit on certain entities, such a clause is suspect because it is more likely designed to irrationally protect a chosen few. *See Delaware River Basin Comm'n*, 641 F.2d at 1098–99.

[2] For example, TPSA representative David Jabour told a committee of the Texas House of Representatives that was considering a repeal of the five-store limit and related loopholes:

In short, the challenged statutes are exactly the kind of laws that, serving no purpose but economic protectionism, are appropriately struck down as violating the Equal Protection Clause.

II. The State Has Not Identified a Rational Relationship Between the Challenged Statutes and Any of the Post-Hoc Interests It Now Asserts

Though the State does not address Wal-Mart's factual allegations regarding the protectionist nature of the challenged statutes, the State at pages 10–13 does hypothesize a different purpose that the Legislature never discussed: "restricting access to liquor." However, the State does not (and cannot) explain how the challenged statutes "***rationally relate*** to the state interests it articulates." *St. Joseph Abbey*, 712 F.3d at 223 (emphasis added).

A. The Challenged Statutes Bear No Rational Relationship to the State's Primary Asserted Interest in "Restricting Access to Liquor"

The challenged statutes have no relationship to "restricting access to liquor" and thus do not survive rational basis review. The Fifth Circuit held as much in *Cooper*, where it found that "temperance"—though a legitimate state interest—was insufficient to justify the residency law that banned out-of-state entities from holding permits to sell alcoholic beverages. Rather, the temperance rationale was "unpersuasive and insufficient to defend the State's arbitrary treatment of non-Texans." 11 F.3d at 554.

The challenged statutes here do not, in fact, "restrict access to liquor." None of these laws restricts the time, place, or manner of liquor sales. The State's cited authorities are easily

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> Texas has approximately 2,300 liquor stores, all of which are owned by Texas residents. The reason for this 100 percent Texas ownership is the five store limit and the consanguinity exception, and a third law that prohibits the ownership of liquor stores by large corporations. . . . The public policy reason for these Texas preference laws is to foster homegrown, family-owned businesses whose income stays in Texas and is circulated in the local community. Our Texas preference laws are not unusual. Many other states also have laws that are designed to protect domestic liquor stores.

See Video of Hearing of Committee on Licensing & Administrative Procedures, TEXAS HOUSE OF REPRESENTATIVES (Apr. 1, 2009), http://tlchouse.granicus.com/MediaPlayer.php?view_id=25&clip_id=3662, at 5:07:33–5:09:57.

distinguished on this basis because in those cases, unlike this one, a retailer was complaining about time, place, or manner restrictions on alcohol sales.[3] Unlike the State's cited cases, the laws ban Wal-Mart from the market not because of the time, place, or manner in which the company would sell alcohol, but rather because of its ***status as a public corporation*** and the threat that competition poses to incumbent package store owners. The challenged statutes bar Wal-Mart from buying a stake in an existing package store, even if Wal-Mart made no changes to the time, place, or manner of the store's liquor sales. TEX. ALCO. BEV. CODE ANN. § 22.16. Conversely, if Wal-Mart were bought out by a private hedge fund, and it were no longer a public corporation, it would become eligible to apply for a package store permit even if its business plan remained unchanged. Indeed, one of Wal-Mart's local competitors, Fiesta Mart, Inc. has been able to own and operate 16 package stores next to its grocery stores because it is not a public corporation. This demonstrates that the State does not believe that allowing package stores next to grocery stores affects access to liquor.

Rather than restrict ***access to liquor***, the challenged statutes actually restrict ***eligibility to own package store permits***. The State assumes without any basis that by forbidding public corporations from owning package stores, the Legislature could have expected to make it harder for Texans to buy liquor in some unspecified way. (Fewer stores? Higher prices? The State does

[3] *See Maxwell's Pic-Pac, Inc. v. Dehner*, 739 F.3d 936, 940–41 (6th Cir. 2014) (upholding law that forbade alcohol sales in grocery stores and gas stations, because "grocery stores and gas stations pose a greater risk of exposing citizens to alcohol than do other retailers"); *Marusic Liquors, Inc. v. Daley*, 55 F.3d 258, 260 (7th Cir. 1995) (upholding ordinance that forbade any new package store permits to be issued in certain designated areas of the city); *Spudich v. Smarr*, 931 F.2d 1278, 1281 (8th Cir. 1991) (upholding law prohibiting billiard halls from selling alcohol on Sundays); *California v. LaRue*, 409 U.S. 109, 110 (1972) (upholding regulation that forbade adult entertainment in bars). The remaining cases the State cites deal with state laws capping the number of permits that an entity may hold, an issue discussed below in Section II.B.

not say.)[4] The State's assumption—which it does not attempt to unpack, much less justify—is irrational, as Wal-Mart will show through discovery. *See Mahone*, 836 F.2d at 937 (assessing relationship between challenged laws and purported interest requires factual development).

Even if the State could rationally expect that banning public corporations from owning package stores would restrict Texans' access to liquor (perhaps by reducing the number of package stores), that expectation would still lack rational basis because the State's method is arbitrary. The State could just as easily (and arbitrarily) reduce the number of package stores by issuing permits only to applicants born on even-numbered days or to applicants with blue eyes. Such limits would be just as (un)related to "restricting access to liquor" as the public-corporation ban and thus demonstrate the lack of rational relationship between the State's interests in temperance and the ***specific*** statutes (and exceptions) that have been challenged. The Fourteenth Amendment does not permit such arbitrary methods of achieving general state interests; "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 449 (1985) (general interest in avoiding construction on a "flood plain" insufficient to justify ordinance forbidding home for the mentally ill but no other institutions).[5]

For the statutes to be constitutional, there must be some non-arbitrary, non-protectionist reason why the exclusion of public corporations (like an exclusion of brown-eyed citizens) is rationally related to a legitimate state interest. No such reason exists here.

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[4] In addition to the lack of explanation on the link between the public corporation ban and restricting access to alcohol, the State is completely silent on any potential rational basis for the grandfather clause to the public corporation ban.

[5] *See also Plyler v. Doe*, 457 U.S. 202, 227 (1982) ("[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources."); *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1183 (10th Cir. 2009) (reversing dismissal of a challenge to pit bull ban because the plaintiffs had "alleged that the means by which Denver has chosen to pursue that [the legitimate] interest [animal control] are irrational").

B. Large Package Store Chains Circumvent the Five-Store Limit and Hold Dozens of Permits

The State cites five cases from other jurisdictions that uphold caps on the number of package store permits that an entity may hold. Four of these precedents are inapposite,[6] while the fifth is obsolete because it applied an outdated legal standard.[7] More importantly, all five cases addressed laws with no statutory loophole to the permit cap.

Texas, by contrast, has no true cap on the number of permits. In practice, as Wal-Mart has alleged, three loopholes have rendered Texas's purported cap a nullity for many permittees: Hotels and "grandfathered" corporations are exempted, and anyone else with a willing child, parent, or sibling may use the consolidation loophole to amass an unlimited number of permits. Texas applies its five-permit cap only to some corporations and to childless orphans with no siblings. The State cites no authority upholding a permit cap that is so frequently circumvented.

Nor does the State cite a case holding that a permit cap is lawful *per se*. To the contrary, all the State's cases uphold permit caps as rationally related to a specific interest ***that the State does not even assert in this case***, namely, increasing competition among retailers. *Grand Union*, 204 A.2d at 859 (state interest in preventing "concentration of retailing"); *Johnson*, 375 N.E.2d

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[6] *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).

[7] *Parks v. Allen*, 426 F.2d 610 (5th Cir. 1970) (per curiam) (upholding, after a bench trial, Atlanta regulation limiting number of permits to two per family). *Parks*—a *per curiam* opinion that simply restated the district court's reasoning without additional analysis—applied a legal standard heavily colored by the Twenty-First Amendment, which the Court interpreted to alter the Equal Protection analysis such that discriminatory laws must be upheld unless "purely arbitrary." *Id.* at 613. As discussed below in Section II.D., that standard is no longer correct.

at 297 (same); *see also Parks*, 426 F.2d at 614 (two-permit limit "tends to increase competition and lessen the evils described of price discrimination"); *Granite State Grocers*, 289 A.2d at 402 (purpose of two-permit limit was to "fractionalize the beverage industry"); *McCurry*, 4 F. Supp. 3d at 1047 (purpose of one-permit limit was to achieve "very diffuse ownership").

Texas's consolidation loophole has allowed exactly the opposite, a reduction in competition: a few favored local family businesses have acquired large numbers of permits, while protected from competition, resulting in highly concentrated markets. *See* Complaint ¶ 38. Specifically, Texas's six largest package store chains "own 45% of the package stores in El Paso County, 43% of the package stores in Bexar County, and 31% of the package stores in Travis County." *Id.* This is precisely what the true permit-cap cases discussed above say the permit caps are intended to avoid. Because the State does not invoke the interest asserted in these permit-cap cases, the cases do not support Texas's irrational and routinely circumvented five-store limit. The inapplicability of these cases and the State's silence in its Motion regarding any potential rational basis for the consolidation loophole demonstrate that Wal-Mart's claims are more than plausible.

C. The Challenged Statutes are not Related to the State's Alternative Interests

The State mentions, in a footnote on page 11, three other interests that "the Legislature may have also sought to ensure" by banning public corporations from selling liquor. These "alternative argument[s]" are "raised in such a conclusory manner that [they are] waived." *Symetra Life Ins. Co. v. Nat'l Ass'n of Settlement Purchasers*, No. 05-3167, 2012 WL 5880799, at *16 (S.D. Tex. Nov. 21, 2012) (citing *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 356 n.7 (5th Cir. 2003) ("Arguments that are insufficiently addressed in the body of the

brief . . . are waived.")). Even if not waived, the arguments still fail because the challenged statutes bear no rational relationship to the purported alternative interests.

1. The Challenged Statutes Do Not "Ensure Orderly Market Conditions"

Though the State's Motion does not spell out what it means by an interest in "ensuring orderly market conditions," the State's lone citation addresses a challenge to Texas's "three tier" regulatory regime, which requires separation between the manufacturing, distribution, and retail "tiers" of the alcohol industry. Motion at 11 n.6 (citing *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 814 (5th Cir. 2010)). That interest is irrelevant here because Wal-Mart does not challenge the three-tier system or any of the other laws designed to make the alcohol market "orderly." *See* Complaint ¶¶ 49–50. The State offers no explanation of how banning public corporation ownership of package stores could be rationally related to market "orderl[iness]."

2. The Challenged Statutes Do Not "Avoid Discounting"

Even assuming the State's purported interest in avoiding discounts in the retail price of alcohol were legitimate,[8] there is no rational relationship between that interest and the challenged statutes. The State does not sketch the factual basis for its assumption that public corporations are more likely to discount alcohol than individual proprietors, partnerships, or private corporations. Wal-Mart, like many other public corporations, has sold beer and wine in Texas for decades. *Id.* ¶¶ 14–15. Yet the State cites nothing in Wal-Mart's or other public corporations' long histories as permittees to suggest that they are more likely to engage in improper discounting. As fact and expert discovery in this case will show, there is no rational reason to

[8] "Avoiding discounting" is illegitimate under *St. Joseph Abbey* to the extent that it is a roundabout way of suggesting that the State has an interest in keeping prices artificially high to advance the economic interests of the existing package store industry. 712 F.3d at 222.

believe that public corporations are any more likely to "discount" prices than are large private corporations, partnerships, or individual proprietors.[9]

Moreover, the Code already has a separate, specific statute—unchallenged in this case—that forbids any "excessive discount on liquor." TEX. ALCO. BEV. CODE ANN. § 102.07(c). This statute directly addresses the supposed evil of discounting. Accordingly, there is no reason for a ban on public corporations to achieve partially and indirectly what Section 102.07(c) achieves completely and directly. *See St. Joseph Abbey*, 712 F.3d at 225 (Louisiana law allowing sales of caskets only by funeral home operators not related to interest in consumer protection because "Louisiana's Unfair Trade Practices and Consumer Protection Law already polices inappropriate sales tactics by all sellers of caskets"). "The Supreme Court, employing rational basis review, has been suspicious of a legislature's circuitous path to legitimate ends when a direct path is available." *Craigmiles*, 312 F.3d at 227 (discussing *City of Cleburne*, 473 U.S. at 439).

3. The Challenged Statutes Do Not "Achieve Increased Accountability"

Finally, the State does not identify any rational relationship between the challenged statutes and its purported interest in "achiev[ing] increased accountability from permit holders." Motion at 11 n.6. It is not clear what the State means by "accountability." If the State means to suggest that a public corporation cannot be held accountable for Code violations, the Fifth Circuit rejected such concerns in *Cooper*: "[A] holder-corporation that violates the State's laws faces revocation of its permit, dissolution of its corporate charter, and other civil and criminal penalties. The entity's employees or supervisors can, of course, be criminally prosecuted regardless where they reside." 11 F.3d at 554. Indeed, public corporations are ***more*** accountable

[9] This is particularly true in light of the Code's broad definition of "public corporation"—which includes private corporations with more than 35 shareholders—an issue on which the State's Motion is silent. TEX. ALCO. BEV. CODE ANN. § 22.16(b)(2).

than individual owners because public corporations must make additional disclosures to state and federal governments (such as SEC filings) that make such corporations even more visible for purposes of government regulation and accountability.

Perhaps instead the State means by "accountability" the notion that if a package store owner lives in the community where her store is located, she will be more responsive to local interests. That notion of "accountability," however, appears nowhere in the Code. The Code does not require that package store owners be individuals, or that they live near their stores. Just the opposite, partnerships and private corporations may own package stores, and the Code goes out of its way to accommodate out-of-town owners.[10] Owners of Texas's large consolidated package store chains do not necessarily (and are not required to) live in the communities where their stores are located.[11] Thus, there is no rational relationship between the challenged statutes and some undefined interest in "accountability."

D. The Twenty-First Amendment Does Not Dilute the Fourteenth Amendment's Guarantee of Equal Protection

Without coming right out and saying so, the State hints that the Twenty-First Amendment changes the legal standard for reviewing a state's restrictions on eligibility for package store

[10] The Code allows an out-of-town owner to appeal the revocation of her permit to the district court closest to her, rather than force her to appear in the local court where her store is located. *See, e.g., Texas Alcoholic Beverage Comm'n v. Diedrich*, 679 S.W.2d 737, 738–39 (Tex. App.—El Paso 1984).

[11] David Jabour of Twin Liquors, a package store chain with 76 permits, testified to a Texas House committee that the five-store limit was needed to advance accountability, because family owners of package stores were more accountable to local communities. In response, a committee member inquired into the accuracy of the assumption underlying Mr. Jabour's testimony:

> COMMITTEE MEMBER: My question is: I wonder how many people from Spec's [a large package store chain with 160 permits] live in Fort Worth out of the family [of owners]?
>
> MR. JABOUR: They do employ managers that live in those communities.

Managers and employees of public corporations would be no less likely to live in (and be accountable to) local communities. *See Video of Hearing of Committee on Licensing & Administrative Procedures*, TEXAS HOUSE OF REPRESENTATIVES (Mar. 19, 2013), http://tlchouse.granicus.com/MediaPlayer.php?view_id=28&clip_id=6730, at 43:45–44:50.

ownership. The State is wrong. Though the State on page 10 cites *California v. LaRue*, 409 U.S. 109 (1972), to suggest that the Twenty-First Amendment confers "an added presumption of validity in the area of liquor control," *LaRue* is no longer good law. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) ("Without questioning the holding in *LaRue*, we now disavow its reasoning insofar as it relied on the Twenty-first Amendment."). The Supreme Court's most recent opinion on the Twenty-First Amendment holds that "state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment. The Court has applied this rule in the context of . . . the Equal Protection Clause . . . ." *Granholm v. Heald*, 544 U.S. 460, 486–87 (2005) (citing *Craig v. Boren*, 429 U.S. 190 (1976)). Thus, the Twenty-First Amendment does not obviate the need to show that the challenged statutes are rationally related to a legitimate state interest—a test that the State has not met and cannot meet here.

E. Wal-Mart Has a Right to Develop Facts Disproving the State's Purported Interests and the Asserted Rational Relationship to the Challenged Statutes

Even if the State's Motion had posited a legitimate state interest for these protectionist statutes and some rational relationship between the laws and that interest, that alone would not justify dismissal. Wal-Mart is entitled to develop facts refuting the State's purported interests and the relationship between those interests and the challenged statutes (the so-called "fit").

The Fifth Circuit has held that this relationship must be rooted in reality. Therefore, "the determination of the fit between the classification and the legitimate purpose—the search for rationality—may also require a factual backdrop." *Mahone*, 836 F.2d at 937; *see also Mikeska v. City of Galveston*, 451 F.3d 376, 382 (5th Cir. 2006) ("evidentiary support" is needed to establish whether a government regulation is rationally related to a legitimate interest). Dismissal under Rule 12(b)(6) would only be appropriate if "momentary reflection" were enough to grasp both the legitimate purpose and the laws' rational relationship to it. *Mahone*, 836 F.2d at 936.

Here—as in most of the alcohol-regulation cases cited in the State's Motion—"momentary reflection" does not answer the question. *Id.* Instead, a factual record is necessary.[12] For example, the Fifth Circuit in *Parks v. Allen* upheld Atlanta's two-permit cap only after first remanding for a bench trial: "Since a determination of the constitutional infirmity of a state statute . . . is necessarily a serious matter, we are reluctant to undertake this step without the benefit of a well developed record." 409 F.2d 210, 211 (5th Cir. 1969).

Deciding whether the State's purported interests are legitimate "may require a reference to the circumstances which surround the state's action." *Mahone*, 836 F.2d at 936–37. Though the State is entitled to invent its interests post hoc, the State may not invent "post hoc hypothesized facts" to justify those interests. *St. Joseph Abbey*, 712 F.3d at 223. Therefore, in assessing whether the State's rationale is legitimate, the Court must consider "the setting and history of the challenged rule," *id.*, including its legislative history, *see id.* at 219 (reviewing attempts to repeal protectionist law); *see also Craigmiles*, 312 F.3d at 227 (reviewing legislative history of licensing law to conclude that the law "appears directed at protecting licensed funeral directors from retail price competition").

Here, as in *Craigmiles*, Wal-Mart has alleged (and will develop facts to prove) that the intended purpose of the challenged statutes, and their effect, is economic protectionism. Complaint ¶¶ 23, 27, 29, 38, 41, 44. Moreover, Wal-Mart has pleaded detailed facts regarding

[12] The State cites only three cases that resolve Equal Protection claims on the pleadings, all of which are distinguishable. In the first, *Marusic Liquors, Inc.*, 55 F.3d at 261, the parties agreed that the case could be resolved on the pleadings. In the second, *Lee v. Whispering Oaks Home Owners' Ass'n*, 797 F. Supp. 2d 740, 753 (W.D. Tex. 2011), a homeowner challenged a zoning decision, and the court found that in zoning cases, rational bases were obvious and noted the plaintiff's complaint attached a city council member email laying out various legitimate bases for the land use decision related to property values, traffic, and flooding. Finally, the court in *McCurry*, 4 F. Supp. 3d at 1047, dismissed an Equal Protection challenge to a one-store limit, as discussed above, because of a rational interest in preventing concentration of retailers.

the history, purpose, and effect of the challenged statutes and their loopholes. Wal-Mart has thus pleaded "factual content that allows the court to draw the reasonable inference" that the statutes have no legitimate purpose. *Iqbal*, 556 U.S. at 678. Through expert and fact discovery in this case, Wal-Mart will demonstrate that no rational relationship exists between the State's asserted post hoc interests and the actual statutes challenged in this case. Fact and expert discovery will prove not only that the challenged statutes fail to achieve any of these purported interests, but also that the statutes merely protect incumbent package store interests from competition.

III. The Purpose and Effect of the Challenged Statutes is Discrimination Against Out-of-State Entities in Violation of Dormant Commerce Clause Precedent

Even if the State could provide a rational basis for the challenged statutes, which it cannot, the statutes would fail to satisfy the higher standard of the Dormant Commerce Clause, which requires that the State have no other way of promoting its interest where laws have the purpose or effect of discriminating against out-of-state commerce. The State does not even attempt to meet this rigorous standard, but instead relies on the Twenty-First Amendment and the fact that the laws are not facially discriminatory. Neither argument saves the challenged statutes.

Though the Twenty-First Amendment does alter the Dormant Commerce Clause analysis (unlike Equal Protection Clause analysis), it does not, as the State suggests, immunize the challenged statutes. "The dormant Commerce Clause applies, but it applies differently" to ***some*** alcohol regulations. *Wine Country Gift Baskets.com*, 612 F.3d at 814. The Twenty-First Amendment allows a state to discriminate against out-of-staters if—but only if—the discrimination is a "constitutionally benign incident of an acceptable three-tier system" of alcohol distribution. *Id.* at 820 (state law that only allows local retailers to make home deliveries of alcohol is one such "benign incident"). The Twenty-First Amendment does not immunize

discrimination that is not an "incident of" a three-tier system. *Id.* at 818–20 (discrimination is "questionable" if "not inherent in the three-tier system itself").

That is why the Supreme Court, in *Granholm v. Heald*, struck down a law that prohibited out-of-state wineries from selling directly to in-state consumers, but allowed in-state wineries to do so; such discrimination was not incident to a three-tier system but was, instead, mere "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* (quoting *Granholm*, 544 U.S. at 472). And that is why the Fifth Circuit, in *Wine Country Gift Baskets*, reaffirmed *Cooper*, the 1994 decision that struck down Texas's discriminatory alcohol law. *Id.* at 821 (*Cooper* is "consistent" with *Wine Country Gift Baskets* because *Cooper* "concerned legal residence of owners," a requirement which, far from being "a critical component of the three-tier system," was "not involved" with the three-tier system at all). In this case, Wal-Mart does not challenge Texas's three-tier system, or anything "inherent in" or "incident of" that system. *Id.* at 819–20.

Applying traditional principles, the challenged statutes discriminate against out-of-staters both "by purpose" and "by effect." *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007). The Fifth Circuit has applied a four-factor test to determine whether a statute is discriminatory:

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

Id. Wal-Mart has alleged facts demonstrating that (1) Texas has a long history of discrimination against out-of-state liquor retailers;[13] (2) the public-corporation ban immediately followed and

[13] Most recently, Judge Nowlin discussed some of the history of protectionist laws and the TPSA's role in preserving those laws in his December 2, 2014 order denying the TPSA's motion

was in response to judicial abolition of Texas's facially discriminatory ban against out-of-state liquor retailers; (3) the vast majority of, if not all, package store permit holders are Texans, Texas partnerships, and Texas (private and public) corporations; and (4) a grandfather clause allows Texas corporations (and necessarily, only Texas corporations) the ability to circumvent the public corporation ban. Complaint ¶¶ 20–21, 27. Moreover, the facts will show that the Texas Legislature passed (and has maintained) the challenged laws with a specific intent to benefit local in-state interests, protect local interests from out-of-state competition, and achieve indirectly what the Fifth Circuit in *Cooper* decreed it could not do directly: prohibit non-resident public corporations from holding package store permits. *Id.* ¶ 23. Indeed, statements made by supporters of the challenged statutes in legislative proceedings demonstrate the discriminatory purpose and effect of not only the public corporation ban, but also the five-store limit:

- The public corporation ban was originally passed after a TPSA lawyer, the sole witness to appear before the Legislature, testified that "Texas has long had a requirement that package stores could not be owned except by Texas residents," that requirement had been "struck down" by the courts on the grounds that it "penalized out-of-state citizens." *Id.* ¶ 22. Thus, as Senator Kenneth Armbrister, a sponsor of the public corporation ban, explained, the purpose of the law was to ensure that "[y]ou can't have a package store inside a Walmart." *Id.* ¶ 23.

- When the Legislature considered eliminating the five-store limit and its loopholes, a TPSA representative told the Legislature that the "[t]he public policy reason for these ***Texas preference laws*** is to foster homegrown, family-owned businesses ***whose income stays in Texas*** and is circulated in the local community."[14] Another TPSA lobbyist warned that "[i]f this bill [repealing the five-store limit] was passed, ***there would be out of state***—there would be the ability for nonfamily members to enter the business, i.e., not locally controlled, ***locally state owned***. It's about states' rights first and for most."[15]

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to set aside the injunction issued in *Cooper*. *See Wilson v. McBeath*, No. 90-736, Dkt No. 25, at 8–9 (W.D. Tex. Dec. 2, 2014).

[14] *See supra* note 2 (emphases added).

[15] *See Video of Hearing of Committee on Licensing & Administrative Procedures*, TEXAS HOUSE OF REPRESENTATIVES (Mar. 19, 2013), http://tlchouse.granicus.com/MediaPlayer.php?view_id=28&clip_id=6730, at 40:38–41:02.

- A TPSA lobbyist stated: "Texas has approximately 2,300 liquor stores, ***all of which are owned by Texas residents***. ***The reason for this 100 percent Texas ownership is the five store limit and the consanguinity exception, and a third law that prohibits the ownership of liquor stores by large corporations***."[16]

- At another hearing, the lobbyist called the five-store limit a "Texas first law" and told the Legislature: "it's true that Texas has some large liquor chains; however, ***it's also important to bear in mind that all of these chains are owned by Texas families***"; "we believe it is more important than ever during the economic downturn to foster and ***protect homegrown businesses*** by keeping these laws intact."[17]

- Repeal of the five-store limit would, as one TPSA lobbyist told the Legislature, "open [the market] up for [entities] ***outside Texas to come in and take the money right out of the state***." For these reasons, the lobbyist asked the legislative "committee to not support this law in any way because one thing that we're all about is ***business staying in Texas***."[18]

To survive the State's Motion, Wal-Mart need only plead and point to facts suggesting that a finding of discrimination is plausible. The facts in the Complaint and the legislative history easily meet this standard. Because the statutes are purposely discriminatory, the State must "demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest"—a test that the State does not attempt to meet. *Allstate Ins. Co.*, 495 F.3d at 160.

The State's contention at pages 17–18 that the statutes are facially neutral is a red herring. Facially neutral statutes that discriminate in purpose or effect—even those dealing with alcohol—cannot escape Commerce Clause scrutiny. *See Family Winemakers of California v. Jenkins*, 592 F.3d 1, 18 (1st Cir. 2010) (holding Twenty-First Amendment does not immunize facially neutral alcohol regulations). Recognizing this, the First Circuit struck down a Massachusetts law that allowed "small" wineries below a certain gallonage to ship directly to consumers, while prohibiting "large" wineries from doing so. *Id.* at 5. Although the statute was

[16] *See supra* note 2.
[17] *See Video of Hearing of Committee on Business & Commerce*, TEXAS SENATE (April 7, 2009), http://tlcsenate.granicus.com/MediaPlayer.php?view_id=14&clip_id=2238, at 3:18:30–3:23:15.
[18] *See Video of Hearing of Committee on Business & Commerce*, TEXAS SENATE (April 2, 2013), http://tlcsenate.granicus.com/MediaPlayer.php?view_id=9&clip_id=394, at 47:58–54:18.

"neutral on its face," and did not expressly discriminate based on residence, the First Circuit found the statute "violates the Commerce Clause because the effect of its particular gallonage cap is to change the competitive balance between in-state and out of-state wineries in a way that benefits Massachusetts's wineries and significantly burdens out-of-state competitors." *Id.*[19]

The discrimination against out-of-state competitors alleged in this case is even stronger than in *Family Winemakers*. Supporters of the statutes challenged in this case have been candid about the effect of the laws, telling the Legislature that their practical effect means ***only*** Texas entities hold package store permits. By contrast, in *Family Winemakers,* some "small" out-of-state winemakers did hold permits. Moreover, just as the First Circuit found that lawmakers knew the demarcation between small and large winemakers would have a discriminatory effect, here the lawmakers knew of the discriminatory effect, because supporters of the law ***told them*** exactly that; supporters lobbied based on the need to circumvent *Cooper*.

This Court must consider the "practical impact of the law" to determine if laws are discriminatory. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). Here, Wal-Mart has pleaded facts regarding both the discriminatory purpose and effect of the statutes, and factual development is needed to undertake this inquiry.[20] *See McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 443 (6th Cir. 2000) (looking to deposition testimony and letters

[19] The First Circuit noted that an exception for non-grape wines rendered the statute particularly suspect because it made "small" the one in-state winery that would have otherwise been deemed large. *Family Winemakers*, 592 F.3d at 17 ("This exception, like similar, facially neutral statutory exemptions apparently motivated by a desire to shield in-state interests, weakens the presumption in favor of the validity of the general provision" (internal alterations and quotation marks omitted)).

[20] The majority of cases the State cites decide Dormant Commerce Clause claims at summary judgment or after trial. The two motion to dismiss cases cited are distinguishable. One dealt with a challenge to a three-tier statute, which is not raised here. *See Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 192 (2d Cir. 2009) (statutes "are an integral part of New York's three-tier system"). In the second, dismissal was appropriate because the challenger did not allege facts suggesting that the statute had a discriminatory effect or purpose. *McCurry*, 4 F. Supp. 3d at 1046.

sent by local industry representatives and lack of any consumer push for legislation to conclude that the challenged statute had a discriminatory purpose).

Even if the statutes were found non-discriminatory, they would violate the Commerce Clause if—as Wal-Mart has alleged—the "burden imposed on interstate commerce" by the challenged statutes is "'clearly excessive' in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); Complaint ¶¶ 64–65. Through discovery, Wal-Mart will demonstrate that the burdens imposed on out-of-state public corporations are clearly excessive in relation to the (non-existent) local benefits of the challenged statutes.

IV. The Challenged Statutes Violate the Comity Clause

The State contends that the Comity Clause does not apply to corporations. That is true under case law from previous eras, but that position has been criticized in more modern commentary. The Supreme Court's most recent reference to this rule is dicta in a decision 30 years old—and that dicta relied on precedent that is now nearly 90 years old. *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 884 (1985) (citing *Hemphill v. Orloff*, 277 U.S. 537, 548–50 (1928)). This exclusion of corporations is ripe for reconsideration in light of the pervasive role that corporations play in the modern economy. *See* George F. Carpinello, *State Protective Legislation and Nonresident Corporations: The Privileges and Immunities Clause As A Treaty of Nondiscrimination*, 73 IOWA L. REV. 351 (1988) (arguing to include corporations).[21]

CONCLUSION

For the foregoing reasons, the State's Motion should be denied.

[21] If the Clause is extended to corporations, then Wal-Mart will be entitled to relief because the Clause protects "a nonresident's right to pursue a livelihood in a State other than his own." *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 386 (1978) (citing *Toomer v. Witsell*, 334 U.S. 385 (1948) (striking down discriminatory state tax against out-of-state shrimp fishermen)).

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2015, the foregoing *Plaintiffs' Response to Defendants' Motion to Dismiss* was electronically filed with the Clerk of the Court using the CM/ECF system and served on all attorney(s) and/or parties of record, via the CM/ECF service and/or via electronic mail.

/s/ Neal Manne
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