FILED
22-0499
3/29/2023 8:40 PM
tex-74150799
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 22-0499

In the Supreme Court of Texas

SURFVIVE, ANUBIS AVALOS, AND ADONAI RAMSES AVALOS,

Petitioners,

V.

CITY OF SOUTH PADRE ISLAND,

Respondent.

On Petition for Review from the Thirteenth Court of Appeals at Corpus Christi and Edinburg, Texas
No. 13-20-00536-CV

PETITIONERS' BRIEF ON THE MERITS

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In the 138th Judicial District Court

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STATEMENT OF THE CASE

Nature of the Case:	Action for declaratory judgment, injunctive relief, and nominal damages of $1 challenging the constitutionality of S. Padre Island, Tex., Code of Ordinances ("SPI Code") § 10-31(C)(3) ("Restaurant Permission Scheme") and §§ 10-31(C)(2), (F)(2)(a) ("Permit Cap"), under Article I, § 19 of the Texas Constitution and the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code Ann. § 37.003.
Trial Court:	The Honorable Arturo Cisneros Nelson, 138th Judicial District Court, Cameron County, Texas.
Trial Court Disposition:	Before discovery commenced, Respondent City of South Padre Island ("City") filed its first plea to the jurisdiction challenging only the availability of nominal damages ($1) as a remedy for a constitutional violation. Supp. CR.6–14. The district court took it under advisement. After discovery closed, the parties cross-moved for summary judgment and the City filed its second plea to the jurisdiction raising immunity and standing arguments. CR.64–105, 501–61. In two concurrent orders issued November 30, 2020, the district court granted the Plaintiff Food Truck Petitioners' motion for summary judgment in full, CR.3058 (App. 1)[1], and it denied the City Respondent's second plea to the jurisdiction and competing summary-judgment motion, CR.3057 (App. 2).
Court of Appeals:	In the Thirteenth Court of Appeals, the City appealed only the district court's concurrent order that denied its second plea to the jurisdiction. CR.3059–62. The appeal triggered an automatic stay of proceedings, *see* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(b) (staying district court

[1] References to "App." refer to Petitioners' Appendix.

proceedings pending interlocutory appeals), CR.3061, which deprived the district court from enforcing its summary-judgment ruling and entering a final judgment.

The Appellant was City of South Padre Island.

The Appellees were Surfvive, Anubis Avalos, and Adonai Ramses Avalos.

Court of Appeals Disposition:

Justice Longoria, joined by Justice Benavides and Justice Tijerina, reversed the district court, rendered judgment granting the City's second plea to the jurisdiction, and dismissed Food Truck Petitioners' claims. The Thirteenth Court held that the Petitioners lack a viable Article I, Section 19 claim challenging the City's Restaurant Permission Scheme and further held that Petitioners lack standing to challenge the Permit Cap. *See City of South Padre Island v. Surfvive*, No. 13-20-00536-CV, 2022 WL 2069216 (Tex. App.—Corpus Christi–Edinburg June 9, 2022, pet. filed) (mem. op.). *See* App. 3. No motions for rehearing or *en banc* review are pending.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Tex. Gov't Code Ann. § 22.001(a) because this case presents constitutional issues that are important to the jurisprudence of the state.

ISSUES PRESENTED

1. Just two months ago in *Texas Department of State Health Services v. Crown Distributing LLC*, a four-Justice concurrence called for cases to answer foundational questions about Article I, § 19's Due Course of Law Clause: "[W]hat *does* that clause protect—and how does it do so?" 647 S.W.3d 648, 664 (Tex. 2022) (Young, J., concurring) (emphasis in original). The concurrence seeks cases allowing an examination of the premises underlying this Court's leading economic-liberty precedent, *Patel v. Texas Department of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015). This case provides the vehicle for this examination because there is a preserved argument about the scope of the Due Course of Law Clause, and undersigned counsel, which litigated *Patel*, is prepared to present the "relevant and probative historical evidence." *Crown Distrib.*, 2022 WL 2283170, at *27.

   The issue presented is: What is the scope of the Due Course of Law Clause, its relationship to the Fourteenth Amendment, and its substantive protections for the right to pursue a common occupation?

2. The Thirteenth Court's decision seriously undermined the Due Course of Law Clause's protections by holding that private economic protectionism—the naked preference for existing businesses over new entrants—justifies restrictions on the right to pursue a common occupation. This dangerous ruling upends *Patel* because virtually every barrier to entering a common occupation can be recast as the legislature's desire to protect existing businesses from competition. Under the decision below, *Patel* itself was wrongly decided because the cosmetology laws this Court found so oppressive to eyebrow threaders could easily be reframed as the legislature's desire to protect existing salons from competition. This case is an ideal vehicle for addressing the issue because, as the appellate court correctly held, there is no rational health-and-safety reason for the challenged regulations. Hence, whether Petitioners win or lose depends entirely on whether private economic protectionism is a valid justification for a law.

   The issue presented is: Is private economic protectionism a legitimate government interest in Due Course of Law Clause challenges to restrictions on the right to pursue a common occupation?

3. The Thirteenth Court held that Petitioners lack standing to challenge the cap on food-truck permits even though the cap had been met and no permits were left.

   The issue presented is: If a Texan cannot obtain a permit because no permits are left, does standing to challenge that provision require anything more than showing that no permits exist?

TO THE HONORABLE SUPREME COURT OF TEXAS:

STATEMENT OF FACTS

Petitioners Surfvive and the Avalos brothers are grassroots food-truck entrepreneurs who want to pursue their common occupation in South Padre Island ("SPI"). But the City's Restaurant Permission Scheme and Permit Cap shut them out.

I. The Permission Scheme and Permit Cap.

Petitioners challenge two unprecedented restrictions on food trucks. First, the Permission Scheme: A permit applicant must persuade a local restaurant owner to sign a permission slip. SPI Code § 10-31(C)(3) ("Applicants must be supported locally and have the signature of an owner or designee of a licensed, free-standing food unit on South Padre Island *before being eligible for a permit*." (emphasis added)). Local restaurateurs are not required to sign. Second, the Permit Cap: Only eighteen food-truck permits are available.[2] *Id.* §§ 10-31(C)(2), (F)(2)(a). No other Texas city has a Permission Scheme or Permit Cap for vending on private property.[3]

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[2] Food trucks may operate only on commercially-zoned private property. SPI Code §§ 10-31(A)(3), (C)(1). Thus, a food truck can rent space at a gas station or grocery store but cannot operate without permission from a local restaurateur.

[3] *See, e.g.*, Amarillo Code § 8-5-21(c); Austin Code § 10-3-91 *et seq.*; Brownsville Code § 22-126; Corpus Christi Code § 38-18; Dallas Code § 17-8.2; Edinburg Code § 112.18; El Paso Code § 9.12.800; Fort Worth Code § 16-131; Galveston Code § 19-51 *et seq.*; Harlingen Code § 22-127 *et seq.*; Houston Code §§ 20-22, 20-37; McAllen Code § 54-51; Midland Code § 8-4-1 *et seq.*; Mission Code § 42-361 *et seq.*; New Braunfels Code § 90-2; San Antonio Code § 13-61 *et seq.*; San Marcos Code § 18.101 *et seq.*

II. The Purpose Is Protecting Restaurants from Food-Truck Competition.

The plain language and history of the challenged restrictions establish their true purpose: protecting local restaurants from honest competition. City staff initially drafted a food-truck ordinance without the challenged restrictions. *See* CR.1997–2002; CR.1798 (165:8–13); CR.1810 (177:13–18). In discovery, the City conceded that this draft ordinance would protect public health. CR.1689 (56:3–8). The City also admitted that their "thorough research" never suggested a need for the Permission Scheme or Permit Cap. *See* CR.632, 673–74, 696–704 (research was unrelated to Permission Scheme or Permit Cap); *see also* Resp. to Pet. 4.

The Permission Scheme and Permit Cap were written by the local restaurant lobby. After City staff presented the draft ordinance, local restaurateurs objected to food-truck competition. CR.678 (89:16–21), 970. In response, City Council allowed local restaurateurs to amend the City's draft, approving:

> "[A] motion to have a local group of restaurateurs get together and *come up with ideas* on modifying the proposed ordinance and bring [it] back to City Council for discussion and action."

CR.2017–18 (emphasis added). The Mayor urged them to "make it restrictive so that it doesn't hurt the local businesses" but not "so restrictive where

outsiders start saying 'Hey, this is unfair' and decide[] to take legal action." CR.1264–65 (27:1–28:8).

The local restaurateurs formed the Food Truck Planning Committee. Statements during meetings make clear the goal of suppressing food-truck competition:

- "[I]f you take that cream away from us, I think it's materially going to hurt our business."
- "[F]ive trucks aren't going to hurt me . . . [b]ut 15 are going to start to eat us up."
- "My initial opposition was, and still is, that I am not convinced that South Padre Island has the population to support added competition for the already existent businesses."

CR.1216–17, 1221; *see also* Ron Whitlock Reports, *SPI Food Trucks*, YOUTUBE (July 28, 2015), https://youtu.be/yXDWAaO4xF0 (video at 17:23–35), *cited in* CR.1225–26.

The Permission Scheme and Permit Cap were the first order of business. CR.1966 (333:15–18); CR.1967 (334:1–6). The Committee emailed City officials the revised ordinance with the challenged restrictions. *See* CR.1375–80; *see also* CR.1112–16 (130:19–134:4), CR.1118–19 (136:24–137:5). Days later, the City Council enacted both. *Compare* CR.1375–80

(Email with amended food-truck ordinance dated Feb. 6, 2016), *with* CR.1231–36 (Ordinance No. 16-05 dated Feb. 17, 2016).[4]

III. The Permission Scheme and Permit Cap Bar Petitioners from South Padre Island.

Petitioner Surfvive twice sought a food-truck permit but was shut out by the Permission Scheme and Permit Cap. Surfvive is a charity dedicated to healthy living. CR.562. It offers free surfing lessons, community gardening, and a food truck that promotes responsible eating. *Id.* Surfvive leased a food truck in April 2018, and began selling smoothies, coffee, and veggie bowls outside SPI city limits. CR.563. At that point, all six SPI permits had been issued. *Id.*, CR.2661, CR.2761.

Surfvive operated legally on county land while waiting for an SPI permit. A few months later, the City notified Surfvive that a permit became available when the Cap was raised to twelve. *See* CR.2743. Surfvive identified a vending location, CR.564, 2745, and submitted its permit application, CR.2747. But the City rejected it because it lacked a local restaurateur's signature. CR.1608–09.

The challenged restrictions also fenced out Petitioners Adonai and Anubis Avalos. The brothers co-own Chile de Árbol and developed original

[4] The evidence for economic protectionism is overwhelming. Petitioners do not restate it all here, but details are in the record. *See* CR.518–27.

recipes for vegan tacos, burgers, and Indian-inspired bowls. CR.570–71, 576–77. Full-time music teachers, they purchased a food truck to operate at a Brownsville food-truck park on evenings and weekends.[5] CR.570-71, 576-77, 2755. The brothers took several steps to vend on SPI. CR.571–72, 577–78 (e.g., testing the market at an SPI event, visiting potential vending locations, and researching City regulations).

But the challenged restrictions thwarted their efforts. When this case was pending in the district court in 2020, the City had issued all twelve permits. CR.2662. And even if a permit became available, the Avalos brothers would have had to obtain permission from a local restaurant owner, a requirement they reject in principle. CR.573, 579.

IV. The Thirteenth Court Upholds the Permission Scheme as Valid Economic Development, and Finds No Standing for Permit-Cap Challenge.

The district court granted Petitioners' summary-judgment motion. CR.3058 (App. 1). The Thirteenth Court of Appeals reversed. First, the panel held that Petitioners lacked standing to challenge the Permit Cap, ruling—in

[5] After the City continued enforcing the Permission Scheme and Permit Cap despite Petitioners prevailing at summary judgment, the brothers temporarily ceased operations pending the outcome of this case. *See* App. 12 at 3. However, they fully intend to reopen Chile de Árbol on SPI should they succeed here, *see id.*, as recognized by the Thirteenth Court, *see City of South Padre Island v. Surfvive,* No. 13-20-00536-CV, 2022 WL 2069216, at *3 n.1 (Tex. App.—Corpus Christi–Edinburg June 9, 2022, pet. filed) (mem. op.) (evidence indicates "a temporary closure and such closure does not prevent the Avalos brothers from reopening or engaging in the food truck business").

a three-sentence paragraph—that the Petitioners' injuries were "hypothetical" because "they [did] not indicate how they were in fact injured by the cap." *City of South Padre Island v. Surfvive*, No. 13-20-00536-CV, 2022 WL 2069216, at *3 (Tex. App.—Corpus Christi–Edinburg June 9, 2022, pet. filed) (mem. op.). That conclusion is Issue Presented 3 below.

Next, the Court ruled that Petitioners "had standing to assert their claim as to the constitutionality of the restaurant permission requirement." *Id.* at *8. The City advanced three arguments: (1) Petitioners lacked a cognizable liberty interest in operating food trucks; (2) the Permission Scheme protects public health; and (3) the Permission Scheme is a form of economic development. Applying the test from *Patel v. Texas Department of Licensing & Regulation*, the appellate court first held that Petitioners have a valid liberty interest in the "ability to pursue an economic or professional opportunity." *Id.* at *6 (citing *Transformative Learning Sys. v. Tex. Educ. Agency*, 572 S.W.3d 281, 293 (Tex. App.—Austin 2018, no pet.)). That conclusion is Issue Presented 1 below.

The court then rejected the City's contention that the Permission Scheme "protects the general health and safety of the public" because "the requirement contains no language indicating" a connection to public health. *Id.* at *7. The panel did, however, uphold the Permission Scheme on the

ground it "was created to promote economic development, including the legitimate government interest in retaining current businesses and preventing economic decline." *Id.* at *8. That conclusion is Issue Presented 2 below.

SUMMARY OF THE ARGUMENT

> "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." TEX. CONST. art. I, § 19.

Issue Presented 1: Petitioners answer a fundamental question that a four-Justice concurrence posed last summer about Article I, Section 19: "[W]hat *does* that clause protect—and how does it do so?" *Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 664 (Tex. 2022) (Young, J., concurring). Petitioners explain that the original public meaning of "privileges or immunities" and "liberty" in 1876 included the ancient right to pursue a common occupation. They next demonstrate that "due course of the law of the land" meant meaningful judicial review of the *substance* of deprivations, as the *Patel* court recognized. *See Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015). Thus, by depriving Petitioners of their right to pursue the common occupation of selling food, the Permission Scheme and Permit Cap are subject to substantive judicial review under the *Patel* test.

Issue Presented 2: Is private economic protectionism—that is, a naked preference for A over B without any justification in the public interest—a legitimate government purpose under the *Patel* test? If it is, then the Permission Scheme and Permit Cap are constitutional because the ordinances are surgically tailored to protect the private financial interests of local SPI restaurants at the expense of the public and Petitioners. But such protectionism is not legitimate, and the Thirteenth Court erred by labeling the challenged restrictions "economic development." *Surfvive*, 2022 WL 2069216, at *8. Indeed, this sort of collusion between government and special interests for the sole benefit of the latter is antithetical to the occupational liberty Texans protected in their 1876 Constitution, as well as inimical to their self-understanding as hard workers in a land of boundless economic opportunity.

Issue Presented 3: The panel below erred in finding that Petitioners lacked standing to challenge the Permit Cap.

ARGUMENT

I. Issue 1: Article I, Section 19 Contains a Judicially Enforceable, Substantive Right to Pursue a Common Occupation.

An analysis under Article I, Section 19 consists of two steps. First, "the citizen must have a liberty or property interest that is entitled to constitutional protection." *Honors Acad., Inc. v. Tex. Educ. Agency*, 555 S.W.3d 54, 61 (Tex. 2018). Second, "if a protected interest is implicated, did the government defendant follow due course of law in depriving the plaintiff of that interest?" *Tex. S. Univ. v. Villarreal*, 620 S.W.3d 899, 905 (Tex. 2021). Though the appellate court found that Petitioners have a protected interest in pursuing their occupation, the City contested that below and in its response to the Petition for Review. *See* Resp. to Pet. 13–14; App. 10. Thus, Petitioners must answer the first-step question.

Petitioners do so by responding to the provocative questions raised last year in the four-Justice *Crown* concurrence. The impetus for the concurrence was the remarkable fact that "[w]e still do not really know, even as we approach the sesquicentennial of our current Constitution," "what [Article I, Section 19] protects—and how does it do so?" *Crown Distrib.*, 647 S.W.3d at 664 (Young, J., concurring). Given Sam Houston's firm belief that the law-of-the-land clause is the "charter of our liberty," 8 THE WRITINGS OF

SAM HOUSTON 1813–1863, at 318 (1943), it is indeed remarkable that the clause lacks an authoritative interpretation. However, as Petitioners demonstrate below, it would have been entirely *unremarkable* to Texans in 1876 that Article I, Section 19 protects, among other constitutional interests, the right to pursue a common occupation. And it protects this venerable right the same way as our other rights: meaningful, substantive judicial review, as embodied in cases like *Patel*.

Petitioners answer the two-part *Crown* concurrence question as follows. First, Section A explains the proper approach to constitutional interpretation. Next, Section B establishes that the original public meaning of "privileges or immunities" and "liberty" included the right to pursue a common occupation. Then, Section C demonstrates that "due course of the law of the land" requires, in addition to procedural regularity, meaningful judicial review of the *substantive* propriety of a challenged deprivation. Finally, in Section D, Petitioners bolster their plain-language analysis by explaining how theirs is the only reading consistent with the anti-government sentiments of 1876, and with the unmistakable intent of the 1875 delegates, who enshrined "every safeguard known to constitutional law" to protect Texas liberty. *Address to the People of Texas*, GALVESTON DAILY NEWS, Nov. 28, 1875, at 2 [https://tinyurl.com/yc83duma].

A. Method: Constitutional Terms of Art Are Interpreted Through Text, Cases, History, and Tradition.

Petitioners begin by explaining the correct way to ascertain the Constitution's meaning. "When we interpret our state constitution, we rely heavily on its literal text and must give effect to its plain language." *Stringer v. Cendant Mortg. Corp.*, 23 S.W.3d 353, 355 (Tex. 2000). "The fundamental rule for the government of courts in the interpretation or construction of a Constitution is to give effect to the intent of the people who adopted it." *Cox v. Robinson*, 150 S.W. 1149, 1151 (Tex. 1912); *Smissen v. State*, 9 S.W. 112, 116 (Tex. 1888) ("[T]he real question [of constitutional interpretation is], what did the people intend by adopting a constitution framed in language submitted to them?"); *cf.* ANTONIN SCALIA, *Common Law Courts in a Civil-Law System, in* A MATTER OF INTERPRETATION 3, 39 (2d ed.1997) (placing primacy on "original text and understanding"). That meaning "is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." *Cox*, 150 S.W. at 430. Thus, the question is what Article I, Section 19 meant at the 1876 ratification, not what gloss we might impose today.

We do not assume that Texans handed the reins to the U.S. Supreme Court so that Article I, Section 19 means only whatever the high court declares the Fourteenth Amendment to mean at any given moment. To the

contrary, Texans charted an independent course. They rewrote Article I, Section 1 in 1875, repudiating prior language characterizing the state charter as "framed in harmony with, and in subordination thereto" the U.S. Constitution, replacing that with a stirring pronouncement: "Texas is a free and independent state." *Compare* TEX. CONST. of 1869, art. I, § 1, *with* TEX. CONST. art. I, § 1. *See also* DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875, at 45 (Seth Shepard McKay ed., 1930) (statement of delegate Charles DeMorse) ("[The delegates] were sent, not to reenact [the Texas Constitution of 1845] or any other instrument, but to make a Constitution according to their best lights on the subject."); DEBATES OF THE TEXAS CONVENTION 468 (Wm. F. Weeks ed., 1846) (statement of Thomas J. Rusk) ("We can reflect for ourselves, and are capable of forming a Constitution for ourselves."). Nor would we expect Texans to be federal supplicants. The United States was, then, a conqueror that only just ceded political control back to Texans. *See* T.R. FEHRENBACH, LONE STAR 433–42 (2d ed. 2000) (describing the effect of Reconstruction on Texans' attitudes toward ratification). The national government was not, from the perspective of Texans, a paragon of wisdom to be emulated blindly.

Of course, "[b]ecause the U.S. Constitution's 'due process' clause uses language similar to the Texas Constitution's 'due course' clause, we may find

guidance in the federal courts' due process decisions." *Crown Distrib.*, 647 S.W.3d at 654 n.17. And Petitioners acknowledge that this Court has often said that Article I, Section 19, "for the most part, align[s] with" the federal due-process clause. *Patel*, 469 S.W.3d at 86. But, as the *Crown* concurrence recognizes, such statements are rarely substantiated by a deep historical dive. *Crown Distrib.*, 647 S.W.3d at 665 (Young, J., concurring). While this Court's statements may be instructive, what ultimately matters is the actual meaning of Article I, Section 19 in 1876.

Identifying original meaning requires more than a word-by-word analysis. Phrases like "privileges or immunities" or "due course of the law of the land" are legal terms of art whose meaning is more than the sum of individual words. When parsing a term of art, we seek its "established meaning at the time of the framing of the Constitution." *Collins v. Youngblood*, 497 U.S. 37, 41 (1990); *see also Sekhar v. United States*, 570 U.S. 729, 733 (2013) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.") (citation omitted)). *Collins*, for example, explained that the phrase "ex post facto Law" in Article I, Section 10 of the U.S. Constitution, though literally encompassing "any law passed 'after the fact,'" applies "only

to penal statutes which disadvantage the offender affected by them" because that was the meaning at ratification. *Collins*, 497 U.S. at 41.

Unraveling terms of art necessarily relies on historical context. "In determining the intent" of 1876 Texans, "proper subjects of inquiry" include "the history of the times out of which [the Constitution] grew and to which it may be rationally supposed to have a direct relationship, the evils intended to be remedied and the good to be accomplished." *Davenport v. Garcia*, 834 S.W.2d 4, 19 (Tex. 1992) (cleaned up).[6]

B. The Terms "Privileges or Immunities" and "Liberty" Include the Right to Pursue a Common Occupation.

1. "Privileges or Immunities" was added in 1876 to protect the economic rights that the U.S. Supreme Court, in 1873's Slaughter-House Cases, said were the responsibility of the states.

The 1876 Constitution added "or immunities" to the word "privileges" in Article I, Section 19. Predecessor clauses in the 1836, 1845, 1861, 1866, and 1869 constitutions contained only the word "privileges." One might mistake this for textual housekeeping—Texas drafters thinking that "privileges" should not appear alone because "privileges or immunities" was

[6] Guidance on the use of history may be drawn from recent U.S. Supreme Court decisions, which have reaffirmed the importance of historical evidence in identifying protected liberty interests and the scope of enumerated rights. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022) ("[I]n conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue."); *see also Timbs v. Indiana*, 139 S. Ct. 682, 686–88 (2019).

a cognate term of art. *See, e.g.* U.S. CONST. art. I, § 2 ("Privileges and Immunities"); *id.* amend. XIV, § 1 ("Privileges or Immunities").

But there was a larger purpose. The Texans of 1876 added "or immunities" right after the infamous 1873 *Slaughter-House Cases*, in which the U.S. Supreme Court held that, contrary to the prevailing understanding, "privileges or immunities" in the newly ratified Fourteenth Amendment included only a peculiar set of uniquely *federal* rights, not traditional ones such as the right to pursue a common occupation. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74–80 (1873). *Slaughter-House* also laid protection for traditional "privileges or immunities" at the feet of the states. *Id.* at 78 ("[T]he privileges and immunities relied on in the argument . . . are left to the State governments for security and protection.").

We presume the 1875 delegates had *Slaughter-House* in mind. Just as legislatures are presumed familiar with existing law when enacting statutes, "[i]t is equally proper to presume that the delegates to the Constitutional Convention were fully aware of" their contemporary legal landscape. *Cent. Va. Comty. Coll. v. Katz*, 546 U.S. 356, 362 n.3 (2006); *see also Alden v. Maine*, 527 U.S. 706, 721–24 (1999) (Eleventh Amendment ratified after Supreme Court decision authorizing suit against a state); *accord Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 89 (Tex. 1997) (noting that courts

"may consider . . . the historical context in which [the Texas Constitution] was written"). "Thus, discussions preceding proposal and adoption of the 187[6] Texas Constitution were held against the backdrop of recent Supreme Court mandates placing guardianship of non-federal rights of individuals squarely in the hands of the states." *Patel*, 469 S.W.3d at 83.

The significance of *Slaughter-House* is bolstered by the fact that delegate William Pinckney McLean proposed adding "or immunities" at the 1875 Texas convention. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF TEXAS 351 (1875) [hereinafter CONVENTION JOURNAL]. McLean, an attorney, was a U.S. Congressman when *Slaughter-House* was decided, and he participated in congressional debates in 1875 in Washington for H.R. 796, denominated a "Civil-Rights Bill," that included discussion of *Slaughter-House*. *See* 3 CONG. REC. 976–77 (1875) [https://tinyurl.com/26sk54ys]. Though no official record of Texas' 1875 convention debates exist because the delegates were too thrifty to retain stenographers, Congressman McLean's pivotal role substantiates the conclusion that "or immunities" was added to Article I, Section 19 in response to *Slaughter-House*.

How do we know that the inclusion of "or immunities" was intended to protect the traditional right to pursue a common occupation, among other interests? Because that is what *Slaughter-House* was about. *Slaughter-*

House, 83 U.S. at 60 ("[I]t is asserted that [the monopoly] deprives a large and meritorious class of citizens—the whole of the butchers of the city—of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families."). In 1869, the Louisiana legislature granted a monopoly to a private corporation to operate the stock landings and slaughterhouses of New Orleans. *Id.* at 59. The Supreme Court hinted that the monopoly's abridgment of "the right to exercise [one's] trade" may have been justified "to remove from the more densely populated parts of the city, the noxious slaughter-houses and large and offensive collections of animals." *Id.* at 60. But that public-health rationale was not the ultimate holding.

Instead, the majority held that "privileges or immunities" in the Fourteenth Amendment did not include the right to pursue a common occupation, only exotic, often previously unknown, rights peculiar to federal citizenship, such as "free access to . . . the subtreasuries." *Id.* at 79. In reading traditional "privileges or immunities" out of the Fourteenth Amendment, the Supreme Court noted that those rights, including the right to pursue a common occupation, "are left to the State governments for security and protection." *Id.* at 75.

In the aftermath of *Slaughter-House*, Texans included "privileges or immunities" in Article I, Section 19 to memorialize the traditional understanding of that term, including the right to pursue a common occupation. In the Reconstruction era, "privileges and/or immunities" embraced an array of fundamental personal liberties rooted in the common-law and natural-rights theory. The *Slaughter-House* dissents lambasted the majority's inexplicable failure to acknowledge the public meaning of "privileges or immunities." *See id.* at 109 (Field, J., dissenting) ("In all these cases there is a recognition of the equality of right among citizens in the pursuit of the ordinary avocations of life, and a declaration that all grants of exclusive privileges, in contravention of this equality, are against common right, and void."); *id.* at 120 (Bradley, J., dissenting) ("The granting of monopolies, or exclusive privileges to individuals or corporations, is an invasion of the right of others to choose a lawful calling, and an infringement of personal liberty.").

Dissenting Justices Field and Bradley knew in 1873 that the term of art "privileges or immunities" included the right to pursue a common occupation because of Justice Bushrod Washington's authoritative interpretation in *Corfield v. Coryell*. *See* 6 F. Cas. 546, 551–52 (No. 3,230) (C.C.E.D. Pa. 1823). Like *Slaughter-House*, *Corfield* was about the right to

pursue a common occupation. There, a Delaware resident challenged the validity of a New Jersey statute that forbade non-New Jersey residents from gathering shellfish at the mouth of the Maurice River. *Id.* at 550–51. Justice Washington, then riding circuit, invalidated New Jersey's restriction on Corfield's right to pursue his common occupation. In doing so, he elucidated the meaning of Article IV, Section 1's "privileges and immunities." They "are, in their nature fundamental; . . . [they] belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states." *Id.* at 551. He observed that "privileges and immunities" have countless permutations, rendering it "tedious . . . to enumerate" them. *Id.* Thus, they "may be comprehended under the following general heads," including "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness[.]" *Id.* at 551–52. As to economic liberty, he noted that "privileges and immunities" include the right "to pass through, or to reside in any other state for purposes of trade, agriculture, [or] professional pursuits." *Id.* at 552. In sum, "privileges and immunities" encompassed the full universe of personal liberty.

This was well known. Justice Washington's view of "privileges and immunities" is "certainly one of the most famous pronouncements ever made

in a circuit court." Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 10 (1949). Scholars concur that his *Corfield* opinion was *the* definitive statement.[7] Until *Slaughter-House*, courts widely endorsed his natural-rights interpretation of "privileges and immunities."[8]

* * *

Thus, by adding the term of art "privileges or immunities" to Article I, Section 19 in 1876 in response to *Slaughter-House*, Texans were protecting traditional, fundamental personal liberties, including the right to pursue a common occupation.

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[7] *See, e.g.*, Adam J. Rosen, *Slaughtering Sovereignty: How Congress Can Abrogate State Sovereign Immunity to Enforce the Privileges or Immunities Clause of the Fourteenth Amendment*, 11 TEMP. POL. & C.R. L. REV. 111, 130 n.102 (2001) (characterizing Corfield as the "premier case of the antebellum period" explaining privileges and immunities); Douglas G. Smith, *A Lockean Analysis of Section One of the Fourteenth Amendment*, 25 HARV. J.L. & PUB. POL'Y 1095, 1158 (2002) (referring to the Corfield opinion as the "most widely-cited enumeration" of privileges and immunities at the time of the Fourteenth Amendment's adoption); *see also* Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 1001–02 (2002) (arguing that modern cases reaffirm Justice Washington's interpretation of privileges and immunities).

[8] *See Dunham v. Lamphere*, 69 Mass. (3 Gray) 268, 276 (1855) (citing *Corfield* with approval); *State v. Medbury*, 3 R.I. 138, 142–43 (1855) (same); *Slaughter v. Commonwealth*, 54 Va. (13 Gratt.) 767, 774 (1856) (same); *Tatem v. Wright*, 23 N.J.L. 429, 444 (1852) (Elmer, J.,) (same); *Crandall v. State*, 10 Conn. 339, 351 (1834) (argument for appellant in error); *id.* at 362–64 (argument for respondent in error); *Wiley v. Parmer*, 14 Ala. 627, 631–32 (1848); *Commonwealth v. Milton*, 51 Ky. (12 B. Mon.) 212, 219 (1851). *See also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1800, at 675 n.1. (Boston, Hilliard, Gray & Co. 1833).

2. "Liberty" also included the right to pursue a common occupation.

The original public meaning of the word "liberty" in Texas in 1876 likewise encompassed the full array of ancient natural rights, including the right to pursue a common occupation. Contemporary dictionaries contained entries for "civil liberty," which express the meaning of "liberty" in Article I, Section 19: "The liberty of a member of society, being a man's natural liberty, so far restrained by human laws, (and no farther), as is necessary and expedient for the general advantage of the public," *Liberty*, 1 ALEXANDER M. BURRILL, A LAW DICTIONARY & GLOSSARY (2d ed. 1871) (referring readers to the entry for "civil liberty"); "Exemption from arbitrary interference with person, opinion, or property, on the part of government under which one lives," *Liberty*, WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE: BEING AN AUTHENTIC EDITION OF WEBSTER'S UNABRIDGED DICTIONARY, COMPRISING THE ISSUES OF 1864, 1879, AND 1884 (Noah Porter ed., reference history ed. 1907). *See also Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 75 (2015) (Thomas, J., concurring) (stating that the "individual liberty" cherished by "the Framers" is "not liberty in the sense of freedom from all [physical] constraint," but "liberty as described by Locke"). Learned uses of "liberty" in popular writings likewise included the right to pursue a common occupation. *See, e.g.*, *A New Political Platform*,

GALVESTON DAILY NEWS, June 11, 1874, at 2 [https://tinyurl.com/mp34rvsp] ("This right to personal liberty no man and no community of men has any legal power to interfere with. The right to pursue any honest calling, to change from one place to another, to live where and how one pleases, are but carollary [sic] to this incontestible [sic] right."); *Injustice of the Occupation Tax*, DENISON DAILY NEWS, May 19, 1876, at 2 [https://tinyurl.com/y6rjvz86] ("Liberty and equality were bequeathed to every American citizen by our forefathers—liberty to follow any lawful occupation . . . .").

Cases of the era likewise defined liberty broadly and as including the right to pursue a common occupation. Both *Slaughter-House* dissents, for example, invoke this meaning. Justice Bradley: "This right to choose one's calling is an essential part of that liberty which it is the object of government to protect." *Slaughter-House*, 83 U.S. at 116. Justice Field: "Although the court, in its opinion, refers to the increase in prices and deterioration in quality of commodities which necessarily result from the grant of monopolies, the main ground of the decision was their interference with the liberty of the subject to pursue for his maintenance and that of his family any lawful trade or employment. This liberty is assumed to be the natural right of every Englishman." *Id.* at 104.

And cases following the 1876 ratification consistently found that "liberty" included the right to pursue a common occupation. *See, e.g.*, *Smith v. Decker*, 312 S.W.2d 632, 633 (Tex. 1958) (recognizing that the "right to earn a living" is a liberty and property right); *Dent v. West Virginia*, 129 U.S. 114, 121 (1889) (recognizing a liberty interest in a "lawful calling, business, or profession"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing right to "engage in any of the common occupations of life"); *Greene v. McElroy*, 360 U.S. 474, 492 (1959) (right to engage in one's "chosen profession"). This Court recently discussed these cases in *Crown Distributing*. 647 S.W.3d at 654 (citing *Meyer* and *Dent*). Thus, the term "liberty" in Article I, Section 19 also included the right to pursue a common occupation.

3. Ordinary Texans in 1876 would have understood their new Constitution as protecting the right to pursue a common occupation.

The preceding section examined "privileges or immunities" and "liberty" primarily as legal terms of art. That is a good start, but not the whole story. The ratifying voters, after all, were mostly ordinary Texans—farmers, ranchers, entrepreneurs, and practitioners of trades. Did *they* understand the word "liberty" to include the right to pursue a common occupation?

Absolutely. Ratification history reveals what surely comes as no surprise. Texans respected hard work, were hard working, and thought of hard work as a moral imperative with two facets: the duty to earn one's daily bread by honest, lawful effort; and the duty not to trammel upon another's economic liberty by resort to protectionist, oppressive, and unreasonable legislation. Everywhere, the word "right" is used. Nowhere is the pursuit of a common occupation characterized as a benefaction bestowed or revoked at the pleasure of the elected branches.

The "right to work hard for an honest living," DENISON DAILY HERALD, Dec. 22, 1878, at 5 [https://tinyurl.com/2wj5cu2t], was the cornerstone of Texas' Reconstruction era identity. When Provisional Governor Hamilton addressed Texas freedmen on their rights in 1865, he observed that the "right to labor for an honest living" is "all that freedom means" for any Texan:

> You are free—made so by a generous, good Government; but you must not think that freedom means more for you than it does for others. It means for you, that you have the right to labor for an honest living—the right to obey the great command of God to all men, to earn, in the sweat of their face, their daily bread; the right to work for yourselves and receive the full reward of your labor. This is all that freedom means for any people.

Address to the Freedmen of Texas, SEMI-WEEKLY STATE GAZETTE (Austin), Nov. 21, 1865, at 1 [https://tinyurl.com/ycxcybhc]. More than a right, even,

Hamilton recognized the moral "duty" of the freedmen to "employ [themselves] in useful labor for [their] own support," for "[n]o man is a good citizen, who does not earn a living in some honest way." *Id.* And in return for the freedmen discharging this moral duty—a duty common to all Texans—Hamilton promised them that their "rights w[ould] be protected by the laws of the country" in the same manner as the rights of all Texans. *Id.*

Governor Hamilton's words resonated in a frontier state long a destination for the intrepid seeking prosperity in the Piney Woods of East Texas, the fertile soil of the Blackland Prairies, or the mines and ranchlands of the Trans-Pecos. Texas attracted those fleeing bankruptcy and misfortune for the promise of a chance to reinvent themselves and earn what fortune they could in the "land of opportunity." BILL CANNON, TEXAS: LAND OF LEGEND AND LORE 51–52 (2004). Indeed, Texas' history as a Spanish colony begins with Moses Austin leaving the Louisiana territory, after going bankrupt and being "jailed briefly for debt," to "recover his fortune" in Texas. JAMES L. HALEY, PASSIONATE NATION 68 (2006). And so powerful was the image of Texas as a land of economic freedom and opportunity that, in the early 1800s, the letters "G.T.T." ("Gone to Texas") could be found chalked on the doors of those throughout America who had "left their troubles, including their creditors, behind" to pursue a new life and an honest living in Texas.

John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH. L. REV. 1089, 1110 (1995).

The framers of our first statehood constitution also shared the experience of Texas as a land of economic opportunity. *See* Cornyn, *supra*, at 1090–91 ("[T]he delegates who assembled in the frontier town of Austin beginning on July 4, 1845" were all "recent immigrants seeking their fortune in the cheap and abundant lands of the Republic," each "fleeing personal or financial misfortune."). Early Texas laws accorded the right to pursue a common occupation special immunities. In 1829, a new statute allowed creditors to demand satisfaction from colonists and empresarios, but only "in a manner not to affect their attention to their families, to their husbandry, or to the art they professed." Laws and Decrees, State of Coahuila and Texas, Decree no. 70 (1829), *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 111 (Austin, Gammel Book Co. 1898). Likewise, debtors could not be obligated to pay in "implements of husbandry, or [the] tools of their trade." *Id.* Indeed, so central was one's profession that, under the 1827 Constitution of Coahuila and Texas, citizens could forfeit their rights "[f]or having no employment, trade, or known way of support." COAHUILA & TEX. CONST. of 1827, art. XXII, § 5, *reprinted in id.* at 316.

The ratifying voters of the 1876 Constitution—the people of Texas—understood, as one Texan put it plainly, that the "right to work hard for an honest living is inherited by all." DENISON DAILY HERALD, Dec. 22, 1878, at 5 [https://tinyurl.com/2wj5cu2t]. Additional pronouncements abound:

- "Every man has a right to follow any honorable occupation to make a living. This is an inherent right, one which no legislative body can give or take away." FORT WORTH STANDARD, July 8, 1875, at 1 [https://tinyurl.com/bdafzp3j].

- "[E]very man has the natural right to choose such profession or occupation as is best suited to his taste or capacity . . . it is the duty of the State to protect all her citizens alike in the pursuit and enjoyment of all lawful occupations . . . ." *The Occupation Tax*, GALVESTON DAILY NEWS, May 18, 1876, at 4 [https://tinyurl.com/4cakyruu].

- "[T]he true spirit of [the government of our fathers] is to give protection to life, liberty, and property, and leave every man free to make or mar his own fortune, with as few restraints on his personal liberty as are compatible with the general good of society." *Whither Are We Drifting?*, DAILY DEMOCRAT (Fort Worth), Aug. 15, 1877, at 2 [https://tinyurl.com/2827tzjz].

- "The worker is a free agent, and is at liberty to engage in any lawful calling by which he can gain a livelihood, and no one can prevent him, and into which no one can coerce him." *Wedlock of Labor and Capital*, GALVESTON DAILY NEWS, Jan. 19, 1879, at 2 [https://tinyurl.com/weekmrvh].

- "It is not possible to think of a more damnable act of tyranny than that which denies to a free man the right to work for an honest living . . . ." *Current Comment*, EVENING TRIBUNE (Galveston), Apr. 29, 1886, at 1 [https://tinyurl.com/4w68mfdp].

Judges likewise recognized the right to earn an honest living in lawful occupations. A few months before the delegates assembled in Austin, a

Galveston judge struck down an ordinance prohibiting anyone except the "city Lumber Inspector" from inspecting lumber. *See Lumber Inspection*, GALVESTON DAILY NEWS, Apr. 9, 1875, at 4 [https://tinyurl.com/4svwjykb] (reporting the case of *City of Galveston v. Gonzalez*). After determining that the ordinance was *ultra vires*, the judge added that "any law which unnecessarily and oppressively restrains a citizen from engaging in any traffic or trade, following or calling, legitimate and lawful, is void, even though passed under the specious pretext of a public regulation." *Id.* (paraphrasing *State v. Fisher*, 52 Mo. 174, 177 (1873)). Accordingly, the lumber-inspection law was "unconstitutional, as it unnecessarily and oppressively restrain[ed] a citizen from exercising a legitimate and lawful calling or trade." *Id.*

State officials also recognized the right to pursue a common occupation. As the Constitutional Convention was meeting down the street, Attorney General George Clark recognized a Texan's "common right . . . of pursuing his own pleasure and profit in any manner he deems fit, conforming only to the laws of society and the rights of others." Tex. Att'y Gen. Op. No. 3438 (To Seller of Brandy Fruits, Aug. 24, 1875), TEX. STATE LIBR. AND ARCHIVES COMM'N, Box 2006/216-1 [https://perma.cc/KZ2L-C8Z3]. Accordingly, laws "in derogation of [this] common right," like occupation

taxes, had to be strictly construed. *Id.* Only a few years later, W.W. Lang, the head of the State Grange—an influential force at the Constitutional Convention—recognized the "right" of "every man . . . to pursue his lawful calling in his own way and to enjoy the fruits of his own labor." Hon. W.W. Lang, *Definition of His Attitude in State Politics*, DALLAS DAILY HERALD, May 15, 1880, at 2 [https://tinyurl.com/2p8zc7jr]. And in 1889, Governor Ross, who had been a delegate to the Convention, stated forthrightly that, "[i]f there be any right in this country you should protect, it is the right of labor," for the "people are in favor of having and enjoying all the right they are justly entitled to." *Railways*, JACKSBORO GAZETTE, Jan. 17, 1889, at 2 [https://tinyurl.com/38rnzkks].

One limitation of research into occupational liberty is the comparative paucity of occupational restrictions then, coupled with the fact that most restrictions were municipal, and challenges to them were heard in municipal courts that left few records. But the surviving evidence strongly suggests that municipal officials feared that local judges would strike down unreasonable burdens on the right to pursue a common occupation. For example, in 1889, Houston's City Attorney recognized the infirmities of a proposed ordinance to limit the sale of meat in the city's main market because "[t]he sale of meat is a lawful avocation . . . in which any and all persons have the right to

engage, and the city has no right to restrict the privilege to any given number of persons." *New Business*, GALVESTON DAILY NEWS, Aug. 13, 1889, at 3 [https://tinyurl.com/ycyxefvp] (reporting proceedings of the Houston City Council). The attorney "thought they could do it as a police regulation," but not for any other purpose, or else a "court would decide against the city." *Id.* And one of the Houston aldermen bemoaned that, even if the city took a more measured approach, "some lawyer or court would then find a new flaw in the law and break up the whole work." *Id.*

* * *

The foregoing provides the answer to the *Crown* concurrence's first question: What does Article I, Section 19 protect? The terms "privileges or immunities" and "liberty" include the right to pursue a common occupation. No Texan of 1876 would have doubted that.

C. "Due Course of the Law of the Land" Includes Substantive Judicial Protection for the Right to Pursue a Common Occupation.

Petitioners turn now to the *Crown* concurrence's second question. Given that Article I, Section 19 protects the right to pursue a common occupation, "how does it do so?" *Crown Distrib.*, 647 S.W.3d at 664 (Young, J., concurring). Fundamentally, this question "concerns the lawful role for *judges*." *Id.* at 677 (emphasis added). What, exactly, did Texans of 1876

expect their judges *to do* when presented, as here, with the deprivation of an interest that Article I, Section 19 protects?

The *Crown* concurrence floats one possible answer: "[T]he due-course clause was written to be an important procedural limitation yet not a freestanding font of substantive rights." *Id.* at 675. This proposition, if true, has major implications for the role of judges: "*If* the People placed only procedural protections within that clause, the judiciary would have no proper authority to say otherwise." *Id.* at 677. *Patel*, for example, would be wrongly decided under a "procedural fairness only" reading of Article I, Section 19 because that case invalidated cosmetology statutes as applied on *substantive* grounds: no real and substantial relationship to public health.

But the "procedural fairness only" hypothesis is incorrect. To be sure, Petitioners do not dispute that "due course of the law of the land" guarantees procedural regularity. But that is not all it guarantees. Article I, Section 19 also provides meaningful, substantive judicial review for deprivations of protected interests.

1. "Due course of the law of the land" means more than "due course of law" alone.

The *Crown* concurrence does not distinguish between two distinct uses of "due course of law" in the Texas Constitution. But there is an important difference that Texans have preserved since 1836. As a standalone phrase,

"due course of law" has a primarily procedural connotation. In the colonial and revolutionary eras, "due course of law" alone was "well understood . . . to mean due or appropriate legal proceedings—precisely the meaning most now associate with [procedural] 'due process of law.'" Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 VA. L. REV. 447, 502 (2022). That procedural connotation appears in all Texas constitutions. The Sixth (criminal prosecutions) and Eleventh (civil remedies) clauses of the Declaration of Rights of the 1836 Republic of Texas Constitution use "due course of law" to guarantee procedural fairness in criminal and civil proceedings. REPUB. TEX. CONST. OF 1836, Declaration of Rights, §§ 6, 11, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1069, 1083 (Austin, Gammel Book Co. 1898). "Due course of law" was dropped from Section 8 (criminal prosecutions) of the 1845 statehood constitution, but retained in Section 11 (civil remedies). TEX. CONST. of 1845, art. I, §§ 8, 11. This procedural use of "due course of law" in the civil-remedies clause was perpetuated through the constitutions of 1861 (§ 11), 1866 (§ 11), 1868 (§ 11), and 1876 (§ 13).

But neither Article I, Section 19 in the 1876 Constitution, nor its five predecessor clauses, used "due course of law" alone. Instead, they all use "due course of the law of the land." *Compare* REPUB. TEX. CONST. of 1836,

Declaration of Rights, §§ 6, 11, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1069, 1083 (Austin, Gammel Book Co. 1898), *with* TEX. CONST. of 1845 § 16; *id.* 1861 § 16; *id.* 1866 § 16; *id.* 1868 § 16; *id.* 1876 § 19. Thus, "due course of law" alone and "due course of the law of the land" are not synonymous. What, then, does "the law of the land" signify that may be absent from "due course of law" alone?

2. "Due course of the law of the land" imposes substantive, judicially enforceable constraints on the elected branches.

In 1876, "due course of the law of the land" meant more than just a guarantee of procedural fairness. It required meaningful judicial inquiry into the *substance* of duly enacted statutes, rules, or governmental interference to ensure that they comport with ancient principles of liberty rooted in the common law, such as the right to pursue a common occupation. "[I]n leading turn-of-the-[nineteenth-]century cases, state courts began to adopt a rich reading of ["law of the land" clauses], offering these courts a textual basis for striking down statutes perceived to impinge on the rights of individuals." Crema & Solum, *supra*, at 514. As Thomas Cooley, the leading constitutional scholar of the period notes, "due course of the law of the land" does not allow the government to work any deprivation it wants simply by jumping through procedural hoops. THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL

LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 409 (3d ed. 1874) [https://tinyurl.com/22tsk8jx] ("The words 'by the law of the land,' as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense . . . .").

Since at least 1805, state courts have consistently understood "law of the land" to include substantive, judicially enforceable constraints on legislative power. *See, e.g.*, *Trs. of the Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58, 87–89 (1805) (holding that North Carolina's law-of-the-land provision "is applicable to the legislature . . . and was intended as a restraint on their acts" because "to presume otherwise [would] render this article a dead letter"); *Hoke v. Henderson,* 15 N.C. (4 Dev.) 1, 16 (1833) ("[L]egislative acts . . . [contrary to the] mode and usages of the common law as derived from our fore-fathers, are not effectually 'laws of the land.'"). *See also* COOLEY, *supra* at 409 n.2 (collecting cases). State courts, including this one, often repeated Justice Johnson's encomium in *Bank of Columbia v. Okely* that a law-of-the-land provision "secure[s] the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." 17 U.S. (4 Wheat.) 235,

244 (1819); *see also McFadden v. Longham*, 58 Tex. 579, 585 (1883); *Allen v. Inhabitants of Jay*, 60 Me. 124, 138 (1872) ("[C]an any one conceive a more arbitrary exercise of the powers of government than [a law that deprives one man of his vested rights in favor of] another?").

As a result, when the Texas delegates convened in 1875, the "'law of the land' guarantees of many state constitutions . . . came to be understood as placing significant, substantive constraints on the power of state legislatures." Crema & Solum, *supra*, at 509–10; *see also id.* at 513 ("[Law-of-the-land] provisions were generally believed to harbor rich, substantive restrictions upon legislative power by the late antebellum period."). Indeed, so consistent were nineteenth-century state courts in recognizing this principle that, in 1883, just seven years after ratification of the Texas Constitution, this Court dismissed out of hand the contention that every legislative act was automatically "law of the land." *See McFadden v. Longham*, 58 Tex. 579, 585 (1883) (holding that a statute "does not become a part of 'the law of the law' in virtue of its enactment"). Thus, the original public meaning of "due course of the law of the land" as a legal term of art in

1876 included meaningful judicial review of the substance of legislation, not just procedural fairness.[9]

3. Substantive judicial review "by due course of the law of the land" is part of 1876 Texas' inheritance from the common law of England.

Substantive judicial review "by due course of the law of the land" is rooted in ancient rights, privileges, and protections of English common law that Texans understood as their birthright in 1876. Article IV, Section 13 of the Republic of Texas Constitution of 1836 explicitly adopted the common law (and intended to reject the Spanish civil-law system). REPUB. TEX. CONST. of 1836, art. IV, § 13, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1069, 1074 (Austin, Gammel Book Co. 1898) ("The Congress shall, as early as practicable, introduce, by statute, the common law of England."). In *Janes v. Administrators of Reynolds*, this Court recognized that "the common law of England" is "the basis of our jurisprudence," placing Article I, Section 19's precursors alongside "Magna Charta" because it incorporates the rights, privileges, and protections of English common law. 2 Tex. 250, 251 (1847). It is, therefore, unsurprising that delegates at the 1875 Convention in Austin were familiar with the common law, Magna Carta, and

[9] Additionally, this Court has recognized that "due course of the law of the land" requires "general public laws, binding all the members of the community under similar circumstances, and not partial or private laws, affecting the rights of private individuals, or classes of individuals." *Janes v. Adm's of Reynolds*, 2 Tex. 250, 252 (1847).

Lord Coke. CONVENTION JOURNAL, *supra*, at 236, 458 (invoking "common law"); 108 ("Magna Charta"); 58 ("Lord Coke").

For Texans of 1876, that common-law inheritance included substantive review of protectionist occupational restrictions. The venerable Lord Coke regarded the common law, originating in the Magna Carta of 1215, as a judicial bulwark against the monarchy and governmental bodies. It is, he said, "the best and most common birthright that the subject hath for the safeguard and defense, not only of his goods, lands, and revenues, but of his wife and children, his body, fame, and life also." 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 12 (1628). The great virtue of the *legem terrae* is that it applied to all, including the sovereign. 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 50 (1642) (stating that the law of the land "extend[s] to all").

Lord Coke, as Chief Justice, applied meaningful substantive review of protectionist restrictions on the right to pursue a common occupation. In *Dr. Bonham's Case*, a physician from Cambridge University practiced medicine in London without first obtaining permission from the Royal College of Physicians of London. 8 Co. Rep. 114a, 77 Eng. Rep. 646, 647–49 (C.P. 1610). Dr. Bonham was fined and barred from practice under a protectionist restriction bestowed by the King on the Royal College. *Id.* at 116b–17a, 77

Eng. Rep. at 650–51. Coke invalidated that. Other early English cases rejected anti-competitive restrictions. In *The Case of the Monopolies*, the court voided Queen Elizabeth's grant of a monopoly over the playing-card business to Darcy, her groom. 11 Co. Rep. 84b, 86b, 77 Eng. Rep. 1260 (Q.B. 1602). Coke later trumpeted this result, despite being the losing Solicitor General in the case. *See* 2 COKE, *supra*, at 47 ("[A]ll monopolies are against this great Charter, because they are against the liberty and freedom of the Subject, and against the Law of the land."). In short, "[a]t common law every man might use what trade he pleased." 1 WILLIAM BLACKSTONE, COMMENTARIES *427.

American colonists embraced Coke's understanding that "the law of the land" included substantive judicial review. *See, e.g.*, WILLIAM PENN, THE EXCELLENT PRIVILEGE OF LIBERTY & PROPERTY BEING THE BIRTH-RIGHT OF FREE-BORN SUBJECTS OF ENGLAND (1687), *reprinted in* A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 412, 418 (1968) (describing Magna Carta's "law of the land" protections as the "Elixer of our English Freedoms, the Store-house of our Liberties"). Penn's *The Excellent Privilege* was the first publication in the American colonies of a commentary on Magna Carta. *See* HOWARD, *supra*, at

89 (1968). Colonial and early American charters incorporated common-law protections.[10]

The common law was understood by the American Founders as a cornerstone of protections for individual liberty. *See* Declaration and Resolves of the First Continental Congress (Oct. 14, 1774), *reprinted in* CHARLES C. TANSILL, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 398, at 1, 3 (1927) ("Resolved, N. C. D. 5. That the respective colonies are entitled to the common law of England[.]"). And that early American understanding encompassed occupational freedom. Benjamin Franklin wrote that "[t]here cannot be a stronger natural right than that of a man's making the best profit he can of the natural produce of his lands." BENJAMIN FRANKLIN, CAUSES OF THE AMERICAN DISCONTENTS BEFORE 1768 (1768), *reprinted in* BENJAMIN FRANKLIN: WRITINGS 613 (Lemay ed., 1987). And James Madison rejected occupational restrictions as "justly classed among the great nuisances in

[10] THE CHARTER OR FUNDAMENTAL LAWS, OF WEST NEW JERSEY, AGREED UPON—1676, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS (Francis Newton Thorpe ed., 1909); 2 STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 18 (James T. Mitchell & Henry Flanders eds., 1896); *see also* 3 STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 31, 445, 447 (James T. Mitchell & Henry Flanders eds., 1896) (Penn arguing that "[i]n this act nothing more is contained than what every Englishman enjoys under Magna Charta"); *see also* VA. DECLARATION OF RIGHTS of 1776, art. I, § 1; MASS. CONST. of 1780, pt. I, art. I ("A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts").

government." *Letter from James Madison to Thomas Jefferson* (Oct. 17, 1788), *in* 14 THE PAPERS OF THOMAS JEFFERSON 21 (Princeton 1958).

Nineteenth-century courts likewise recognized that the law of the land included substantive common-law liberties. *See, e.g.*, *State v. Knight*, 43 Me. 11, 123 (1857) ("'The law of the land' . . . [includes] all the maxims of law which were brought to this country by our ancestors . . . or recognized as parts of the common law of England afterwards."). And in 1855, the Supreme Court took the same view of the Due Process Clause of the Fifth Amendment, citing several state-court law-of-the-land decisions. *See Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 280 (1856) (recognizing that whether a statute comports with due process must be "[t]ested by the common and statute law of England"). The American embrace of judicial protection for the common-law right to pursue a lawful occupation was true not only at the framing but also in the wake of the Civil War. A primary drafter of the Fourteenth Amendment, Representative John Bingham, later explained that "our own American constitutional liberty . . . is the liberty . . . to work an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil." CONG. GLOBE, 42d Cong., 1st Sess. App'x. 86 (March 31, 1871).

Federal courts today continue to acknowledge the common-law roots of the right to pursue a common occupation. As explained recently by Judge Ho of the Fifth Circuit, a former Texas Solicitor General, "the right to earn a living" has "deep roots in our Nation's history and tradition." *See Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 981 (5th Cir. 2022) (Ho, J., concurring) (collecting sources); *see also supra* at pp. 21–23.

D. Petitioners' Reading of Article I, Section 19 Is the Only One Consistent with the Intense Anti-Government Sentiment of the Constitutional Convention of 1875.

In the preceding sections, Petitioners have explained the original public meanings of terms like "privileges or immunities" and "due course of the law of the land," and how they work in tandem to secure substantive judicial review of restrictions on the right to pursue a common occupation. Petitioners also explained the grassroots understanding of 1876 Texans that they possessed the right to pursue a common occupation, and that they would have believed their new Constitution enshrined that right. Petitioners now turn to the prevailing anti-government mood of 1876 and the broader reforms Texans ratified into their Constitution. Petitioners' reading of Article I, Section 19 is the only one that can plausibly be squared with the sentiments of that era.

Reeling from the Civil War and trying to reestablish independence from federal rule, Texans were fed up with the corruption, venality, and rapacity of state and federal officials. The slogan "Deference to the Legislature" was no one's rallying cry. As one eminent historian put it, "[t]he dominant spirit was to allow the state government no real latitude to act" because "Texans had seen what government could do, not for them but to them." FEHRENBACH, *supra*, at 435. Thus, the 1876 Constitution "was an antigovernment instrument," that "tore up previous frameworks, and its essential aim was to bind all state governments within very tight confines." *Id.*

But we do not need to rely solely on historians; the delegates told us themselves what they set out to do. They drafted an address to Texans—the definitive articulation of the Constitution's purpose and why a resounding "yes" was warranted in the upcoming ratification vote. *Address to the People of Texas*, GALVESTON DAILY NEWS, Nov. 28, 1875, at 2 [https://tinyurl.com/yc83duma]; *see also* CONVENTION JOURNAL, *supra*, at 500. In soaring language, *The Address* described Article I as codifying "every safeguard known to constitutional law":

> Fellow-citizens, we invite you first to examine the "Bill of Rights;" therein you will see the liberty of the citizen, as inherited from our ancestors, is asserted and protected by every safeguard known to constitutional law. The government of Texas is restored to the people of Texas, a pledge to you that you, your children, and your children's children, shall enjoy the priceless legacy bequeathed to us by our fathers of 1776 and 1836.

Id.; *see also* SETH SHEPARD MCKAY, SEVEN DECADES OF THE TEXAS CONSTITUTION OF 1876, at 136–43 (1942). *Every* safeguard known to constitutional law. Not just some. Not just whatever few safeguards a modern jurist thinks necessary. Every one.

Against this post-war backdrop, the delegates went to work at the 1875 Convention to forge a state government of limited power. Four years prior, the 1871 Taxpayers' Convention raised several issues (supported by former Governors Pease and Hamilton) and condemned the Twelfth Legislature for "abridg[ing] the rights of the citizen" and "enlarg[ing] . . . the power of the Executive." *See Report of Sub-Committee to Taxpayers' Convention*, WKLY. DEMOCRATIC STATESMAN, Oct. 5, 1871, at 2 [https://tiny url.com/yrxff53t]; MCKAY, *supra*, at 39. The Legislative and Executive overreach complained of included a militia law that gave the Governor "unlimited power" to declare martial law, the creation of a state police, broad use of the appointments power (despite positions requiring election), the

power to suspend habeas corpus, and the centralizing of government power over Texans. *Report of Sub-Committee*, *supra*, at 2. The Taxpayers' Convention of 1871 also criticized taxation—state and county tax rates had risen from fifteen cents per $100 to over two dollars per $100 in 1871 ("not including the poll tax, occupation tax, or license tax"). *Id*. These issues also loomed large at the 1875 Constitutional Convention

The framers in 1875 knew their assignment. The Bill of Rights was extensively revised, including the previously discussed amendments to Article I, Section 19. Section 12 was amended to remove from the Legislature the ability to suspend habeas corpus when public safety may require it—under the 1876 Constitution, habeas corpus is designated as a writ of right that "shall never be suspended." TEX. CONST. art. I, § 12; *see also* MCKAY, *supra*, at 119. The delegates did not stop at Article I. They used half of Article III to further constrain the Legislature's power. *See* TEX. CONST. art. III; *see also* MCKAY, *supra*, at 79. As for the Executive Department, it was reformed by constraining the appointment power and imposing term limits. MCKAY, *supra*, at 84–87. The delegates also used general provisions to further rein in abuses of power: extravagant taxation, special legislation, abusing corporate power, and hasty and corrupt legislation. *Id*. at 142; *see also The Address, supra*, at 2.

Despite the framers' focus on protecting rights and reducing government power, they were also mindful not to stifle the numerous freedmen. The delegates rejected a poll tax. MCKAY, *supra*, 96–97. The suffrage article broke down "every barrier to an honest exercise of voting." *See* MCKAY, *supra*, at 138 (quoting *The Address*, *supra*, at 2). As explained in *The Address*, Texans "have so recently recovered the right of self-government" and thus recognize their "responsibility before the judgment bar of an enlightened commonwealth of freemen." *The Address*, *supra*, at 2. The freedmen pursued many common occupations in *postbellum* Texas.[11]

The proposed Constitution so restrained government that the Democratic and Republican parties opposed it. *See* MCKAY, *supra*, at 170–73 (citing *A Help for the New Constitution*, GALVESTON DAILY NEWS, Jan. 15, 1876, at 1 [https://tinyurl.com/3y452sj8]). But Texans had the final say, and over 70% voted to ratify the 1876 Constitution. *See Official Vote on the New*

[11] Most black Texans pursued "some type of farming after emancipation, but some became cowboys on Texas ranches and with trail drives . . . act[ing] as ropers, cooks, bronc riders, and horse wranglers." ALWYN BARR, BLACK TEXANS – A HISTORY OF AFRICAN AMERICANS IN TEXAS, 1528–1995 (2d ed. 1996). In the cities, freedmen worked in diverse jobs from unskilled labor, to semi-skilled occupations "such as teamsters, hack drivers, cart drivers, and hostlers," to those who "obtained their livelihood as skilled artisans—carpenters, wheelwrights, stone masons, barbers, blacksmiths, painters, plasterers, and cooks," and some "found employment in professions such as policemen, ministers, and teachers." *See id.* at 58–59; *see also* Alwyn Barr, *Occupational and Geographic Mobility in San Antonio, 1870–1900*, 51 SOC. SCI. Q. 396 (1970) (collecting data).

Constitution, WEEKLY DEMOCRATIC STATESMAN, Apr. 20, 1876, at 4 [https://tinyurl.com/2f5njpj3] (136,606 in favor and 56,652 against).

* * *

From the iconic chuckwagon to motorized food distribution in *Ex parte Baker*, 78 S.W.2d 610 (Tex. Crim. App. 1934), to Petitioners' modern food trucks, selling food has long been a common occupation in Texas. As the foregoing established, pursuing that common occupation is protected by the terms "privileges or immunities" and "liberty" in Article I, Section 19. And the deprivation of that occupational freedom here via the Permission Scheme and Permit Cap is subject to meaningful, substantive judicial review by "due course of the law of the land." With the threshold questions of the *Crown* concurrence answered, Petitioners now move to that substantive judicial review under the *Patel* test.

II. Issue 2: The City's Restrictions on Food Trucks Violate the Right to Pursue a Common Occupation Because Private Economic Protectionism Is Not a Legitimate Government Purpose and No Other Legitimate Justification Exists.

Did the City violate Petitioners' right to pursue a common occupation by preventing them from operating their food trucks in town? The answer to that turns on whether the Thirteenth Court erred in upholding the challenged ordinances as a legitimate form of economic development. Here, in Issue Presented 2, Petitioners explain that what the panel below called

"economic development" is, in fact, private economic protectionism—an illegitimate preference for A over B with no justification in the public interest. Because, under *Patel*, the pursuit of an *illegitimate* prupose is unconstitutional, the Thirteenth Court must be reversed and remanded with an order to enter judgment for Petitioners.

Issue Presented 2 proceeds as follows. In Section A, Petitioners establish that the *Patel* test is the controlling standard.[12] Next, in Section B, they explain that this case necessarily turns on whether private economic protectionism is legitimate because, on this record, as the Thirteenth Court correctly found, the food-truck restrictions do not rationally advance public health (nor does any other valid justification exist). Finally, Section C demonstrates that private economic protectionism is not a legitimate government interest, that the panel erred on this point, and that Petitioners are entitled to final judgment.

A. The *Patel* Test Controls the Analysis.

In *Patel*, this Court set forth the two-part test for restrictions on the right to pursue a common occupation:

[12] In adopting the standard of review it did, *Patel* was primarily deciding between federal rational-basis review and a more rigorous Texas-specific standard. This Court chose the latter. Here, because it is clear that Petitioners prevail under the *Patel* test, they do not reexamine that standard. But federal-style tiered scrutiny—sorting our rights into different boxes—may not be consistent with the original public meaning of the many freedoms enshrined in the Texas Bill of Rights.

> [T]he 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.

469 S.W.3d at 87.

The *Patel* test is this Court's definitive framework for Article I, section 19 challenges to economic regulations. That is the test the Court of Appeals applied below. *Surfvive*, 2022 WL 2069216, at *6 ("[W]e follow the guidance as set forth in *Patel* to determine if appellees . . . have overcome the presumption that the ordinance is constitutional."). It is the test this Court should apply here.

B. This Court Must Address Whether Private Economic Protectionism Is a Legitimate Purpose Because, as the Court of Appeals Correctly Found, the City's Restrictions Fail *Patel* as to Public Health.

Issue Presented 2 asks whether private economic protectionism—the naked preference for existing businesses over new entrants—is a legitimate government purpose under the first prong of the *Patel* test. 469 S.W.3d at 87 The Court must reach this question because, as the following explains, neither the Permission Scheme nor the Permit Cap are connected to public

health. Thus, if the restrictions are not a valid form of economic development, they are unconstitutional.

1. The Permission Scheme is not for public health.

The City argued below that forcing food trucks to affiliate with a local restaurant "protects the general health and safety of the public" by creating "an 'alternative' to the state requirement that a food truck operate from a [central preparation facility] or commissary." *Surfvive*, 2022 WL 2069216, at *7. State law requires food trucks to prepare their food in a commercial kitchen, not from scratch in the truck itself. Because there is no commissary in SPI, the City's theory is that, as an "alternative," food trucks can use the commercial kitchens in local brick-and-mortar restaurants with which they affiliate via the Permission Scheme. In effect, the City asked the panel to believe that it enacted the Permission Scheme *for the benefit of food trucks*, not restaurants.

But the panel was not fooled. The lower court concluded that the City's asserted public-health justification lacked any footing in statutory language, the record, or common sense. This was evident on the face of the Permission Scheme. "The relevant portion of SPI's ordinance" requires that an "Applicant . . . be supported locally and have the signature of an owner or designee of a licensed, free-standing [restaurant] on South Padre Island

before being eligible for a permit." *Surfvive*, 2022 WL 2069216, at *7 (quoting SPI Code § 10-31(c)). Nowhere does that language require "that the 'free-standing [restaurant]' that provides a signature to allow a food truck to operate on SPI will also operate as a [central preparation facility] or commissary" for that food truck. *Id.* Thus, rather than provide an "alternative" to the state commissary requirement, the permission scheme "operates as a separate and distinct requirement in addition to applicable state laws" with zero public-health benefit. *Id.*

2. The Permit Cap is not for public health.

Although not argued below because the panel erroneously held Petitioners lacked standing, it is likewise clear that restricting the number of food trucks that can operate on private property, each of which must comply with existing state and local health laws, has no independent effect on public health.

C. Private Economic Protectionism Is Not a Legitimate Government Purpose.

The Permission Scheme and Permit Cap have nothing to do with public health, but are surgically tailored to their obvious purpose: private economic protectionism. When City staff first presented the proposed food-truck ordinance, there was no Permission Scheme or Permit Cap. *Compare* CR.1997–2002 (original proposal, No. 15-11), *with* CR.2275–80 (enacted

ordinance, No. 16-05). The local restaurant lobby vociferously demanded them. *See* C.R.518–26; 1216–17; 1221;2017–18. The SPI Council then allowed local restaurant owners to write the protectionist barriers. CR.2017–18. The Mayor issued clear instructions: "[M]ake it restrictive so that it doesn't hurt the local businesses" but not "so restrictive where outsiders start saying 'Hey, this is unfair' and decide[] to take legal action." CR.1264–65 (27:1–28:8). According to the euphemistically named "Food Truck Planning Committee," the City's initial draft "needed to be massaged, if you will," CR.1116 (134:16–21), because "if you take that cream away from us" by letting food trucks compete, "it's materially going to hurt our business," CR.2260 (105:1—3). The SPI Council promptly enacted the protectionist measures. CR.946, 1383–87.

The panel below concluded that the City's use of public power for the private gain of restaurants was legitimate economic development: "Appellees['] contention that SPI was acting to protect 'brick and mortar' restaurants . . . does not negate SPI's evidence that the ordinance was created to promote economic development, including the legitimate government interest in retaining current businesses and preventing economic decline." *Surfvive*, 2022 WL 2069216, at *8.

But private economic protectionism is not a valid form of economic development. To be sure, Petitioners recognize that economic development can be legitimate. South Padre Island, for example, has programs such as "Section 312 property tax abatements," the "Art Business Incubator," a "Business Mentorship Program," and a grant called "Sand Dollars for Success" for small businesses. *Business Programs*, SOUTH PADRE ISLAND ECON, DEV. CORP., https://southpadreislandedc.com/business-programs (last visited Mar. 28, 2023). Their common feature is a focus on the prosperity of the whole community.

But the challenged restrictions are not permissible economic development. They are private economic protectionism. Protectionism is a naked preference for A over B without regard to the public interest. To believe that the food-truck restrictions serve the public interest, one would have to believe that residents of South Padre Island were crying out to their City Council for *fewer* dining options and *higher* prices, for their Council to violate the rights of small-business entrepreneurs, for laws that shunt unearned money into the wallets of local restaurant owners. That scenario is so absurd that to say it out loud is to refute it.

But private economic protectionism is not bad just because it diverts money to people who have not earned it by providing the best combination

of choice, price, and service. It is bad for a more basic reason. It elevates the *right* of SPI restaurateurs to pursue their common occupation (running a restaurant) over the identical *right* of Petitioners to pursue theirs (running a food truck). In failing to recognize the stark difference between economic development and naked protectionism, the lower court "turn[ed] a blind eye to transparent rent-seeking that bends government power to private gain, thus robbing people of their innate right—antecedent to government—to earn an honest living." *Patel*, 469 S.W.3d at 98 (Willett, J., concurring, joined by Lehrmann and Devine, JJ.).

Worse yet, in cementing naked preferences into Texas constitutional law, the decision swallows economic rights whole. Virtually every barrier to a common occupation, no matter how unreasonable and oppressive, can be recast by a forgiving court as the laudable legislative desire to "retain[] current businesses and prevent[] economic decline." *See Surfvive*, 2022 WL 2069216, at *8. This is such a wrecking ball that *Patel* itself was wrongly decided if the Thirteenth Court is right. The onerous barriers into the cosmetology field that this Court found so oppressive could have been waved off as the legislature's desire to "retain[] current [cosmetology] businesses and prevent[] [their] economic decline." *See id.*

D. Texas Courts Have Long Rejected Private Economic Protectionism.

As the historical survey of Issue Presented 1 established, no Texan of 1876 would have believed that Article I, Section 19 tolerated private economic protectionism, or believed that the judiciary, prostrate in deference, should solicitously euphemize away such venality with pretextual labels like "economic development." In 1875, as noted earlier, a Galveston judge invalidated an ordinance "which unnecessarily and oppressively restrain[ed] a citizen from engaging in any traffic or trade, following or calling, legitimate and lawful . . . even though [it was] passed under the specious pretext of a public regulation." *See Lumber Inspection*, GALVESTON DAILY NEWS, Apr. 9, 1875, at 4 [https://tinyurl.com/4svwjykb] (reporting the case of *City of Galveston v. Gonzalez* and paraphrasing *State v. Fisher*, 52 Mo. 174, 177 (1873)). And in *Houston & Texas Central Railway Co. v. City of Dallas,* this Court likewise recognized that the law-of-the-land provision looks beyond the "guise" of police-power regulations. 98 Tex. 396, 84 S.W. 648, 653–54 (1905).

This rejection of total judicial deference for occupational rights originates in the fact that the Texans of 1876 did not want to be ruled by cabals of politicians and economic special interests. HARVEY KATZ, SHADOW ON THE ALAMO 32 (1972) ("The new state Constitution . . . was a backlash to

the Davis regime and its corporate patrons. Its prime objective was to establish as weak a state government as possible."). Texans were not "oblivious to the iron political and economic truth that the regulatory environment is littered with rent-seeking by special-interest factions who crave the exclusive, state-protected right to pursue their careers." *Patel*, 469 S.W.3d at 118 (Willett, J. concurring, joined by Lehrmann and Devine, JJ.). They wanted to eradicate the form of government exemplified by the challenged restrictions here: A cynical mayor, in letting a cossetted industry group fleece the public by writing protectionist laws, admonishes them to "make it restrictive," but not "so restrictive where outsiders start saying 'Hey, this is unfair' and decide[] to take legal action." "Grab all you can but don't cause problems for me" is not a constitutional principle in Texas.

"If the police power is to have any meaningful limitations, public needs must be distinguished from the financial protection of a particular private business or business segment." *Satterfield v. Crown Cork & Seal Co.*, 268 S.W.3d 190, 219 (Tex. App.—Austin 2008, no pet.). In *Satterfield*, the Third Court of Appeals struck down a new statute, enacted by the legislature at the behest of the corporate defendant, that extinguished the claims of an asbestos-death plaintiff in a pending case. *Id.* at 195. The only discernable purpose of the retroactive statute was to protect the pocketbook of an

influential corporation with friends in the legislature. Following a meticulous historical survey of the scope of the police power, the court held: "We may fairly say, then, that by stripping a litigant of his rights in his pending and vested common law claim, *for the purported benefit of one or more corporations succeeding to liability it seeks to shed*, and without a true articulation of any 'real or substantial' relation to the objects of public health, public morals, or the public safety, we must exercise our duty to adjudge that the limitations of the police power have been far exceeded, so as to no longer be in sight of those who claim to rely on it." *Id.* at 219 (emphasis added).

That is an apt description of the food-truck restrictions here: "stripping" Petitioners of their right to pursue a common occupation "for the purported benefit of one or more" local restaurant owners, "and without a true articulation of any 'real or substantial' relation to the objects of public health, public morals, or the public safety." That is why, contrary to the Thirteenth Court's conclusion, "the limitations of the police power have been far exceeded" in this case.

Satterfield is only the beginning of many cases rejecting private economic protectionism. *See, e.g.*, *Tex. Power & Light Co. v. City of Garland*, 431 S.W.2d 511, 518 (Tex. 1968) (holding economic protectionism is not legitimate under Article I, Section 19); *Humble Oil & Ref. Co. v. City of*

Georgetown, 428 S.W.2d 405, 408 (Tex. App.—Austin 1968, no writ) (striking down restriction on capacity of gas trucks that used "the police power to regulate economic aspects of the gasoline distribution system so as to favor local bulk agents"); *Falfurrias Creamery Co. v. City of Laredo*, 276 S.W.2d 351, 355 (Tex. App.—San Antonio 1955, writ ref'd n.r.e.) ("Any ordinance or statute which prevents any person from engaging in a lawful business cannot be upheld unless protection of life, health or property makes it reasonably necessary.") (quoting *Meridian, Ltd. v. Sippy*, 128 P.2d 884, 888 (Cal. Dist. Ct. App. 1942)); *Ex parte Baker*, 78 S.W.2d at 614 (striking down license that "establish[ed] a protective wall around bakeries located within the city . . . and create[d] a monopoly on the bakery business").[13]

E. This Court Should Stay on the Correct Side of a Federal Split.

In rejecting private economic protectionism, this Court will also stay on the right side of a spilt among the federal courts of appeals. The U.S. Supreme Court has long recognized that every economic regulation would be constitutional if a naked preference for A over B could be labeled "promotion

[13] Sister state courts have also long rejected private protectionism in their law-of-the-land or due-process clause cases. *See, e.g.*, *Consumers Gasoline Stations v. City of Pulaski*, 292 S.W.2d 735, 737 (Tenn. 1956); *Roller v. Allen,* 96 S.E.2d 851, 859 (N.C. 1957); *Rogers v. State*, 199 A.2d 895, 898 (Del. 1964); *Buehman v. Bechtel*, 114 P.2d 227, 376–77 (Ariz. 1941); *Union Carbide & Carbon Corp. v. White River Distribs.*, 275 S.W.2d 455, 456, 458 (Ark. 1955); *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.*, 54 N.W.2d 268, 270 (Mich. 1952); *Cent. States Theatre Corp. v. Sar*, 66 N.W.2d 450, 543 (Iowa 1954); *Thorne v. Roush*, 261 S.E.2d 72, 75 (W.Va. 1979).

of domestic industry" or, as with the Thirteenth Court below, "economic development." *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985) ("[A]cceptance of [the] contention that promotion of domestic industry is always a legitimate state purpose under equal protection analysis would eviscerate the Equal Protection Clause in this context."). Closer to home, the Fifth Circuit struck down funeral-licensure restrictions on monks who sold their handmade caskets, reaffirming that "neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013); *see also Greater Hous. Small Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235, 240 (5th Cir. 2011) ("[N]aked economic preferences are impermissible to the extent they harm consumers."); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("[M]ere economic protectionism for the sake of economic protectionism is irrational."); *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002) ("This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review.").[14]

[14] With the Fifth Circuit's *St. Joseph Abbey* and this Court's *Patel* decisions, Texans presently enjoy the highest protection for economic liberty in the nation. It would be a grave error for this Court to eviscerate that protection by holding that Article I, Section 19

And the two rogue circuits that have blessed private economic protectionism, notwithstanding Supreme Court authority to the contrary, have not done so because there is anything *good* about it. Instead, these courts believe that life is an unprincipled brawl in which legislators and lobbyists may use public power for the private gain of a connected few. *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 287 (2d Cir. 2015) ("Much of what states do is to favor certain groups over others on economic grounds. We call this politics."); *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004) ("[W]hile baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments.").

This jaundiced view is inimical to any conception of the United States as a constitutional republic of limited government, and it is certainly anathema to the historical understanding of economic freedom and opportunity here in Texas. Texans of 1876 squarely rejected the type of government for which, in the words of the Tenth Circuit's *Powers* decision, "the favored pastime of state and local governments" was "dishing out special economic benefits" to industry lobbies like the City's Food Truck Planning Committee. Simply put, the "Texas Constitution has something to say when

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does not protect the right to pursue a common occupation, or, even if it does, that private economic protectionism is legitimate.

barriers to occupational freedom are absurd or have less to do with fencing out incompetents and more to do with fencing in incumbents." *Patel*, 469 S.W.3d at 104 (Willett, J., concurring, joined by Lehrmann and Devine, JJ.).

F. The Thirteenth Court in Effect Adopted the Reviled Holding of *Kelo v. City of New London*.

The wrongness of the Thirteenth Court's protectionism holding is further evident in that the lower court, in effect, imported the reviled holding of *Kelo v. City of New London*, 545 U.S. 469 (2005), into Article I, Section 19 jurisprudence. "In *Kelo*, a city took private property through eminent domain only to turn it over to other private parties for economic development." *KMS Retail Rowlett, LP v. City of Rowlett*, 593 S.W.3d 175, 196 (Tex. 2019) (Blacklock, J., dissenting, joined by Lehrmann and Boyd, JJ.) (citing *Kelo*, 545 U.S. at 473–75). Indeed, the City invoked the economic-development holding in *Kelo* in its response to the Petition. Resp. to Pet. 20. This notion of using public power for purely private benefit—what the Thirteenth Court sanctioned below—is so contrary to Texans' liberty that they amended their Bill of Rights after *Kelo* to clarify that the phrase "'public use' does not include the taking of property . . . for transfer to a private entity for the primary purpose of economic development." TEX. CONST. art. I, § 17. And in doing so, the People were not announcing a *new* right. They were underscoring for overly deferential courts that eminent domain in Texas had

never encompassed public power for private gain. It is no more plausible that public power for private gain is acceptable in the Article I, Section 19 context than the eminent-domain context.

* * *

Petitioners are entitled to reversal and remand so the district court can enter its final judgment and a permanent injunction. The right to pursue a common occupation exists; the City's food-truck restrictions abridge Petitioners' right, triggering the *Patel* test; the challenged ordinances have no actual, real-world relationship to public health under *Patel*; and the only discernable interest being advanced—private economic protectionism—is not legitimate. As the district court resolved at summary judgment: The Restaurant Permission Scheme and Permit Cap are unconstitutional. CR.3058 (App. 1).

III. Issue 3: Petitioners Have Standing to Challenge the Permit Cap.

The Thirteenth Court's standing holding should also be reversed. This third Issue Presented raises nothing novel. The Thirteenth Court, in ruling that Petitioners lacked standing to challenge the Permit Cap, misapplied settled doctrine. In a one-paragraph analysis, the panel stated that Petitioners' injuries were merely "hypothetical" because they supposedly failed to "indicate how they were in fact injured by the cap." *Surfvive*, 2022

WL 2069216, at *3. The court added that "[m]erely stating that the cap would have prevented them from obtaining a permit had they applied is presenting a hypothetical situation." *Id.*

But there was nothing hypothetical about Petitioners' injuries, and they were well explained. To quote from Petitioners' appellate briefing below, each "suffered an actual restriction under the Permit Cap because all twelve permits have issued under the cap." Appellee's Br. at 31. Later, they explained that the "Food Truck Appellees want to operate food trucks on South Padre Island," but the "City won't allow them to do so because: (1) there are no permits." *Id.* Further on, they asserted that "it would have been pointless to apply for permits that were capped—no permits were available when Surfvive obtained its food truck in April 2018 . . . and none were available when appellees wrapped up discovery in 2020 and moved for summary judgment." *Id.* at 32–33. Those statements explain why Petitioners did not apply for a permit: none existed.

The absence of an available permit is a complete injury. A plaintiff does not have to apply for a permit to have a cognizable injury "when a policy's flat prohibition would render submission futile." *LeClerc v. Webb*, 419 F.3d 405, 413 (5th Cir. 2005). Although there is little on-point Texas caselaw, federal courts have long recognized this common-sense conclusion, and their

decisions are persuasive authority. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (Texas follows federal standing jurisprudence). For example, in *Ellison v. Connor*, the court considered whether plaintiffs had standing to sue an agency for its failure to issue a building permit when the plaintiffs had not actually applied. 153 F.3d 247, 254–55 (5th Cir. 1998). The Fifth Circuit held that the plaintiffs had standing because the agency had issued a letter to other builders stating that no building permits were available. *Id.* Similarly, in *Moore v. Department of Agriculture*, the court held that white applicants had standing to challenge a federal program—despite not submitting applications—because the government told them the program was closed to "Whites." 993 F.2d 1222, 1222–23 (5th Cir. 1993); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 929 (Tex. 1998) ("[I]n order for a regulatory takings claim to be ripe, there must be a final decision regarding the application of the regulations to the property at issue . . . . However, futile variance requests or re-applications are not required.").

Here, Petitioners have an injury. The Cap "flat[ly] prohibit[ed]" them from obtaining a permit because the City had issued all available permits at all relevant times. *See LeClerc*, 419 F.3d at 413. A futile application would not have changed anything. Because they have a cognizable injury, Petitioners

have standing. The proper course here, then, is to reverse and remand for entry of final judgment for Petitioners.

PRAYER

For the reasons above, Petitioners ask the Court to reverse and remand with instructions to enter final judgment for Petitioners.

Dated: March 29, 2023.

RESPECTFULLY SUBMITTED,

INSTITUTE FOR JUSTICE

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I certify that on March 29, 2023, I caused a true and correct copy of the foregoing Petitioners' Brief on the Merits to be sent to the following counsel by United States certified mail, return receipt requested:

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Microsoft Word reports that the foregoing Petitioners' Brief on the Merits contains 14,633 words, excluding the portions of the brief exempted by Tex. R. App. P. 9.4(i)(1).

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