# No. 17-1046

IN THE SUPREME COURT OF TEXAS

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

***Petitioner*,**

**V.**

**TEXAS ALCOHOLIC BEVERAGE COMMISSION, ET AL.,**

***Respondent.***

*On Appeal from the Third Court of Appeals, Austin, Texas*
*No.* 03-16-00786-CV

## BRIEF OF TEXAS PUBLIC POLICY FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS


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## INTEREST OF *AMICUS CURIAE*[1]

The Texas Public Policy Foundation (the "Foundation") is a non-profit, non-partisan research organization dedicated to promoting liberty, personal responsibility, and free enterprise through academically-sound research and outreach.

Since its inception in 1989, the Foundation has emphasized the importance of limited government, free market competition, private property rights, and freedom from regulation. In accordance with its central mission, the Foundation has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to reduce the burden of government on Texans.

Through the Foundations' litigation center, the Center for the American Future, the Foundation currently represents individuals seeking to secure their constitutionally protected liberty and private property rights under the Due Course of Law provision of the Texas Constitution. Because of this litigation, the Foundation has done a significant amount of research on the history and application of the Texas Constitutions' Due Course of Law guarantee. It is with this background and experience that the Foundation files this Brief in support of Petitioners.

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[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. The Foundation has paid all of the costs and fees incurred in the preparation of this brief.

## SUMMARY OF ARGUMENT

In *Patel v. Texas Dept. of Licensing and Reg.*, 469 S.W.3d 69, 87 (Tex. 2015), this Court held that, at a minimum, restrictions on individual liberty must be justified by a government interest and not be unduly burdensome given the real-world government interest at stake. The *Patel* holding was not limited to the right to earn a living but set the floor of constitutional review for rights protected under the Due Course of Law provision of the Texas Constitution.

Since its inception, the Due Course of Law provision has provided a means to challenge any arbitrary burden placed on individual liberty or private property rights. The Third Court of Appeals departed from this tradition in this case by holding that a restriction on individual liberty, in this case the right to earn a living, is not challengeable under the Due Course of Law provision unless the restriction amounts to a complete prohibition on the ability to conduct one's business.

This holding should be overturned for three reasons. First it conflicts with the plain meaning of the Due Course of Law provision. As understood at the time of ratification, the text of the Due Course of Law provision indicates that it was intended to apply in cases that fell short of the complete prohibition of a right. Second, the decision conflicts with every other Texas court to interpret the Due Course of Law provision, including this Court in *Patel*. Finally, the lower court's decision undermines this Court's Opinion in *Patel* by effectively immunizing most

economic regulations from meaningful judicial review. This Court should grant review to confirm that *Patel* applies to any governmental infringement on individual liberty without requiring that the restriction eliminate the right in its entirety.

## ARGUMENT

To state a claim for relief under the Due Course of Law provision of the Texas Constitution, plaintiffs must allege, at a minimum, that: 1) the law burdens a protected liberty or property interest, and 2) that the challenged restriction is not rationally related to a legitimate government interest or is "as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest". *Patel*, 469 S.W.3d at 87.

The Foundation focuses in this Brief on step 1 of this test—*i.e.* whether the law burdens a protected right. The Foundation does not take a position on whether the challenged provision would survive under step 2 of *Patel*, and notes that the Third Court did not fully engage in the step 2 analysis.

Petitioners challenge a state law that prohibits brewers, as a condition of operating a brewery, from being paid for transferring permanent, exclusive distribution rights for their beer—an asset worth thousands of dollars. Tex. Alco. Bev. Code § 102.75(a)(7). Petitioners claim that this requirement infringes on their right to earn a living by requiring that they comply with arbitrary conditions in order to practice their trade.

The lower court held that no liberty interest was implicated, however, because the restriction was not a total bar on Petitioners' right to practice their trade; it merely placed conditions on that right's exercise. *See Texas Alcoholic Beverage Comm'n v. Live Oak Brewing Co., LLC*, No. 03-16-00786-CV, 2017 WL 6503035, at *7-8 (Tex. App.—Austin Dec. 15, 2017, pet. filed) ("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*" and "the evidence showed that appellees have continued to operate their breweries and distribute their beer.")

As explained below, this misapplication of the first step of the *Patel* analysis is contrary to the text of the Due Course of law provision and the prior holdings of this Court, and would effectively eliminate meaningful judicial for most economic regulations.

## I. THE APPELLATE COURT'S COMPLETE PROHIBITION STANDARD IS INCONSISTENT WITH THE TEXT OF THE DUE COURSE OF LAW PROVISION

Article I, Sec 19 of the Texas Constitution provides that: "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." (emphasis added). The issue in this case can be boiled down to whether "deprived…or in any

manner disfranchised" should be given its common meaning, or whether it should be read narrowly, as the appellate court did in this case, to include only total deprivations and complete prohibitions on the exercise of constitutionally protected rights. The Petitioners in this case have shown that Texas courts have always interpreted the Due Course of Law provision to apply to partial deprivations. The Foundation writes separately to establish that a plain reading of the text of that provision mandates the same result.

When interpreting a constitutional provision, one must begin with the plain meaning of the text. *D.C. v. Heller*, 554 U.S. 570, 577 (2008). The goal of constitutional interpretation is to establish the meaning of the terms as they would "have been known to ordinary citizens in the founding generation." *Id.* When a provision "borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013). Or, as the Supreme Court recently put it, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Id*.

To the extent that a provision is subject to more than one reading, this Court must give the provision the reading that is most conducive to liberty[2], and most likely grant an injured party judicial review. [3] With these presumptions in mind, we turn to the text of the Due Course of Law provision.

The text of the Due Course of Law provision indicates that the provision was intended to apply to partial deprivations of rights for at least three reasons. First, "Due course of law" is a term of art with a well-established understanding dating back to the English common law and Magna Carta. *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984) ("Our constitutional guarantees of open courts and remedy by due

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[2] It is a well-established maxim of American Jurisprudence that constitutional provisions should be interpreted according to the purpose for which the Constitution was created. *Calder v. Bull*, 3 U.S. 386, 387–89 (1798)("The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it."); *Gibbons v. Ogden*, 22 U.S. 1, 188–89 (1824)( "If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction.")

Like its federal forbearer, the purpose of the Texas Constitution is to preserve and protect liberty. Tex. Const. Art. 1 ("That the general, great and essential principles of liberty and free government may be recognized and established, we declare…"). Accordingly, our laws come to this Court with a heavy presumption in favor of liberty. *Patel*, 469 S.W.3d at 93 ("Texans are thus presumptively free, and government must justify its deprivations.") As famed abolitionist Frederick Douglass once wrote: "Where a law is susceptible of two meanings...the language of the law must be construed strictly in favour of justice and liberty." Frederick Douglass, *Selected Speeches and Writings*, 386-87 (Lawrence Hill Books, 1999).

[3] Justice Marshall wrote in *Marbury v. Madison*, 5 U.S. 137, 163, 2 L. Ed. 60 (1803), that the law should be interpreted such that for every legal right "there is also a legal remedy by suit or action at law, whenever that right is invaded." John Bingham, who crafted the 14th Amendment to the United States Constitution (the predecessor to our Due Course of Law provision[3]), noted that constitutionally guaranteed rights are a "mere dead letter" if their restriction is not reviewable in court. [3]

course of law are rooted in the Magna Carta.") At common law, "due course of law" provisions were seen as granting the court authority to remedy even partial deprivations of common right. As Sir Edward Coke explained, the "due course of law" empowered the court "not only to correct errors in judicial proceedings, but…any manner of misgovernment; so that no wrong or injury, either public or private can be done, but that it shall be (here) reformed or punished." *Bagg's Case*, 11 Co.Rep. 93b, 98a (1615). This understanding of the term "due course of law" was well understood at the time the Texas Constitution was ratified, and this Court should affirm this well-understood meaning. *See*, *Hunt*, 664 S.W.2d at 324.

Second, the words "deprive" and "disfranchise" indicate that less than total prohibition was intended. "In determining the ordinary and common meaning of an undefined word" courts will "consider a variety of sources, including dictionary definitions, judicial constructions of the term, and other statutory definitions." *Colorado City. v. Staff*, 510 S.W.3d 435, 448 (Tex. 2017). When looking at old statutes or constitutional texts, it is common to look to dictionaries in use at the time as evidence of an undefined terms natural meaning. *See*, *D.C. v. Heller*, 554 U.S. 570, 582-84 (2008) (using 18th Century dictionaries extensively to determine the meaning of the Second Amendment to the United States Constitution.) The Webster's dictionary from 1844 (in use at the time the due course of law language first appeared in a Texas Constitution) defines "deprived" to include "hindered [or]

degraded."[4] To "hinder" or "degrade" implies something less than complete elimination.

Third, any ambiguity as to whether "deprive" means *complete* elimination is removed by the other terms in the Due Course of Law provision which states that citizens may not be in "***any manner*** disfranchised." Tex. Const. Art. 1, sec. 19. (emphasis added). To "disfranchise" means to "deprive someone of any of a number of legal rights" or to engage in any act resulting in "diminished social or political status."[5] That term seems broad enough to include partial deprivations.

But the framers of the Texas Constitution went further by noting that disfranchisement in "any manner" was prohibited. The *Corpus of Historical American English* recently compiled by Brigham Young University contains nineteen entries from 1874-77 (the time period that the Texas Constitution was drafted) where the term "in any manner" was used in well-read publications. In virtually every instance, the term was used to indicate that even minor usurpations were included in the category of things referenced.[6] Indeed, as early as *The Federalist Papers*, American legal thinkers used the term "in any manner" to cover "economic regulations…effecting the value of differing species of property."

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4 Available at: http://edl.byu.edu/webster/d/67

5 *See*, https://www.merriam-webster.com/dictionary/disfranchise explaining the history of the term disfranchised; See also, Webster's 1844 dictionary, defining disfranchised to mean "Deprived of the rights and privileges of a free citizen, or of some particular franchise."

6 Available at: https://corpus.byu.edu/coha/

*Federalist Papers*, No. 62. Put simply, all of the textual evidence indicates that the Texas Constitution's due course of law provision applies to partial deprivations.

## II. THE APPELLATE COURT MISCONSTRUED THE FIRST PRONG OF *PATEL*

As Petitioners address in their briefing, no Texas court has ever held that plaintiffs must show a complete eradication of a right before bringing a Due Course of Law claim. Indeed, if this case involved any other constitutionally protected right, both lawyers and laypersons alike would realize the strangeness of such a position. Imagine if Texas passed any of the following laws:

- You may worship as you like, but only on Sundays.
- You may publish anything you like, but only in print media.
- You may live anywhere you like, but only west of I-35.

Now imagine that a Texas court found that these laws were not subject to challenge because they do not totally prevent individuals from worshipping, publishing, or living as they like—they merely place conditions on the exercise of those rights. That is essentially how the appellate court applied *Patel* in this case.

Texas courts have long recognized that a regulation of a constitutional right is subject to review, even when it falls sort of prohibition. *See, e.g., Am. Fed'n of Labor v. Mann*, 188 S.W.2d 276, 282 (Tex. Civ. App.—Austin 1945) (due course of law

claim properly before the court even though the challenged law was "regulatory, rather than prohibitory.").[7]

*Patel* did not draw any distinction between regulation and prohibition. That case involved eyebrow-threaders who challenged a state law that required a cosmetology license to thread eyebrows. The Third Court characterized this licensing requirement as a complete prohibition from practicing a trade, but that overstates the nature of the law. The threaders in *Patel* remained free to practice their trade, subject to their willingness to transfer thousands of dollars to a cosmetology school that provided irrelevant training. Nonetheless, this Court struck down the licensure requirement as an arbitrary burden on their right to earn a living under the Due Course of Law provision.

Similarly, the fact that Petitioners remain free to operate, subject to this prohibition on selling their distribution rights to third-parties, should not immunize the provision from constitutional scrutiny.

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[7] *See also, State v. Spartan's Indus.*, Inc., 447 S.W.2d 407, 410 (Tex. 1969) (challenge to Sunday closing law); *Lens Express, Inc. v. Ewald*, 907 S.W.2d 64, 68–69 (Tex. App.—Austin 1995, no writ) (challenge to 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.) (challenge to 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.) (challenge to wrecking yard ordinance); *Humble Oil & Ref. Co. v. City of Georgetown*, 428 S.W.2d 405, 408 (Tex. Civ. App.—Austin 1968, no writ) (challenge to local law regulating the size of gas tanks).

## III. THE APPELLATE COURT'S COMPLETE PROHIBITION STANDARD IMMUNIZES A SIGNIFICANT NUMBER ECONOMIC REGULATIONS FROM REVIEW

Finally, review is essential in this case, because the appellate court's complete prohibition standard effectively immunizes most economic regulations from any sort of meaningful judicial review. The vast majority of regulations are not complete prohibitions. As 18th-century philosopher David Hume cautioned, "It is seldom that liberty of any kind is lost all at once." Rather, suppression "must steal in upon [the people] by degrees, and must disguise itself in a thousand shapes in order to be received." David Hume, Of the Liberty of the Press 1, 262 n.4, in Hume: Political Essays (Knud Haakonssen ed., Cambridge Univ. Press 1994) (1741). Justices Willett, Lehrman, and Devine recently echoed this opinion, noting that the loss of liberty often occurs subtly, "with such drop-by-drop gentleness as to be imperceptible." *Patel*, 469 S.W.3d at 121 (Willett, J. concurring) (citing Hume).

The appellate court's complete prohibition standard effectively immunizes these common and therefore dangerous usurpations of individual liberty from any form of judicial review. Such a broad abandonment of judicial oversight has implications well beyond economic liberty.[8] This Court should grant the petition for

[8] For example, Land-use and zoning restrictions are generally subject to the same due course of law standard applied to economic regulations, like the right to earn a living. *See*, *Patel*, 469 S.W.3d at 87 (*citing Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 938 (Tex. 1998)).

review in this case to prevent further confusion in this important area of constitutional law.

## CONCLUSION

Therefore, this Court should grant the Petitioners' request for review to address whether the appellate court correctly applied the first step of Patel.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, I certify that the body of the attached Brief of the Texas Public Policy Foundation as *Amicus Curiae* in Support of Petitioner appears in proportionately spaced type of 14 points, is double-spaced using Times New Roman font, and contains **2941** words, excluding the caption, table of contents, index of authorities, signature, proof of service, certification, and certificate of compliance.

ROBERT HENNEKE

## CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2018, the Brief of the Texas Public Policy Foundation as *Amicus Curiae* in Support of Petitioner was served via electronic service on the following:

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