No. 23-0136

In the Supreme Court of Texas

MICHAEL GARRETT, M.D., AND KRISTIN HELD, M.D.,

Petitioners,

v.

TEXAS STATE BOARD OF PHARMACY, ET AL.,

Respondents.

On Petition for Review from the Third Court of Appeals at Austin, Texas
No. 03-21-00039-CV

PETITION FOR REVIEW

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In the 98th Judicial District Court

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STATEMENT OF CASE

Nature of Case:	Petitioners (the Doctors) sued Respondents (the State) challenging Tex. Occ. Code §§ 158.001(b), 158.003(b), 551.006, 563.051(d), 563.053(b); and 22 Tex. Admin. Code §§ 169.2(10), 169.4, 169.5(1) (collectively, the Dispensing Ban) under Article I, §§ 19 and 3 of the Texas Constitution and the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code § 37.003. CR.7–27.
Trial Court:	98th Judicial District Court, Travis County The Honorable Scott H. Jenkins
Disposition in Trial Court:	The trial court granted the State's motion for summary judgment on both constitutional claims and denied the Doctors' cross-motion. CR.1571.
Parties in Court of Appeals:	The Doctors were the appellants. The State was the appellee.
Disposition in Court of Appeals:	The Third Court affirmed the trial court's decision. *Garrett v. Tex. State Bd. of Pharmacy*, No. 03-21-00039-CV, 2023 WL 376900 (Tex. App.—Austin Jan. 25, 2023, pet. filed) (mem. op.) (per Byrne, C.J., joined by Triana and Kelly, JJ.).

STATEMENT OF JURISDICTION

This Court has jurisdiction under Tex. Gov't Code § 22.001(a) because this case presents constitutional issues important to the jurisprudence of the state. This Court also has appellate jurisdiction under Tex. Const. art. V, § 3(a).

ISSUES PRESENTED

The Doctors seek to dispense non-controlled medications to their patients at cost. Licensed physicians were allowed to do so as part of the practice of medicine for all of Texas history until 1981, when a pharmacist drafted a law—the Dispensing Ban—that forbade anybody but licensed pharmacists from dispensing for a fee. The Doctors argue that the Ban violates their right to pursue a common or lawful occupation under Article I, § 19 (Due Course of Law) and Article I, § 3 (Equal Rights) of the Texas Constitution.

The issues presented are:

1. What are common or lawful occupations and how does the Due Course of Law Clause protect them?

2. What are common or lawful occupations and how does the Equal Rights Clause protect them?

TO THE HONORABLE SUPREME COURT OF TEXAS

This case presents unresolved questions about the right to pursue a common or lawful occupation under the Texas Constitution. There is an open question about "what" occupations are protected. *Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 655 (Tex. 2022). There is an open question about "how" the Due Course of Law protects them, *id.*, including confusion about when to apply the test announced in *Patel v. Texas Department of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015). And there is an open question about how the federal rational-basis test could possibly be the right way to protect occupational freedom under the Equal Rights Clause. The decision below tees up these issues perfectly because, even though dispensing medication was a historically common and lawful part of the practice of medicine, the Third Court refused to fully apply *Patel* to the Doctors' substantive-due-course claim and applied the federal rational-basis test to their equal-rights claim.

Questions about how the Texas Constitution protects occupational freedom are not going away. Indeed, the Court is currently considering whether to grant review in *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.), which asks whether the due-course

clause offers any substantive protection for the right to pursue a common or lawful occupation. *See* Pet'rs' Merits Br. 7–46, No. 22-0499 (Mar. 29, 2023). That broad question is not presented here (because the State has never argued it), nor does *Surfvive* ask the distinct questions presented here about whether the Doctors have asserted a common or lawful occupation and whether the Third Court applied the wrong test under the due-course and equal-rights clauses. Still, the fact that both this case and *Surfvive* are seeking review in such close proximity shows that, when it comes to occupational freedom, this Court "will [not] have the luxury of kicking the can down the road much longer." *Crown Distrib.*, 647 S.W.3d at 665 (Young, J., concurring).

STATEMENT OF FACTS

The Third Court correctly stated the nature of the case, but omitted facts about the services the Doctors want to provide and about the origins and practical effect of the Dispensing Ban.

I. The Doctors want to dispense non-controlled medications at cost.

The Doctors are licensed physicians who have decades of experience practicing medicine. CR.434, 443. Dr. Michael Garrett is a board-certified family physician who runs a primary-care practice in Austin. CR.434. Dr. Kristin Held is a board-certified ophthalmologist who runs an eye clinic in

San Antonio. CR.443. The Doctors treat a wide range of routine, chronic, and acute medical conditions within their specialties. CR.434–35, 443–44. And naturally, the Doctors prescribe medications daily for these conditions. CR.434, 444.

The vast majority of the medications the Doctors prescribe are "non-controlled," meaning they are non-addictive drugs not subject to the Texas or U.S. Controlled Substances Acts. CR.435, 444. For example, Dr. Garrett often prescribes anti-nausea medications to help patients with the flu stop vomiting, antibiotics to fight infections like pneumonia, and statins for high cholesterol. CR.435. Similarly, Dr. Held often prescribes antibiotic and anti-inflammatory eye drops, including after she operates on a patient's eyes, to prevent and treat infections, CR.444, 446.

It's important that patients take the medications they are prescribed. CR.437, 446. Yet the Doctors see patients almost every day who fail to do so. CR.437, 446. There are various reasons why: the drug was too expensive at the pharmacy, or the patient did not have time to visit the pharmacy, or the pharmacist dispensed the wrong drug, or the patient did not want to risk exposure to COVID-19 at the pharmacy. CR.437, 446, 518–19, 565–67.

To help address this problem, the Doctors want to offer their patients an easier way to obtain medications. CR.437, 447. Specifically, they want to

purchase the medications they most commonly prescribe and dispense them to patients at cost. CR.437–41, 447–50. There is nothing unusual about this service. Most American physicians dispense medications for a fee daily and the practice is "firmly entrenched in the U.S. health care system." CR.171, 174, 176. Indeed, the Doctors even have a real-world example they'd follow: Kansas physician Dr. Josh Umbehr, who has been dispensing non-controlled medications at cost for a decade. CR.437–38, 447, 454–59.

The Doctors like Dr. Umbehr's model because it is simple, safe, and effective. CR.438, 447, 456–59. He dispenses drugs for just a few pennies over the wholesale price. CR.456. Patients who fill their prescriptions in his office are "spare[d] . . . the hassle, delay, and expense of an extra trip to the pharmacy." CR.458. They are "more likely . . . to complete their prescribed courses of treatment." *Id.* And their health outcomes are "no differen[t]" than his patients who choose to fill their prescriptions at pharmacies. *Id.* The Doctors want to provide the same service and offer the same benefits for their own patients. CR.438, 447, 459.

II. The Doctors are banned from dispensing non-controlled medications at cost.

In 1981, Texas granted pharmacists "the exclusive authority to determine whether or not to dispense a drug." Tex. Occ. Code § 551.006; *see also id.* §§ 158.001(b), 563.051(d). The Dispensing Ban was written by a

pharmacist, Rep. Tim Von Dohlen, to forbid physicians from "retailing . . . prescription drugs." CR.341, 349, 352. Though the Ban is a national outlier—only four states have comparable bans[1]—the Texas Pharmacy Association has lobbied hard to keep the Ban in place. *See, e.g.*, CR.408 (urging members to oppose "physician dispensing . . . amendments unfavorable to pharmacy"); CR.413–14 (boasting of efforts to "protect the business of pharmacy" by defeating bill that would have "hurt the practice of pharmacy" by allowing physicians to dispense at cost).

The Dispensing Ban has a few exceptions. Physicians can dispense a 72-hour supply of medication, or drug samples in any supply, for free. Tex. Occ. Code §§ 158.001(a), 158.002; 22 Tex. Admin. Code § 169.2(6) (Tex. Med. Bd., Definitions). And physicians in "rural areas" can dispense in a way that "would not set doctors up in competition with retail pharmacies," CR.401 (legislative record): They can dispense non-controlled medications at cost if their offices are over 15 miles from the nearest pharmacy and in either a county with a population under 5,000 or a city with a population under 2,500. Tex. Occ. Code §§ 158.003, 563.053.

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[1] *See* Mass Gen. Laws ch. 94C, § 9(b); N.J. Stat. Ann. § 45:9-22.11; N.Y. Educ. Law § 6807(2)(a); N.H. Rev. Stat. Ann. § 318.42.

The practical effect of this system is that all Texas physicians can dispense for free, and rural physicians can dispense at cost—but urban physicians, including the Doctors, can only dispense at cost if they obtain pharmacist licenses. CR.267–68, 1117. The Doctors are full-time physicians who are always on call for their patients. CR.509, 528, 558. They do not have time to put their practices on hold for years to become pharmacists. *See* Tex. Occ. Code § 558.051 (pharmacist licensing requirements). So they sued, alleging that the Dispensing Ban violates their right to occupational freedom under Article I, § 19 (Due Course of Law) and Article I, § 3 (Equal Rights) of the Texas Constitution.

SUMMARY OF ARGUMENT

Issue 1: The Court should grant review to answer questions about the Due Course of Law Clause that it raised last year in *Crown*. There, the Court held the due-course clause protects "a right to 'engage in any of the *common* occupations of life,' *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), or . . . a right to follow or pursue a '*lawful* calling, business, or profession,' *Dent v. West Virginia*, 129 U.S. 114, 121 (1889)." *Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 654 (Tex. 2022) (emphases in original). But the Court left for another day "what constitutes a 'common

occupation' or a 'lawful calling'" and "how or whether Texas's due-course clause protects all such occupations or callings." *Id.* at 655.

This case presents both issues *Crown* reserved. First, it asks what occupations are protected because dispensing was a common and lawful part of the practice of medicine until 1981—when a pharmacist drafted the Dispensing Ban that the Doctors are challenging. Second, this case asks how the due-course clause protects occupational freedom. In 2015, the Court set "the standard of review for as-applied substantive due course challenges to economic regulation statutes." *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015). Yet questions persist about the standard. Lower courts are confused about when to apply *Patel*. The Third Court's holding that *Patel* is limited to "entry barrier[s]" and therefore "inapposite," *Garrett v. Tex. State Bd. of Pharmacy*, No. 03-21-00039-CV, 2023 WL 376900, at *6 (Tex. App.—Austin Jan. 25, 2023, pet. filed) (mem. op.), embodies the problem. And at a deeper level, there are good reasons to question this Court's reliance on the federal rule that economic rights get less protection than other rights. The Court should grant review to finally clarify how the due-course clause protects occupational freedom.

Issue 2: This case presents similar issues under the Equal Rights Clause. The equal-rights clause protects the same economic rights as the

due-course clause. *See, e.g.*, *San Antonio Retail Grocers, Inc. v. Lafferty*, 297 S.W.2d 813, 817 (Tex. 1957). *Crown*'s question about what occupations are protected therefore arises under both provisions. The Doctors' equal-rights claim also presents an ideal opportunity to clarify the proper test. The Third Court applied the federal rational-basis test below. *Garrett*, 2023 WL 376900, at *7–8 (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). But how could that be right? The same factors that prompted *Patel*—confusion in the caselaw and the context in which the due-course clause was adopted—justify a more engaged test under the equal-rights clause too. Moreover, there is no textual or historical reason to think that the federal rational-basis test reflects the original public meaning of the equal-rights clause. The Court should grant review to adopt a test that does.

ARGUMENT

I. This case asks the questions *Crown* raised about how the Due Course of Law Clause protects occupational freedom.

A. *Crown* raised questions about when and how occupational freedom is protected.

This Court conducts a "two-step inquiry" under Article I, § 19: "First, does the plaintiff have a liberty, property, or other enumerated interest that is entitled to protection? 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) (cites omitted). While that basic framework is well-settled, how it applies to "work-related economic interests" is far from clear. *Crown Distrib.*, 647 S.W.2d at 654.

In *Crown*, a few companies brought a due-course challenge to a law that banned smokable hemp products. *Id.* at 651–52. The companies argued that the ban failed the test for "economic regulation statutes" set forth in *Patel*, 469 S.W.3d at 87, because the ban was either irrational or oppressive. *Crown Distrib.*, 647 S.W.3d at 653. But the Court declined to reach that argument, concluding that the companies had failed to assert a protected interest at all. *Id.* The companies could not rely on *Patel* for that point because *Patel* "did not address the first-step issue." *Crown Distrib.*, 647 S.W.3d at 653 n.16. Thus, fresh analysis was in order.

The Court noted that "[m]any cases" under the due-course and due-process clauses have recognized "a right to 'engage in any of the *common* occupations of life,' *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), or . . . a right to follow or pursue a '*lawful* calling, business, or profession,' *Dent v. West Virginia*, 129 U.S. 114, 121 (1889)." *Crown Distrib.*, 647 S.W.3d at 654 & n.18 (emphases in original). At the same time, some occupations are "inherently vicious and harmful" and have never received protection. *Id.* at

654–55 (citing *Murphy v. California*, 225 U.S. 623, 628 (1912)). After covering Texas's "long history" of banning smokable hemp products, the Court held that the companies were engaged in a traditional vice activity, not a common or lawful occupation. *Crown Distrib.*, 647 S.W.3d at 657–64.

But resolving the case on that narrow ground may have raised more questions than answers. The Court reserved judgment on "what constitutes a 'common occupation' or a 'lawful calling'" and on "how or whether Texas's due-course clause protects all such occupations or callings." *Id.* at 655. A four-justice concurrence echoed these questions while raising still broader questions of its own: "[W]hat *does* that clause protect—and how does it do so?" *Id.* at 664 (Young, J., concurring). Granting review here would allow the Court to answer some of these important questions.

B. The Doctors, unlike the *Crown* petitioners, present a historically common and lawful occupation.

This case presents *Crown*'s question about what occupations are protected because the Doctors, unlike the companies in *Crown*, are in a profession that has been common and lawful in Texas for centuries: the practice of medicine. And the dispensing services they seek to provide have been a common and lawful part of that profession for almost as long. *Cf.* *Crown Distrib.*, 647 S.W.3d at 657 (analyzing companies' asserted right to

sell smokable hemp products because that was the service restricted by the challenged law). The Doctors preview each point below.

First, the Doctors' asserted interest is historically "common." *Id.* at 654–55. The practice of medicine spans all of Texas history. *See* Tex. State Hist. Ass'n, *Health & Medicine*, https://tinyurl.com/7spnsvb2 (updated Nov. 5, 2020) (describing physicians' role in Texas's settlement, in the Texas Revolution, and throughout Texas's statehood). And medication dispensing has been a part of that profession from the very beginning: "[D]rug manufacture and sales in Texas" started when early "colonial doctors made up medicines in large quantities and placed them on the shelf in their offices or in their homes, which they called drugstores." Tex. State Hist. Ass'n, *Pharmacy,* https://tinyurl.com/4u8shyj8 (updated Jan. 1, 1996). That was pretty much how it worked everywhere:

> Whatever else the early medical practitioners may have done to earn their livelihood, in one particular they were no doubt alike: With few exceptions they dispensed their own medicines, unless they directed the relatives of the patient to prepare potions from indigenous or cultivated herbs or roots.
>
> The apothecary shop, as it existed at a later period in the larger cities of the American colonies, was thus a kind of dispensary attached to the office of a medical practitioner.

Glenn Sonnedecker, *Kremers & Urdang's History of Pharmacy* 154 (4th ed. 1986); *see generally id.* at 152–56 (elaborating on history).

Second, the Doctors' interest is historically "lawful." *Crown Distrib.*, 647 S.W.3d at 654. The practice of medicine has always been legal in Texas to those with licenses. *See* Texas Medical Board, *Self-Evaluation Report* 8 (Aug. 2015), https://tinyurl.com/2p85h23m (providing regulatory history dating back to 1837 licensing law); *see also Dent v. West Virginia*, 129 U.S. 114, 122 (1889) (describing the practice of medicine as a "lawful vocation"). Likewise, dispensing was a lawful part of the practice of medicine until 1981—when a pharmacist, Rep. Tim Von Dohlen, drafted the Dispensing Ban that the Doctors are challenging. CR.341, 349, 352.

In sum, the Dispensing Ban took what had been a common and lawful part of the practice of medicine for all of Texas history and gave it to retail pharmacists. If the Court is going to decide "what constitutes a 'common occupation' or a 'lawful calling,'" *Crown Distrib.*, 647 S.W.3d at 655, this case is an ideal place to start.

C. There is still confusion, even after *Patel*, over whether occupational freedom gets meaningful protection.

This case also presents *Crown*'s question about "how" the due-course clause protects occupational freedom. *Id. Patel* was supposed to clarify the test: It declared the federal rational-basis test too deferential and adopted a more engaged test in its place. *Patel*, 469 S.W.3d at 85–87. Yet there is still confusion about when the *Patel* test applies. Perhaps that confusion stems,

as the decision below suggests, from a footnote this Court wrote 10 months after *Patel*. Or perhaps it stems from this Court's continued reliance on the federal rule that occupational freedom deserves less protection than other rights. Either way, the confusion warrants this Court's review.

First, lower courts are confused about when to apply the *Patel* test. In *Patel*, this Court set "the standard of review for as-applied substantive due course challenges to economic regulation statutes." *Patel*, 469 S.W.3d at 87. Distilling over a century of jurisprudence, the Court held that, unlike the federal rational-basis test, Texas's test requires courts to determine whether, "when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest." *Id.*

Patel was supposed to resolve longstanding confusion about the test for economic regulations. *Id.* at 80–82. Just 10 months later, though, this Court wrote in a footnote (in an entirely unrelated case) that the *Patel* test is "limited to the particular legal framework[] in which [it] arose." *Hegar v. Tex. Small Tobacco Coal.*, 496 S.W.3d 778, 788 n.35 (Tex. 2016). On its face, the *Hegar* footnote should not have changed anything because *Patel* was clear about its scope: "as-applied substantive due course challenges to

economic regulation statutes." *Patel*, 469 S.W.3d at 87. Even so, *Hegar* has spawned confusion in the lower courts about when the *Patel* test applies.

Some courts take *Patel* at its word and hold that it applies to all economic regulations. *See, e.g.*, *Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 435 (Tex. App.—Austin 2018, pet. denied) (applying *Patel* to ordinance requiring businesses to pay sick leave); *Gatesco Q.M. Ltd. v. City of Houston*, 503 S.W.3d 607, 620 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (applying *Patel* to ordinance imposing late fee and city's decision to shut off water to apartment); *Sepulveda v. City of Pasadena*, No. 2021-80180, 2022 WL 952888, at *7 (Tex. Dist. Ct. Mar. 21, 2022) (applying *Patel* to ordinance requiring certain number of parking spots for auto shops).

Other courts treat *Patel* as an outlier that applies only to occupational entry barriers. *See, e.g.*, *City of South Padre Island v. Surfvive*, No. 13-20-00536-CV, 2022 WL 2069216, at *6 (Tex. App.—Corpus Christi-Edinburg, pet. filed) (mem. op.) (applying *Patel* because the law "creates an economic barrier of entry into a given profession"); *Transformative Learning Sys. v. Tex. Educ. Agency*, 572 S.W.3d 281, 293 (Tex. App.—Austin 2018, no pet.) (refusing to apply *Patel* because "the statute at issue here does not erect an economic barrier of entry into a given profession"); *Tex. Alcoholic Beverage*

Comm'n v. Live Oak Brewing Co., 537 S.W.3d 647, 656–57 (Tex. App.—Austin 2017, pet. denied) (rejecting *Patel* challenge because plaintiffs "have not demonstrated that . . . [the law] has prevented them from operating within their chosen trade").

The decision below embodies this confusion. Relying on *Hegar*, the Third Court held that *Patel* was solely about "entry barrier[s]." *Garrett v. Tex. State Bd. of Pharmacy*, No. 03-21-00039-CV, 2023 WL 376900, at *6 (Tex. App.—Austin Jan. 25, 2023, pet. filed) (mem. op.). Because the Doctors are still "able to practice medicine," the Third Court found *Patel* "inapposite" and refused to weigh the burdens of requiring the Doctors to obtain pharmacist licenses in order to dispense at cost. *Id.* But weighing a law's burdens is a dispositive part of the test. *See Patel*, 469 S.W.3d at 87, 90 (striking down esthetician licensing requirement for eyebrow threaders as an overly burdensome way to promote safe threading services).

The Court should grant review to correct the Third Court's error and resolve the lower courts' confusion about when the *Patel* test applies.

Second, another source of confusion may be *Patel*'s insistence that plaintiffs still bear a "high burden to show unconstitutionality." *Patel*, 469 S.W.3d at 87. After all, there *is* something confusing about rejecting the federal rational-basis test while clinging to the U.S. Supreme Court's rule

that economic rights deserve less rigorous protection than other rights. *Compare United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 & n.4 (1938) (holding that economic rights get "rational basis" review while other Fourteenth Amendment rights get "more searching" review), *with Patel*, 469 S.W.3d at 86 (holding that the "due course of law protections in Article I, § 19, for the most part, align with the protections found in the Fourteenth Amendment").

Consider: The federal approach gives "fundamental" rights "no-nonsense 'strict scrutiny' to ensure government is behaving itself," while non-fundamental "rights get servile, pro-government treatment." *Patel*, 469 S.W.3d at 113 (Willett, J., concurring). Because *Carolene Products* locked economic rights in the second box, courts "privilege a broad swath of non-economic human activities, while leaving economic activities out in the cold." *Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 982 (5th Cir. 2022) (Ho, J., concurring).

But there are good reasons to think this approach is wrong for Texas. For one, "[n]othing in the . . . Texas Constitution[] requires treating certain rights as 'fundamental' and devaluing others as 'non-fundamental' and applying different levels of judicial scrutiny." *Patel*, 469 S.W.3d at 113 (Willett, J., concurring). For another, even assuming tiered scrutiny makes

sense under the due-course clause, disfavoring occupational freedom does not. *See Golden Glow Tanning Salon, Inc.*, 52 F.4th at 984 (Ho, J., concurring) (arguing that "the right to engage in productive labors is essential to ensuring the ability of the average American citizen to exercise most of their other rights" and "is deeply rooted in our Nation's history and tradition").

The Court should grant review to consider whether its reliance on federal due-process standards is perpetuating confusion about "how" the due-course clause protects occupational freedom. *Id.* at 655.

II. This case asks equally important questions about how the Equal Rights Clause protects occupational freedom.

The Doctors' equal-rights claim presents similar questions to their due-course claim. The equal-rights clause protects the same underlying economic rights as the due-course clause. *See, e.g.*, *San Antonio Retail Grocers, Inc. v. Lafferty*, 297 S.W.2d 813, 817 (Tex. 1957) (striking down law regulating grocery stores and other stores differently under Article I, §§ 3 & 19); *Ex parte Rodgers*, 371 S.W.2d 570, 571 (Tex. Crim. App. 1963) (striking down law regulating large and small gas trucks differently under Article I, §§ 3 & 19). Thus, the Doctors' equal-rights claim presents the same question *Crown* raised about "precisely what constitutes a 'common occupation' or a 'lawful calling.'" *Crown Distrib.*, 647 S.W.3d at 655.

The Doctors' equal-rights claim would also allow the Court clarify the proper legal test. The Third Court rejected the Doctors' equal-rights claim by applying the federal rational-basis test. *See Garrett*, 2023 WL 376900, at *7–8 (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). As with the Doctors' due-course claim, however, there are compelling reasons to question whether that test makes sense for Texas.

Start with *Patel*. The Court granted review there to resolve confusion over Texas's rational-basis test. *See Patel*, 469 S.W.3d at 80–82. But *Patel* only decided how the test works in *due-course* cases. It did not decide (because the issue was not presented) how the test works in *equal-rights* cases. The result, displayed in the Third Court's decision, is that courts now apply two different versions of the rational-basis test to laws that restrict occupational freedom: the *Patel* test for due-course claims and the federal test for equal-rights claims. *See Garrett*, 2023 WL 376900, at *3–4, *8.

This fractured approach is untenable. Texas courts have sometimes applied a more engaged rational-basis test under the equal-rights clause. *See HL Farm Corp. v. Self*, 877 S.W.2d 288, 293–94 (Tex. 1994) (Doggett, J., dissenting) (contrasting "fair and substantial relation" test under the equal-rights clause with the "extremely deferential federal rational-basis test"). In fact, most of the cases *Patel* cited as showing confusion over the

test resolved parallel equal-rights claims using the same analysis. *See Patel*, 469 S.W.3d at 80–82.[2] The equal-rights clause was even adopted in 1876 in the same "temporal legal context" that prompted the *Patel* test. *Patel*, 469 S.W.3d at 87. Accordingly, if the Court is going to continue applying the rational-basis test under the equal-rights clause, it should at least consider whether *Patel* justifies a more engaged version of that test.

Or it may be that *no* form of rational-basis review would be proper. Texans deserve a test rooted in the "text" and "history" of the equal-rights clause. *See Crown Distrib.*, 647 S.W.3d at 666 (Young, J., concurring). The rational-basis test is neither. It was invented by the U.S. Supreme Court decades after the equal-rights clause was adopted for a federal provision with completely different text. *Compare* Tex. Const. art. I, § 3 (securing "equal rights" and forbidding state from granting "exclusive separate public emoluments, or privileges, but in consideration of public services"), *with* U.S. Const. amend. XIV (barring states from denying "the equal protection

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[2] Citing, *e.g.*, *Barshop v. Medina Cnty. Underground Water Cons. Dist.*, 925 S.W.2d 618, 631–32 (Tex. 1996); *LeCroy v. Hanlon*, 713 S.W.2d 335, 338 (Tex. 1986); *State v. Richards*, 301 S.W.2d 597, 600 (Tex. 1957); *Limon v. State*, 947 S.W.2d 620, 627–28 (Tex. App.—Austin 1997, no writ); *Lens Express, Inc. v. Ewald*, 907 S.W.2d 64, 69 (Tex. App.—Austin 1995, no writ); *Tex. Optometry Bd. v. Lee Vision Ctr, Inc.*, 515 S.W.2d 380, 386 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.); *Humble Oil & Refin. Co. v. City of Georgetown*, 428 S.W.2d 405, 406 (Tex. Civ. App.—Austin 1968, no writ); *Martin v. Wholesome Dairy, Inc.*, 437 S.W.2d 586, 590 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.); *Garcia v. Kubosh*, 377 S.W.3d 89, 93, 99 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

of the laws”). There is simply no reason to think that rational-basis review—in any form—reflects the original public meaning of the equal-rights clause.

In sum, whether a more engaged rational-basis test or *no* version of that test should apply under the equal-rights clause, granting review here would allow the Court to clarify the standard.

PRAYER

The Doctors ask that the Court grant their petition, reverse the Third Court’s decision, and render judgment in their favor.

Dated: April 10, 2023.

RESPECTFULLY SUBMITTED,

INSTITUTE FOR JUSTICE

By: /s/ Joshua Windham

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CERTIFICATE OF SERVICE

I certify that on April 10, 2023, I caused a true and correct copy of the foregoing petition and the attached appendix to be sent to the following counsel electronically:

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CERTIFICATION

I certify that all factual statements in the foregoing petition are supported by competent evidence in the appendix or record to which the petition has cited.

/s/ Joshua Windham

CERTIFICATE OF COMPLIANCE

Microsoft Word reports that the foregoing petition contains 4,423 words, excluding the portions of the brief exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Joshua Windham

APPENDIX

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Tab 1

Order Granting Defendants' Motion Summary Judgment

CAUSE NO. D-1-GN-19-003686

MICHAEL GARRETT, M.D.; and KRISTIN HELD, M.D., *Plaintiffs*,	§ § § §	IN THE DISTRICT COURT
v.	§ §	TRAVIS COUNTY, TEXAS
The TEXAS STATE BOARD OF PHARMACY, et.al., *Defendants*.	§ § §	98TH JUDICIAL DISTRICT

ORDER GRANTING DEFENDANTS' MOTION SUMMARY JUDGMENT

On this day came on to be considered the parties' motions for summary judgment. After due consideration of the motions, responses on file, evidentiary objections, and arguments, the Court orders as follows:

IT IS ORDERED that Defendants' motion for summary judgment is GRANTED.

ITS IS FURTHER ORDERED that Plaintiffs' motion for summary judgment is DENIED.

IT IS FUTHER ORDERED that Plaintiffs' Application for a Permanent injunction is DENIED.

IT IS FURTHER ORDERED that all of Plaintiffs' claims against Defendants are DISMISSED WITH PREJUDICE in their entirety.

This is a FINAL JUDGMENT, and all relief not specifically granted is denied.

SIGNED December 23, 2020.

SCOTT JENKINS
JUDGE, 53rd DISTRICT COURT
TRAVIS COUNTY, TEXAS

Tab 2

Opinion and Judgment of the Court of Appeals, Third District

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-21-00039-CV

Michael Garrett, M. D. and Kristin Held, M.D., Appellants

v.

The Texas State Board of Pharmacy, Ian Shaw, Bradley Miller, Donnie Lewis, Jenny Yoakum, Rick Fernandez, Daniel Guerrero, Lori Henke, Donna Montemayor, Julie Spier, Rick Tisch, and Suzette Tijerina, in their Official Capacities as members of the State Board of Pharmacy; Timothy Tucker, in his Official Capacity as the Executive Director of the Texas State Board of Pharmacy; the Texas Medical Board; Sherif Zaafran, Robert Martinez, Devinder S. Bhatia, James Distefano, Jayaram Naidu, Manuel Quinones, Satish Nayak, David Vanderweide, George De Loach, Kandace Farmer, Jason Tibbels, Sharon Barnes, Michael Cokinos, Robert Gracia, Tomeka Moses Herod, LuAnn Morgan, and Ebony Todd, in their Official Capacities as members of the Texas Medical Board; and Stephen Carlton, in his Official Capacity as the Executive Director of the Texas Medical Board, Appellees

FROM THE 98TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-19-003686, THE HONORABLE SCOTT H. JENKINS, JUDGE PRESIDING

MEMORANDUM OPINION

Appellants Michael Garrett, M.D., and Kristin Held, M.D., (collectively "Doctors") appeal from the trial court's final judgment granting Appellees'[1] motion for summary

[1] Doctors named the following people as defendants in their official capacities: L. Suzan Kedron, Chip Thornsburg, and Dennis Wiesner as board members of the Texas State Board of Pharmacy; Allison Benz as executive director of the Texas State Board of Pharmacy; and Jeffrey Luna, Margaret McNeese, Karl Swann, Surendra Varma, Scott Holiday, Frank Denton, Linda Molina, and Timothy Webb as board members of the Texas Medical Board. Because those former officials no longer hold those positions, we automatically substitute their successors as parties. *See* Tex. R. App. P. 7.2(a) ("When a public officer is a party in an official capacity to an

judgment, denying Doctors' motion for summary judgment, and dismissing all of Doctors' claims with prejudice. For the following reasons, we affirm the trial court's final judgment.

BACKGROUND

Texas regulates the pharmacy profession through the Texas Pharmacy Act, which "shall be liberally construed to regulate in the public interest the practice of pharmacy in this state as a professional practice that affects the public health, safety, and welfare." Tex. Occ. Code §§ 551.001, .002(a). Because "[i]t is a matter of public interest and concern that the practice of pharmacy merits and receives the confidence of the public and that only qualified persons be permitted to engage in the practice of pharmacy," *id.* § 551.002(b), pharmacists and pharmacies are subject to extensive regulations. A person must hold a license to practice pharmacy in Texas, and that license requires, among other things, graduating and obtaining a degree from a college of pharmacy, completing at least a 1,000-hour internship, and passing two examinations. *See id.* §§ 558.001, .051(a); *see also* 22 Tex. Admin. Code §§ 283.3–.4, .7 (Licensing Requirements for Pharmacists).[2]

The Texas State Board of Pharmacy (the "Pharmacy Board") has also adopted numerous administrative rules governing the actions and responsibilities of licensed pharmacists in Texas. *See* Tex. Occ. Code § 554.051(a) (providing that Board "shall adopt rules consistent with [the Texas Pharmacy Act] for the administration and enforcement of [that Act]"). For

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appeal or original proceeding, and if that person ceases to hold office before the appeal or original proceeding is finally disposed of, the public officer's successor is automatically substituted as a party if appropriate.").

[2] Rule citations are to the rules in effect as of 2019, when the operative petition was filed. All citations to Title 22 of the Texas Administrative Code are to rules promulgated by the Texas State Board of Pharmacy unless otherwise noted.

example, "[a] pharmacist shall exercise sound professional judgment with respect to the accuracy and authenticity of any prescription drug order dispensed." 22 Tex. Admin. Code § 291.29(a) (Professional Responsibility of Pharmacists). Among other things, licensed pharmacists are responsible for ensuring that medication "is dispensed and delivered safely and accurately as prescribed" as part of the dispensing process, which includes "drug regimen review and verification of accurate prescription data entry." *Id.* § 291.32(c)(1)(F) (Personnel). The "drug regimen review" includes reviewing the patient's medical record to identify clinically significant information (e.g., known allergies, adverse drug reactions, drug-drug interactions), and the pharmacist must take "appropriate steps to avoid or resolve the problem including consultation with the prescribing practitioner." *Id.* § 291.33(c)(2)(A) (Operational Standards). Pharmacists must also counsel patients regarding said prescriptions. *Id.* § 291.33(c)(1).

The purpose of those rules and the other provisions in the Texas Pharmacy Act "is to promote, preserve, and protect the public health, safety, and welfare through: (1) effectively controlling and regulating the practice of pharmacy; and (2) licensing pharmacies engaged in the sale, delivery, or distribution of prescription drugs and devices used in diagnosing and treating injury, illness, and disease."[3] Tex. Occ. Code § 551.002(c). Accordingly, a person is prohibited from dispensing or distributing non-controlled prescription drugs unless the person is a licensed pharmacist or otherwise statutorily authorized to dispense or distribute such medication. *See id.* § 558.001(c); *see also id.* §§ 158.001(b) (authorizing physician to dispense certain medication for "immediate need" but clarifying that provision "does not permit a physician to operate a

[3] Pharmacies are also separately licensed under the Texas Pharmacy Act. *See* Tex. Occ. Code § 560.001 (License Required). Numerous additional regulations control the operations of pharmacies within Texas. *See, e.g.*, 22 Tex. Admin. Code §§ 291.15 (Storage of Drugs), .17 (Inventory Requirements), .28 (Access to Confidential Records).

retail pharmacy without complying with Chapter 558"), .003(b) (dispensing of dangerous drugs in certain rural areas); 551.006 ("Notwithstanding any other law, a pharmacist has the exclusive authority to determine whether or not to dispense a drug."); 563.051(d) (clarifying that "immediate need" dispensing "does not authorize a physician or a person acting under the supervision of a physician to keep a pharmacy, advertised or otherwise, for the retail sale of dangerous drugs, other than as authorized under Section 158.003, without complying with the applicable laws relating to the dangerous drugs"), .053(b) (dispensing of dangerous drugs in certain rural areas); 22 Tex. Admin. Code §§ 169.2(10) (Tex. Med. Bd., "Rural Area" definition), 169.5 (Tex. Med. Bd., Exceptions). Collectively, these provisions are the "Dispensing Ban," which generally functions to prohibit persons, including physicians, from dispensing non-controlled prescription medication unless they are licensed pharmacists.[4] There are only three narrow exceptions permitting physicians to dispense such medication without a pharmacist license: (1) the 72-Hour Supply Exception, a three-day supply of medication "necessary to meet the patient's immediate needs," Tex. Occ. Code § 158.001(a); 22 Tex. Admin. Code § 169.2(6) (Texas Med. Bd., "Immediate needs" Definition); (2) the Free Sample Exception, medication samples provided to the physician free of charge, Tex. Occ. Code § 158.002(a); 22 Tex. Admin. Code § 169.5(2) (Texas Med. Bd., Exceptions); and (3) the Rural Exception, allowing physician to dispense medication at cost to patients if the physician practices

[4] Doctors have expressly sought relief from the Dispensing Ban to dispense "non-controlled prescription medication at cost," so we focus our analysis on that specific subset of medication. Generally, the relevant statutes and administrative rules comprising the Dispensing Ban concern "dangerous drugs," which includes any drug or device that is unsafe for self-medication and that is not included in specific penalty groups of the Texas Controlled Substances Act or has been designated by the Federal Drug Administration as a drug that requires a prescription. *See* Tex. Health & Safety Code § 483.001(2); Tex. Occ. Code § 551.003(12).

medicine in a narrowly defined rural area, Tex. Occ. Code § 158.003; 22 Tex. Admin. Code §§ 169.2(10) (Texas Med. Bd., "Rural area" Definition), 169.5(1) (Texas Med. Bd., Exceptions).[5]

Dr. Michael Garrett is an Austin-based family doctor who has practiced medicine for over 20 years. Dr. Garrett currently operates a "direct primary care" family practice, where patients pay a monthly fee for pre-agreed medical services rather than accepting insurance or other third-party payments. Dr. Kristin Held is a San Antonio-based ophthalmologist and surgeon who has practiced medicine for over 30 years. Dr. Held also does not take insurance or third-party payments. Both doctors desire to dispense non-controlled prescription medication at cost to their patients but are currently prohibited from doing so because they do not hold a pharmacist license nor qualify for the Rural Exception.

Doctors therefore brought the present lawsuit against the Pharmacy Board and the Texas Medical Board, as well as each boards' respective members and executive directors in their official capacities (collectively, the State), alleging that the Dispensing Ban (and its prohibition on their dispensing of non-controlled prescription medication at cost without a pharmacist license) violates their constitutional rights. Doctors argue that the Dispensing Laws violates their "rights to pursue a chosen business" protected by the Due Course of Law provision of the Texas Constitution. *See* Tex. Const. art. I, § 19. Doctors also allege that the distinction drawn between themselves and rural physicians who qualify for the Rural Exception violates

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[5] The Rural Exception applies only "to an area located in a county with a population of 5,000 or less, or in a municipality or an unincorporated town with a population of less than 2,500, that is within a 15-mile radius of the physician's office and in which a pharmacy is not located," and that is not "adjacent to a municipality with a population of 2,500 or more." Tex. Occ. Code § 158.003(b).

their right to equal protection under the Texas Constitution. *See id.* art. I, § 3. Doctors therefore sought a permanent injunction against the State and attorneys' fees.

The parties filed cross-motions for summary judgment. After a hearing, the trial court granted the State's motion and denied Doctors' motion. Doctors timely appealed.

STANDARD OF REVIEW

We review summary judgment rulings de novo. *Texas Alcoholic Beverage Comm'n v. Live Oak Brewing Co.*, 537 S.W.3d 647, 654 (Tex. App.—Austin 2017, pet. denied). To prevail on a motion for summary judgment, the movant must demonstrate that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). "When, as here, both parties seek summary judgment on the same issue and the court grants one motion and denies the other, we consider the summary judgment evidence presented by both sides, determine all questions presented and, if we determine that the trial court erred, render the judgment the trial court should have rendered." *Live Oak Brewing*, 537 S.W.3d at 654.

Moreover, we review de novo disputes concerning the constitutionality of a statute. *Id.* "Although whether a law is unconstitutional is a question of law, the determination will in most instances require the reviewing court to consider the entire record, including evidence offered by the parties." *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015).

DISCUSSION

On appeal, Doctors contend that the trial court erred in failing to conclude that the Dispensing Ban violates their rights to due course of law and equal protection under the Texas Constitution. We address each in turn.

Due Course of Law Challenge

The Texas Constitution provides that "no citizen of this State shall be deprived of life, liberty, property, privileges or immunities or in any manner disenfranchised, except by the due course of the law of the land." Tex. Const. art. I, § 19. A two-part test governs a Due Course of Law claim: (1) whether petitioners have a liberty or property interest that is entitled to procedural due process protection, and (2) if so, what process is due. *See Mosley v. Texas Health & Human Servs. Comm'n*, 593 S.W.3d 250, 264 (Tex. 2019).

Here, the State does not dispute that Doctors are asserting a protected liberty interest "to engage in any of the common occupations of life." *See id.* (quoting *University of Tex. Med. Sch. At Houst. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995)); *Live Oak Brewing*, 537 S.W.3d at 654 ("Among the liberty interests protected by due course of law is freedom of contract, which includes the right to pursue a lawful occupation."); *see also Texas Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 653 (Tex. 2022) (explaining that party must first show deprivation of interest protected by Due Course provision).

We therefore turn to the second step: what process is due to protect the asserted liberty interest. *See Mosley*, 593 S.W.3d at 264. Statutes, and the corresponding regulations adopted by an agency pursuant to statutory authority, are presumed constitutional. *Patel*, 469 S.W.3d at 87. The party making an as-applied challenge to an economic regulation under the Due Course of Law provision must make a showing under either of the two *Patel* prongs:

> (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or
>
> (2) when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so

burdensome as to be oppressive in light of, the governmental interest.

Id. Doctors challenge the Dispensing Ban under both *Patel* prongs, and so we address each in turn.

Patel *Rational Basis Challenge*

The State asserts, and the Doctors do not dispute, that it has a legitimate governmental interest: ensuring the safe dispensing of prescription medication in Texas. *See Texas State Bd. of Pharmacy v. Gibson's Disc. Ctr.*, 541 S.W.2d 884, 887 (Tex. App.—Austin 1976, writ ref'd n.r.e.). Instead, Doctors contend that the three purposes for the Dispensing Ban advanced by the State—(1) promoting safety by requiring a licensed pharmacist's independent review of a prescription before dispensing; (2) preventing potential conflicts of interest from physician dispensing the same medication they have prescribed; and (3) enabling effective regulation by limiting the number of dispensing locations—do not further that legitimate interest.

The State asserts that the Dispensing Ban satisfies the first *Patel* prong because requiring a licensed pharmacist to independently review a medication before dispensing it promotes safe dispensing, which is rationally related to its governmental interest. We agree. Pharmacists must meet strict requirements to be licensed, *see, e.g.*, Tex. Occ. Code §§ 558.001, .051(a); *see also* 22 Tex. Admin. Code §§ 283.3–.4, .7 (Licensing Requirements for Pharmacists), and part of their professional obligations includes completing "drug regimen reviews" where the pharmacist reviews a patient's medical records and takes steps to resolve any "clinically significant information" relating to a prescribed medication, 22 Tex. Admin. Code §§ 291.32(c)(1)(F) (Personnel), .33(c)(2)(A) (Operational Standards), .33(c)(1). Viewing the statute as a whole, it is clear that the Legislature has decided that having a pharmacist

doublecheck medication before dispensing would correct potential errors and improve the health and safety of patients. *See Bailey v. Smith*, 581 S.W.3d 374, 389 (Tex. App.—Austin 2019, pet. denied) (explaining that we "consider the context and framework of the entire statute and meld its words into a cohesive reflection of legislative intent" (quoting *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018));[6] Tex. Occ. Code § 551.002(c) (describing purpose of Texas Pharmacy Act as to "promote, preserve, and protect the public health, safety, and welfare" by "effectively controlling and regulating the practice of pharmacy"). Like the old proverb "two heads are better than one," the Legislature rationally could have determined that requiring two separate professionals—the prescribing physician and the dispensing pharmacist—to review medications promotes the safe dispensing of said medication in Texas. *See Mauldin v. Texas State Bd. of Plumbing Examn'rs*, 94 S.W.3d 867, 873 (Tex. App.—Austin 2002, no pet.) (explaining that "[a] legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data" (quoting *Heller v. Doe*, 509 U.S. 312, 320–21 (1993)); *see also* Sesame Street, *Two Heads Are Better Than One* (Sesame Street Inc. 1980).

Doctors argue that independent review by pharmacists does not further the governmental interest because some doctors may dispense medication without such oversight if they qualify under the statutory exceptions. *See* Tex. Occ. Code §§ 158.001(a) (72-Hour Supply Exception), .002(a) (Free Sample Exception), .003(c) (Rural Exception). But that argument is unavailing. Our review is not premised on "second guess[ing]" legislative policy choices. *See Hebert v. Hopkins*, 395 S.W.3d 884, 900 (Tex. App.—Austin 2013, no pet.). Even if a "perfect" or "superior" Dispensing Ban would not have such exceptions, generally requiring pharmacist

[6] "We further interpret administrative rules, like statutes, under traditional principles of statutory construction." *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011).

review before dispensing is still rationally related to a legitimate governmental interest here.[7] *See Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 264 (Tex. 2002) ("The restriction clearly serves [the act's] purposes, and it is not for us to second-guess the Legislature's policy choices."); *cf. Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 685 (2012) (explaining that relevant determination is whether governmental action is "rational," not whether an alternative would have been "perfect" or "superior"). We cannot conclude that establishing a system which necessarily requires most prescribed medications to be doublechecked before dispensing "could not arguably be rationally related" to the uncontested legitimate governmental interest of ensuring safe dispensing of such medications. *See Patel*, 469 S.W.3d at 87.

That conclusion is strengthened when we consider the entire record before us.[8] *See id.* (explaining that as-applied challenge "in most instances require[s] the reviewing court to consider the entire record, including evidence offered by the parties"). In his report, Doctors' expert witness Dr. Mark Munger described his original research in prescriber dispensing; explained that 44 states allowed unrestricted dispensing by legally authorized prescribers as of 2013, and that patients reported an identical adverse drug reaction rate (ADR) of seven precent whether purchasing the medication from their prescriber or from a pharmacy; and opined that the

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[7] Moreover, the argument ignores that the Dispensing Ban exceptions may be rationally related to other complementary, but sometimes competing, legitimate interests of the State.

[8] Doctors interpret the first *Patel* prong as requiring an as-applied challenge to the Dispensing Ban based on whether it is irrational "on its face" and the second *Patel* prong as requiring two separate analyses: the oppressiveness analysis used in *Patel* and *Live Oak Brewing*, *see Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015); *Texas Alcoholic Beverage Comm'n v. Live Oak Brewing Co*., 537 S.W.3d 647, 659 (Tex. App.—Austin 2017, pet. denied), and an additional rational basis analysis of the Dispensing Ban's "actual, real-world effect." We do not construe *Patel*, and Doctors have not directed this Court to any authority interpreting *Patel*, as requiring this third independent analytical approach or otherwise treating it as distinct from the rational basis review under the first prong.

"current nationwide practice of prescribers dispensing is safe, that it is beneficial (both economically and medically) for patients, and that there is no reason to think the same would not be true in Texas or in the Plaintiffs' proposed dispensing practices." However, the underlying study "was not directed at detecting direct ADR risk from prescriber dispensing in contrast to the bi-provider system of dispensing medications" but instead relied on consumer patient self-reporting of experiencing an ADR. Furthermore, the same survey found that 64% of respondents strongly agreed that "having a physician/NP *and* pharmacist both check my medication makes it safer for me to take the medication." Similarly, other research in the record found that 1.6% of prescriptions contained errors detected by pharmacists and that pharmacists on average catch two prescription errors each day.

Dr. Munger also stated at his deposition that pharmacists receive "greater education in pharmacology." He also testified that involvement of pharmacists in dispensing medications "can increase medication adherence and reduce medication errors" and that pharmacists can have a role in "correcting errors contained in prescriptions from physicians." Dr. Munger and Allison Benz, former executive director of the Pharmacy Board, testified separately that pharmacists (and pharmacies) may also have software programs that compile patient's prescription histories, including prescriptions across multiple medical providers beyond just the prescribing physician.

Doctors point to affidavits and physician records demonstrating that they have safely dispensed medications under the Free Sample Exception for years and that rural doctors dispensing medications pursuant to the Rural Exception have done so without discipline. They also testified regarding examples in their own practices of pharmacists making errors in dispensing medication to Doctors' patients. But Dr. Garrett also testified that he receives calls

from pharmacists on an almost weekly basis, asking for clarifications about or raising potential concerns with prescribed medications; he further admitted that he has "infrequently" modified a prescription based on a pharmacist's call "a few times a year." Dr. Held similarly testified that she "[p]robably" received such calls, "would appreciate" such alerts from pharmacists, and she was "not saying I'm infallible. Everyone makes mistakes."

At most, Doctors have demonstrated that states have undertaken different approaches to regulating the dispensing of prescription medication, and that there may be benefits and detriments associated with either physicians or pharmacists having final authority over dispensing medication. But picking between such alternatives is a policy decision of the Legislature. *See Hebert*, 395 S.W.3d at 900; *cf. Mauldin*, 94 S.W.3d at 873 ("The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." (quoting *Heller*, 509 U.S. at 320–21)). Accordingly, Doctors have failed to satisfy the high burden of demonstrating that the Dispensing Ban on either Doctors specifically or doctors generally is not rationally related to the legitimate governmental interest of ensuring the safe dispensing of medication in Texas.[9] *See Patel*, 469 S.W.3d at 87.

Patel *Oppressiveness Challenge*

Under the second *Patel* prong, Doctors contend that the actual, real-world effect of the Dispensing Ban is so burdensome as to be oppressive because it requires them to obtain a

[9] Because a rational relationship exists between ensuring independent review by pharmacists and the legitimate governmental interest in ensuring the safe dispensing of prescription medications, we need not address the other two asserted purposes. *See Mauldin v. Texas State Bd. of Plumbing Exam'rs*, 94 S.W.3d 867, 873 (Tex. App.—Austin 2002, no pet.) (explaining that "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it" (quoting *Heller v. Doe*, 509 U.S. 312, 320–21 (1993))).

pharmacist license to dispense prescription medication at cost. They analogize their circumstances to those of the eyebrow threaders in *Patel*, who would have had to undertake at least 320 hours of irrelevant training as part of an esthetician license to legally practice eyebrow threading in Texas. *See Patel*, 469 S.W.3d at 89; *see also Live Oak Brewing*, 537 S.W.3d at 656 (explaining that eyebrow threaders in *Patel* were "entirely shut out from practicing their trade" until they completed training, including paying for training and losing the opportunity to make money while actively practicing their trade). Here, Doctors complain that, just like in *Patel*, the Dispensing Ban requires them to attend pharmacy school, complete a 1,000-hour internship, and pass two exams before being allowed to dispense medication at cost. *See* Tex. Occ. Code § 558.051 (Qualification for [Pharmacist] License by Examination).

But *Patel* is inapposite. The record here is clear that Doctors are full-time physicians, who have been able to practice medicine successfully for decades in their chosen specialties. The Doctors are therefore clearly distinguishable from the eyebrow threaders in *Patel*, who faced a barrier of entry before they could even begin to legally practice their chosen profession. *See Patel*, 469 S.W.3d at 73 (explaining that commercial eyebrow threaders required esthetician license to legally practice their chosen profession) (citing Tex. Occ. Code § 1602.002(a)(8)). Doctors have not demonstrated that the Dispensing Ban has erected an entry barrier into their medical profession so as to deprive them of their occupational freedom. *See Transformative Learning Sys. v. Texas Educ. Agency*, 572 S.W.3d 281, 292–93 (Tex. App.—Austin 2018, no pet.) (rejecting Due Course challenge because challenged statute "does not impair an individual's ability to obtain a charter and establish an open-enrollment charter school" but rather only governs rights and obligations of recipients of state funding); *Live Oak Brewing*, 537 S.W.3d at 657 (rejecting constitutional challenge to statute prohibiting craft brewer from

accepting payment in exchange for territorial rights because statute did not prevent craft brewers "from operating within their chosen trade—brewing and selling beer—within the confines of the unchallenged three-tier system"). Nor have Doctors asserted any general challenge to the pharmacy licensing system within which the Dispensing Ban operates. *See* Tex. Occ. Code § 551.002(b) (stating legislative purposes of Texas Pharmacy Act is to ensure "that only qualified persons be permitted to engage in the practice of pharmacy" in Texas).

Doctors have instead relied on *Patel* in an attempt to expand the scope of their medical practice to include dispensing certain prescription drugs. But the Supreme Court has made clear that its holdings in *Patel* "must remain 'properly limited to the particular legal framework' in which they were made." *Transformative Learning*, 572 S.W.3d at 292–93 (quoting *Hegar v. Texas Small Tobacco Coal.*, 496 S.W.3d 778, 788 n.35 (Tex. 2016)). Accordingly, Doctors must, and have failed to, establish that the Dispensing Ban is "so burdensome as to be oppressive." *See Patel*, 469 S.W.3d at 87.

We conclude that the trial court did not err when it granted summary judgment in favor of the State and dismissed Doctors' Due Course of Law claim.

Equal Protection Challenge

Doctors next contend that the trial court erred in failing to conclude that the Dispensing Ban violates their right to equal protection of the law because they are unable to dispense prescriptions at cost unlike doctors who qualify for the Rural Exception.[10] The Texas

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[10] The State contends that Doctors lack standing to assert an equal-protection claim because the State interprets Doctors as specifically challenging the Rural Exception, which does not apply to them, and therefore any favorable judgment would not redress their injuries. *See Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 926 (Tex. App.—Austin

Constitution provides that all persons "have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." Tex. Const. art. I, § 3. A viable Equal Protection claim under the Texas Constitution requires Doctors to show they have been "treated differently from others similarly situated." *See Klumb v. Houston Mun. Employees Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015) (quoting *Texas Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 647 (Tex. 2004)). Doctors must then show "that the challenged [statute] is not rationally related to a legitimate governmental purpose." *Id.* "In conducting a rational-basis review, we consider whether the challenged action has a rational basis and whether use of the challenged classification would reasonably promote that purpose." *Id.* Such determinations are "not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)).

As previously discussed, the Dispensing Ban relates to a legitimate governmental interest—promoting the safe dispensing of medication—but Doctors complain that the Dispensing Ban makes an arbitrary distinction between them and other doctors who qualify for the Rural Exception. Even assuming that Doctors are similarly situated to physicians who qualify for the Rural Exception, Doctors have failed to demonstrate that the Dispensing Ban (and its Rural Exception) are not rationally related to a legitimate governmental interest. *See id.*

2010, no pet.) (stating that standing requires showing (1) concrete and particularized injury in fact; (2) fairly traceable to defendants' conduct, and (3) favorable judgment would redress injury). But Doctors' equal-protection claim is premised on challenging the Dispensing Ban, not just the Rural Exception. Based on the record before us, Doctors have demonstrated, and the State does not dispute, that they have standing to challenge the Dispensing Ban itself. *See id.*

Doctors point to *Smith v. Decker*, 312 S.W.2d 632 (Tex. 1958) and *Jackson v. State*, 117 S.W. 818 (Tex. Crim. App. 1908), to argue that the "geographical location" distinction made by the Rural Exception is not rationally related to a legitimate governmental purpose. In *Smith*, the plaintiff challenged a law governing bail bonds that expressly prohibited parties from engaging in the business of making bail bonds without a license in counties containing cities between 73,000 and 100,000 inhabitants.[11] 312 S.W.2d at 635. The Supreme Court of Texas held that the disputed population limitation constituted the "use of population brackets alone to direct legislation toward a particular county needing a particular type of legislation." *See id.* Although the alleged basis for the licensing requirement was the "unprecedented increase in the number of forfeited recognizance and bail bonds in criminal cases and there were no adequate laws regulating the business of giving bail," the Texas Supreme Court found no reasonable relationship between this purpose and the rationale for limiting that licensing requirement only to that population bracket. *See id.* ("We can see no situation or circumstance with reference to the necessity of regulating the business of giving bail in counties [within that population bracket] that would be peculiar to such counties and not equally applicable to counties containing cities of more than 100,000 population."). However, *Smith* is distinguishable because there is a "situation or circumstance" here for treating rural doctors differently: the legitimate governmental purpose of promoting access to medications for persons who live in rural areas that have limited access to pharmacies. That a narrow exception exists for

[11] The law in question included a similar prohibition for counties containing a city of 350,000 inhabitants or more, but that portion was found invalid because the Act failed to include language necessary to make it effective. *See Smith v. Decker*, 312 S.W.2d 632, 637 (Tex. 1958).

a handful of rural doctors[12] does not negate the State's previously discussed purpose of ensuring the safe dispensing of medication; rather, it merely reflects the State's attempt to balance that interest with its separate (but related) interest in promoting access to medications for persons who live in rural areas that would otherwise have no or limited access to pharmacies. *Cf. Draper v. City of Arlington*, 629 S.W.3d 777, 792 (Tex. App.—Fort Worth 2021, pet. denied) (concluding multiple legitimate governmental purposes rationally related to challenged ordinances).

In *Jackson v. State*, the Texas Court of Criminal Appeals found a licensing requirement for barbers unconstitutional because it applied to all barbers except (1) students working as barbers to pay for school; (2) barbers at [charitable] institutions, and (3) barbers in towns with fewer than 1,000 people. 117 S.W. at 819. Again, however, the court emphasized that the expressly stated purpose of the licensing requirement—insuring better sanitary conditions and preventing the spread of disease—had equal applicability to all barbers and did not justify the exceptions. *Id.* at 820. The other cases cited by Doctors similarly involve geographic restrictions unrelated to a legitimate governmental purpose. *See Ex parte Baker*, 78 S.W.2d 610, 613–14 (Tex. Crim. App. 1934) (holding city ordinance unconstitutional because licensing fee applied to bakers from outside city limits had no public health or safety purpose); *Linen Serv. Corp. of Tex. v. City of Abilene*, 169 S.W.2d 497, 498 (Tex. Civ. App.—Eastland 1943, writ ref'd) (rejecting city ordinance requiring license for linen supply services located outside city limits because there was no contention that ordinance served legitimate governmental interest).

[12] Evidence in the record shows that only three to eight of the more than 64,000 doctors within the State of Texas may have dispensed medication pursuant to the Rural Exception.

Unlike the geographic restrictions in the cases cited by Doctors, the Dispensing Ban and the Rural Exception are rationally related to legitimate governmental purposes. Although the effect of the Dispensing Ban and the Rural Exception is that Doctors are treated differently from a handful of rural physicians when it comes to dispensing medication, that does not change that the Rural Exception is rationally related to and reasonably promotes the State's interest in ensuring access to medications in rural areas with limited pharmaceutical facilities. *See Klumb*, 458 S.W.3d at 13. Accordingly, we conclude that the trial court did not err when it granted summary judgment in favor of the State and dismissed Doctors' Equal Protection claim.[13]

CONCLUSION

For these reasons, we affirm the trial court's final judgment.

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Darlene Byrne, Chief Justice

Before Chief Justice Byrne, Justices Triana and Kelly

Affirmed

Filed: January 25, 2023

[13] Doctors also complain that the trial court erred in sustaining evidentiary objections made by the State and, consequently, striking certain evidence from the summary-judgment record. That evidence is not necessary for resolving the issues before this Court, but even if the trial court had considered the excluded evidence, the trial court did not err in granting summary judgment in favor of the State. Consequently, we need not decide this issue.

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED JANUARY 25, 2023

NO. 03-21-00039-CV

Michael Garrett, M. D. and Kristin Held, M.D., Appellants

v.

The Texas State Board of Pharmacy, Ian Shaw, Bradley Miller, Donnie Lewis, Jenny Yoakum, Rick Fernandez, Daniel Guerrero, Lori Henke, Donna Montemayor, Julie Spier, Rick Tisch, and Suzette Tijerina, in their Official Capacities as members of the State Board of Pharmacy; Timothy Tucker, in his Official Capacity as the Executive Director of the Texas State Board of Pharmacy; the Texas Medical Board; Sherif Zaafran, Robert Martinez, Devinder S. Bhatia, James Distefano, Jayaram Naidu, Manuel Quinones, Satish Nayak, David Vanderweide, George De Loach, Kandace Farmer, Jason Tibbels, Sharon Barnes, Michael Cokinos, Robert Gracia, Tomeka Moses Herod, LuAnn Morgan, and Ebony Todd, in their Official Capacities as members of the Texas Medical Board; and Stephen Carlton, in his Official Capacity as the Executive Director of the Texas Medical Board, Appellees

APPEAL FROM THE 98TH DISTRICT COURT OF TRAVIS COUNTY
BEFORE CHIEF JUSTICE BYRNE, JUSTICES TRIANA AND KELLY
AFFIRMED -- OPINION BY CHIEF JUSTICE BYRNE

This is an appeal from the order signed by the trial court on December 23, 2020. Having reviewed the record and the parties' arguments, the Court holds that there was no reversible error in the trial court's order. Therefore, the Court affirms the trial court's order. The appellants shall pay all costs relating to this appeal, both in this Court and in the court below.

Tab 3
Tex. Const. article I, § 3

THE TEXAS CONSTITUTION

ARTICLE 1. BILL OF RIGHTS

Sec. 3. EQUAL RIGHTS. All freemen, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

(Feb. 15, 1876.)

Tab 4
Tex. Const. article I, § 19

THE TEXAS CONSTITUTION

ARTICLE 1. BILL OF RIGHTS

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

(Feb. 15, 1876.)

Tab 5
Tex. Occ. Code §§ 158.001(b), 158.003(b)

OCCUPATIONS CODE

TITLE 3. HEALTH PROFESSIONS

SUBTITLE B. PHYSICIANS

CHAPTER 158. AUTHORITY OF PHYSICIAN TO PROVIDE CERTAIN DRUGS AND SUPPLIES

Sec. 158.001. PROVISION OF DRUGS AND OTHER SUPPLIES.

(b) This section does not permit a physician to operate a retail pharmacy without complying with Chapter 558.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2001, 77th Leg., ch. 700, Sec. 1, eff. June 13, 2001.

Sec. 158.003. DISPENSING OF DANGEROUS DRUGS IN CERTAIN RURAL AREAS.

(b) This section applies to an area located in a county with a population of 5,000 or less, or in a municipality or an unincorporated town with a population of less than 2,500, that is within a 15-mile radius of the physician's office and in which a pharmacy is not located. This section does not apply to a municipality or an unincorporated town that is adjacent to a municipality with a population of 2,500 or more.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Tab 6
Tex. Occ. Code § 551.006

OCCUPATIONS CODE

TITLE 3. HEALTH PROFESSIONS

SUBTITLE J. PHARMACY AND PHARMACISTS

CHAPTER 551. GENERAL PROVISIONS

Sec. 551.006. EXCLUSIVE AUTHORITY. Notwithstanding any other law, a pharmacist has the exclusive authority to determine whether or not to dispense a drug.

Added by Acts 2017, 85th Leg., R.S., Ch. 485 (H.B. 2561), Sec. 9, eff. September 1, 2017.

Tab 7
Tex. Occ. Code §§ 563.051(d), 563.053(b)

OCCUPATIONS CODE

TITLE 3. HEALTH PROFESSIONS

SUBTITLE J. PHARMACY AND PHARMACISTS

CHAPTER 563. PRESCRIPTION REQUIREMENTS; DELEGATION OF ADMINISTRATION AND PROVISION OF DANGEROUS DRUGS

SUBCHAPTER B. DELEGATION OF ADMINISTRATION AND PROVISION OF DANGEROUS DRUGS

Sec. 563.051. GENERAL DELEGATION OF ADMINISTRATION AND PROVISION OF DANGEROUS DRUGS.

(d) This section does not authorize a physician or a person acting under the supervision of a physician to keep a pharmacy, advertised or otherwise, for the retail sale of dangerous drugs, other than as authorized under Section 158.003, without complying with the applicable laws relating to the dangerous drugs.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2001, 77th Leg., ch. 1420, Sec. 14.308(a), eff. Sept. 1, 2001.

Sec. 563.053. DISPENSING OF DANGEROUS DRUGS IN CERTAIN RURAL AREAS.

(b) This section applies to an area located in a county with a population of 5,000 or less, or in a municipality or an unincorporated town with a population of less than 2,500, that is

within a 15-mile radius of the physician's office and in which a pharmacy is not located. This section does not apply to a municipality or an unincorporated town that is adjacent to a municipality with a population of 2,500 or more.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Tab 8
22 Tex. Admin. Code § 169.2(10)

Texas Administrative Code

TITLE 22	EXAMINING BOARDS
PART 9	TEXAS MEDICAL BOARD
CHAPTER 169	AUTHORITY OF PHYSICIANS TO SUPPLY DRUGS
RULE §169.2	Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

. . .

(10) Rural area--An area in which there is no pharmacy within a 15-mile radius of the physician's office and which is within either a county with a total population of 5,000 or less according to the most recent federal census; or a city or town, incorporated or unincorporated, with a population of less than 2,500 according to the most recent federal census, but not including a city or town, incorporated or unincorporated, whose boundaries are adjacent to an incorporated city or town with an equal or greater population.

Tab 9
22 Tex. Admin. Code § 169.4

Texas Administrative Code

TITLE 22	EXAMINING BOARDS
PART 9	TEXAS MEDICAL BOARD
CHAPTER 169	AUTHORITY OF PHYSICIANS TO SUPPLY DRUGS
RULE §169.4	Providing, Dispensing, or Distributing Drugs

Except as otherwise provided in §169.5 of this chapter, a physician may provide, dispense, or distribute drugs for use or consumption by the patient away from the physician's office or after the conclusion of the physician-patient encounter only in quantities as are necessary to meet the patient's immediate needs. A physician shall comply personally with all appropriate labeling and record keeping requirements under state or federal law or shall oversee compliance by persons acting under his or her direction and supervision. A physician who provides, dispenses, or distributes drugs to a patient to meet his or her immediate needs may not charge a fee separate from that charged for medical services provided to the patient.

Tab 10

22 Tex. Admin. Code § 169.5(1)

Texas Administrative Code

TITLE 22	EXAMINING BOARDS
PART 9	TEXAS MEDICAL BOARD
CHAPTER 169	AUTHORITY OF PHYSICIANS TO SUPPLY DRUGS
RULE §169.5	Exceptions

Under the following circumstances, a physician may dispense or distribute drugs in quantities greater than those necessary to meet a patient's immediate needs.

(1) A licensed physician who practices medicine in a rural area, as defined in Section 169.2(10) of this chapter, may maintain a supply of dangerous drugs in his or her office to be dispensed in treating his or her patients and may be reimbursed for the cost of supplying those drugs without violating the Texas Pharmacy Act, Title 3 Subtitle J Tex. Occ. Code Ann. A physician desiring to dispense dangerous drugs in compliance with this subsection and §§158.001-.003 of the Act, shall notify the board and the Texas State Board of Pharmacy that he or she practices in a rural area.