NO. 14-0819

IN THE SUPREME COURT OF TEXAS

CADENA COMMERICAL USA CORP., D/B/A OXXO,

***Petitioner*,**

V.

TEXAS ALCOHOLIC BEVERAGE COMMISSION,

***Respondent*.**

On Appeal from the Third Court of Appeals, Austin, Texas
No. 03-13-00262-CV

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

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SUMMARY OF ARGUMENT

Last year in *Patel v. Texas Dep't of Licensing and Regulation*,[1] this Court struck down as unconstitutional regulation requiring eyebrow threaders take 750 hours of immaterial classwork before the government permitted them to pursue their chosen profession. The Court did so observing that the real world effect of these regulations was so disproportionate and so unconnected from the government's stated interest as to violate Article I, §19 of the Texas Constitution and therefore constitute an unjustifiable restraint on the threaders' basic right to sally forth into the economy and find a gainful trade. "The Texas Constitution," as Justice Willett eloquently penned, "has something to say when barriers to occupational freedom are absurd and have less to do with fencing out incompetents than with fencing in incumbents."[2]

Looking ahead, the holding in *Patel* has the potential to make new the old song that guided the steps of the Texas' Founding Fathers, whereby the limbs of government, not of individuals, are constrained in their movement. This Court, however, has not yet had the opportunity to test the limits and span of *Patel's* reach, nor apply its principles to an analogous encroachment on economic liberty—that is until today. In the present case, the Texas Alcoholic Beverage Commission (TABC) has promulgated a ridiculous and oppressive interpretation of the state's tiered house laws, which wrongly denies the Petitioner their right to participate in economic activity, as per *Patel*. Indeed, the majority opinion in *Patel* laid out a two prong test, where the satisfaction of either signaled the law's constitutional infirmity.[3] The so-called "One Share Rule" falls afoul of both. Not only does it establish a standard that is impossible to meet, but it is also completely unmoored from a legitimate governmental interest.

Patel stands for the principle that to be lawful, a government edict must be directed, at least in part, towards the common good before it treads on the ambitions of Texas men and women. The history, impact, and selective enforcement of TABC's One Share Rule all attest that, in this instance, the purpose behind of TABC's interpretation was not so inclined but rather sought to insulate existing market participants from competition. The rule therefore does not possess the qualities that grant it force under the Texas Constitution. It does not, simply put, deserve to be recognized as valid law. It is an unfortunate fact that even with this state's overall commitment to economic liberty, there remain many examples where Texas law sacrifices the rights of many to benefit the pocketbooks of a few. By applying *Patel's* holding here and vindicating the Petitioner's right to pursue honest work, this Court would remind public servants of the limits concomitant to their office. It would prove to them that the vigor of Article I, § 19 of the Texas Constitution is more than a one-hit-wonder in the Court's jurisprudence and should be taken seriously. In that sense, this Court should evaluate this dispute as an opportunity for *Patel*, Chapter II.

ARGUMENT

I. TABC'S ONE SHARE RULE VIOLATES THE TEXAS CONSTITUTION'S DUE COURSE OF LAW PROVISION, THEREBY PRESENTING AN EXCELLENT OPPORTUNITY FOR THE COURT TO FORTIFY ITS HOLDING IN *PATEL V. TEXAS DEPARTMENT OF LICENSING AND REGULATION*.

TABC's decision to arbitrarily deny Cadena a license under §102.07(a)(1), Tex. Alcoholic Beverage Code, as well as its public avowal to interpret the provision as prohibiting alcohol retail companies from owning even a single share in a business of another tier, violates the Petitioner's right to "due course of law," as promised in Article I, § 19 of the Texas Constitution. Specifically, the decision denies Cadena its right to pursue honest work and does so in such a way as that neither the purpose behind the rule nor the rule's real world effect can be seen as rationally related to a legitimate government interest. This Court made it clear in *Patel* that the "due course of law" guarantee in the Texas Constitution demands more than pro forma obedience to procedure.[4] Actions instead must share at least some passing resemblance to the substantive *sine qua non* qualities that distinguish a feat of force from the rule of law—a threshold the One Share Rule fails to cross.[5]

The Court's assertion here builds off centuries' worth of precedent; albeit, not all of it is judicial in origin. From time immemorial, great minds have pondered the nature of law. This includes an examination into the particular mechanisms by which men and women determine whether a command is in actual fact a law and whether it is legitimate, deserving of obedience. There are many who would assume power over others regardless of where or if they received a mandate; how then are dutiful individuals to discriminate between an arrogant usurpation of their dignity as free thinking beings and a properly enacted accord that embodies the weight of the combined demos? *Patel* merely represents the Texas courts' own attempt to digest this lengthy record and answer the question definitively within its jurisdiction.

Vindicating occupational freedom closely tracks with the truths that human reason uncovered during this ageless debate. Although the inquiry into conceptual jurisprudence, like all philosophical disciplines, remains ongoing, partakers of the enterprise have done a good job at pinpointing which characteristics human beings look for in a directive before deeming it as having rightful authority. H.L.A. Hart, for instance, in his seminal work The Concept of Law, talks about "rules of recognition," which he defines as the "authoritative criteria" that a society relies upon to identify a legal obligation.[6] "They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined."[7] As Hart observed, rules of recognition do not concern themselves with governing human conduct directly; rather, they exist as a secondary and distinct layer, from which more traditional regulations draw their binding force. They are in point of fact implicit in any legal system that seeks to reign by something other than violence.

A positivist by training, Hart only addressed the procedural hoops through which an edict must leap. His template, however, leaves open the possibility that the rules of recognition also encompass the moral substance of the law's purpose and effect. Herein enters Lon L. Fuller. In a pointed rebuttal to Hart, Fuller argues that certain ethical standards are built into the very idea of law, what he calls "principles of legality."[8] Any government action that lacks these inner qualities falls short of obtaining the moral authority to regulate human conduct. David F. Forte explains this as "the positive law of law" or "the outer moral limits of what a judge can enforce as positive law."[9]

Fuller identifies eight minimal conditions that a law must meet, including that the law be sufficiently general, that it be consistently applied, and that it be administered so that its enforcement is aligned with the text's obvious meaning;[10] but his list is not exhaustive. Other thinkers have arrived at a different terminus. St. Thomas Aquinas, for one, reasoned before a government command could be recognized as indeed lawful and binding, that it must first be "ordered to the common good," that its burdens must be imposed on citizens fairly, and that the lawmakers must not exceed their authority.[11] Ronald Dworkin, on the other hand, emphasizes the law's "integrity."[12] Here, legitimacy arises when a jurisdiction expresses in a single voice a "coherent scheme of justice and fairness in the right relation."[13] The law's exact means and ends carry less import under this paradigm than the lawgiver's good faith and adherence to consistent political principles.

The Texas Constitution has, within its own rules of recognition the straightforward requirement that the government, at bare minimum, pursue a legitimate state interest oriented towards the general welfare before it impedes on the liberty of its citizens.[14] This is where the "due course of law" provision comes into play. The Texas Constitution accepts as objective truth that every man and women is born free and with equal dignity. An attempt to hinder the former for the sake of individual profit violates the latter, with the result that the victim becomes indentured to the interest group leading the charge.[15]

As a consequence, Texas courts have read the "due course of law" provision, to contain a content-based component, which demands that restrictions have some level of justification and proportionality.[16] A state action taken for the primary purpose of rent-seeking does not rise to level of a legitimate government interest under this framework.[17]

TABC's One Share Rule proves intentionally anti-competitive. It fails to advance towards a legitimate end and therefore lacks the substantive qualities that would allow it to pass constitutional muster. In *Patel*, this Court consolidated the net of Texas cases, which articulated the standard implicit to the term "due course of law." The Court offered a two prong test, where a strike in either direction was enough to signal the law's constitutional infirmity. First, the challenger had to show that the statute's purpose could not arguably be rationally related to a proper governmental interest. Second, they had to show that the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to a government interest or be so burdensome as to be oppressive[18]. The One Share Rule violates both.

As an initial matter, TABC's interpretation inflicts an oppressive and unavoidable burden on the Petitioner's right to occupational freedom as well as any other entity which seeks to secure an alcohol beverage license. The One Share Rule holds that a company cannot obtain a license if it has *any* ownership interest in a business of another tier. A single share, in other words, is enough to foreclose the Petitioner and others from a profitable line of commerce. Both the Petitioner and Amici have done an admirable job at showing exactly why this is a senseless standard and how it would impact the market if the rule were universally enforced. Suffice it to say here that TABC's regulatory interpretation is broad enough that it denies Texans an occupational opportunity simply for engaging in ordinary, day-to-day business activities. General investment in a publically traded stock, for instance, could disqualify an applicant.

TABC defends the One Share Rule as necessary to implement the Legislature's ban on tied houses; however, as the Texas Association of Business expounded in its letter to the Court, TABC refuses to implement its rigid interpretation uniformly. It has instead selectively applied the absurdity to Cadena and a small collection of upstarts, all while ignoring heaps of cross-tier investment by established permittees.

This is not selective enforcement, but rather, selective licensing. Courts routinely distinguish between the two, recognizing that prosecutorial discretion is inevitable, while selective licensing is impermissible.[19] Generally speaking, selective application strongly insinuates bad faith. Fuller, Aquinas, and Dworkin, all identify fair and consistent enforcement as a *sine qua non* characteristic of the law.

The evidence submitted by the Petitioner and Amici indicate that the agency applied the One Share Rule restriction toward prospective competitors. Established players received a pass. The combination belies TABC's assertion that its single share rule is essential to execute the Legislature's intent, especially in light of the burden it imposes. The Texas Constitution place a high burden on parties contesting a government action under the "due course of law" provision,[20] but deference "does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation."[21] With eyes cast upon it, the TABC's interpretation of § 102.07(a)(1) proves empty of the internal moral authority that justifies an encroachment on the Petitioner's right to self-improvement and industry.

CONCLUSION

For the foregoing reasons, the Foundation respectfully requests the Court apply the *Patel* economic liberty framework to find TABC's One Share Rule unconstitutional.

ENDNOTES

1 469 S.W.3d 69 (Tex. 2015).

2 *Patel*, 469 S.W.3d at 104 (Willett, J., concurring).

3 *Patel*, 469 S.W.3d at 87.

4 *Patel*, 469 S.W.3d at 82-87.

5 *See Ex parte Flake*, 149 S.W. 146, 149 (Tex. Crim. App. 1911) (court has a duty to give effect to the Constitution if a law has "no real or substantial relation" to the public's health, safety, or morals.); *See also,* St. Thomas Aquinas, Summa Theologica pt. I-II, q. 96, art. 4 (An unjust law is "like an act of violence.").

6 H.L.A. Hart, The Concept of Law 100 (2nd Ed. 1994).

7 H.L.A. Hart, The Concept of Law 94 (2nd Ed. 1994).

8 Lon L. Fuller, The Morality of Law (Rev. ed. 1969).

9 David F. Forte, *May It Please the Court,* 11 Claremont Review of Books 50, 51 (no. 4 Fall 2011).

10 Lon L. Fuller, The Morality of Law 39 (Rev. ed. 1969).

11 St. Thomas Aquinas, Summa Theologica pt. I-II, q. 96, art. 4.

12 Ronald Dworkin, Law's Empire 176-224 (1986).

13 Ronald Dworkin, Law's Empire 219 (1986).

14 *Patel*, 469 S.W.3d at 87. ("Section 19's substantive due course provisions undoubtedly were intended to bear at least some burden for protecting individual rights that the United States Supreme Court determined were not protected by the federal Constitution.).

15 Letter from Thomas Jefferson to Roger C. Weightman (Jun. 24 1826) *reprinted in* Thomas Jefferson: Writings 1516, 1517 (M. Peterson, ed., 1984) ("The mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of god.").

16 *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 938 (Tex. 1998); *see generally* Hadley Arkes, First Things: An Inquiry into the First Principles of Morals and Justice 69 (1986) (creatures with the capacity for morals deserve to be ruled by a government compelled to offer justifications for its acts.).

17 *St. Louis Southwestern Ry. Co. of Texas v. Griffin*, 106 Tex. 477, 489 (Tex. 1914) (quoting Lawton v. Steele, 52 U.S. 133, 136 (1894)) (To justify the state interposing its authority, "the interest of the public generally, as distinguished from those of a particular class," must require such interference.). *See also, New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (declaring a Oklahoma licensing scheme unconstitutional because it arbitrarily sought to prevent competition.); *Craigmiles v. Giles,* 312 F.3d 220, 224 (6th Cir. 2002) ("protecting discrete interest group from economic competition is not a legitimate governmental purpose.); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222-23 (5th Cir. 2013) (holding that "mere economic protection of a particular industry" is not enough to survive rational basis review.); St. Thomas Aquinas, Summa Theologica pt. I-II, q. 96, art. 4 (A law is unjust when it is "conducive, not to the common good, but rather to [the authority's] own cupidity or vainglory.").

18 *Patel*, 469 S.W.3d at 87.

19 *See*, *e.g.*, *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (declaring government licensing action unlawful where plaintiff alleged "she ha[d] been intentionally treated differently from others similarly situated and that there [was] no rational basis for the difference in treatment"); *Lindquist v. City of Pasadena, Tex.*, 525 F.3d 383, 387 (5th Cir. 2008) (selective prosecution claim subject to "higher evidentiary burden" than selective licensing claim).

20 *Patel*, 469 S.W.3d at 87.

21 *St. Joseph Abbey*, 712 F.3d at 226; *Patel*, 469 S.W.3d at 106 (Willett, J., concurring) ("Courts need not be contortionists, ignoring obvious absurdities to contrive imaginary justification for laws designed to favor politically connected citizens."); *Ex parte Flake*, 149 S.W. at 149 ("The courts "are at liberty–indeed, are under a solemn duty–to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority.")

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