03-16-00786-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

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TEXAS ALCOHOLIC BEVERAGE COMMISSION AND SHERRY COOK,
IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR
OF THE TEXAS ALCOHOLIC BEVERAGE COMMISSION,

Appellants,

v.

LIVE OAK BREWING CO., LLC; REVOLVER BREWING, LLC;
AND PETICOLAS BREWING CO., LLC,

Appellees.

On Appeal from the 98th District Court, Travis County

APPELLEES' RESPONSE BRIEF

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ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Appellees ask the Court to affirm the ruling below declaring Texas Alcoholic Beverage Code § 102.75(a)(7) unconstitutional under Article I, Section 19 of the Texas Constitution. The court below correctly ruled that the statute—a 2013 law that prohibits brewers in Texas from selling the distribution rights for the beer they produce—violates Article I, Section 19's substantive due course of law protections.

Appellees request oral argument to assist the Court in reaching its decision, which will involve: applying the standard of review for substantive due course of law challenges to economic regulations under Article I, Section 19, as pronounced in *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69 (2015); reviewing the record concerning the history and the government's justifications for Texas Alcoholic Beverage Code § 102.75(a)(7); and ruling on the statute's constitutionality.

TO THE HONORABLE THIRD COURT OF APPEALS:

INTRODUCTION

For over eighty years, brewers in Texas were free to sell to distributors the right to distribute their beer in a given territory, sometimes earning hundreds of thousands of dollars doing so. Then, in 2013, the beer distributors persuaded the Texas Legislature to enact Texas Alcoholic Beverage Code § 102.75(a)(7) ("Sale Prohibition"), which forces brewers to surrender those valuable rights to distributors for free. At summary judgment, on a full record, the trial court declared the Sale Prohibition unconstitutional under the substantive due course of law protections of Article I, Section 19 of the Texas Constitution. This Court should affirm.

This case is governed by the Texas Supreme Court's recent decision in *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69 (2015), which requires that regulations such as the Sale Prohibition be subject to meaningful scrutiny, and under which naked transfers of wealth from one group to another, more politically powerful group, will not be sustained.

Appellants ("TABC") offer three arguments in an attempt to escape this scrutiny: that *Patel* only applies in cases involving individuals but not businesses; that *Patel* does not apply to facial claims; and that the standard

of review pronounced in *Patel* is essentially a rubber stamp under which facts are irrelevant. But none of these arguments can be squared with *Patel*'s text, the role evidence plays in the required inquiry, and the record in this case.

Applying *Patel* correctly, there are three independent grounds for affirming the decision below. First, the Sale Prohibition is not supported by a legitimate government interest. Second, the evidence shows that when considered as a whole, the Sale Prohibition's actual, real-world effect is not logically connected to a legitimate government interest. Third, the evidence also shows that the Sale Prohibition's effect is so unreasonably burdensome while providing no public benefits that it is unconstitionally oppressive.

STATEMENT OF FACTS

The statement of facts contained in the TABC's opening brief leaves out many facts that support the trial court's conclusion that the Sale Prohibition violates Article I, Section 19 of the Texas Constitution. In particular, their facts are incomplete with respect to four things: First, brewers are dependent on distributors to get their beer to market. Second, distribution rights are highly valuable; Appellees were paid hundreds of thousands of dollars for their distribution rights prior to the Sale Prohibition. Third, brewers were stripped of the ability to sell their distribution rights in

2013 at the behest of the distributors, who drafted and proposed the Sale Prohibition. Fourth, there is no evidence that stripping brewers of the ability to sell their distribution rights promotes any goal of the three-tier system. This record evidence is detailed below.

I. Brewers Are Dependent on Beer Distributors to Get Their Beer to Market.

The TABC's statement of facts admits that brewers "must sell their beer through distributors." Brief for Appellants ("TABC Br.") 5–6; *see also* Tex. Alco. Bev. Code §§ 6.03(i), 102.01. But it fails to explain *how* brewers are dependent—as a matter of law—on distributors in order to get their product to market.[1] What the TABC omits in its statement of facts is important because it illustrates how the laws in existence *prior to* the Sale Prohibition already addressed the alleged risk of vertical integration, or control, between distributors and brewers.

Under the three-tier system, brewers must contractually assign distributors an exclusive, near-perpetual right to distribute a particular brand within a given geographic territory. Tex. Alco. Bev. Code §§ 102.21, 102.51. A territory is typically the size of a city or county but can be as

[1] For all brewers, every barrel beyond the first 40,000 barrels must be distributed by an independent beer distributor. *See* Tex. Alco. Bev. Code §§ 12A.02(a), (b); 62A.02(a). Once a brewery starts brewing 125,000 barrels per year, it must use distributors to distribute all of its beer, period. *See* Tex. Alco. Bev. Code §§ 12A.02(a), (b); 62A.02(a).

small as a single address. CR.243 (66:15–25); *see also* Tex. Alco. Bev. Code Ann. § 102.51(a). Within that territory, distributors are the middle man between brewers and retailers.

A distributor's right to a given territory must be exclusive and is, effectively, perpetual. Once distribution rights are assigned, brewers have no say in who will retail their beer in a particular city or county and may not interfere with whatever business practices the distributor chooses to follow, including the distributor's right to set the sales price. Tex. Alco. Bev. Code § 102.72(a)(1) ("[T]he beer distributor is free to manage its business enterprise . . . ."). Brewers are legally prohibited from allowing multiple distributors to operate in the same territory. *Id.* § 102.51(b). Maintenance of distribution rights is at the discretion of the distributor; the original distributor may keep distributing a brand of beer for a long time, *id.* § 102.74, or it may sell those rights to a different distributor, *id.* § 102.52. Even a brewer's change in ownership does not affect the distribution rights for that beer. *Id.* § 102.21. The TABC is responsible for the monitoring of distribution-right agreements. *Id.* §§ 102.51(b), 102.54(a)–(c).

Under Texas law, so long as a distributor fulfills its minimum duties to a given brewer, there is almost nothing a brewer can do to re-acquire or re-assign its rights after the initial assignment is made. *Id.* §§ 102.73(a)–(c),

102.74, 102.77(b). Rights can be returned to a brewer only if the distributor agrees to sell them back or if a distributor wholly fails to distribute that brand's beer. CR.170 (52:1–24); Tex. Alco. Bev. Code §§ 102.73(a)–(c), 102.74. In practice, this almost never happens, and distribution rights are perpetual as a practical matter, CR.170 (52:1–24), even upon the death of the distributor, Tex. Alco. Bev. Code § 102.76(b). Distributors thus acquire portfolios of various brands of beer, for which they are the exclusive and perpetual middle man in a given territory. *Id.* 102.51(a)–(b).

II. Brewers' Distribution Rights Are Highly Valuable.

TABC's statement also fails to discuss that the right to distribute a brewer's beer is highly valuable, in some cases worth hundreds of thousands of dollars. The evidence in the record on this point is important because it establishes the scope of the burden that the Sale Prohibition places on craft brewers like Appellees.

Appellees Live Oak Brewing Co., LLC ("Live Oak") and Peticolas Brewing Co., LLC ("Peticolas") negotiated for the sale of their distribution rights prior to the Sale Prohibition. Live Oak sold its Houston rights for $250,000 in 2012, prior to the law being passed. CR.166 (35:20–37:16); CR.176 (75:9–18). Peticolas was in the middle of negotiations for some of its distribution rights in 2013, while the law was being considered by the

Legislature. CR.137 (75:8–76:1, 76:17–78:15). It appeared probable that Peticolas would sell its distribution rights for at least $300,000. CR.146 (113:6–116:6). Once the Sale Prohibition was passed by the Legislature those negotiations ended.

Indeed, the fact that distribution rights are valuable is reflected elsewhere in the TABC's regulatory scheme. Under Section 102.77 of the Texas Alcoholic Beverage Code ("Code"), if a brewer cancels, terminates, or fails to renew a distribution agreement with a distributor, without good cause, that brewer "shall pay such distributor . . . the fair market value of the distributor's business with relation to the affected brand or brands." In other words, the Code itself not only recognizes that distribution rights have value, but mandates a cross-tier payment for the fair market value of those rights—from brewers *to* distributors—if a brewer ends the agreement.

The sale of distribution rights allows brewers to identify distributors who recognize the value of their brand in the market. CR.253–54 (¶ 3, 5). This is important because, as explained above, *see supra* at 4–5, brewers have no control over distributors under the three-tier system. Brewers may not increase market competition for their beer by allowing a second distributor to distribute in the same territory as the first. Tex. Alco. Bev. Code § 102.51(b). Instead, a brewer relies upon distributors to set costs and

assess market demand and placement of a brand. CR.254 (¶¶ 4, 5). A brewer needs to be able to identify, up front, a distributor who is interested in successfully marketing that brewer's beer. CR.253–54 (¶¶ 3, 4, 5). Payment for distribution rights has traditionally been an important way to do that. *See*, *e.g.*, CR.253 (¶ 3).

Selling distribution rights is also important to brewers because it provides them with needed capital to independently invest in, and grow, their own businesses. CR.176 (75:16–76:4); CR.253–54 (¶¶ 3, 6). Without the ability to convert distribution rights into investment capital, brewers' ability to expand is diminished. CR.254 (¶ 6). Live Oak, for example, used the $250,000 received in 2012 for the sale of its Houston rights to expand its business and purchase additional equipment. CR.176 (75:16–20).

III. Brewers Were Stripped of the Ability to Sell Their Distribution Rights in 2013 at the Behest of Distributors.

The practice of selling distribution rights came to an abrupt end in 2013 with the passage of Senate Bill 639 during the 83rd Texas Legislature. *See* CR.256–60. The TABC states that Senate Bill 639, now codified at Texas Alcoholic Beverage Code § 102.75(a)(7), the Sale Prohibition, "prohibited brewers from accepting payment" in exchange for an agreement setting forth territorial rights. TABC Br. 12. This is true; but it omits

entirely the role that distributors—who stood to benefit financially—played in its passage.

The record shows that the Sale Prohibition was written by the Wholesale Beer Distributors of Texas ("WBDT"), the distributors' lobbying arm, and introduced at their behest by former Senator John Carona, then chair of the Senate Business and Commerce Committee. CR.469. Senator Carona asked the WBDT "what they would want (even if it was not related) in the bill to be okay with [a separate package of proposed craft brewing reforms]." *Id.* In response, the WBDT gave Chairman Carona bill language that addressed "paying for exclusive territory agreements." *Id.*

The WBDT is the only group listed in Senate Bill 639's legislative history as supporting the Sale Prohibition. CR.475–76. The bill was uniformly opposed by brewers, and it received no support from consumer groups, nor any support from any temperance organizations. *Id.* Nevertheless, it passed and became effective on June 14, 2013.

The history of the Sale Prohibition matters because it supports Appellees' contention that the purpose of the law is to enrich distributors at the expense of brewers, and not to protect the public. The TABC admitted in an entity deposition that it has no knowledge of the legislature ever having studied whether the sale of distribution rights was a problem. CR.300

(86:14–87:16). And the record is entirely devoid of any signs pointing to the existence of such a study. Nor does the record contain evidence that the sale of distribution rights leads to consumer harm, any harms related to temperance or the overconsumption of alcohol, or any harm to the three-tier system. Indeed, there is no evidence that anybody—including the TABC—thought that the sale of distribution rights by brewers was a problem before the distributors wrote legislation banning the practice. *See, e.g.*, CR.334 ("[D]istributors paying manufacturers for territorial agreements . . . is just like other terms and conditions in the agreement, and the TABC does not get involved.").

Due to the Sale Prohibition, brewers now have only one option: give away distribution rights for free. Distributors, on the other hand, face no such restrictions. Tex. Alco. Bev. Code § 102.52. A distributor can obtain distribution rights from a brewer for free and re-sell them the same day to another distributor for millions of dollars. *Id.* §§ 102.52, 102.75(c), 102.76, 102.77, 102.55(c). As noted in Part II, *supra*, if a brewer terminates a distribution agreement without good cause, that brewer is statutorily required to *pay the distributor* the fair market value of the affected distribution rights. *Id.* § 102.77. Therefore, it is not that distribution rights can never be sold, or even that payment for the value of those rights cannot

be made across tiers, it is just that the financial beneficiary of such a transaction must always be a distributor, and never a brewer.

IV. There Is No Evidence That Stripping Brewers of the Ability to Sell Their Distribution Rights Promotes Any Goal of the Three-Tier System.

There is no evidence in the record that the Sale Prohibition promotes any goal of the three-tier system. This lack of evidence matters because it creates a void in the record where we would not otherwise expect to see one. Although the TABC repeatedly asserted during discovery that selling distribution rights threatens the three-tier system because it "weakens the walls" between the tiers in some unspecified manner,[2] and claims in its opening brief that the Sale Prohibition is "protecting the vitality" of the three-tier system, TABC Br. 20, the TABC came forward with nothing to explain or support the need to prevent brewers from negotiating for the value of their distribution rights. The TABC's statement of facts reflects this glaring omission; it cites not a shred of evidence in support of its theory that the Sale Prohibition promotes the three-tier system in any way. *See id.* 2–13. This glaring hole in the record is one the trial court rightly took notice of

[2] For example, the TABC stated that "[w]hile [selling distribution rights] would not destroy the whole three-tier system, each newly created cross-tier relationship weakens the walls between the tiers." CR.314 (145:11–17); *see also* CR.328.

in declaring the Sale Prohibition unconstitutional under Article I, Section 19. *See* CR.576–78.

The record does reflect, however, that *prior to* the Sale Prohibition the TABC did not view the sale of distribution rights as a risk to the three-tier system. *See* CR.334. Internal communications by TABC officials during the 2013 legislative session reflect that it viewed the "payment for distribution rights like all other terms and conditions of the [distribution] agreement"; that such "terms and conditions" fell under Tex. Alco. Bev. Code § 102.72 (citing the purpose of Texas's Beer Industry Fair Dealing Law of "promot[ing] the public's interest in the fair, efficient, and competitive distribution of beer . . . ."); and therefore the "TABC has never been involved with the 'terms and conditions' of these types of agreements." CR.335. In justifying its position, the TABC stated it was "not aware of any complaints" due to a brewer selling their distribution rights; indeed, the TABC cited no concerns about the sale of distribution rights "weaken[ing] the walls" between the tiers, undermining the vitality of the three-tier system, or any other concern. *Id.*; CR.314 (145:11–17); CR.328.

There is also no evidence in the record that the Sale Prohibition does anything to promote the classic purpose of the three-tier system: reducing the overconsumption of alcohol, or any of its attendant social ills, like

joblessness, drunk driving, and domestic violence. This is important because the TABC originally defended the Sale Prohibition by claiming it served the public health, safety, and welfare by reducing the overconsumption of alcohol, and thereby reducing the associated problems of joblessness, "domestic violence," and "inebriated drivers." CR.327–28. When asked numerous times, in interrogatories and depositions, to identify any evidence supporting its contentions, the TABC never identified any evidence that the Sale Prohibition furthers the government interest of preventing overconsumption.[3]

It is not surprising, therefore, that the TABC ultimately abandoned its claims that the Sale Prohibition reduces the overconsumption of alcohol. At deposition, the TABC's executive director (TABC's entity deponent) acknowledged that the sale of distribution rights and problems associated with the overconsumption of alcohol are not actually linked in any way. CR.316 (150:21–151:15) ("[I]t's not the sale of the territorial agreement that ultimately leads to that harm."). In its briefing in the trial court, the TABC conceded this point, writing that "TABC did not assert … that section

[3] *See* CR.283 (18:2–19:8); CR.284 (24:23–25:4); CR.292 (57:2–24); CR.294 (63:10–65:5); CR.298 (80:15–81:11); CR.299 (82:6–83:25); CR.306 (110:5–111:12; 111:22–112:17), CR.307 (114:13–115:7, 116:1–117:11); CR.308–09 (121:19–123:3); CR.310 (126:20–25); CR.313–14 (140:15–142:10); CR.314–15 (144:17–149:11); CR.316 (150:6–151:15); *see also* CR.327–28 (Interrog. No. 4).

102.75(a)(7) was intended, by itself, to reduce the overconsumption of alcohol." CR.390. Finally on appeal in this Court, the TABC has completely abandoned justifying the Sale Prohibition as a means to reduce overconsumption. *See* TABC Br. 1–33.[4]

[4] Aside from a single sentence asserting that reducing overconsumption is a legitimate government interest, *see* TABC Br. 21, the TABC does not discuss nor argue that the Sale Prohibition reduces overconsumption.

SUMMARY OF THE ARGUMENT

The Court should affirm the trial court on the three issues presented in the TABC's appeal and find that the Sale Prohibition violates Article 1, Section 19 of the Texas Constitution.

As explained in Part I, this case is governed by the Texas Supreme Court's recent decision in *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69 (2015), and the TABC's attempts to escape the meaningful scrutiny called for by that decision all fail. There is no support for the TABC's arguments that the standard of review established in *Patel* does not apply to businesses (Part I-A), or to facial claims (Part I-B). Nor is the TABC's reading of the *Patel* test, which essentially renders that test a rubber stamp, consistent with that decision. *See* Part I-C.

As explained in Part II, *Patel* provides three independent bases for affirming the decision below. The Sale Prohibition violates Article I, Section 19's substantive due course of law protections because it is not supported by a legitimate government interest. *See* Part II.A. The evidence shows that there is no logical connection between the Sale Prohibition's actual, real-world effect and a legitimate government interest. *See* Part II.B. The record also makes clear that the Sale Prohibition is so burdensome (while providing the public no benefit) that it is unconstitutionally

oppressive. *See* Part II.C. For these reasons, Appellees prevail under *Patel* and this Court should affirm the ruling below.

ARGUMENT

I. The Standard of Review Established in *Patel* Controls This Case.

Patel controls this case. The test pronounced in *Patel* governs any "challenge to an economic regulation statute under Section 19's substantive due course of law requirement[.]" 469 S.W.3d at 87. Appellees raised such a challenge to an economic regulation—the Sale Prohibition—and invoked Article I, Section 19's substantive due course of law provisions.[5] CR.32–52. The TABC attempts to escape the scrutiny called for in *Patel* in three ways: (1) claiming that the standard of review established in *Patel* does not apply to businesses asserting their rights under Article I, Section 19 of the Texas Constitution; (2) claiming that Appellees raised only facial claims and that *Patel* does not apply to such claims; and (3) mischaracterizing the *Patel* test and the required inquiry to render that test toothless. TABC Br. 15–27. None of these arguments has merit.

[5] In the trial court, the TABC conceded at oral argument that *Patel* "is, in fact, controlling[.]" CR.636–37 (37:23–38:2).

A. The TABC's Argument That Businesses Aren't Protected by *Patel* Ignores That Businesses Have Invoked Their Rights Under Article I, Section 19 of the Texas Constitution for Decades.

Article I, Section 19 of the Texas Constitution protects the rights of both individuals and businesses to operate free from unreasonable government interference. For decades, Texas courts have enforced the substantive due course of law protections of Article I, Section 19 of the Texas Constitution when such claims are raised by businesses.[6] There is not so much as a suggestion from the Texas Supreme Court that Article I, Section 19's constitutional safeguards disappear when individuals organize as business entities. Yet the TABC's opening argument is that the substantive due course of law protections of Article 1, Section 19 do not apply to businesses, *see* TABC Br. 15–16, a contention that requires ignoring over a century of precedent involving Texas courts doing the very opposite.

[6] *See, e.g., City of San Antonio v. TPLP Office Park Props., L.P.*, 218 S.W.3d 60 (Tex. 2007); *Trinity River Auth. v. URS Consultants*, 889 S.W.2d 259 (Tex. 1994); *Tex. Power & Light Co. v. City of Garland*, 431 S.W.2d 511 (Tex. 1968); *Houston & Tex. Cent. Ry. Co. v. City of Dallas*, 84 S.W. 648 (Tex. 1905); *Tex. State Bd. of Pharmacy v. Gibson's Disc. Ctr., Inc.*, 541 S.W.2d 884 (Tex.Civ.App.—Austin 1976, writ ref'd n.r.e.); *City of Houston v. Johnny Frank's Auto Parts Co.*, 480 S.W.2d 774 (Tex.Civ.App.—Houston [14th Dist.] 1972 ref'd n.r.e.); *Humble Oil & Refining Co. v. City of Georgetown*, 428 S.W.2d 405 (Tex.Civ.App.—Austin 1968, no writ); *accord City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982); *Aladdin's Castle, Inc. v. City of Mesquite*, 713 F.2d 137, 138 n.2 (5th Cir. 1983) (applying Texas law).

This can be seen clearly from *Patel* itself. In that case, the Texas Supreme Court pronounced the standard of review courts must apply in substantive due course of law challenges to economic regulations under Article I, Section 19. 469 S.W.3d. at 87. After addressing the different lines of substantive due course of law cases that had emerged over the past eighty years, the Court cites cases involving businesses to clarify the proper standard of review. *See, e.g., id.* at 87 (citing *Trinity River Authority v. URS Consultants*, 889 S.W.2d 259, 263–64 (Tex. 1994); *Houston & Tex. Cent. Ry. v. City of Dallas*, 84 S.W. 648, 653 (Tex. 1905)). The TABC's claim that the *Patel* test does not apply when such claims are brought by businesses cannot be squared with the very jurisprudence the *Patel* test is based on.

For its part, the TABC does not cite a single case interpreting the Texas Constitution to support this novel proposition. Instead, it relies exclusively on cases, some more than a century old, addressing the question of whether corporations have liberty interests that are safeguarded by the Fourteenth Amendment to the U.S. Constitution. *See* TABC Br. 15–16.[7] And even if these cases were relevant to the claim before this Court, the

[7] The TABC relies on *NW. Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906); *W. Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 527 (1939). Its brief also cites dicta in *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1129–30 (7th Cir. 1995), for the same proposition.

TABC's argument is without merit because it ignores the U.S. Supreme Court's more recent decisions suggesting that these earlier holdings are no longer viable. *See Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936); *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 780 n.16 (1978).

In short, businesses have invoked the substantive due course of law protections of Article I, Section 19 for decades. The standard of review articulated by the Texas Supreme Court in *Patel* reflects the same and governs this case.

B. The TABC's Argument That *Patel* Does Not Apply to Facial Claims Is Both Wrong and Irrelevant, as Appellees Brought Both Facial and As-Applied Claims.

The TABC next argues that this Court should ignore *Patel* because it does not apply to facial claims. TABC Br. 17–18. But, although *Patel* was decided on an as-applied basis, the decision does not even hint at one standard of review for facial challenges and a separate one for as-applied challenges under Article I, Section 19. *See, e.g.*, 469 S.W.3d at 86–87.

In any event, the record makes clear that Appellees brought both kinds of claims: as-applied *and* facial. CR.49–51. Their claims are facial in the sense that Appellees requested relief from the Sale Prohibition for *everyone* who brews craft beer; and they are as-applied in the sense that, failing facial relief, Appellees sought as-applied relief for *themselves* based on their

unique factual circumstances, namely as brewers who could sell distribution rights—today—if they were legally allowed to do so. CR.50 ("Defendants are presently and unconstitutionally requiring Plaintiffs to give away their territorial rights to distributors as a condition of transferring those rights."). The Petition also claims that "Defendants have violated the due process guarantee of the Texas Constitution by enforcing the Sale Restriction, *which prohibits Plaintiffs* from negotiating for the sale of their territorial rights." *Id.* (emphasis added).[8]

Finally, even if the TABC were correct that Appellees brought only a facial challenge, that distinction would not be a basis for this Court to reverse the ruling below. As the U.S. Supreme Court has made clear, the facial/as-applied distinction only matters as to the scope of the remedy, and not whether a constitutional claim is valid or not:

> The distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, *not what must be pleaded in a complaint*.

Citizens United v. FEC, 558 U.S. 310, 331 (2010) (emphasis added).

[8] The prayer for relief in Appellees' First Amended Petition also asks for "a declaratory judgment that Defendants violate the due process guarantee of the Texas Constitution by unreasonably interfering *with Plaintiffs' right* to operate *their* businesses and contract freely on the open market." CR.51 (emphasis added).

Appellees alleged that the law is unconstitutional because it prevents them from selling their distribution rights, and, as discussed below, the record reflects that the law does so without serving any corresponding public purpose. That is sufficient to bring it within the scope of *Patel*.

C. The TABC Mischaracterizes the *Patel* Standard.

Finally, unable to distinguish *Patel*, the TABC argues that *Patel* requires the Sale Prohibition be upheld if the government articulates any "conceivable state of facts that could provide a rational basis" for that prohibition, and characterizes the test as an "exceedingly deferential" form of review. TABC Br. 23 (citations omitted). But the TABC is wrong, and the standard of review it argues for squarely conflicts with the text of the *Patel* majority opinion. Indeed, the TABC's argument most resembles that made by the three dissenting justices in *Patel*, and was expressly rejected by the majority, which characterized the standard of review the TABC calls for as "for all practical purposes no standard" at all. 469 S.W.3d at 91.

The history leading up to *Patel* makes clear why the TABC's interpretation of that decision is wrong. *Patel* resolved an open question concerning the proper standard of review under the due course of law

protections in Article I, Section 19.[9] Specifically, since the enactment of that provision, three lines of cases had emerged—each applying a different standard of review under the due course of law protections in Article I, Section 19. *Id.* at 80–82.

The first line of cases applied the "real and substantial test." *Id.* at 80–81. Courts applying this standard not only looked for a real and substantial connection between a law's legislative purpose and how it functions in practice, but also an accompanying consideration of whether the law works "an excessive or undue burden" in light of the government's interest. *Id.* at 80. The distinguishing characteristic of cases applying this standard of review involved "consider[ing] evidence concerning both the government's purpose for a law and the law's real-world impact on the challenging party." *Id.*

The second line of cases that emerged pre-*Patel* consisted of rational-basis review *with* the consideration of evidence. *Id.* at 81–82. Courts applying this test applied rational-basis review but weighed evidence "to determine the purpose of the law and whether the law enacted to effect that purpose is reasonable." *Id.* at 82.

[9] The Texas Supreme Court acknowledged "that Texas courts [had] not been entirely consistent in the standard of review applied when economic legislation [was] challenged under Section 19's substantive due course of law protections." *Id.* at 80; *see also id.* at 86.

Finally, the third line of cases involved courts applying rational-basis review *without* considering evidence. *Id.* Under this most deferential version of rational-basis review, challenged laws survived if they had "any conceivable justification . . . regardless of whether the justification is advanced by the government" or merely invented, and evidence played no meaningful role. *Id.*

The standard of review pronounced in *Patel* incorporates elements from the first two lines of cases, but not the third. *Patel* not only clarified the correct standard but also made clear that reviewing courts must "consider the entire record, including evidence offered by the parties." *Id.* at 87. First, courts must determine whether a statute's purpose is "rationally related to a legitimate governmental interest[.]" *Id.* at 87. Second, if it is, courts must next determine whether, if "considered as a whole, [a] statute's actual, real-world effect . . . could not arguably be rationally related to . . . the governmental interest." *Id.* Third, even if the evidence shows that an actual, real-world connection between means and ends exists, the *Patel* test also contains a burden inquiry: Courts must determine whether, "when considered as a whole, the statute's actual, real-world effect . . . is so burdensome as to be oppressive in light of, the governmental interest." *Id.*

The Texas Supreme Court also made clear that this standard "necessarily constrain[s]" judicial deference. *Id.* at 91.

In its brief, however, the TABC interprets *Patel* as having adopted the no-evidence version of rational-basis review and argues that the Sale Prohibition may be upheld "if there is any reasonably conceivable state of facts" giving rise to a rational basis, TABC Br. 23 (citations omitted)[10], and that it can rely on "rational speculation *unsupported by evidence*" to defend the Sale Prohibition. *See* TABC Br. 26 (citing *Lens Express, Inc. v. Ewald*, 907 S.W.2d 64, 69 (Tex. App.—Austin 1995, no writ)) (emphasis added). But this argument finds no basis in the text of the *Patel* decision. The Texas Supreme Court did not use "conceivable" language when pronouncing the *Patel* test. Significantly, in describing the test, the Court omitted the word "conceivable" even though it referenced it when describing the third line of cases that had emerged pre-*Patel*. *Compare Patel*, 469 S.W.3d at 81 (describing the "no-evidence version of the rational basis test") *with id.* at 87 (describing the *Patel* standard of review). And the TABC's argument

[10] The TABC invokes a series of federal cases applying rational-basis review (and pre-*Patel* Texas cases that apply federal rational-basis review), to defend the Sale Prohibition using "conceivable" justifications and facts found nowhere in the record. *See* TABC Br. 23–24 (citing *FCC v. Beach Commc'ns, Inc.* 508 U.S. 307 (1993); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955); *Mauldin v. Tex. State Bd. of Plumbing Exam'rs*, 94 S.W.3d 867 (Tex. App.—Austin 2002, no pet.) (applying federal rational-basis review)).

ignores *Patel*'s specific command that courts must consider evidence in resolving claims under Article I, Section 19. *Id.* at 87.

To the extent it resembles anything in the *Patel* decision, the standard of review TABC advocates looks most like the standard supported by the dissenting justices in *Patel*. *Id.* at 138 (Hecht, C.J., dissenting) ("[A] regulation is unconstitutional only if it lacks a rational relationship to a legitimate government interest."). But the majority in that decision made expressly clear that the standard of review it pronounced is a "different standard" than the "rational relationship" test called for by the dissent, which it criticized as "for all practical purposes no standard." *Id.* at 90–91.

In short, *Patel* demands meaningful judicial review, not the rubber-stamp review urged by the TABC. And, as discussed below, the Sale Prohibition cannot withstand that review.

II. The Sale Prohibition Fails Under Any of *Patel*'s Three Steps.

The Sale Prohibition is unconstitutional because it fails under *any* of the three steps of the test articulated in *Patel*. First, under *Patel*, courts must look at whether there is a rational connection between the law's purpose and a legitimate governmental interest, and no such connection is present here. *Id*. at 87. Second, if such a connection were present, this Court would then look at evidence in the record to determine whether the law actually

advances the government's alleged legitimate interest in the real world, and here there is no reason to believe it does. *Id.* Third, even if the record reflected a legitimate governmental interest were actually being advanced, the evidence shows that the Sales Prohibition nevertheless places an unconstitutionally oppressive burden on the Appellees. *Id*. Any one of these grounds is sufficient to affirm the ruling below.

A. The Sale Prohibition Fails Step One of *Patel* Because It Is Not Supported by a Legitimate Government Interest.

The first step of *Patel* asks whether the law's purpose is rationally connected to a legitimate government interest. 469 S.W.3d at 87. Here, there is no such connection for two reasons. First, the TABC's argument that the Sale Prohibition is legitimate because it "bolsters" the three-tier system is an attempt to end the inquiry before it even begins. The three-tier system of alcohol regulation is a means to an end, not an end in itself, and the TABC fails to identify what end the Sale Prohibition furthers. Second, the true purpose of the Sale Prohibition is to transfer wealth from brewers to distributors, which is not a legitimate purpose.

1. Regulating for its own sake is not a legitimate governmental interest.

The TABC's primary merits argument is that the Sale Prohibition is aimed at "bolstering" and "protecting the vitality of" the three-tier system.

See TABC Br. 20–21. But this argument confuses the government ends with the regulatory means chosen to achieve those ends. The three-tier system is not an end in itself. The question, in other words, is not whether the challenged regulation "bolsters" the three-tier system, but whether it does so in a way that advances a legitimate government interest. The TABC's brief identifies only one reason for the three-tier system: preventing the return of a pre-Prohibition scheme, the "tied house," in which *retailers* were controlled by beer manufacturers (either through ownership or under contract). TABC Br. 3. In other words, the government ends that the system generally seeks to address involve suppressing the evils of tied houses, namely the overconsumption of alcohol caused by beer manufacturers using their retail outlets to induce patrons into drinking too much. *Id.* at 3–4.[11]

But a statute cannot be constitutional simply because it is part of, and hence "bolsters," a larger regulatory scheme. Accepting the three-tier system as a legitimate end in itself would effectively make the system immune to judicial review. The government could add any law to the three-

[11] Notably, the TABC twice conceded in the trial court that there is no connection between the Sale Prohibition and overconsumption. These concessions are telling. First, TABC's executive director acknowledged, as designee for the entity, that the sale of distribution rights and problems associated with the overconsumption of alcohol are not actually linked in any way. *See* CR.316 (150:21–151:15) ("[I]t's not the sale of the territorial agreement that ultimately leads to that harm."). Second, at summary judgment, the TABC again conceded this point in its briefing, writing that the "TABC did not assert . . . that section 102.75(a)(7) was intended, by itself, to reduce the overconsumption of alcohol." CR.390.

tier system and assert that the law is, *ipso facto*, constitutional because it "bolsters" the system. If the TABC were right, then the plaintiffs would have lost in *Patel*. A regulation forcing eyebrow threaders to become licensed cosmetologists plainly "bolsters" cosmetology regulation by subjecting yet another activity to government supervision. Yet the question in *Patel* was not whether the government had "bolstered" cosmetology licensure by adding another regulation, but was instead whether that regulation advanced a legitimate government interest in health and safety. 469 S.W.3d at 88. Accordingly, the TABC must advance a legitimate governmental end for the Sale Prohibition, and cannot rely on a bald assertion that the Prohibition "bolsters" the three-tier system.

Conflating the government's ends with the means chosen to achieve those ends also conflicts with other elements of this Court's judicial review under *Patel*. Most notably, as discussed in Section II.B., below, step two of the *Patel* test asks whether the government's chosen policy advances its ends in a tangible, real-world way. If the government's ends are the prevention of tied houses and their attendant evils, this is a meaningful inquiry. This Court could examine whether there is any real-world connection between the sale of distribution rights from brewers to distributors and the problems associated with the tied house, which would reveal that the TABC has

provided no evidence that this is even theoretically possible, let alone that the sale of distribution rights caused real-world problems. But if the government's ends are simply the "bolstering" of its regulatory framework, this review ceases to be meaningful.

As support for its "bolstering" argument, the TABC cites a single case, *Neel v. Texas Liquor Control Board*, in which this Court upheld a law that prohibited cash purchases by liquor retailers who became delinquent in their credit accounts with a wholesaler. 259 S.W.2d 312 (Tex. Civ. App.—Austin, 1953). But whatever vitality this 64-year-old case has in the wake of the Texas Supreme Court's decision in *Patel*, it does not support the notion that the three-tier system exists for its own sake. Rather, *Neel* held that the challenged law "serve[d] as a deterrent to *retailers who might otherwise contemplate delinquency*," when wholesalers extended them credit terms, a situation that the Court noted was directly connected with a problem of the tied house. 259 S.W.2d at 316–17 (observing that "[o]ne of the most effective methods of obtaining and keeping [control of a liquor retailer] is through the extension or withdrawal of credit by the wholesaler"). In other words, *Neel* found a direct connection between the government's ends—preventing tied houses—and the means chosen to pursue those ends. *Id.*

The TABC may wish to avoid such an inquiry in this case, where, by contrast, there is no logical, real-world connection between the Sale Prohibition and any goal of the three-tier system, *see* Part II.B, but it cannot do so by identifying the three-tier system as an end in itself.

2. The Sale Prohibition is logically connected only to an illegitimate purpose—the enrichment of the distributors at the expense of brewers.

The Sale Prohibition is surgically tailored for one interest: Enriching distributors at the expense of brewers. The statute here is a classic case of politically connected industry insiders—the distributors' lobby—abusing the legislative process to get a private financial benefit with no benefit to the public. The law, in other words, is the proverbial naked transfer of wealth from brewers to distributors.[12] *Cf. St. Joseph Abbey v. Castille*, 712 F.3d 215, 223–23 (5th Cir. 2013) ("economic protectionism, that is favoritism," for its own sake, "is aptly described as a naked transfer of wealth."). The record shows that the Sale Prohibition—both its origin and its real-world effect—was custom-made to serve the illegitimate purpose of naked economic protectionism.

[12] *Cf.* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1732 (1984) (arguing that hostility to naked preferences is so engrained in our constitutional structure that it "serves as the most promising candidate for a unitary theory of the Constitution.").

First, the record points to private economic protectionism, and nothing more, as the underlying interest for the Sale Prohibition. The record shows that the law was written by the WBDT, the distributors' lobbying arm, and introduced at their behest by former Senator John Carona, then chair of the Senate Business and Commerce Committee. CR.265. The WBDT provided bill language to Senator Carona addressing "paying for exclusive territory agreements" in response to Senator Carona asking the WBDT "what they would want (even if it was not related) in the bill to be okay with [a separate package of proposed craft brewing reforms]." *Id.* At the same time, the record is devoid of any evidence that anybody—including the TABC—thought that the sale of distribution rights by brewers was a problem before the distributors wrote legislation banning the practice.[13]

Second, the real-world effect of the law consists of a naked transfer of wealth, with no public benefit whatsoever. Prior to the Sale Prohibition, Appellees were paid by distributors for their distribution rights (and were also negotiating for the sale of distribution rights). CR.132 (55:21–56:25); CR.137 (75:8–76:1); CR.146 (113:6–25); CR.166 (36:4–37:13); CR.176 (75:9–18). But after the Sale Prohibition became law, it became illegal for

[13] To the contrary, before the Sale Prohibition was passed the TABC considered the payment for distribution rights just like other permissible terms and conditions contained in distribution agreements. *See* CR.334–35.

brewers to sell their distribution rights, but not for distributors, Tex. Alco. Bev. Code § 102.52; distributors are now given those rights for free, *see id.* § 102.52; and distributors themselves may turn around and sell those rights as they so choose after obtaining them, *id.* §§ 102.52, 102.75(c), 102.76, 102.77, and 102.55(c). This transfers the value of distribution rights from brewers (who created the value) to distributors. It is difficult to imagine a more literal transfer of wealth than this one.

Such blatant economic protectionism cannot be a legitimate basis for a law under the Texas Constitution. "[U]nder the Texas Constitution, government may only pursue constitutionally permissible ends. Naked economic protectionism … is not one of them." *Patel*, 469 S.W.3d at 122 (Willet, J., concurring); *see also St. Joseph Abbey*, 712 F.3d at 222 ("[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose."). The government can pass laws that protect the public health, safety, and welfare. The government cannot pass laws that serve no purpose other than to transfer wealth from one party to another, solely for the latter's private financial benefit.

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This Court should affirm the ruling below because the Sale Prohibition fails the first step in *Patel*: There is no rational connection between the Sale Prohibition's purpose and a legitimate governmental interest. Instead, there is a rational connection—obvious to even a casual observer—to the illegitimate interest of economic protectionism.

B. The Sale Prohibition Fails Step Two of *Patel* Because No Evidence Shows an Actual, Real-World Connection Between It and Any Legitimate Governmental Interest.

Even if the TABC could articulate a connection between the law and some legitimate governmental interest, the second part of the *Patel* test instructs courts to look next at the evidence to determine whether that law actually has the "actual, real-world effect" of addressing the government's asserted interest. 469 S.W.3d at 87. This "determination will in most instances require the reviewing court to consider the entire record, including evidence offered by the parties." *Id*. In other words, even if the Court were convinced that the Sale Prohibition bore a connection to a legitimate public purpose, it would still be required to ask: Does evidence show that the law's actual, real-world effect actually advances that interest? The record in this case makes clear that the answer to that question is no.

There is no actual, real-world connection between "bolstering" the three-tier system (or preventing the vertical integration of brewers and

distributors) and the Sale Prohibition. The TABC's assertions that the Sale Prohibition advances these interests are not only unsupported by evidence in the record, *see* TABC Br. 21, but as discussed below, the record undermines the TABC's claims that a logical connection exists between means and ends.[14]

First, the TABC was unable to identify a single instance where the sale of distribution rights by a brewer to a distributor created any of the supposed problems associated with so-called "tied houses," despite the fact that this practice was perfectly legal for nearly 80 years following the end of prohibition.[15] It is undisputed that the TABC has received no complaints about the sale of distribution rights raising concerns about undue influence

[14] It is unsurprising that the TABC's brief ignores *Patel*'s requirement that courts examine the real-world effect of the law and the evidence in the record. The TABC defends the Sale Prohibition by offering conjecture about things that *might* happen, somewhere, if brewers and distributors went beyond the mere sale of distribution rights and actually obtained improper control over one another. For example, the TABC speculates such things as giving rise to a "perception" of integration, or a hypothetical "imbalance between the tiers" because brewers "might demand" large payments. *See* TABC Br. 24–26. But speculation, unsupported by evidence, does not suffice under the *Patel* standard.

[15] The TABC's executive director testified, as the entity designee, that in 2013 the sale of distribution rights suddenly posed a threat to the three-tier system as a whole. *Compare* CR.313 (140:15–141:4) (testifying that the Sale Prohibition is a "tied house provision") *with* CR.334–35 (In 2013, the TABC's "stance on distributors paying manufacturers for territorial agreements" was that "it is just like other terms and conditions in the agreement, and TABC does not get involved."). The TABC never did more than repeatedly assert that selling distribution rights "weakens the walls" between the tiers, and failed to identify any evidence that its naked assertion has any basis in reality. *See* CR.313–14 (141:13–142:10); CR.314 (145:11–22) ("[W]hile [selling distribution rights] would not destroy the whole three-tier system, each newly created cross-tier relationship weakens the walls between the tiers.").

between brewers and distributors. CR.335. During the 83R legislative session, the TABC referenced the absence of complaints, and considered the "payment for distribution rights like all other terms and conditions of the [distribution] agreement[.]" CR.335; *see also* CR.334 ("[D]istributors paying manufacturers for territorial agreements . . . is just like other terms and conditions in the agreement, and TABC does not get involved."). According to the TABC's own communications, such "terms and conditions" are consistent with the purpose of this state's Beer Industry Fair Dealing Law, namely to "promote the public's interest in the fair, efficient, and competitive distribution of beer . . . ." CR.335.

This is hardly surprising because, to the extent the TABC needs to police the exertion of undue influence or control between members of different tiers, it already had all the tools it needed long before the passage of the Sale Prohibition in 2013. For example, brewers, distributors, and retailers are prohibited from: (1) holding any kind of ownership interest in the "business or corporate stocks" of the member of another tier, Tex. Alco. Bev. Code § 102.01(c); (2) serving as an officer or employee of a member of a different tier, *id.* § 102.01(d); (3) owning or using the premises, fixtures, or equipment of a member of a different tier, *id.* § 102.01(e), (f); (4) providing credit or loans to a member of a different tier, *id.* § 102.01(g); (5) entering

into any kind of profit-sharing agreement with, or any agreement to repurchase the assets of, a member of a different tier, *id.* § 102.01(i); and (6) as a catchall, entering into a conspiracy or agreement to "control or manage, financially or administratively, directly or indirectly, in any form or degree, the business or interests of a permittee" of a different tier, *id.* § 102.01(h).

Second, the irrationality of the TABC's theory can be demonstrated by looking at the very arguments raised in their briefing in the trial court. Specifically, the TABC conceded that brewers and distributors can legally enter into relationships that *result in brewers being compensated for distribution rights* as long as that compensation takes some form other than money, such as an agreement by the distributor to aggressively promote a brewer's products. CR.390–97. It also admitted that the Sale Prohibition "does not prevent the Brewers from receiving value for their distribution rights[,]" but "merely prohibits brewers from accepting a particular variety of consideration for those rights[.]" CR.404. "Section 102.75(a)(7)," the TABC claimed, "prohibits a brewer from receiving *only one* type of consideration" for distribution rights—a lump sum payment. CR.399 (emphasis added).

To better understand how this lump-sum payment ban is irrational, consider two contracts: Under Contract A, a brewer and distributor agree

that the distributor will pay the brewer $250,000 for the right to distribute its beer in the Houston metro area. Under Contract B, a distributor agrees to give a brewer "more favorable terms"[16] such as by increasing its advertising budget,[17] expanding its fleet,[18] and building new warehouses[19] in exchange for being given the right to distribute beer in a particular territory. Both contracts were legal prior to the passage of the Sale Prohibition in 2013. Today, the Sale Prohibition makes Contract A illegal while Contract B remains—according to the TABC's trial court briefing—perfectly legal. This is irrational because there is no constitutionally meaningful difference between the two. Indeed, as between the two, a simple lump-sum payment actually seems *less* likely to result in vertical integration because it involves less extensive collaboration between the brewer and the distributor.

When a challenge identifies fundamental irrationalities in a proffered justification for a law, courts simply do not credit those rationales. *See, e.g.*, *Patel*, 469 S.W.3d at 91 ("judicial deference is necessarily constrained where constitutional protections are implicated").

The evidence in the record also undermines the existence of a logical connection between the Sale Prohibition's actual, real-world effect and

[16] CR.399–400.
[17] CR.391.
[18] CR.396.
[19] CR.391.

overconsumption. The TABC is not aware of any reports or studies indicating that the law was necessary to address the overconsumption of alcohol, and the legislative record is devoid of the same. CR.292 (57:2–6); CR.294 (63:9–13). The TABC could not point to "anecdotal evidence, stories, [or] anything [someone] could conceivably think of as being evidence" that might have made someone, somewhere at any point since the end of Prohibition think that preventing the sale of distribution rights could help reduce the overconsumption of alcohol. CR.306 (110:5–112:17). There is only one conclusion to be drawn: The government does not have and cannot point to any evidence showing that a brewer selling distribution rights causes a consumer to overconsume alcohol.

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This evidentiary void is not surprising, because claims that the Sale Prohibition prevents integration between the tiers or reduces the overconsumption of alcohol are *post hoc* justifications for a law the beer distributors wrote to do one thing: eliminate the need to pay for distribution rights. In truth, the actual, real-world effect of the sale of distribution rights is *not* harmful to anyone; rather, it is part of the ordinary course of business. Brewers sell their distribution rights for the same reasons that Coca-Cola assigns the right to distribute their soft drinks in a given territory, an author

sells the right to publish her book, or movie studios contract with a company to distribute their films to theaters. The creators have produced something of value. They want to distribute through distributors who are committed to their mutual success. And they want working capital to grow their enterprises in the future. There is nothing nefarious or improper about this—it's simply how business works.

C. The Sale Prohibition Fails Step Three of *Patel* Because Imposing Massive Financial Burdens on Appellees for No Public Benefits Is Oppressive.

The third reason to affirm the ruling below is that Appellees have demonstrated that the Sale Prohibition is "so burdensome as to be oppressive in light of [] the governmental interest." *Patel*, 469 S.W.3d at 87. Oppressiveness is not a high threshold requirement. If the record reveals that there is no rational sense of proportionality between the private burdens and public benefits,[20] the law violates Article I, Section 19 of the Texas Constitution. This burden analysis simply requires a comparison of the level of burden against the usefulness of the law. *Id.* Here, the Sale Prohibition is unconstitutionally oppressive under *Patel* because it imposes great financial burdens on Appellees in exchange for zero or immeasurably tiny public benefits.

[20] The burden inquiry "require[s] the reviewing court to consider the entire record, including evidence offered by the parties." *Patel*, 469 S.W.3d at 87.

The Sale Prohibition imposes massive financial burdens. For example, the record reflects that distribution rights are worth hundreds of thousands of dollars for a city like Houston. CR.166 (35:20–37:13); CR.176 (75:9–18). If Live Oak's Houston distribution rights were worth $250,000 in 2012, in a single territory, then it stands to reason that the brand would likely be worth millions of dollars statewide when adding the value of distribution rights in other Texas cities like Dallas, Fort Worth, San Antonio, Austin, and El Paso. Likewise, if Peticolas was on the verge of selling its distribution rights to some territories for at least $300,000 before the law was passed, CR.146 (113:6–116:6), then the state-wide value of his rights would be worth substantially more. The TABC also recognizes that distribution rights have value. Its brief states that the Sale Prohibition "limits a source of capital" by prohibiting brewers from selling their distribution rights. *See* TABC Br. 31. That is true, and the evidence in the record confirms that this source of capital is very valuable.

The record, however, is devoid of any evidence that the Sale Prohibition confers public benefits. It is unsurprising, therefore, that the TABC fails to cite to the record at all in order to identify any public benefit stemming from the Sale Prohibition, when arguing that it survives the burden inquiry. *See* TABC Br. 26–31.

Instead, the TABC mischaracterizes the burden analysis under *Patel*. It argues that Appellees have not been unduly burdened by the Sale Prohibition because they are not prevented from continuing to operate their breweries and grow their businesses.[21] TABC Br. 27. But, as discussed above, that is not the inquiry. Failing to properly apply *Patel*'s burden analysis leads the TABC to offer no explanation for how the *actual* burden on brewers (the loss of at least hundreds of thousands of dollars and potentially millions of dollars' worth of distribution rights) is not oppressively burdensome *relative to* a legitimate government interest. *See* TABC Br. 26–31.

As *Patel* makes clear, however, proper balancing must weigh the clear loss the law inflicts on Appellees against an alleged governmental benefit that does not exist. In that case, the Supreme Court found that there was

[21] Appellants also argue that because brewers need state-issued licenses to brew beer, that such licenses are "privileges, not property rights," and therefore Appellees have not suffered a "deprivation of any kind." *See* TABC Br. 29–30. This argument represents a fundamental misunderstanding of a claim under the substantive due course of law protections in Section 19. That an industry is heavily regulated and requires licensure does not mean one loses their rights to economic liberty under the Texas Constitution. Whether or not licenses are a form of property is immaterial to the analysis under *Patel*. The *Patel* case itself involved a heavily regulated and licensed industry—cosmetology. 469 S.W.3d at 73–74. The Article I, Section 19 claim in that case did not stand or fall based on whether the licenses themselves were a form of property. *See id.* at 82–88 (discussing broader range of economic rights); *id.* at 92–100 (Willett, J., concurring) (describing underlying rights in terms of "economic liberty"). Instead, the Texas Supreme Court vindicated the "constitutional right 'to earn an honest living . . . free from unreasonable government interference.'" *Patel*, 469 S.W.3d at 74. Appellees seek the same here. CR.49–50.

evidence that the practice of eyebrow threading posed some health risks that regulation could possibly address, including the potential, in extreme circumstances, to "spread [] highly contagious bacterial and viral infections." *Patel*, 469 S.W.3d at 89. But this potential public benefit was nevertheless weighed against the fact that the state was requiring threaders to take *at least* 320 hours of irrelevant training in order to thread eyebrows. *Id*. The Court also considered it significant that the challenged law imposed burdens that forced the threaders to "lose the opportunity to make money actively practicing their trade[.]" *Id.* at 90. In other words, the degree of burden must be justified by what is achieved by the law. There, the Court found that requiring 320 hours of irrelevant training that resulted in the loss of income was oppressively burdensome in light of a public benefit (that evidence showed to be extremely small). *Id*. at 90.

The Sale Prohibition imposes an unconstitutionally oppressive burden. Indeed, the burden on Appellees here is plainly *greater* than the burden in *Patel*, and the interest of the government is plainly *weaker*. It is thus inconceivable that the burden here could be constitutional while the burden in *Patel* was not.

PRAYER

In light of the foregoing arguments and authorities, the Appellees respectfully ask the Court to affirm the trial court's grant of Appellees' motion for summary judgment on their due course of law claim under Article I, Section 19 of the Texas Constitution, and the injunction prohibiting enforcement of the Sale Prohibition.

RESPECTFULLY SUBMITTED this 2nd day of June, 2017.

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CERTIFICATE OF SERVICE

I certify that on June 2, 2017, a true and correct copy of the foregoing Appellees' Response Brief was served electronically to the following counsel of record through the Court's electronic filing system:

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CERTIFICATE OF COMPLIANCE

Microsoft Word reports that the foregoing Appellees' Response Brief contains 8,330 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

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