No. 02-2710

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UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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**WAL-MART STORES, INC.; WAL-MART PUERTO RICO, INC.; SUPERMERCADOS AMIGO, INC.**

Plaintiffs – Appellees

v.

**ANABELLE RODRÍGUEZ, in her Personal and Official capacity as SECRETARY OF JUSTICE OF THE COMMONWEALTH OF PUERTO RICO**

Defendant – Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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# BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF DEFENDANT – APPELLANT ANABELLE RODRÍGUEZ

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**UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

Case No. 02-2710
*WAL-MART STORES, INC. ET AL. v. ANABELLE RODRÍGUEZ*

## CORPORATE DISCLOSURE STATEMENT

Pursuant to First Circuit R. 26.1, the American Antitrust Institute ("AAI") makes the following disclosure:

1. Is said party a subsidiary of a publicly owned corporation? No.

   If the answer is YES, list below the identify of the parent corporation or affiliate and the relationship between it and the named party:

   N/A

2. Is there a publicly owned corporation, not a part to the appeal, that has a financial interest in the outcome? No.

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

   N/A

Kevin J. O'Connor _____ Date

**TABLE OF CONTENTS**

**Page**

## TABLE OF AUTHORITIES

**Page**

### Cases

**Statutes**



**Other Authorities**

## BRIEF *AMICUS CURIAE* OF THE AMERICAN ANTITRUST INSTITUTE

The American Antitrust Institute ("AAI") respectfully submits this brief *amicus curiae* in opposition to the district court's holding and in support of the Commonwealth of Puerto Rico.

### Identity and Interest of *Amicus Curiae*

The AAI is an independent, not-for-profit organization dedicated to economic research, study of the antitrust laws and public education. The directors of the AAI, Jonathan Cuneo, Esq., Albert H. Foer, Esq., and Professor Robert Lande of the University of Baltimore Law School, authorized this filing. The Advisory Board of the AAI consists of 58 prominent lawyers, law professors, economists and business leaders (The members of the Advisory Board are listed on Exhibit A attached hereto). The members of the Advisory Board serve in a consultative capacity and their individual views may differ from the positions taken by the AAI. The AAI's mission is to increase the role of competition and challenge the undue concentration of economic power.

### Summary

The district court's decision is an unprecedented and unwarranted intrusion into state enforcement of state antitrust statutes, and is wholly inconsistent with long-held principles of federalism. No case in modern jurisprudence has struck down a state antitrust enforcement action on constitutional grounds, and there has never been a decision enjoining a state merger enforcement action on that basis. Improperly invoking both the commerce clause and the equal protection clause, the district court enjoined the Commonwealth's antitrust enforcement action under Puerto Rican antitrust law before a Puerto Rican court. The lower court's holding is not only wrong, but significantly impairs the ability of states to protect their consumers from anticompetitive conduct by enforcing state antitrust laws.

Even more fundamentally, the decision below is inconsistent with established principles of federalism—the underpinning of the American system of concurrent enforcement of the antitrust laws. The American system provides deference to state actions except where there is a clear violation of the commerce clause or equal protection principles. In this case, the district court's flawed analysis of Wal-Mart's commerce clause claims failed to recognize that Puerto Rico's antitrust statute presents no discrimination, and that the Commonwealth had a legitimate basis to raise concerns over the impact of the proposed merger on Puerto Rican producers. Similarly, Wal-Mart's equal protection claims ignored the fact that there was no evidence that Wal-Mart was treated differently than similarly situated firms, or that the Commonwealth acted with impermissible animus.

Wal-Mart's claim boils down to an allegation that its constitutionally protected rights have been violated because Puerto Rico changed its negotiating position during its merger investigation, has not brought other merger enforcement actions in this same industry, and disagreed with the Federal Trade Commission on the resolution of their joint merger investigation. If Wal-Mart's claim is accepted, *every* party in *any* merger investigation—either at the state level with state attorneys general, or the federal level with the Federal Trade Commission or Department of Justice, or even with private parties—could turn an antitrust investigation into a federal lawsuit concerning the details of the conduct of the investigation. Indeed, accepting Wal-Mart's claim would not only turn every merger investigation into a federal lawsuit, it could potentially turn every state law enforcement claim against an out-of-state defendant for any law – criminal, environmental, regulatory—into such a case. Accepting these arguments as a constitutional claim runs counter to our system of concurrent enforcement and

erroneously provides a wide-avenue for defendants to block valid enforcement actions. This Court therefore should reverse the district court's decision.

## ARGUMENT

### I. CONCURRENT ENFORCEMENT IS A STRENGTH, NOT A WEAKNESS, OF THE AMERICAN ANTITRUST ENFORCEMENT SYSTEM.

The most prominent and, arguably, unique feature of the American system of antitrust enforcement is the multiplicity of potential plaintiffs who are permitted to challenge allegedly unlawful conduct under both federal and state antitrust law.[1] Not only are there two federal agencies with overlapping antitrust enforcement authority,[2] other federal agencies possess the authority to block business transactions in certain industrial sectors.[3] Significantly, Congress—the ultimate regulator of interstate commerce—expressly authorized state attorneys general and private plaintiffs to sue under federal law to obtain damages and injunctive relief. Moreover, many of these same potential plaintiffs have authority to sue under state antitrust laws, which, although similar to federal law, often present the potential plaintiff with remedies beyond those

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[1] *See* International Competition Policy Advisory Committee, Final Report, ch. 3, at 42 (Feb. 28, 2000), *available at* http://www.usdoj.gov/atr/icpac/icpac.htm (hereinafter "ICPAC") ("No other legal system in the world distributes decision-making power for competition policy issues so widely.").

[2] The U.S. Department of Justice (DOJ) has exclusive federal governmental authority to enforce the Sherman Act and shares federal authority to enforce the Clayton Act with the Federal Trade Commission (FTC). *See* A.B.A. Section of Antitrust Law, *Antitrust Law Developments IV* at 657 (4th ed. 1997) (hereinafter "ALD IV").

[3] 15 U.S.C. § 21(a) provides the Federal Communications Commission (FCC), the Secretary of Transportation, and the Federal Reserve Board with limited Clayton Act authority. *See generally* ALD IV, *supra* note 2, at 657, 1135 *et seq*. The ICPAC report focused its discussion on several agencies including the Surface Transportation Board (STB) (railroads), the FCC (telephone), and the U.S. Department of Transportation (airlines). *Id*. at 43-45.

obtainable under federal law.[4] Finally, Congress has expressly refused to preempt state antitrust statutes or the common law of restraint of trade.

The injunction issued by the district court strikes at the very heart of this concurrent enforcement system. By second-guessing a state investigation, this federal district court has intruded upon the basic power of states to review mergers, especially local mergers occurring entirely within their borders. This is particularly troublesome because a state may be the *only* prospective non-federal enforcer possessing the resources and requisite standing to challenge a merger,[5] and thereby provide a check on the federal enforcement agencies. By issuing the injunction, the district court ignores the traditional and concurrent role states have long played in enforcing antitrust laws and advancing competitive interests within their state.

In essence, the district court's injunction has closed the door to any enforcement by the Commonwealth of Puerto Rico against any potentially anticompetitive merger. It prevents the Commonwealth from raising antitrust concerns with this merger, let alone conducting a full trial on the merits. This decision is inconsistent with over a century of dual federal and state antitrust enforcement and it ignores settled Supreme Court precedent allowing States to conduct their own antitrust investigations and enforce state antitrust laws to protect competition within their borders.[6]

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[4] *See* ALD IV, *supra* note 2, at 741-44.

[5] *See, e.g., Cargill v. Monfort*, 479 U.S. 104 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, 429 U.S. 477 (1977). *See generally* Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 Mich. L. Rev. 1, 17-22 (1995).

[6] Professor Jean Burns asserts that "by bringing inconsistency, unpredictability, and flat-out contradictions into the law, federalism enhances antitrust jurisprudence", reminding us that we do not yet have all the answers about appropriate antitrust policy and that reasonable minds can and do differ about the appropriate goals of antitrust policies. Jean Wegman Burns, *Embracing Both Faces of Antitrust Federalism: Parker and ARC America Corp.*, 68 Antitrust L.J. 29, 32-33 (2000) (highlighting differences in policies between the states and federal government during the 1980s but ultimately concluding that such independence strengthens the enforcement system).

Congress acted wisely in permitting concurrent enforcement of the antitrust laws. Concurrent enforcement has two distinct advantages over more center-heavy enforcement systems: preventing underenforcement of the antitrust laws and generating substantially more case law. Reasonable minds can and do differ about the appropriate situations to enforce antitrust laws, and more specifically, to challenge mergers. Concurrent enforcement actively prevents underenforcement because both state and federal agencies, as well as private plaintiffs, exercise independent discretion to decide when to enforce state and federal antitrust laws. In addition, practical restrictions, such as budget constraints, do not result in underenforcement because other agencies or private plaintiffs without similar constraints can still file suit. And more lawsuits means more case law. Judicial opinions from both state and federal courts generate and test antitrust enforcement theories and then establish parameters for relief. Without concurrent enforcement, the field of antitrust decisional law would be generated by a single source, factual situations would remain untested, and antitrust law in general would be significantly less developed.

These advantages—preventing underenforcement and generating case law—are illustrated by numerous cases of concurrent, or even competing, enforcers choosing alternative paths. *Hartford Fire Insurance Co. v. California,* 509 U.S. 764 (1993), is a case where the DOJ Antitrust Division declined to investigate despite a direct request to do so by several states.[7] In the face of federal inaction, 19 states sued 32 insurers, reinsurers, and an important trade association of insurers, alleging boycotts of certain types of business and municipal insurance. The states were particularly sensitive to these violations because their own municipalities and governmental agencies were unable to obtain liability insurance from the domestic commercial

property and casualty insurers, allegedly due to a conspiracy among domestic insurers, domestic and foreign reinsurers, and the trade association representing the domestic industry. In other words, although the conspiracy was international in scope, the effects of the conspiracy were felt most acutely at the local level. Ultimately, the states prevailed on three important issues in the Supreme Court, including the ability of U.S. courts to reach the conduct of foreign reinsurers operating largely outside of the United States. The case settled for important structural relief.

More to the point, many of the international cartel cases now resulting in antitrust enforcement by the DOJ Antitrust Division are premised on the precedent established by *Hartford Fire Insurance*.[8] Had the system not provided concurrent authority to the states (and private plaintiffs who represented various affected classes of injured parties), not only would the conspiracy not have been stopped, but an important piece of decisional authority would not have been created.

The same is true even in those instances where a state or private enforcer unsuccessfully litigates an alleged violation. *See, e.g., New York v. Kraft Gen. Foods, Inc.*, 862 F. Supp. 1030 (S.D.N.Y. 1993) (New York unsuccessfully challenged Nabisco acquisition after the FTC chose not to act); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (private plaintiff's unsuccessful challenge to location clause resulted in landmark precedent virtually eliminating the applicability of the per se rule to nonprice vertical restraints). Furthermore, to the extent cases with little or no merit are filed, the courts are given an opportunity to dismiss those cases at various stages of the litigation, thereby creating precedents that enhance the transparency of

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[7] There are numerous additional examples that could be cited in industries as diverse as national debit cards, cable television, and retail grocery. *See generally* ALD IV, *supra* note 2, at 735-38.

[8] *See* Robert Skitol & James Meyers, *Ten Milestones In Twentieth-Century Antitrust Law and Their Importance to the Decade Ahead*, 1-2000 Antitrust Rep. 6 (2000) (listing *Hartford Fire Insurance* as the as a "milestone case" in the field of antitrust law).

American antitrust law. It is the process itself—concurrent enforcement—that allows time-honored theories to be tested and generates important decisional law on the appropriate antitrust remedies.

In addition to *Hartford Fire Ins.*, there are numerous cases where State Attorneys General have sought relief different from that sought by federal antitrust enforcement agencies. In the one most closely on point with this case, the U.S. Supreme Court recognized the state's role as an independent enforcer of both state and federal antitrust laws in the merger context. *See California v. American Stores*, 495 U.S. 217 (1990) (California permitted to seek additional divestiture of stores after FTC settled with merging entities). The facts in *American Stores*, which involved a merger of two supermarket chains, are strikingly similar to those here. After the FTC's final approval of the merger conditioned on divestiture of "several designated supermarkets," California commenced an action to enjoin completion of the merger and to obtain divestiture of all the acquired company's 252 retail grocery stores located in 62 cities throughout the state. *Id.*, 495 U.S. at 274-76. The Supreme Court upheld California's right to maintain its action notwithstanding the fact that it sought much broader relief than that consented to by the FTC.

*American Stores* is not the only case where states have played a critical role in preventing anticompetitive mergers and acquisitions. It is especially common for State Attorneys General to proceed independently of the FTC and Antitrust Division in investigations of mergers affecting local markets, like those at issue here.[9] Because State Attorneys General are particularly knowledgeable about local market conditions, it is not surprising that they often have succeeded

[9] A principal difference between the complaints filed by the FTC and Puerto Rico is that Puerto Rico, unlike the FTC, alleges anticompetative effects arising from the merger in Bayamon, a municipality in the San Juan metropolitan area.

in obtaining divestitures not sought or obtained by either federal antitrust enforcement agency in such mergers. A case in point is *Massachusetts v. Campeau Corp.*, 1988-1 Trade Cas. (CCH) ¶ 68,093 (D. Mass. 1988), a merger of two department store chains in which the merging parties settled state and federal antitrust claims brought by Massachusetts, Maine and New Hampshire by agreeing to divest local department store assets (Filene's) even though the FTC had taken no action to block the transaction.[10] There are many other examples of merger cases where a state has taken a different approach than the federal agencies. *See, e.g., California v. Sutter Health Sys.*, 84 F. Supp.2d 1057 (N.D. Cal.), *aff'd mem*., 217 F.2d 846 (9th Cir. 2000) (opinion not for publication at 2000-1 Trade Cas. (CCH) ¶ 72, 896), *opinion after remand*, 130 F. Supp.2d 1109 (N.D. Cal. 2001)(after the FTC closes its investigation, the California Attorney General litigates hospital merger); *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 149 (E.D.N.Y. 1997) (New York Attorney General accepted a consent judgment with the merging hospitals while antitrust division filed suit to enjoin the merger); *Wisconsin v. Kenosha Hosp. & Med. Ctr.*, 1997-1 Trade Cas. (CCH) ¶ 71,669 (E.D. Wis. 1997) (after the FTC closed its investigation, the Wisconsin Attorney General continued its investigation and ultimately negotiated a detailed consent judgment setting terms for the merger to proceed).

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[10] Other examples of local assets divested pursuant to consent decrees terminating merger investigations conducted by State Attorneys General include: soft drink vending assets in Texas, *see Texas v. Coca-Cola Bottling Co. of the Southwest*, 1986-1 Trade Cas. (CCH) ¶ 67,169 (Tex. Dist. Ct. 1986); department stores in Pennsylvania, *see City of Pittsburgh v. May Dep't Stores*, 1986-2 Trade Cas. (CCH) ¶ 67,304 (W.D. Pa. 1986); department stores in New York, *see New York v. R.H. Macy & Co.*, 54 Antitrust & Trade Reg. Rep. (BNA) 502-503 (Mar. 24, 1988); supermarkets in New York, *see New York v. Great Atlantic and Pacific Tea Co.*, 55 Antitrust & Trade Reg Rep. (BNA) 1073-74 (Dec. 22, 1988); oil terminals in Connecticut, *see Connecticut v. Wyco New Haven, Inc.*, 1990-1 Trade Cas. (CCH) ¶ 69,024 (D. Conn. 1990) (state investigation after the merger was consummated, following early waiver by the federal antitrust enforcement agencies of the normal waiting period before which mergers can occur); gas stations in Washington, *see Washington v. Texaco Ref. & Mktg., Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,346 (D. Wash. 1991); funeral homes in Massachusetts, *see Massachusetts v. Doane Beal & Ames, Inc.*, 1994-1 Trade Cas. (CCH) ¶ 70,516 (D. Mass. 1994); and banks in Maine, *see Maine v. Key Bank of Maine, Inc.*, 61 Antitrust & Trade Reg. Rep. (BNA) 730 (Dec. 19, 1991).

In addition to merger cases, the Court more broadly has categorically affirmed the authority of the states to seek additional remedies beyond those which the Court itself had ruled unobtainable under federal antitrust law. *See California v. ARC America Corp.* 490 U.S. 93 (1989)(holding that federal antitrust laws do not preempt state antitrust laws granting indirect purchasers the right to seek damages even though such damages had been held unavailable under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)). In *ARC America*, the Court recognized "[g]iven the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the states." 490 U.S. at 101. Applied here, a merger occurring entirely within the Commonwealth of Puerto Rico clearly falls within the scope of Puerto Rico's power to investigate and challenge anticompetitive behavior. The district court's decision to enjoin this investigation is simply unprecedented.[11]

The history and role of state antitrust enforcement just recounted is completely consistent with the recent rend to restrict the federal government's ability to impinge upon state law

[11] There are even more cases, too numerous to detail or even list completely, where State Attorneys General have pursued antitrust relief beyond that sought by the FTC or the Antitrust Division—and sometimes when the federal antitrust enforcement agencies had either not even investigated or investigated, but chose not to act. *See e.g.*, *New York v. St. Francis Hospital*, 94 F. Supp. 2d 399, 418 (S.D.N.Y. 2000) (state successfully prosecuted joint pricing activity by two hospitals although the Antitrust Division had reviewed the hospitals' plans for a "virtual merger" and had failed to object); *New York ex rel. Abrams v. Primestar Partners L.P.*, 1993-2 Trade Cas. (CCH) ¶ 70, 403 (S.D.N.Y. 1993) (states conducted an investigation parallel to one conducted by the Antitrust Division, but obtained very different relief); *New York v. Microsoft Corporation*, 209 F. Supp. 2d 132, 154 (D.D.C. 2002) (court permitted nine states and the District of Columbia to seek antitrust relief different from that to which the United States and nine other States had agreed); *In Re Nasdaq Market-Makers Antitrust Litigation*, 184 F.R.D. 506 (S.D.N.Y. 1999) (private plaintiffs sued market-makers despite the inaction of federal enforcers). Significantly, in none of these cases were the States prevented from seeking redress although the relief they sought differed substantially from that, if any, sought by the federal antitrust enforcement agencies. Furthermore, although many cases—like *Hartford Fire*, *Primestar* and *Microsoft*—involved conduct with national and even international implications, no deference was given to the different enforcement decision made by the federal antitrust agencies. No adverse inferences were drawn about the motives of the State Attorneys General because they had pursued different remedies than the federal enforcers.

enforcement.[12] The district court's decision is even more troubling, therefore, because it flies in the face of this trend. The U.S. Supreme Court has shown signs that it intends to uphold the general concept of federalism by making it more difficult for federal agencies to enlist state and local governments for regulation and law enforcement purposes. *See, e.g,. Printz v. United States*, 521 U.S. 898 (1997) (Supreme Court struck down part of the Brady Gun Control Law in holding that Congress may not "commandeer" state officials into enforcing the law's provisions); *Alden et al. v. Maine*, 527 U.S. 706 (1999) (ruling that a provision of Fair Labor Standards Act of 1938 authorizing private suits against States in their own courts constituted a violation of Maine's sovereign immunity); *New York v. United States*, 505 U.S. 144 (1992) (Supreme Court declared unconstitutional a portion of the Low-Level Radioactive Waste Policy Amendments Act of 1985 that forced States to assume title and liability for certain wastes generated within its borders); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (ruling that Congress had improperly abrogated States' sovereign immunity with passage of Age Discrimination and Employment Act).

Directly contrary to this trend, the district court castigates a state enforcer for applying state law and infringes on Puerto Rico's ability to enforce its own antitrust laws. The district court does not discuss important federalism principles or even cite the leading and clearly applicable Supreme Court decisions in *American Stores* and *ARC America*. Instead, the district court ignores the historic contributions of State Attorneys General to antitrust enforcement in this country, and disregards the most basic tenets of federalism when it concludes:

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[12] Barry Hawk & Laraine Laudati, *Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison*, 20 Fordham Int'l L.J. 18, 20 (1996).

> It is in the best interest of the people of Puerto Rico that under circumstances such as this one, where a federal and a state agency are conducting parallel investigations and one has more resources available to it than the other, their government recognizes with full faith and credit the decisions of a federal agency such as the FTC when there is no indication that such decision was incorrect or unjust.

*Wal-Mart Stores, Inc. v. Rodriguez*, No. Civ. 02-2778 PG, 2002 WL 31931657, at *25 (D. Puerto Rico Dec. 26, 2002). This opinion cannot be squared with the well-established principle that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." *ARC America Corp.*, 490 U.S. at 102.[13]

## II. MERGING PARTIES HAVE NO RIGHT TO CONSUMMATE A TRANSACTION THAT VIOLATES STATE ANTITRUST LAW.

The common-sense underpinnings of the American system of concurrent enforcement discussed above, are built upon a solid constitutional foundation. It is undisputed—and has been for many years—that antitrust enforcement by the states, even when seeking remedies beyond those sought by the federal enforcement agencies, is not barred by any provision of the U.S. Constitution.[14] The district court, therefore, erroneously concluded that Wal-Mart has a claim under the commerce clause and the equal protection clause.

The premise of the district court's decision is that the defendant, by purportedly engaging in selective and vindictive prosecution, punished plaintiffs for exercising "their rights under the Commerce Clause to be market participants free from imposition of state protectionism." *Wal-*

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[13] *See* James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and conceptual Reach of state antitrust Law, 1880-1918*, 135 U. Pa. L. Rev. 495, 499 (1987) (contains discussion of state antitrust law predating the Sherman Act).

[14] This Court has held that, to prevail on a § 1983 claim, a plaintiff must establish both the deprivation of a federal right and that the alleged action was taken under the color of state law. *See Gonzalez-Morales v. Hernandez-Arencibia*, 221 F.3d 45, 49 (1st Cir. 2000).

*Mart*, 2002 WL 31931657, at *22. Plaintiffs, however, have no right—under the federal constitution or otherwise—to consummate a merger that violates State antitrust law.[15]

**A. There is no preemption of state enforcement under the Supremacy Clause.**

The proposition that the states should defer to or are preempted by the FTC's judgment is entirely unsupported and incorrect as a matter of law. By enacting federal antitrust law, Congress did not preempt existing state antitrust laws, but merely added a new layer of enforcement to the state antitrust regimes already in effect. Moreover, federal courts have concluded that in addition to enforcing their own antitrust laws, States may initiate private actions to challenge anticompetitive behavior under Federal antitrust law. The district court's decision runs counter to these principles of concurrent enforcement and diminishes the state's long-standing right to separately enforce state and federal antitrust laws.

First and foremost, the fact that federal antitrust law does not preempt state antitrust laws is no longer open for debate. The Supreme Court has consistently held that federal antitrust law does not preempt the ability of States to regulate in this area.[16] As discussed previously, in *ARC America Corp.*, 490 U.S. 93, the Court held that states, through their own antitrust regimes, could offer relief to a greater scope of plaintiffs than that provided under federal antitrust laws. Furthermore, in the indirect purchaser context, many state laws provide for relief not available under federal antitrust law. More importantly, however, federal enforcement does not preempt the right of states to challenge mergers, even where a federal antitrust agency has acted. In

[15] Plaintiffs do not contend that Puerto Rico's antitrust law is unconstitutional or that defendant failed to state a valid claim under that law in the state court action. The effect of the district court's decision, therefore, is to deny the highest law enforcement officer of Puerto Rico the opportunity to vindicate a well-pleaded claim on the merits in state court. Not until final resolution of that claim can it be said that plaintiffs have a "right" to consummate their transaction.

*American Stores*, 495 U.S. 271, also discussed above, the Court never even questions California's ability to sue under the federal antitrust laws or seek additional remedies after the FTC had already conducted its investigation and settled with the merging parties. This is because the American system provides for concurrent enforcement, not preemption. The states, acting as *parens patriae*, may seek a full range of antitrust remedies. States can enforce federal antitrust law and state antitrust laws, without any deference to the action or inaction of the federal enforcers.

### B. Puerto Rico's efforts to enforce its antitrust laws do not run afoul of the Commerce Clause.

The district court's decision deprives Puerto Rico of its legitimate right to enforce its merger laws by holding that Wal-Mart is likely to prevail in its 42 U.S.C.A. § 1983 claim based on rights emanating from the commerce clause. This is an unprecedented decision. Courts have rarely, if ever, struck down state antitrust enforcement on commerce clause grounds, and have *never* enjoined enforcement against a potentially anticompetitive merger. The magnitude of the district court's erroneous application of the commerce clause is compounded because this case involves a purely intrastate merger. Not surprisingly, both Wal-Mart and the district court failed to cite antitrust cases. Instead, they rely on cases involving laws that facially discriminate against out-of-state entities—a situation vastly different from the one here.

Well-established precedent rejects commerce clause challenges to state antitrust laws unless the state law poses a threat to uniformity. In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), the Supreme Court rejected a similar effort to undermine the ability of a state to enforce its antitrust laws. The plaintiffs, various out-of-state oil companies, challenged a

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[16] *Watson v. Buck*, 313 U.S. 387 (1941); *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

Maryland antitrust statute under the commerce clause. They contended that because "the burden of state regulation falls on interstate companies . . . the statute impermissibly *burdens* interstate commerce." *Id.* at 118. The Supreme Court rejected the commerce clause argument, because the Maryland statute did not pose a threat to uniformity of law. *Id*. at 130-31. The Court held that "in the absence of a relevant congressional declaration of policy, or a showing of a specific discrimination against, or burdening of, interstate commerce, we cannot conclude that the States are without power to regulate in this area." *Id.* The fact that the law in question would only affect out of state oil producers did not give rise to a claim under the commerce clause.

Subsequent cases also have held that the commerce clause is not a legitimate means to trump state antitrust law. *See Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 993 (9th Cir. 2000) ("[T]he Supreme Court has made clear that neither the Sherman Act nor the Commerce Clause preempts state antitrust laws."); *Griffiths v. Blue Cross and Blue Shield of Alabama*, 147 F. Supp. 2d 1203, 1220 (N.D. Ala. 2001) ("Alabama's antitrust statutes 'regulate monopolistic activities that occur within this state – within the geographic boundaries of this state – even if such activities fall within the scope of the Commerce Clause of the Constitution of the United States.'")(internal quotations and citations omitted); *cf. Flood v. Kuhn*, 407 U.S. 258 (1972). Accordingly, courts have universally held that "concurrent state jurisdiction over activities affecting interstate commerce seems settled." Thomas M. Wilson III, *Antitrust Federalism: The Role of State Law*, A.B.A. Section of Antitrust Law Monograph 15, at 10 (1988).

Without any explanation or reasoning, the district court here ignores this well-established principle in antitrust law and instead relies on cases with either discriminatory statutes or discriminatory enforcement actions. These cases are inconsistent, however, with facially neutral

legislation, such as Puerto Rican antitrust law. For instance, the district court relies on *New Energy Company of Indiana v. Limbach*, 486 U.S. 269 (1988) to support the contention that Puerto Rico's enforcement of its antitrust law violates the commerce clause by "discriminat[ing] against interstate commerce." *Wal-Mart*, 2002 WL 31931657, at *18. This case is inapt for at least two obvious reasons. First, *Limbach* does not involve a challenge to an antitrust statute; rather it involves an Ohio statute that gave a tax credit for ethanol "produced in Ohio or, if produced in another state, to the extent that State grants similar tax advantages to ethanol produced in Ohio." *Limbach*, at 269. Second, unlike Puerto Rican antitrust law, which is facially neutral, the Ohio statute "explicitly deprives certain products of generally available beneficial tax treatment because they are made in certain other States, and thus on its face appears to violate the cardinal requirement of nondiscrimination." *Id.* at 274.[17]

Here, the district court's analysis fails to demonstrate how the Puerto Rican antitrust statute, on its face, or in any way, favors in-state entities to the detriment of entities out of state. The Puerto Rican antitrust statute is facially neutral and does not discriminate against any out-of-state interests. Wal-Mart claims that Puerto Rico discriminated against out of state entities by requesting, throughout its negotiations with Wal-Mart, that "Wal-Mart maintain a high level of purchases from local suppliers, distributors and manufacturers." *Wal-Mart*, 2002 WL 31931657, at *18. This is insufficient proof of discrimination.

Allowing Wal-Mart to evade antitrust review merely based on an unfavorable position held by the state regulating agency during the course of the negotiation will drastically alter antitrust enforcement. All antitrust agencies—State and Federal alike—will be prevented from

[17] The district court also relies on *Dennis v. Higgins*, 498 U.S. 439 (1991), which involved a challenge to a discriminatory non-antitrust statute. *Wal-Mart*, 2002 WL 31931657, at *18-19. In that case, the Court

engaging in candid negotiation discussions with merging parties. Agencies will be forced not to reveal any of its views about a proposed merger until it takes or declines official action. Courts may be flooded unnecessarily with merger challenges that previously have been resolved through heated, yet candid, negotiations. The district court's decision deprives state antitrust enforcement agencies of their ability to carry out their elected duties, including assessing the effects of a prospective merger on their states, because even a hint of such a consideration in the course of negotiation may impermissibly burden interstate commerce. Such an approach is unwarranted and flies in the face of Supreme Court precedent.

### C. Allowing Wal-Mart to Evade Antitrust Scrutiny Through a Selective Enforcement Claim Undermines Federal and State Efforts to Enforce All Antitrust Laws.

The crux of Wal-Mart's equal protection claims—*i.e.*, selective and vindictive enforcement—is that Puerto Rico commenced its antitrust enforcement action to punish them for invoking their rights under the commerce clause. As shown, Wal-Mart has not established that Puerto Rico violated its commerce clause rights. In addition, Wal-Mart has made out none of the other essential elements of their claims. The district court's decision to grant Wal-Mart's selective enforcement claim therefore is unsupported and disregards past precedent.[18] This decision, undoubtedly, will impair all future government antitrust investigations including, potentially, state investigations of criminal defendants.

The Supreme Court has recognized that states may exercise their judgment to make the necessary distinctions to effectively enact and enforce their antitrust laws without running afoul

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struck down a Nebraska statute which placed taxes and fees on vehicles registered in states other than Nebraska, but operate in Nebraska.

[18] The court below held that Wal-Mart was likely to succeed in its §1983 action, which alleged, *inter alia*, that "Defendants' imposition of certain conditions on [plaintiff] before approving their transaction violates their civil rights to equal protection of the laws . . . ." *Wal-Mart*, 2002 WL 31931657, at *18.

of the equal protection clause. *See Tinger v. Texas*, 310 U.S. 141 (1940). A state can enact and apply its laws in a manner which it believes will best preserve and protect competition within its borders without running the risk of a court second guessing its decisions through an equal protection challenge. *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n*, 360 U.S. 334, 341 (1959) ("Certainly this Court will not interpose its own economic views or guesses when the State has made its choice.").

Wal-Mart does not claim to be a member of a protected class treated differently by the Puerto Rican statute. Rather, Wal-Mart contends that Puerto Rico violated its rights under the equal protection clause by selectively enforcing Puerto Rico's antitrust laws against Wal-Mart. This claim is unsupported and is inconsistent with precedent.

***1. Wal-Mart failed to demonstrate that it was a class of one treated differently by Puerto Rico from others similarly situated.***

The district court correctly recognized that to impose liability for selective enforcement plaintiffs must prove that "(1) "compared with other similarly situated," they were "selectively treated"; and (2) that the selective treatment "was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights or bad faith intent to injure a person."" *Wal-Mart*, 2002 WL 31931657, at *21(citations omitted).

It is well-settled in the First Circuit that a plaintiff who asserts a claim of selective enforcement "must first identify and relate specific instances where persons situated similarly in all relevant aspects were treated differently." *Rubinovitz v. Rogato*, 60 F.3d 906, 910 (1st Cir. 1995) (internal quotations and citations omitted); *see also Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1058 (6th Cir. 1996) ("[T]he First Circuit limits the availability of § 1983 for a regulator's malice by requiring that the plaintiff prove that others who are similarly situated in all relevant aspects have not been regulated.") (internal quotations and citations omitted). The requirement

that a party claiming selective enforcement establish by specific evidence that it was treated differently in all relevant respects than others similarly situated is essential. Otherwise, defendants in state actions could readily evade legitimate enforcement simply by providing examples of instances where state officials had exercised their discretion not to use their scarce resources to investigate or prosecute others. [19] Thus, absent a strong showing that such entities are similarly situated, a selective enforcement claim must fail. *Donovan v. City of Haverhill*, 311 F.3d 74, 77 (1st Cir. 2002) (equal protection claim must be dismissed where the defendants fail to "provide any information about how any other party was similarly situated"); *Wojcik v. Mass. Lottery Comm'n*, 300 F.3d 92, 104 (1st Cir. 2002) (selective enforcement claim must fail because "appellant has failed to identify specific evidence concerning similarly situated individuals who received more lenient treatment").

There was no finding below—and could have been none based on the evidence—that other companies "situated similarly in all relevant aspects were treated differently." The district court found only that "[t]he evidence . . . showed that Defendant had never before imposed conditions such as the ones demanded from Plaintiffs in this case." *Wal-Mart*, 2002 WL 31931657, at *22. That finding, however, is insufficient to support a selective enforcement claim since it does not answer the critical question: whether others seeking to consummate mergers like Wal-Mart's were treated differently than Wal-Mart was here. Although the district court did take judicial notice that "at least three other mergers have taken place" during defendant's tenure, it made no attempt to assess what similarity, if any, they had to this

[19] *See Rubinovitz*, 60 F.3d at 910 (selective enforcement claim properly dismissed because plaintiffs failed to present specific evidence that neighbors were similarly situated or were treated differently by defendants.); *accord Futernick*, 78 F.3d at 1059-60 ("In selective enforcement doctrine, however, the characteristics used to select some people to prosecute or regulate need not be rationally related to a state need . . . due to the discretion to initiate government action traditionally given state officials").

transaction. *Id.* Indeed, it appears that none of the basic details of those mergers was submitted into evidence. Moreover, a merger involving one of the largest retailers in the world naturally raises several competitive concerns irrelevant to mergers involving smaller Puerto Rican entities.

Because virtually every antitrust case is unique, antitrust analysis is inherently fact specific. Merger analysis, in particular, is complex, turning on product and geographic market definition, the size and number of competitors in a market, market shares and a host of other factors. Since even most mergers are unchallenged on the federal level, any merging party, relying on the selective enforcement doctrine as applied by the district court, could claim that it had been "singled out" for enforcement. It is not surprising, therefore, that the district court's decision upholding a selective enforcement claim to an antitrust enforcement action is unprecedented.

***2. Wal-Mart failed to demonstrate that Puerto Rico intended to discriminate against Wal-Mart based on animus.***

In order to satisfy the second element of a selective enforcement claim, a court must find that Puerto Rico had an arbitrary or irrational motive for its decision to challenge the merger. *Wojcik*, 300 F.3d at 104. The First Circuit recognizes that a court should defer to the judgment of the body enforcing the law in determining whether there actually was selective enforcement of the law. *Id.* ("The legal test we apply to the [defendants'] conduct is an exceptionally deferential one."); *see also Gardenhire v. Schubert*, 205 F.3d 303, 319 (6th Cir. 2000) ("[T]here is a strong presumption that the state actors have properly discharged their official duties, and to overcome that presumption the plaintiff must present clear evidence to the contrary; the standard is a demanding one."). Wal-Mart contends that it was irrational for Puerto Rico to seek concessions beyond those secured by the FTC. It is not sufficient for Wal-Mart to allege merely that Puerto Rico acted irrationally; rather Wal-Mart must prove that the Commonwealth acted with the intent

to discriminate. *See Pariseau v. City of Brockton*, 135 F. Supp. 2d 257, 263 (D. Mass. 2001) ("Plaintiffs' claim does not survive the *Willowbrook* equal protection analysis because there is no evidence of discriminatory intent. The arbitrariness of a law enforcement decision is not, without more, sufficient to state an equal protection claim.").

Wal-Mart alleges that the Commonwealth's antitrust action was brought to punish it for exercising its rights under the commerce clause. However, as discussed above, the Commonwealth's action did not violate the commerce clause, and thus did not inhibit or punish the exercise of any of Wal-Mart's rights arising thereunder.

### *3. The District Court's decision to allow a selective enforcement defense to an antitrust enforcement action undermines future antitrust enforcement actions.*

The district court's selective enforcement analysis is far reaching and interferes not only with state antitrust enforcement, but also federal antitrust enforcement. Allowing Wal-Mart to evade antitrust review through a selective enforcement equal protection claim undermines the ability of *all* antitrust enforcement actors, including the FTC and DOJ, to exercise discretion and decide whether or not to challenge a proposed merger. Over 97 percent of all HSR filings are not investigated or challenged in any way. In fact, in fiscal year 2001 only one filing out of 2,376 resulted in a preliminary injunction proceeding at the federal level.[20] Based on the reasoning in the district court, those entities that are scrutinized by the FTC for anticompetitive effects that may arise because of their proposed merger would be able to evade substantive antitrust review by demonstrating only that there were other mergers in a similar market that were not challenged by the FTC. This reasoning runs directly counter to our system of concurrent enforcement and therefore, should not be affirmed.

## CONCLUSION

In our concurrent enforcement system, both state and federal authorities play vital roles in the continuous effort to protect consumers. The district court's decision directly contradicts these roles, despite well-established Supreme Court precedent. It overreaches in a way that will handcuff not only state antitrust officials, but also the federal authorities at the Federal Trade Commission and Department of Justice. The unsupported and contradictory rationale of one district court opinion should not overturn decades of antitrust jurisprudence and effectively weaken the enforcement authority of all officials to conduct investigations, negotiate with merging parties and bring antitrust enforcement actions under either state or federal antitrust law. For these reasons, this court should reverse the decision of the U.S. District Court for the District of Puerto Rico and vacate the preliminary injunction against Appellant.

Dated this ___ day of February, 2003.

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[20] *See FTC HSR Annual Report to Congress for Fiscal Year 2001* (2002) at http://www.ftc.gov/bc/hsr/hsrinfopub.htm.

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the rules contained in F.R. App. P (Rule) 32(a)(7)(B) for a brief produced with a proportional font. The length of this brief is 6,785 words.

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