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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).

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.* § 1639p.

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.

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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,

Constance H. Pfeiffer

cc: All counsel of record.

Oral Argument Transcript

TEXAS SUPREME COURT

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TEXAS DEPARTMENT OF STATE HEALTH SERVICES,

Plaintiff,

v. : Case No. 01-21-00596-CV

CROWN DISTRIBUTING, LLC,

Defendant.

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ORAL ARGUMENT

DATE: Tuesday, March 22, 2022

BEFORE: Texas Supreme Court

LOCATION:

204 West 14th Street, Room 104

Austin, Texas 78701

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CHIEF JUSTICE NATHAN HECHT
JUSTICE JEFF BOYD
JUSTICE BRETT BUSBY
JUSTICE JANE BLAND
JUSTICE JIMMY BLACKLOCK
JUSTICE EVAN YOUNG

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EXHIBITS

EXHIBIT	DESCRIPTION	MARKED	ADMITTED
(None marked.)			

PROCEEDINGS

CHIEF JUSTICE HECHT: We're ready for argument and 211045, the Texas Department of State Health Services v. Crown Distributing.

COURT CLERK: Today, please, the Court, Mr. Davis will present argument for the appellants. Appellants have reserved five minutes for rebuttal.

MR. DAVIS: Thank you, Mr. Chief Justice. And may it please the Court?

The primary question in this case is whether the Court should extend Patel and effectively end rational basis review for a broad range of substantive due course claims. I'll focus my time, if I could, on why the Court should not take that step and why the challenged law is constitutional.

So to begin with Patel, that case is distinguishable from this one in several ways. And I can just highlight a couple of those. The first is that the Patel plaintiff's, eyebrow threaders, were practicing a lawful trade. And they encountered a regulatory scheme in Texas that was ill suited to that trade, but there's no question that it was a lawful profession.

And so for that reason, the plaintiffs in Patel could trace their substantive due course claim

all the way back to the very origins of substantive due process in the slaughterhouse cases. And in particular, Justice Bradley's descent in that case, which focused on a lawful calling, being able to practice a lawful profession.

But here, we're not talking about professionals, we're talking about companies and we're talking about companies who were engaged in manufacturing hemp for smoking, which is an activity, at least when it's used with parts of the plants, such as the flower, that have never been on the exclusion from marijuana, is something that's never been lawful in Texas.

The second point of distinction is that, again, the Patel professionals encountered regulatory hurdles to getting into the profession that they wanted to practice in Texas. And here, we're talking about the statute, not the -- the second part of the rule that we don't challenge the trial court's injunction as to -- as to the second part of that. We're talking about a statute that bars manufacturing or processing of hemp for smoking. So that's a narrow exclusion from what the companies can do.

In -- in that respect, it's -- it's a bit like what the U.S. Supreme Court encountered in the

Williamson Optical case, sorry, Williamson v. Lee Optical where the regulation there was not on an entire profession, but rather on a particular practice of opticians who wanted to fit old lenses into new frames. And that, of course, is a class example of where the rational basis test finds its application.

And then a final point, I would say, about extending Patel is a separation of powers point that we addressed in the briefing. Moving away from rational basis towards the Patel standard shifts the balance of the courts, with respect to the legislature. And here when we're talking about Patel, the question of what is an undue burden or oppressive is in the eyes of the beholder. That means, every judge in every county at ever level of this state will be engaged in those questions. And not only that, but also what counts as a economic regulatory statute. That's another part of the Patel test that's subject to wide-ranging interpretations.

Now many people would look at economic regulations and -- and regulations of social rights differently and say, well, there's a line between those. But even regulations of social rights have economic implications. A statute that governs who can marry has implications for who can file a joint tax

return, who can qualify for benefits.

And we've seen Patel applied, or at lest considered, in other jurisdictions. And one that I would note is the Kansas Supreme Court in Hodes v. Schmidt case from 2019. That case involved an abortion regulation, and at least one of the judges of that court, Justice Stegall, argued in descent that Patel should apply there. And so I think the risk of extending Patel is that it's uncertain where it will lead. And Patel itself doesn't give clear guidance on where it applies.

JUSTICE YOUNG: But the -- the company versus individual point that you started with, that seems like something that isn't as susceptible to these slippery slope type arguments that you're making them.

MR. DAVIS: That's, I think, true, Your 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 someone who's formed a business organization of

something.

MR. DAVIS: Well, I mean, the text of Article 1, Section 19 does use the word "citizen." And normally, we would think of a citizen as an individual. But I could move to how the -- the constitutional analysis plays out here, I think that the question is either under rational basis or under Patel. And it's constitutional under both of those frameworks. And just to start with the rational basis test.

There are several basis for this statute, and we've laid them out in the briefs. If I could focus on -- on one, it would be the health concerns that underly inhalation of any kind of smoke. I think if we were litigating this case in 1950, it might be the case that we would need evidence that inhaling smoke is not good for you. But in the 2020's, we don't need that evidence, and that's something that the rational basis standard allows us to make a showing of without an evidentiary burden.

JUSTICE BLACKLOCK: Isn't there -- isn't the premise of rational basis review that you need -- you need a rational basis to distinguish between similarly situated parties. And I -- I wonder if we even have that here, if -- if we even get to rational basis

review. If this -- is this an equal protection problem? But where -- where is the Court's entitlement to examine the rationality of the regulation coming from.

MR. DAVIS: Well, I guess I would first say, there's been no equal protection claim alleged here. The claim is under the substantive of due course provision, which you know, historically has been subject to rational basis review. I'm not sure I'm answering Your Honor's question, but I would say that the Court --

JUSTICE BLACKLOCK: So it's -- so it's the substantive due course of law concept that is the -- that would be the basis for any rational basis review that -- that would apply here?

MR. DAVIS: That's right. That's -- that's the only claim that's been brought in this case.

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.

Again, no evidence is need on that --

JUSTICE BLAND: Is that rational basis fulfilled by the statute when out-of-state manufactures that can sell and distribute their product in state, and by the same token, does Texas have an interest in ensuring that out-of-state consumers don't inhale hemp or smoke hemp even though their own states permit it.

MR. DAVIS: Right. So the State does have that interest, but the statute doesn't pursue its objective to that extent. And that's another feature of the rational basis standard that states are allowed to address problems one step at a time. They don't need to introduce comprehensive legislation.

Here we're dealing with an area that's new to Texas, hemp manufacturing, hemp smoking. And the legislature could reasonably decide to -- to take an indirect approach to address that problem and potentially increase the regulation if it doesn't think that's effective enough. If we were to turn to --

JUSTICE BUSBY: Can they increase the regulation, or does -- would the federal law prohibit the state legislature from banning sale by out-of-state manufacturers?

MR. DAVIS: I believe federal law would

prohibit the state from restricting transport across state lines, but the state can regulate more restrictively if it wants to.

And if I could turn to the Patel standard, and if we're in the world in which Patel applies, we have the same governmental interests. They're strong interests in promoting effective law enforcement and protecting the health of Texans. And the question, of course, in the first part of Patel is essentially rational basis.

But if we get to the second part of the test, we get to burden and oppressiveness. And for the reasons that I've noted earlier, this is not an oppressive law because it allows these companies to do a whole host of things in the hemp economy. They can manufacture hemp products for purposes other than smoking. They can even sell hemp products for smoking, as long as they've been manufactured in another state. And -- and the companies, as Justice Bland noted, argue, well that means it's -- it's not effective. But again, it needed be entirely effective to the maximum extent under rational basis. And under Patel, it just doesn't have to be oppressive. And if it's not so oppressive to shut off an entire range of professionals, as we saw in Patel, then it satisfies

that standard as well.

JUSTICE BLACKLOCK: Now I wonder, Counsel, whether there isn't -- if you talk about Patel as being up here and rational basis here, I wonder whether there's not even a lower more differential standard of review that would apply to judicial review of -- of regulations in areas that are -- that have historically been viewed with great suspicion by the law and that have historically been prohibited and heavily regulated if they are allowed, and if they might include drugs and alcohol and perhaps sexually oriented businesses in this category. I -- I just wonder whether there is any liberty or property interests that's rooted in the legal traditions of this country that you could point to, to say I -- I'm entitled to review by courts on the basis of the constitution of the government's decision to (inaudible) what I'm doing in these sorts of areas.

MR. DAVIS: Well, Your Honor, I think that's exactly right. The -- the state's police power is very strong in this context, and the threshold barrier of having a protected property -- vested property right or protected liberty interest is another stumbling block for the -- the companies here. And that's the case for the -- the reason I've noted

earlier, that manufacturing of hemp for smoking, using the flower and other parts of the plant that the testimony here reflects are being used has never been legal in -- in Texas.

And we can see that the flower is -- is what's used from page 83 to 85 of the trial transcript. It's the second reporter's record. Mr. Maghani (ph) testified that manufacturing has been going on for several years. That's at least since the late -- 2018. And he said we get the produce in and we separate it out, use the flower. And again, that's something that has never been excluded from that -- the definition of what marijuana consists of.

And that's a -- that's a long answer to Your Honor's question, but I think the answer is yes. If -- if the companies can't get over that initial hurdle of showing a protected liberty interest because this is not activity that Texas law has allowed, then that is a complete bar to their claim without getting to rational basis review or to Patel.

JUSTICE BLAND: What -- what if it was a completely new activity, like synthetic marijuana, like Kush or K2 -- or not Kush, but Spice or one of those drugs that chemical composition is slightly different, so it hasn't been on any schedule. Is

there a -- is there a vested interest in being able to produce that and -- and any subsequent addition of it to the drug schedule. Would that create some sort of problem under Patel, or should it?

MR. DAVIS: Well, I don't see how there could be a vested interest in doing something that has never been authorized. I think the companies might argue, well, we have a liberty interest to do something that is lawful. But I -- I think at least applying that here, it doesn't work because the activity that the companies have been engaged in, according to the trial transcript, and also page 642, I believe of the clerk's record is the second amended live petition has a picture of a bottle of smokable hemp flower.

So those are the points I intended to cover in my opening time unless the Court has other questions.

CHIEF JUSTICE HECHT: Any other questions?

Thank you, Mr. Davis. We'll hear from the appellees.

COURT CLERK: May it please the Court, Ms. Pfeiffer will present argument for the appellees.

MS. PFEIFFER: May it please the Court? Exactly one year ago today this case was in the trial court where the plaintiffs were putting on evidence.

They had fact witnesses; we had an expert witness who was an expert in cannabis economics. We had exhibits, including a 40-page expert report that substantiated the harm to these business, and the irrationality of the state's asserted interests. And the state put on nothing. The state had no fact witnesses, no expert witness, no exhibits. And when the judge asked if they'd like to cross-examine our witnesses, the state didn't even cross-examine our witnesses.

JUSTICE BLACKLOCK: Well, I think their position is that all of that presentation you made should've been made at a legislative hearing and where 150 elected representatives could've considered it before they passed this law instead of to a -- a district judge.

MS. PFEIFFER: I respectfully disagree. I don't think the state is saying you can't have a trial in these cases. And this Court has clearly held, in Patel, and the Court was unanimous in Patel on this point that evidence is meant to be considered in this kind of an analysis. That you look at the record, you look at the entire record. And so this is a very case because the state hasn't even bothered to create a record, and they're standing here in court saying just trust us, you can assume that these are interests that

are advanced by the statute, even though that is refuted by the evidence in the record.

JUSTICE BLACKLOCK: So does that -- does what you just said only work if there's some review beyond rational basis that applies here, or would you say that under rational basis review, they have to make an evidentiary record to support the laws?

MS. PFEIFFER: Even under rational basis review. So if -- if we were in front of --

JUSTICE BLACKLOCK: What's your authority for that?

MS. PFEIFFER: Well, the St. Joseph's Abbey v. Castille case that we've cited in our brief where Judge Higginbotham said that -- I can give you a quote. "The state's plausible basis for a law maybe refuted by adducing evidence of irrationality."

So even in federal law, the court may consider evidence and the -- the party challenging a state statute as unconstitutional can always meet its burden by showing that the law is in fact irrational. So we've met that burden here. That -- that's part of what makes this case so easy.

JUSTICE BLAND: Even relying on your record, is the -- is the oil used, the CBD oil used in smokable hemp made from the exempt portions of the

cannabis plant? In other words, do you use flowers to make the smokable hemp? And if that is the case, can the state rest on the record that was presented?

MS. PFEIFFER: So let me address the flower part first. Yes, now we use flower to make smokable hemp because it is now legal to use flower ever since 2018. It's been legal to use flower to make smokable hemp. Previously, you could legally make smokable hemp from the excluded portions of the cannabis plant.

So think about it this way, historically, cannabis has been regulated by the anatomical portions of the plant. So you were looking at parts of the plant that were excluded from the definition of marijuana. And in more modern times, we now have the technology to define what is legal or not legal by terms of the chemically, in terms of THC content.

So now because of THC content testing, we can say it's legal to use flower. But previously, these companies in Texas were not using the flower, and we know that from the record because they were explaining that before they went into business, they got opinion letters from three different law firms that confirmed that the -- the parts of the plant that they were using to make smokable hemp was all exempt and legal cannabis. And the Dallas Police Department and the

DEA came to the facilities in late 2018 to inspect the produce and test it. They tested it and confirmed that this was all legal.

So the State's just standing here and saying the court could assume it was illegal, and that's totally refuted by the record. And they -- they never challenged that evidence in the trial court.

JUSTICE BLAND: Is your position that we should read Patel so broadly that it protects any lawful business from any government interference? And if it's something short of that, what is the test?

MS. PFEIFFER: Well, I -- the -- this Court's opening line in Patel is what we're standing on. And the Court started the opinion by saying that the standard of review it -- it is addressing, the standard of review applied when economic legislation is challenged under Section 19's substantive due course of law protection.

So Patel is the -- it's just a -- a method of interpreting a constitutional challenge. It is the standard of review for economic --

JUSTICE BLAND: Your answer is that there is a -- if there is interference with any lawful business activity, there potentially could be a challenge under the substantive due course of law?

MS. PFEIFFER: Yes.

JUSTICE BLAND: As -- as for any sort of economic regulation.

MS. PFEIFFER: Yes. And I -- I would make the distinction between activity versus products or 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 happened in, you know, decades of -- of law where courts have reviewed constitutionality under due process challenges or due course of law challenges.

So there's nothing about Patel that is expanding the scope of what is tested under the constitution, it's simply stating a standard of review.

JUSTICE BUSBY: Is the irrationality that you're identify inherent in the way that the Farm Bill portions out what the states can regulate versus what the federal government regulates and what the state's cannot regulate?

MS. PFEIFFER: No.

JUSTICE BUSBY: Why?

MS. PFEIFFER: I don't think our position has anything to do with the way the farm bills have made

more legal. I mean the -- the farm bills are expanding what is legal and making it legal to cultivate hemp domestically in the United States. So that's what's opened the door for all of this cannabis production and sales and new products.

JUSTICE BUSBY: But they've also pushed some regulation down to the state level.

MS. PFEIFFER: That's right. So the states have now been given the freedom to create their own hemp plants, cannabis --

JUSTICE BUSBY: Within certain limits, which the -- the farm bill says you can't do this, but you can do that, right?

MS. PFEIFFER: I don't even know. I mean, I -- I don't think anything that is prohibited under the farm bill to the extent that is at issue in this case.

JUSTICE BUSBY: Well, what I'm asking, though, is, is the irrationality that you're identifying a product of what the state cannot regulate under the Farm Bill?

MS. PFEIFFER: No.

JUSTICE BUSBY: Okay. Then explain -- explain the -- how would summarize the irrationality that you see here?

MS. PFEIFFER: So I've got a lot to say about

this. So let -- let me just start with the statute. And I think Justice Blacklock, this might address some of your concerns about evidence. Just look at the statute. Look at this chapter 443 and look at what 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 portions of Chapter 443.

I'd like to highlight a couple of these because it shows that what the state is saying doesn't make any sense in terms of the governmental interests. First, start with 443.003 where it says, "Local regulation is prohibited." Local governments in Texas may not do anything that prohibits the processing of hemp or the manufacturing or sale of a consumable hemp product.

So if the State is standing here in court saying the reason we're banning processing and manufacturing is because we think it may have some incidental effect on the end-use, and the -- the end-users in Texas. Simultaneously, it's prohibiting local governments, and we know that Austin may have different views about smokable hemp than Tyler and different places in Texas, it's prohibiting local governments from banning the sale of smokable hemp.

Then look at 443.201, it's expressly allowing persons to possess, transport, sell, purchase, and consume consumable hemp products. And then in 443 --

JUSTICE BUSBY: And that's required by the federal legislation, right?

MS. PFEIFFER: I don't know.

JUSTICE BUSBY: Okay. I think it is. So that's -- that's what I'm asking about is, is the state basically doing what it can here within the scop of what the federal government has allowed it to do?

MS. PFEIFFER: I --

JUSTICE BUSBY: And is that rational.

MS. PFEIFFER: I don't think so.

JUSTICE BUSBY: If not, then should you be challenging the rationality of the Farm Bill instead of the state statute?

MS. PFEIFFER: No, and I would say because the state statute is the one that threatens penalties. So this is the statute that we are under that threatens the -- or the state is saying makes our activity illegal.

And look at --

JUSTICE YOUNG: The provision that you read ends in compliance with this chapter, and the first one, the local regulation as authorized by this

chapter. I take that to refer to the statutes desire to have a uniform statewide program as opposed to having, necessarily, this -- this incoherent desire to -- to block something while stopping localities from doing (inaudible). How is that irrational, I guess, is what I'm asking.

MS. PFEIFFER: Say it -- can you say that one more time?

JUSTICE YOUNG: Why is it irrational to insist on having a uniform statewide scheme?

MS. PFEIFFER: For -- are you talking about 003 or 201?

JUSTICE YOUNG: Well, 003 is -- is what you started with, and the .201 that you then relied on to show why 003 is irrational ends with incomplete (inaudible) but I'm seeing --

MS. PFEIFFER: So --

JUSTICE YOUNG: -- in that is the idea that the legislature is saying what we don't want to have is a patchwork. But it isn't necessarily saying 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 here, but now they're trying to stop it and the State's giving us arguments that relate to health. I

mean, how -- it just doesn't make any sense. And I'm -- I'm thinking maybe it does if that's the rationale.

MS. PFEIFFER: Well, so you have to take the State's asserted interest and keep that at the forefront of your mind as you're reading through all of this. So remember, the State is prohibiting manufacturing or processing of a particular product, and it has not come to court and said that it has any interest in the manufacturing or processing activities itself. It's not saying that this has environmental impact or it's a nuisance, or that there's something, you know, harmful to public health created by the manufacturing of smokable hemp. They are saying we are trying to mitigate and use. And simultaneously they're saying, and local governments can't prohibit end-use. They're saying statewide, it's legal to use this product. They have not put any restrictions on use or any age restrictions, anything that would mitigate use. And you know, the 206, 443.206, it expressly allows the retail sale of consumable hemp products processed or manufactured outside of Texas.

So what happens in this case, if this law were upheld, is that existing Texas business that have been in the lawful process of making -- manufacturing

smokable hemp would have to shut down their facilities, fire their Texas employees, and move across state lines. And in this record, the hemp -- the Dallas hemp companies have actually secured facilities right across the border in Oklahoma where they can lawfully manufacture and process hemp and ship it right back into Texas for Texas use.

So that's the irrationality is that --

JUSTICE BUSBY: But it seems like that's compelled by the code of federal regulations that says we can't prohibit transportation or shipment of hemp or hemp products lawfully produced in another state.

MS. PFEIFFER: Well, okay, they can -- they can't prohibit transporting it back into Texas, but it doesn't make any sense to prohibit Texas manufacturers from doing something that is not going to impact end-use, and then try to justify it on the theory that it would impact end-use. That thought's the irrationality.

And I think I hear you saying, Justice Busby, that there's -- that the State's hands are tied. They're not making that argument. They haven't cited these provisions. But --

JUSTICE BUSBY: Well, this is if it's rational basis review, we get to think about what

would be rational, right?
MS. PFEIFFER: Well, the -- the Court could -- I guess you're saying we can be creative and just go anywhere the State hasn't gone and come up with some way to defend this law. And I -- I think --
JUSTICE BUSBY: I -- I'm just looking at what the federal law says and what it allows the states to do. I don't think that requires a lot of creativity, but --
MS. PFEIFFER: Well, it -- it goes into whether this was a rational way to restrict end-use.
The State could have restricted end-use. There's nothing inconsistent with the Farm Bills that would have prevented it from saying we want this to be only for 18 years and up, or 21 years and up, or we want some kinds of limits on use. But they haven't done that.
They're restricting a business activity that's just a part of the whole process of creating this product and bringing it to market. That's irrational. And they've -- they've stood here -- I haven't really heard them defend the law enforcement aspect, and I'm glad, because the record very strongly refutes that.
They're here saying, oh public health. We

don't have to put on evidence that smoking is harmful to health, and I think that's what they're really relying on is that they don't have a record, and so they're hoping the Court will just assume this advances public health.
In the same legislative session that the legislature passed House Bill 1325, this hemp program, the legislature also raised the legal age for purchasing and using tobacco cigarettes. So in Texas, it went from 18 years old to 21 years old. That shows that the legislature knows how to regulate and advance public health for smoking, which is the asserted interest here, but it didn't do that with smokable hemp.
So what -- what's happened is the State has come back with a completely irrational law that they couldn't defend in the trial court, and they're asking for not just a -- any inconceivable possible basis kind of review. They're basically saying if we can stand here and say public health, you can't -- you can't scrutinize the statute.
JUSTICE YOUNG: How does Patel even get into your argument, then, because it sounds like you're making some straight-up classic rationale basis argument where you don't even need -- why would the

Court even need to address Patel if -- if you're right on everything that you've said?
MS. PFEIFFER: Well, I agree with you that the starting point in Patel is just rationale basis, and the Court could end the analysis there. It doesn't really need to go into any of the additional steps in Patel. And so to the extent anybody were -- were more comfortable with a federal framework, we win under the -- the way a federal court would process this case. But --
JUSTICE BLAND: Does it matter that Patel was an as applied challenge?
MS. PFEIFFER: This is an as applied challenge as well. So we've -- we've made a facial and as applied challenge. And no, I -- I don't think that matters.
JUSTICE BLAND: Are you saying that certain manufacturers are disparately affected by the law, or are you saying all of the manufacturing, all of the manufacturers ought to be able to produce smokable hemp?
MS. PFEIFFER: We're saying all manufacturers should be able to produce smokable hemp under a facial challenge. But the evidence in this record is that the smokable hemp product is one of the highest margin

products, and without being able to manufacture and process that, these companies can't stay in business. The other products don't have enough margin for them to continue on with that part of their business. So --
JUSTICE BOYD: It doesn't seem like much of a stretch to think that if we agree with you in this case, then the next case will be casino gambling. You know, why -- I mean, we send them all across to Oklahoma and Louisiana because the policy choices they made that in Texas, we don't want it here.
Now I know that's very high-level, and once you get into the federal regulations, you get into the fact that we allow shipping into Texas. There are a lot of distinctions there. But the high-level policy choice, we may think that's stupid to not allow casino gambling in Texas because all I got to do is drive across the border. And yet, you have to agree, the legislature has the right to make that policy choice. The fact that I may think it's stupid doesn't make it irrational.
MS. PFEIFFER: Well --
JUSTICE BOYD: How -- how would you address sort of that bigger picture, kind of the newspaper headline question going on here?

MS. PFEIFFER: Sure. So policy choices are always for the legislature. And we're not here arguing otherwise. But courts have a role in testing legislative restrictions on economic activity under the constitution and apply judicial scrutiny to that.

And so I'm not saying putting yourself in the legislature shoes, I'm saying looking at the record that has been created in this case and actually look at what the state is saying, or its asserted interests. It's saying there's challenges for law enforcement that it's not here defending today. And it's saying there's a public health rationale for this statute. But it can't tie those rationales to the way it's gone about restricting economic activity. That's the fundamental problem. That's where it would fail under federal rational basis test. And as the very starting point of Patel, it doesn't get past the go line. Like you -- you don't --

JUSTICE YOUNG: If the state did restrict the end-use, then your -- you would go, well, you'd say well, now it's -- now it's coherent. No problem.

MS. PFEIFFER: That's right. Yes. If -- if they had said, look, in Texas we don't want smokable hemp, we are banning the product, then my clients would not be able to come to court and say well, we

have this economic activity to make an illegal product. We couldn't make that argument. So if they had restricted end-use or done something that rationally tied to ending or --

JUSTICE YOUNG: What if they restricted it without banning it.

MS. PFEIFFER: I -- I think that would've been rational. I -- I mean --

JUSTICE YOUNG: (Inaudible) this policy.

MS. PFEIFFER: Right. They could've said it's complete product ban, or they could've said we want this to be for people 21 years and older. They could've put certain kinds of parameters around use.

JUSTICE BLAND: What's your reasoning for one type economic regulation of smokeable hemp fitting and one being unconstitutional? What -- what's your test?

MS. PFEIFFER: Well that, we were just talking about is restricting a product, not an economic activity. So my -- my test is Patel.

I mean, Patel is the test that applies to this type of challenge under the due course of law cause.

JUSTICE BLAND: If -- if there was a video game that was targeted to children and the legislature ultimately said we don't think this video game is

appropriate for children, so we're going to require only sales to adults, but the evidence is that only children purchase the video game, or it was only used by children. And the video game people said, well, this will just put us out of business. Would they have a Patel challenge?

MS. PFEIFFER: No. That -- you're talking about banning a product or restricting a product. That's not --

JUSTICE BLAND: Okay.

MS. PFEIFFER: That's not a Patel challenge.

JUSTICE BLAND: The reporting or the manufacturing of a videogame that the legislature determines is not appropriate for children and further determines it's targeting children, we just don't want it made in Texas --

MS. PFEIFFER: Right and I think --

JUSTICE BLAND: -- that would -- that would violate --

MS. PFEIFFER: I will concede --

JUSTICE BLAND: -- your understanding of substantive economic due course of law challenge?

MS. PFEIFFER: No. No. So that -- if -- if you're asking about an economic activity to make an illegal product, that wouldn't violate the

constitution. So we're -- we're talking about an economic activity to make a legal product.

JUSTICE BLAND: But a videogame is probably a legal product, right?

MS. PFEIFFER: I -- well, it -- I guess it would just --

JUSTICE BLAND: We just don't want children playing it for -- for whatever reason, the legislature decides it's -- it's just not the right kind of videogame.

MS. PFEIFFER: I -- well, I think the Court can make this easy in terms of what does a Patel apply to by just the face of the Patel opinion. So the Patel opinion is talking about economic legislation that's challenged under the Texas Constitution's due course of law provision. And I mean, since Patel, we've only seen five cases get decided --

JUSTICE YOUNG: If we rule for you, won't that number rather dramatically grow?

MS. PFEIFFER: No. I mean, this case right here is squarely within the heart of Patel. I mean, this is classic economic activity. It's manufacturing.

JUSTICE YOUNG: Look, and -- and you've made a -- a, you know, a very good argument. You're a

brilliant lawyer. You've made a good argument for why this doesn't seem to make a whole lot of sense. But I'm concerned that what your argument would rely -- require us to do is to subject the legislature to standards of exactitude and precision and -- and (inaudible) looking at what other things they might've passed in -- in the session, and then have trials where judges now are -- are the ones who are making decisions in a way that we really haven't seen before. And the fact that there's only five suggests to me that that -- that that -- this might be a phase-shift in some ways if we go your way.

MS. PFEIFFER: No, I don't think it suggests a phase shift at all. I think it suggests that in the seven years since Patel was decided, that this isn't coming up very much. And also, that every single challenge so far has held the statute constitutional.

What's unique about this case is that the State's trying to come to court and saying disregard Patel. We don't have to put on any evidence to justify our interests, and you don't have to consider the evidence that has refuted our interests. That's where you get back to Patel and say this Court said look at the entire record and look to see whether the State's interests are actually being advanced. Even

Chief Justice Hecht didn't descent and Patel said that you could look to the effects of that regulation and see whether this is being advanced, and what the impacts would be on the Texas business that's being regulated.

CHIEF JUSTICE HECHT: Any other questions?

Thank you, Ms. Pfeiffer.

Mr. Davis, you have five minutes.

MR. DAVIS: Thank you, Mr. Chief Justice.

I think I heard Ms. Pfeiffer say that the flower of the plant was legal since 2018. And I think maybe she was talking about the Federal Farm Bill there, but that's not true in Texas. The Federal Farm Bill in 2018 allowed states to come up with their own plans for this, and Texas implemented that by changing the control substances schedule. But that didn't become effective until April 5th of 2019. And the source for that is the March 15th Texas Register Notice, changing the definition of marijuana to exclude hemp. That notice became effective 21 days later under Section 41.036(c) of the Health and Safety Code. And just ten days after that, we see a bill introduced, House Bill 1325, that included this prohibitions on smoking. So anyone watching this in Texas would know that it wasn't legal to use those

parts of the plant, including the flower, before then.

Justice Blacklock began by asking about the -- the position that we took that required no evidence in the trial court. And that's because we view this as a rational basis case, and not evidence is required there. We objected to the fact that the court was going to hold a trial. In our view, that should never have happened.

JUSTICE BOYD: Your friend on the other side says that since Patel, we respectively, if I understood her correctly, that in fact all what, four or five different writings agreed that we should apply a rational basis with evidence test. Do you disagree with that?

MR. DAVIS: Well, I think Patel surveyed a long history of different ways this Court has spoken about regulation under -- under the rational basis test, or other tests that are applied to substantive due course. And that was certainly one of the things that was in the history of -- of Texas law. But we have cases such as (inaudible) that follow the federal standard and that don't require evidence. I think that's always also been a part in Texas law. And the virtue of that --

JUSTICE BLACKLOCK: Does this provision

that's being challenged past as part of a -- a package, a bill that also opened up various elements of this industry, or was it kind of a one-off restriction?

MR. DAVIS: So House Bill 1325 had a lot of different provisions in it. And it did open up the hemp economy in Texas. And it just restricted the part that the State was concerned with, the manufacturer for smoking --

JUSTICE BLACKLOCK: I'm wondering if -- if the balance that that bill struck between opening up and closing various elements of the industry was so irrational that we can't even, you know, contemplate how it could've come to be, then why doesn't the whole bill go away, including the opening up? And the legislature needs to start over and you go back to the baseline where it was more closed than it is today.

MR. DAVIS: I think that's a good question, Your Honor. The challenge, of course here, is just to one specific part of it. But it is a -- it is a bigger picture we're looking at. And that's why the legislature holds hearings. And that's why lobbyists exist to advocate for different segments of the industry. That's where the process happens here. And applying the Patel standard here, and I think Ms.

Pfeiffer has a very broad view of -- of where Patel should apply, would -- would really change that game.

JUSTICE BUSBY: Is there a severability provision in the -- in this act?

MR. DAVIS: I believe there is, Your Honor.

The rational basis standard is an objective standard. It doesn't ask courts to look at what the legislature's really had in mind. It asks courts to look to see if there is a rational basis for doing something good for Texans, and if the provision furthers that to some extent, even if not completely, that's the standard that applies here in this --

JUSTICE BOYD: So if -- if we can come up with some legitimate purpose to which this law is rationally related, that saves the law regardless of whether the state or any department or any of its lawyers have ever raised that legitimate purpose into this court?

MR. DAVIS: That's correct, because the Court is looking to whether the statute does something that's beneficial to Texas, regardless of anyone -- whether anyone articulated that rationale or not.

JUSTICE BLACKLOCK: And the reason for that, right, is that the -- whether or not an act of the legislature rises or falls, when we don't have

constitutional rights implicated, should not come down to the lawyering in a lawsuit.

MR. DAVIS: Exactly, Your Honor. I see my time has expired.

CHIEF JUSTICE HECHT: Any other questions?

Thank you, Mr. Miller, the case is submitted and the Court will take a little brief recess.

COURT CLERK: All rise.

(Whereupon the proceeding was concluded.)

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I, JENNIFER MILLARD, do hereby certify that this transcript was prepared from the digital audio recording of the foregoing proceeding, that said transcript is a true and accurate record of the proceedings to the best of my knowledge, skills, and ability; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this was taken; and, further, that I am not a relative or employ y employed by the p or otherwise intereste ion.

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