IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
Division Two - Charleston

ARTHUR VOGT, et al.,	)	Case No. 2:16-cv-04492
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
INGRID FERRELL, et al.,	)	
	)	
Defendants.	)	
_____	)	

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INTRODUCTION AND STATEMENT OF FACTS

Plaintiffs Arthur Vogt and Vogt Ventures LLC d/b/a/ Lloyd's Transfer & Storage[1] challenge a West Virginia law that restricts their constitutionally protected right to earn a living. Compl. ¶ 1. Vogt's moving company, Lloyd's Transfer & Storage, is located in Virginia, about 10 miles away from the West Virginia border. *Id.* ¶ 2. Vogt has legal authority to offer intrastate moving services within the State of Virginia, as well as interstate moves between any two states. *Id.* ¶ 3. He now wishes to provide intrastate moving services within West Virginia. *Id.* Vogt regularly receives requests for such services, and is ready, willing, and able to provide them. *Id.* ¶¶ 46, 65. However, he is prohibited from doing so by West Virginia's Certificate of Convenience and Necessity (Certificate) law, which effectively protects existing moving companies from new competition. *Id.* ¶ 4.

No one may offer intrastate moving services in West Virginia without a Certificate. W. Va. Code § 24A-2, *et seq*. Existing Certificate holders may protest new applicants, triggering a hearing. *Id*. At the hearing, applicants must prove that the existing service is "inadequate" and that the applicant's business is "necessary." *Id.* In short, under the challenged laws, the Commission[2] shall deny a Certificate regardless of the applicant's skills, qualifications, or experience if it finds that additional competition would take business away from incumbent moving companies. Compl. ¶ 4.

The Certificate requirement therefore acts as an unconstitutional "Competitor's Veto," whereby existing firms insulate themselves from economic competition. The law bears no rational relationship to a legitimate government interest. *Id.* ¶ 35. Vogt alleges that the law violates the

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[1] For ease of reference, Plaintiffs are collectively referred to as "Vogt."

[2] The members of the Public Services Commission are sued in their official capacities pursuant to *Ex parte Young*, 209 U.S. 123 (1908), but are collectively referred to as "Commission."

dormant Commerce Clause, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Compl. ¶ 1.

SUMMARY OF ARGUMENT

A Rule 12(b)(6) motion must be denied when a Complaint alleges facts that, if true, would "plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (dismissal is improper "even if it appears 'that a recovery is very remote and unlikely.'" (citation omitted)). Courts presented with such motions should "construe[] [pleadings] liberally so as to do substantial justice." *Wright v. N. Carolina*, 787 F.3d 256, 263 (4th Cir. 2015) (citation omitted). A motion to dismiss for failure to state a claim should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Commission's motion should be denied.

Vogt alleges that West Virginia's Certificate of Necessity law for movers of household goods allows in-state movers to manipulate the application process to prevent out-of-state competition. Compl. ¶¶ 70-86. He therefore sufficiently states a claim that the law discriminates against and unduly burdens interstate commerce in violation of the dormant Commerce Clause, and his claims cannot be dismissed. *Colon Health Centers of Am., LLC v. Hazel*, 733 F.3d 535, 545 (4th Cir. 2013) (dormant Commerce Claim against similar Certificate law for medical services was properly pled and required discovery before court could rule on merits). Vogt further alleges that the law grants existing moving companies special privileges, and restricts his right to earn a living, without a rational connection to any legitimate governmental interest. Compl. ¶¶ 58, 92, 100. He therefore alleges that the challenged law violates the Equal Protection and Due Process Clauses. *See Bruner v. Zawacki*, 997 F. Supp. 2d 691, 699 (E.D. Ky. 2014) (a virtually identical Certificate law in

Kentucky violated due process because it advanced economic protectionism rather than any legitimate governmental interest).

The Commission argues that Vogt's Commerce Claim should be dismissed because the Certificate law prohibits him from providing intrastate moves, activity which it asserts is not protected by the dormant Commerce Clause. MTD at 6. It further argues that Congress has reserved regulation of intrastate moving services to states, and the Commerce Clause therefore does not apply. *Id.* at 7. Both arguments fail. Laws that discriminate or unduly burden interstate commerce violate the dormant Commerce Clause—regardless of whether they purport to regulate intrastate activity. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389 (1994) (local law regulates interstate activity because "its economic effects are interstate in reach"). Both tests are fact specific, and a properly pled claim entitles plaintiffs to engage in discovery to prove their claims. *Colon Health*, 733 F.3d at 545.

The Commission further argues that Vogt's Fourteenth Amendment claims must be dismissed because the law is "rational." MTD at 8. This is an argument on the merits, which is inappropriate on a motion to dismiss. *Miller v. Carolinas Healthcare Sys.*, 561 F. App'x 239, 240 (4th Cir. 2014) (The merits should be "dealt with through summary judgment," not through a motion to dismiss.). Vogt is entitled to discovery to prove that the law serves no valid public purpose, and instead is impermissible protectionism. *See Merrifield v. Schwarzenegger*, No. 04-0498 MMC, 2004 WL 2926161 (N.D. Cal. July 16, 2004) (denying motion to dismiss rational basis claims and permitting discovery); *Bokhari v. Metro. Gov't of Nashville & Davidson Cty.*, No. 3:11-00088, 2012 WL 162372, at *4 (M.D. Tenn. Jan. 19, 2012) (plaintiffs sufficiently pled due process claim by alleging that the law "serve[d] no legitimate public health or safety purpose, and by alleging that the

Ordinance was enacted not to protect any such purpose, but rather to protect limousine companies and taxicab companies from competition").

The Commission's argument that the court lacks subject matter jurisdiction because Vogt has failed to exhaust state remedies also fails because a plaintiff need not exhaust state remedies before bringing a Section 1983 case for prospective relief in federal court. *See Patsy v. Bd. of Regents of State of Fla*., 457 U.S. 496, 501 (1982).

Though the Commission seeks to dismiss Ingrid Ferrell as a defendant, she is a proper party because she attends hearings and issues orders related to an application process that Vogt contends is unconstitutional. *See Ex parte Young*, 209 U.S. at 157. An injunction would prevent her from aiding in the enforcement of these laws in the future.

Plaintiff concedes that his privileges or immunities claim should be dismissed because it is precluded by precedent. Vogt asserts that claim only to preserve it for appeal.

I

VOGT HAS ADEQUATELY ALLEGED THAT THE LAW VIOLATES THE DORMANT COMMERCE CLAUSE

A. Vogt Sufficiently Alleged That the Challenged Law Discriminates Against Interstate Commerce

Though the Commerce Clause grants Congress authority to "regulate Commerce . . . among the several states," it is "well-established" that this "affirmative grant of authority implies a 'negative' or 'dormant' constraint on the power of the States to enact legislation that interferes with or burdens interstate commerce." *Colon Health Centers of Am., LLC*, 733 F.3d at 542 (citations omitted). This "dormant" Commerce Clause is concerned with limiting "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008)

(citation omitted). States violate the dormant Commerce Clause when they discriminate against out-of-state economic interests, or unduly burden the flow of interstate commerce. *Colon Health Centers of Am., LLC*, 733 F.3d at 544; *Medigen of Kentucky, Inc. v. Pub. Serv. Comm'n of W. Virginia*, 985 F.2d 164, 166 (4th Cir. 1993).

Laws that discriminate against interstate commerce on their face, in effect, or in purpose, are subject to "a virtually *per se* rule of invalidity." *Colon Health Centers of Am., LLC*, 733 F.3d at 543 (citation omitted). A court must invalidate such a discriminatory law "unless the state demonstrates 'both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means.'" *Id.* (citing *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005)); *Medigen of Kentucky, Inc.*, 985 F.2d at 165.

Thus the First Circuit held that a Certificate law for pharmacies in Puerto Rico "discriminate[d] against interstate commerce by permitting the Secretary [of Health] to block a new pharmacy from locating to its desired location simply because of the adverse competitive effects that the new pharmacy will have on existing pharmacies." *Walgreen Co. v. Rullan*, 405 F.3d 50, 55 (1st Cir. 2005). Although the law was neutral on its face, the court found that, in practice, a largely local group influenced the Secretary to limit out-of-Commonwealth competition. *Id.*

Similarly here, Vogt alleges that the challenged law has the practical effect of discriminating against out-of-state providers of intrastate moving services. Compl. ¶¶ 79-80. He alleges that the law permits existing Certificate holders to influence the application process so as to exclude out-of-state moving companies from providing intrastate services. The Commission has not granted a Certificate to an out-of-state company in more than 30 years. *Id.* ¶ 5. Yet the law serves no legitimate purpose. *Id.* ¶¶ 84-85. It's purpose and effect is to protect in-state companies from out-

of-state competition. *Id.* ¶¶ 79-80. Vogt has therefore sufficiently alleged that the W. Va. Code § 24A-2-5 impermissibly discriminates against interstate commerce.

B. Vogt Sufficiently Alleged That the Challenged Law Unduly Burdens Commerce

Even where a law does not discriminate against out-of-state interests in purpose or effect, it violates the dormant Commerce Clause if it "unjustifiably . . . burden[s]" interstate commerce. *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 98 (1994). Such unduly burdensome laws will be struck down if the burden on commerce is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Like the discrimination test, this inquiry is "fact-bound." *Colon Health Centers of Am., LLC*, 733 F.3d at 546.

In *Medigan of Kentucky, Inc.*, 985 F.2d at 167, the Fourth Circuit struck down a Certificate law for transporters of infectious waste because the law significantly burdened interstate commerce without promoting any legitimate local interests. The Public Service Commission made similar arguments to those made here; that the Certificate law ensured that adequate service was available at reasonable prices. *Id.* The court rejected this argument, finding instead that restricting market entry necessarily limited the availability of services, and resulted in higher prices. *Id.* Relying on the record, the court held that the law unduly burdened interstate commerce without providing any local benefits.

Vogt sufficiently pled that West Virginia's law unduly burdens the interstate market for intrastate moving services. Comp. ¶¶ 74, 76. He alleges that the law provides no legitimate local benefits, but instead serves to protect in-state movers from economic competition. *Id.* ¶¶ 84-85.

Because Vogt alleges both that West Virginia's law discriminates against out-of-state movers and unduly burdens interstate commerce, he has properly alleged a dormant Commerce Clause violation.

C. Supreme Court and Fourth Circuit Precedent Preclude Dismissal of Well-Pled Dormant Commerce Clause Claims on a Motion To Dismiss

The Supreme Court has consistently recognized that the dormant Commerce Clause analysis requires "a sensitive, case-by-case analysis" of the law's "purposes and effects." *See, e.g.*, *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994). Plaintiffs are entitled to discovery to prove their claim that the law discriminates against and unduly burdens interstate commerce. Courts can only resolve this inquiry by looking to the law's practical application, which requires factual development. *Colon Health Centers of Am., LLC*, 733 F.3d at 544 (whether certificate-of-need law violates dormant Commerce Clause "necessarily requires looking behind the statutory text to the actual operation of the law"); *cf. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 337 (2007) (dormant Commerce Clause analysis based on record built after "protracted discovery"); *Medigan of Kentucky, Inc.*, 985 F.2d at 167 (striking down Certificate of Need law under dormant Commerce Clause based on evidence gathered during discovery); *Walgreen Co. v. Rullan*, 405 F.3d at 56 (same).

In *Colon Health Centers*, 733 F.3d at 544 , the Fourth Circuit refused to dismiss a dormant Commerce Clause challenge to a Certificate law in the medical services industry. There, the plaintiffs alleged that the law drove up the costs for out-of-state medical providers to do business in the state, and gave in-state providers the ability to influence the application process to block new, out-of-state competition. The court recognized that the allegations "raise[d] practical questions of fact," and therefore could not be dismissed on a 12(b)(6) motion. *Id.* For instance, whether in-state interests employed the statute to block out-of-state competition could not be resolved without examining how the statute "function[ed] . . . in practice." *Id.* And whether the hearing officer

focused on protecting existing businesses from competition when making application decisions could not be "ascertained in the absence of proper fact-finding." *Id.* Though it may have been true that the law was entirely neutral in effect, or that the burden on interstate commerce was not substantial, at the motion to dismiss stage, the court "d[id] not know," and thus allowed the plaintiffs to proceed to discovery. *Id.*

Vogt's well-pled claims should therefore not be dismissed.

II

DEFENDANTS' ARGUMENTS FOR DISMISSAL OF THE DORMANT COMMERCE CLAIM FAIL

A. The Dormant Commerce Clause Applies to Laws That Purport To Regulate Intrastate Activity

Defendants argue that Vogt's dormant Commerce Clause claim must be dismissed because he desires to provide only intrastate moving services, and, according to Defendants, the dormant Commerce Clause does not apply to laws that regulate intrastate activity. MTD at 6. Defendants misunderstand the scope of the Clause. The dormant Commerce Clause forbids states from enacting laws that discriminate against out-of-state commerce, or unduly burden the flow of interstate commerce, even if those laws purport to regulate "intrastate" activity.

In *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. at 389, the plaintiffs challenged a law that required local waste to be processed at a local transfer station before leaving the municipality. Though, on its face, the law regulated only intrastate activity, the Supreme Court held that the law regulated interstate commerce because "its economic effects [were] interstate." *Id.* First, the law drove up the costs for out-of-state parties to dispose of their solid waste in the state. Second, by preventing everyone except for a favored local operator from acting as a waste processor, the law "deprive[d] out-of-state businesses of access to a local market." *Id*. Thus, though facially

the law regulated only intrastate services, it violated the dormant Commerce Clause because, in effect, it discriminated against out-of-state actors' ability to provide intrastate services.

Similarly, in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 572 (1997), the Supreme Court rejected the argument that the dormant Commerce Clause did not apply because the plaintiff's product was "delivered and 'consumed' entirely within Maine." Because the plaintiff provided a summer camp solely within one state, the defendants argued that interstate commerce was not implicated. The Court disagreed, recognizing that laws that regulate wholly intrastate activity can have an effect on interstate commerce. "Even when business activities are purely local, if 'it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.'" *Id.* at 573 (citation omitted).

Here, Plaintiffs allege that the law violates the dormant Commerce Clause because it discriminates against the interstate market for intrastate moving services. Compl. ¶¶ 70-86. The fact that the law regulates *intra*state moving services is immaterial; Plaintiffs allege that it effectively allows established in-state businesses to harness the regulatory process to block out-of-state competition, and burdens interstate commerce by stifling the interstate market for West Virginia moving services. As in *C&A Carbone*, *Camps*, and *Colon Health*, Vogt is entitled to discovery to prove those claims.

B. Congress Has Not Exempted the State's Regulation of Moving Services from the Effect of the Dormant Commerce Clause

The Commission argues that Vogt's dormant Commerce Clause claim also must be dismissed because Congress has reserved regulation of intrastate moving services to the states. This argument fails.

Congress may remove state laws from the reach of the dormant Commerce Clause, but Congress's intent to authorize the discriminating law must be either "unmistakably clear" or "expressly stated." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984); *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992) ("Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve . . . a violation of the Commerce Clause . . . ."); *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 782 (4th Cir. 1996) (Congress must "affirmatively have contemplated the otherwise invalid state legislation."). Federal laws that merely save state regulation from preemption do not "alter the limits of state power otherwise imposed by the Commerce Clause." *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982) (citation omitted).

In *Envtl. Tech. Council v. Sierra Club*, 98 F.3d at 782, the Fourth Circuit held that two South Carolina laws that regulated hazardous waste were invalid under the dormant Commerce Clause. South Carolina argued that the dormant Commerce Clause did not apply because Congress authorized states to enact programs regulating hazardous waste. The Fourth Circuit rejected that argument, holding instead that Congress must affirmatively authorize states to burden interstate commerce.

The Commission makes a similar argument here as South Carolina made in *Envtl. Tech. Council*: the Certificate law cannot violate the dormant Commerce Clause because Congress exempted state regulation of moving services from federal preemption. But the mere fact that Congress saved state regulation of moving services from federal preemption is not enough to insulate the challenged law from the dormant Commerce Clause. The motion to dismiss on this ground should be denied.

III

VOGT ADEQUATELY ALLEGED DUE PROCESS VIOLATIONS

A. Defendants' Argument on the Merits at the Motion To Dismiss Stage Is Improper

Whether a statute bears a rational relationship to a legitimate state interest is a matter to be determined after discovery and fact finding, not on a motion to dismiss where the plaintiff's allegations must be presumed true. *Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008) ("The rational basis standard . . . cannot defeat the plaintiff's benefit of the broad Rule 12(b)(6) standard."). "[C]laims lacking merit may be dealt with through summary judgment," not through a motion to dismiss. *Miller v. Carolinas Healthcare Sys.*, 561 F. App'x at 240 (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002)).

While courts presume the legitimacy of legislation, that presumption can be overcome by evidence the plaintiff introduces. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("[P]arties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational . . . ." (citation omitted)). Indeed, district courts have convened full-scale trials to determine whether occupational licensing requirements are in fact rationally related to a legitimate government interest. *See, e.g.*, *St. Joseph Abbey v. Castille*, 835 F. Supp. 2d 149, 151 (E.D. La. 2011), *aff'd*, 712 F.3d 215 (5th Cir. 2013); *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 664 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002); *Powers v. Harris*, No. CIV-01-445-F, 2002 WL 32026155 (W.D. Okla. Dec. 12, 2002), *aff'd*, 379 F.3d 1208 (10th Cir. 2004). This is true even when the interest put forward by the government for a given regulation appears rational on its face. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could

not have been a goal of the legislation."); *Keenon v. Conlisk*, 507 F.2d 1259, 1261 (7th Cir. 1974) ("Bald assertions that the [government's actions] are reasonable cannot be considered.").

In *Merrifield*, the district court held that the plaintiff had adequately alleged a claim under both the Due Process and Equal Protection Clauses when he argued that a California licensing requirement was designed solely to protect existing businesses from competition. *See Merrifield v. Schwarzenegger*, 2004 WL 2926161 (denying motion to dismiss). The regulation at issue in *Merrifield* required all pest control specialists to undergo training in chemical pesticides regardless of whether or not they used pesticides in their work. *Id.* at **1-2. The plaintiff alleged that this requirement was irrational and only served to protect chemical pest control companies from competition. *Id.* The court denied the motion to dismiss, *id.* at *5, and on appeal, the Ninth Circuit ruled for the plaintiff on the merits, holding that "mere economic protectionism for the sake of economic protectionism is irrational . . . [under] rational basis review." *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008); *see also Craigmiles*, 312 F.3d at 225 (affirming same after district court held trial on merits); *St. Joseph Abbey*, 712 F.3d at 222-23 (same); *Bruner*, 997 F. Supp. 2d at 700 (holding same on motion for summary judgment); *cf. Bokhari*, 2012 WL 162372, at *4 (denying motion to dismiss rational basis claim that alleged protectionism).

To survive a motion to dismiss, plaintiffs need only state a "plausible" claim for relief. *Iqbal*, 556 U.S. at 678. As these cases show, occupational licensing laws—and Certificate laws in particular—can be proven irrational when they are aimed solely at economic protectionism. And as several cases litigated under the rational basis standard show, the Commission's assertion that the licensing requirement protects public health, safety, and welfare is a question of fact that can be disproven after discovery. The state's bare assertion that the challenged laws satisfy rational basis review cannot defeat the plaintiffs' allegations on a motion to dismiss.

B. Vogt Alleged That the Challenged Statutes Are Not Related to Any Legitimate State Interest

Both the Due Process and Equal Protection Clauses bar the state from depriving people of federal constitutional rights without a rational relationship to a legitimate government interest. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Romer v. Evans*, 517 U.S. 620, 632 (1996). States may place restrictions on the right to engage in an occupation only if those restrictions are rationally related to the "the applicant's fitness or capacity to practice" the profession. *Schware v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 239 (1957).

When a licensing law bears no rational relationship to public health, safety, and welfare, or only protects established companies against competition from new businesses, that law violates the Due Process Clause. *See*, *e.g.*, *Merrifield*, 547 F.3d at 991 n.15; *St. Joseph Abbey v. Castille*, 700 F.3d 154, 161 (5th Cir. 2012) (same); *Craigmiles*, 312 F.3d at 224 (same); *Bruner*, 997 F. Supp. 2d at 699 (striking down a Certificate law virtually identical to the one at issue here).

Plaintiffs allege that the challenged statutes bear no rational relationship to protecting public health, safety, or welfare, and are instead designed solely to protect existing licensees from competition.[3] Compl. ¶ 99, 103. Existing businesses are permitted to protest new businesses for any reason, including the simple reason that they do not want to compete. W. Va. Code § 24A-2. And at a hearing, applicants must prove to the government that, among other things, they will not take business away from existing carriers. *Id.*; Compl. ¶ 4. Moreover, the Commission must deny an applicant a Certificate on this basis, regardless of the applicant's fitness or capacity to provide moving services. *Id.* ¶ 57. As Vogt alleges, such a law is contrary to any conceivable health and safety goals. *Id.* ¶ 103. Vogt has, therefore, stated a valid claim for relief.

[3] The Commission admits that the law is based, in part, on "protect[ing] existing certificate holders from competition." MTD at 12.

In *Bruner*, the plaintiff successfully challenged a nearly identical law for the moving industry under the Due Process Clause. 997 F. Supp. 2d at 699. There, the court found that the law did not further any legitimate state purpose. It did nothing to protect consumers, and actually increased administrative costs. *Id.* Moreover, similar to Vogt's allegations here, the record showed that consumers never objected to new companies starting—it was only existing companies who used the law to block new competition. *Id.* at 700. After dispensing with the state's proffered rationales for the Competitor's Veto procedure, the court concluded that it served instead only the unconstitutional goal of economic protectionism. *Id.* Most importantly for the present motion, the case was decided on the merits on a motion for summary judgment with the benefit of a record created through discovery.

Vogt's Fourteenth Amendment claims are nearly identical to the plaintiff's claims in *Bruner*, which not only survived a motion to dismiss but prevailed on the merits after discovery. *Bruner*, 997 F. Supp. 2d at 699. This stands in contrast to the dismissal of Fourteenth Amendment claims in *Colon Health*, which was based on facts unique to the healthcare industry and on defects in the complaint. For instance, in dismissing the equal protection claims, the court focused on public health concerns, such as the geographical allocation of medical services. *Colon Health Centers of Am., LLC*, 733 F.3d at 548. The market for movers of household goods implicates no such concerns. In dismissing the due process claim, the court held that the plaintiffs had made "cursory" allegations, insufficient to overcome the presumption of constitutionality. *Id.* By contrast, here, Vogt makes allegations substantiating his claim of protectionism, including the allegations that the protest and intervention process has only been used by existing companies, and never by concerned members of the public, Compl. ¶ 24, that not one applicant that has been protested has been granted a Certificate in more than 15 years, *id.* ¶ 5, and that Defendants must deny a Certificate regardless of

the impact on health or safety if an applicant would take away business from existing companies. *Id.* ¶¶ 30, 101.

Like the *Bruner* plaintiff, Vogt alleges that the challenged law violates due process by depriving him of his ability to pursue his chosen occupation solely to protect existing moving companies from competition. If he proves these allegations, he would be entitled to relief. *Merrifield*, 547 F.3d at 991 n.15; *St. Joseph Abbey v. Castille*, 700 F.3d at 161; *Craigmiles*, 312 F.3d at 229; *Bruner*, 997 F. Supp. 2d at 699. Accordingly, Vogt has pled facts sufficient to justify a plausible inference that his rights under the Due Process Clause are being violated, and Defendants' motion to dismiss on this cause of action should be denied. *Iqbal*, 556 U.S. at 664.

Similarly, Vogt properly alleged a claim under the Equal Protection Clause. Laws which discriminate among classes of entrepreneurs solely to protect established businesses from competition do not serve any legitimate state interest, and are therefore unconstitutional. *Merrifield*, 547 F.3d.at 991 n.15; *Craigmiles*, 312 F.3d at 229; *see also Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 882-83 (1985) (protectionism was not a legitimate state interest under the Equal Protection Clause and could not justify discriminatory tax).

Here, Vogt alleges that the Competitor's Veto licensing procedure arbitrarily discriminates against Certificate applicants by giving existing businesses a special privilege to protest their would-be competitors. The Certificate law operates to discriminate against new businesses by forcing them to go through an expensive, burdensome, and anti-competitive licensing process. Compl. ¶¶ 90-97. This difference in treatment lacks any rational connection to protecting public health and safety, and exists solely to favor incumbent moving companies. *Id.* If Vogt proves these allegations, he would be entitled to relief. Therefore, Defendants' motion to dismiss on these grounds should be denied.

IV

VOGT'S CLAIMS ARE RIPE AND DEFENDANTS' EXHAUSTION ARGUMENTS FAIL

The Commission argues that this Court lacks "subject matter jurisdiction, in that there is no existing case or controversy since Vogt has not exhausted administrative remedies." MTD at 18. Whether Defendants' argument sounds in administrative exhaustion or ripeness, it is without merit.

A controversy is ripe for adjudication when a plaintiff can "demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). In 2012, the Commission sent Vogt a cease-and-desist letter requiring him to abandon any and all intrastate moving business in West Virginia or suffer penalties for violating the Certificate law (which include fines and jail time). Compl. ¶ 44. This establishes the case and controversy that gives rise to the present action. Vogt alleges that he would like to offer moving services in West Virginia in the future, but is unwilling to do so on pain of violating the unconstitutional Certificate law. *Id.* ¶¶ 65-68. He therefore brought suit under Section 1983 to prevent Defendants from applying the challenged licensing laws against him in the future. *Id.* ¶ 6. The cease-and-desist letter establishes with certainty that the Commission will punish Vogt if he begins providing intrastate moving services in West Virginia without a Certificate. A favorable decision will redress his injuries because, if successful, he will no longer have to submit to an unconstitutional licensing procedure. *See Bruner*, 997 F. Supp. 2d at 696-97 ("A favorable decision by this Court would redress the injury" because "the unconstitutional obstacle would be removed from their path to operat[ing]."). Vogt's challenge is therefore ripe for adjudication.

In *Wooley v. Maynard*, 430 U.S. 705, 706-08 (1977), the plaintiffs covered up the language on their New Hampshire license plates that read "live free or die." They were cited and fined under a law that made it illegal to knowingly obscure a license plate. *Id.* Instead of submitting to the state

procedures for contesting the citations, they filed a Section 1983 action in federal court seeking injunctive and declaratory relief against future enforcement of the unconstitutional law. *Id.* at 710. Like the plaintiffs in *Wooley*, Vogt has had the challenged statutes enforced against him in the past, and he seeks to prevent Defendants from punishing him in the future. He may therefore bring this Section 1983 action for prospective relief to enjoin Defendants from applying the Competitor's Veto against him. *Cf. Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (Section 1983 suit ripe where plaintiff had merely been threatened with enforcement of the challenged statute).

Further, the Supreme Court has stated "categorically that [administrative] exhaustion is not a prerequisite to an action under § 1983." *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. at 501. It has "uniformly held that individuals seeking relief under 42 U.S.C. § 1983 need not present their federal constitutional claims in state court before coming to a federal forum." *Zablocki v. Redhail*, 434 U.S. 374, 379 n.5 (1978); *Moore v. City of Asheville*, 396 F.3d 385, 396 (4th Cir. 2005) (a plaintiff may bring a "*wholly prospective* federal action even if the plaintiff failed to exhaust" state remedies); *Moore v. Bonner*, 695 F.2d 799, 801 (4th Cir. 1982) ("The choice of whether to proceed in a state or federal forum . . . necessarily belongs to the plaintiffs . . . .").

Finally, the Commission asserts that Vogt "should be required to file a certificate application with the Commission" as a prerequisite to the present action. MTD at 19. This is not the law, for the reasons indicated and according to the precedent cited above, but it also ignores a fact that the Commission does or should know: Plaintiffs *have* previously applied for a Certificate and have been denied for just the unconstitutional reasons alleged in his Complaint.[44] Vogt is not asking this Court

[4] The Commission's Order denying Lloyd's Moving & Storage a certificate on the basis that he would take away business from the existing certificate holders is a public record, and is available at: http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=376220.

to review the validity of the prior order of the Commission, but to provide the wholly prospective declaratory and injunctive relief that all civil-rights plaintiffs are entitled to seek.

V

DEFENDANT INGRID FERRELL IS A PROPER PARTY

Pursuant to the Supreme Court's ruling in *Ex parte Young*, 209 U.S. at 157, any state officer who has "*some connection* with the enforcement of the [challenged] act" may be sued in his or her official capacity for prospective injunctive relief under Section 1983 (emphasis added); *S. Carolina Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 332 (4th Cir. 2008) (same). This includes clerks and other officials who participate in processing applications. *McGee v. Cole*, 115 F. Supp. 3d 765, 773 (S.D. W. Va. 2015). Ingrid Ferrell meets this standard.

Vogt alleges that Ms. Ferrell, in her official capacities, takes part in the administration of the challenged hearing procedures and participates in the granting of licences. Compl. ¶ 14. Defendants point out that her duties are defined by W. Va. Code § 24-1-4. According to that statute, Ms. Ferrell's duties include "keep[ing] a full and true record of all proceedings, acts, orders and judgments of the commission," "issu[ing] all necessary process, returns and notices," "keep[ing] all books, maps, documents and papers ordered filed by the commission, and all orders made by the commission or approved and confirmed by it and ordered to be filed." She therefore attends and participates in meetings where decisions about Certificate applications are made. A cursory examination of the Commission's website reveals that Ms. Ferrell signs various orders related to the Certificate process.[5] Indeed, the Commission's previous executive secretary signed an Order issued during Vogt's application process.[6] This connection to the administration of the challenged statutes

[5] http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=455147

[6] http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=357321

and procedures is sufficient to render her a proper party in this case. Defendants have provided no argument, aside from conclusory claims, negating Vogt's claim that Ms. Ferrell is involved in the administration of the challenged process. Accordingly, Defendants' motion to dismiss Ms. Ferrell as a defendant should be denied.

VI

VOGT'S PRIVILEGES OR IMMUNITIES CLAIM IS PROPERLY DISMISSED

Finally, the Commission argues that Vogt fails to state a claim for the violation of his privileges or immunities. Defendants base this argument on *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). Vogt acknowledges that this claim is barred by precedent, which compels dismissal of this cause of action. Vogt asserts it solely to preserve it for appellate review.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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