IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION

The Crafted Keg, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Civ. Case No. 14-cv-14430-RLR**
	)	
Ken Lawson, Secretary of the State of Florida Department of Business and Professional Regulation, in his official capacity, and William Spicola, Director of the State of Florida Division of Alcoholic Beverages and Tobacco, in his official capacity,	)	**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**
	)	
Defendants.	)	
	)	

STATEMENT OF THE CASE

This civil rights lawsuit challenges the constitutionality of a Florida law that prohibits businesses like the plaintiff's from selling or filling 64 oz. containers of beer (called "growlers")—but allows businesses to fill or sell multiple 32 oz. containers or 128 oz. containers, or pitchers of beer in any size. The 64 oz. growler is the industry-standard size, roughly the equivalent to a six-pack of beer.[1] But under § 563.06(6), Fla. Stat. ("Growler Ban"), it is a second-degree misdemeanor, to sell a 64 oz. growler full of beer—a crime punishable by a fine of up to $500 and 60 days in jail. *See* § 562.45, Fla. Stat. But while it is a crime to sell a 64 oz. container of beer, it is perfectly legal to sell that amount of beer in two separate containers, or in a container

[1]Jessica Botelho-Urbanski, *Craft Beer Bellies Are Growling*, Winnipeg Free Press (7/26/14), *available at* http://www.winnipegfreepress.com/local/craft-beer-bellies-are-growling-268698022.html (last visited Dec. 17, 2014).

that holds twice as much, or to sell wine, hard liquor, or any other alcoholic beverage, in containers of 64 oz. or any other size.

The plaintiff, The Crafted Keg, runs a "growler bar," which supplies specially crafted beers, wines, ciders, and sodas, made by artisans and specialty breweries around the world. Dkt. 1, Plaintiff's Verified Complaint ¶ 7. Every day, The Crafted Keg taps a new keg of a different exotic beer and sells it to the public, allowing beer fanciers and novice gourmets to taste an assortment of beers either in the bar or at home. *Id*. Customers can bring the beer home in growlers that they bring themselves, or can buy a growler at the bar. *Id*. But they must buy two 32 oz. containers or a 128 oz. container. They cannot buy a 64 oz. container. § 563.06(6), Fla. Stat. This Growler Ban abridges the constitutionally protected right of The Crafted Keg to pursue a common occupation without unreasonable interference, and harms The Crafted Keg financially. *See* Dkt. 1, Plaintiff's Verified Complaint ¶¶ 3, 15-17.

Patrons on vacation in Florida from other states regularly visit The Crafted Keg with their own growlers, and ask employees to fill the growlers with the variety of craft beer that The Crafted Keg sells. *Id*. ¶15. Because of the Growler Ban, The Crafted Keg must refuse to fill the growlers, and ask the patron to instead purchase two 32 oz. canisters of beer, or a 128 oz. canister. *Id*. ¶ 16. Patrons often tell Crafted Keg employees that they do not believe this Growler Ban actually exists, and assert that it appears to be an attempt to gouge the tourist. *Id*. The Crafted Keg regularly loses business based on the Growler Ban. *Id*. ¶ 17.

The Crafted Keg alleges that the Growler Ban is not rationally related to promoting any legitimate government interest. It does not promote sobriety, public health or safety, or prevent harm to consumers. Instead, it exists solely to protect large breweries from competition by small

business craft breweries. *Id*. Large corporate sellers of beer can afford to package and sell beer in cans, bottles, and the like, whereas the smaller, artisanal breweries who produce the specialty beers The Crafted Keg sells cannot afford the costs of moving to that system of packaging. *Id*. ¶ 3. They must therefore employ the craft beer industry-standard way of selling beer by the 64 oz. growler. Because the prohibition on 64 oz. containers bears no relation to protecting public health and safety, promoting sobriety, or any other legitimate public interest, but is arbitrary, discriminatory, and irrational, it violates The Crafted Keg's Fourteenth Amendment rights to due process and equal protection, both facially and as applied. *See id.* ¶ 1.

The State moves to dismiss The Crafted Keg's complaint. *See* Dkt. 4, Defendants' Motion to Dismiss Complaint and Memorandum in Support. Its motion relies largely upon factual assertions and arguments on the merits of The Crafted Keg's allegations, which are simply not proper on a motion to dismiss. *Milburn v. United States*, 734 F.2d 762, 765 (11th Cir.1984) ("Consideration of matters beyond the complaint is improper in the context of a motion to dismiss."); *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301, 1349 (S.D. Fla. 2011) ("factual inquiries not appropriate for resolution on a motion to dismiss."). Under Fed. R. Civ. P. 12(b)(6), The Crafted Keg is entitled to an opportunity to prove its well-pled allegations, and it is improper to determine the merits of the complaint. Thus, the State's motion should be denied, and The Crafted Keg allowed to pursue discovery in order to prove its case.

STANDARD OF REVIEW

In deciding this motion, it is important to emphasize that in reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), this Court must accept "as true all of the factual allegations contained in the complaint," and construe the complaint liberally in favor of the plaintiff.

See Jackson v. Bellsouth Telecomms., 372 F.3d 1250, 1262 (11th Cir. 2004). A complaint should not be dismissed if it alleges facts which, if true, would "plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). This standard is met "even if it appears 'that a recovery is very remote and unlikely.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (citation omitted). The standard is easily met here.

ARGUMENT

I
THE CRAFTED KEG SHOULD HAVE THE OPPORTUNITY TO PROVE THAT THE GROWLER BAN IS NOT RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST

This Court must assume all the allegations of the complaint are true, and draw every inference in the light most favorable to The Crafted Keg. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 249-50 (1989). The Motion to Dismiss stage is not the proper place to argue the facts or determine the merits of the parties' legal arguments. *See Young Apartments, Inc. v. Town of Jupiter*, 529 F.3d 1027, 1038 (11th Cir. 2008) (a motion to dismiss does not test merits of a case, but only requires that the plaintiff's factual allegations, when assumed to be true, must be enough to raise a right to relief above the speculative level); *accord*, Milburn, 734 F.2d at 765 (same); *In re Chiquita Brands*, 792 F. Supp. 2d at 1349. Defendants' motion asks this Court to rule on the merits of whether the challenged statutes are constitutional, but it is improper to do so at the motion to dismiss stage. *Wroblewski v. City of Washburn*, 965 F.2d 452, 459-60 (7th Cir. 1992). Here, the only question is whether the complaint sets forth allegations which, if proven true, plausibly entitle The Crafted Keg to judgment on the merits. *Iqbal*, 556 U.S. at 679; *Twombly*, 550 U.S. at 556.

The Crafted Keg's complaint sets out sufficient allegations to withstand a motion to dismiss. The Fourteenth Amendment prohibits the state from depriving The Crafted Keg of liberty, or treating it differently from similarly situated others, unless doing so is rationally related to a legitimate government interest. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Romer v. Evans*, 517 U.S. 620, 632 (1996). That rational basis test imposes a heavy burden on The Crafted Keg; under that test, the Court presumes that the restriction is constitutional, and The Crafted Keg must prove that the restriction on its liberty or the different treatment to which it is subjected is positively irrational. *See FCC v. Beach Communications*, 508 U.S. 307, 313 (1993).

But, as the Supreme Court has explained, the rational basis test is a rebuttable factual presumption, which the plaintiff can overcome by "showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary." *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209 (1934). A plaintiff can prevail under the rational basis test by meeting the burden of proving the well-pled allegations of irrationality. *See, e.g., Merrifield v. Lockyer*, 547 F.3d 978, 991-92 (9th Cir. 2008) (plaintiffs prevailed challenging licensing law under rational basis review); *Craigmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002) (same); *St. Joseph Abbey v. Castille*, 712 F.3d 215, (5th Cir. 2013) (same).

More recently, the Seventh Circuit has explained that a court confronted with a motion to dismiss in a rational basis case must allow the plaintiff to prove the well-pled allegations in a complaint, and not simply determine the merits without evidence: "The rational basis standard . . . cannot defeat the plaintiff's benefit of the broad Rule 12(b)(6) standard. The latter standard is procedural, and simply allows the plaintiff to progress beyond the pleadings and obtain discovery,

while the rational basis standard is the substantive burden that the plaintiff will ultimately have to meet to prevail on an equal protection claim." *Wroblewski*, 965 F.2d at 459-60.

In *Craigmiles*, *supra*, the plaintiffs challenged the constitutionality of a Tennessee licensing law that prohibited a person from selling coffins or other funeral merchandise unless the person was a licensed funeral director. Although regulating the funeral industry was obviously a legitimate government interest, the district court allowed the plaintiffs to introduce evidence—indeed, conducted a full-scale trial—to disprove the law's constitutionality. The court explained that "a genuine issue of material facts exists as to whether defendants' asserted reasons for the [challenged statute] are rationally related" to those legitimate interests. *Craigmiles v. Giles*, No. 1:99-CV-30, 2000 U.S. Dist. LEXIS 22435, at *18 (E.D. Tenn. July 18, 2000) (denying motion to dismiss). The government's "mere assertion of a legitimate government interest has never been enough to validate a law[.]" *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 662 (E.D. Tenn. 2000). Ultimately, the court found the law unconstitutional, and the Sixth Circuit affirmed. *Craigmiles*, 312 F.3d at 229.

Similarly, in *Merrifield*, *supra*, the district court rejected the government's effort to persuade the court to determine the merits of a rational basis case at the motion to dismiss stage. *See Merrifield v. Schwarzenegger*, No. 04-0498 MMC, 2004 WL 2926161 *5 (N.D. Cal. July 16, 2004). The court observed that "the issue of whether the Legislature lacked a rational basis" to enact the challenged statute was "premature," because "plaintiffs have not had the opportunity to provide evidence in support of their claims." *Id.* Later, after the plaintiff had introduced evidence and testimony, the Ninth Circuit found the law failed the rational basis test because it advanced no legitimate public interest and was "designed to favor economically certain constituents at the expense of others similarly situated." *Merrifield*, 544 U.S. at 991. Both *Merrifield* and *Craigmiles*,

like the Supreme Court precedents cited earlier, demonstrate that the rational basis test *requires* the plaintiff to introduce evidence to prove the unconstitutionality of a statute—and therefore must also *allow* the plaintiff to do so.

Here, The Crafted Keg should have the opportunity to present evidence to show that there is no legitimate public justification for the rule against 64 oz. packages. The Crafted Keg argues that banning the sale of 64 oz. growlers, while simultaneously allowing customers to buy multiple 32 oz. containers, or 128 oz. containers, or pitchers of any size—or wine or hard liquor in packages of any size—is not rationally related to the state's legitimate interests in sobriety, public safety, consumer protection, etc. If The Crafted Keg proves its allegations, it would be entitled to judgment on the merits. Therefore dismissal is improper.

Indeed, the Motion to Dismiss implicitly admits that The Crafted Keg has alleged a plausible cause of action, when it tries to argue the merits—contending that the challenged law satisfies constitutional standards because "consumers are significantly more likely to attempt to consume an amount of beer greater than 32 ounces, but less than 128 ounces at one sitting." Dkt. 4, Defendants' Motion to Dismiss at 5. That is, of course, an assertion of *fact* on which The Crafted Keg is entitled to discovery. A motion to dismiss is not a proper place to make that determination, and the Court is prohibited from assuming the truth of the Defendants' bald assertion. The Court must presume the truth of the *plaintiff's* allegations, and it cannot determine the merits on a 12(b)(6) motion.

If the allegations in The Crafted Keg's Verified Complaint raise a plausible inference that the challenged law lacks a rational basis, the court should reject the motion to dismiss, and allow The Crafted Keg to prove its allegations, notwithstanding the fact that proving those allegations is

an uphill battle. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556; *Young Apartments*, 529 F.3d at 1038; *Milburn*, 734 F.2d at 765. The Crafted Keg is entitled to its day in court.

II
State's Beer Packaging Scheme Is Arbitrary, Not Connected to Rational Basis the State Proffers, And Not Grounded in Realities of Alcohol Consumption or Realities the Scheme Creates

The Growler Ban is arbitrary in the way it limits beer while not limiting the packaging sizes of other alcoholic beverages. *See* Dkt. 4, Defendants' Motion to Dismiss at 4. It is not grounded in the reality of alcohol consumption. Dkt. 1, Plaintiff's Verified Complaint ¶¶ 3, 15-17, 33-35. And it is designed not to achieve the proffered reason for the law, but rather to favor large corporations over small craft brewers. *Id.* ¶ 3. If The Crafted Keg can present evidence to buttress these assertions, then the Court would have to strike down the law as irrational. But for now, the Court should deny the State's motion to dismiss so as to allow The Crafted Keg to proffer the evidence it can marshal to support its claims in the complaint.

A. Law Does Not Advance, And Is Not Connected To, The Cause of Stopping Excessive Drinking

The Government contends that allowing 32 oz. containers, and 128 oz. containers, of beer, but not containers between those sizes, is rational because it prevents "intoxication and its collateral evils," Dkt. 4, State's Motion to Dismiss at 5, and because it "encourage[s] alcoholic beverage vendors to implement responsible policies for serving and promoting alcoholic beverages to customers and prevent[s] the over-consumption of alcoholic beverages to customers while on the licensed premises of vendors." *Id.* at 12. But the challenged law—under which a patron is not only still free to purchase 128 oz. packages or multiple 32 oz. packages of beer, but also wine or hard liquor in any size, simply does not rationally relate to preventing excessive consumption of beer.

And this Court cannot rubber-stamp the state's claims without allowing discovery on its contentions. *Cf. Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000) ("rational basis review is not a rubber stamp[.]").

Not only does the law allow a patron to buy two or more 32 oz. containers of beer, or a gallon (128 oz.), but a beer consumer can buy a six pack, or twelve pack, or even a case of beer at any Florida supermarket. These packages will all contain 64 ounces or more of beer. *See* Dkt. 1, Plaintiff's Verified Complaint ¶ 33. Banning a 64 oz. growler, while allowing a 128 oz. jug and other containers that can hold up to and including 64 ounces, does not rationally advance the cause of discouraging excessive drinking.

When the purported basis for a law is not and cannot reasonably be furthered by the law at issue, that law fails the rational basis test. In *Craigmiles*, the state had a legitimate interest in regulating how the remains of the deceased were disposed, but that interest was not rationally advanced by requiring people who only sold coffins—but did not deal with human remains or officiate at funerals—to undergo expensive and time-consuming training and education to obtain a license. Likewise here, discouraging excessive drinking is a legitimate state interest, but the Growler Ban does not discourage excessive drinking, since it allows customers to buy 64 ounces of beer, or more, in different containers.

The *Merrifield* case is particularly on point. In *Merrifield*, the Ninth Circuit considered a regulation that required people engaged in pest control but did not use pesticides to go through years of training in handling pesticides, and pass a test regarding their knowledge of pesticides. 547 F.3d at 990-92. The law only applied to pest control technicians who addressed mouse, rat, or pigeon

infestations, and did not apply to technicians who dealt with any other type of pest, such as seagulls or squirrels. *Id*. at 981-82.

The Ninth Circuit found the law unconstitutional under the rational basis test because the exemptions to the law contradicted the rationale for the law itself. "We cannot simultaneously uphold the licensing requirement under due process based on one rationale and then uphold . . . the exemption based on a completely contradictory rationale," the court noted. *Id.* at 991. While pest control obviously "implicates a state's health and public safety interest," the exemption "undercut[] the principle of non-contradiction," and therefore "[could] not be said to rest on a rational basis." *Id.* In short, "while a government need not provide a perfectly logically solution to regulatory problems, it cannot hope to survive rational basis review by resorting to irrationality." *Id*.

Like the unconstitutional licensing scheme in *Merrifield*, the Growler Ban contains so many exemptions that it cannot be said to rationally further the purposes of sobriety. Allowing customers to buy any number of 32 oz. containers, or 128 oz. containers, of beer, or any size container of other alcoholic beverages, simply does not promote the interest that the Growler Ban is supposedly designed to promote. It is no different than requiring some pest controllers to obtain a license, while not acquiring other pest controllers to obtain that same license. It is akin to a speed limit of 65 miles per hour to promote public safety, which nevertheless allows drivers to go at speeds above 100 miles per hour, or to ignore the speed limit entirely so long as they drive sports cars.

The State admits that it allows *other* alcoholic beverages to be sold in 64 oz. containers. *See* Dkt. 4, Defendants' Motion to Dismiss at 4; see § 564.05, Fla. Stat. A wine consumer can purchase 64 oz. of wine in a bottle, but the beer consumer cannot purchase 64 oz. of beer in a growler. *Id.* That disparate treatment is simply arbitrary. Wine has an alcohol content of as much as 17 percent,

see Jennifer Frazer, *Wine Becomes More Like Whisky As Alcohol Content Gets High*, Scientific American, Feb. 27, 2014,[2] and under federal regulations be as rich as 24 percent alcohol. *See* 27 CFR 24.10. Beer, on the other hand, averages between 3 and 6 percent. *See* Charles W. Bamforth, *Beer: Health and Nutrition* 72-73 (2004).

Also, a Florida consumer may purchase *hard liquor*—such as Bacardi 151 rum, which is 75.5 percent alcohol[3]—in any size, without restriction. Banning the sale of 64 oz. growlers of beer while allowing 64 oz. containers of wine, as well as any number of 32 oz. or 128 oz. containers of beers is irrational—or so The Crafted Keg is entitled to prove after discovery. *See Wroblewski*, 965 F.2d at 459-60.

Again, The Crafted Keg is not asking this Court to rule on the merits at this stage—indeed, it is not proper to determine the truth of the allegations at the motion to dismiss stage. But as the foregoing shows, The Crafted Keg has stated a more than plausible case that the Growler Ban is not rationally related to promoting sobriety or discouraging excessive drinking. Instead, the law arbitrarily precludes the sale of the industry-standard size growler container, and hurts the bottom-line for all businesses in the craft beer business, arbitrarily and indefensibly.

B. The 64 oz. Prohibition Is Not Grounded In The Reality of Alcohol Consumption

Tellingly, the Growler Ban is not based in the reality of alcohol consumption. The State submits—again, without any evidence—that "if individuals . . . buy beer in bottles or jugs of over

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[2]*Available at* http://www.scientificamerican.com/article/wine-becomes-more-like-whisky-as-alcohol-content-gets-high/ (last visited Dec. 17, 2014).

[3]Kathy Flanigan, *The Proof Is In The Absinthe*, Milwaukee Journal Sentinel (10/15/2007) (noting that the now-legal absinthe, at 62 percent alcohol content, is comparable to Bacardi 151 at 75.5 percent), *available at* http://www.jsonline.com/entertainment/29322559.html (last visited Dec. 17, 2014).

32 oz., but less than one gallon, they may assume that it is reasonable for an individual to drink such bottles or jugs. Further, they [the beer drinker] could honestly say, if asked by a spouse, friend, *or police officer* about their drinking, that they had only had 'one beer.'" Dkt. 4, Defendant's Motion to Dismiss 13 (emphasis added).

The Crafted Keg is entitled to discovery to challenge this factual claim. In particular, it should have the opportunity to present an expert on law enforcement to testify as to whether a reasonable Florida law enforcement officer would stop a drunk driver who had consumed 64 oz. of beer, but then would be *fooled* by the drunk driver when he says that he only had "one beer" despite having consumed *a half-gallon* of beer.

The State's argument also fails to apprehend the nature of beer drinking by way of growler. The consumer who buys or re-fills a growler generally does not swig the beer, but pours the beer into a glass, or shares the beer with a friend. *See* Clarke Canfield, *Growlers Roaring As A New Old Way to Buy Beer*, USA Today (10/19/11)[4] ("What's nice about the growler is you pour it into the glass, and that's the proper way to enjoy all that a beer has to offer for flavor and aroma"). Or, the consumer brings the beer home in the closed, sealed container to consume over the course of days, just as a consumer might buy a six-pack of beer and bring it home to drink over the course of days. *Id.* This, too, is a matter on which The Crafted Keg is entitled to obtain discovery and introduce evidence in order to disprove the state's purported rational basis for the law. *See Wroblewski*, 965 F.2d at 459-60.

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[4]*Available at* http://usatoday30.usatoday.com/news/health/wellness/fitness-food/story/2011-10-19/Growlers-roaring-as-a-new-old-way-to-buy-beer/50823610/1 (last visited Dec. 17, 2014).

The amount of beer in the prohibited growler—64 oz.—is, as noted above, comparable to the traditional six-pack of 12 oz. beers. Just as the average consumer does not drink all six beers in a sitting, and just as the average consumer of wine does not drink a half-gallon in a sitting, the average consumer does not drink 64 oz. of beer in a sitting, but rather drinks it over a few days. *Id*. ("people buy growlers at brewpubs, where they're filled with beer and capped. After they're brought home, the beer will stay good for two to five days once opened."). The state fails to apprehend the way the growler bar business model works, as reflected by the argument about the drinking of "one beer" when drinking a 64 oz. growler. That gives the Court all the more reason at this time to hold that The Crafted Keg is entitled by Rule 12(b)(6) to show by way of evidence that this law is irrational and does not rationally relate to any legitimate government.

C. The Growler Ban Does Not Rationally Promote Sobriety, But Only Favors Large Corporate Beer Producers Over Small Craft Brewers

The Crafted Keg contends that the Growler Ban is unconstitutional because it is not rationally related to the public interest in sobriety, but instead favors one business interest—the large corporations that can package beers in cans and bottles and the like—against legitimate competition by smaller businesses that cannot afford the costs that moving to that system of packaging would require. *See* Dkt. 1, Plaintiff's Verified Complaint ¶ 2. The Florida Supreme Court has held that regulations that operate to the detriment of one specific sector of the alcohol industry (beer and wine) and to the benefit of another sector (liquor) are unlawful exercise of the police power. *See Castlewood Int'l Corp. v. Wynne*, 294 So.2d 321, 323 (Fla. 1974) (statute requiring that all sales of beer and wine to retail licensees be for cash only is unconstitutionally discriminatory as it treats beer and wine vendors differently from liquor distributors without a rational basis).

Likewise, federal courts have repeatedly found that economic regulations fail the rational basis test when they do not rationally advance a public interest, but are designed solely to favor certain business interests at the expense of others, similarly situated. *See, e.g.*, *Merrifield*, 547 F.3d at 991 (occupational licensing law failed rational basis review because the law was designed to favor economically certain constituents at the expense of others similarly situated); *Craigmiles*, 312 F.3d at 228-29 (striking down casket retailer licensure requirement has no rational basis but rather exists only to erect barrier to competition for funeral directors); *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 701-02 (E.D. KY 2014) (certificate of need law that creates barrier of entry of new moving company into moving business industry violates due process and equal protection because law favored already-established movers and limited competition).

The challenged law favors the big beer industry because a popular way to purchase beer and take it home is to buy it by the six pack. A traditional six-pack is 72 ounces of beer, i.e. six 12 oz. cans. The growler, at 64 oz., is roughly equivalent to that most popular packaging for beer. Should the 64 oz. growler be allowed, the big beer industry worries that the craft beer industry will compete more effectively against their businesses. *See* Ari Bargil and Claudia Murray Edenfield, *Florida's Dirty Dozen: Twelve Repealers That Can Boost Business, Create Jobs, and Change Florida's Economic Policy for the Better*, Institute for Justice at 23 (Feb. 2014)[5] (noting that industry insiders stand to lose market share if growler is made legal).

As Bargil and Edenfield explain, "[o]ffering growlers for sale is the perfect way for local and small-scale breweries to capitalize on America's exploding demand for craft beer." *Id*. at 22.

[5]*Available at* http://www.ij.org/images/pdf_folder/economic_liberty/fl_repealers/floridas-dirty-dozen.pdf (last visited Dec. 17, 2014).

Granting the State's motion and leaving the ban in place would act to provide a judicial imprimatur to the State's unconstitutional decision to favor one business interest over another. *See Castlewood*, 294 So. 2d at 323. The Crafted Keg is entitled to prove that statute has no rational basis where it has alleged that the Growler Ban was designed to favor the larger corporate beer industry interest.

III

Other Arguments For Dismissal Are Not Persuasive

Although the State focuses primarily on its improper attempts to address the merits of The Crafted Keg's allegations in its 12(b)(6) motion, it also makes a number of brief secondary arguments for dismissal. None of them are persuasive.

A. Complaint Is Not a Shotgun Pleading

The State's assertion that the Complaint is a shotgun pleading is without merit. A shotgun pleading typically contains many counts that incorporate *every* preceding paragraph in a way that makes it virtually impossible for the opposing party to understand what factual allegations apply to what count. *See, e.g., Anderson v. District Bd. Of Trustees of Cent. Florida Community College*, 77 F.3d 364, 366 (11th Cir. 1996). This is not a shotgun complaint. This is a simple two-count, 13-page complaint. Its allegations do not incorporate every paragraph which preceded them, and the State never asserts that it cannot understand the claims made in the Complaint. If the State found it "virtually impossible" to respond, then the State should have filed a motion for more definite statement. *Id*. ("a defendant faced with a [shotgun] complaint . . . is expected to move the court, pursuant to Rule 12(e), to require the plaintiff to file a more definite statement."). Not only did the State fail to so move the Court, in fact the State argues against the merits of the allegations in the Complaint.

B. That State May Prohibit Alcohol Sales Altogether Does Not Mean State Can Regulate the Industry Irrationally

The State contends that, after Prohibition was repealed, the federal government delegated the regulation of alcohol to the states via the Twenty-first Amendment. *See* Dkt. 4, Defendants' Motion to Dismiss at 5. The state relies on *Granholm v. Heald*, 544 U.S. 460 (2005), for this proposition, but the State misreads *Granholm*.

In *Granholm*, the Court explicitly acknowledged that state laws that violate the Constitution, including the equal protection clause and the due process clause, are *not* immunized by the Twenty-first Amendment. 544 U.S. at 486 (citing *Craig v. Boren*, 429 U.S. 190, 204-09 (1976), for proposition that state alcohol regulation may run afoul of equal protection clause, and *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), for proposition that state alcohol regulation may run afoul of due process clause). Controlling Circuit precedent also sets out that state regulations of alcohol industry must have a rational basis to pass muster under the Constitution. *See Parks v. Allen*, 426 F.2d 610, 613 (5th Cir. 1970)[6] (the Fourteenth Amendment allows states wide discretion to regulate alcohol, but this regulation must have a reasonable basis); *see also Castlewood Int'l Corp.*, 294 So. 2d at 323 (state's alcohol industry regulation is subject to both due process and equal protection clauses).

Obviously the state has broad latitude to regulate the alcohol industry, but that does not mean it can do so in an arbitrary, discriminatory, and irrational manner. *Parks*, 426 F.2d at 613; *Castlewood Int'l Corp.*, 294 So. 2d at 323. In *Nebbia v. New York*, 291 U.S. 502 (1934), the

[6]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) *(en banc)*, the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Supreme Court—while granting states power to regulate industries in whatever way is rationally related to a legitimate government interest—nevertheless declared that the state could not enforce regulations that were "arbitrary or discriminatory," *id.* at 536, or that were "unreasonable or . . . without relation to the purpose" the law purported to serve. *Id.* at 530.

That is what The Crafted Keg alleges here. The Crafted Keg acknowledges that the State may regulate the alcohol industry, but the Growler Ban is arbitrary and discriminatory, and thus violates the Fourteenth Amendment. Or so The Crafted Keg should be allowed to prove via evidence.

C. State's Argument That The Crafted Keg Has No Protectible Due Process Interest Is Without Merit

Finally, despite spending most of its brief arguing that it has a rational basis for the Growler Ban and improperly attempting to justify it on a factual basis, the State also makes a curious argument that The Crafted Keg has no property or liberty interest in selling beer at all and thus is entitled to absolutely no constitutional due process protection at all. *See* Dkt. 4, Defendants' Motion to Dismiss at 7-9. Federal and state courts have already rejected that argument. *See Constantineau*, 400 U.S. at 439 (statute allowing state to label resident an excessive drinker and prohibit sale of alcohol to that resident violates due process despite fact that law springs from state's police power to regulate alcohol); *Castlewood*, 294 So. 2d at 323-24 (once state decides to allow sale of alcohol, it cannot regulate the industry arbitrarily or discriminatorily). Indeed, the federal Constitution protects the right to pursue a common occupation by running a business, free of unreasonable government interference. *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *cf. Craig*, 429 U.S. at 194-95 (bar owner could challenge discriminatory and arbitrary regulation because she "incurr[ed] a direct economic injury through the constriction of her buyers' market.").

In *Constantineau*, Wisconsin put in place a statute that allowed the police chief, or other local government leaders, to post a notice prohibiting the sale or gift of liquor to a local resident known to be an excessive drinker. 400 U.S. at 434. In considering the due process claim of a labeled resident who objected to the label and the signs posted at liquor stores to identify her, the Supreme Court acknowledged that "the police power of the States over intoxicating liquors was extremely broad." *Id.* at 436. Yet it held that those police powers were subordinate to the due process clause. *Id.* Likewise here, the State's police powers to regulate the alcohol industry are indeed broad, but not so broad as to exempt from the Constitution the State's enforcement of laws that are arbitrary or discriminatory and thus violate a business's right to pursue a common occupation, protected by the Fourteenth Amendment.

Similarly, in *Castlewood*, the Florida Supreme Court reviewed a lower court decision that dismissed due process and equal protection rational basis claims predicated on the disparate treatment afforded beer and wine sellers versus liquor sellers. Beer and wine sellers were required by law to purchase beer and wine for retail sale by cash only, while liquor sellers did not have the same handcuffs and could buy on credit. 294 So. 2d at 323.

The State argued—as it does here—that the plaintiff had no right to sell beer and wine, just a privilege the State could revoke, thus rendering the plaintiff without any protectible interest. *Id.* The Florida Supreme Court rejected that argument *by quoting U.S. Supreme Court precedent*:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes on his constitutionally protected interest. . . .

Id. (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). In other words, once the State decided that it would allow the sale of beer, wine, and liquor in the State of Florida, the State was required to do so in a way that complies with the Constitution, including the due process and equal protection clauses. That is why the Court in *Castlewood* concluded it was unconstitutional to allow liquor sellers to purchase liquor on credit, while prohibiting beer and wine sellers from buying beer and wine on credit. *Id.* If the State's argument that The Crafted Keg has no protectible right to sell beer were true, then the Florida Supreme Court would have rejected Castlewood's appeal. The Florida Supreme Court recognized, *as the federal Constitution required it to*, that even the regulation of the alcohol industry must bend to the requirements of the equal protection and due process clauses of the Fourteenth Amendment. *Id*.

CONCLUSION

Since the allegations in The Crafted Keg's Verified Complaint raise a plausible inference that the challenged law lacks a rational basis, the Court should reject the motion to dismiss, and allow The Crafted Keg to prove its allegations, notwithstanding the fact that proving those allegations is an uphill battle. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556. The motion to dismiss should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 17, 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on the following counsel of record by email, via transmission of Notices of Electronic Filing generated by CM/ECF:

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