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SUPREME COURT OF TEXAS
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No. 21-1045

In the Supreme Court of Texas

TEXAS DEPARTMENT OF STATE HEALTH SERVICES; JOHN HELLERSTEDT, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES,

Appellants,

v.

CROWN DISTRIBUTING LLC; AMERICA JUICE CO. LLC; CUSTOM BOTANICAL DISPENSARY, LLC; AND 1937 APOTHECARY, LLC,

Appellees.

On Direct Appeal from the
345th District Court, Travis County

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STATEMENT OF THE CASE

Nature of the Case	Challenge to the constitutionality of Texas Health and Safety Code § 443.204(4) ("the Statute") and the validity of 25 Texas Administrative Code § 300.104 ("the Rule").
Parties	Appellants/Defendants – "DSHS" or "Defendants" Texas Department of State Health Services; Commissioner John Hellerstedt Appellees/Plaintiffs – "The Hemp Companies" Crown Distributing, LLC; America Juice Co. LLC; Wild Hempettes LLC Custom Botanical Dispensary, LLC; and 1937 Apothecary, LLC
Trial Court	345th Judicial District Court, Travis County Hon. Lora J. Livingston.
Disposition	After a temporary injunction was upheld in part on appeal, the trial court held a trial on the merits. The trial court declared the Statute unconstitutional, declared the Rule invalid in its entirety, and permanently enjoined DSHS from enforcing either one. CR.664–66. Defendants sought review on direct appeal.

JURISDICTIONAL STATEMENT

The Court has jurisdiction under Texas Government Code § 22.001(c) because DSHS appeals an order granting a permanent injunction on the ground that a Texas statute is unconstitutional.

ISSUES PRESENTED

After the 2018 Farm Bill legalized hemp production nationwide, the Texas Legislature enacted statutes to regulate consumable hemp products in Texas. The Legislature directed the Department of State Health Services to adopt rules, including one prohibiting "the processing or manufacturing of a consumable hemp product for smoking." Tex. Health & Safety Code § 443.204(4).

Several hemp companies filed this lawsuit, raising two issues of statewide importance:

1. Does the directive to adopt a rule that prohibits "the processing or manufacturing of a consumable hemp product for smoking"—a product that is otherwise legal to import, sell, possess, and consume—violate the due course of law provision of the Texas Constitution?
   See Tex. Health & Safety Code § 443.204(4) ("the Statute").

2. Did DSHS exceed its authority by going beyond the express language of its statutory mandate by prohibiting not just "processing or manufacturing," but also the "retail sale" and "distribution" of consumable hemp products for smoking?
   See 25 Tex. Admin. Code § 300.104 ("the Rule").

In this Court, the State concedes that DSHS exceeded its authority (Issue 2) and, for the first time in its merits brief, raises a new jurisdictional issue:

3. Do the Hemp Companies—who process and manufacture smokable hemp products—have standing to challenge the constitutionality of the Statute and validity of the Rule that prohibit this activity?

INTRODUCTION

Cannabis policy reform is enjoying its heyday as the federal government and states across the nation update their laws. After the 2018 Farm Bill relaxed federal restrictions on hemp cultivation, the Texas Legislature enacted laws to facilitate a Texas hemp economy. Yet while *importing*, *selling*, *buying*, and *using* smokable hemp is permissible, somehow *manufacturing* or *processing* the product ended up banned. This case addresses the constitutionality of a statute that goes too far.

The State defends an irrational law by liberally conflating cannabis products. But marijuana and smokable hemp are as different as red wine and grape juice. Hemp is not intoxicating and enjoys myriad practical uses, including for smoking.

Although this case arises in the budding hemp industry, it transcends any industry. It is fundamentally about constitutional principles of limited government. A Legislature's power to regulate economic activities is broad, but not limitless. Economic regulations must rationally relate to a legitimate government interest without becoming oppressively burdensome.

The manufacturing ban on smokable hemp in this case blows by those limits. It was correctly declared unconstitutional in the trial court, and Texas should remain a place where businesses operate without fear of prohibitions on economic activity that are arbitrary and irrational. The judgment should be affirmed.

STATEMENT OF FACTS

The plant *Cannabis sativa* L. has been cultivated for centuries, both as a psychoactive drug with high levels of delta-9 tetrahydrocannabinol (THC) (marijuana) and as a non-psychoactive fiber with low-levels of THC (hemp).[1]

Because marijuana and hemp come from the same plant species, they are sometimes conflated or misunderstood, even though they are genetically distinct.[2] The key difference is that hemp derives from cannabis parts that lack any significant level of THC and thus is not intoxicating if ingested or inhaled.[3]

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[1] Renée Johnson, Cong. Rsch. Serv., RL32725, at 1-2, 9, Hemp as an Agricultural Commodity ("CRS Report") (2013) *available at* https://www.everycrsreport.com/files/20130724_RL32725_b2a91097ba168413aa8806f6bc5215fa20ee97de.pdf.

[2] Thomas J. Ballanco, *The Colorado Hemp Production Act of 1995: Farms and Forests Without Marijuana*, 66 U. Colo. L. Rev. 1165, 1166 (1995) (*quoting* Julie Deardorff, Clothing Industry Going to Pot, Chi. Trib., Jan. 24, 1995, at A12)).

[3] *See* Cong. Rsch. Serv., R44742, at 3, Defining *Hemp:* A Fact Sheet (2019), *available at* https://crsreports.congress.gov/product/pdf/R/R44742 (explaining that hemp falls below THC for threshold cannabis to have intoxicating potential).

Hemp has a storied history. The colonists grew hemp to make maritime rope.[4] And founding fathers George Washington and Thomas Jefferson grew hemp and debated (among other things) hemp cultivation.[5]

Until the mid-1800s, when cotton overtook it, hemp was widely grown and used throughout the United States.[6] During World War II, the "Hemp for Victory" campaign encouraged farmers to grow as much as possible to support war efforts.[7]

Hemp (sometimes called "industrial hemp") is a versatile material that can be used to make many consumable and non-consumable products:[8]

[4] Lawrence J. Trautman et. al., *Cannabis at the Crossroads: A Transdisciplinary Analysis and Policy Prescription*, 45 Okla. City U. L. Rev. 125, 135 (2021).

[5] Thomas J. Ballanco, *The Colorado Hemp Production Act of 1995: Farms and Forests Without Marijuana*, 66 U. Colo. L. Rev. 1165 (1995) (quoting Note from President George Washington to Mt. Vernon's gardener (1794) reprinted in Chris Conrad, Hemp: Lifeline to the Future 305 (1993)); Trautman, *supra* n.4, at 132.

[6] CRS Report at 12.

[7] Ballanco, *supra* n. 5, at 1171; Trautman, *supra* n.4, at 135.

[8] CRS Report at 5; CR.639.

A brief history of U.S. hemp regulation

Cannabis has been regulated in the United States at federal and state levels. As with other agricultural products that can be used in different ways, U.S. federal and state laws have always recognized that intoxicating and non-intoxicating cannabis are distinct.

In 1937, Congress first regulated cannabis through the Marihuana Tax Act.[9] The Marihuana Tax Act required all growers, sellers, manufacturers, importers, and distributors of marijuana to register with the U.S. Department of Treasury but carved out non-psychoactive parts of the cannabis plant, such as hemp seed and oil, from its reach.[10]

In 1970, Congress enacted the Controlled Substances Act as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970.[11] The federal CSA carried forward the Marihuana Tax Act's definition of hemp, continuing to exclude the non-psychoactive portions of the cannabis plant, such as hemp seed, mature stalks, and oil, from its reach.[12]

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[9] Pub. Law 75-238, 50 Stat. 551 (1937) (repealed 1970).

[10] 50 Stat. 551 § 1(b); *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1089 (9th Cir. 2003) ("*HIA I*") (discussing legislative and regulatory history of federal law regulating marijuana).

[11] Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified at 21 U.S.C. § 801); *see Gonzales v. Oregon*, 546 U.S. 243, 250 (2006) (discussing legislative history).

[12] 21 U.S.C. § 802(16)(B)(ii); *Hemp Indus. Ass'n v. DEA*, 357 F.3d 1012, 1014 (9th Cir. 2004) ("*HIA II*").

The Texas Controlled Substances Act (Texas CSA) parallels the federal CSA. It defines "marihuana" to exclude non-psychoactive portions of the cannabis plant.[13] "Marihuana" is any part of the cannabis plant, *except*: (A) resin extracted from a part of the plant or a derivative; (B) the mature stalks of the plant or fiber produced from the stalks; (C) oil or cake made from seeds of the plant; (D) derivatives of resin, mature stalks, oil, or cake; (E) sterilized seeds; or (F) hemp.[14]

Congress updates federal law with Farm Bills

In the early 2000s, the popularity of hemp products grew. Congress responded with the Agricultural Act of 2014 (the "2014 Farm Bill"), in which it authorized the domestic cultivation and marketing of industrial hemp as part of an agricultural pilot program or for research purposes.[15]

The 2014 Farm Bill also provided a broader exclusion of non-psychoactive cannabis compared to the 1937 Marihuana Tax Act.[16] The Farm Bill distinguished psychoactive marijuana from non-psychoactive cannabis based on THC content.[17]

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[13] Tex. Health & Safety Code § 481.002(26).

[14] *Id.* The term "hemp" was added in 2019 after the term was recognized in the 2018 Farm Bill; *see* p. 16 & n.20, *infra.*

[15] Pub. L. No. 113-79, 128 Stat. 649, 912 (2014) (codified at 7 U.S.C. § 5940).

[16] 7 U.S.C. § 5940(a)(2).

[17] 7 U.S.C. § 5940(a)(2) (defining "industrial hemp" as "the plant Cannabis sativa L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.").

With the Agriculture Improvement Act of 2018 (the "2018 Farm Bill"), Congress legalized hemp production nationwide.[18] The 2018 Farm Bill did so by carving out "hemp" from the federal definition of marijuana.[19] The 2018 Farm Bill was a significant step forward for the hemp industry by legalizing it for production as an agricultural commodity and removing it from the list of controlled substances.

Texas quickly followed the federal definition and removed hemp from the definition of controlled substances by carving it out of the definition of marihuana.[20]

The State's brief is wrong to claim in its Issues Presented that "[s]moking cannabis was illegal under both federal law and Texas law for decades." Br. xi. Neither federal nor Texas law has ever directly prohibited *smoking* cannabis in any form. Texas law has only prohibited the unauthorized *possession* of "marihuana."[21] And "marihuana" has always excluded non-psychoactive parts of the plant, such as the mature stalks, seeds, fiber, and cannabis seed oil.[22]

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[18] Pub. L. No. 115-334, 132 Stat. 4490 (2018).

[19] *See* 21 U.S.C. § 802(16)(B)(i) (incorporating federal definition of "hemp," which means the cannabis plant and any part of that plant, including derivatives and extracts "with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.") (citing 7 U.S.C. § 1639*o*(1)).

[20] Order Removing Hemp, 44 Tex. Reg. 1467 (Mar. 15, 2019); Tex. Health & Safety Code § 481.002(26)(F); Tex. Agric. Code § 121.001.

[21] Tex. Health & Safety Code § 481.121 ("a person commits an offense if the person knowingly or intentionally *possesses* a usable quantity of marihuana …"); 21 U.S.C. § 844 (simple possession).

[22] Tex. Health & Safety Code § 481.002(26) (defining "marihuana" and what is excluded).

Non-psychoactive portions of the cannabis plant have always been excluded from the definition of "marihuana" in one way or another, and the manufacture and sale of these hemp products has always been legal in the United States.[23]

Texas House Bill 1325: The Statutory Scheme and Legislative Ban

The 2018 Farm Bill gave states and Indian Tribes primary regulatory authority over hemp production.[24] Texas responded by enacting House Bill 1325, which established a new framework for the production, manufacture, retail sale, and inspection of hemp and hemp products, including "consumable hemp products."[25]

Under the new law, authority over hemp is divided among two departments. The Department of Agriculture has primary authority over hemp production and cultivation.[26] The Department of State Health Services (DSHS) regulates the manufacture, sale, and distribution of "consumable hemp products."[27]

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[23] *Hemp Indus. Ass'n*, 333 F.3d at 1088-90 (discussing legislative and regulatory history of federal law regulating marihuana).

[24] 7 U.S.C. § 1639p(a)(1).

[25] *See* Tex. Health & Safety Code § 443.001 *et seq.*; *id.* § 443.001(1) (defining "[c]onsumable hemp product" as a "food, a drug, a device, or a cosmetic […] that contains hemp or one or more hemp-derived cannabinoids, including cannabidiol").

[26] *See* Tex. Agric. Code §§ 121.003, .004, and .051.

[27] *See* Tex. Health & Safety Code § 443.001 *et seq.*

DSHS's responsibilities appear primarily in Health and Safety Code Ch. 443, entitled "Manufacture, Distribution, and Sale of Consumable Hemp Products." Chapter 443 broadly allows persons to "possess, transport, sell, or purchase" consumable hemp products.[28] But in the same Chapter the Legislature directed the Executive Commissioner of DSHS to adopt a rule prohibiting "the processing or manufacturing of a consumable hemp product for smoking."[29] This provision—Texas Health and Safety Code § 443.204(4)—is the "Statute" being challenged as unconstitutional.

DSHS Adopts Rules that Go Far Beyond Its Legislative Mandate

DSHS adopted rules in 2020 to govern Texas's consumable hemp program.[30] DSHS stepped far outside the lines the Legislature had drawn for it and prohibited not just *processing* or *manufacturing* but also the *distribution* and *retail sale* of smokable hemp.[31] This provision—25 Texas Administrative Code § 300.104—is the "Rule" being challenged as invalid.

[28] *Id.* § 443.201(a).

[29] *Id.* § 443.204(4).

[30] *See* 25 Tex. Admin. Code § 300.100.

[31] *See id.* § 300.104.

The Administrative Code enforces the Rule via administrative penalties.[32] DSHS may assess administrative penalties against persons who hold licenses or are registered under Chapter § 300.202 to manufacture, process, distribute, or sell a consumable hemp product.[33]

In response to its proposed rules, DSHS received feedback from 1,726 commenters.[34] 1,690 of those commenters opposed the prohibition of the retail sale and distribution of smokable hemp products and warned that such a ban would cripple Texas's burgeoning hemp industry.[35] They also argued that such a ban would contravene the authority granted to DSHS in the text of HB 1325.[36] DSHS made no changes in response to these comments.[37]

Hemp Companies file suit to challenge the Statute and Rule

Texas hemp businesses had no choice but to challenge these new laws in court. CR.5, 21-24. Three of the plaintiffs operate a Dallas facility—Crown Distributing LLC, America Juice Co. LLC, and Wild Hempettes LLC. They have processed and manufactured smokable hemp products since Fall 2018. 2.RR.84-85.

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[32] *See id*. § 300.606.

[33] *Id.* §§ 300.601(a), .606.

[34] 45 Tex. Reg. 30, 5195 (July 24, 2020).

[35] *Id.* at 5197.

[36] *Id.*

[37] *Id.*

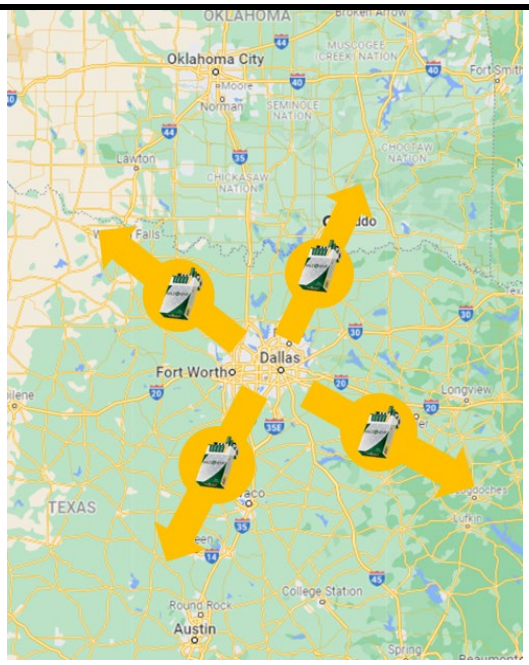
Two other plaintiffs are companies owned by Austin resident Sarah Kerver—1937 Apothecary and Custom Botanical. CR.10. Kerver's companies have been a "Go Texan" brand—a marketing program for Texas products overseen by the Texas Department of Agriculture. 2.RR.71-72. Since before HB 1325, Kerver's companies have legally manufactured and sold smokable hemp products by sourcing hemp grown in Oregon. The sale of smokable hemp products comprises around half of Kerver's small business revenue. 2.RR.74-75; 3.RR.5 (Ex. 1).

The plaintiffs can collectively be called the "Hemp Companies." One company in Dallas manufactures only one product—an innovative smokable hemp product called the "Hempette":

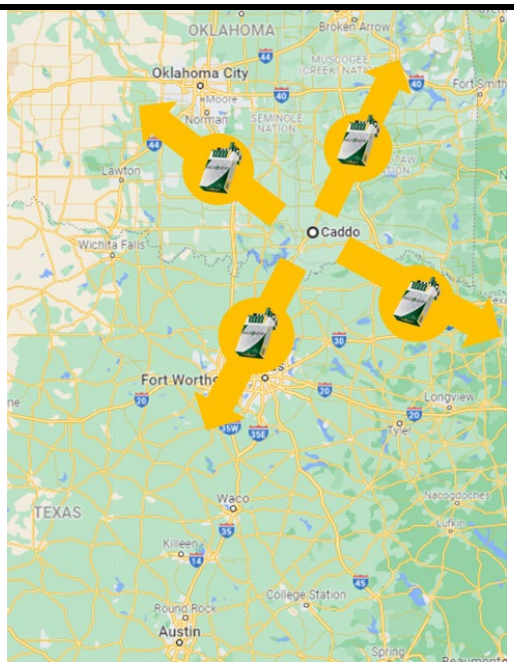
3.RR.45 (Ex. 4 (Appx. 3) at 35). The Dallas Hemp Companies distribute Hempettes all over the country and internationally for sale. 2.RR.80-82. Hempettes make up 10 to 15 percent of the nationwide smokable hemp market. 2.RR.86. In 2019, for example, Wild Hempettes earned roughly $8 million in Hempette sales. 3.RR.43 (Ex. 4 (Appx. 2) at 33).

The Hemp Companies have always operated within the bounds of the law. Before entering production in late 2018—and before the Legislature enacted HB 1325—the Dallas Hemp Companies sought the opinions of three separate law firms to confirm that production of their smokable hemp product comported with state and federal law. 2.RR.84. Both the Dallas Police Department and the U.S. Drug Enforcement Agency inspected the Dallas facility. 2.RR.85. They took samples and tested the Hempette product. 2.RR.85. After they established that the product was comprised of legal hemp, they left. 2.RR.85. There were "no issues." 2.RR.85.

Shortly after HB 1325 was enacted, the Dallas Hemp Companies developed a contingency in case they could no longer do their chosen business in Dallas. They secured a manufacturing facility just over the Red River in Oklahoma, about 100 miles away from the Dallas facility. 2.RR.87-88. Rather than manufacture, process, and distribute Hempettes from their Dallas facility, they would manufacture, process, and distribute the exact same product from Oklahoma and just ship the product back to the same retail outlets and consumers in Texas. *See* 2.RR.92-95.



Existing Manufacturing/Distribution



Contingency Manufacturing/Distribution

Being forced to move out of state would cause significant harm. The Dallas Hemp Companies have spent money preparing a contingency facility. 2.RR.91-92. And if the manufacturing ban remains in place, the cost of moving equipment to Oklahoma will cost millions more.[38] Relocating would also result in the loss of dozens of longtime specialized employees currently working at the Dallas facility. 2.RR.92-94, 122. And Wild Hempettes would lose between in $5.4 and $2.9 million in profit. 3.RR.16-17 (Ex. 4 at 6-7).

[38] *See, e.g.*, 3.RR.35 (showing $1.4 million in one-time costs and $53,756 in monthly costs).

Ms. Kerver's hemp companies also hold a manufacturing license with DSHS. 2.RR.73. As an Austin mom running her own small businesses, she testified to the "array of customers" who purchase smokable hemp products from her storefront:

> We have such an array of customers. We have a -- you know, moms like myself, moms, dads, grandmas, grandpas. We have a lot of veterans. We actually do have some law enforcement. We also have doctors, nurses, teachers, your neighbors, my neighbors. You know, there isn't a demographic, so to speak, or anything that really says this is who a hemp—or a smokable hemp user is.

2.RR.74. Marijuana may bring to mind Jerry Garcia, but hemp has become a commonplace commodity for the average man and woman.

The Temporary Injunction

In the lawsuit, the Hemp Companies pleaded that the Statute violates the Due Course of Law Clause of Article XI, Section 19 of the Texas Constitution. CR.5, CR.21-24. They also argued that the Rule's distribution and retail sale prohibitions are invalid under Texas Government Code § 2001.038(a). CR.24-26.

In response to a motion for a temporary injunction, Defendants did not contest that the Hemp Companies would suffer irreparable harm. 2.SRR.50. After a hearing, the trial court issued a temporary injunction order, CR.285-87, which the Third Court of Appeals affirmed in part on appeal. [39]

[39] *Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 2021 WL 3411551 (Tex. App.—Austin Aug. 5, 2021).

Trial on the Merits

The trial court held a one-day trial on the merits in March 2021. The Hemp Companies obtained testimony from three fact witnesses, who all spoke to the burden the ban on processing and manufacturing posed for their Texas-based businesses. Kerver explained that she has been selling smokable hemp products in Texas since December 2018 and that more than half her revenue comes from smokable hemp products. 2.RR.67-78.

The CEO of Wild Hempettes explained that being forced to move would be "absolutely devastating" for the company and would cripple it "for years," if it could "even continue." 2.RR.94. Not only would moving out of state cost the company millions of dollars, but being pushed out of state would force it to fire its Texas employees and rehire employees in Oklahoma. 2.RR.91-93.

The CFO of Village Farms International testified about the manufacturing ban's effect on its four Texas greenhouses where it employs about 1,100 workers and has operated since 1996. 2.RR.97. While it is licensed to grow hemp and has an "excellent growing climate" to do so, Village Farms's business has been chilled due to the ban on manufacturing smokable hemp. 2.RR.99-101.

Dr. Goldstein, an economist who focuses on the effects of cannabis laws, [40] offered his expert opinion the oppressive burdens on the Hemp Companies and the real-world economic impact of Texas's manufacturing ban. 2.RR.104-130.

Refuting the State's asserted governmental interests, Dr. Goldstein explained why the manufacturing ban "would not substantially reduce the prevalence of smokable hemp in Texas." 2.RR.125-26. In brief, because the manufacturing and processing ban does not impede possession or use of smokable hemp in Texas, the prohibition would not affect consumer demand. 2.RR.126.

Dr. Goldstein's Report was also admitted into evidence as Exhibit 4. 3.RR.10. It provides additional support for the opinions he provided at trial, including that (1) smokable hemp generates higher revenues per acre than almost any other agricultural commodity and is the highest-margin hemp-based product, 3.RR.21-22; and (2) Texas could be a good location for smokable hemp production, but that it would be economically inefficient to launch a commercial hemp business that excludes the production of smokable hemp, 3.RR.22 (Ex. 4 at 12).

Defendants neither introduced evidence nor conducted cross examination. 2.RR.130-31.

[40] Dr. Goldstein has a Harvard undergraduate degree, a Yale law degree, and a PhD in economics from the University of Bordeaux. 2.RR.105-06. As a cannabis economist, Dr. Goldstein studies the effect of cannabis laws and regulations on supply and demand. 2.RR.107.

After trial, "[b]ased on the entire record in this case," the trial court concluded that the manufacturing and processing ban in Texas Health and Safety Code Section 443.204(4) was irrational and failed to meet the *Patel* standard:

> Texas Health and Safety Code Section 443.204(4) is not rationally related to a legitimate governmental interest. In addition, based on the entire record in this case, the real-world effect of Texas Health and Safety Code Section 443.204(4) is so burdensome as to be oppressive in light of any legitimate government interest.

CR.665.

The Judgment decrees that (1) the Statute violates the Texas Constitution; (2) the Rule is invalid in its entirety; and (3) Defendants are permanently enjoined from enforcing the Statute or the Rule. *Id.* at 665-66.

The State appeals this judgment in this Court by direct appeal.

SUMMARY OF ARGUMENT

I. A plaintiff satisfies the redressability requirement of standing when it shows that a favorable decision will likely relieve any discrete injury to himself—even if only partially. Here, enjoining enforcement of § 443.204 redresses the injury because it enjoins the parties responsible for enforcing the Rule—Defendants—from penalizing the Hemp Companies by assessing penalties.

II. Section 443.204—which deprives the Hemp Companies of the ability to manufacture in Texas a product that is lawful to import, sell, use, and consume—violates Tex. Const. art. I, § 19 under *Patel*. *Patel* applies because Section 443.204 interferes with the Hemp Companies' economic liberty and property rights.

This law fails *Patel* at every step. A ban on manufacturing or processing smokable hemp lacks any logical connection with consumer demand. Without that connection it cannot possibly be defended as advancing the interests of law enforcement or public health. The undisputed real-world evidence adduced at trial further confirms the Statute's "actual, real-world effect" is not connected to these purposes. Finally, the effect of the law on the Hemp Companies is oppressively burdensome.

III. Finally, the State concedes that the Rule's ultra vires prohibitions on distribution and retail sale of smokable hemp products is not authorized by statute. The judgment is correct at each step. This Court should affirm.

STANDARD OF REVIEW

This Court reviews the trial court's interpretation of the Texas Constitution, statutes, and administrative rules *de novo*. *Odyssey 2020 Acad., Inc. v. Galveston Cent. Appraisal Dist.*, 624 S.W.3d 535, 540 (Tex. 2021). "Although whether a law is unconstitutional is a question of law, the determination will in most instances require the reviewing court to consider the entire record, including evidence offered by the parties." *Patel v. Texas Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015). Because the State pursued a direct appeal, it voluntarily waived constitutional arguments that would require fact findings in its favor. *O'Quinn v. State Bar of Tex.*, 763 S.W.2d 397, 399 (Tex. 1988).

In a bench trial, "'where no findings of fact or conclusions of law are filed or requested, it will be implied that the trial court made all the necessary findings to support its judgment.'" *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992) (*quoting Burnett v. Motyka*, 610 S.W.2d 735, 736 (Tex. 1980)).

ARGUMENT

I. The Hemp Companies Have a Redressable Injury.

The State leads with a standing argument that is directly contrary to what it argued below. While DSHS correctly argued in the trial court that § 122.301(b) does not apply to this case, the State now argues that it applies and defeats standing. This new argument misunderstands standing, the statute, and the injury to be redressed. It is merely a last-ditch effort to avoid the merits.

A. Redressability requires the relief to likely remedy the injury.

Redressability requires that the requested relief will likely remedy an injury. *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018). This Court looks to federal law for guidance on this element of standing, as the tests are the same. *See Heckman v. Williamson Cty.*, 369 S.W.3d 137, 155 (Tex. 2012) (explaining that U.S. Supreme Court's description of this element is "consonant with Texas law."); *accord Meyers*, 548 S.W.3d at 485 ("Given the parallels between the federal test and our own, we may look to federal standing requirements for guidance.").

A plaintiff satisfies this standing requirement "when he shows that a favorable decision will relieve a discrete injury to himself." *Larson v. Valente,* 456 U.S. 228, 243 n.15 (1982); *see also Heckman*, 369 S.W.3d at 156 n.91. A plaintiff "need not show that a favorable decision will relieve his every injury." *Larson*, 456 U.S. at 243 n.15. Thus, partial redress or a partial remedy will suffice.

Injunctive relief that partially redresses an injury establishes standing. *See Meese v. Keene*, 481 U.S. 465, 476 (1987) (holding injunction that partially redressed reputational injury satisfied standing). Even nominal damages can redress an injury and establish standing. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801 (2021) ("[A] single dollar often cannot provide full redress, but the ability 'to effectuate a partial remedy' satisfies the redressability requirement."). The redressability standard sets a very low bar that only requires at fit between the injury and relief.

B. Enjoining enforcement of § 443.204 fully redresses the injury.

The Hemp Companies challenged the Statute and the Rule because their business as processors or manufacturers of smokable hemp expose them to penalties. *See* 25 Tex. Admin. Code § 300.606 ("The department may impose an administrative penalty against a person who holds a license or is registered under this chapter and who violates this chapter."). The Hemp Companies have been and are licensed to manufacture consumable hemp products; they do not maintain suit due to a denial of a license application but because of the threat of being assessed penalties.

The final judgment fully redresses this injury. The judgment enjoins Defendants—the parties responsible for enforcing the Rule—from penalizing the Hemp Companies for non-compliance with the Rule. CR.665.

C. Redressability is not affected by other statutes that do not apply.

The State argues that if the permanent injunction were to become effective, § 122.301(b) is "an independent bar to the Hemp Companies receiving authorization to manufacture hemp products for smoking[.]" Br. 10. But the Hemp Companies already have the licenses they need to continue with their business operations and are only suing to avoid the threat of penalties.

Unlike the Statute and Rule, § 122.301(b) does not prohibit or penalize the Hemp Companies from doing anything. It prohibits *a state agency* from authorizing a person to manufacture a product containing hemp for smoking.[41] It does not apply to private parties at all.

In its administrative scheme, DSHS issues a Consumable Hemp Product License authorizing the recipient to manufacture, process, and distribute consumable hemp products generally.[42] This general license for consumable hemp products does not specifically authorize a recipient to manufacture a product containing hemp for smoking, so DSHS is not in violation of § 122.301(b).

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[41] Section 122.301(b) states: "A state agency may not authorize a person to manufacture a product containing hemp for smoking, as defined by Section 443.001, Health and Safety Code."

[42] *See* Tex. Dept. Health & Safety, *Consumable Hemp Program*, *available at* https://www.dshs.texas.gov/consumerprotection/hemp-program/default.aspx.

In the trial court, DSHS urged another reason why § 122.301(b) does not apply: § 122.301(b) applies to *non*-consumable hemp products, while § 443.204(4) applies to consumable hemp products. That distinction made a difference, DSHS argued, because the Hemp Companies manufacture only consumable hemp products. So DSHS argued that the Hemp Companies lack standing to challenge § 122.301(b). In opposing the temporary injunction application, DSHS argued:

> We don't think they have standing to talk about [§ 122.301(b)]. We don't think that applies to consumable hemp products to smoking. We think it applies to nonconsumable hemp product smoking, which doesn't make any sense. The point is, they don't make nonconsumable hemp products for smoking and they don't have standing to challenge that particular statute.

2.SRR.43.

DSHS argued that Texas divides regulatory authority over hemp products between the Department of Agriculture, which has authority over nonconsumable hemp products, and the Department of State Health Services, which has authority over consumable hemp products.[43] Section 122.301(b) is found in the Agriculture Code and so could reasonably be interpreted as providing an exception to § 122.301(a), which refers exclusively to non-consumable hemp products.

[43] *See, e.g.*, Tex. Agric. Code § 122.101(a)-(b) (requiring any person who "cultivate[s] or handle[s] hemp in this state" to "hold a license under this subchapter" unless the person "manufacture[s] a consumable hemp product in accordance with … [the Texas] Health and Safety Code").

Yet now the State takes exactly the opposite position and calls DSHS's interpretation of the statute below "misguided." Br. 10. This flip-flopping is wrong. The State should not be allowed to urge one interpretation of its statutes in the trial court only to change its interpretation by 180 degrees on appeal to argue forfeiture. *Cf. Mosley v. Tex. Health & Hum. Servs. Comm'n*, 593 S.W.3d 250, 270-71 (Tex. 2019) (Blacklock, J., concurring) ("This is a not primarily a case about [the citizen's] ignorance of the law. It is a case about the government's ignorance of the law.").

D. Even if § 122.301(b) did apply, the State's new redressability argument still lacks merit.

Even if § 122.301(b) could be interpreted to cause an injury to the Hemp Companies that the judgment does not redress, the judgment still redresses the injury of threatened penalties. Whether a final judgment provides "full redress" is of no moment. *Uzuegbunam*, 141 S. Ct. at 801. Because partial redress or a partial remedy suffices for purposes of standing, *id.*, the State's arguments fail.

The State seems to argue that because § 122.301(b) precludes a state agency from authorizing a person to manufacture a product containing hemp for smoking, the Hemp Companies cannot obtain licenses to manufacture smokable hemp. But the Hemp Companies already have licenses granted by a state agency, so this premise has no merit. The only immediate and concrete injury that the Hemp Companies face is administrative penalties under Texas Administrative Code § 300.606.

Second, § 122.301(b)'s selective prohibition on manufacturing smokable hemp is unconstitutional for the same reasons that § 443.204(4) is unconstitutional. So even if § 122.301(b) caused some hypothetical future injury—for example, if DSHS will not renew the Hemp Companies' licenses—there is a "substantial likelihood" that the final judgment redresses the harm because this Court's reasoning would ultimately govern the issuance of a hypothetical license denied in the future on § 122.301(b) grounds. *Meyers*, 548 S.W.3d at 485.

All this makes this case quite different from the authorities the State cites where the injunctions at issue were "effectively meaningless." In *Okpalobi v. Foster*, the Fifth Circuit agreed that the plaintiffs had alleged an injury in fact, but they had "fail[ed] to satisfy the 'redressability' requirement" because the named defendants—the governor and attorney general—had "no power to redress the asserted injuries[.]" 244 F.3d 405, 426-27 (5th Cir. 2001) (en banc).

Likewise, in *Meyers v. JDC/Firethorne*, this Court found redressability was lacking because the country commissioner who was sued had no authority "over the processing and presentment of plat applications," so the injunction a developer sought against the commissioner "could not possibly remedy its alleged harm." 548 S.W.3d at 487-88. Suing the wrong defendant for relief the defendant has no authority to give creates a paradigmatic problem of redressability.

Unlike in *Okpalobi* and *Meyers*, where the defendants lacked "enforcement connection with the challenged statute," 244 F.3d at 427 n.35, here, it is undisputed that DSHS and its Commissioner have authority to enforce Chapter 443. Br. 3-4 ("The statute requires the executive commissioner of the Health and Human Services Commission to 'adopt rules and procedures necessary to administer and enforce' Chapter 443.") (quoting Tex. Health & Safety Code § 443.051); *see also id.* § 12.001 *et seq.* (detailing Defendants' duty to implement and enforce the Code). A judgment barring DSHS and its Commissioner from exercising that authority to enforce their Rule and the Statute's unconstitutional manufacturing and processing ban against the Hemp Companies would thus be far from "meaningless."

If the Court disagrees, it should remand to the trial court to allow it to modify the judgment to include § 122.301(b). That provision was pleaded but abandoned only after the State took the position that it did not apply and the Hemp Companies lacked standing to challenge it. CR.206. Fundamental fairness should preclude the State from radically changing positions before this Court or arguing against an interest of justice remand to allow the trial court to modify the judgment. No new trial is needed because the same evidence and arguments below would also support a judgment that § 122.301(b) is unconstitutional.

The Court should hold redressability is met and decide this case on the merits.

II. Section 443.204 Violates the Texas Constitution.

The Texas Constitution protects its citizens from deprivations of life, liberty, property, privileges or immunities "except by the due course of the law of the land." Tex. Const. art. I, § 19. Section 443.204 violates this provision because it deprives the Hemp Companies of the ability to manufacture in Texas a product that is lawful. Smokable hemp may be imported, sold, used, and consumed within Texas lawfully, and there is no legitimate governmental interest in banning only its manufacturing or processing. This case epitomizes the unconstitutional deprivation of economic liberty.

A. The Hemp Companies have constitutionally protected interests.

"Included among the protected liberty interests is the right 'to engage in any of the common occupations of life.'" *Mosley v. Texas Health & Hum. Servs. Comm'n*, 593 S.W.3d 250, 264 (Tex. 2019) (quoting *Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995)). This liberty right encompasses freedom of contract and the right to pursue a lawful calling. *Patel*, 469 S.W.3d at 110, 119-23 (Willett, J., concurring) (observing that this Court "recognizes that Texans possess a basic liberty under Article I, Section 19 to earn a living" and describing interest as "[o]ccupational freedom, the right to earn a living as one chooses").

The Texas Constitution protects economic liberty from government infringement because it is an interest vested in citizens as a preexisting right: "Liberty is not *provided* by the government; liberty *preexists* government." *Patel*, 469 S.W.3d at 92–93.[44]

The federal Due Process Clause likewise "protects an individual's liberty interest which is viewed as including an individual's freedom to work and earn a living[.]" *Martin v. Mem'l Hosp. at Gulfport*, 130 F.3d 1143, 1148 (5th Cir. 1997) (quoting *Cabrol v. Town of Youngsville*, 106 F.3d 101, 107 (5th Cir. 1997)); *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972) ("liberty" includes "the right of the individual . . . to engage in any of the common occupations of life").

Other state supreme court similarly recognize their own constitutional protections for citizens' economic interests. *See, e.g.*, *Jackson v. Raffensperger*, 843 S.E.2d 576, 580 (Ga. 2020) ("[W]e have long recognized that the Georgia Constitution's Due Process Clause entitles Georgians to pursue a lawful occupation of their choosing free from unreasonable government interference"); *Ladd v. Real*

[44] *See also generally* David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 Yale L.J.F. 287 (Dec. 5, 2016); Clark Neily, *Beating Rubber-Stamps Into Gavels: A Fresh Look at Occupational Freedom*, 126 Yale L.J.F. 304 (Dec. 5, 2016); Joshua D. Hawley, *The Intellectual Origins of (Modern) Substantive Due Process*, 93 Tex. L. Rev. 275 (Dec. 2014); David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 Mercer L. Rev. 563, 627–39 (Winter 2009) (discussing property and liberty interests).

Est. Comm'n, 230 A.3d 1096, 1102 (Pa. 2020) (substantive due process under Pennsylvania Constitution applies to "law restricting social and economic rights").

In the United States, companies have long enjoyed the right to manufacture, distribute, and sell products containing hemp oil or sterilized seeds from hemp. *See Hemp Indus. Ass'n*, 357 F.3d at 1013 (describing legislative backdrop). Manufacturing and selling hemp products made from *exempt* portions of the cannabis plant has been lawful for many decades. Going back to 1937, non-psychoactive or exempt parts of the cannabis plant were legal under both federal and state law. *See id.* at 1018; *Hemp Indus. Ass'n*, 333 F.3d at 1085 ("Since 1937, the statute controlling marijuana has excluded the oil and sterilized seed of the plant Cannabis sativa L., commonly known as hemp, from the definition of marijuana. 21 U.S.C. § 802(16).").

The Texas Legislature likewise defines "marihuana" to mean "the plant Cannabis sativa L., whether growing or not, the seeds of that plant, and every compound, manufacture, salt, derivative, mixture, or preparation of that plant or its seeds." Tex. Health and Safety Code § 481.002(26). That definition has long *excluded* the mature stalks, oil or cake made from seeds, or sterilized seeds. *Hernandez v. State*, 137 Tex. Crim. 343, 349, 129 S.W.2d 301, 304-05 (1938) (describing statutory definition of "Cannabis" and noting "non-resinous oil," "mature stalks," and "any product or manufacture of such stalks" are excluded).

Nonetheless, the State contends that manufacturing smokable hemp products before the Legislature enacted the Statute was not "a lawful calling." Br. 12, 14. "Until a few years ago," it claims, "merely possessing smokable hemp products was a crime" and "at no point between hemp's legalization and the present has the Legislature allowed consumable hemp products for smoking to be manufactured in Texas." Br. 12. There are no citations to support these incorrect statements.

Nor is there any merit to the contention that the Hemp Companies have only "'unilateral expectation'" of being able to manufacture or process such products. Br. 12. This point rests on the incorrect premise that manufacturing or processing smokable hemp from exempt parts of the cannabis plant was previously unlawful, which is wrong.

Urging that the statute at issue makes the activity unlawful simply begs the question of whether the Statute is constitutional. A complete ban on an otherwise lawful business must be tested against constitutional standards because it harms vested property rights. *Smith v. Decker*, 312 S.W.2d 632, 634 (Tex. 1958). In *Smith*, this Court held that a law was unconstitutional where it required bail bondsmen practicing in certain geographic areas to obtain a license from the State, which had the effect of preventing the plaintiffs from conducting their business. *Id.* at 633-34.

Like *Patel*, *Smith* relied on the *Slaughter-House* cases. This Court agreed that "a right to earn a living is a property right within the meaning of our Constitution was early established by the United States Supreme Court . . . and a person cannot be deprived of it by simple mandate of the legislature." *Id.* at 633 (citing 83 U.S. 36 (1872)); *e.g.*, *Air Curtain Destructor Corp. v. City of Austin*, 675 S.W.2d 615 (Tex. App.—Tyler 1984, writ ref'd n.r.e.) (recognizing "valuable vested property rights to manufacture, sell and operate" business prohibited by ordinance).

Here, the Statute and Rule prohibit the Hemp Companies from continuing to operate otherwise lawful businesses in Texas. The Statute and Rule abridge a vested property right because they prevent the Hemp Companies "from performing their business otherwise lawful but for the [laws] in question." *Smith*, 312 S.W.2d at 640.[45]

The Hemp Companies' Texas-based facilities have been in the lawful business of processing and manufacturing smokable hemp—until HB 1325 became law. 2.RR.83-86.[46] Because the manufacture and processing of smokable hemp products from exempt portions of the cannabis plant was legal until § 443.204(b) was enacted, the Hemp Companies have an economic liberty interest at stake.

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[45] The State also notes there is no fundamental right to "hemp farming." Br. 12 (citing *United States v. White Plume*, 447 F.3d 1067, 1075 (8th Cir. 2006) (declining to declare "farming" or "hemp farming" a fundamental right protected by strict scrutiny). This is a strawman, as this case does not involve farming or fundamental rights.

[46] *See also* n.20, *supra* ("hemp" was removed from control in March 2019 before HB 1325 enacted).

B. *Patel* applies to challenges to regulation of economic interests.

Judicial review of Texas regulations affecting citizens' economic liberties is governed by this Court's test in *Patel*. 469 S.W.3d at 87. There the Court recognized that the Texas Constitution's substantive due course provisions are *more* protective than federal due process rights: the "drafting, proposing, and adopting of the 1875 Constitution was accomplished shortly after the United States Supreme Court decision in the *Slaughter–House Cases* by which the Court put the responsibility for protecting a large segment of individual rights directly on the states." *Id*. at 86-87. Adopted in response to the *Slaughter-House Cases*, the Texas due course of law provisions "undoubtedly were intended to bear at least some burden for protecting individual rights that the United States Supreme Court determined were not protected by the federal Constitution." *Id*. at 87.

After the Court determined that the greater protections afforded by Texas's Constitution had "been recognized in various decisions of Texas courts for over one hundred and twenty-five years," it held: "the standard of review for as-applied substantive due course challenges to economic regulation statutes includes an accompanying consideration as reflected by cases referenced above: whether the statute's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest." *Id.*

Two points from the *Patel* standard merit emphasis: One, it applies broadly to as-applied "substantive due course challenges to economic regulation statutes." *Id.* Once a person shows a protected interest is restricted by a Texas statute, *Patel* sets the test by which the constitutionality of the statute must be judged. And two, that test is higher than rational basis. It considers evidence and includes a second element to ensure that the liberty and property interests of Texas citizens enjoy greater protection from governmental intrusion—consistently with the policy choices enshrined in the Texas Constitution by the people for well over a century.

The State does not argue that *Patel* sets the wrong standard or should be overturned, and it obviously cannot raise that argument for the first time in reply. Instead, the State simply contends that *Patel* does not apply to this case. Br. 13-15. The notion that *Patel* applies only to some due course of law challenges but not others finds no support in Texas law.

The State strains against the *Patel* standard with four basic errors. *First*, the State misreads *Patel* as if all constitutional challenges must fall within *Patel*'s particular facts, or else only rational basis review applies. Br. 13-14. Just the opposite. *Patel* does not present a fact-specific test but rather a general legal framework for all as-applied constitutional challenges to economic regulations.

Second, the State conflates its position on whether the *Patel* test is satisfied with whether it applies at all. Br. 14 (arguing that the Statute is not oppressive, therefore *Patel* does not apply). The threshold question of whether *Patel* sets the applicable standard is plainly distinct from whether the standard is satisfied.

That *Patel* addressed a business activity with oppressive licensing requirements rather than one that is entirely banned is not a valid distinction, because prohibiting an otherwise lawful business activity is as oppressive as it gets. *Smith*, 312 S.W.2d at 640. Nothing in the *Patel* opinion suggests that its framework for assessing the constitutionality of oppressive economic statutes and regulations falls short of applying to economic activities that are entirely prohibited.

Third, the State reasserts its mistaken position that the activity at issue in this case can be analogized to manufacturing and distributing products that are illegal. Br. 14-15. The products at issue in this case are *lawful* for use or sale, so the analogy to criminal drug laws is a scarecrow. The Legislature *could* ban a particular substance. But here, it has not banned a *substance* or item, it banned the economic activity to create a substance or item that is legal: the *manufacturing* and *processing* of smokable hemp. There is a clear and workable distinction between laws that oppressively regulate economic activity—such as eyebrow threading or manufacturing and processing a legal product—and prohibiting the product itself.

Finally, the State cites several cases to suggest that, unless *Patel* is extended, rational-basis review is the governing standard. Br. 15.[47] It characterizes *Fry Auto Services* as "declining to expand *Patel*'s holding." 584 S.W.3d at 143–44. But that case merely decided that private entities have no constitutional liberty interest in performing economic activities on the government's behalf, as the activity itself "is wholly a creation of the government." *Id.* at 144. Likewise, this Court in *Hegar* noted that *Patel* is limited to Due Course of Law challenges and does not apply to other constitutional contexts. 496 S.W.3d at 788 n.35. Neither case suggests that *Patel* has limited applicability in this context.

The State then cites two cases applying rational basis review. The *Barshop* case pre-dates *Patel* and did not enjoy the support of *Patel*'s majority. 925 S.W.2d at 633. And the *New Jersey Retail Merchants* case states the federal standard, which is lower than Texas's. 669 F.3d at 398. Neither case undermines *Patel*.

The only difference between this case and *Patel* is that here the Statute is a ban that makes the economic activity not just impractical but impossible, as in *Smith*. 312 S.W.2d at 640. Where economic activity is banned, the *Patel* test squarely applies.

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[47] *Tex. Dep't of Motor Vehicles v. Fry Auto Servs.*, 584 S.W.3d 138, 143–44 (Tex. App.—Austin 2018, no pet.); *Hegar v. Tex. Small Tobacco Coal.*, 496 S.W.3d 778, 788 (Tex. 2016); *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 633 (Tex. 1996); *N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 398 (3d Cir. 2012).

C. The Statute fails *Patel*'s test.

The *Patel* test sets forth a three-step inquiry that requires meaningful, evidence-based judicial review. 469 S.W.3d at 87.

First, courts determine whether there is a logical connection between the challenged law's purpose and a legitimate governmental interest. A challenged law is unconstitutional if its purpose is not "rationally related to a legitimate governmental interest[.]" *Id.*

Second, even where a logical connection between the law's purpose and a legitimate governmental interest exists, courts next look at the record to determine whether the law's "actual, real-world effect" is connected to the purpose. *Id.* A challenged law is unconstitutional if, "considered as a whole, [a] statute's actual, real-world effect . . . could not arguably be rationally related to . . . the governmental interest." *Id.*

Third, even if a legitimate government interest were being advanced, courts examine whether the law's "actual, real-world effect" is excessively burdensome. *Patel* calls on courts to conduct a burden analysis, weighing whether "when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest." *Id.*

Here, the State conceives of two governmental interests: "(1) mitigating the difficulty law-enforcement officials and prosecutors have in distinguishing hemp from marihuana and (2) protecting public health." Br. 21, *see also* 15-20.

Neither survives a threshold rational basis review, much less the final two parts of *Patel* review. The Statute fails at every step.

1. The Statute's purpose has no rational relationship to a legitimate governmental interest.

A state's "chosen means must rationally relate to the state interests it articulates." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013). A court's "analysis does not proceed with abstraction for hypothesized ends and means do not include post hoc hypothesized facts." *Id.* Instead, the analysis begins by examining the state's "rationale informed by the setting and history of the challenged rule." *Id.*

Even the highly deferential standard employed by federal courts allows room for courts to use their common sense and general knowledge: "[T]he existence of facts supporting the legislative judgment is to be presumed . . . *unless in the light of the facts made known or generally assumed* it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (emphasis added)). The State's hypothetical rationale "cannot be fantasy." *Castille*, 712 F.3d at 223.

The Statute directs DSHS to enact rules to prohibit the *manufacturing* or *processing* of smokable hemp products. Tex. Health & Safety Code § 443.204(4).[48] The statute does not prohibit smokable hemp products from being:

- Imported
- Distributed
- Sold
- Possessed or
- Used

The Legislature did not make smokable hemp contraband. All it does is ban processing and manufacturing that is domestic. This is like prohibiting Texas cattle farming but allowing Texans to order hamburgers and steaks if the beef is imported.

The ban does not even prohibit making smokable hemp for individual use. *Consumers* can buy hemp flower in Texas and make their own smokable hemp products, so long as that product is not for sale to a person at wholesale or retail.

But Texas businesses cannot do the exact same thing. The Statute forces smokable hemp manufacturers to close their facilities and leave the state, even though they can still export their product back into Texas after they move.

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[48] "Process" is "to extract a component of hemp" that is "(A) sold . . . (B) offered for sale . . . (C) incorporated into . . . or (D) intended to be incorporated into a consumable hemp product." Tex. Health & Safety Code § 443.001. "Manufacture" is "the process of combining or purifying food or packaging food for sale to a person at wholesale or retail." *Id.* § 443.001(8); 431.002(23)(A).

a. The ban does not address law enforcement concerns.

Prohibiting businesses from making smokable hemp products in Texas does not logically connect to the State's interest in differentiating hemp from marijuana. Succinctly stated, the alleged differentiation problem is law enforcement's risk of confusing smokable hemp and marijuana on the street. Yet the risk of confusing these different products has nothing to do with where the product is manufactured.

The major fallacy in the State's logic is that it assumes that banning manufacturing of a product in Texas would have a negative impact on consumer use. This is like saying that if all Texas beef processors were shut down, Texans would eat less beef, even if the processors moved to Oklahoma and could export to Texas. Assuming a negative impact on beef consumption is implausible because consumers rarely care (or only marginally care) where their beef is processed—and the cattle, like cannabis, could still be farmed in Texas. Processing and manufacturing activities are not often connected to consumer demand. *See* 3.RR.23-25 (Ex. 4 at 13-15).

Because an intrastate production ban does not restrict consumer access, it cannot be said to reduce the prevalence of smokable hemp or do anything to aid law enforcement's quest to arrest people who unlawfully possess marijuana. A manufacturing ban does not rationally relate to any government interest in differentiating between products.

The State's claim to the contrary is contained in a single paragraph. Br. 18-19. It argues that banning Texas manufacturing makes it "proportionally more likely" that a smokable cannabis product will be marijuana rather than hemp.

Essentially, the argument is (1) prohibiting the domestic production of smokable hemp creates an added import burden that will increase cost; (2) that increased cost will dissuade consumers from purchasing smokable hemp products; and (3) fewer purchases of smokable hemp products reduces the prevalence of hemp smoking. But this syllogism is built on two speculative and unsound premises.

First, consumers do not "have to either import smokable products or alter other products to make them smokable." Br. 18. The Statute plainly permits retailers to import the product from out of state and re-sell those imported products to consumers, like many other grocery store products. Thus, "[c]onsumers wishing to smoke hemp" do not have to "import smokable products or alter other products to make them smokable." *Id.* They can buy imported smokable products from Texas hemp retailers, just like buying California artichokes or Florida oranges from H-E-B. But if they wish to import the product themselves, they can do so on foot, by car, or with the click of a button on the Internet.

Second, the notion that forcing Texas retailers to import a product will meaningfully affect prices that will discourage consumer use is implausible. The

United States economy is built on interstate commerce. Texas businesses compete with other states for Texas consumers' market share, and if Texas businesses are forced out the vacuum will be quickly filled with out-of-state imports.

Third, even assuming forcing retailers to import smokable hemp products from out of state increased cost enough to result in a decrease in the prevalence of smoking hemp, that still would not make prohibiting domestic manufacture a *rational* way to reduce the prevalence of smoking hemp products in Texas. The State cannot rationally regulate the location of production as a means to discourage consumer use of the product, when there is no evidence to suggest that consumers care or could not afford to buy smokable hemp produced in Albuquerque rather than Austin. Banning the intrastate production or manufacturing of a product as a means to decrease consumer use in a robust interstate economy simply makes no sense.

b. The ban does not address public health concerns.

This is equally true for the State's asserted governmental interest in health. Incidentally, nothing in the record supports the premise that smokable hemp is harmful to health, and the State's extra record sources do not establish this point. Br. 19-20. But even if one assumes legitimacy to the claim, it does not follow that the aim of discouraging smokable hemp use can justify a ban on Texas hemp manufacturers. The rational way to discourage use is to regulate use.

Judge Higginbotham's opinion in *St. Joseph Abbey v. Castille*, 712 F.3d 215 is instructive. The Fifth Circuit struck down a Louisiana law that required caskets to be sold only in licensed funeral homes by licensed funeral directors. *Id.* at 217–18. To become a licensed funeral home that could sell caskets to the public required a business to build a layout parlor with room for thirty people, a display room for six caskets, an arrangement room, and embalming facilities. *Id.* at 218. The State Board argued that the law rationally related to consumer protection because it restricted predatory sales practices by third-party sellers. But that "obscure[d]" the structure of the challenged law. *Id.* at 223. The licensure requirements did not, in fact, require training in the business of funeral direction. *Id.* Rather, it created funeral industry control over intrastate casket sales. *Id.* The State Board argued that this exclusivity would assure purchasers of caskets informed counsel, but the Fifth Circuit rejected this argument as lacking a rational fit between the means and ends. *Id.* at 225-26.

The State urges a similar argument here, but like the State Board in *Saint Joseph Abbey*, they obscure the fact that the law does not regulate access to smokable hemp at all. Instead, it nonsensically regulates an entirely different class of activity — domestic production by businesses— that is not connected to access. They then spin a fantasy to explain how prohibiting the domestic production of a good that is easily imported will suppress consumer demand.

In fact, the Statute here is the inverse of the issue with the law in *Saint Joseph Abbey* and even less rational. Rather than favor in-state producers, the Statute discriminates against Texas businesses and favors out-of-state businesses.

Courts routinely hold that protectionist measures fail rational basis scrutiny. This is because "mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review." *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (same).

Here, the Statute is reverse protectionism: it protects *out-of-state* smokable hemp manufacturers from in-state competition and creates jobs in neighboring states while forcing existing businesses to move out of Texas. That is irrational times two.

Gambone v. Commonwealth, 101 A.2d 634, 637 (Pa. 1954) is also instructive. There, the Pennsylvania Supreme Court struck down a law prohibiting gas dealers from posting price signs exceeding a certain size. The Commonwealth argued that the restriction rationally related to preventing fraud because gas dealers deceived motorists with misleading advertisements in price signs. *Id.* at 637-38 Yet it was "impossible" to see "how the size of the sign would have any relevancy to the perpetration of such fraud; on the contrary, it would seem that the larger the sign the more difficult it would be for the dealer to deceive the purchaser." *Id.* at 637.

To prevent fraud, the court explained, a prohibition should be directed "not against the size of the sign, but against the placing thereon of any false statements concerning the price." *Id.* The "utter lack of connection" between the *size* of the sign and the evil to be avoided rendered the statute unconstitutional. *Id.* at 638.

So too here. The State's alleged interests are utterly disconnected from the ends used to achieve them. Prohibiting Texas business from manufacturing products that they can sell into Texas from across state lines cannot aid public health or law enforcement by suppressing consumer use of the product. It is no different than trying to reduce the prevalence of deceptive signs by regulating *size* instead of *content*. Here, like in *Gambone*, there is a an "utter lack of connection" between prohibiting *manufacturing* and reducing the prevalence of hemp smoking.

2. The record confirms the Statute's "actual, real-world effect" is not connected to its purpose.

A state's "plausible basis" for a law may be refuted "by adducing evidence of irrationality." *Castille*, 712 F.3d at 223. *Patel* emphasizes that evidence may be considered in determining whether a law is unconstitutional and instructs courts to consider the "entire record" as part of the inquiry. 469 S.W.3d at 69, 87. "The parties' evidence, the State's purpose in its regulatory scheme, and the effects of that regulation are all to be considered." *Id.* at 138-39 (Hecht, C.J., dissenting).

Here, the evidentiary record is unrebutted and confirms that a domestic production ban of smokable hemp products is not rationally related to the government objective or reducing hemp smoking in Texas. Dr. Goldstein's report confirms this. 3.RR.24 (Ex. 4 at 14). For the manufacturing ban to address either the differentiation problem or public health, it would have to reduce the prevalence of smokable hemp:

> For HB 1325's statutory prohibitions to mitigate the differentiation problem for Texas law enforcement, then HB 1325 would have to have the effect of reducing the prevalence of smokable hemp in the community in practice and thus reducing the number of situations in which law enforcement officers would encounter people in possession of legal smokable hemp that could not be differentiated from illegal marijuana. If, on the other hand, the prevalence of smokable hemp in Texas were roughly the same with or without the HB 1325 statutory ban in place, then the presence or absence of HB 1325 restrictions would not impact the differentiation problem for law enforcement.

Id.

Applying economic principles, Dr. Goldstein explained why the production ban would not reduce hemp smoking. Most smokable hemp consumed in Texas does not come from Texas, but from Oregon or other states. 2.RR.126. Denying Texas consumers access to smokable hemp made in Texas would have little to no real-world impact on consumption, because the smokable hemp products could be imported. He analogized to wine:

> So by analogy, not much of America's wine is made in Texas and not much of America's – not much of wine drunk in Texas is made in Texas. So if you ban production of wine in Texas, it would not substantially impact the amount of wine drunk in Texas.

2.RR.126. According to Dr. Goldstein, if Texas-manufactured smokable hemp is not available to them, "they will simply substitute smokable hemp that's produced in other states." 2.RR.127, 129-30. Importing smokable hemp is not hard in today's economy, so the prohibition would not affect demand. 2.RR.126. Therefore, in Dr. Goldstein's opinion, the manufacturing ban "would not substantially reduce the prevalence of smokable hemp in Texas." 2.RR.126.

The State did not cross-examine Dr. Goldstein. Nor did it put on any evidence of its own to show how a production ban furthers any governmental interest by reducing consumer use. The State had every opportunity to defend the Statute with evidence. But it chose not to offer any.

3. The Statute is so burdensome as to be oppressive.

Because the Statute is untethered to any legitimate government interest, this Court need not proceed to the final *Patel* step to affirm the trial court's judgment. But if it does, once again, the unrebutted and undisputed record confirms what is manifest: the real-world effect of the Statute is so burdensome as to be oppressive in light of any legitimate government interest as applied to the Hemp Companies. *See, e.g.*, 2.RR.94 (discussing lost jobs and cost of Oklahoma move).

Without addressing the trial record, the State merely contends that "unlike the plaintiffs in *Patel*, the Hemp Companies do not argue that the government could have used less restrictive means to achieve its ends." Br. 21. But in fact, there are two less restrictive ways the Legislature could attempt to achieve its ends without forcing the Hemp Companies to move out of state.

First, the Legislature could prohibit only the manufacturing and processing of smokable hemp products *for sale or distribution in Texas*. Had it done so, the Hemp Companies could continue manufacturing smokable hemp products for export. While one could imagine a hypothetical business where the manufacturing process is itself harmful, perhaps because of its environmental impact, no such harm is alleged in this case. The State has asserted no governmental interest in prohibiting the domestic manufacture and processing of smokable hemp products for sale outside of Texas.

Second, if the point of banning manufacturing and processing was to increase the price of smokable hemp products (presuming that imported smokable hemp is more expensive), that end could be achieved by levying a tax on Texas-made smokable hemp sold in Texas. By ensuring that Texas-made hemp is more expensive, it would steer Texans toward imported hemp and the Hemp Companies could remain in business for exports.

It is not clear either of these restrictions would survive rational basis review, but they would not be less burdensome to Texas manufacturers and processors.

Ladd v. Real Estate Commission, 230 A.3d 1096, 1108 (Pa. 2020) is instructive. There, the Pennsylvania Supreme Court reviewed regulations that burdened a manager's ability to work as a short-term property manager and applied its less-deferential, *Patel*-like rational basis review:

> A law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained. Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations.

Id. at 1109 (quoting *Shoul v. Commonwealth, Dep't of Transp., Bureau of Driver Licensing*, 643 Pa. 302, 316 (2017)).

Ladd cites *Patel* approvingly as applying a *Gambone*-like framework. *Id.* at 1112 ("The [*Patel*] court applied a rational basis test similar to that set forth in *Gambone* to determine the regulation was unconstitutional as applied to these individuals, who perform a very specific, limited cosmetology service"); *see also After Patel*: *State Constitutional Law & Twenty-First Century Defense of Economic Liberty*, 14 N.Y.U. J. L. & Liberty 800, 862-74 (2021) (discussing how *Ladd* "thoroughly endors[es]" *Patel* and heightened rational basis for economic liberties).

As in *Patel*, the regulations in *Ladd* imposed costly licensing requirements, including apprenticeship, instructional coursework and examinations, and requiring a brick-and-mortar location. *Id.* at 1104-05, 1109. And as this Court did in *Patel*, to determine if the plaintiff stated a claim, the court weighed those regulatory burdens as applied to Ladd's enterprise against the government's interest in safeguarding the public from fraudulent practices by those who traded in real estate. *Id.* at 1111.

Two aspects of the *Ladd* inquiry are particularly relevant here. First, *Ladd* looked to exemptions from the scheme to determine if the restrictions were unreasonable, oppressive, or patently beyond the necessities of the case. *Id.* at 1115. Second, the court identified "a less drastic alternative to RELRA broker licensing"—the Pennsylvania Unfair Trade Practices and Consumer Practices Act—that would apply to Ladd's services and was not "unreasonable, unduly oppressive, or patently beyond the necessities of the case." *Id.*

Both considerations are present in this case. First, if the legitimate interest is either the differentiation problem or public health, the scheme has a gaping hole: businesses are free to import and sell smokable hemp products, and consumers are free to make, buy, and smoke hemp products in Texas. Second, as discussed above, there are obvious, less drastic alternatives than the means the Legislature chose.

***

The State urges the Court to sideline *Patel* and apply only rational basis review. But its rationales for the Statute are hardly rational at all. DSHS offered no evidence in the trial court to defend the Statute because there is no straight-faced defense. A manufacturing and processing ban of a product that can be easily obtained and used regardless of where it comes from is not a rational way to regulate businesses—absent some interest against manufacturing or processing itself. Here, it oppressively burdens the Hemp Companies because it forces existing businesses to completely shut down and move out of state. The Statute is therefore unconstitutional.

III. The State Abandons Its Challenge to the Rule.

For all the same reasons that the Statute is unconstitutional, the Rule is likewise invalid for prohibiting the processing and manufacturing of smokable hemp.

Until merits briefing in this Court, the State also defended the Rule's prohibition on the *distribution* and *retail sale* of smokable hemp—even though the Statute did not expressly authorize DSHS to go that far. State agencies do not have authority to create rules that exceed the scope of their legislative authority. *See Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 616 S.W.3d 558, 569 (Tex. 2021). The Third Court of Appeals already so held in the temporary injunction appeal. *See Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, No. 03-20-00463-CV, 2021 WL 3411551 (Tex. App.—Austin Aug. 5, 2021, no pet.).

In this Court, the State finally abandons its defense of the Rule insofar as DSHS exceeded its legislative authority. Br. 23. Because the remaining parts fail for the same reasons the Statute is unconstitutional, the Court should affirm the judgment holding the entire Rule invalid.

CONCLUSION AND PRAYER

The judgment should be affirmed in its entirety. If the State continues to urge a lack of redressability in reply, and if the Court thinks it necessary, the case should be remanded in the interests of justice to allow the trial court to modify the judgment to hold Texas Agriculture Code § 122.301(b) unconstitutional. The Hemp Companies also pray for all other relief at law or equity to which they may be entitled.

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Respectfully submitted,

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I certify that this brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2) because it contains 10,855 words, excluding the parts of the briefs exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

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