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March 28, 2022

Blake Hawthorne, Clerk Texas Supreme Court Via eFile

Re: Texas Department of State Health Services et al. v. Crown Distributing LLC et al. Cause No. 21-1045

Dear Mr. Hawthorne:

Appellees submit this post-submission letter brief to elaborate on questions during oral argument and the State's evolving positions. Oral argument citations are to the attached transcript.

The State's position is in tension with H.B. 1325 opening up the hemp industry.

Giving due deference to the Legislature's policy choices, the Court should recognize that H.B. 1325 is the Texas Legislature's swift and enthusiastic response to Congress's permission to create a hemp program. H.B. 1325 creates a comprehensive plan to allow farmers to cultivate valuable hemp crops, develop new markets for businesses, and position Texas at the forefront of the hemp industry—greatly benefitting the Texas economy with an emerging market of innovative products. *Opening* the hemp industry to farmers, businesses, and consumers is the public policy of Texas.

In the context of the Act as a whole, a ban on domestic *manufacturing* and *processing* of smokable hemp is an aberration. One could make sense of it if the State had argued that manufacturing and processing (drying the plant) activities created some local harm that the Legislature sought to avoid. But there is no straight-faced argument that a ban on the manufacturing and processing of smokable hemp was intended to limit its *use*, because the Legislature simultaneously made *use* completely legal with no restrictions whatsoever. H.B. 1325 evidences the Legislature's intent to vastly expand consumer hemp use, because it is expressly lawful to "possess, transport, sell, or purchase consumable hemp product[s]"—including hemp for smoking. Tex. Health & Safety Code § 443.201(a).

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Federal Farm Bill preemption has no bearing on States' regulation of hemp use.

Justice Busby asked if the ban might be rational if federal law *requires* States to allow persons to possess, transport, sell, and purchase consumable hemp products. OA.22:1-10 (suggesting that legalizing the activities in § 443.201(a) might be "required by the federal legislation"). He wondered whether the irrationality in § 443.204(4)'s ban on domestic processing or manufacturing of a legal product is one of the few means by which the State could attempt to limit use. OA.21:53-22:06 ("Is the irrationality that you are identifying inherent in the way the Farm Bill portions out what the states can regulate versus what the federal government regulates, and what the states cannot regulate?"); *id*. 22:50-59 (same).

Federal law did not force this choice. The 2018 Farm Bill only preempts States from prohibiting "the transportation or shipment of hemp or hemp products … through the state." 7 U.S.C. § 1639*o* note. It does not "preempt[] or limit[] any law of a State . . . that regulates the production of hemp and is more stringent than this subchapter." *Id.* § 1639*p*.

The Seventh Circuit has held that the Farm Bill places *no limits* on a State's ability to regulate the manufacture, production, sale, distribution, or consumption of hemp or hemp products. *See C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541, 546-49 (7th Cir. 2020). And several states have enacted legislation banning or restricting hemp use. *See e.g.*, Haw. Admin. R. § 11-37-3 (prohibiting retail sale of hemp-derived smokable goods); Iowa Code § 204.14A (prohibiting sale, use, possession, distribution or manufacture of smokable hemp or hemp products); S.D. Codified Laws § 38-35-21 (making sale or use of hemp for smoking a misdemeanor).

The Texas Legislature made a different choice. Nothing in the Farm Bill explains the irrationality of the manufacturing and processing ban in § 443.204(4), and the State has never argued otherwise. The Legislature could *rationally* limit the use of smokable hemp by prohibiting or limiting its possession, sale, and purchase. But H.B. 1325 did just the opposite—evidencing a legislative intent to allow and expand use.

Considering evidence is appropriate.

The test articulated in *Patel* squarely applies to this case, because the due course of law challenge is to a statute banning the processing and manufacturing of a lawful product.¹

¹ "The proponent of an as-applied challenge to an economic regulation statute under Section 19's substantive due course of law requirement must demonstrate that either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) 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." *Patel v. Texas Dep't of Licensing and Regulation*, 469 S.W.3d 69, 87 (Tex. 2015).

The statue is an economic regulation because it regulates a type of employment and business activity by which Texas citizens earn a living, but for the ban under review.

At oral argument, the State was unwilling to concede that evidence informs the rational basis inquiry, even though this Court has clearly so held: "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*, 469 S.W.3d at 87; *see also St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) (holding statute failed federal test and noting, "although rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality").²

Notably, the State conceded in *Patel* that evidence informs the constitutional test. *See* State Merits Brief in *Patel* at 27 ("In as-applied cases (like this one), a court should consider whether evidence exists to establish that the regulatory scheme bears a rational relationship to its purpose and whether its application is unreasonable as applied to the particular claimant."). The State further *agreed* in *Patel* that it had a burden to substantiate the connection to its asserted interests and emphasized it had "countered with evidence establishing the health, safety, and sanitation issues associated with threading, as well as its own evidence regarding threading-related instruction and examination." *Id.* at 14-15.

Because the State's asserted interest in *Patel*—protecting public health and safety was furthered by the means sought to achieve that—requiring training for licensure, it was conceded that the threshold step of the rational basis test was satisfied. Instead, the parties clashed on the additional considerations in *Patel*'s test (considering the statute's real-world effect as applied to the challenging party and whether it is "so burdensome as to be oppressive in light of, the governmental interest."). Everyone could agree that the State had a legitimate government interest in protecting public health and safety by requiring some training; the question was whether the State could require an amount of training so excessively far beyond the needs of its health and safety interests that it practically foreclosed the eyebrow threaders from their chosen line of work. Six justices agreed the Legislature could not.

Justice Young asked if the Hemp Companies are embracing the federal standard rather than *Patel*. OA.27:22-28:5. To be clear, the challenge is under the Texas Constitution, including the aspects of Texas law discussed in *Patel*. The point made at oral argument is that the rational basis inquiry in this case could be decided on logic alone, under the most basic conceptualization of rational basis, with addressing *Patel*'s additional steps.

² We will not belabor the evidence the Hemp Companies adduced to prove irrationality and the statute's oppressive burden. *See* Hemp Companies Br. 28-29, 50-62.

A statute that seeks to restrict *use* solely by means of a ban on *manufacturing*—an upstream business activity with no logical or apparent connection to *use*—is a paradigmatic example of clearly arbitrary and unreasonable government overreach, lacking any logical fit between the asserted ends sought to be achieved (less use) and the means of accomplishing them (banning a business activity that is unrelated and too remote to impact use).

Justice Boyd's casino analogy illustrates how to apply Patel.

Justice Boyd's casino analogy is useful to illustrate the potential irrationality of a manufacturing ban on a product whose use is legal. Imagine the Legislature created a comprehensive plan to legalize and promote the casino gambling industry in Texas, allowing casinos to open throughout the state and offer every available game. Yet in the same statewide plan the Legislature prohibited the *domestic manufacture* of slot machines. A Texas-based slot machine manufacturer could challenge the ban and argue it fails *Patel*'s test.

The State could rightly argue that it has a government interest in protecting health and that slot machine gambling has known negative impacts on health. But such an asserted purpose would be "completely mismatched with—that is, it bore no rational relationship to" a ban on the *manufacturing* of slot machines. *Patel*, 469 S.W.3d at 90 (explaining part of standard on which all justices could agree).

The State could argue (as it does in this case) that banning the domestic manufacture of slot machines might have some theoretical impact on slot machine use and thus benefit public health. But slot machine manufacturers could refute that premise by offering evidence that casinos would continue to offer slot machines and simply import them from other states. They might even prove at trial that most slot machines are manufactured in Nevada, further illustrating that a domestic manufacturing ban is completely mismatched with an asserted aim of advancing public health by reducing slot machine use.

Here, the Legislature expressly allowed hemp manufactured or processed in other states to be sold in Texas. Tex. Health & Safety Code § 443.206. And the evidence at trial confirms that most of the smokable hemp currently consumed in Texas comes from Oregon or other states, so supply is not an issue. 2.RR.126. The cannabis economist further testified that a domestic manufacturing ban would not affect consumer demand. 2.RR.104-30; 3RR10. A ban on Texas manufacturing with the purpose of reducing use is thus "completely mismatched" and irrational.

Like the casino analogy, this is an easy case. The ban's irrationality is evident. But the Hemp Companies did not take that for granted; they made a record. That record is unrefuted, so this is the exceedingly rare case where the statute fails Step 1 of *Patel*.

Salvaging irrational laws on grounds not asserted by the State violates due process. At oral argument, the State took the position that the Court could save a law if it can "come up with some legitimate purpose to which the law is rationally related . . . regardless of whether the State or any department or any of its lawyers have ever raised that legitimate purpose to [the] Court." OA.38:13-22. The State contends that the Court is "looking to whether the statute does something that's beneficial to Texans, regardless of whether anyone articulated that rationale." *Id.* Not only is "do good for Texans" not a recognizable or justiciable test, but the State's invitation to the Court to make up its own notion of "good" offends procedural due process because it subjects parties to ever-evolving rationales—long after their opportunity to refute the rationale with evidence has closed.

Even if *States* may justify a law with *post hoc* reasoning, *courts* should not hypothesize new and different interests on appeal that were never argued by the State. *Compare Harris Cty. Tex. v. CarMax Auto Superstores Inc.*, 177 F.3d 306, 323 (5th Cir. 1999) *with Patel*, 469 S.W.3d at 116 (Willett, J., concurring). Doing so would violate the due process requirements of notice and this Court's holding that evidence may be necessary in these cases. *See, e.g., id.* (describing evidence and argument against asserted state interest); *St. Joseph Abbey*, 712 F.3d at 223; *see generally Patel*, 469 S.W.3d at 87.

Imagining unargued state interests also runs afoul of the party presentation rule. "In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation." *Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008). "That is, [courts] rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* "Our adversary system is designed around the premise that the parties know what is best for them and are responsible for advancing the facts and arguments entitling them to relief." *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring).

Texas rightly follows the party presentation rule. In re Farmers Texas Cty. Mut. Ins. Co., 621 S.W.3d 261, 275 & n.18 (Tex. 2021) (Busby, J.); Pike v. Texas EMC Mgmt., LLC, 610 S.W.3d 763, 782 (Tex. 2020) (citing Greenlaw) (Busby, J.) ("A court of appeals may not reverse a trial court judgment on a ground not raised"); Ward v. Lamar Univ., 484 S.W.3d 440, 453 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing Greenlaw) (Busby, J.) ("[C]ourts should rely on the adversary system of justice, which depends on the parties to frame the issues for decision and assigns to courts the role of neutral arbiter of the matters that the parties present"). As Justice Busby explained in Ward: "The Due Process Clause of the Federal Constitution the Due Course of Law Clause of the Texas Constitution require judges to be neutral and detached." Ward, 484 S.W.3d at 545 n.13.³

³ See also Barcus v. Scharbauer, 2021 WL 1422716, at *11 (Tex. App.—Dallas Apr. 15, 2021, no pet.) ("Sarah has a constitutionally justifiable expectation that we will not assist appellants with their

Here, the State has only ever urged two interests underlying the manufacturing ban in this case, which both rely on the premise that a manufacturing ban will reduce end use. The Court's analysis should focus on whether a manufacturing ban to limit use is arbitrary, unreasonable, illogical, and with means and the ends that are "completely mismatched."

Upholding the judgment does not create a phase-shift for Patel.

Justice Young expressed concern that ruling for the Hemp Companies would "subject the legislature to standards of exactitude and precision . . . in a way we really haven't seen before." OA.34:3-12. To the contrary, requiring the Legislature to have a logical fit between a statute's purpose and the means sought to achieve it is the lowest bar known in law, and the Court should hold the statute under review fails that first step of *Patel*. The real impact of ruling for the Hemp Companies is to confirm that the Executive branch must defend its statutes—with evidence, when its asserted interests have been refuted.

The State argued for the first time at oral argument that applying the *Patel* test to an economic regulation may require applying it to social issues, like the right to marry or the right to an abortion. OA.6:20-7:11. Yet the case it cited for this (for the first time in oral argument) shows exactly the opposite. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610 (2019). In that case, the majority held that the right to an abortion is "fundamental" under the Kansas Constitution and struck down restrictions on that right under the highest level of judicial scrutiny.

In dissent, Justice Stegall floated the *Patel* test (citing Justice Willett's concurrence) as an alternative to avoid strict scrutiny and striking down the abortion law. The dissent advocated for the *Patel* standard because it is "a deferential test"—"one that recognizes our Constitution vests the legislative branch of government with the institutional competence to consider competing interests and policy options, resulting in democratic judgment about the common welfare of all Kansans." *Id.* at 766-67 (Stegall, J. dissenting).

In other words, the dissenting justice in *Hodes & Nauser* urged the Court to apply a more lenient, *Patel*-like test to review the Kansas abortion restrictions, not strike them down under strict scrutiny. Far from showing a floodgates problem with social issues, the State's latest argument shows that *Patel* upholds separation of powers between the Legislature and courts.

brief or arguments (just as appellants have the same expectation with respect to our obligation to refrain from helping Sarah)"); *Horton v. Stovall*, 2020 WL 7640042, at *3 (Tex. App.—Dallas Dec. 23, 2020, no pet.) ("We understand when we carry out our duties we must not identify issues and arguments not raised by an appellant.").

That the State might lose a case in which the Legislature has passed an irrational statute that the Executive branch strategically chose not to defend on the merits at trial will not open the floodgates to more challenges.⁴ Each case can be decided narrowly on the particular statute and record before the Court. And applying *Patel* to a manufacturing ban does not extend a test governing economic regulations at all. What distinguishes this case from others decided under *Patel* is that the State's basis for the ban is not logical and the State elected not to present any evidence to show otherwise.

A "lawful calling" describes the constitutional interest in choosing to work.

The State has strained to avoid review by arguing that this case does not involve a lawful calling. The phrase "lawful calling," used in Justice Willett's concurring opinion, merely describes the abstract liberty and property interest in choosing one's work. *Patel*, 469 S.W.3d at 93 & n.46 & 155.⁵ The Court should reject the unsupported argument that the phrase "lawful calling" is an element or threshold step of the constitutional analysis. *See* OA.12:2-13:13 (calling it a threshold barrier and "stumbling block" for the Hemp Companies).

It is the economic liberty right to work and earn a living that has long been recognized in the Constitution and is rooted in history and tradition. *See* Hemp Companies Br. 40-44. That right does not turn on whether the line of work has previously been lawful or not, or whether a product being manufactured is old or new. If the economic activity being regulated would be lawful, but for the challenged statue, then there is a right to challenge the statute. The Court should frame the constitutional right as the right to earn a living as one chooses—here, by manufacturing or processing a legal product.

In any event, manufacturing smokable hemp is lawful.

The State argued that "manufacturing hemp for smoking" has never been lawful in Texas. OA.5:6-13. This is incorrect. Manufacturing hemp products of any kind using excluded portions of the plant—including a smokable hemp product—was legal federally and in Texas, provided that product has no THC. Hence, at trial, witnesses testified that the product they made and sold nationally prior to H.B. 1325 had 0.000% THC and that both the Drug Enforcement Administration and the Dallas Police Department inspected the product in late 2018 and found no issues. 2.RR.84-85.

In the trial court, DSHS objected and refused to answer an interrogatory to "identify the factual and legal basis supporting your contention that the retail sale or manufacture of

⁴ The Institute of Justice amicus brief directly addresses this point as well.

⁵ "The U.S. Supreme Court has repeatedly declared that the right to pursue a lawful calling 'free from unreasonable governmental interference' is guaranteed under the federal Constitution, and is "objectively, deeply rooted in this Nation's history and tradition." *Patel*, 469 S.W.3d at 93.

smokable hemp products before August 2, 2020 was illegal in the State of Texas." 2.RR.65:6-66:6; 150:9-153:23 (discussing interrogatory and objection). The State's implication that the Hemp Companies were ever in violation of any law is not supported by evidence, legal cites, or discovery responses, and is waived.

Nevertheless, the State seems to think there is a point to make about hemp "flower." *E.g.*, OA.14:5-14. Although flower has been legal in Texas only as recently as March 2019 (months before the manufacturing ban), other THC-free hemp products like hemp CBD oil—some of which can be smoked—could be made and sold. *See Hemp Indus. Ass 'n v. Drug Enf't Admin.*, 333 F.3d 1082, 1085 (9th Cir. 2003)). Manufacturing hemp products for smoking is an economic activity that was lawful well before the enactment H.B. 1325, depending on what part of the hemp plant comprised the end-product. The 0.000% THC product the Hemp Companies made and sold was a legal smokable hemp product. The record in this case—which DSHS did not challenge—shows that before the manufacturing ban, the Hemp Companies made legal, THC-free smokable hemp products before the smokable hemp manufacturing ban.

The constitutional right to liberty and property is protected by the courts.

The Court is right to be deferential to legislative policy choices. Yet too much deference to the other branches—"judicial passivism"—is just as corrosive as judicial activism. *See Patel*, 469 S.W.3d at 119 (Willett, J., concurring). Justice Willett wrote:

[J]udicial passivity is incompatible with individual liberty and constitutionally limited government. Occupational freedom, the right to earn a living as one chooses, is a nontrivial constitutional right entitled to nontrivial judicial protection. People are owed liberty by virtue of their very humanity — "endowed by their Creator," as the Declaration affirms. And while government has undeniable authority to regulate economic activities to protect the public against fraud and danger, freedom should be the general rule, and restraint the exception.

The Court's many questions at oral argument showed laudable engagement with this important issue, which will affect the constitutional rights of all who work in this state. The State invites the Court to strain settled precedent, erect new constitutional hurdles to challenging statutes, and afford it uncritical deference even when it fails to defend a statute. Such invitations should be rejected.

The judgment is correct and should be affirmed.

Very truly yours,

Connie Steeffer

Constance H. Pfeiffer

cc: All counsel of record.

Oral Argument Transcript

1 TEXAS SUPREME COURT 2 -----X 3 TEXAS DEPARTMENT OF STATE HEALTH : 4 SERVICES, : 5 Plaintiff, : 6 : Case No. v. CROWN DISTRIBUTING, LLC, : 01-21-00596-CV 7 8 Defendant. : 9 : 10 -----x 11 ORAL ARGUMENT 12 Tuesday, March 22, 2022 DATE: 13 Texas Supreme Court BEFORE: LOCATION: 14 204 West 14th Street, Room 104 15 Austin, Texas 78701 16 17 18 19 20 21 22 23 24 25 Page 1

1 A P P E A R A N C E S	1 PROCEEDINGS
2 ON BEHALF OF PLAINTIFF:	2 CHIEF JUSTICE HECHT: We're ready for
3 BILL DAVIS, ESQUIRE	3 argument and 211045, the Texas Department of State
4 Office of the Solicitor General of Texas	4 Health Services v. Crown Distributing.
5 PO Box 12548	5 COURT CLERK: Today, please, the Court, Mr.
6 Austin, Texas 78711	6 Davis will present argument for the appellants.
7 (512) 936-1700	7 Appellants have reserved five minutes for rebuttal.
8	8 MR. DAVIS: Thank you, Mr. Chief Justice.
9 ON BEHALF OF DEFENDANT:	9 And may it please the Court?
10 CONSTANCE PFEIFFER, ESQUIRE	10 The primary question in this case is whether
11 Yetter Coleman LLP	11 the Court should extend Patel and effectively end
12 811 Main Street, Suite 4100	12 rational basis review for a broad range of substantive
13 Houston, Texas 77002	13 due course claims. I'll focus my time, if I could, on
14 ddean@yettercoleman.com	14 why the Court should not take that step and why the
15 (713) 457-3030	15 challenged law is constitutional.
16	16 So to begin with Patel, that case is
17 ALSO PRESENT:	17 distinguishable from this one in several ways. And I
18 CHIEF JUSTICE NATHAN HECHT	18 can just highlight a couple of those. The first is
19 JUSTICE JEFF BOYD	19 that the Patel plaintiff's, eyebrow threaders, were
20 JUSTICE BRETT BUSBY	20 practicing a lawful trade. And they encountered a
21 JUSTICE JANE BLAND	21 regulatory scheme in Texas that was ill suited to that
22 JUSTICE JIMMY BLACKLOCK	22 trade, but there's no question that it was a lawful
23 JUSTICE EVAN YOUNG	23 profession.
24	And so for that reason, the plaintiffs in
25	25 Patel could trace their substantive due course claim
Page 2	Page 4
1 CONTENTS	1 all the way back to the very origins of substantive
2 ARGUMENT PAGE	2 due process in the slaughterhouse cases. And in
3 By Mr. Davis 4, 35	3 particular, Justice Bradley's descent in that case,
4 By Ms. Pfeiffer 14	4 which focused on a lawful calling, being able to
5	5 practice a lawful profession.
6	6 But here, we're not talking about
7 EXHIBITS	7 professionals, we're talking about companies and we're
8 EXHIBIT DESCRIPTION MARKED ADMITTED	8 talking about companies who were engaged in
9	9 manufacturing hemp for smoking, which is an activity,
10 (None marked.)	10 at least when it's used with parts of the plants, such
11	11 as the flower, that have never been on the exclusion
12	12 from marijuana, is something that's never been lawful
13	13 in Texas.
14	14 The second point of distinction is that,
15	15 again, the Patel professionals encountered regulatory
16	16 hurdles to getting into the profession that they
17	17 wanted to practice in Texas. And here, we're talking
18	18 about the statute, not the the second part of the
19	19 rule that we don't challenge the trial court's
20	20 injunction as to as to the second part of that.
21	
22	21 We're talking about a statute that bars manufacturing
	21 We're talking about a statute that bars manufacturing22 or processing of hemp for smoking. So that's a narrow
23	
23 24	22 or processing of hemp for smoking. So that's a narrow
	22 or processing of hemp for smoking. So that's a narrow23 exclusion from what the companies can do.
24	 22 or processing of hemp for smoking. So that's a narrow 23 exclusion from what the companies can do. 24 In in that respect, it's it's a bit

^{2 (}Pages 2 - 5)

1	Williamson Optical case, sorry, Williamson v. Lee	1	something.
2	Optical where the regulation there was not on an	2	MR. DAVIS: Well, I mean, the text of Article
3	entire profession, but rather on a particular practice	3	1, Section 19 does use the word "citizen." And
4	of opticians who wanted to fit old lenses into new	4	normally, we would think of a citizen as an
5	frames. And that, of course, is a class example of	5	individual. But I could move to how the the
6	where the rational basis test finds its application.	6	constitutional analysis plays out here, I think that
7	And then a final point, I would say, about	7	the question is either under rational basis or under
8	extending Patel is a separation of powers point that	8	Patel. And it's constitutional under both of those
9	we addressed in the briefing. Moving away from	9	frameworks. And just to start with the rational basis
10	rational basis towards the Patel standard shifts the	10	test.
11	balance of the courts, with respect to the	11	There are several basis for this statute, and
12	legislature. And here when we're talking about Patel,	12	we've laid them out in the briefs. If I could focus
13	the question of what is an undue burden or oppressive	13	on on one, it would be the health concerns that
14	is in the eyes of the beholder. That means, every	14	underly inhalation of any kind of smoke. I think if
15	judge in every county at ever level of this state will	15	we were litigating this case in 1950, it might be the
16	be engaged in those questions. And not only that, but	16	case that we would need evidence that inhaling smoke
17	also what counts as a economic regulatory statute.	17	is not good for you. But in the 2020's, we don't need
18	That's another part of the Patel test that's subject	18	that evidence, and that's something that the rational
19	to wide-ranging interpretations.	19	basis standard allows us to make a showing of without
20	Now many people would look at economic	20	an evidentiary burden.
21	regulations and and regulations of social rights	21	JUSTICE BLACKLOCK: Isn't there isn't the
22	differently and say, well, there's a line between	22	premise of rational basis review that you need you
23	those. But even regulations of social rights have	23	need a rational basis to distinguish between similarly
24	economic implications. A statute that governs who can	24	situated parties. And I I wonder if we even have
25	marry has implications for who can file a joint tax	25	that here, if if we even get to rational basis
	Page 6		Page 8
1	return, who can qualify for benefits.	1	review. If this is this an equal protection
2	And we've seen Patel applied, or at lest	2	problem? But where where is the Court's
3	considered, in other jurisdictions. And one that I	3	entitlement to examine the rationality of the
4	would note is the Kansas Supreme Court in Hodes v.	4	regulation coming from.
5	Schmidt case from 2019. That case involved an	5	MR. DAVIS: Well, I guess I would first say,
6	abortion regulation, and at least one of the judges of	6	there's been no equal protection claim alleged here.
7	that court, Justice Stegall, argued in descent that	7	The claim is under the substantive of due course
8	Patel should apply there. And so I think the risk of	8	provision, which you know, historically has been
9	extending Patel is that it's uncertain where it will	9	subject to rational basis review. I'm not sure I'm
10	lead. And Patel itself doesn't give clear guidance on	10	answering Your Honor's question, but I would say that
11	where it applies.	11	the Court
12	JUSTICE YOUNG: But the the company versus	12	JUSTICE BLACKLOCK: So it's so it's the
1	individual point that you started with, that seems		substantive due course of law concept that is the
14	like something that isn't as susceptible to these	14	that would be the basis for any rational basis review
15	slippery slope type arguments that you're making them.	15	that that would apply here?
16	MR. DAVIS: That's, I think, true, Your	16	MR. DAVIS: That's right. That's that's
17		17	the only claim that's been brought in this case.
	Honor. And if if the Court were to read Patel as	11/	
18	Honor. And if if the Court were to read Patel as not applying to companies, but rather to professionals	18	But regulating the manufacturer of hemp for
18	Honor. And if if the Court were to read Patel as not applying to companies, but rather to professionals who are trying to get into a lawful trade but face a	18 19	But regulating the manufacturer of hemp for smoking is a bit like regulating the manufacturer of
18 19 20	Honor. And if if the Court were to read Patel as not applying to companies, but rather to professionals who are trying to get into a lawful trade but face a series of regulatory barriers, I think that would	18 19 20	But regulating the manufacturer of hemp for smoking is a bit like regulating the manufacturer of paint for inhalation, or paint thinner for inhalation,
18 19 20 21	Honor. And if if the Court were to read Patel as not applying to companies, but rather to professionals who are trying to get into a lawful trade but face a series of regulatory barriers, I think that would one be one way	18 19 20 21	But regulating the manufacturer of hemp for smoking is a bit like regulating the manufacturer of paint for inhalation, or paint thinner for inhalation, or laundry detergents for eating. Certainly, there's
18 19 20 21 22	Honor. And if if the Court were to read Patel as not applying to companies, but rather to professionals who are trying to get into a lawful trade but face a series of regulatory barriers, I think that would one be one way JUSTICE YOUNG: Wouldn't it be sort of	18 19 20 21 22	But regulating the manufacturer of hemp for smoking is a bit like regulating the manufacturer of paint for inhalation, or paint thinner for inhalation, or laundry detergents for eating. Certainly, there's a rational basis in prohibiting the manufacture of
18 19 20 21 22 23	Honor. And if if the Court were to read Patel as not applying to companies, but rather to professionals who are trying to get into a lawful trade but face a series of regulatory barriers, I think that would one be one way JUSTICE YOUNG: Wouldn't it be sort of strange to read the constitutional provision as	 18 19 20 21 22 23 	But regulating the manufacturer of hemp for smoking is a bit like regulating the manufacturer of paint for inhalation, or paint thinner for inhalation, or laundry detergents for eating. Certainly, there's a rational basis in prohibiting the manufacture of something for something that it's not its intended use
18 19 20 21 22 23 24	Honor. And if if the Court were to read Patel as not applying to companies, but rather to professionals who are trying to get into a lawful trade but face a series of regulatory barriers, I think that would one be one way JUSTICE YOUNG: Wouldn't it be sort of strange to read the constitutional provision as inherently only applying to a a human being and not	18 19 20 21 22 23 24	But regulating the manufacturer of hemp for smoking is a bit like regulating the manufacturer of paint for inhalation, or paint thinner for inhalation, or laundry detergents for eating. Certainly, there's a rational basis in prohibiting the manufacture of something for something that it's not its intended use and could have clear health consequences.
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3 (Pages 6 - 9)

1 JUSTICE BLAND: Is that rational basis	1 that standard as well.
2 fulfilled by the statute when out-of-state	2 JUSTICE BLACKLOCK: Now I wonder, Counsel,
3 manufactures that can sell and distribute their	3 whether there isn't if you talk about Patel as
4 product in state, and by the same token, does Texas	4 being up here and rational basis here, I wonder
5 have an interest in ensuring that out-of-state	5 whether there's not even a lower more differential
6 consumers don't inhale hemp or smoke hemp even though	6 standard of review that would apply to judicial review
7 their own states permit it.	7 of of regulations in areas that are that have
8 MR. DAVIS: Right. So the State does have	8 historically been viewed with great suspicion by the
9 that interest, but the statute doesn't pursue its	9 law and that have historically been prohibited and
10 objective to that extent. And that's another feature	10 heavily regulated if they are allowed, and if they
11 of the rational basis standard that states are allowed	11 might include drugs and alcohol and perhaps sexually
12 to address problems one step at a time. They don't	12 oriented businesses in this category. I I just
13 need to introduce comprehensive legislation.	13 wonder whether there is any liberty or property
14 Here we're dealing with an area that's new to	14 interests that's rooted in the legal traditions of
15 Texas, hemp manufacturing, hemp smoking. And the	15 this country that you could point to, to say I I'm
16 legislature could reasonably decide to to take an	16 entitled to review by courts on the basis of the
17 indirect approach to address that problem and	17 constitution of the government's decision to
18 potentially increase the regulation if it doesn't	18 (inaudible) what I'm doing in these sorts of areas.
19 think that's effective enough. If we were to turn	19 MR. DAVIS: Well, Your Honor, I think that's
20 to	20 exactly right. The the state's police power is
21 JUSTICE BUSBY: Can they increase the	21 very strong in this context, and the threshold barrier
22 regulation, or does would the federal law prohibit	22 of having a protected property vested property
23 the state legislature from banning sale by out-of-	23 right or protected liberty interest is another
24 state manufacturers?	24 stumbling block for the the companies here. And
25 MR. DAVIS: I believe federal law would	25 that's the case for the the reason I've noted
Page 10	Page 12
1 prohibit the state from restricting transport across	1 earlier, that manufacturing of hemp for smoking, using
2 state lines, but the state can regulate more	2 the flower and other parts of the plant that the
3 restrictively if it wants to.	3 testimony here reflects are being used has never been
4 And if I could turn to the Patel standard,	4 legal in in Texas.
5 and if we're in the world in which Patel applies, we	5 And we can see that the flower is is
6 have the same governmental interests. They're strong	6 what's used from page 83 to 85 of the trial
7 interests in promoting effective law enforcement and	7 transcript. It's the second reporter's record. Mr.
8 protecting the health of Texans. And the question, of	8 Maghani (ph) testified that manufacturing has been
9 course, in the first part of Patel is essentially	9 going on for several years. That's at least since the
10 rational basis.	10 late 2018. And he said we get the produce in and
11 But if we get to the second part of the test,	11 we separate it out, use the flower. And again, that's
12 we get to burden and oppressiveness. And for the	12 something that has never been excluded from that
13 reasons that I've noted earlier, this is not an	13 the definition of what marijuana consists of.
14 oppressive law because it allows these companies to do	14 And that's a that's a long answer to Your
15 a whole host of things in the hemp economy. They can	15 Honor's question, but I think the answer is yes.
16 manufacture hemp products for purposes other than	16 If if the companies can't get over that initial
17 smoking. They can even sell hemp products for	17 hurdle of showing a protected liberty interest because
18 smoking, as long as they've been manufactured in	18 this is not activity that Texas law has allowed, then
19 another state. And and the companies, as Justice	19 that is a complete bar to their claim without getting
20 Bland noted, argue, well that means it's it's not	20 to rational basis review or to Patel.
21 effective. But again, it needed be entirely effective	21 JUSTICE BLAND: What what if it was a
22 to the maximum extent under rational basis. And under	22 completely new activity, like synthetic marijuana,
23 Patel, it just doesn't have to be oppressive. And if	23 like Kush or K2 or not Kush, but Spice or one of
24 it's not so oppressive to shut off an entire range of	24 those drugs that chemical composition is slightly
25 professionals, as we saw in Patel, then it satisfies	25 different, so it hasn't been on any schedule. Is
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Page 11	Page 13

4 (Pages 10 - 13)

1 there a - is there a vested interest in heing able to 1 are advanced by the statute, even though that is 2 produce that and and any subsequent addition of it 2 refuted by the evidence in the record. 3 to the drug schedule. Would that create some sort of 3 JUSTICE BLACKLOCK: So does that does what 4 problem under Parel, or should it? 4 you gust said only work if there's some review beyond 5 MS. DAVIS: Well, I don't see how there could 6 that aupplics brev, or would you say 7 been authorized. I think the companies might argue, 7 evidentiary record to support the laws? 8 Well, we have a liberry interest to do something that 9 review in front of 10 Derev, it doesen' work because the activity that the 10 JUSTICE BLACKLOCK: What's our authority for 11 tanzerti, and also page 642, I believe of the 13 NC. Arstific case that we'ce cited in our brief where 14 jatcure of a hottle of snokubic hemp flower. 15 So tose are the points 1 intended to cover 15 12 OURT CLERK: May it please the Court, Mas. 16 refueed by adducing evidence of inrationality.'' <t< th=""><th></th><th></th><th></th><th></th></t<>				
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5 MR. DAVIS: Well, I don't see how there could 5 rational basis that applies here, or would you say 6 be a vested interest in doing something that has never 6 that under rational basis that applies here, or would you say 7 be may indoes the activity that regue, 8 that under rational basis that applies here, or would you say 8 well, we have a liberty interest to do something that 9 revice interve core to support the laws? 8 well, we have a liberty interest to do something that 9 revice interve core to support the laws? 10 Inter, id osor two kbeceuse the activity that the 10 IUSTICE BLACKLOCK: What's you authority for 11 that? if any opening time unless the Court has other 10 IUSTICE BLACKLOCK: What's you authority for 13 clerk : record is the second amended live petition has 14 Judge Higginbotham said that1 can give you a 15 So those are the points I intended to cover 15 questions. 17 So even in federal law, the court may 18 CHIEF JUSTICE HECHT: Any other questions? 18 consider evidence and the the part challenging a 10 TArey had fact witnesse; we had an expert witness who 2 So wee met that burden here. That t		-		
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22 look at the entire record. And so this is a very case 22 letters from three different law firms that confirmed	21	kind of an analysis. That you look at the record, you	21	that before they went into business, they got opinion
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23 because the state hasn't even bothered to create a 23 that the the parts of the plant that they were				
24 record, and they're standing here in court saying just 24 using to make smokable hemp was all exempt and legal				
25 trust us, you can assume that these are interests that 25 cannabis. And the Dallas Police Department and the	25	-	25	-
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5 (Pages 14 - 17)

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1	DEA came to the facilities in late 2018 to inspect the		more legal. I mean the the farm bills are
2	produce and test it. They tested it and confirmed	2	expanding what is legal and making it legal to
3	that this was all legal.	3	cultivate hemp domestically in the United States. So
4	So the State's just standing here and saying	4	that's what's opened the door for all of this cannabis
5	the court could assume it was illegal, and that's	5	production and sales and new products.
6	totally refuted by the record. And they they never	6	JUSTICE BUSBY: But they've also pushed some
7	challenged that evidence in the trial court.	7	regulation down to the state level.
8	JUSTICE BLAND: Is your position that we	8	MS. PFEIFFER: That's right. So the states
9	should read Patel so broadly that it protects any	9	have now been given the freedom to create their own
	lawful business from any government interference? And		hemp plants, cannabis
	if it's something short of that, what is the test?	11	JUSTICE BUSBY: Within certain limits, which
12	MS. PFEIFFER: Well, I the this Court's	12	the the farm bill says you can't do this, but you
13	opening line in Patel is what we're standing on. And		can do that, right?
14	the Court started the opinion by saying that the	14	MS. PFEIFFER: I don't even know. I mean, I
15	standard of review it it is addressing, the	15	I don't think anything that is prohibited under the
	standard of review applied when economic legislation		farm bill to the extent that is at issue in this case.
	is challenged under Section 19's substantive due	17	JUSTICE BUSBY: Well, what I'm asking,
	course of law protection.		though, is, is the irrationality that you're
19	So Patel is the it's just a a method of		identifying a product of what the state cannot
	interpreting a constitutional challenge. It is the		regulate under the Farm Bill?
	standard of review for economic	21	MS. PFEIFFER: No.
21	JUSTICE BLAND: Your answer is that there is	$ ^{21}_{22}$	JUSTICE BUSBY: Okay. Then explain
	a if there is interference with any lawful business		explain the how would summarize the irrationality
	activity, there potentially could be a challenge under		that you see here?
	the substantive due course of law?	24	MS. PFEIFFER: So I've got a lot to say about
25	Page 18	25	Page 20
1	MS. PFEIFFER: Yes.		this. So let let me just start with the statute.
2	JUSTICE BLAND: As as for any sort of		And I think Justice Blacklock, this might address some
3	•		of your concerns about evidence. Just look at the
4	MS. PFEIFFER: Yes. And I I would make		
_			statute. Look at this chapter 443 and look at what
	the distinction between activity versus products or	5	the state allowed and what it didn't allow all in the
6	substances. The State I didn't hear Mr. Davis	5 6	the state allowed and what it didn't allow all in the same legislation. And if the court looks at our
6 7	substances. The State I didn't hear Mr. Davis argue it today, but in their brief, they tried to say	5 6	the state allowed and what it didn't allow all in the
6 7	substances. The State I didn't hear Mr. Davis	5 6 7	the state allowed and what it didn't allow all in the same legislation. And if the court looks at our
6 7 8 9	substances. The State I didn't hear Mr. Davis argue it today, but in their brief, they tried to say that Patel would be extended to regulating drugs or products, and that's not the case. That's not	5 6 7	the state allowed and what it didn't allow all in the same legislation. And if the court looks at our our bench exhibits at Tab C, we've carved out relevant
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1			mean, how it just doesn't make any sense. And
	persons to possess, transport, sell, purchase, and		I'm I'm thinking maybe it does if that's the
	consume consumable hemp products. And then in 443		rationale.
4	1 5	4	MS. PFEIFFER: Well, so you have to take the
5	federal legislation, right?		State's asserted interest and keep that at the
6			forefront of your mind as you're reading through all
7			of this. So remember, the State is prohibiting
	that's that's what I'm asking about is, is the		manufacturing or processing of a particular product,
9	state basically doing what it can here within the scop	9	and it has not come to court and said that it has any
10	of what the federal government has allowed it to do?	10	interest in the manufacturing or processing activities
11	MS. PFEIFFER: I	11	itself. It's not saying that this has environmental
12	JUSTICE BUSBY: And is that rational.		impact or it's a nuisance, or that there's something,
13	MS. PFEIFFER: I don't think so.		you know, harmful to public health created by the
14	JUSTICE BUSBY: If not, then should you be	14	manufacturing of smokable hemp. They are saying we
15	challenging the rationality of the Farm Bill instead	15	are trying to mitigate and use. And simultaneously
16	of the state statute?	16	they're saying, and local governments can't prohibit
17	MS. PFEIFFER: No, and I would say because	17	end-use. They're saying statewide, it's legal to use
18	the state statute is the one that threatens penalties.	18	this product. They have not put any restrictions on
19	So this is the statute that we are under that	19	use or any age restrictions, anything that would
20	threatens the or the state is saying makes our	20	mitigate use. And you know, the 206, 443.206, it
	activity illegal.	21	expressly allows the retail sale of consumable hemp
22	And look at	22	products processed or manufactured outside of Texas.
23	JUSTICE YOUNG: The provision that you read	23	So what happens in this case, if this law
24	ends in compliance with this chapter, and the first	24	were upheld, is that existing Texas business that have
	one, the local regulation as authorized by this		been in the lawful process of making manufacturing
	Page 22		Page 24
1	chapter. I take that to refer to the statutes desire	1	smokable hemp would have to shut down their
	to have a uniform statewide program as opposed to		facilities, fire their Texas employees, and move
1	having, necessarily, this this incoherent desire		across state lines. And in this record, the hemp
1	to to block something while stopping localities		the Dallas hemp companies have actually secured
	from doing (inaudible). How is that irrational, I		facilities right across the border in Oklahoma where
	guess, is what I'm asking.		they can lawfully manufacture and process hemp and
7			ship it right back into Texas for Texas use.
	more time?	8	So that's the irrationality is that
9		9	JUSTICE BUSBY: But it seems like that's
	insist on having a uniform statewide scheme?		compelled by the code of federal regulations that says
11	MS. PFEIFFER: For are you talking about		we can't prohibit transportation or shipment of hemp
	003 or 201?		or hemp products lawfully produced in another state.
12			
			MS. PFEIFFER: Well, okay, they can they
	started with, and the .201 that you then relied on to		can't prohibit transporting it back into Texas, but it
15	5 1		doesn't make any sense to prohibit Texas manufacturers
16	· · · · · · · · · · · · · · · · · · ·		from doing something that is not going to impact end-
17			use, and then try to justify it on the theory that it
18			would impact end-use. That thought's the
	the legislature is saying what we don't want to have		irrationality.
20	1 5 5 8	20	And I think I hear you saying, Justice Busby,
21			that there's that the State's hands are tied.
1			
23	stopping anybody from criminalizing it or prohibiting	23	these provisions. But
1	here, but now they're trying to stop it and the	24	JUSTICE BUSBY: Well, this is if it's
1			JUSTICE BUSBY: Well, this is if it's rational basis review, we get to think about what Page 25
22	anything that's that's incoherent in and of itself in terms of well, look, they're authorizing it and stopping anybody from criminalizing it or prohibiting	22	They're not making that argument. They haven't cited

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1	would be rational, right?		Court even need to address Patel if if you're right
2		2	on everything that you've said?
	could I guess you're saying we can be creative and	3	MS. PFEIFFER: Well, I agree with you that
	just go anywhere the State hasn't gone and come up		the starting point in Patel is just rationale basis,
5	with some way to defend this law. And I I think		and the Court could end the analysis there. It
6	5 6		doesn't really need to go into any of the additional
7	the federal law says and what it allows the states to		steps in Patel. And so to the extent anybody were
8	do. I don't think that requires a lot of creativity,		were more comfortable with a federal framework, we
9	but	9	win under the the way a federal court would process
10		10	this case. But
1	whether this was a rational way to restrict end-use.	11	JUSTICE BLAND: Does it matter that Patel was
12		12	an as applied challenge?
	There's nothing inconsistent with the Farm Bills that	13	MS. PFEIFFER: This is an as applied
1	would have prevented it from saying we want this to be		challenge as well. So we've we've made a facial
1	only for 18 years and up, or 21 years and up, or we		and as applied challenge. And no, I I don't think
1	want some kinds of limits on use. But they haven't	16	that matters.
17	done that.	17	JUSTICE BLAND: Are you saying that certain
18	They're restricting a business activity		manufacturers are disparately affected by the law, or
	that's just a part of the whole process of creating		are you saying all of the manufacturing, all of the
	this product and bringing it to market. That's		manufacturers ought to be able to produce smokable
	irrational. And they've they've stood here I		hemp?
	haven't really heard them defend the law enforcement	22	MS. PFEIFFER: We're saying all manufacturers
23	aspect, and I'm glad, because the record very strongly		should be able to produce smokable hemp under a facial
24	refutes that.		challenge. But the evidence in this record is that
25	They're here saying, oh public health. We	25	the smokable hemp product is one of the highest margin
	Page 26		Page 28
1	don't have to put on evidence that smoking is harmful	1	products, and without being able to manufacture and
2	to health, and I think that's what they're really	2	process that, these companies can't stay in business.
3	relying on is that they don't have a record, and so	3	The other products don't have enough margin for them
4	they're hoping the Court will just assume this	4	to continue on with that part of their business.
5	advances public health.	5	So
6	In the same legislative session that the	6	JUSTICE BOYD: It doesn't seem like much of a
7	legislature passed House Bill 1325, this hemp program,	7	stretch to think that if we agree with you in this
8	the legislature also raised the legal age for	8	case, then the next case will be casino gambling. You
9	purchasing and using tobacco cigarettes. So in Texas,	9	know, why I mean, we send them all across to
10	it went from 18 years old to 21 years old. That shows		Oklahoma and Louisiana because the policy choices they
11	that the legislature knows how to regulate and advance	11	made that in Texas, we don't want it here.
12	public health for smoking, which is the asserted	12	Now I know that's very high-level, and once
13	interest here, but it didn't do that with smokable	13	you get into the federal regulations, you get into the
14	hemp.		fact that we allow shipping into Texas. There are a
15	So what what's happened is the State has		lot of distinctions there. But the high-level policy
16	come back with a completely irrational law that they		choice, we may think that's stupid to not allow casino
1		17	gambling in Texas because all I got to do is drive
18	for not just a any inconceivable possible basis	18	across the border. And yet, you have to agree, the
19	kind of review. They're basically saying if we can	19	legislature has the right to make that policy choice.
20	stand here and say public health, you can't you	20	The fact that I may think it's stupid doesn't make it
21	can't scrutinize the statute.	21	irrational.
22	JUSTICE YOUNG: How does Patel even get into	22	MS. PFEIFFER: Well
23	your argument, then, because it sounds like you're	23	JUSTICE BOYD: How how would you address
24	making some straight-up classic rationale basis	24	sort of that bigger picture, kind of the newspaper
25	argument where you don't even need why would the	25	headline question going on here?
	Page 27	1	Page 29

^{8 (}Pages 26 - 29)

1 MS. PFEIFFER: Sure. So policy choices are 1 appropriate for children, so we're going to require 2 arguing otherwise. But courts have a role in testing 4 4 legislative restrictions on economic activity under 6 And so I'm not saying putting yourself in the 7 legislature shees, I'm saying looking at the record 8 that has been created in this case and actually look 9 that has been created in this case and actually look 9 that so there defending today, And 12 it's saying there's challenges for law 11 enforcement that it's not here defending today, And 12 it's saying there's a public health rationale to thus 13 statute. But it can't the those rationales to the way 14 it's gone about restricting economic activity. That's 15 the fundamental problem. That's where it would rail 16 it made in Taxas. 17 Statute. But is control economic activity. That's 18 itmeres is not appropriate for children, we just don't wat 19 outer federal rational basis test. And as the very 19 statute. But is cohrent. No problem. 20 MS. PFEIFF
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16 one boing unconstitutional? What what's your tast? 16 course of law provision. And I mean since Patel
17MS. PFEIFFER: Well that, we were just17 we've only seen five cases get decided
18 talking about is restricting a product, not an18JUSTICE YOUNG: If we rule for you, won't
19 economic activity. So my my test is Patel. 19 that number rather dramatically grow?
19 continue activity: so my = my test is rate.19 that number ratio rati
20I mean, Patel is the test that applies to20MS. PFEIFFER: No. I mean, this case right21this type of challenge under the due course of law21here is squarely within the heart of Patel. I mean,
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9 (Pages 30 - 33)

1 brilliant lawyer. You've made a good argument for why	1 parts of the plant, including the flower, before then.
2 this doesn't seem to make a whole lot of sense. But	2 Justice Blacklock began by asking about
3 I'm concerned that what your argument would rely	3 the the position that we took that required no
4 require us to do is to subject the legislature to	4 evidence in the trial court. And that's because we
5 standards of exactitude and precision and and	5 view this as a rational basis case, and not evidence
6 (inaudible) looking at what other things they might've	6 is required there. We objected to the fact that the
7 passed in in the session, and then have trials	7 court was going to hold a trial. In our view, that
8 where judges now are are the ones who are making	8 should never have happened.
9 decisions in a way that we really haven't seen before.	9 JUSTICE BOYD: Your friend on the other side
10 And the fact that there's only five suggests to me	10 says that since Patel, we respectively, if I
11 that that that that this might be a phase-shift	11 understood her correctly, that in fact all what, four
12 in some ways if we go your way.	12 or five different writings agreed that we should apply
13 MS. PFEIFFER: No, I don't think it suggests	13 a rational basis with evidence test. Do you disagree
14 a phase shift at all. I think it suggests that in the	14 with that?
15 seven years since Patel was decided, that this isn't	15 MR. DAVIS: Well, I think Patel surveyed a
16 coming up very much. And also, that every single	16 long history of different ways this Court has spoken
17 challenge so far has held the statute constitutional.	17 about regulation under under the rational basis
18 What's unique about this case is that the	18 test, or other tests that are applied to substantive
19 State's trying to come to court and saying disregard	19 due course. And that was certainly one of the things
20 Patel. We don't have to put on any evidence to	20 that was in the history of of Texas law. But we
21 justify our interests, and you don't have to consider	21 have cases such as (inaudible) that follow the federal
22 the evidence that has refuted our interests. That's	22 standard and that don't require evidence. I think
23 where you get back to Patel and say this Court said	23 that's always also been a part in Texas law. And the
24 look at the entire record and look to see whether the	24 virtue of that
25 State's interests are actually being advanced. Even	25 JUSTICE BLACKLOCK: Does this provision
Page 34	Page 36
1 Chief Justice Hecht didn't descent and Patel said that	1 that's being challenged past as part of a a
2 you could look to the effects of that regulation and	
	2 package, a bill that also opened up various elements
	2 package, a bill that also opened up various elements3 of this industry, or was it kind of a one-off
3 see whether this is being advanced, and what the	2 package, a bill that also opened up various elements3 of this industry, or was it kind of a one-off4 restriction?
3 see whether this is being advanced, and what the4 impacts would be on the Texas business that's being	3 of this industry, or was it kind of a one-off
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10 (Pages 34 - 37)

	Pfeiffer has a very broad view of of where Patel	1	CERTIFICATE OF TRANSCRIBER
2	should apply, would would really change that game.	2	I, JENNIFER MILLARD, do hereby certify that
3	JUSTICE BUSBY: Is there a severability		this transcript was prepared from the digital audio
4	provision in the in this act?		recording of the foregoing proceeding, that said
5	· ·		transcript is a true and accurate record of the
6	The rational basis standard is an objective		proceedings to the best of my knowledge, skills, and
7	standard. It doesn't ask courts to look at what the		ability; that I am neither counsel for, related to,
8	legislature's really had in mind. It asks courts to		nor employed by any of the parties to the action in
9	look to see if there is a rational basis for doing		which this was taken; and, further, that I am not a
	something good for Texans, and if the provision		relative or employ employed by the p
11	furthers that to some extent, even if not completely,		otherwise intereste
12	that's the standard that applies here in this		Dated: 3/24/2022
13	1	14	
	with some legitimate purpose to which this law is		
	rationally related, that saves the law regardless of	15	' JENNIFER MILLARD
	whether the state or any department or any of its	16	
	lawyers have ever raised that legitimate purpose into	17	
18	this court?	18	
19		19	
	is looking to whether the statute does something	20	
	that's beneficial to Texas, regardless of anyone	21	
22	whether anyone articulated that rationale or not.	22	
23		23	
24	right, is that the whether or not an act of the	24	
25	legislature rises or falls, when we don't have	25	
	Page 38		Page 40
1	constitutional rights implicated, should not come down		
	to the lawyering in a lawsuit.		
3	MR. DAVIS: Exactly, Your Honor. I see my		
4	time has expired.		
5	CHIEF JUSTICE HECHT: Any other questions?		
6	Thank you, Mr. Miller, the case is submitted		
7	and the Court will take a little brief recess.		
8	COURT CLERK: All rise.		
9	(Whereupon the proceeding was concluded.)		
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	Page 39		

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