



PACIFIC LEGAL FOUNDATION

September 7, 2016

Alabama Alcoholic Beverage Control Board
Administrative Procedures Secretary
2715 Gunter Park Drive West
Montgomery, AL 36109

VIA EMAIL admin@abc.alabama.gov
AND FIRST-CLASS MAIL

Re: Alabama Administrative Code 20-X-9-.04, (1) (b) (3)

IDENTITY OF PACIFIC LEGAL FOUNDATION

Pacific Legal Foundation (PLF) appreciates the opportunity to comment on the Alabama Alcoholic Beverage Control Board's proposed changes to its craft brewery laws. PLF is a non-profit organization that litigates issues affecting the public interest, including important issues of economic liberty and free enterprise. Founded in 1973, PLF is the oldest and most experienced public interest legal foundation of its kind. PLF's Economic Liberty Project is devoted to protecting individuals' right to earn a living free of unreasonable governmental interference. To this end, PLF attorneys engage in litigation, write amicus briefs, and provide legislative testimony regarding the constitutionality of occupational licensing laws. PLF has participated in numerous lawsuits challenging anti-competitive laws that restrict entrepreneurs' right to earn a living, including laws that affect craft breweries. *See, e.g., The Crafted Keg, LLC v. Lawson*, 2014 WL 5462384 (S.D. Fla.) (PLF lawsuit challenging Florida's anti-competitive ban on growlers, which resulted in legislative repeal of the challenged law).

I. Introduction

The craft beer industry is thriving, and it has not only been at the forefront of innovative new beverages for imbibing consumers—like coffee and grapefruit flavored beer¹—it also offers

¹ In addition to crafting interesting new beverages, craft breweries have crafted particularly catchy names, like “Hops of Wrath,” “Hopsickle,” “Hop Drop ‘n Roll,” “Hopivore,” “Aurora Hoppyalis,” “Hoptimum,” “Hopsecutioner,” and “Notorious H.O.P.” *See Sara Randazzo, Hoppportunity Cost: Craft Brewers Brawl Over Catchy Names as Puns Run Dry*, Wall St. J., July 10, 2016, <http://www.> (continued...)

economic opportunity for entrepreneurs, and increased tourism for cities that support it. Positive legislative changes have contributed to the success of craft breweries, but several anti-competitive laws remain on the books. Though often passed under the guise of protecting the public, these laws stifle economic opportunity for no other reason than that big, politically powerful businesses do not want to compete with them.

The ABC's proposed rule requires craft brewers to collect and safeguard the personal information—including the name, address, date of birth, and telephone number—of anyone who wants to buy beer for off premise consumption. This law imposes an unnecessary burden on industrious brewers, who must persuade their customers to divulge private information just to buy a beer. And because the brewers must maintain the information safely, it drives up the cost for craft brewers to earn a living by providing honest services to the public.

II. Barriers to Economic Freedom in the Alcoholic Beverage Industry

Craft brewing belongs to an industry with a long history of anti-competitive laws. Chiefly as a result of these laws, just recently the beer market was dominated by a few, large companies.² In 1979, there were only forty-four breweries operating in the entire United States.³ As a result, consumers had few choices when filling up their coolers. During that time, “[o]nly light lager appeared on shelves and in bars, and imported beer was not a significant player in the marketplace.”⁴

With the gradual loosening of restrictive laws that had formerly discouraged upstart small breweries, craft breweries have proliferated. States like Ohio decreased barriers to entry by reducing the license fee for small breweries.⁵ Others, like North Dakota, Wyoming, and Arizona, raised the

¹ (...continued)

[wsj.com/articles/hopportunity-cost-craft-brewers-brawl-over-catchy-names-as-puns-run-dry-1468170639](http://www.wsj.com/articles/hopportunity-cost-craft-brewers-brawl-over-catchy-names-as-puns-run-dry-1468170639).

² See Shirley Chen, *Craft Beer Drinkers Reignite the Wine Wars*, 26 Loy. Consumer L. Rev. 526, 539-40 (2014) (noting the lack of diversity that preceded the rise of craft styles); David R. Scott, *Brewing up a New Century of Beer: How North Carolina Laws Stifle Competition in the Beer Industry and How They Should Be Changed*, 3 Wake Forest J.L. & Pol’y 417, 417 (2013) (same).

³ Eric Hawkins, *Great Beer, Good Intentions, Bad Law: The Unconstitutionality of New York’s Farm Brewery License*, 56 B.C. L. Rev. 313, 349 (2015).

⁴ Brewers Ass’n, *History of Craft Brewing*, <http://perma.cc/N3T8-XN92>.

⁵ Chris Crowell, *Ohio Passes Craft Brewing-Friendly Legislation, AB InBev Upset*, *Craft Brewing* (continued...)

formerly harsh production caps that limited growth.⁶ Upon signing such a bill, Arizona Governor Doug Ducey noted that, “Arizona has a booming craft beer industry and it’s growing every day. I want to ensure that it continues to thrive, unimpeded by overly burdensome regulations.”⁷ North Carolina has taken an explicit interest in promoting the industry, with the General Assembly explaining that craft brewers “could serve as an economic engine throughout North Carolina and create jobs and serve as a tourist draw.” Due to positive developments in state law, there are now over 4,200 craft breweries in the country.⁸ In 2012 alone, craft breweries contributed almost \$34 billion to the national economy, and created over 360,000 jobs nationwide.⁹

Despite these positive steps in the direction of economic freedom, barriers to entrepreneurship remain. Under the Constitution, laws that restrict the ability of people to earn a living, or impede their ability to enter an industry, must be related to protecting public health or safety.¹⁰ Yet these laws are often motivated by anti-competitive forces, rather than legitimate government concerns.¹¹

For example, for many years, Florida law prohibited craft brewers from offering their beverages in the standard half-gallon container—called a “growler.” Though presented as a means of curbing drinking, that rationale was undercut by the fact that two, or even four, quarter-gallon jugs were

⁵ (...continued)

Bus., Apr. 24, 2013, <http://perma.cc/8N5Q-MUNH>.

⁶ Ryan van Velzer, *Microbrew Laws Rewritten as Demand for Craft Beer Grows*, Boston Globe, Apr. 1, 2015, <https://www.bostonglobe.com/business/2015/04/01/states-rewrite-microbrew-laws-demand-for-craft-beer-grows/1RRaspPQ7vg3FXD9B7cJiO/story.html>.

⁷ *Id.*

⁸ See Brewers Ass’n, *Number of Breweries*, <https://www.brewersassociation.org/statistics/number-of-breweries/>.

⁹ See Brewers Ass’n, *Economic Impact Data*, <https://www.brewersassociation.org/statistics/economic-impact-data/>.

¹⁰ See, e.g., *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) (“mere economic protectionism for the sake of economic protectionism is irrational” and violates due process).

¹¹ Studies show that there is no correlation between several of these laws and public health rationales, like reducing per capita consumption. See, e.g., James C. Cooper & Joshua D. Wright, *Alcohol, Antitrust, and the 21st Amendment: An Empirical Examination of Post and Hold Laws*, 32 Int’l Rev. L. & Econ. 379 (2012) (Post and hold laws have no appreciable effect on drunk driving, but instead foster collusion to the detriment of consumers.).

perfectly legal. The big brewers' real concern was that a standard growler contains about the same amount of beer as a six-pack, and thereby offers customers an alternative to six packs, and a reason to buy beer for later consumption from craft breweries. The growler ban amounted to crony capitalism, stifling small businesses solely in order to protect big industry players from legitimate competition. Following a PLF civil rights lawsuit on behalf of Florida brewery, The Crafted Keg, the Legislature unanimously passed a bill to get rid of the irrational restriction. When Governor Rick Scott signed the bill, he explained: "By making the sale of 64 ounce growlers legal in Florida, we are eliminating another burdensome regulation and allowing more Florida businesses to succeed."¹²

Anti-competitive laws like Florida's growler ban abound.¹³ Fortunately, many states—including Alabama¹⁴—have recently made legislative changes removing some of these barriers to entry. The economic impact of such changes on states can be staggering. Craft brewers contributed \$438 million to the Alabama economy in 2014.¹⁵ But the proposed rule threatens to undo some of that good.

III. The Proposed Rule Unnecessarily Threatens Craft Breweries' Economic Freedom

Alabama craft brewers anticipate that the proposed rule will be a "logistical nightmare."¹⁶ The rule would require small companies to come up with a quick and efficient method of recording thousands of patrons' personal information, and storing it in a fashion that protects their privacy. The undeniable result is to impose additional overhead costs on craft brewers, but not their bigger counterparts. And it will increase wait times at these small breweries, which have a more limited capacity. Because they often lack established distribution lines, small breweries routinely have lines

¹² *Governor Scott Signs Bill Legalizing 64 Oz. Growlers*, May 14, 2015, Florida Governor website, <http://www.flgov.com/2015/05/14/governor-scott-signs-bill-legalizing-64-oz-growlers/>.

¹³ See, e.g., Eric Hawkins, *Great Beer, Good Intentions, Bad Law: The Unconstitutionality of New York's Farm Brewery License*, 56 B.C. L. Rev. 313, 313 (2015).

¹⁴ A notable example is Alabama's decision to allow craft breweries to sell their beer directly to qualified buyers. Historically, big manufacturers used their market power to prevent distributors from carrying smaller brands in their portfolio. Allowing on-site distribution gives small brewers a chance to compete. Moreover, on-site sales contribute to solidifying the consumer relationship, and increasing overall sales.

¹⁵ See *Economic Impact Data*, *supra* n.9.

¹⁶ Nick Hudson, *Scary New Rule Proposed by ABC on Growler Sales*, Free the Hops Blog, Aug. 2, 2016, <http://www.freethetehops.org/blog/2016/08/scary-new-rule-proposed-by-abc-on-growler-sales/>.

out the door, and consumers report waiting hours to get their hands on the newest brew.¹⁷ Adding an additional administrative requirement like the proposed rule will exacerbate that problem, deterring potential customers.

Moreover, many consumers will be uncomfortable divulging personal information—to be stored and handed over to the government—simply to drink a beer. In the wake of data breach incidents that have affected even the biggest retailers,¹⁸ many will choose to buy beer outside of craft breweries instead of risking exposure of their personal information.

Thus, the proposed rule gives a competitive edge to big producers and the establishments who sell their products—which have no similar rule imposed on them. But any *public* benefits are doubtful. While ABC has not stated its rationale for the proposed rule, some have surmised that the rule will be used to enforce the volume limits on sales.¹⁹ Collecting private information is a particularly invasive way to go about that goal, especially when compared to other industries that have limitations on purchases, but lack an analogous requirement.

For example, states do not require tobacco vendors to obtain the names and addresses of anyone who buys cigarettes, even though vendors cannot sell to children. Sellers of products that contain ivory—which have strict limitations on transfer—are not required to relinquish the names of purchasers so that the government can monitor future sales. States that ban ticket scalping do not require venues to record the information of the primary buyers. Perhaps most relevant here, Alabama does not require non-craft restaurants or bars to collect and maintain the personal information of their customers, even though those establishments can only sell to someone who is over 21, and to someone who is not already intoxicated. While many products have limits on who may buy them, and on how much one can buy, requiring consumers to disclose personal information in order to enforce those limits is unusual. Instead, states typically rely on sellers to obey the law, and use normal enforcement mechanisms, like investigations, to find violations. The proposed rule treats beer like pseudoephedrine—an over-the-counter drug that has purchase limits. The government requires pharmacies to collect personal information from purchasers of pseudoephedrine because of the drug's relationship to methamphetamine production. Not since Prohibition has buying beer been considered so vile.

¹⁷ Jon Urch, *The Phenomenon of Beer Wait Lines*, The Drinking Classes Blog, Apr. 10, 2016, <http://www.thedrinkingclasses.com/phenomenon-beer-lines/>.

¹⁸ Ahiza Garcia, *Target Settles for \$39 Million over Data Breach*, CNN Money, Dec. 2, 2015, <http://money.cnn.com/2015/12/02/news/companies/target-data-breach-settlement/>.

¹⁹ See, e.g., Jay Reeves, *Proposed Alabama Beer Rule Prompts Privacy Concerns*, Associated Press, Aug. 5, 2016, <http://bigstory.ap.org/article/90572e57bbdc4a0b8fb2ba732d3fb962/proposed-alabama-beer-rule-prompts-privacy-concerns>.

The proposed rule is less tailored to enforcing purchase limitations than it is to economic protectionism. The natural result of the law will be to drive up compliance costs for small businesses, and to scare away consumers who either do not want the hassle or do not like the idea of giving up their personal information simply to buy a beer. Such protectionism is not only unfair, it is contrary to the entrepreneurial spirit underlying the craft brewery movement.

CONCLUSION

PLF believes that the proposed rules impose an anti-competitive burden on craft brewers who want to provide honest services to the public, and a disincentive to the consumers who want to take advantage of those services. The proposed rule is bad policy, and the Board's goals could be served by a less invasive and burdensome method of enforcement..

Sincerely,



ANASTASIA P. BODEN
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