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 DSHS,

Appellants,

v.

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

Appellees.

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

REPLY BRIEF ON THE MERITS FOR APPELLANTS

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To the Honorable Supreme Court of Texas:

The Texas Legislature made the rational decision to prohibit the manufacturing of hemp products for smoking—products that were illegal until a few years ago, raise health concerns, and are difficult to distinguish from marihuana. In trying to persuade this Court to second-guess the Legislature, the Hemp Companies seek to expand the reach of heightened scrutiny under *Patel v. Texas Department of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015), well beyond its original context of regulatory hurdles to the practice of a lawful profession. Rather than deferring to the people's elected legislators to make policy decisions regarding which cannabis products may be manufactured in Texas, the Hemp Companies effectively ask this Court to "sit as a super-legislature." *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 853 (Tex. 2016). In their zeal to cast aside a duly enacted law, the Hemp Companies make counter-intuitive statements, such as asserting that shutting down *all* Texas beef producers would have *no* impact on beef consumption in Texas, Appellees' Br. 52, and are even unwilling to admit that smoking may have health risks, *id.* at 54. All this in support of an injunction that cannot help them because a separate, unchallenged statute bars the manufacturing they wish to engage in.

The Court should hold that the Hemp Companies lack standing. If the Court concludes that they do have standing, it should uphold the Statute and the part of the Rule that implements it.

ARGUMENT

I. The Hemp Companies Lack Standing to Challenge the Statute and the Part of the Rule Related to Manufacturing and Processing Because Their Claims Are Not Redressable.

Texas Agriculture Code section 122.301(b) provides that "[a] state agency may not authorize a person to manufacture a product containing hemp for smoking." That is an independent bar to manufacturing hemp products for smoking that the Hemp Companies did not challenge in their live petition and that the trial court did not address in its final judgment. *See* Appellants' Br. 8–11. Therefore, the relief that the Hemp Companies sought and obtained will not redress their alleged harms, and they lack standing.

The Hemp Companies are correct (at 37) that Defendants expressed a different view of section 122.301(b) in the trial court, as Defendants admitted in their opening brief (at 10). But the Hemp Companies have changed *their* position to the same extent. Even after Defendants argued in the trial court that section 122.301(b) was irrelevant to this litigation because it applies only to non-consumable hemp products, *see, e.g.*, CR.206, the Hemp Companies continued to claim standing to challenge the provision because all smokable hemp products are inherently consumable products, CR.272–73. And, in their live petition, they maintained that the provision was an unconstitutional ban on smokable hemp products. CR.633–34. They just did not ask the trial court to do anything about it.

But whatever the parties' past positions, this Court must assure itself, based on a de novo interpretation of section 122.301(b), that the Hemp Companies have standing. *See Haynes & Boone, LLP v. NFTD, LLC*, 631 S.W.3d 65, 70–71 (Tex. 2021)

(confirming, in a case in which no party raised a jurisdictional objection, that "[a]s always, we must first determine whether we have jurisdiction"); *Odyssey 2020 Acad., Inc. v. Galveston Cent. Appraisal Dist.*, 624 S.W.3d 535, 540 (Tex. 2021) (statutes are interpreted de novo); *Farmers Tex. Cnty. Mut. Ins. Co. v. Beasley*, 598 S.W.3d 237, 240 (Tex. 2020) (questions of standing are reviewed de novo). It may otherwise not reach the merits. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–46 (Tex. 1993).

The Hemp Companies also argue (at 37) that section 122.301(b) poses no immediate threat of harm to them because, at most, the section would prohibit a state agency from granting them licenses to manufacture hemp products. They state, without record citation, that they already have the licenses they need to manufacture their products. Appellees' Br. 35, 37. Because they are already licensed, the Hemp Companies reason, section 122.301(b) is irrelevant. *Id.*

But the Hemp Companies fail to recognize that section 122.301(b) limits the *scope* of any manufacturing licenses they obtained. The Hemp Companies may lawfully manufacture consumable hemp products only if they have received a license to do so. Tex. Health & Safety Code § 443.101; 25 Tex. Admin. Code § 300.201(a). Because the Legislature has prohibited state agencies from authorizing the manufacture of hemp products for smoking, Tex. Agric. Code § 122.301(b), the Court should assume, absent contrary evidence, that no Texas license provides such authorization. Accordingly, the Hemp Companies are not licensed to manufacture hemp products for smoking, and it would be illegal for them to do so. In addition, a license to manufacture consumable hemp products is valid for one year only; after that, it must be

renewed. Tex. Health & Safety Code § 443.104(a); 25 Tex. Admin. Code § 300.202(a). Even if the Hemp Companies previously obtained licenses to manufacture hemp products for smoking, those licenses will expire, and section 122.301(b) will prohibit their renewal.

Because any licenses obtained by the Hemp Companies do not authorize them to manufacture hemp products for smoking, the trial court's permanent injunction does not remedy their alleged harms. Their harms are not redressable, and the Hemp Companies lack standing.

The Hemp Companies argue (at 39) that remand would be appropriate if the Court decides that they lack standing. They try to blame Defendants for their unilateral decision to omit a challenge to section 122.301(b) from their live petition, again ignoring their own "flip-flopping" on this point. Appellees' Br. 37. But far from somehow tricking the Hemp Companies into dropping an essential claim, Defendants were confused by the Hemp Companies' position on section 122.301(b) and called the issue to the trial court's attention. At trial, Defendants' counsel quoted the provision and stated: "And I think they are not challenging that one anymore. I'm not really sure. I hope they clarify that." 2.RR.56. No clarification was forthcoming.

The Hemp Companies were obliged to read section 122.301(b) for themselves and determine its meaning. And they were obliged to ensure that their live petition requested, and that the trial court's final judgment granted, relief that would actually remedy their alleged harms. The fact that they failed to do so is not attributable to Defendants.

II. The Trial Court Erred in Declaring the Statute Unconstitutional and Enjoining Its Enforcement.

A. The Hemp Companies have no liberty interest or vested property interest in manufacturing or processing consumable hemp products for smoking.

The due-course-of-law challenge fails at the outset because the Hemp Companies have neither a liberty interest nor a vested property interest in manufacturing or processing hemp products for smoking. They are not challenging regulations burdening the practice of a lawful profession, so they lack the liberty interest recognized in *Patel*. And they have no vested property interest in manufacturing a previously illegal product. Appellants' Br. 11–13.

In response, the Hemp Companies state (at 44) that their "Texas-based facilities have been in the lawful business of processing and manufacturing smokable hemp—until HB 1325 became law." But their pleadings do not support the assertion that any manufacturing of hemp products for smoking they may have engaged in was lawful. The Hemp Companies emphasize the fact that certain parts of the cannabis plant were excluded from the definition of "marihuana" under Texas law even before HB 1325. *See* Appellees' Br. 20–21, 42. The list of excluded parts included, for example, mature stalks and sterilized seeds. Act of May 9, 2001, 77th Leg., R.S., ch. 251, 2001 Tex. Gen. Laws 466, 466–67 (codified at Tex. Health & Safety Code § 481.002(26)). Notably absent from that list, however, is cannabis flower. Until HB 1325 excluded hemp from the definition of marihuana (based on the concentration of delta-9 THC, not on the plant part), *all* cannabis flower was considered marihuana and a controlled substance because it was not specifically excluded from

marihuana's definition. *See id.* The Hemp Companies did not plead that their products for smoking included only cannabis parts excluded from marihuana's definition, and they admitted in the trial court to using hemp flower in those products. CR.641–42; 2.RR.83. Assuming that is true (a question on which Defendants express no view), they were illegally manufacturing marihuana.

There was, at most, a period of less than three months when it was arguably legal in Texas to manufacture cannabis-flower products for smoking. That is because hemp (cannabis with a sufficiently low concentration of delta-9 THC) was removed from the schedules of controlled substances on March 15, 2019. Dep't of State Health Servs., *Order Removing Hemp, as Defined by the Agricultural Marketing Act of 1946, From Schedule I*, 44 Tex. Reg. 1467, 1467–69 (2019). HB 1325, which prohibited manufacturing hemp products for smoking, became effective on June 10, 2019. But the Hemp Companies did not plead that they manufactured their products or invested in their infrastructure, equipment, and workforce during that brief window. In fact, one specific period of manufacturing that they mentioned in the trial court—"late 2018," 2.RR.85—occurred before hemp was removed from the schedules of controlled substances in March 2019.

The Hemp Companies may argue that they could have manufactured their products until August 2020, when the Department of State Health Services promulgated hemp-related rules. *See* 2.RR.85–86. That would be incorrect, however, because Health and Safety Code section 443.101, which was added by HB 1325 and became effective in June 2019, provides that "[a] person may not process hemp or manufacture a consumable hemp product in this state unless the person holds a license under

this subchapter." The Hemp Companies have not alleged that they obtained manufacturing licenses before August 2020, and, as explained above in Part I, no license authorized the manufacturing of hemp products for smoking in violation of Agriculture Code section 122.301(b).

Because the Hemp Companies have not shown that they legally manufactured hemp products for smoking or invested in a legal enterprise, they have failed to establish that they have a vested property interest, and their due-course-of-law claim fails.

B. The Statute is constitutional under rational-basis review.

1. The Statute is subject only to rational-basis review, not *Patel*.

Patel was a case about unnecessary and oppressive hurdles to entry into a lawful profession. *See* 469 S.W.3d at 88; *id.* at 93, 106–08 (Willett, J., concurring). The Hemp Companies face no such hurdles. They concede (at 35, 37) that they already have licenses to manufacture hemp products. The question here is whether the Legislature may prohibit the manufacturing of one specific class of products—hemp products for smoking—that have long been surrounded by controversy and health concerns. *See* Appellants' Br. 2–4, 19–20. It can. *Patel* is inapposite, and the Statute is subject to rational-basis review. *See id.* at 13–15.

The Hemp Companies respond (at 46) that "[t]he notion that *Patel* applies only to some due course of law challenges but not others finds no support in Texas law." But they cite no precedent applying *Patel* to a statute that totally prohibits an activity. There are at least three reasons why the Court should reject the Hemp Companies' invitation to expand *Patel*.

First, *Patel*'s framework is not well-suited to evaluating absolute prohibitions like the one on manufacturing hemp products for smoking. Under *Patel*'s second prong, a court must weigh "the statute's actual, real-world effect as applied to the challenging party" against "the governmental interest." 469 S.W.3d at 87. But a flat prohibition, which was not at issue in *Patel*, infinitely burdens the subject activity. The Legislature has erected a wall, not just a hurdle. *See* Appellees' Br. 48 (acknowledging that, unlike the law at issue in *Patel*, "the Statute is a ban that makes the economic activity not just impractical but impossible"). It is difficult to see how to weigh an infinite burden against a finite state interest, however compelling the interest may be.

Second, the Hemp Companies offer no limiting principle as to what constitutes "economic regulations," *id.* at 46, or "economic activities," *id.* at 47. Adopting the Hemp Companies' broad reading would sweep countless laws into *Patel*'s ambit. For example, although the Hemp Companies point out (at 47) that smoking hemp is not itself illegal and assert that Defendants' "analogy to criminal drug laws is a scarecrow" and that "[t]he Legislature *could* ban a particular substance" like hemp, they offer no principle foreclosing *Patel*'s application to criminal drug laws. After all, manufacturing and selling many illegal drugs can be a lucrative economic activity. No substance is illegal by default, and substances that were not previously banned are occasionally added to the schedules of controlled substances. *See, e.g.*, Dep't of State Health Servs., *Order Placing PMMA in Schedule I, Extending the Temporary Scheduling of Six Cathinones, and Maintaining Remimazolam in Schedule IV*, 47 Tex. Reg. 176, 176–77 (2022); Andrew Weber, *House Tentatively Approves Salvia Ban*, Tex. Tribune

(Apr. 19, 2011), https://tinyurl.com/tx-salvia-ban (describing legislative effort to classify salvia divinorum as a controlled substance) (all websites cited in this brief last visited Mar. 1, 2022). Despite the Hemp Companies' assurances, embracing their interpretation would subject the Legislature's decision to prohibit any substance to scrutiny under *Patel*.

Third, an overly broad application of *Patel* raises constitutional concerns. Although the Texas Constitution protects individual liberty, *Patel*, 469 S.W.3d at 92 (Willett, J., concurring), it also enshrines the separation of powers. "In fact, the Texas Constitution takes Madison a step further by including, unlike the Federal Constitution, an explicit Separation of Powers provision to curb overreaching and to spur rival branches to guard their prerogatives." *Henry v. Cox*, 520 S.W.3d 28, 38 (Tex. 2017) (quoting *In re State Bd. for Educator Certification*, 452 S.W.3d 802, 808 n.39 (Tex. 2014) (orig. proceeding)); *see* Tex. Const. art. II, § 1. If this Court applies overly rigorous scrutiny to democratically enacted laws, it risks violating the separation of powers by "legislat[ing] from the bench," *Patel*, 469 S.W.3d at 140 (Guzman, J., dissenting), and engaging in "the kind of line-drawing" that courts are ill-equipped to conduct, *id.* at 137 (Hecht, C.J., dissenting). "Unconstrained by any meaningful standard, substantive due process allows judges to define liberty according to their personal policy preferences." *Id.* at 127 (Hecht, C.J., dissenting). That risk is particularly great when, as here, the law in question pertains to the manufacturing, in Texas, of controversial products that were illegal to use or sell just a few years ago.

2. The Statute survives rational-basis review.

The Statute is constitutional because it is rationally related to at least two legitimate governmental interests: (1) mitigating the problems law-enforcement officials and prosecutors face because it is difficult to distinguish legal hemp from illegal marihuana using only the senses and (2) protecting public health. The Legislature could have rationally concluded that by prohibiting the manufacturing of hemp products for smoking in Texas, the Statute will make it more expensive or more difficult for Texans to obtain such products and will therefore decrease hemp smoking and its deleterious effects on smokers. And less hemp smoking means that law-enforcement officials will encounter unknown cannabis products less often, improving enforcement efforts aimed at detecting and halting the illegal use of that controlled substance. Appellants' Br. 15–20.

The Hemp Companies' central argument in response is that the Statute is not rationally related to reducing hemp smoking in Texas. According to the Hemp Companies,

> [t]he 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.

Appellees' Br. 52.

That analogy shows why the Statute is rational. It is common sense that, if the production of a good decreases, much less if *all* domestic production ceases, the price may go up. *See, e.g.*, Robert Johansson (USDA Chief Economist), *Another Look at*

Availability and Prices of Food Amid the COVID-19 Pandemic, USDA (July 29, 2021), https://tinyurl.com/usda-food-covid (explaining that a reduction in beef production caused by the pandemic led to increased prices for consumers). The Hemp Companies' evidence shows, at most, that a single expert believes that the Statute will not decrease hemp smoking in Texas. *See* Appellees' Br. 58–59. It does not show that it would have been irrational for the Legislature to conclude that prohibiting Texas manufacturing will decrease hemp smoking.

The Hemp Companies also criticize the Legislature for prohibiting the manufacture of hemp products for smoking but not their importation or use. *Id.* at 51. As the United States Supreme Court has "frequently . . . explained, however, a state statute need not be so perfectly calibrated in order to pass muster under the rational-basis test." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 85 (1988). "Rational-basis review . . . does not require a perfect or exact fit between the means used and the ends sought." *Walker v. Hartford Life & Accident Ins. Co.*, 831 F.3d 968, 978 (8th Cir. 2016) (alteration in original) (quoting *United States v. Johnson*, 495 F.3d 951, 963 (8th Cir. 2007)); *accord City of Chicago v. Shalala*, 189 F.3d 598, 607 (7th Cir. 1999) (noting that "rational basis scrutiny does not require a perfect fit"). Instead, the Legislature "may tackle a problem one step at a time." *Person v. Ass'n of Bar of City of N.Y.*, 554 F.2d 534, 539 (2d Cir. 1977) (citing *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955)); *see also Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam) (noting that "no legislation pursues its purposes at all costs" and that "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice").

The Hemp Companies' reliance (at 55) on *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), is misplaced. That case, like *Patel*, involved "significant regulatory burdens," 712 F.3d at 218, not a manufacturing prohibition. The question was not whether the plaintiff monks could construct and sell burial caskets, but whether it was rational for a state agency to require them to meet such irrelevant requirements as "building a layout parlor for thirty people, a display room for six caskets, an arrangement room, and embalming facilities." *Id.* The State had not shown that those requirements were connected in any way with public health. *See id.* at 226. In contrast, it is rational to believe that smoking hemp poses health risks and that the Statute will reduce hemp smoking in Texas. *See* Appellants' Br. 18–20.

C. The Statute is constitutional under *Patel*.

Even if *Patel* applies (and, for the reasons already noted, it does not), the Hemp Companies have failed to meet their "high burden" under either prong. *Patel*, 469 S.W.3d at 87.

First, the Statute is at least arguably related to two governmental interests: (1) mitigating the difficulty law-enforcement officials and prosecutors have in distinguishing hemp from marihuana and (2) protecting public health. As discussed above in Part II.B.2, the Hemp Companies have failed to overcome the strong presumption that the Legislature acted rationally when it prohibited the manufacturing of hemp products for smoking.

Second, the Statute's real-world effect as applied to the Hemp Companies could arguably be rationally related to, and is not so burdensome as to be oppressive in the light of, the governmental interests. Although the Hemp Companies cannot

manufacture or process hemp products for smoking, they may still participate in "Texas's burgeoning hemp industry." Appellees' Br. 23. There are other hemp products they could manufacture because, by their own admission, hemp "is a versatile material that can be used to make many consumable and non-consumable products." *Id.* at 17; *see* CR.638–39 (the Hemp Companies describing a variety of non-smoking uses of hemp and alleging that "the global market for hemp consists of more than 25,000 products in nine submarkets"). But hemp products for *smoking* pose unique threats to lung health and law-enforcement efforts. *See* Appellants' Br. 16–20. Even if the Hemp Companies are correct that hemp products for smoking are especially lucrative, *see* CR.633, 641, nothing in the Texas Constitution guarantees them maximum profits, especially given the State's interest in protecting its citizens' health and aiding law enforcement.

In response, the Hemp Companies rely (at 61–62) on *Ladd v. Real Estate Commission*, 230 A.3d 1096 (Pa. 2020). That is telling because *Ladd*, like *St. Joseph Abbey*, involved onerous licensing requirements that allegedly interfered with the plaintiff's ability to practice a lawful profession. *Id.* at 1098–1101, 1109. The Hemp Companies' repeated reliance on cases that are like *Patel*, but not like this case, further suggests that *Patel*'s framework is misplaced here. *See supra*, Part II.B.1. *Ladd* also offers limited guidance in this case because Pennsylvania's standard differs from that of *Patel*. Under *Ladd*, "an exercise of the police power" must not exceed "the necessities of the case" or "impose unusual and unnecessary restrictions upon lawful occupations." 230 A.3d at 1109 (quoting *Shoul v. Commonwealth, Dep't of Transp., Bureau of Driver Licensing*, 173 A.3d 669, 677 (Pa. 2017)). None of that language appears in

Patel. Under this Court's test, the exclusion of a single class of hemp products from manufacturing in Texas is not unconstitutionally oppressive in the light of the important health and safety concerns the Statute advances.

III. The Trial Court Erred in Declaring the Rule Invalid in Its Entirety and Enjoining Its Enforcement.

The first part of the Rule merely tracks the Statute's language prohibiting the manufacturing and processing of hemp products for smoking. *Compare* Tex. Health & Safety Code § 443.204(4), *with* 25 Tex. Admin. Code § 300.104. The Hemp Companies do not dispute that the first part of the Rule stands or falls with the Statute. *See* Appellees' Br. 63. Because the Statute is constitutional for the reasons given above, the trial court erred in declaring the first part of the Rule invalid and enjoining its enforcement. *See* Appellants' Br. 22–23.

Prayer

The Court should grant the relief requested in Defendants' opening brief.

Respectfully submitted.

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