IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DEEP ELLUM BREWING, LLC, and GRAPEVINE CRAFT BREWERY, LLC, Plaintiffs, v. TEXAS ALCOHOLIC BEVERAGE COMMISSION, JOSE CUEVAS, JR., *in his official capacity as Presiding Officer of the Texas Alcoholic Beverage Commission*, STEVEN M. WEINBERG, *in his official capacity as Commissioner of the Texas Alcoholic Beverage Commission*, IDA CLEMENT STEEN, *in her official capacity as Commissioner of the Texas Alcoholic Beverage Commission*, Defendants.	§	1:15-cv-821-RP

ORDER

Before the Court are two motions: (1) Motion for Summary Judgment by Plaintiffs Deep Ellum Brewing, LLC and Grapevine Craft Brewery, LLC (the "Brewers"), (Dkt. 35); and (2) Motion for Summary Judgment by Defendants Texas Alcoholic Beverage Commission, Jose Cuevas, Jr., in his official capacity as Presiding Officer of the Texas Alcoholic Beverage Commission, Steven M. Weinberg, in his official capacity as Commissioner of the Texas Alcoholic Beverage Commission, Ida Clement Steen, in her official capacity as Commissioner of the Texas Alcoholic Beverage Commission (collectively, "TABC"), (Dkt. 36). Having reviewed the motions, responsive pleadings, and the relevant evidence and case law, the Court issues the following order.

I. BACKGROUND

Since Prohibition, Texas, like other states, has maintained a three-tier regulatory scheme for the alcoholic beverage industry that separates industry members into three classes: (1) manufacturers, (2) wholesalers or distributors, and (3) retailers. (First Am. Compl., Dkt. 14, at 2).

Texas law prohibits co-mingling among the three tiers. (*Id.*); TEX. ALCO. BEV. CODE § 102.01(c). For example, a distributor cannot also act as a retailer. (Dkt. 14, at 2). As the alcohol industry has changed over the decades, the Texas legislature has created exceptions to the strict three-tier system. In 1979, wineries—members of the manufacturing tier—were given the ability to sell wine for off-site consumption. (Pls.' Mot. Summ. J., Dkt. 35, at 7). In 1993, brewpubs—entities that manufacture beer[1] but were deemed retailers by the legislature—were given the ability to sell beer for off-site consumption. (*Id.*). More recently, in 2013, distilleries—members of the manufacturing tier—were given the ability to sell liquor for off-site consumption. (*Id.*). The Brewers—also members of the manufacturing tier—have not been granted the ability to sell beer for off-site consumption.

Borrowing from the Brewers' motion for summary judgment, the current state of affairs among these producers can be summarized by this table:

Entity	Makes alcoholic beverage?	Can sell alcoholic beverage on-site for on-site consumption?	Can sell alcoholic beverage on-site for off-site consumption?
Winery	Yes	Yes	Yes
Distiller	Yes	Yes	Yes
Brewpub	Yes	Yes	Yes
Brewer/manufacturer	Yes	Yes	No

(Dkt. 35, at 6). The Brewers naturally want the same ability to sell alcohol for off-site consumption as the other producers, and this case represents the Brewers' attempt—after failed attempts with the Texas legislature—to secure the ability to sell beer for off-site consumption through the courts.

The two companies bringing this suit—Deep Ellum Brewing and Grapevine Craft Brewery—state that they are craft beer brewers. (Dkt. 35, at 8). Deep Ellum has a brewer's permit, and Grapevine has both a brewer's permit and a manufacturer's license. (*Id.*). Neither entity is a

[1] Texas law divides malt beverages into two types based on their alcohol content: "beer" is defined as a malt beverage that contains not more than 4% alcohol by weight, TEX. ALCO. BEV. CODE § 1.04(15), while "ale" or "malt liquor" are defined as malt beverages containing more than 4% of alcohol by weight, *id.* at § 1.04(12). The Court follows common practice and refers to all of these products as "beer" in this order. (*See* Dkt. 35, at 8 (noting that the Brewers will use "beer" in their motions to refer to all malt beverages including beer, ale, and malt liquor); Dkt. 36, at 7 (noting that TABC will use "beer" in their motions to refer to all malt beverages including beer, ale, and malt liquor)).

brewpub. Texas law distinguishes between a brewpub, brewer, and manufacturer, defining each, in relevant part, as follows:

- A brewpub may sell beer for on-site and off-site consumption and is considered a retailer. TEX. ALCO. BEV. CODE § 74.01. A brewpub may make no more than 10,000 barrels of beer each year at each licensed brewpub. *Id.* § 74.03. At the time of the amended complaint, the Brewers state there were just over 100 brewpub licenses in the state. (Dkt. 14, at 9).
- A brewer may sell beer for on-site consumption only. TEX. ALCO. BEV. CODE § 12.052. A producer with a brewer's permit may produce beer with more than 4% alcohol by weight. *Id.* §§ 1.04(12), 12.01. At the time of the amended complaint, the Brewers state there were approximately 91 active brewer's permits. (Dkt. 14, at 8).
- A manufacturer may sell beer for on-site consumption only. TEX. ALCO. BEV. CODE § 62.122. A producer with a manufacturer's license may produce beer that has less than 4% alcohol by weight. *Id.* §§ 1.04(15), 62.01. At the time of the amended complaint, the Brewers state there were approximately 40 active manufacturer's licenses in the state. (Dkt. 14, at 8).

At first, it may appear that a beer producer can gain the ability to sell beer for off-site consumption by adding a brewpub's license; however, while a beer producer can hold both a brewer's permit and a manufacturer's license, TEX. ALCO. BEV. CODE § 62.06, a beer producer cannot hold a brewpub license and also a brewer's permit or manufacturer's license. *Id.* § 74.01. Since combining a brewpub license with a manufacturer's license or brewer's permit is not a possibility, the Brewers assert that to obtain the ability to sell beer for off-site consumption, they would have to give up their current permits and licenses in favor of a brewpub license, which would limit their production to no more than 10,000 barrels/year. (Dkt. 35, at 9). Deep Ellum states it produced almost 23,000 barrels in 2015 and therefore would have to reduce its production by more than half. (*Id.*). Grapevine expects to produce more than 10,000 barrels and would have to reduce its

desired production goals. (*Id.* at 9, 13). If the Brewers instead continue to operate under the current system, they claim they are losing revenue when they decline requests from customers seeking to purchase their beer for off-site consumption in addition to losing a percentage of revenue when their beer is sold by a retailer. (*Id.* at 10). Finding themselves stuck between two economically undesirable options—become a brewpub and limit production or stay brewers and manufacturers unable to sell beer for off-site consumption—the Brewers now look to the Court for a remedy. (*Id.* at 13–14).

The Brewers filed suit on September 14, 2015, requesting declaratory and injunctive relief. (Compl., Dkt. 1). They filed an amended complaint on October 27, 2015. (Dkt. 14). In their amended complaint, the Brewers assert two claims: (1) equal protection and (2) substantive due process. (*Id.* at 14–18). For their equal protection claim, the Brewers allege that Sections 12.01, 12.052, and 62.01 of the Texas Alcoholic Beverage Code violate their rights under the Constitution because those statutes treat the Brewers differently than other similarly situated alcohol producers, namely brewpubs, wineries, and distilleries. (*Id.* at 15). Those statutes allow the holder of a brewer's permit to engage in certain activities (Section 12.01), allow the holder of a manufacturer's license to engage in certain activities (Section 62.01), and allow the holder of a brewer's permit and/or manufacturer's license to sell beer for on-site consumption (Sections 12.052) but do not allow them to sell for off-site consumption. TEX. ALCO. BEV. CODE §§ 12.01, 62.01, 12.052.[2] For their substantive due process claim, the Brewers allege that Sections 12.01, 12.052, 62.01 create distinctions between producers that have no relationship to a valid government interest and that those distinctions impede the Brewers' right to pursue their businesses, the pursuit of which the Brewers alleged is a protected property interest under the Due Process Clause of the Fourteenth Amendment. (Dkt. 14, at 17–18). Both parties filed motions for summary judgment.

[2] The Brewers do not challenge Section 62.122 of the Texas Alcoholic Beverage Code. That section allows the holder of a manufacturer's license to sell beer for on-site consumption.

In their motion for summary judgment, the Brewers argue that there is no rational basis for the state to allow only some alcohol producers to sell their beverages for off-site consumption. The Brewers raise seven "potential plausible bases for the distinction": (1) protecting the three-tier system, (2) avoiding organized crime, (3) protecting temperance, health, safety, and welfare, (4) promoting fair competition and consumer choice, (5) promoting tourism, (6) avoiding additional TABC work, and (7) protecting "small" breweries. (Dkt. 35, at 16). They additionally claim that "[b]ecause Substantive Due Process' rational-basis test here is largely the same as for Equal Protection," the statutes also violate their due process rights. (*Id.* at 35).

In its motion for summary judgment, TABC contends that the Brewers' equal protection claim fails because (1) the Brewers are not similarly situated to brewpubs, wineries, and distilleries and (2) the Brewers cannot show that the relationship between the statute and the furtherance of three legitimate government interests is irrational. (Dkt. 36, at 8–16). The three interests identified by TABC are: (1) maintaining the integrity of the three-tier system, (2) promoting responsible consumption of alcoholic beverages, and (3) ensuring fair competition within the alcoholic beverage industry. (*Id.* at 12). TABC additionally argues that the Brewers' substantive due process claim fails for two reasons: (1) "it is nothing more than a restatement of the Brewers' Equal Protection claim," and (2) the "Brewers cannot negate that their lack of a privilege to sell their products" for off-site consumption is rationally related to legitimate government interests. (*Id.* at 16).

II. STANDARD OF REVIEW

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). "A fact issue is 'material' if its resolution could affect the outcome of the action." *Poole v. City of Shreveport*, 691 F.3d 624, 627 (5th Cir. 2012).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[T]he moving party may [also] meet its burden by simply pointing to an absence of evidence to support the nonmoving party's case." *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 544 (5th Cir. 2005). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *Wise v. E.I. Dupont de Nemours & Co.*, 58 F.3d 193, 195 (5th Cir. 1995). "After the non-movant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the non-movant, summary judgment will be granted." *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000).

The parties may satisfy their respective burdens by tendering depositions, affidavits, and other competent evidence. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992). The Court will view this evidence in the light most favorable to the nonmovant, *Rosado v. Deters*, 5 F.3d 119, 122 (5th Cir. 1993), and will "not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). "Cross-motions must be considered separately, as each movant bears the burden of establishing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law." *Shaw Constructors v. ICF Kaiser Engineers, Inc.*, 395 F.3d 533, 538–39 (5th Cir. 2004).

III. DISCUSSION

A. TABC Entitled to Summary Judgment on the Brewers' Equal Protection Claim

The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying their citizens the equal protection of the law. U.S. CONST. AMEND. XIV. Equal protection demands that "all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Id.* at 440 (internal citations omitted). In this case, the Brewers challenge an economic regulation, and the parties agree—as does the Court—that their challenge triggers a rational-basis review. *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."). Under rational-basis review, a statutory classification comes to court bearing "a strong presumption of validity." *Id.* at 314.

While the Brewers must establish that Texas's regulatory scheme for the sale of alcohol for off-site consumption treats the Brewers differently than other members similarly situated and that the difference in treatment is not rationally related to a legitimate state interest, a state, on the other hand, "has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993).

1. The Brewers are similarly situated to other members

TABC contends that the Brewers are not similarly situated to wine-makers, distillers, and brewpub proprietors, and their equal protection claim therefore fails to satisfy that threshold requirement. Admitting that the Brewers are like the all members of the class because they all

produce alcoholic beverages, TABC disputes that there are other commonalities "for the purposes of selling their products to consumers for off-premises consumption." (Dkt. 36, at 9).

TABC claims that the Brewers are most different from brewpubs because brewpubs have been classified as retailers. TABC adds that brewpubs are subject to limits on production. The Brewers counter that labels or production limits do not "change the reality of what [brewpubs] are and what they do." (Pls.' Resp., Dkt. 37, at 7). The Court agrees. Determining that the Brewers and brewpubs are similarly situated presents the easiest comparison. Brewers and brewpubs are subject to the Texas Alcoholic Beverage Code; brewers and brewpubs produce alcohol; brewers and brewpubs specifically produce beer; and brewers and brewpubs sell the beer they produce for on-site consumption. While there are differences in the volumes allowed and in their classification as manufacturers versus retailers, brewers and brewpubs are alike in relevant ways. Therefore, the two are similarly situated.

TABC attempts to set apart wineries from the Brewers by explaining the motivations behind giving wineries the ability to sell alcohol for off-site consumption and implying that the reasons the legislature decided to allow wineries to sell for off-site consumption differ from reasons to allow brewers to sell for off-site consumption. Assuming that to be true, the reasons for allowing wineries to do so are not relevant to whether wineries are similarly situated to brewers. TABC's argument is logically flawed. The Brewers are challenging the difference in treatment between breweries and wineries, and yet TABC relies on the very law (and the motivations for it) that the Brewers argue creates that difference in treatment to claim that the Brewers are not similarly situated to wineries. TABC conflates the two separate analytical steps of the Equal Protection inquiry. Although treated differently by Texas law, brewers and wineries are similarly situated because they are subject to the Texas Alcoholic Beverage Code; they produce alcohol; and they sell the alcohol they produce for on-site consumption.

TABC tries to distinguish between brewers and distillers by pointing out that distilleries are subject to different volume limits and different distribution provisions. Like with brewpubs and wineries, brewers and distilleries are similarly situated because they are subject to the Texas Alcoholic Beverage Code; they produce alcohol; and they sell the alcohol they produce for on-site consumption.

Finally, TABC strives to show that the Brewers are not similarly situated with a catch-all argument: beer is different than other alcohol. Their argument goes like this. Texans drink more beer than other types of alcoholic beverages and wineries and distilleries do not make beer, and more brewers and manufacturers have been licensed in the last five years than distillers and brewpubs. Therefore, the Brewers "are very different." (Dkt. 36, at 11). This Court will not reject an equal protection claim based on the drinking preferences of Texans for the last five years. And, again, TABC's argument is untenable. As noted above, brewers, manufacturers, and brewpubs all produce and sell beer, making them more similar, not more dissimilar. In addition to lacking clear relevance, the number of licenses granted and the rate of growth of licenses in each segment do not support TABC's stance. More winery licenses were granted than licenses for brewers and manufacturers and the rate of growth in the brewers/manufacturers segment (469%) is almost exactly the same growth rate as for distilleries (456%). Thus, TABC's own facts and figures do not bear out and, if anything, support that the Brewers are similarly situated to other alcohol producers.

2. Legitimate state interests are rationally related to the challenged regulatory scheme

Since TABC has failed to show that the Brewers are not similarly situated to the other producer members of Texas's three-tier system, the Court moves to the second part of its analysis: whether governmental interests are rationally related to the challenged scheme. TABC, in its motion for summary judgment, identifies three state interests: (1) maintaining the integrity of the three-tier system, (2) promoting responsible consumption of alcoholic beverages, and (3) ensuring fair

competition within the alcoholic beverage industry. (Dkt. 35, at 12).[3] The parties then focus their briefing on the three interests presented by TABC in its motion for summary judgment, (Dkt. 36), and the Court will follow suit. The Brewers do not challenge the legitimacy of the state's interests but rather challenge whether those state interests are rationally related to the statutes at issue. The Court will again follow the parties' lead and assume the interests are legitimate and therefore confine its analysis to the issue of a rational relationship.

a. Maintaining the integrity of the three-tier system

The first governmental interest debated by the parties is the state's interest in maintaining the integrity of the three-tier system for regulating alcohol. Texas enacted a three-tier system after the passage of the Twenty-First Amendment to regulate alcohol within its borders. Texas adopted the system to forbid "tied houses," i.e., overlapping ownership between those engaged in producing, distributing, and selling alcohol. "That is, an entity engaged in the alcoholic beverage industry in Texas generally must choose a single level on which to operate, and cannot operate on either of the other two levels." *Authentic Beverages Co. v. Texas Alcoholic Beverage Comm'n*, 835 F. Supp. 2d 227, 232 (W.D. Tex. 2011). "[W]ith rare exceptions, manufacturers are permitted to sell only to wholesalers; wholesalers only to retailers; and retailers only to consumers. This tripartite functional division of firms that participate in the alcoholic beverages industry is designed to aid Texas in the regulation and control of alcohol consumption, and prevents companies with monopolistic tendencies from dominating all levels of the alcoholic beverage community." *Dickerson v. Bailey*, 336 F.3d 388, 397 (5th Cir. 2003) (cleaned up). Texas set up the system to "ensure that safe products reached consumers, temperance was achieved, [and] organized crime was reduced if not eliminated." (Dkt. 35, at 17 (citing expert reports)).

[3] In their motion for summary judgment, the Brewers proffer seven "potential plausible bases for the distinction": (1) protecting the three-tier system, (2) avoiding organized crime, (3) protecting temperance, health, safety, and welfare, (4) promoting fair competition and consumer choice, (5) promoting tourism, (6) avoiding additional TABC work, and (7) protecting "small" breweries. (Dkt. 35, at 16).

The Brewers contend the challenged statutes are not rationally related to maintaining the three-tier system for two reasons: (1) the primary purpose of preventing tied houses is not relevant in this case, and (2) there will be no harm to the system if the Brewers sell beer for off-site consumption. The Brewers describe tied houses, as they existed before Prohibition, as retail stores controlled by suppliers that offered retailers credit, loans, equipment, and inducements in return for promoting the supplier's products. (Dkt. 35, at 18). The suppliers' control over retailers led to reduced competition, (*id.*), among other problems. With that description, the Brewers state that their requested relief does not impact ownership across tiers or subject a third-party retailer to control. Essentially, the Brewers argue that they seek only to expand their rights within their own house and therefore that expansion would not disturb the three-tier system or the motivation behind it. The Brewers add that if they sell beer for off-site consumption, it would be another exception, among many, to the three-tier system and also consistent with those other exceptions. They point out that they already operate in the manufacturing tier while conducting a retail function and that, if that retail function were expanded to include sales for off-site consumption, they would be subject to existing volume limitations. The Brewers claim that altering their status within the three-tier system would not affect the system and therefore the government interest of maintaining the integrity of the system is negated.

The Brewers' attempt to show there is no rational link between preventing them from selling alcohol for off-site consumption and maintaining the three-tier system fails. It is rational for the state to limit the retail sales of the Brewers as a method to preserve the three-tier system. While the legislature has allowed other alcohol producers to sell alcohol for off-site consumption, making one exception and not another exception in this context is not irrational. Drawing those lines fits squarely within the goal of reducing the number and volume of alcoholic beverages sold by manufacturers directly to consumers. "Where there are plausible reasons for [legislative] action, [a

court's] inquiry is at an end. . . . The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993) (cleaned up). Moreover, the Court rejects the notion that a contrary ruling would not affect the three-tier system. Allowing the Brewers to sell more beer—by opening up an additional retail stream for them even if there are limitations on those sales—does impact the three-tier system by either expanding an existing exception or adding another exception and by increasing the amount of beer sold by beer producers directly to consumers.

b. Promoting temperance and health

TABC identifies a second governmental interest—promoting responsible consumption of alcohol—to the challenged regulatory scheme. TABC asserts that the legislature was entitled to weigh health and safety concerns related to opening new beer retail outlets against the ability of the Brewers to sell more beer and decide not to open additional beer retail outlets. The Brewers must show that reducing the number of beer retail outlets is not rationally related to not allowing the Brewers to sell beer for off-site consumption.

The Brewers start their argument with the suggestion that temperance as a rationale has its limits and cannot, standing alone as an explanation, be sufficient. The Brewers rely on a decision of this court in support. (Dkt. 35, at 24 (citing *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Commission*, 110 F. Supp. 3d 719, 725–26)). The Brewers' reliance is misplaced. In *Wal-Mart Stores*, the Court merely stated that protecting temperance "has its limits as a justification," but that case involved restrictions on package store permits. 110 F. Supp. 3d at 726. Besides, neither the Brewers nor TABC contend that temperance alone is the justification. Thus, even if temperance as a rational in

this type of case may have its limits, that would not mean that the Brewers have negated the temperance and health rationale altogether.

The Brewers continue by arguing that the asserted goal of limiting the consumption of alcohol is contradicted by the legislature's decision to allow other alcohol producers (brewpubs, wineries, and distilleries) to sell alcohol for off-site consumption. The Brewers make an initially appealing argument by pointing out that the legislature has allowed other producers to sell alcohol—with higher alcohol content, i.e., wine and spirits—directly to consumers for off-site consumption. However, allowing other producers to sell alcohol for off-site consumption does not show that the legislature was irrational for not also allowing the Brewers to do so. Preventing approximately 190 retail outlets—the purported number of alcohol producers that cannot sell for off-site consumption—does reduce the number of outlets selling alcohol directly to consumers and therefore is rationally related to promoting temperance.[4] Whether it was good governance for the legislature to grant that exemption to wineries and distilleries but not beer producers is not the question before this Court. The Court does not sit in judgment on the effectiveness of the means chosen by the legislature to achieve its goals. *See Monarch Beverage Co., Inc. v. Cook*, 861 F.3d 678, 684 (2017) (discussing Indiana's temperance rationale in an alcohol regulation case and, while concluding that the relationship was not irrational, commenting that the challenged law was "certainly not the most direct way of achieving this aim").[5]

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[4] The Brewers also claim that not allowing them to sell for off-site consumption leads to consumers buying more beer for on-site consumption or buying beer from a true retailer. Assuming those claims are accurate and not mere speculation, the Brewers essentially again attack TABC's interest in maintaining the integrity of the three-tier system. As discussed, limiting the number of exceptions granted within the three tiers to cross over tier functions is rationally related to maintaining that system.

[5] In rapid fire fashion, the Brewers also anticipate several additional justifications (that TABC does not raise) with respect to temperance: packaging, size and portability, drinking and driving, and sales to minors or intoxicated persons. The concern about packaging stems from whether the beer that would be sold for off-site consumption would be in sealed or unsealed containers and whether that rationally relates to promoting temperance. The Brewers produce some evidence that the nature of packaging is the same when their products are sold elsewhere but fail to show that the legislature does not have a reasonable basis for limiting the number of locations selling sealed or unsealed beer products. Size and portability addresses whether beer containers are more easily ported and whether that rationally relates to promoting temperance. The Brewers try to show that beer and beer containers are not significantly distinguishable from,

c. Promoting fair competition and consumer choice

The third and final proposed rationale is ensuring fair competition and promoting consumer choice. The Brewers claim the opposite has happened—that the statutes reduce competition by discouraging entrepreneurial and small business opportunities and limiting the number of outlets selling beer. Additionally, the Brewers assert they lose "vital marketing" because consumers cannot take the beer home "for a more leisurely evaluation, comment and follow-up (including in a group setting, where others sample the beer)." (Dkt. 35, at 30). Turning to state revenue, the Brewers argue that the statutes limit the state and local tax base and the potential for new jobs. Finally, they stress that they are put at a disadvantage compared with their competitors, the brewpubs, which can sell beer for off-site consumption, and compared with other tiers, specifically the distributors, which the Brewers argue is economic protectionism in favor of distributors.

Many of the Brewers' arguments are compelling, as even TABC admits, (dkt. 38, at 16), but the Brewers do not adequately address another tier in the three-tier system: retailers. As discussed by TABC, the legislature may have been concerned about disrupting the beer retail market by allowing brewers and manufacturers to make additional retail sales. The legislature could have concluded that it would be unfair to retailers to allow producers to compete directly and potentially at lower prices than retailers. Again, whether the legislature properly weighed the possible outcomes or came to the

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for example, liquor and liquor bottles and that it's no easier for a purchaser to drink a beer versus liquor due to size or opening mechanism. Therefore, their argument goes, it would not be rational for the legislature to allow more consumer access to screwtop liquor bottles, for example, but not to flip-top cans of beer (or screwtop beer bottles). While it seems unlikely that the legislature made its decision based on size and portability, it would not have been irrational for the legislature to have considered the differences between the average can of beer and the average bottle of wine or bottle of liquor. For drinking and driving, the Brewers raise the issue of whether the legislature's decision to prohibit the Brewers from selling beer for off-site consumption is reasonably justified to reduce intoxicated driving, contending that where a person buys beer for off-site consumption (at a brewer or at a convenience store, for example) is not rationally related to reducing drunk driving. The Court disagrees. The legislature could have been concerned that buying beer at a brewer's location, potentially after already consuming beer on-site, puts Texans at a greater risk for intoxicated driving. And, finally, the Brewers try to negate any concern about sales to minors and intoxicated people by stating that they still would be subject to laws prohibiting sales to both groups. Being subject to those laws does not mean that those illegal sales do not happen, and the legislature could have been concerned that more sales overall means a proportionate uptick in the illegal sales it wants to reduce or eliminate. To the extent the Brewers have adequately confronted these plausible justifications, they fail to negate that they are not rationally related to reducing access to alcohol and increasing the health and safety of citizens.

correct conclusions about the potential effect on retailers, the Court cannot say it was irrational for the legislature to be concerned about other members of the three-tier system and the effect changes to the three-tier system might have on competition between tiers.

The Brewers focus heavily on their economic protectionism claim as to the distributors. That claim boils down to: the legislature protected the economic interests of distributors—because that group allegedly has more political power—over the economic interests of brewers and manufacturers and enacted the statutes for that reason and not to maintain the three-tier system. Or, as the Brewers put it: "[t]he only plausible explanation is the illegitimate protection of the distributor tier—the tier that exerts the most influential control over the Texas Legislature." (Dkt. 35, at 36). In support, the Brewers cite to an expert deposition and two affidavits, one from each of the founders of the plaintiff brewers. The Brewers' expert, Scott Metzger, testified only that the wholesale / distributor tier was opposed to legislation in 2015 that would have allowed the Brewers to sell beer for off-site consumption. (Dkt. 35-12, at 157). His testimony does not connect that supposed opposition with the failure of the bill. The two founders' affidavits appear to have identical paragraphs stating: "I participated in legislative efforts in 2013 and 2015 with respect to alcoholic beverage laws. The alcoholic beverage laws that were passed—or not passed—were not the result of a concern for temperance or the three-tier system, but were the result of the industry tiers' agreement. If the distribution tier did not want specific legislation, it would not pass." (Dkt. 35-41, at 4; Dkt. 35-47, at 4). There are several problems with the last two sentences of that paragraph, but the most difficult for the Brewers is that these statements represent lay opinions, at best, and, more likely, pure speculation from non-legislators (who also happen to be the founders of the plaintiff brewers in this case) as to the inner-workings of the legislative process. The Court therefore will not rely on that evidence and, if it did, would not find it persuasive. The Brewers make a similar argument with respect to other bills that *did* pass, saying those bills passed because they had the

support of the distributors. Other legislation that impacted the three-tier system—even if those bills passed for no other reason than because of distributor support—is not relevant to the inquiry here.

The Brewers' final attempt to show a lack of a rational relationship involves notes taken at a working group that met before and during the 2013 legislative session. According to the Brewers, the notes show that the distributors drive the decision-making, not state interests. These notes, however, are a collection of mostly handwritten notes, replete with incomplete phrases, abbreviations, shorthand, and acronyms, that provide little context about the topics being discussed, little attribution to who said what, and little explanation for what was jotted down. (*See, e.g.*, Dkt. 35-33). At the top of one sheet, the notetaker has "Sen. VdP" underlined and followed by a colon. (*Id.* at 7). Next to the colon is "frequent lawsuits issue." (*Id.*). Under that are three additional lines: "in & out of state," "not about 3 Tier system," and "Sen Carona also involved." The Brewers' expert Scott Metzger, who was not at that particular meeting, testified that he knew who wrote the notes, and when asked "[d]o you see where she also wrote, not about three-tier system," he responded, "I do." (Dkt. 35-12, at 144–45). According to the Brewers' argument, based on the notes and the expert's confirmation about what was written in the notes, the Court should conclude that the Brewers have shown that the legislature passed bills subjecting the Brewers to disparate treatment only to protect the distributors. The notes, and the testimony about the notes, do not indicate whether Senator Van de Putte attended the meeting or why the words "not about 3 Tier system" were spoken. Perhaps, as TABC pointed out, she was stating that talking about the three-tier system was not on that meeting's agenda. Without more, the Brewers fail to sufficiently show that the rationale (the integrity of the three-tier system) is "fantasy." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) ("[A] hypothetical rationale, even post hoc, cannot be fantasy."). Although protecting a discrete interest group from economic competition may not be a legitimate governmental purpose, the Brewers fall short of showing that is what occurred. Moreover, even if they had, the Fifth Circuit has advised

that economic protection is not per se impermissible, if it can be "supported by a post hoc perceived rationale." *Id.* at 222–23; *see Greater Houston Small Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235, 240 (5th Cir. 2011) (rejecting challenge to taxi cab permitting scheme disfavoring small cab companies finding that even if the scheme was "motivated in part by economic protectionism, there is no real dispute that promoting full-service taxi operations is a legitimate government purpose under the rational basis test.").

B. TABC Entitled to Summary Judgment on the Brewers' Substantive Due Process Claim

TABC argues that they are entitled to judgment as a matter of law on the Brewers' substantive due process claims because (1) the claim is nothing more than a restatement of the Brewer's equal protection claim and (2) the Brewers cannot negate that their lack of a privilege to sell alcohol for off-site consumption is rationally related to a legitimate state interests. As to TABC's first point, the Brewers seem to agree, to some extent, and contend they are entitled to summary judgment on their substantive due process claim because the substantive due process rational basis test is "largely the same as for Equal Protection." (Dkt. 35, at 40). In their First Amended Complaint, the Brewers allege that because the challenged statutes have no reasonable relationship to a legitimate government interest, the statutes violate their substantive due process rights, specifically the freedom to pursue a chosen profession, as guaranteed by the Fourteenth Amendment and 42 U.S.C. § 1983. (Dkt. 14, at 17–18). A plaintiff who brings a substantive due process claim must: (1) "allege a deprivation of a constitutionally protected right;" and (2) demonstrate that the government action is not "rationally related to a legitimate governmental interest." *Mikeska v. City of Galveston*, 451 F.3d 376, 379 (5th Cir. 2006).

The Court first determines whether the Brewers allege a deprivation of a constitutionally protected right. The Fifth Circuit has held that a person "has a constitutionally protected liberty interest in pursuing a chosen occupation." *Stidham v. Tex. Comm'n on Private Sec.*, 418 F.3d 486, 491

(5th Cir. 2005). While the Brewers may have a liberty interest in pursuing their chosen occupation of brewing and selling beer, the actions of TABC in enforcing or attempting to enforce the challenged statutes have not deprived the Brewers of their liberty interest in operating their businesses. A state may impose reasonable government regulation, *see, e.g.*, *Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999) (noting that that the Fourteenth Amendment's "due process right to choose one's field of private employment . . . is nevertheless subject to reasonable government regulation"). In this case, the Brewers do not allege that TABC is excluding the Brewers from brewing beer or denying a license to them that would allow them to brew beer.

Even assuming the Brewers have alleged the deprivation of a protected liberty interest, they still must demonstrate that TABC's enforcement is not rationally related to a legitimate governmental interest. For all the reasons set out above, the Brewers cannot show that there is no rational relationship between the challenged statutes and the stated rationales for not allowing the Brewers to sell beer for off-site consumption. *See supra* Part III.A.

C. Evidentiary Objections

In their response to the Brewers' motion for summary judgment, TABC objects to several statements in the two affidavits of the founders discussed above in Part III.A.2.c. Specifically, TABC objects to: (1) Gary Humble's affidavit, the last sentence of paragraph 7, (2) Gary Humble's affidavit, the last two sentences of paragraph 15, (3) John Reardon's affidavit, the last sentence of paragraph 8, (4) John Reardon's affidavit, paragraph 14, and (5) John Reardon's affidavit, the last two sentences of paragraph 15. The Court already declined to rely on the last two sentences of paragraph 15 of both affidavits (objections (2) and (5)). *See supra* Part.A.c. As to objections (1), (3), and (4), the Court does not rely on those statements. TABC also objects to the characterization of a statement by a government employee that was published on a government website. (Dkt. 38, at 2). Likewise, the Court does not rely on that statement or the Brewers' characterization of it. Therefore,

the Court grants TABC's objections (2) and (5) and denies as moot TABC's objections (1), (3), and (4).

IV. CONCLUSION

For these reasons, the Court **GRANTS** [36] Defendants' Motion for Summary Judgment and **DENIES** [35] Plaintiffs' Motion for Summary Judgment.

SIGNED on March 20, 2018.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE