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SUPREME COURT OF TEXAS
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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

PETITION FOR REVIEW

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IDENTITY OF PARTIES AND COUNSEL

Petitioners / Appellees / Plaintiffs

Live Oak Brewing Co., LLC
Revolver Brewing, LLC
Peticolas Brewing Co., LLC

Respondents / Appellants / Defendants

Texas Alcoholic Beverage Commission

Sherry Cook, in her official capacity as Executive Director of the Texas Alcoholic Beverage Commission[1]

Adrian Bentley Nettles, in his official capacity as Executive Director of the Texas Alcoholic Beverage Commission[2]

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[1] Former Executive Director Sherry Cook was a party to the trial court's final judgment and, for this reason, she is listed here. *See* Tex. R. App. P. 53.2(a). However, Ms. Cook has been replaced by Adrian Bentley Nettles. Mr. Nettles is therefore automatically substituted as a party before this Court. *See* Tex. R. App. P. 7.2(a).

[2] *See* n.1 *above*.

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STATEMENT OF THE CASE

Nature of the Case:	Action for declaratory and injunctive relief based on Article I, § 19 and Article I, § 17 of the Texas Constitution.
Trial Court:	The Honorable Karin Crump, 98th Judicial District Court, Travis County
Trial Court Disposition:	The trial court granted in part and denied in part both Petitioners' and Respondents' motions for summary judgment. *See* Appendix 1. The court declared Texas Alcoholic Beverage Code § 102.75(a)(7) unconstitutional as-applied and on its face under Article I, § 19, but denied Petitioners' Article I, § 17 and attorney's fees claims.
Court of Appeals:	In the Third Court of Appeals, Respondents appealed the denial of their motion for summary judgment that Texas Alcoholic Beverage Code § 102.75(a)(7) violates Article I, § 19. The Appellants were the Texas Alcoholic Beverage Commission and Sherry Cook, in her official capacity as Executive Director of the Texas Alcoholic Beverage Commission. The Appellees were Live Oak Brewing Co., LLC, Revolver Brewing, LLC, and Peticolas Brewing Co., LLC.
Court of Appeals Disposition:	Justice Goodwin, joined by Chief Justice Rose and Justice Pemberton, reversed the trial court. *Texas Alcoholic Beverage Comm'n v. Live Oak Brewing Co., LLC*, No. 03-16-00786-CV, 2017 WL 6503035 (Tex. App.—Austin Dec. 15, 2017, pet. filed). *See* Appendix 2. No motions for rehearing or en banc review are pending.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Texas Government Code § 22.001(a) because this case presents important constitutional issues likely to recur. This Court also has jurisdiction because the court of appeals' opinion below conflicts with earlier decisions of other courts of appeals on a material question of law. *Id.*

ISSUES PRESENTED

1. In *Patel v. Texas Department of Licensing and Regulation*, this Court held that Article I, § 19's Due Course of Law Clause protects all Texans from economic regulations that lack a logical, real-world connection to a legitimate government interest or are so burdensome as to be oppressive. 469 S.W.3d 69, 87 (Tex. 2015). Below, the Third Court drastically narrowed *Patel*, holding that the right to occupational liberty actually applies only when the challenged economic regulation *wholly excludes* a person from an occupation. The Question Presented is:

   Does Article I, § 19's Due Course of Law Clause protect the occupational liberty of *all* Texans from unconstitutional economic regulations or only the *tiny minority* who happen to be totally excluded from an occupation?

2. The Third Court further held that the challenged prohibition on the sale of beer-distribution rights by brewers was valid merely because it was part of a legislative package that included putatively beneficial provisions that the brewers did not challenge. If the Third Court of Appeals should have applied the standard of review announced in *Patel*, the second Question Presented is:

   When a challenged law is unconstitutional because it bears no logical connection to a legitimate government interest or is oppressive, will that unconstitutional law nevertheless survive as long as some other unchallenged statute arguably benefits the plaintiff?

STATEMENT OF FACTS

The opinion below correctly describes this case with four critical exceptions:

- The Craft Brewers sold, and sought to continue selling, the exclusive right to distribute the beer they produce to raise capital. CR at 176, 253–54.

- The record shows that, in 2013, Respondent Texas Alcoholic Beverage Commission's ("TABC") top brass informed legislative staff that when brewers require payment for the right to exclusively distribute the beer they produce it is "just like other terms and conditions" in a distribution agreement, and therefore the "TABC does not get involved[.]" CR at 334–35.

- The TABC also informed legislative staff that compensating brewers for the right to distribute their beer "fall[s] under" Tex. Alco. Bev. Code § 102.72 (describing the purpose of the Beer Industry Fair Dealing Law), and noted that it promotes the "competitive distribution of beer[.]" CR at 335.

- The record shows that the only interest served by a 2013 law prohibiting brewers from getting paid for their distribution rights, is the financial interests of distributors, not public health and safety. *See* CR at 469.

I. Petitioner Craft Brewers Want to Raise Capital by Selling the Right to Distribute Their Beer.

Petitioners Live Oak, Revolver, and Peticolas ("Craft Brewers") are craft brewers in Texas. A craft brewery produces beer using traditional methods and innovative ingredients. Craft breweries are small, artisanal, and produce beer in comparatively small amounts.

Breweries operate within the "three-tier system" in which alcohol manufacturers, distributors, and retailers must be independent. The Craft Brewers are licensed to make beer. They must sell to state-licensed distributors that in turn sell to retailers. *See* Tex. Alco. Bev. Code § 102.51. Since 1979, there has been an exception allowing tiny breweries to sell small amounts directly to retailers. *See* Acts of 1979, 66th Leg. R.S., p. 55, ch. 33, § 11, eff. Aug. 27, 1979 (allowing brewers producing fewer than 75,000 barrels per year to sell to retailers). In 2013, the legislature reduced the annual self-distribution cap to 40,000 barrels.[3] *See* Acts of 2013, 83rd Leg. R.S., ch. 533, § 2, eff. June 14, 2013.

The distribution system is complex. First, beer manufacturers must divide Texas into distribution territories (usually cities or counties). Tex. Alco. Bev. Code § 102.51. A manufacturer may have only one distributor in each territory. *Id.* at § 102.51(b). Distribution agreements are effectively permanent, and can be undone for good cause only if, for example, the distributor fails to wholesale to retailers. *See id.* at § 102.74.

Distribution rights are valuable. Petitioner Craft Brewers sold and sought to continue selling the distribution rights for their beer. CR at 146,

[3] For all brewers, every barrel beyond the first 40,000 per year requires a distributor. Once a brewery produces over 125,000 barrels, it must use distributors for all of its beer. *See* Tex. Alco. Bev. Code §§ 12A.02(a), 62A.02(a), (b).

166, 253–54. They wanted to use the proceeds as capital for future growth. CR at 176, 253–54. In addition, the willingness to pay for distribution rights signals that a distributor is committed to the brand. CR at 253–54. In 2012, Petitioner Live Oak sold its distribution rights for Houston for $250,000. CR at 166, 176. In 2013, in a deal that was torpedoed by the law challenged here, Petitioner Peticolas was in negotiations to sell its distributions rights for $300,000. CR at 137, 146. These sums represented the value of distribution rights for a *single* territory in Live Oak's case and only several territories for Peticolas.

II. Texas Outlaws the Sale of Distribution Rights from Brewer to Distributor to Protect the Latter's Private Financial Interests.

The sale of distribution rights from the Craft Brewers to distributors ended in 2013 with the passage of Senate Bill 639. CR at 256–60. The statute mandates that "[n]o manufacturer shall . . . accept payment in exchange for an agreement setting forth territorial rights." Tex. Alco. Bev. Code § 102.75(a)(7) ("Sale Prohibition").

Respondent TABC admitted below that there were no complaints about the sale of distribution rights. CR at 335. In 2013, prior to the legislation, the TABC informed legislative staff that the sale of distribution rights by manufacturers is "just like other terms and conditions" in a

distribution agreement, and therefore the TABC "does not get involved." CR at 334–35. The TABC further explained that selling distribution rights promotes the "competitive distribution of beer." CR at 335 (citing Tex. Alco. Bev. Code § 102.72, Beer Industry Fair Dealing Law). Thus, the TABC viewed such sales as *beneficial*.

Seemingly, the only opposition to the sale of distribution rights came from distributors themselves, who want those valuable rights for free. So it is no surprise that the Wholesale Beer Distributors of Texas, the distributors' lobbying arm, drafted the Sale Prohibition, CR at 469, and was its sole supporter, CR at 475–76. No regulator, temperance, or consumer-protection group advocated for the Sale Prohibition. *See* CR at 475–76. Thirty-eight brewers and business associations opposed. *Id.*

Just as unsurprisingly, the Sale Prohibition did not forbid distributors from selling distribution rights to each other. *See* Tex. Alco. Bev. Code § 102.75(c). In sum, in a forced transfer of wealth worth millions, brewers are now required to give away their distribution rights for free to distributors who can then turn around and sell those rights to each other.

The record contains zero evidence that the Sale Prohibition prevents any social ill related to alcohol. Indeed, when asked numerous times, the TABC could not even identify a theoretical way that forbidding the Craft

Brewers from selling their distribution rights could, for example, prevent someone somewhere from someday ordering too many beers.[4]

Instead, the Sale Prohibition had only one objective: protecting the private financial interests of distributors at the expense of brewers and the public. In that regard, the Prohibition was 100 percent effective: It is now illegal for the Craft Brewers to sell their distribution rights.

SUMMARY OF THE ARGUMENT

This Court should grant review for two reasons. First, the decision below drastically narrowed the Due Course of Law Clause, holding that courts should not even consider a challenge to an economic regulation unless the plaintiff has been wholly excluded from an occupation. Only one other jurisdiction, state or federal, appears to have a similar rule: the Ninth Circuit. By immunizing most occupational-liberty claims from judicial review, the Third Court has departed sharply from this Court's jurisprudence.

Second, the decision below established a novel standard under which a challenged economic regulation—no matter how arbitrary or oppressive—will be upheld if it was enacted as part of a legislative package that includes theoretical benefits for the plaintiff. As with the first issue presented, the

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

effect of the Third Court's unprecedented rule is that another huge swath of economic regulations will be immune to constitutional review.

Both dangerous holdings conflict squarely with decades of Texas precedent and threaten to eviscerate *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015), which is the authoritative interpretation of the Due Course of Law Clause as it applies to economic regulations. By severely narrowing *Patel*, the Third Court has put countless entrepreneurs, small businesses, and workers in Texas at risk. This Court should grant review to make clear that Article I, § 19's Due Course of Law Clause protects Texans from *all* economic regulations that lack a logical, real-world connection to a legitimate government interest or are so burdensome as to be oppressive.

ARGUMENT

I. The Ruling Below Conflicts with This Court's Recent *Patel* Decision and Significantly Narrows Article I, § 19's Protections for Occupational Liberty.

In irreconcilable conflict with *Patel*, the Third Court's opinion established a new threshold question under which a challenged economic regulation is only reviewed under Article I, § 19's Due Course of Law Clause if it *wholly* excludes the plaintiff from an occupation. The U.S. Court of Appeals for the Ninth Circuit is the only appellate jurisdiction, state or

federal, that agrees with the Third Court of Appeals, and aligning with that court takes Texas in the wrong direction.

A. The Third Court's new threshold question conflicts with *Patel*.

The opinion below conflicts with *Patel*, this Court's definitive statement about the Due Course of Law Clause and economic regulations. 469 S.W.3d at 80–87. The Third Court created a threshold question, holding that a plaintiff lacks a liberty interest in pursuing an occupation—and thus is not entitled to constitutional review—unless *wholly excluded* from that occupation. *See Texas Alcoholic Beverage Comm'n v. Live Oak Brewing Co., LLC*, No. 03-16-00786-CV, 2017 WL 6503035, at *7 (Tex. App.—Austin Dec. 15, 2017, pet. filed) (holding Craft Brewers were not "deprived . . . of occupational freedom" because they are not being excluded from "their chosen trade—brewing and selling beer"); *see also id.* at *8 ("Even if we agree . . . that section 102.75(a)(7) directly benefits distributors at the expense of manufacturers and that territorial rights are valuable, we cannot conclude that [the Sale Prohibition] equates [to a] deprivation of a constitutionally protected liberty interest such as that protected in *Patel*.").

The Third Court's ruling plainly conflicts with *Patel* because, under the decision below, Ash Patel himself—the victorious lead plaintiff—not

only would have lost, but his Due Course of Law claim never would have been analyzed. *Patel* involved two sets of plaintiffs: (1) Ash Patel, the owner of a licensed salon who wanted to hire threaders (practitioners of a hair-removal technique) regardless of whether the threaders were licensed cosmetologists; and (2) threaders who did not want to become full-service, state-licensed cosmetologists to work only as threaders. *See Patel*, 469 S.W.3d at 74. Mr. Patel was not *wholly excluded* from his occupation as a salon owner. As with the Craft Brewers, he was licensed by the state to offer cosmetology services and could have hired licensed cosmetologists to work as threaders. Yet, unlike the Third Court's treatment of the Craft Brewers, this Court did not hold that Mr. Patel lacked a liberty interest in hiring the people he wanted to hire and refuse to hear his Due Course of Law claim because he was not *wholly excluded* from salon ownership. To the contrary, this Court analyzed his claim that a *particular* economic regulation lacked a logical, real-world connection to a legitimate government interest or was so burdensome as to be oppressive. *See id.* at 87–90. Mr. Patel not only won, but the decision in his case established the framework for Due Course of Law analysis.

The Third Court ignored that framework. Had Mr. Patel had the misfortune of being subject to the Third Court's new rule, he would not

even have had a cognizable constitutional claim, much less a winning one. But this jarring departure from this Court's Due Course of Law jurisprudence stands constitutional law on its head. Courts do not refuse to hear constitutional claims unless the government has *totally* violated the right at issue. Courts do not say, for example, that free-speech claims will be heard only if the government completely bans a book (but not if it censors only a few pages); or that the right against unreasonable searches is triggered only if one's home is searched top to bottom (but not if the police just rifle through one's bedroom). The right to occupational liberty is no different; it need not be entirely extinguished before a court will examine the constitutionality of an economic regulation.

The long history of Texas's Due Course of Law jurisprudence confirms this. *See Patel*, 469 S.W.3d at 80–87. This Court's survey of Article I, § 19 jurisprudence in *Patel* made clear that the clause applies to all "economic regulation statutes" and "regulations adopted by an agency[.]" *Id.* at 87. This Court, and lower courts, have repeatedly reviewed Article I, § 19 challenges to economic regulations brought by plaintiffs who were not being wholly excluded from their occupation or industry.[5]

[5] *See, e.g.*, *State v. Spartan's Indus., Inc.*, 447 S.W.2d 407, 410 (Tex. 1969) (Sunday closing law); *Tex. Power & Light Co. v. City of Garland*, 431 S.W.2d 511, 518 (Tex. 1968) (permit for extending power lines); *San Antonio Retail Grocers, Inc. v. Lafferty*, 297

In short, *Patel*, consistent with this Court's Article I, § 19 jurisprudence, clarified the standard of review that applies to all challenged economic regulations. But under the opinion below, economic regulations are immune from substantive Due Course of Law Clause challenges—no matter how irrational or burdensome—once the State allows entry into an occupation or industry by issuing a license or permit. Because this rule would immunize most economic regulations from judicial review, and significantly narrow Article I, §19 protections, this Court should grant the Petition for Review and correct course.

B. The Third Court's new threshold inquiry splits with the rest of the country and makes Texas an outlier alongside the Ninth Circuit.

As discussed above, the Third Court split with this Court and a century of Due Course of Law jurisprudence in holding that the liberty interest in a chosen occupation is triggered only when one is wholly

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S.W.2d 813, 814–17 (Tex. 1957) (ban on loss-leader sales); *Bruhl v. State*, 111 Tex.Crim 233, 13 S.W.2d 93 (1928) (ban on non-optometrist eyeglass sales); *St. Louis Sw. Ry. Co. of Tex. v. Griffin*, 171 S.W. 703 (Tex. 1914) (at-will employee discharges); *Lens Express, Inc. v. Ewald*, 907 S.W.2d 64, 68–69 (Tex. App.—Austin 1995, no writ) (lens prescription requirement); *Retail Merch. Ass'n of Houston, Inc. v. Handy Dan Hardware, Inc.*, 696 S.W.2d 44, 51 (Tex. App.—Houston [1st Dist.] 1985, no writ) (Sunday closing law); *Tex. State Bd. of Pharm. v. Gibson's Disc. Ctr., Inc.*, 541 S.W.2d 884, 886–87 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (ban on advertising drug prices); *City of Houston v. Johnny Frank's Auto Parts Co.*, 480 S.W.2d 774, 780 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.) (wrecking yard ordinance); *Humble Oil & Ref. Co. v. City of Georgetown*, 428 S.W.2d 405, 408 (Tex. Civ. App.—Austin 1968, no writ) (gasoline ordinance).

excluded from that occupation. Not only did the Third Court split from this Court's longstanding doctrine, the panel also split with every state and federal appellate jurisdiction, except the U.S. Court of Appeals for the Ninth Circuit. Thus, as it now stands, the Third Court and the Ninth Circuit are the only jurisdictions in the country that refuse to hear occupational-liberty claims (under the U.S. or state constitutions) unless the plaintiffs have been totally barred from their chosen occupations. In splitting from the rest of the country and aligning with the outlying Ninth Circuit, the Third Court is taking Texas in the wrong direction and has undermined a vital constitutional right.

In *Patel*, this Court recognized the liberty interest in the "right 'to earn an honest living in the occupation of one's choice free from unreasonable government interference[.]'" 469 S.W.3d at 74 (quoting plaintiffs). The U.S. Supreme Court has similarly long recognized that "the right to hold specific private employment and to follow a chosen profession free from unreasonable government interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *see also id.* (collecting Fourteenth Amendment cases for the same proposition). In light of this understanding, the Fifth Circuit, for example, recently struck down a Louisiana licensing statute forbidding

monks from selling their handmade caskets to the public. *See St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013). The Fifth Circuit heard—and ruled for—the monks under the Fourteenth Amendment even though the challenged law did not prevent the brothers from making their caskets and selling them to funeral directors for resale to the public. In other words, the Fifth Circuit did not declare that the monks had no liberty interest—and hence no Fourteenth Amendment claim—because they were not *wholly excluded* from making and selling caskets.

State supreme courts are in unanimous agreement with this Court and the U.S. Supreme Court. Petitioners were unable to find any case decided under any state's equivalent of Texas' Due Course of Law Clause holding that the liberty interest in occupational liberty is triggered only by a total exclusion from a job—and contrary cases abound.[6]

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[6] *See, e.g., Khan v. State Bd. of Auctioneer Exam'rs*, 842 A.2d 936 (Pa. 2004) (auctioneer regulations); *Omya, Inc. v. Town of Middlebury*, 758 A.2d 777 (Vt. 2000) (regulation of daily truck trips); *Peppies Courtesy Cab Co. v. City of Kenosha*, 475 N.W.2d 156 (Wis. 1991) (taxicab dress code); *Katz v. S.D. State Bd. of Med. & Osteopathic Exam'rs*, 432 N.W.2d 274 (S.D. 1988) (medical-practice regulations); *Louis Finocchiaro, Inc. v. Neb. Liquor Control Comm'n*, 351 N.W.2d 701 (Neb. 1984) (liquor wholesale price controls); *Myrick v. Bd. of Pierce Cnty. Comm'rs*, 677 P.2d 140 (Wash. 1984) (massage parlor regulations); *In re Florida Bar*, 349 So. 2d 630 (Fla. 1977) (per curiam) (contingency-fee schedule); *Hand v. H & R Block, Inc.*, 528 S.W.2d 916, 923 (Ark. 1975) (minimum price for franchise agreements); *Leetham v. McGinn*, 524 P.2d 323 (Utah 1974) (cosmetology law); *Md. State Bd. of Barber Exam'rs v. Kuhn*, 312 A.2d 216 (Md. 1973) (same); *People ex rel. Orcutt v. Instantwhip Denver, Inc.*, 490 P.2d 940 (Colo. 1971) (ban on "filled milk" products); *Coffee-Rich, Inc. v. Comm'r of Pub. Health*, 204 N.E.2d 281 (Mass. 1965) (ban on imitation coffee cream); *Berry v. Koehler*, 369

There appears to be only one jurisdiction—state or federal—that views the liberty interest in occupational freedom the same way as the Third Court: the U.S. Court of Appeals for the Ninth Circuit. In *Dittman v. California*, the Ninth Circuit held that that the liberty interest in pursuing an occupation arises only when there is a "'*complete prohibition*' on entry into a profession." 191 F.3d 1020, 1029 (9th Cir. 1999) (emphasis added). The Ninth Circuit had been alone in this unprecedented holding for 18 years until the Third Court—without citing *Dittman*—adopted the same rule below.

Dittman is pernicious—and no model for a Texas court—not simply because it imposed an unheard-of threshold requirement on a constitutional right, but also because the panel flatly misread Supreme Court authority to achieve that erroneous result. *Dittman*'s "complete prohibition" language comes from *Conn v. Gabbert*, 526 U.S. 286 (1999). 191 F.3d at 1029. In *Conn*, prosecutors had a defense lawyer searched, pursuant to a warrant, when the lawyer arrived for his client's appearance before a grand jury. *Id.* at 288–89. The lawyer sued, arguing that the search violated his substantive due process right to practice law. *Id.* at 289.

P.2d 1010 (Idaho 1961) (regulation of dental prosthetics); *Christian v. La Forge*, 242 P.2d 797 (Or. 1952) (fixed barbering prices).

The Supreme Court recognized that the Fourteenth Amendment guarantees the right to pursue one's chosen occupation, *id.* at 291-92, but held that the lawyer's right to practice law could not be violated by the "brief interruption" of being searched, *id.* at 292. This makes sense. A lawful search briefly delays the practice of law—just as a government-installed red light might delay a lawyer's arrival at the courthouse—but does not materially deny occupational liberty. *See id.* (observing that a person's liberty interest "is simply not infringed by the inevitable interruptions of our daily routine as a result of legal process, which all of us may experience from time to time"). Contrary to *Dittman*, "*Conn* did not purport to articulate a higher standard to prove a deprivation of a liberty interest. Rather, the case narrowly held that the plaintiff's particular, and peculiar, claim lacked merit." *PDK Labs Inc. v. Ashcroft*, 338 F. Supp. 2d 1, 9 & n.12 (D.D.C. 2004).[7]

[7] In *Doss v. Morris*, an unpublished decision, a *per curiam* Fifth Circuit panel states that the trial court, in its unpublished decision, read *Conn* and *Dittman* as requiring a "complete prohibition" on work for a viable claim. 642 Fed. Appx. 443, 447 n.3 (5th Cir. 2016) (citing 2013 U.S. Dist. LEXIS 68946, *20-21 (W.D. Tex. May 15, 2013)). The appellate panel did not decide whether a "complete prohibition" was required because there was another basis for affirmance. *Id.* To the extent that the trial court required "harm akin to a complete prohibition on the right to conduct . . . business," 2013 U.S. Dist. LEXIS 68946, *22, that is not the Fifth Circuit rule. In addition to the monks' case, the Fifth Circuit recently analyzed the claims of a licensed veterinarian who challenged telemedicine restrictions, even though he was free to do in-person veterinary work. *Hines v. Alldredge*, 783 F.3d 197, 202-03 (5th Cir. 2015). *Hines* actually cited *Dittman*

Thus, the Ninth Circuit is an extreme outlier precisely because it—like the Third Court—misread binding authority. This Court should grant review to realign Texas constitutional law with that of every state and federal jurisdiction.

II. The Third Court's Balancing of the Challenged Provision Against Unchallenged Provisions Also Conflicts with *Patel*.

This Court should also grant review of the second issue presented: Whether a challenged law that is part of a legislative package requires no constitutional analysis whenever some unchallenged provision in the legislative package is, at least theoretically, good for the plaintiff. *See Live Oak Brewing*, 2017 WL 6503035 at *8–9 ("[D]etermining the constitutionality of section 102.75(a)(7) . . . in the context of the statutory framework of the three-tier system" by weighing "the provisions . . . of the 2013 [legislative] package" to find that "the provisions as a whole" provide the Craft Brewers with "offsetting benefits"). Under this novel holding, a challenged law—no matter how unconstitutionally arbitrary, irrational, or oppressive—will always be upheld if it was passed at the same time as an unchallenged law that supposedly offers "offsetting benefits." The Third Court's new rule would immunize most economic regulation from Article I,

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for the standard of review, while ignoring the "complete prohibition" language. *Id.* at 203 n. 23.

§ 19 review because most economic regulation is enacted (or promulgated, in the case of administrative rules) as part of a larger package.

This unprecedented balancing test conflicts with *Patel*. In *Patel*, this Court *did not* look at other cosmetology statutes or regulations to determine whether there were "offsetting benefits" elsewhere that obviated the need for constitutional analysis. *See Patel*, 469 S.W.3d at 88–90. Rather, it examined the challenged law and record evidence before it to determine whether that law, standing on its own, was constitutional.

The Third Court, by contrast, did not examine the Craft Brewers claims through *Patel*'s constitutional lens, but instead analyzed the "legislative package" using statutory-construction cases. *See Live Oak Brewing*, 2017 WL 6503035 at *8 (citing *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (holding that when construing statutes, courts "must always consider the statute as a whole rather than its isolated provisions") and *Cadena Commercial USA Corp. v. Texas Alcoholic Beverage Comm'n*, 449 S.W.3d 154, 163 (Tex. App.—Austin 2014) (construing statute within "statutory and historical context" of Alcoholic Beverage Code)). *Wilkins* and *Cadena* stand for the unremarkable proposition that when *construing statutes*, courts must consider the statute as a whole rather than its isolated provisions. Neither case is appropriate

for *constitutional* analysis: statutory construction aims to determine what statutory text *means*, not whether the statute is constitutional. There is no dispute here about the *meaning* of the Sale Prohibition, just its constitutionality under the Due Course of Law Clause. After deciding, in the absence of any record evidence, that the 2013 legislative package had offsetting benefits for the Craft Brewers, the Third Court entered judgment for Respondents. *See Live Oak Brewing*, 2017 WL 6503035 at *8–9 ("[i]n contrast with [the Sale Prohibition], these provisions benefit [the Craft Brewers] at the expense of distributors and retailers[.]")[8]

This rule creates yet another sweeping exception to constitutional review. As it stands now, plaintiffs in the Third Court, which handles the majority of litigation against state entities and officials, will not receive *any* constitutional review under *Patel* without first establishing: (1) total exclusion from an occupation; and (2) the absence of *any* supposed "offsetting benefits" in some larger bill or administrative rulemaking. These barriers to constitutional review are fundamentally inconsistent with Texas constitutional law. This Court should grant the Petition for Review.

[8] In addition, the opinion below is actually wrong that there was an offsetting benefit. In 1979, it became legal to self-distribute up to 75,000 barrels per year. Acts of 1979, 66th Leg. R.S., p. 55, ch. 33, § 11, eff. Aug. 27, 1979. Rather than benefit the Craft Brewers, the "2013 legislative package" *reduced* self-distribution to 40,000 barrels and restricted even that option to breweries that make fewer than 125,000 barrels. Tex. Alco. Bev. Code § 62A.02.

III. This Case Is an Attractive Vehicle for Deciding the Issues Presented.

Given the Third Court's special role in resolving challenges to state laws and agency regulations, it is particularly important that conflicts with this Court's jurisprudence be resolved swiftly. This case is an excellent vehicle for addressing the issues presented. The only live claim at this point is the Due Course of Law claim. There is no alternative basis for judgment. In addition, the fully developed fact-record leaves no necessary questions unanswered. Now is the time to resolve these issues of extraordinary public importance before the Third Court's insupportable holdings undermine the Due Course of Law Clause any further.

As this Court recognized in *Patel*, uncertainty about the constitutional standard governing economic regulations—uncertainty this Court resolved in 2015—had proliferated into a confusing patchwork in the lower courts. *See Patel*, 469 S.W.3d at 80–82. The Third Court's opinion below re-sows confusion. Once again, Texans' rights to occupational liberty now depends on the judicial district in which they live. *Compare Gatesco Q.M. Ltd. v. City of Houston*, 503 S.W.3d 607, 620 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("*Patel* legal standard applies" in company's challenge to law imposing late fees for water service) *with Live Oak Brewing*, 2017 WL

6503035 (*Patel* standard not applied in brewers' challenge to law prohibiting brewers from selling their distribution rights). This inconsistency is anathema to the uniformity that this Court created with *Patel*.

The Texas Constitution has long protected persons from irrational or oppressively burdensome economic regulations. *See Patel*, 469 S.W.3d at 80–87. Because this case—with its simple record and the Sale Prohibition's unambiguous legislative history—is an ideal vehicle for resolving the issues presented, the Court should grant review.

PRAYER

Petitioners ask the Court to grant their petition for review, reverse the judgment of the Court of Appeals, and render judgment in favor of Petitioners.

RESPECTFULLY SUBMITTED this 13th day of February 2018,

INSTITUTE FOR JUSTICE

By: /s/ Arif Panju

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CERTIFICATE OF SERVICE

I certify that on February 13, 2018, a true and correct copy of the foregoing Petition for Review and the attached Appendix was served electronically to the following counsel of record through the Court's electronic filing system:

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/s/ Arif Panju

RULE 52.3(j) CERTIFICATION

Pursuant to Tex. R. App. P. 52.3(j), I certify that all factual statements in this Petition for Review are supported by competent evidence in the appendix or record to which the petition has cited.

/s/ Arif Panju

CERTIFICATE OF COMPLIANCE

Microsoft Word reports that the foregoing Petition for Review contains 4,467 words, excluding the portions of the brief exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Arif Panju

APPENDIX

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COPY

Filed in The District Court
of Travis County, Texas
AUG 25 2016 NVR
At 1:35p M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-14-005151

LIVE OAK BREWING CO., LLC, REVOLVER BREWING, LLC; AND PETICOLAS BREWING CO., LLC, **Plaintiffs,**	§	**IN THE DISTRICT COURT OF**
v.	§	**TRAVIS COUNTY, TEXAS**
TEXAS ALCOHOLIC BEVERAGE COMMISSION; and SHERRY COOK, in her official capacity as Executive Director of the Texas Alcoholic Beverage Commission, **Defendants.**	§	**98TH JUDICIAL DISTRICT**

FINAL JUDGMENT

On August 15, 2016, the Court considered (1) Plaintiffs Live Oak Brewing Company, LLC, Revolver Brewing, LLC, and Peticolas Brewing Company, LLC's Motion for Summary Judgment, and (2) Defendants Texas Alcoholic Beverage Commission and Sherry Cook's Traditional and No-Evidence Motion for Summary Judgment. After reviewing the parties' respective motions, the response and reply briefs, the pleadings on file, the summary judgment evidence presented, arguments of counsel, and applicable law, the Court enters the following orders:

1. IT IS ORDERED that Plaintiffs Live Oak Brewing Company, LLC, Revolver Brewing, LLC, and Peticolas Brewing Company, LLC's Motion for Summary Judgment is GRANTED in part and DENIED in part.

    A. IT IS ORDERED that Plaintiffs' Motion for Summary Judgment against Defendants on their claim for a declaratory judgment that Section 102.75(a)(7) of the Texas Alcoholic Beverage Code violates the Due Course of Law guarantees of Article I, Section 19 of the Texas Constitution is GRANTED.

B. IT IS THEREFORE ORDERED, ADJUDGED, and DECLARED that Section 102.75(a)(7) of the Texas Alcoholic Beverage Code violates the Due Course of Law guarantees of Article I, Section 19 of the Texas Constitution.

C. IT IS FURTHER ORDERED, ADJUDGED AND DECLARED that Defendants, their employees, agents, and successors are permanently enjoined from enforcing Section 102.75(a)(7) of the Texas Alcoholic Beverage Code against Plaintiffs and all other producers of beer, ale, and malt liquor.

2. IT IS ORDERED that Defendants Texas Alcoholic Beverage Commission and Sherry Cook's Traditional and No-Evidence Motion for Summary Judgment is GRANTED in part and DENIED in part.

A. IT IS ORDERED that Defendants' Motion for Summary Judgment on Plaintiffs' claim for a declaratory judgment that Section 102.75(a)(7) of the Texas Alcoholic Beverage Code violates the Takings Clause of Article I, Section 17 of the Texas Constitution is GRANTED.

B. IT IS THEREFORE ORDERED, ADJUDGED, and DECLARED that Plaintiffs' claim for a declaratory judgment that Section 102.75(a)(7) of the Texas Alcoholic Beverage Code violates the Takings Clause of Article I, Section 17 of the Texas Constitution is DISMISSED with prejudice.

C. IT IS ORDERED that Defendants' Motion for Summary Judgment on Plaintiffs' claim for attorney's fees is GRANTED.

D. IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that Plaintiff's request for attorney's fees is DISMISSED with prejudice.

All relief not expressly granted herein is DENIED.

This Final Judgment disposes of all parties and all claims pending before the Court. It is, therefore, a final and appealable judgment.

Signed on this 25th day of August, 2016.

JUDGE PRESIDING
KARIN CRUMP

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00786-CV

Texas Alcoholic Beverage Commission and Adrian Bentley Nettles, in his 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

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 98TH JUDICIAL DISTRICT
NO. D-1-GN-14-005151, HONORABLE KARIN CRUMP, JUDGE PRESIDING

O P I N I O N

The Texas Alcohol Beverage Commission and its Executive Director[1] (collectively the Commission) appeal from the trial court's final judgment declaring that "Section 102.75(a)(7) of the Texas Alcoholic Beverage Code violates the Due Course of Law guarantees of article I, section 19 of the Texas Constitution" and permanently enjoining the Commission from enforcing the statute against appellees Live Oak Brewing Co., LLC; Revolver Brewing, LLC; Peticolas Brewing Co., LLC; "and all other producers of beer, ale, and malt liquor." For the following reasons, we reverse the trial court's final judgment and render judgment in favor of the Commission.

[1] We have automatically substituted Adrian Bentley Nettles, the Commission's current Executive Director in his official capacity. *See* Tex. R. App. P. 7.2(a).

Background

The Three-Tier System and the Beer Industry Fair Dealing Law

The alcoholic beverage industry in the State of Texas is regulated pursuant to a three-tier system that maintains "strict separation between the manufacturing, wholesaling, and retailing levels of the industry." *See* Tex. Alco. Bev. Code § 6.03 (describing history behind framework for distribution of alcoholic beverage products after Prohibition). Generally speaking, manufacturers of alcoholic beverages sell their product to distributors, distributors then sell the product within designated territories to retailers, and retailers then sell the product to the end consumer. Under this system, the members of the different tiers must remain independent from members of the other tiers, with the distributors acting as the middle-person in the alcoholic beverage supply chain. *See id.* § 102.01 (listing prohibited conduct between tiers).

The "public policy of this state" is "to maintain and enforce the three-tier system" and "thereby to prevent the creation or maintenance of a 'tied house.'" *Id.* § 6.03; *see id*. §§ 1.03 (stating that Texas Alcoholic Beverage Code is "exercise of the police power of this state for the protection of the welfare, health, peace, temperance, and safety of the people of this state"), 6.03 (explaining that one purpose of framework is to prevent organized crime). A "tied house" for these purposes means "any overlapping ownership or other prohibited relationship between those engaged in the alcoholic beverage industry at different levels." *Id.* § 102.01; *Cadena Comercial USA Corp. v. Texas Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 321–22 (Tex. 2017) (explaining that "catalyst for the tied house provisions was a fear of returning to the state of affairs before Prohibition when tied houses played what was thought to be a substantial role in over-intoxicating society" and that

"provisions are designed to prevent certain overlapping relationships between those engaged in the alcoholic beverage industry at different levels, or tiers"); *Neel v. Texas Liquor Control Bd.*, 259 S.W.2d 312, 316 (Tex. Civ. App.—Austin 1953, writ ref'd n.r.e.) (recognizing Texas Legislature's express determination that "liquor traffic in this State would be best controlled by keeping the various levels of the liquor industry independent of each other").

In addition to general provisions applying to the alcoholic beverage industry, specific provisions address the beer industry. Relevant to this appeal, holders of beer manufacturer licenses generally are required to "designate territorial limits in this state within which the brands of beer the licensee manufacturers may be sold by general, local, or branch distributor's licensees." Tex. Alco. Bev. Code § 102.51(a). The manufacturer and distributor must enter into a written agreement "setting forth the sales territory within which each brand of beer purchased by that distributor may be distributed and sold," and a "manufacturer may not assign all or any part of the same sales territory to more than one distributor." *Id*. § 102.51(b). Once a distributor has been assigned a sales territory for a manufacturer's brand of beer, the distributor is required to maintain sufficient employees, storage facilities, delivery vehicles, and inventory to satisfy "the reasonable needs of all retailers in the assigned territory." *Id.* § 102.54. The stated purposes for these provisions concerning the distribution territorial limits on the sales of beer are "to promote the public interest in the fair, efficient, and competitive distribution of beer, to increase competition in such areas, and to assure product quality control and accountability." *Id*. § 102.51(c).

The beer industry in Texas is also subject to the "Beer Industry Fair Dealing Law" (the Fair Dealing Law). *See id.* §§ 102.71–.82. The stated purpose of the Fair Dealing Law is "to

promote the public's interest in the fair, efficient, and competitive distribution of beer within this state by requiring manufacturers and distributors to conduct their business relations so as to assure: (1) that the beer distributor is free to manage its business enterprise, including the right to independently establish its selling price; and (2) the public, retailers, and manufacturers are served by distributors who will devote their reasonable efforts and resource to the sales and distribution of all of the manufacturer's products which the distributor has the right to sell and distribute and maintain satisfactory sales levels in the sales territory assigned the distributor." *Id.* § 102.72(a).

Among the Fair Dealing Law's provisions, a party to a distribution agreement between a manufacturer and distributor cannot cancel the agreement except with notice and for "good cause." *Id.* § 102.74. Once obtained, a distributor can sell assigned territorial rights from a manufacturer to another distributor, and the manufacturer cannot "unreasonably withhold or delay its approval" of the assignment. *Id.* § 102.76. A manufacturer also cannot:

> (1) induce or coerce, or attempt to induce or coerce, any distributor to engage in any illegal act or course of conduct;
>
> (2) require a distributor to assent to any unreasonable requirement, condition, understanding, or term of an agreement prohibiting a distributor from selling the product of any other manufacturer or manufacturers;
>
> (3) fix or maintain the price at which a distributor may resell beer;
>
> (4) fail to provide to each distributor of its brands a written contract which embodies the manufacturer's agreement with its distributor;
>
> (5) require any distributor to accept delivery of any beer or any other item or commodity which shall not have been ordered by the distributor;
>
> (6) adjust the price at which the manufacturer sells beer to a distributor based on the price at which a distributor resells beer to a retailer, but a manufacturer

> is free to set its own price so long as any price adjustment is based on factors other than a distributor's increase in the price it charges to a retailer and not intended to otherwise coerce illegal behavior under this section; or
>
> (7) accept payment in exchange for an agreement setting forth territorial rights.

Id. § 102.75.

Section 102.75(a)(7)—the challenged statute here—was enacted in 2013 as part of a legislative package that addressed the craft beer brewing industry. *See* Act of May 20, 2013, 83d Leg., R.S., ch. 555, 2013 Tex. Gen. Laws 1494, 1494–95; *see also* Acts of May 20, 2013, 83d Leg., R.S., chs. 533–535, 2013 Tex. Gen. Laws 1443, 1443–1448. After expressly recognizing that "the three-tier system of regulating the alcoholic beverage industry is unquestionably legitimate," the Texas Legislature found that "the state is authorized to promote, market, and educate consumers about the emerging small brewing industry" and that "it is in the state's interest to encourage entrepreneurial and small business development opportunities in this state." *Id.* ch. 533, § 1, 2013 Tex. Gen. Law at 1443.

Among the other provisions that were enacted as part of the package, the statute authorizes small brewers and manufacturers of beer to self-distribute up to 40,000 barrels annually, *see id.* § 2 (to be codified at Tex. Alco. Bev. Code § 12A.02), ch. 534, § 2 (to be codified at Tex. Alco. Bev. Code § 62A.02), 2013 Tex. Gen. Laws at 1444–45, and to sell up to 5,000 barrels of beer annually directly to consumers on their premises, *see id*. ch 535, §§ 2, 3, 2013 Tex. Gen. Laws at 1447 (to be codified at Tex. Alco. Bev. Code §§ 12.052, 62.122).[2] Each of the bills in the package

[2] For purposes of this appeal, there is no relevant difference between beer, ale, and malt liquor. *See* Tex. Alco. Bev. Code § 102.81 (applying provisions "to agreements concerning ale and malt liquor in the same manner as they apply to agreements concerning beer, and each particular

was written so as to take effect only if all of the bills in the package passed. *See id.* ch. 533, § 5; ch. 534, § 5; ch. 535, § 5; ch. 555, § 2, 2013 Tex. Gen. Laws at 1444, 1446–48, 1494–95.

The Parties' Dispute

Appellees are three Texas companies that brew ale and craft beer[3] and are holders of manufacturer's licences, brewer's permits, and self-distribution permits. *See* Tex. Alco. Bev. Code §§ 12.01 (requiring brewer's permit for ale and malt liquor), 12A.01 (authorizing self-distribution permit for holder of brewer's permit), 61.01 (requiring license or permit to manufacture or brew beer), 62.01 (requiring manufacturer's license for beer), 62A.01 (authorizing self-distribution license for holder of manufacturer's license).

Appellees filed suit in 2014 seeking declaratory and injunctive relief against the Commission challenging the constitutionality of section 102.75(a)(7) based on the due course of law clause of the Texas Constitution.[4] *See* Tex. Const. art. I, § 19 ("No citizen of this State shall be

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class of permittee dealing with ale and malt liquor is subject to those provisions that apply to functionally corresponding licensees within the beer industry"). In this opinion, we generally refer to beer, ale, and malt liquor as "beer" and manufacturers and brewers as "manufacturers," unless otherwise stated.

[3] According to appellees, "'craft beer' . . . can be loosely defined as full flavored beer, brewed using simple ingredients without artificial additives, with direct involvement by the brewery's owners."

[4] In its summary judgment rulings, the trial court ruled in favor of the Commission on a separate constitutional challenge that appellees brought under article I, section 17 of the Texas Constitution. *See* Tex. Const. art. I, § 17(a) ("No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made."), (d) (stating that "all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof"); *see also* Tex. Alco. Bev. Code §§ 11.03 ("A permit issued under this code is a purely personal privilege and is subject to revocation as provided in this code. It is not property, is not subject to execution, does not pass by descent or distribution, and except as

deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by due course of the law of the land."). They asserted that the statute violated "the [Texas] constitution's 'due process' guarantee"—"the right to earn an honest living in the occupations of one's choice free from unreasonable governmental interference." Specifically, appellees asserted that: (i) the Commission "violated the due process guarantee of the Texas Constitution by enforcing [the statute], which prohibits [appellees] from negotiating for the sale of their territorial rights"; (ii) the Commission "[has] no substantial, legitimate, or rational reason for prohibiting the sale of territorial rights by beer producers"; (iii) "[t]he state's police power does not extend to regulating the terms of contract between two private businesses for no other reason than to transfer wealth from one business to another"; and (iv) the Commission "[is] presently and unconstitutionally requiring appellees to give away their territorial rights to distributors as a condition of transferring those rights." Among their requests for relief, appellees sought a permanent injunction barring the Commission from enforcing the statute against them and sought declaratory judgment that the Commission was "violat[ing] the due process guarantee of the Texas Constitution by unreasonably interfering with [appellees]' right to operate their businesses and contract freely on the open market."

The parties filed competing motions for summary judgment, responses, and replies joining issue on the constitutionality of section 102.75(a)(7). In its motion for traditional and

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otherwise provided in this code, ceases on the death of the holder."), 61.02(a) ("A license issued under this code is a purely personal privilege and is subject to revocation as provided in this code. It is not property, is not subject to execution, does not pass by descent or distribution, and ceases on the death of the holder."). Appellees have not appealed from that ruling. The trial court also dismissed their request for attorney's fees, and they have not appealed that ruling. Thus, we do not further address appellees' request for attorney's fees or their constitutional challenge brought under article I, section 17 of the Texas Constitution.

no-evidence summary judgment, the Commission argued that it was entitled to summary judgment on appellees' due course of law claim because appellees could not carry their burden to establish that the statute's purpose was not rationally related to a legitimate government interest or that its "actual, real-world effect as applied to [appellees] could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest." The Commission further argued that the statute was rationally related to the State's interest in maintaining the three-tier system and that it did not unreasonably interfere with appellees' "engaging in their chosen profession." In its response to appellees' motion for summary judgment, the Commission also argued that appellees had asserted only a facial challenge to the statute but that they had not attempted to carry the burden of showing that the statute was unconstitutional in all of its applications. Appellees countered in their motion for summary judgment that section 102.75(a)(7) did not further a governmental interest, the Commission already had the necessary tools to police undue influences or control between members of the difference tiers, and the statute existed "solely to enrich beer distributors at the expense of craft brewers."

Both parties filed evidence to support their competing motions, including the transcripts of depositions, legislative history, and discovery responses. The relevant evidence was undisputed.[5] Prior to the enactment of section 102.75(a)(7), appellee Live Oak Brewing was paid $250,000 for territorial rights for distribution in the Houston area, and the proceeds from the sale

[5] The parties joined issue and filed evidence to support their competing positions about the legality of payments from distributors to manufacturers for territorial assignments prior to the enactment of section 102.75(a)(7). According to the Commission, these types of payments were not legal, but it only became aware of such payments in 2012. Appellees counter that manufacturers have been free to sell territorial rights for over eighty years. Resolution of this dispute, however, ultimately is unnecessary to our analysis.

were used to purchase equipment and for expansion. Appellee Peticolas Brewing also was negotiating to sell territorial rights for distribution in the range of $300,000 but those negotiations ended after the bills addressing the craft beer industry were introduced. The evidence further showed that appellees had permits to self-distribute, none of them produced more than 125,000 barrels annually, and they primarily self-distributed their beer but hoped to expand with their products being more widely available. At the time of the depositions of appellees' representatives, Peticolas Brewing was self-distributing everything it produced; Live Oak Brewing was self-distributing between 85 and 90 percent of its product with two distributors in the Houston area doing the rest; and Revolver Brewing was self-distributing approximately 94 percent of its product.

Following a hearing, the trial court signed the final judgment, declaring that section 102.75(a)(7) violates the due course of law guarantees of article I, section 19 of the Texas Constitution and permanently enjoining the Commission from enforcing the statute against appellees and "and all other producers of beer, ale, and malt liquor." The Commission filed a motion for new trial, which the trial court denied. This appeal followed.

Analysis

The Commission raises three issues on appeal. The Commission denies appellees' assertion that the fundamental economic liberty interest recognized in *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015), applies to business interests like appellees. The Commission further argues that appellees failed to establish that section 102.75(a)(7) is facially unconstitutional, and that, even if appellees brought an as-applied challenge to the statute, they failed

to prove that there was no rational basis for the statute or that is was unconstitutionally oppressive as applied to them.

Standard of Review and Applicable Law

The procedural posture of this appeal is from the trial court's summary judgment ruling, which we review de novo. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 156 (Tex. 2004). Summary judgment is proper if the moving party establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Joe*, 145 S.W.3d at 156–57. A movant seeking a no-evidence summary judgment must assert that "there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial." Tex. R. Civ. P. 166a(i). "The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact." *Id.* When, as here, both parties seek summary judgment on the same issue and the court grants one motion and denies the other, we consider the summary judgment evidence presented by both sides, determine all questions presented and, if we determine that the trial court erred, render the judgment the trial court should have rendered. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

The parties' dispute concerns the constitutionality of a statute, which we also review de novo. *See Patel*, 469 S.W.3d at 87. "Although whether a law is unconstitutional is a question of law, the determination will in most instances require the reviewing court to consider the entire record, including evidence offered by the parties." *Id.* (citing *Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 520 (Tex. 1995)). Statutes are presumed to be constitutional, and a party

challenging the constitutionality of a statute has a "high burden." *Id*.; *see* Tex. Gov't Code § 311.021(1) ("In enacting a statute, it is presumed that . . . compliance with the constitutions of this state and the United States is intended.").

The parties also join issue as to whether appellees brought an as-applied or facial challenge. "A facial challenge claims that a statute, by its terms, always operates unconstitutionally." *Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 702 (Tex. 2014) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Garcia*, 893 S.W.2d at 518). "A party seeking to invalidate a statute 'on its face' bears a heavy burden of demonstrating that the statute is unconstitutional in all of its applications." *HCA Healthcare Corp. v. Texas Dep't of Ins.*, 303 S.W.3d 345, 349 (Tex. App.—Austin 2009, no pet.) (citing *Washington State Grange v. Washington State Repub. Party*, 552 U.S. 442, 449 (2008)); *see Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 623 (Tex. 1996). "By contrast, an as-applied challenge asserts that a statute, while generally constitutional, operates unconstitutionally as to the claimant because of her particular circumstances.'" *Rivera*, 445 S.W.3d at 702 (citing *City of Corpus Christi v. Public Util. Comm'n of Tex.*, 51 S.W.3d 231, 240 (Tex. 2001); *Garcia*, 893 S.W.2d at 518 n.16). With these principles of law in mind, we turn to our analysis of the constitutionality of section 102.75(a)(7).

Constitutionality of Section 102.75(a)(7)

Appellees' challenge to section 102.75(a)(7) is based on the Texas Constitution's due course of law clause and fashioned after arguments recently evaluated by the Texas Supreme Court in *Patel*. *See* Tex. Const. art. I, § 19. Among the liberty interests protected by due course of law is

freedom of contract, which includes the right to pursue a lawful occupation. *See Patel*, 469 S.W.3d at 110, 123 (Willett, J., concurring) (observing that Texas Supreme Court "recognizes that Texans possess a basic liberty interest under Article I, Section 19 to earn a living" and describing economic liberty interest that was before court as "[o]ccupational freedom, the right to earn a living as one chooses"); *see also Mauldin v. Texas State Bd. of Plumbing Exam'rs*, 94 S.W.3d 867, 872 (Tex. App.—Austin 2002, no pet.) (recognizing that "right to work in a particular profession" is "protected right, but one subject to rational regulation" (citing *State v. Project Principle, Inc.*, 724 S.W.2d 387, 391 (Tex. 1987)); *Andrada v. City of San Antonio*, 555 S.W.2d 488, 491 (Tex. Civ. App.—San Antonio 1977, writ dism'd w.o.j.) (acknowledging that "liberty of contract is generally said to be part of that 'liberty' which is protected by due process clauses" but that "freedom of contract is a qualified, not an absolute, right" and that exercise of police power may prohibit "the making of future contracts").[6]

In their pleadings, appellees asserted that section 102.75(a)(7) was unconstitutional under "the [Texas] constitution's 'due process' guarantee" because it violated their "right to earn an honest living in the occupations of one's choice free from unreasonable governmental interference." In their argument to this Court, appellees also contend that they brought both facial and as-applied

[6] *See also generally* David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 Yale L.J.F. 287 (Dec. 5, 2016); Clark Neily, *Beating Rubber-Stamps Into Gavels: A Fresh Look at Occupational Freedom*, 126 Yale L.J.F. 304 (Dec. 5, 2016); Joshua D. Hawley, *The Intellectual Origins of (Modern) Substantive Due Process*, 93 Tex. L. Rev. 275 (Dec. 2014); David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 Mercer L. Rev. 563, 627–39 (Winter 2009) (discussing different facets of liberty of contract, including right to entry into lawful trades or occupations).

challenges to section 102.75(a)(7) based on their due course of law protections. We begin with appellees' as-applied challenge.

As-applied Challenge

To support their position that the statute is unconstitutional as applied to them, appellees analogize their alleged constitutionally protected right to assign sales territorial rights for a cash payment to the protected economic liberty interest of occupational freedom that was at issue in *Patel*. In *Patel*, the plaintiffs were individuals who practiced commercial eyebrow threading and salon owners employing eyebrow threaders (the Threaders). 469 S.W.3d at 73. The Threaders had brought as-applied challenges based on the due course of law clause of the Texas Constitution to licensing statutes and regulations (the cosmetology scheme) that required 750 hours of cosmetology training, largely unrelated to commercial eyebrow threading, to obtain a license to practice. *Id.* at 73–74; *see* Tex. Const. art. I, § 19. Similar to appellees' claims, the Threaders alleged that the cosmetology scheme "violated their constitutional right 'to earn an honest living in the occupation of one's choice free from unreasonable government interference.'" *Patel*, 469 S.W.3d at 74.

The Texas Supreme Court concluded that the Threaders had met their "high burden" of proving that the cosmetology scheme was unconstitutional as applied to them based on the Texas Constitution due course of law protections. *See id.* at 90. In reaching its conclusion, the Texas Supreme Court set forth the following test for overcoming the presumption of constitutionality:

> To overcome that presumption, the proponent of an as-applied challenge to an economic regulation statute under Section 19's substantive due course of law requirement must demonstrate that either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as

> a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest.

Id. at 87. The court's analysis in its application of this test focused on the Threaders' constitutional right to occupational freedom and the State's concession that "as many as 320 of the curriculum hours [were] not related to activities that threaders actually perform." *See id.* at 89–90. The evidence showed that the Threaders were entirely shut out from practicing their trade until they completed the "oppressive" required training and that the threader trainees had to pay out-of-pocket expenses for that training "and at the same time lose the opportunity to make money actively practicing their trade." *Id.* at 88–90.

In contrast with the cosmetology scheme at issue in *Patel*, section 102.75(a)(7) addresses one aspect of the multi-faceted business relationship between beer distributors and manufacturers in the context of the three-tier system. Appellees' ability to assign a particular sales territory to a distributor arises from appellees' permits and licenses to manufacture beer in Texas and the requirement that manufacturers assign territorial rights to distributors under the comprehensive regulatory framework of the three-tier system. *See* Tex. Alco. Bev. Code §§ 11.01(a)(1) (requiring permit for privilege to "manufacture, distill, brew, sell, possess for the purpose of sale, . . . transport, distribute, warehouse, or store liquor"), 12.01 (stating authorized activities for holder of brewer's permit), 61.01 ("No person may manufacture or brew beer for the purpose of sale, import it into this state, distribute or sell it, or possess it for the purpose of sale without having first obtained an appropriate license or permit as provided in this code.").

Appellees do not challenge the statutory requirements of permits and licenses for the privilege to manufacture beer in this state, and they have not challenged the three-tier system itself. *See Granholm v. Heald*, 544 U.S. 460, 489 (2005) (recognizing that three-tier system for alcoholic beverage industry is "unquestionably legitimate"); *Neel*, 259 S.W.2d at 316 (affirming government's legitimate interest in preventing "evils of the 'tied house'"); *see also Dickerson v. Bailey*, 336 F.3d 388, 397 (5th Cir. 2003) (describing history of Alcoholic Beverage Code, including that it was enacted in 1935 after regulation of alcoholic beverages was returned to states). They also have not challenged any other provision addressing the relationship between manufacturers and distributors. *See, e.g.*, Tex. Alco. Bev. Code § 102.51(b).

Within the statutory framework of the three-tier system, the evidence showed that appellees have continued to operate their breweries and distribute their beer. Appellees have permits to self-distribute and have been doing so. *See id.* §§ 12A.02(a), (b) (authorizing self-distribution of up to 40,000 barrels directly to retailers for brewers producing fewer than 125,000 barrels annually), 62A.02(a), (b) (same authorization for manufacturers). The evidence further showed that, under the statutory framework, appellees are not required to "give away" sales territories to distributors. In addition to self-distributing their product, appellees can seek favorable provisions in the accompanying distribution agreement to a territorial rights assignment if they decide to assign territorial rights to a particular distributor. *See id.* § 102.75(b) (stating that "[n]othing in this section shall interfere with the rights of a manufacturer or distributor to enter into contractual agreements that could be construed as governing ordinary business transactions, including, but not limited to, agreements concerning allowances, rebates, refunds, services, capacity, advertising funds,

promotional funds, or sports marking funds").[7] Thus, unlike the entry barrier faced by the Threaders in *Patel*, appellees have not demonstrated that section 102.75(a)(7) has deprived them of occupational freedom, i.e., that it has prevented them from operating within their chosen trade—brewing and selling beer—within the confines of the unchallenged three-tier system.

Appellees argue that the "true purpose" of section 102.75(a)(7) is "the illegitimate purpose of naked economic protectionism" of the distributors—a "naked transfer of wealth" aimed at "[e]nriching distributors at the expense of brewers" "with no public benefit whatsoever." *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 222–23 (5th Cir. 2013) (concluding that regulation that granted exclusive right to sell caskets to funeral homes was unconstitutional and explaining that "economic protection, that is favoritism may well be supported by a post hoc perceived rationale . . . without which it is aptly described as a naked transfer of wealth"); *see also Patel*, 469 S.W.3d at 105 (Willett, J., concurring) (discussing Fifth Circuit's striking down of anticompetitive law in *Castille*).

As support for their position that the only purpose of section 102.75(a)(7) was to benefit distributors, appellees point to the evidence concerning the origins of section 102.75(a)(7) as part of the 2013 legislative package and to other provisions in the Code that already provided the Commission with "all of the tools it needed long before the passage of [section 102.75(a)(7)] in 2013" to police improper influence or control between members of different tiers. *See* Tex. Alco. Bev. Code § 102.01 (expressly prohibiting "tied house"—"any overlapping ownership or other prohibited relationship" between members of different tiers—and specifically listing prohibited

[7] The summary judgment evidence included deposition testimony about the terms and considerations that are subject to agreement between a distributor and manufacturer, such as quality and quantity of the distributor's storage and the distributor's geographic reach, capacity for growth, the number of other beers that a distributor has assignment rights, and advertising issues.

conduct of members of different tiers, including prohibiting member of one tier from providing credit or loans to member of different tier).

Appellees also rely on the evidence that territorial rights are "highly valuable," such as Live Oak Brewing's receipt of $250,000 for the assignment of territorial rights prior to the enactment of the statute.[8] Appellees argue, "[w]ithout the ability to convert distribution rights into investment capital, [their] ability to expand is diminished." And appellees rely on other provisions within the framework of the three-tier system that implicitly recognize that territorial rights for distribution have value, such as statutory limitations on cancellation of distribution agreements between manufacturers and distributors. *See id.* §§ 102.74 (requiring party to have "good cause" and to comply with notice requirements prior to cancelling agreement between manufacturer and distributor), 102.76 (allowing distributor to sell rights under distribution agreement to another distributor and, in that situation, prohibiting manufacturer from "unreasonably withhold[ing] or delay[ing] its approval"), 102.77 (requiring "reasonable compensation"—"fair market value of the distributor's business with relation to the affected brand or brands"—when manufacturer cancels distribution agreement without "good cause").

Even if we agree with appellees, however, that section 102.75(a)(7) directly benefits distributors at the expense of manufacturers and that territorial rights are valuable, we cannot conclude that prohibiting appellees from receiving a lump sum payment for the assignment of territorial rights equates with their deprivation of a constitutionally protected liberty interest such as

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[8] As previously noted, the parties join issue on whether manufacturers were prohibited from receiving payment for sales territorial assignments prior to the enactment of section 102.75(a)(7). Because it is unnecessary to the disposition of this appeal, we expressly do not resolve this dispute.

that protected in *Patel*. *See Patel*, 469 S.W.3d at 91 (although recognizing that "judicial deference is necessarily constrained where constitutional protections are implicated," explaining "that Courts must extend great deference to legislative enactments, apply a strong presumption in favor of their validity, and maintain a high bar for declaring any of them in violation of the Constitution"); *see also Neel*, 259 S.W.2d at 318 (concluding that challenged statute within framework of three-tier system did not violate plaintiff's liberty of contract).

In determining the constitutionality of section 102.75(a)(7) as applied to appellees, we must consider it in the context of the statutory framework of the three-tier system within which appellees operate. *See Cadena*, 449 S.W.3d at 163 (considering and construing statute within "statutory and historical context" of Alcoholic Beverage Code and three-tier system); *see also, e.g.*, *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (holding that when construing statutes, courts "must always consider the statute as a whole rather than its isolated provisions"). Among the provisions that were enacted as part of the 2013 legislation package, manufacturers like appellees were authorized to self-distribute their product to retailers and to sell their product for on-site consumption to consumers. *See* Tex. Alco. Bev. Code §§ 12A.02(a), (b) (authorizing self-distribution up to 40,000 barrels for brewers producing fewer than 125,000 barrels of beer annually), 12.052 (authorizing sales by certain brewers to consumers for on-site consumption), 62A.02(a), (b) (authorizing self-distribution up to 40,000 barrels for manufacturers producing fewer than 125,000 barrels of beer), 62.122 (authorizing sales by certain manufacturers to consumers for on-site consumption). In contrast with section 102.75(a)(7), these provisions benefit appellees at the expense of distributors and retailers. Viewing the provisions in the legislative package as a whole,

it becomes clear that they were the result of the type of commonplace compromise among various stakeholders that takes place as part of the legislative process.

Further, the provisions as a whole—providing offsetting benefits between the different tiers—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. *See, e.g.*, *id.* §§ 6.03(i) (expressing policy of "strict separation between the manufacturing, wholesaling, and retailing levels of [alcoholic beverage] industry and thereby to prevent the creation or maintenance of a 'tied house'"), 102.51(c) (stating purpose for territorial limits was "to promote the public interest in the fair, efficient, and competitive distribution of beer, to increase competition in such areas, and to assure product quality control and accountability by allowing manufacturers to assign sales territories within this state"); *Cadena*, 518 S.W.3d at 326–27, 330 (discussing "comprehensive framework for regulating everything from overlapping ownership among the three tiers down to specific financial transactions and gifts and promotions" and observing that "sheer number of statutes that Legislature enacted and the different approaches it took in proscribing the prohibited relationships, both specific and broad, reinforce its clear intent"); *S.A. Disc. Liquor, Inc. v. Texas Alcoholic Beverage Comm'n*, 709 F.2d 291, 293 (5th Cir. 1983) (explaining that three-tier system is intended to "avoid the harmful effects of vertical integration in the intoxicants industry" and "prevents companies with monopolistic tendencies from dominating all levels of the alcoholic beverage industry").

Because section 102.75(a)(7) is presumed constitutional, it was appellees' "high burden" to overcome the presumption and show that the statute as applied to them violated an

economic liberty interest protected by the Texas substantive due course of law clause. *See Patel*, 469 S.W.3d at 87. We conclude that they failed to do so. Thus, to the extent that the trial court found section 102.75(a)(7) was unconstitutional as applied to appellees, we conclude that the trial court erred in its summary judgment ruling. On the same grounds, we also conclude that the trial court erred in denying the Commission's competing motion. *See Dorsett*, 164 S.W.3d at 661.

Facial Challenge

To the extent that appellees also brought a facial challenge, we agree with the Commission that appellees failed to allege or meet the "heavy burden" to demonstrate that there was no set of circumstances under which section 102.75(a)(7) would operate constitutionally. *See Rivera*, 445 S.W.3d at 702; *HCA Healthcare*, 303 S.W.3d at 349, 351 (in context of appeal from summary judgment ruling, rejecting facial challenge because plaintiffs "[had] not argued, much less demonstrated," that statute operated unconstitutionally for every relevant medical dispute and rendering judgment that statute was facially constitutional); *see also FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000) (explaining that courts, in analysis of facial challenge to statute, "consider the statute as written, rather than as it operates in practice"). Our conclusion that section 102.75(a)(7) is not unconstitutional as applied to appellees is fatal to their facial challenge under the circumstances here.

Thus, to the extent that the trial court found section 102.75(a)(7) facially unconstitutional, we conclude that the trial court erred in its summary judgment ruling. *See Dorsett*, 164 S.W.3d at 661; *HCA Healthcare*, 303 S.W.3d at 351; *see also Gatesco Q.M. Ltd. v. City of Hous.*, 503 S.W.3d 607, 619–20 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (analyzing

summary judgment ruling in context of challenge to statute based on due course of law clause after the Texas Supreme Court's opinion in *Patel* was issued).

Conclusion

For these reasons, we reverse the trial court's final judgment and render judgment in favor of the Commission that appellees take nothing on their claims.

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Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Pemberton and Goodwin

Reversed and Rendered

Filed: December 15, 2017

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED DECEMBER 15, 2017

NO. 03-16-00786-CV

Texas Alcoholic Beverage Commission and Adrian Bentley Nettles, in his 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

APPEAL FROM THE 98TH DISTRICT COURT OF TRAVIS COUNTY
BEFORE CHIEF JUSTICE ROSE, JUSTICES PEMBERTON AND GOODWIN
REVERSED AND RENDERED -- OPINION BY JUSTICE GOODWIN

This is an appeal from the judgment signed by the trial court on August 25, 2016. Having reviewed the record and the parties' arguments, the Court holds that there was reversible error in the court's judgment. Therefore, the Court reverses the trial court's judgment and renders judgment in favor of the Texas Alcoholic Beverage Commission that appellees take nothing on their claims. The appellees shall pay all costs relating to this appeal, both in this Court and the court below.

THE TEXAS CONSTITUTION

ARTICLE 1. BILL OF RIGHTS

That the general, great and essential principles of liberty and free government may be recognized and established, we declare:

Sec. 19. DEPRIVATION OF LIFE, LIBERTY, ETC.; DUE COURSE OF LAW. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedHeld Unconstitutional by Live Oak Brewing Co., LLC v. Texas Alcoholic Beverage Com'ns, Tex.Dist., Aug. 25, 2016

V.T.C.A., Alcoholic Beverage Code § 102.75

§ 102.75. Prohibited Conduct

Effective: June 14, 2013
Currentness

(a) No manufacturer shall:

(1) induce or coerce, or attempt to induce or coerce, any distributor to engage in any illegal act or course of conduct;

(2) require a distributor to assent to any unreasonable requirement, condition, understanding, or term of an agreement prohibiting a distributor from selling the product of any other manufacturer or manufacturers;

(3) fix or maintain the price at which a distributor may resell beer;

(4) fail to provide to each distributor of its brands a written contract which embodies the manufacturer's agreement with its distributor;

(5) require any distributor to accept delivery of any beer or any other item or commodity which shall not have been ordered by the distributor;

(6) adjust the price at which the manufacturer sells beer to a distributor based on the price at which a distributor resells beer to a retailer, but a manufacturer is free to set its own price so long as any price adjustment is based on factors other than a distributor's increase in the price it charges to a retailer and not intended to otherwise coerce illegal behavior under this section; or

(7) accept payment in exchange for an agreement setting forth territorial rights.

(b) Nothing in this section shall interfere with the rights of a manufacturer or distributor to enter into contractual agreements that could be construed as governing ordinary business transactions, including, but not limited to, agreements concerning allowances, rebates, refunds, services, capacity, advertising funds, promotional funds, or sports marketing funds.

(c) It is the public policy and in the interest of this state to assure the independence of members of the three-tier system, but nothing in this code may be construed to prohibit contractual agreements between members of the same tier who hold the same licenses and permits.

Credits

Added by Acts 1981, 67th Leg., p. 60, ch. 26, § 1, eff. April 8, 1981. Amended by Acts 2013, 83rd Leg., ch. 555 (S.B. 639), § 1, eff. June 14, 2013.

V. T. C. A., Alcoholic Beverage Code § 102.75, TX AL BEV § 102.75
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

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