No. 17-1046

In the Supreme Court of Texas

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

Petitioners,

v.

TEXAS ALCOHOLIC BEVERAGE COMMISSION, *ET AL.*,

Respondents.

On Petition for Review from the
Third Court of Appeals at Austin, Texas
No. 03-16-00786-CV

REPLY IN SUPPORT OF PETITION FOR REVIEW

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The Texas Alcoholic Beverage Commission's ("TABC") response shows why this Court should grant review. As the Third Court did, the TABC argues that the *constitutional* analysis here consists of looking at a "five-bill legislative package" to show that the legislature, though banning the sale of distribution rights, also gave craft brewers a benefit by allowing limited self-distribution and limited retailing at their breweries. The TABC argues that the economic-liberty test in *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015), is satisfied if, in enacting legislation, the government doled out special benefits and burdens to every industry group that showed up to lobby.

But this fundamentally misconceives *Patel*. Rather than looking at how a law was passed, *Patel* examines how a law *operates in the real world*—the burdens it imposes and whether those burdens are justified. Here, the question is whether the sale prohibition's real-world effect advances the goals of the three-tier system—namely, the interest in curbing excessive drinking—not whether the legislature provided brewers with a spoonful of sugar to sweeten the bitter pill of the sale prohibition.

The TABC cannot answer the actual question here because it has never explained how the sale prohibition could reduce problem drinking.

The TABC just engages in handwaving about how there is no need to consider the real-world effect because the sale prohibition is part of the three-tier system.[1] Review must be granted because *Patel* will be meaningless if reduced to an inquiry into how a law was passed, rather than a constitutional analysis of how it operates in the real world.

REPLY

As explained in Part I-A, *Patel* requires analyzing how a challenged statute advances a government interest in the real world, not describing how special interests fought in the legislature. In Part I-B, Petitioners explain why the TABC cannot otherwise distinguish *Patel*. Finally, Part II explains that the TABC's unbriefed issue—the Due Course of Law Clause does not protect businesses—conflicts with *Patel* and decades of precedent, and review should be granted to settle the issue.

I. An Unconstitutional Law Does Not Become Constitutional Because It Is Part of a "Five-Bill Legislative Package."

A. *Patel* requires analyzing how a statute operates in the real world, not simply how it was passed.

The decision below substitutes a description of legislative horse trading among competing interest groups for constitutional analysis. Its

[1] The TABC is correct that Petitioners are not challenging the three-tier system as a whole. But they can certainly challenge an individual law within it.

circular premise is that the three-tier system is an end in itself, and so any shuffling of benefits and burdens among the three tiers is, *ipso facto*, constitutional because doing so serves the "purpose of maintaining inter-tier balance." Response to Petition for Review ("Resp. to Pet.") at 12. Because of this approach, the Third Court relied on statutory-analysis cases to conclude that, although the sale prohibition transferred wealth from brewers to distributors, other provisions "benefit [brewers] at the expense of distributors and retailers." *Tex. Alco. Bev. Comm'n v. Live Oak Brewing Co.*, 537 S.W.3d 647, 658 (Tex. App.—Austin 2017, pet. filed). This "type of commonplace compromise among various stakeholders" was purportedly necessary to "conform with the statutory framework of the three-tier system that seeks to maintain balance between the tiers and preserve the viability and independence of each tier." *Id*.

Patel makes clear that the Third Court's framework is invalid. Under the Due Course of Law clause, the TABC cannot simply invoke an interest in the three-tier system, note that the three-tier system remained intact after the "five-bill legislative package," and then declare that the sale prohibition is constitutional because it is part of the three-tier system.

Instead, the TABC had to explain how, under the record,[2] the sale prohibition had an actual, real-world effect on the goal of the three-tier system: suppressing problem drinking. Petitioners have repeatedly implored the TABC in discovery and briefing to explain how allowing the sale of distribution rights could cause Texans to have one too many beers.[3] Yet the TABC has never explained how the sale prohibition will reduce problem drinking.[4] Nor did the Third Court. This is not surprising because the record shows that there is no connection between the sale of distribution rights and temperance.[5] The real reason for the sale prohibition is the obvious one: Some distributors and some brewers fought over how to split the money that Texans spend on beer.[6] No noble purpose should be imputed to that.

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[2] *Patel* not only clarified the correct standard of review but also made clear that reviewing courts must "consider the entire record, including evidence offered by the parties." *Id*. at 87.

[3] *See* CR. at 283–84, 292, 294, 298–99, 306–10, 313–16.

[4] The TABC originally defended the sale prohibition by claiming, without explanation, that it served the public health, safety, and welfare by reducing the overconsumption of alcohol and its attendant problems. CR. at 327–28. It has abandoned this contention on appeal.

[5] *See*, CR. at 316 (150:21–151:15) (TABC acknowledging no link between the sale of distribution rights and the problems associated with overconsumption, and conceding that "it's not the sale of the territorial agreement that ultimately leads to that harm"); CR. at 390 (TABC brief noting that the "TABC did not assert . . . that section 102.75(a)(7) was intended, by itself, to reduce the overconsumption of alcohol").

[6] The TABC suggests that a one-page agreement signed by industry lobbyists—and *not* signed by any party to this case and never made part of the record—shows that brewers were happy to accept the sale prohibition. *See* Resp. to Pet. at 1, Tab A. But a statute is

The TABC's analysis also leads to perverse results. It implies that Mr. Patel would have lost if Texas had been clever enough to pass a law that threw a bone to threading salons. The TABC argues that an unconstitutional burden from statute X can be remedied if statute Y offers any offsetting benefit. Yet, under this framework, the State would have won *Patel* if it passed a law conferring a benefit on threading salons. For example, Texas might have responded to Mr. Patel's lawsuit by passing a law that lets salon owners offer cosmetology services off-site at special events such as weddings on the theory that doing so "balanced" out the burden of requiring threaders to be licensed cosmetologists. But this Court never would have ignored the constitutional wrong in *Patel* just because some other law existed, and this Court should reject that theory here.

The framework of the decision below departs so significantly from *Patel* that it does not even satisfy federal rational-basis review. The Fifth Circuit, for example, recently reaffirmed that plaintiffs in rational-basis cases may use evidence to refute asserted rationales for a challenged statute. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223–27 (5th Cir. 2013) ("[P]laintiffs may . . . negate a seemingly plausible basis for the law by

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not immune from constitutional challenge simply because some people to whom it applies do not mind all that much.

adducing evidence of irrationality."). The Fifth Circuit also held that rational-basis review does not allow the government to invoke hypothetical justifications that amount to "fantasy." *Id.* at 223. Yet that is just what the TABC did and the Third Court ratified by assuming, in conflict with the record, that the sale prohibition prevents Texans from drinking beer irresponsibly. Because the standard under the Due Course of Law Clause is higher than the standard for Fourteenth Amendment economic-liberty claims, the framework below conflicts with *Patel*. 469 S.W.3d at 80–87.

B. The TABC cannot otherwise distinguish *Patel*.

The TABC also tries to distinguish *Patel* on its facts, arguing that cosmetology licensure "was almost completely unrelated to eyebrow threading and thus failed to serve any legitimate governmental interest in protecting public health." Resp. to Pet. at 10. There, the "challenged licensing statutes and regulations . . . required 750 hours of cosmetology training, the vast majority of which was unrelated to eyebrow threading." *Id*. at 16. Here, according to the TABC, "[u]nlike the onerous and largely irrelevant training required to obtain the license necessary to practice commercial eyebrow threading, selling distribution rights is not necessary or vital to brewing beer." *Id.* In reaching this conclusion, the TABC echoes

the Third Court's holding that only laws that wholly exclude people from their "chosen trade" implicate the Due Course of Law Clause. *See Live Oak Brewing*, 537 S.W.3d at 657.

But rather than distinguishing *Patel*, the TABC underscores how badly the decision below conflicts with *Patel* for two reasons: (1) this case is materially identical to *Patel*; and (2) the TABC is wrong that the Due Course of Law Clause applies only to "vital and necessary" activities.

1. *Patel* and this case are materially identical.

The TABC cannot distinguish *Patel* on the facts because the two cases are materially identical. The TABC argues that the public-health interest in *Patel* was not as significant as the temperance interest here. But Mr. Patel did not win because the state's interest was too slight. He won because the record made clear that forcing threaders to become cosmetologists did not advance public health in any real way, and so the burden on his occupational liberty outweighed any miniscule public benefit. *See Patel*, 469 S.W.3d at 90. Likewise here, the sale prohibition has no real-world effect on the three-tier system or irresponsible drinking. This is why the TABC's vague, handwaving description of the sale prohibition's benefits

amounts to an argument that *Patel* forbids: Just trust us when we say that the sale prohibition somehow protects the public.

2. The TABC is wrong that the Due Course of Law Clause protects only "vital and necessary" activities.

The TABC's alleged distinction between restrictions on activities "vital and necessary" to a threading business and prohibiting the sale of distribution rights has no constitutional significance. As Petitioners explained previously, *see* Petition for Review at 9–10, *any* restriction on occupational liberty is subject to the Due Course of Law Clause, not just those the government considers "vital and necessary" to an occupation.

True, the sale of distribution rights is not "necessary" to brewing beer, but the same could be said of the restriction in *Patel*. Mr. Patel did not challenge the requirement that his threading employees be licensed cosmetologists because it was "vital or necessary" that his salon employ only people who were *not* cosmetologists. Instead, he challenged the requirement and won because forcing him to employ only licensed cosmetologists was pure burden without justifying public benefits. That same unconstitutional imbalance is present here: The real-world effect of the sale prohibition is all burden with no discernable public benefit.

II. Unbriefed Issue—Review Should Be Granted to Make Clear That the Due Course of Law Clause Applies to Businesses.

Review should be granted to correct the position of the State of Texas, as expressed in the "unbriefed issue," that the Due Course of Law Clause does not apply to businesses. *See* Resp. to Pet. at vii. This novel proposition ignores decades of Texas precedent.[7] This Court's decision in *Patel* itself relied on cases in which businesses raised Due Course of Law claims. *See, e.g.*, *Patel*, 469 S.W.3d at 87 (citing *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 263–64 (Tex. 1994); *Hous. & Tex. Cent. Ry. Co. v. City of Dall.*, 84 S.W. 648, 653 (Tex. 1905)). It is dangerous to the freedom of Texans that their government believes that a vital constitutional protection for economic liberty does not apply when they exercise their economic liberty within entities like corporations. Thus, to

[7] *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, Inc.*, 889 S.W.2d 259 (Tex. 1994); *Tex. Power & Light Co. v. City of Garland*, 431 S.W.2d 511 (Tex. 1968); *Hous. & Tex. Cent. Ry. Co. v. City of Dall.*, 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 Hous. v. Johnny Frank's Auto Parts Co.*, 480 S.W.2d 774 (Tex.Civ.App.—Hous. [14th Dist.] 1972 ref'd n.r.e.); *Humble Oil & Ref. 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).

safeguard the liberty of the millions of Texans who work within business entities, review should be granted.

CONCLUSION

The Court should grant the Petition for Review.

RESPECTFULLY SUBMITTED this 5thday of July 2018,

INSTITUTE FOR JUSTICE

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CERTIFICATE OF SERVICE

I certify that on July 5, 2018, a true and correct copy of the foregoing Reply in Support of Petition for Review 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 Reply in Support of Petition for Review contains 2,124 words, excluding the portions of the brief exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Arif Panju