

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

DEEP ELLUM BREWING	§	
COMPANY, LLC, and GRAPEVINE	§	
CRAFT BREWERY, LLC,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 1:15-cv-00821-RP
	§	
TEXAS ALCOHOLIC BEVERAGE	§	
COMMISSION; JOSÉ 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; and IDA	§	
CLEMENT STEEN, in her official capacity	§	
as Commissioner of the Texas Alcoholic	§	
Beverage Commission,	§	
	§	
Defendants.	§	

**FIRST AMENDED ORIGINAL COMPLAINT  
FOR DECLARATORY AND INJUNCTIVE RELIEF**

Pursuant to FED. R. CIV. P. 15(a)(1)(B), Plaintiffs Deep Ellum Brewing Company, LLC, and Grapevine Craft Brewery, LLC, by and through their undersigned counsel, file this their First Amended Original Complaint for Declaratory and Injunctive Relief challenging the constitutionality of the provisions of the Texas Alcohol Beverage Code that prohibit Plaintiffs Deep Ellum Brewing and Grapevine Craft Brewery—both state-licensed and federally approved Texas craft beer brewers—from selling their products on-site to consumers for off-premises consumption. Other similarly situated alcoholic beverage producers can do this, but Texas craft beer brewers like Plaintiffs cannot. As a result of these unconstitutional distinctions, a Texas

resident or visitor cannot buy a can or bottle of beer at Deep Ellum Brewing or Grapevine Craft Brewery to take home or elsewhere to enjoy, but he or she can buy for consumption at home or elsewhere cans or bottles of beer at other types of beer producers in Texas, a bottle of wine at a Texas winery, or a bottle of spirits at a Texas distillery. This differential treatment of craft beer producers like Plaintiffs not only violates the U.S. Constitution, but it harms Plaintiffs and the many Texas businesses, residents and visitors who would benefit from equal and non-arbitrary treatment of craft beer brewers. It also harms Texas businesses like Plaintiffs by hamstringing their efforts to compete with out-of-state beer brewers. In support, Plaintiffs allege as follows:

### **INTRODUCTION**

1. The U.S. Constitution prohibits a State from creating irrational and arbitrary distinctions between similarly situated entities. Texas, however, does just that by creating distinctions between various types of alcoholic beverage producers, which in turn harm those directly involved, including Texas businesses, citizens and tourists, and ultimately the Texas economy. Specifically, Texas impermissibly and unconstitutionally creates two classes of alcoholic beverage producers and two classes of beer producers: those that can sell their product on-premises to consumers for off-premises consumption and those that cannot do so. Neither classification passes constitutional muster.

2. Since the end of Prohibition, Texas has long divided the alcohol beverage industry into three levels—manufacturers (e.g., brewers, wineries, distillers), wholesalers or distributors, and retailers (e.g., bars, restaurants, liquor stores). Under this three-tier system, Texas law prohibits overlapping ownership and certain other relationships between those engaged in the alcoholic beverage industry at the different levels. For example, a distributor of alcohol ordinarily cannot also act as a retailer of alcohol, and vice versa.

3. But Texas law provides many and various exceptions to its strict three-tiered system, such as allowing wineries, distillers and beer manufacturers to act as both producers and retailers in certain situations and under various differing conditions. Indeed, “regulation of alcoholic beverages in Texas is complicated and, in many cases, confusing.” *Authentic Bevs. Co. v. Tex. Alcoholic Bev. Comm’n*, 835 F. Supp.2d 227, 234 (W.D. Tex. 2011). Even the Texas Comptroller’s office has recognized that the “past and present inequities of beer law in Texas spring from an extraordinarily complex regulatory structure.” See P. Graves, *Recent Legislation Gives Craft Beer a Boost*, at [http://comptroller.texas.gov/comptrol/fnotes/fn14Q2\\_craftbrewing.pdf](http://comptroller.texas.gov/comptrol/fnotes/fn14Q2_craftbrewing.pdf) (last accessed Aug. 22, 2015). As set forth below, this regulatory scheme is not just complex, it is arbitrary and discriminatory.

4. There is no rational basis or legitimate government purpose for Texas’ disparate treatment of craft beer brewers like Plaintiffs, which *are not* allowed to sell their products on-site for off-premises consumption, and Texas brewpubs, Texas wineries and Texas distillers, which *are* all allowed to do so. This type of economic protectionism is unconstitutional, *see St. Joseph Abbey v. Castille*, 712 F.3d 215, 226-27 (5<sup>th</sup> Cir. 2013); it is not a legitimate exercise of the state’s power to protect the welfare, health, peace, temperance or safety of its people. The distinctions are arbitrary, unreasonable and have no rational relationship to a legitimate government interest. As such, the Texas liquor laws that create these distinctions violate Plaintiffs’ constitutional rights to Equal Protection and Due Process. In doing so, they also harm Texas residents and visitors—not to mention the Texas economy—by impeding, if not totally precluding, their right to choose where they can buy certain alcoholic beverages for home or off-premises consumption.

**PARTIES**

5. Plaintiff Deep Ellum Brewing Company, LLC, is a Texas limited liability company with its principal place of business in Dallas, Texas.

6. Plaintiff Grapevine Craft Brewery, LLC, is a Texas limited liability company with its principal place of business in Grapevine, Texas.

7. Defendant Texas Alcoholic Beverage Commission (“TABC”) is an agency of the State of Texas, and is the agency with an interest in the matter made the subject of the action. TABC has entered an appearance in this action and will be served through its attorney of record.

8. Defendant José Cuevas, Jr. (“Cuevas”) is the Presiding Officer of the TABC, and, as such, has been charged with and empowered under Texas law with the day-to-day management and oversight of the TABC and its functions. Cuevas is sued in his official capacity only. Cuevas has entered an appearance in this action and will be served through his attorney of record.

9. Defendants Steven M. Weinberg (“Weinberg”) and Ida Clement Steen (“Steen”) are the other members of the TABC. Weinberg and Steen are sued in their official capacities only. Weinberg and Steen have entered an appearance in this action and will be served through their attorney of record.

10. The Texas Attorney General has been notified of this proceeding, pursuant to TEX. CIV. PRAC. & REM. CODE § 30.004(b) and FED. R. CIV. P. 5.1.

**JURISDICTION AND VENUE**

11. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 because this is a civil action arising under the U.S. Constitution and laws of the United States. Because Plaintiffs are bringing this suit under 42 U.S.C. § 1983 for the deprivation of their rights,

privileges, or immunities secured by the Constitution and laws of the United States, the Court also has jurisdiction under 28 U.S.C. § 1343(a)(3). Plaintiffs also seek declaratory and related relief under 28 U.S.C. §§ 2201, *et seq.*

12. Venue is proper in this District under 28 U.S.C. § 1391(b)(1) because the TABC, an agency of the State of Texas, has its headquarters in this district.

## **FACTS**

### **Texas Craft Beer Brewing**

13. America's beer industry has dramatically changed in recent years. One of those changes includes the increased consumer demand for "craft beer," or beer that has been made, most often, by smaller, locally owned, independent businesses that use traditional and innovative brewing methods, ingredients and fermentation processes. Craft beer is usually a full-flavored beer, brewed using simple ingredients without artificial additives, with direct involvement by the brewer's owners.

14. Although craft beer has gained tremendous market share in other states, the Texas craft beer industry is still developing. But its growth has been hampered by Texas' illogical patchwork of liquor laws, including laws improperly treating beer producers like Plaintiffs differently than other alcoholic beverage producers. Nonetheless, as late as 2011, Texas craft brewers employed more than 1,200 people on either a full- or part-time basis, according to the Texas Craft Brewers Guild, a state-wide non-profit trade association representing Texas independent craft beer breweries.

15. Recently, the Brewer's Association (a national non-profit trade association representing independent craft breweries) estimated that the Texas craft beer industry contributed more than \$2.3 billion to the Texas economy, currently ranking Texas in 8th place nationwide in

the economic impact from craft beer brewing. A study from the Texas Craft Brewers Guild estimated that Texas craft breweries will have a projected economic impact of \$5.6 billion on the Texas economy by 2020. In other words, the craft beer industry not only provides Texas residents with additional choice in alcoholic beverages, but it also makes substantial and important contributions to the economy of Texas.

16. One example of Texas craft beer brewers is Plaintiff Deep Ellum Brewing, which, as more fully discussed below, is an ale and malt liquor brewer that has its sole place of business in Dallas, Texas. Likewise, another example of a craft beer brewer is Plaintiff Grapevine Craft Brewery, which, as more fully discussed below, is a beer, ale and malt liquor manufacturer and brewer that currently has its sole place of business in Grapevine, Texas.

**Texas Law's Differential Treatment of Craft Beer Brewers**

17. 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 percent alcohol by weight, TEX. ALCO. BEV. CODE § 1.04(15), while “ale” or “malt liquor” are defined as a malt beverage containing more than 4 percent of alcohol by weight, *id.* at § 1.04(12). Despite those legal distinctions, however, the common practice is to refer to all of these products as “beer.” This Complaint, therefore, refers to all these products as “beer,” unless otherwise necessary or important.

**Two Types of Beer Producers**

18. Texas law creates two types of beer producers: holders of Manufacturer’s Licenses and Brewer’s Permits, on the one hand, and holders of Brewpub Licenses, on the other:

**Manufacturer's License**

- A beer manufacturer must have a Manufacturer's License (a "Manufacturer"), which allows it, among other things, to manufacture or brew beer and distribute and sell it in Texas to holders of distributor's licenses and to qualified persons outside the state. TEX. ALCO. BEV. CODE § 62.01.
- The holder of a Manufacturer's License may also "dispense beer for consumption on the premises," subject to certain volume limitations. *Id.*; TABC Guide for Manufacturers, Wholesalers, Distributors & Retailers of Alcoholic Beverages in Texas, Sept. 2013 ("TABC Guide"), at 19, available at <http://www.tabc.state.tx.us/publications/licensing/IndustryGuide.pdf> (last accessed Aug. 22, 2015).
- The holder of a Manufacturer's License *cannot* sell beer on-site for off-premises consumption.

**Brewer's Permit**

- The holder of a Brewer's Permit ("Brewer") may, among other things, "sell ale produced on the brewer's premises under the permit to ultimate consumers on the brewer's premises for responsible consumption on the brewer's premises," subject to certain volume limitations, TEX. ALCO. BEV. CODE § 12.052(a) & (b); TABC Guide at 19.
- The holder may also "dispense ale and malt liquor for consumption on the premises." TEX. ALCO. BEV. CODE § 12.01(4).

**Brewpub License**

- The holder of a Brewer’s Permit *cannot* sell ale or malt liquor on-site for off-premises consumption.
- The holder of a Brewpub License (a “Brewpub”) may, if located in a wet area, “sell or offer without charge, on the premises of the brewpub, to ultimate consumers for consumption on or off those premises, malt liquor, ale, or beer produced by the holder . . . .” TEX. ALCO. BEV. CODE § 74.01(a).
- Unlike holders of Manufacturer’s Licenses and Brewer’s Permits, the holder of a Brewpub License *may* sell on-site for off-site consumption.

19. Under Texas law, any producer of ale or malt beverages with more than 4 percent alcohol by weight must hold a Brewer’s Permit, while any producer of malt beverages with less than 4 percent alcohol by weight must hold a Manufacturer’s License. A beer producer can hold both of these licenses. *See* TABC Guide at 19; TABC License and Permit Descriptions, available at [https://www.tabc.state.tx.us/licensing/license\\_and\\_permit\\_description.asp](https://www.tabc.state.tx.us/licensing/license_and_permit_description.asp) (“TABC Website”) (last accessed Aug. 22, 2015). As of the time of filing this original complaint, there were approximately 91 active Brewer’s Permits and 40 active Manufacturer’s Licenses in Texas. The TABC in its answer to the original complaint admitted that as of October 2, 2015, “there were 97 active Brewer’s Permits and 42 active Manufacturer’s Licenses in the state.”

20. A Brewpub License is available to a beer producer if it makes no more than 10,000 barrels of malt liquor, ale and beer annually for each licensed brewpub. TEX. ALCO. BEV. CODE § 74.03; TABC Guide at 51; TABC Website. A Brewpub must also have certain other



permits or licenses, which a Manufacturer or Brewer do not have to obtain. *See* TEX. ALCO. BEV. CODE § 74.01(c); TABC Guide at 50. But a Brewpub *cannot* be a Manufacturer or Brewer. TEX. ALCO. BEV. CODE § 74.01(d). As of the time of filing this original complaint, there were approximately 109 active Brewpub Licenses in Texas. In its answer to the original complaint, the TABC admitted that as of October 2, 2015, “there were 114 active Brewpub Licenses in the state.”

21. There are other limits and requirements on the ability of a Manufacturer, Brewer and Brewpub to both produce and distribute beer. Since Plaintiffs are not challenging Texas’ three-tiered system, these exceptions and limitations on the ability of a beer producer to distribute its product will only be addressed if relevant.

### **Two Types of Alcohol Beverage Producers**

22. Texas law also creates two types of alcoholic beverage producers: Manufacturers and Brewers, on the one hand, and wineries and distillers, on the other hand:

<b>Manufacturer’s Licenses and Brewer’s Permits</b>
---

- As noted above, neither the Manufacturer’s License nor the Brewer’s Permit allows for the holder to sell beer on-premises for off-premises consumption. TEX. ALCO. BEV. CODE §§ 12.01, 12.052, 62.01.

<b>Winery Permit</b>
----------------------

- The holder of a Winery Permit (“Winery”) may, among other things, sell wine to ultimate consumers “for consumption on the winery premises” and “in unbroken packages for off-premises consumption,” with certain volume limitations. TEX. ALCO. BEV. CODE § 16.01.

**Distiller's and  
Rectifier's  
Permit**

- The holder of a Distiller's and Rectifier's Permit ("Distiller") may, among other things, if located in a wet area, "sell distilled spirits to ultimate consumers" with certain volume limitations. TEX. ALCO. BEV. CODE §§ 14.01, 14.05.

23. These statutes, regardless of their original purposes, have "been subverted by the economic interests of the entities" they were intended to regulate, according to Howard Wolf, a former member of the Texas Sunset Advisory Commission. *See* H. Wolf, *Position Paper*, at 2 (available at [http://alt.coxnewsweb.com/statesman/pdf/02/020907alcohol\\_positionpaper.pdf](http://alt.coxnewsweb.com/statesman/pdf/02/020907alcohol_positionpaper.pdf), last accessed Aug. 31, 2015) ("Wolf Position Paper"). According to Mr. Wolf, who spent time examining the purpose and value of the TABC during his tenure on the Texas Sunset Advisory Commission:

The system currently used to regulate alcoholic beverage in Texas now promotes and protects private, rather than public, welfare. . . . While the private interests of the commercial entities in the industry are artificially protected from the challenges of dealing with changes in the market place, there is no noticeable advancement of the public welfare. Even worse, in many instances, the public interests are either neglected or ignored. This disconnection, between the valid exercise of public authority and its application to the environment in which the authority operates, corrupts the entire regulatory system.

*Id.* at 2.

24. As they apply to Deep Ellum Brewing, a Brewer, and Grapevine Craft Brewery, a Manufacturer and Brewer, these statutes preclude Plaintiffs from selling their product on-premises for off-premises consumption, unlike the holder of a Brewpub License, a Winery Permit, or Distiller's Permit.

**Deep Ellum Brewing**

25. Deep Ellum Brewing is currently engaged in the business of producing and selling craft ale and malt liquor. Deep Ellum Brewing regularly sells some 8 kinds of beer (legally, ales and malt liquors). Since its beginning in 2011, Deep Ellum Brewing has brewed and sold more than 30 different kinds of ales and malt liquors. It sells its ales and malt liquors on-site in draft form, but sells its product to retailers in cans and kegs.

26. Deep Ellum Brewing operates in one location: the Deep Ellum area east of downtown Dallas, Texas. It employs its founder, John Reardon, and approximately 33 employees. In 2014 it sold 12,500 barrels of beer, becoming the seventh largest craft Brewery in Texas. In their response to the original complaint, Defendants stated that “for fiscal year 2014, only ten producers produced more ale than [Deep Ellum Brewing].”

**Grapevine Craft Brewery**

27. Grapevine Craft Brewery is currently engaged in the business of manufacturing and selling craft beer, ale and malt liquor. Grapevine Craft Brewery regularly sells two kinds of beer and seven kinds of ales and malt liquors in draft form on-site and in cans and kegs at retailers.

28. Grapevine Craft Brewery currently operates in one location in Grapevine, Texas. It employs its founder, Gary Humble, and approximately 26 employees. It was formed in 2012 and began selling its product in late-2013. In 2014 it sold 3,200 barrels of beer, and it expects to sell about 5,200 barrels in 2015. Grapevine Craft Brewery projects that it will sell more than 10,000 barrels in 2016.

**Texas Law's Unfair and Unconstitutional Treatment  
of Deep Ellum Brewing and Grapevine Craft Brewery**

29. Deep Ellum Brewing and Grapevine Craft Brewery, however, cannot sell their products on-site for off-premises consumption under current Texas law. If a customer of Deep Ellum Brewing visiting its Dallas location decides that Deep Ellum IPA or Dallas Blonde—two of its most popular brands—are great beers, he or she cannot buy a six-pack or keg to take home to drink, despite being able to buy and drink the same beer on-site.

30. Likewise, if a customer of Grapevine Craft Brewery takes a liking to its Sir William's English Brown Ale, that customer can purchase and drink it on site. But it cannot buy that beer to take to the lake or a tailgate party.

31. Those same customers, however, can visit a company with a Brewpub License, a Texas Winery, or a Texas Distiller and (provided those entities are complying with Texas law) purchase their products (beer, wine or distilled spirits) to take home for consumption.

32. Deep Ellum Brewing and Grapevine Craft Brewery have had many requests—in fact, those requests are almost daily—from customers to purchase their beer to take home or consume elsewhere. Because of Texas law's differential treatment of Deep Ellum Brewing and Grapevine Craft Brewery, however, they cannot do so and are forced to tell their customers, "We're thrilled you like our beer, but you cannot buy it to take home or anywhere else to drink." Of course, Brewpubs, Wineries and Distillers can sell their products this way.

33. Deep Ellum Brewing and Grapevine Craft Brewery have lost and continue to lose business (and resulting profits) because they cannot sell their product on-site for off-premises consumption. Plaintiffs lose business because Texas law prohibits them from selling their products on-site for customers to take off-premises to consume. Even if Plaintiffs told their customers where to buy their products at a retail location, they still lose business because they

have lost the revenue stream from that on-location sale; indeed, they are not guaranteed that the customer will make the effort to find that retailer and purchase their products, nor do they make as much profit through retail sales as they would through on-site sales for off-premises consumption.

34. If the laws and regulations prohibiting Plaintiffs from selling on-site for off-site consumption did not exist, Deep Ellum Brewing and Grapevine Craft Brewery would be able to sell, and would in fact sell, their beer on-site for off-premises consumption. They could sell more product, hire more employees, and otherwise expand their business—and, of course, contribute more to the Texas economy and to Texans' freedom of choice. Texas law's prohibition on Brewer's and Manufacturer's selling their product on-site for off-premises consumption hinders Plaintiffs' ability to grow and expand their businesses, creates an economic hardship to Deep Ellum Brewing and Grapevine Craft Brewery, and stifles Texas-based businesses from competing with non-Texas beer producers.

35. Plaintiffs cannot solve this problem by merely obtaining a Brewpub License, which allow the holder to sell product on-site for off-premises consumption, because Brewpubs can only manufacturer up to 10,000 barrels of beer annually. TEX. ALCO. BEV. CODE § 74.03; TABC Guide at 51; TABC Website. Deep Ellum Brewing currently manufactures more than 10,000 barrels of ale and malt liquor annually, and Grapevine Craft Brewery expects to manufacture more than 10,000 barrels in 2016. Not only are Deep Ellum Brewing (a Brewer) and Grapevine Craft Brewery (a Manufacturer and Brewer) prohibited by law from having a Brewer's Permit or Manufacturer's License at the same time as a Brewpub License, but to be a Brewpub they, among other things, would have to *cut back* on or limit their current and expected production of beer to no more than 10,000 barrels annually. Plaintiffs should not be forced to

change their business model and severely curtail the amount of beer they sell—and their profits—in an attempt to become a Brewpub in order to avoid the current ban on on-site sales for off-premises consumption. Even Defendants denied in their answer to the original complaint that Deep Ellum Brewing could acquire a Brewpub License by cutting back on its sales or that it could avoid the ban on on-site sales for off-premises consumption “by seeking to acquire a Brewpub License.”

36. Moreover, obtaining a Manufacturer’s License would not solve Deep Ellum Brewing’s problem either. Like the holder of a Brewer’s Permit, the holder of a Manufacturer’s License (e.g., Grapevine Craft Brewery) cannot sell beer on-premises for off-premises consumption. In any event, a Manufacturer’s License only allows that Manufacturer to make and sell beer, as legally defined (less alcohol than ale or malt liquor), which is different than what a Brewer’s Permit allows Deep Ellum Brewing to do: make and sell ale and malt liquor. Again, Deep Ellum Brewing would have to change its business model and produce beer, not ales and malt liquors, to become a Manufacturer—but even that would not allow it to sell on-premises for off-site consumption.

## **CAUSES OF ACTION**

### ***Count I—Equal Protection Violations***

37. Plaintiffs restate and adopt by reference all allegations set forth above.

38. The Equal Protection Clause of the U.S. Constitution’s Fourteenth Amendment provides that no State shall deny to any person the equal protection of its laws. U.S. CONST. amend. XIV, § 1. The Equal Protection Clause requires the government to treat similarly situated persons the same, or precludes it from treating one set of persons differently than others who are similarly situated. *See Yates v. Stalder*, 217 F.3d 332, 334 (5<sup>th</sup> Cir. 2000); *Wheeler v.*

*Miller*, 168 F.3d 241, 252 (5<sup>th</sup> Cir. 1999); *see also Mahone v Addicks Utility Dist.*, 836 F.2d 921, 932 (5<sup>th</sup> Cir. 1988) (“The equal protection clause essentially requires that all persons similarly situated be treated alike”).

39. Sections 62.01, 12.01 and 12.052 of the Texas Alcoholic Beverage Code violate Plaintiffs’ Equal Protection rights under the U.S. Constitution because, by precluding Plaintiffs from selling their products on-site to consumers for off-premises consumption, they treat Plaintiffs differently than other similarly situated producers of alcoholic beverages—namely, Brewpubs, Wineries and Distillers (*see* TEX. ALCO. BEV. CODE §§ 14.01, 14.05, 16.01 and 74.01):

- Brewpubs can sell their products for off-site consumption to consumers at the point of production (TEX. ALCO. BEV. CODE § 74.01(a)(2)), but Plaintiffs as Manufacturers and Brewers cannot do so (TEX. ALCO. BEV. CODE §§ 62.01, 12.01(4) and 12.052(a));

- Wineries can sell their products for off-site consumption to consumers at the point of production if located in a wet area (TEX. ALCO. BEV. CODE § 16.01(a)(5)), but Plaintiffs as Manufacturers and Brewers cannot do so (TEX. ALCO. BEV. CODE §§ 62.01, 12.01(4) and 12.052(a)); and

- Distillers can sell their products for off-site consumption to consumers at the point of production (TEX. ALCO. BEV. CODE § 14.01(a)(8)) & 14.05, but Plaintiffs as Manufacturers and Brewers cannot do so (TEX. ALCO. BEV. CODE §§ 62.01, 12.01(4) and 12.052(a)).

40. There is no rational basis for this differential treatment of alcoholic beverage producers. These distinctions are neither rationally related to any legitimate or valid government

interest, nor do they further one. Texas cannot, by making these distinctions, accomplish any legitimate purpose. In other words, there is no “fit” between the distinctions Texas draws and any purpose that Texas could possibly articulate, including any interest in the health, welfare, temperance or safety of its people.

41. Instead, Texas’ statutory distinction between Manufacturers and Brewers, Brewpubs, Wineries and Distillers is the type of “arbitrary and irrational discrimination [that] violates the Equal Protection Clause under even [the] most differential standard of review.” *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988). The Equal Protection Clause’s “core concern” is to provide a “shield against arbitrary classifications,” such as those that exist here. *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 598 (2008).

42. The current alcohol statutory system does not advance its stated purposes of protecting the public welfare. Instead, it “operates primarily to prevent competition, protect anti-competitive conduct and otherwise thwart the functioning of a free market in the manufacture, distribution and sale of alcoholic beverages.” Wolf Position Paper at 2-3. This type of economic protectionism of certain industries (and even within the same industry) is “not a legitimate state interest.” *See St. Joseph Abbey*, 712 F.3d 215 at 220. As such, these laws violate Plaintiffs’ equal protection rights under the U.S. Constitution.

43. Defendants, their agents and employees, acting under the color of state law, have violated Plaintiffs’ right to equal protection of the laws, as guaranteed by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, by enforcing or attempting to enforce TEX. ALCO. BEV. CODE §§ 62.01, 12.01 and 12.052.

44. Due to the unconstitutionality of those statutes and due to the Defendants’ enforcement of them, Plaintiffs have been irreparably injured by the deprivation of their rights to



sell their products under the same conditions as other similarly situated entities. Unless Defendants are enjoined from committing the above-described constitutional violations, Plaintiffs will continue to suffer great and irreparable harm.

45. Plaintiffs are entitled to and hereby requests their attorneys' fees and costs, pursuant to 42 U.S.C. § 1988.

***Count II—Substantive Due Process Violations***

46. Plaintiffs restate and adopt by reference all allegations set forth above.

47. The Due Process Clause of the U.S. Constitution's Fourteenth Amendment protects Plaintiffs' economic liberty, or the right to pursue legitimate occupations free from unreasonable government interference, subject only to regulations that are rationally related to a legitimate government purpose. When a government action is arbitrary, unreasonable, or has no relationship to any legitimate government interest, it violates substantive due process. *Brantley v. Kuntz*, 2015 U.S. Dist. LEXIS 680, \*11 (W.D. Tex. 2015). The liberty protected by substantive due process encompasses the freedom to pursue one's chosen profession.

48. Sections 62.01, 12.01 and 12.052 of the Texas Alcoholic Beverage Code, as noted above, create distinctions between Manufacturers and Brewers like Plaintiffs and Brewpubs, Wineries and Distillers by prohibiting Plaintiffs from selling their products on-site for off-site consumption, while allowing Brewpubs, Wineries and Distillers to sell their products (some of which have even higher alcohol content than beer, ales and malt liquors) on site for off-premises consumption. Such distinctions are arbitrary, unreasonable and have no relationship—rational or otherwise—to a valid government interest. Indeed, there is *no* legitimate government interest in doing this. These distinctions negatively impact and impede Plaintiffs' right and ability to pursue their businesses—a protected property interest.

49. Defendants, their agents and employees, acting under the color of state law, have violated Plaintiffs' right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, by enforcing or attempting to enforce the provisions of TEX. ALCO. BEV. CODE §§ 62.01, 12.01 and 12.052 that preclude Plaintiffs from selling ale and malt liquor on-site to customers for off-site consumption.

50. Due to Texas law's preclusion of Plaintiffs from selling their products for off-site consumption at the point of production, while allowing other similarly situated entities to do so (per TEX. ALCO. BEV. CODE §§ 14.01, 14.05, 16.01 and 74.01), as noted above, Plaintiffs have been irreparably injured by the deprivation of its rights. Unless Defendants are enjoined from committing the above-described constitutional violations, Plaintiffs will continue to suffer great and irreparable harm.

51. Plaintiffs are entitled to and requests their attorneys' fees and costs, pursuant to 42 U.S.C. § 1988.

***Count III—Declaratory Judgment***

52. Plaintiffs restate and adopt by reference all allegations set forth above.

53. Pursuant to the Declaratory Judgment Act (28 U.S.C. § 2201(a)) and 42 U.S.C. § 1983, Plaintiffs request the Court render a judgment declaring that: (a) TEX. ALCO. BEV. CODE §§ 62.01, 12.01 and 12.052 are unconstitutional to the extent they prohibit Deep Ellum Brewing from selling its products on-site for off-premises consumption, as TEX. ALCO. BEV. CODE §§ 14.01, 14.05, 16.01 and 74.01 allow other similarly situated entities to do; and (b) Defendants violate Plaintiffs' Equal Protection and Due Process rights to the extent they would deny Plaintiffs the right to sell their product on-site to customers for off-premises consumption.

54. Plaintiffs also request that the Court issue an injunction permanently enjoining Defendants from enforcing the laws in question against Plaintiffs and other Brewers precluding them from selling ale and malt liquor on-site for off-premises consumption.

55. Pursuant to 28 U.S.C. § 2202 and 42 U.S.C. § 1988, Plaintiffs are entitled to and requests their attorneys' fees and costs.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs request judgment in their favor that:

- A. Declares that Sections 62.01, 12.01 and 12.052 of the Texas Alcoholic Beverage Code, and any related rules and regulations, are unconstitutional (violating Plaintiffs' Equal Protection and Due Process rights) because they preclude Plaintiffs from selling their products on-site to customers for off-premises consumption;
- B. Permanently enjoins all Defendants from enforcing these laws, and any related regulations and policies, in a manner that impairs Plaintiffs' ability to sell its product on-site to customers for off-site consumption, and enjoins Defendants from imposing fines or criminal penalties, administrative penalties and sanctions, or otherwise subjecting Plaintiffs to harassment from Defendants, their agents and employees, for actions by Plaintiffs in selling their products on-site to customers for off-site consumption.
- C. Awards Plaintiffs their attorneys' fees and costs; and
- D. Awards Plaintiffs all other relief to which they are entitled.

Dated this 27th day of October, 2015.

Respectfully Submitted,

/s/ Kelly Stewart

Kelly Stewart  
State Bar No. 19221600  
K STEWART LAW, P.C.  
100 Highland Park Village, Suite 200  
Dallas, Texas 75205  
972-308-6168  
kelly@kstewartlaw.com

and

Jeffrey S. Levinger  
Texas Bar No. 12258300  
LEVINGER PC  
1445 Ross Avenue, Suite 2500  
Dallas, Texas 75202  
214-855-6817  
214-855-6808 (fax)  
jlevinger@levingerpc.com

and

Christopher M. McNeill  
Texas Bar No. 24032852  
BLOCK & GARDEN, LLP  
5949 Sherry Lane, Suite 900  
Dallas, Texas 75225  
214.866.0990  
214.866.0991 (fax)  
mneill@bgvllp.com

ATTORNEYS FOR PLAINTIFF  
DEEP ELLUM BREWING COMPANY, LLC,  
AND GRAPEVINE CRAFT BREWERY, LLC

**CERTIFICATE OF SERVICE**

I certify on the 27th day of October, 2015, I electronically filed the foregoing with the clerk of the court using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

*/s/ Kelly Stewart* \_\_\_\_\_