No. 21-1045

In the Supreme Court of Texas

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

Appellants,

v.

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

Appellees.

AMICUS CURIAE BRIEF OF THE INSTITUTE FOR JUSTICE IN SUPPORT OF NEITHER PARTY

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

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Institute for Justice (IJ) is a nonprofit law firm dedicated to defending the hallmarks of a free society: private property rights, economic and educational liberty, and the free exchange of ideas.[1] As part of its mission, IJ represents clients across the country in legal challenges to unconstitutional restrictions on Americans' right to earn an honest living.

Texas has been a focus of IJ's efforts. For example, amicus litigated *Patel v. Texas Department of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015). Like *Patel*, this case raises questions about the Due Course of Law provision of the Texas Constitution and the legal standard that applies in challenges to economic regulations. Like in *Patel*, the State raises clever (but ultimately meritless) arguments for maximal government power and minimal individual liberty. Amicus wishes to demonstrate why this Court's analysis in *Patel* was exactly right.

Additionally, IJ and its clients have cases pending in Texas that rely on *Patel* and may, therefore, be impacted by this Court's decision.[2]

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[1] No person or entity other than the Institute for Justice has provided funding for the preparation or filing of this brief. *See* Tex. R. App. P. 11(c).

[2] *See, e.g.*, *Garrett v. Tex. State Bd. of Pharm.*, No. 03-21-00039-CV (Tex. App.—Austin, filed Apr. 30, 2021); *City of S. Padre Isl. v. SurfVive*, No. 13-20-00536-CV (Tex. App.—Corpus Christi, filed Jan. 21, 2021); *Sepulveda v. City of Pasadena*, No. 2021-80180 (Tex. Civ. Dist. Ct.—Harris Cty., filed Dec. 8, 2021) (temporary injunction granted Feb. 28, 2022).

TO THE HONORABLE SUPREME COURT OF TEXAS:

The Institute for Justice respectfully submits this amicus brief in support of neither party. *See* Tex. R. App. P. 11.

SUMMARY OF ARGUMENT

Amicus takes no position on who should win between the Hemp Companies and DSHS.

We are nevertheless troubled by the State's assertion that *Patel v. Texas Department of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015), "has no proper application here," State's Br. at 7, because *that* case was about the "lawful occupation" of eyebrow threading, while *this* case is about an "absolute prohibition[] . . . on manufacturing hemp products for smoking[,]" State's Reply Br. at 8. "*Patel* is inapposite," we are told, where "[t]he Legislature has erected a wall, not just a hurdle." *Id.* at 7–8. Using this reasoning, the Hemp Companies' "due-course-of-law challenge *fails at the outset* because [they] have neither a liberty interest nor a vested property interest in manufacturing or processing hemp products for smoking." *Id.* at 5 (emphasis added). What's more, even if they have a constitutionally protected right, rational basis review should apply, "not *Patel*." *Id.* at 7–9. Amicus reads these arguments as an effort to win *this* case, for sure, but one based on poor reasoning, with little thought for the future.

Below, amicus explains why the State's view of *Patel* is incorrect. We first put *Patel* in context (section 1) by explaining the preexisting confusion that led this Court to articulate a clear standard for economic liberty claims. Next, we explain why the State's approach is incompatible with any fair reading of the opinions in *Patel* and the earlier Texas cases on which the decision rests (section 2). With these precedents in focus, this is not complicated: *Patel* applies when someone challenges the scope of the government's power to regulate their means of earning a living. It easily applies to the challenges in this case.

The State's approach, by contrast, would turn *Patel* on its head—making Texas's independent constitutional standard applicable where the state or local government merely burdens a person's right to earn a living, but perversely *not* applicable when that right is totally denied (section 3). The upside-down result would mean the State could, for example, ban grocery stores but could not unduly burden them when—by sheer grace—the State allows them to exist.

This Court should reject the State's upside-down methodology. *Patel* is about more than eyebrow threading; it is about Texans' right to economic self-determination and how the history, text, and case law surrounding the state constitution meaningfully protect that right—in all cases.

ARGUMENT

The State urges the Court to "decline to extend *Patel* to categorical prohibitions on the manufacturing of controversial products." State's Br. at 1. As the Hemp Companies point out, this is like saying that *Patel* applies only to eyebrow threaders—and *this* case is about something else. *See* Appellees' Br. at 46 (noting that "the State misreads *Patel* as if all constitutional challenges must fall within *Patel*'s particular facts"). Amicus agrees with the Hemp Companies: *Patel* governs their challenge.

1. *Patel* resolved a longstanding split of authority over how courts should evaluate the constitutionality of economic regulations under Article I, Section 19 of the Texas Constitution. *See Patel*, 469 S.W.3d at 80–82. Before the decision, lower courts applied three different tests. Some applied a "real and substantial" test, evaluating whether the evidence demonstrated a real-world reason for an economic regulation and whether its operation substantially advanced the Legislature's purposes. *See id.* at 80 (collecting cases). Other courts applied "rational basis including consideration of evidence," a standard that looked to the record to decide whether an economic regulation has a rational relationship to a legitimate governmental interest. *See id.* at 81–82 (collecting cases). Still others applied the "no evidence rational basis" test to decide (regardless of the evidence) whether a

regulation had any conceivable justification, no matter how fantastical. *See id*. at 82 (collecting cases).

Patel ended this confusion. Reviewing all relevant case law "over one hundred and twenty-five years," this Court held that Article I, Section 19 provides greater protection than its federal counterpart in cases challenging the constitutionality of "economic regulation statutes." *Id*. at 87. It recognized a three-part test for deciding such challenges, synthesizing elements of Texas's real-and-substantial precedents with its rational-basis-with-evidence precedents. Under the resulting standard, the purpose of an economic regulation must be "rationally related to a legitimate governmental interest[.]" *Id*. The regulation's "actual, real-world effect" must be "rationally related" to that governmental interest. *Id*. And the regulation must not be "so burdensome as to be oppressive in light of" the government's interests. *Id*. Rejecting the no-evidence test, the Court "consider[ed] the entire record," *id*. at 88, and observed that, "in most instances" the standard will "require the reviewing court to consider the entire record, including evidence offered by the parties," *id*. at 87 (citing *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 520 (Tex. 1995)).

The State proposes a return to uncertainty. It urges this Court to use the no-evidence test specifically rejected in *Patel*. *See* Reply Br. at 10–12

(arguing that Texas's ban on smokable hemp production is justified by "common sense"). In this case about the Texas Constitution, the State relies exclusively on cases applying the federal Constitution from courts outside our borders. *See id.* at 11. And it invokes the *dissenting* opinions from *Patel* to undermine clear statements in the *majority* opinion. *See id.* at 9. This is not how courts apply constitutional principles—embracing abrogated standards, based on non-binding authority, under other constitutions, relying on dissents. This approach hardly reflects principled legal reasoning.

2. Any fair reading of *Patel* (including the dissenting opinions) shows that this Court was articulating the test applicable to all "substantive due course of law" challenges to economic regulations. *See* 469 S.W.3d at 87. Nothing in the *Patel* majority or dissents suggests that this standard turns on a distinction between "lawful occupations" and "absolute prohibitions." That is the State's invention.[3]

[3] The government in fact plays both sides of this argument. For example, in *Garrett v. Texas State Board of Pharmacy*, No. 03-21-00039-CV (Tex. App.—Austin, filed Apr. 30, 2021), the State argues that *Patel only* applies to regulations that absolutely prohibit an individual from pursuing their chosen profession. *See* Appellees' Br. at ix, 1, 10, available at https://tinyurl.com/2p8kna49. And the City of Austin has claimed the power to impose universal paid sick leave based on the notion that *Patel* only applies to requirements that put people entirely out of business. *See* Cross-Appellants' Opening Br. at 16–17, *Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425 (Tex. App.—Austin 2018, pet. denied) (No. 03-18-00445-CV), 2018 WL 4034008, at *16–17.

The State is correct that one of two concurring opinions mentions the "right to pursue a lawful calling," *Patel*, 469 S.W.3d at 93 (Willett, J., concurring); *cf.* State's Br. at 14 (citing same), but no fair-minded reader could conclude that Justice Willett's choice of the phrase "lawful calling" was meant to signify an on/off switch for the *Patel* standard. And if there were any doubt, Justice Willett elsewhere wrote that "[t]he Court's view is simple, and simply stated: Laws that impinge your constitutionally protected right to earn an honest living must not be preposterous," *id.* at 93–94, and that his view, "simply stated," was that the "economic-liberty test under Article I, Section 19 of the Texas Constitution is more searching than the minimalist test under the Fourteenth Amendment to the United States Constitution," *id.* at 110. It is difficult to read these words and draw from them the State's conclusion that it may ban whole industries and do so based on a minimalist standard like rational basis review.[4]

Most importantly, of course, the majority opinion in *Patel* plainly declares that its standard governs "an as-applied challenge to an economic

[4] In his concurrence, Justice Boyd also stressed the real and judicially enforceable limits on the government's power to regulate a person's chosen occupation—for example, criticizing the dissents' view under which "if the Legislature decided to require eyebrow threaders to obtain a medical license, we would have to uphold that decision . . . ." *Patel*, 469 S.W.3d at 125 (Boyd, J., concurring). Nothing in his concurrence suggests that Justice Boyd would have voted to uphold more onerous restrictions on eyebrow threading if they amounted to a complete ban.

regulation statute under Section 19's substantive due course of law requirement." 469 S.W.3d at 87. Indeed, all members of this Court agreed on that much. *See id.* at 96 (Willett, J., concurring) (discussing "the role judges should play in policing the other branches, particularly when reviewing economic regulations"); *id.* at 124 (Boyd, J., concurring) (describing the Court's "articulation of the standard by which we review the constitutionality of economic regulations under the due course of law provision"); *id.* at 132 (Hecht, C.J., dissenting) (describing the Court's decision as "applying substantive due process doctrine to economic regulation"); *id.* at 141 (Guzman, J., dissenting) (describing the Court's test as controlling "an as-applied challenge to an economic regulation statute under section 19's substantive-due-course-of-law requirement"). Over 74 pages of the Southwestern Reporter, the words "absolute prohibition" appear not once. The members of this Court were certainly not unanimous about the standard in *Patel*, but they all agreed that it would govern all future as-applied challenges to economic regulations. And this is such a challenge.

The long history of Texas's Due Course of Law jurisprudence confirms amicus's position. *See id.* at 80–87. The exhaustive survey of Article I, Section 19 jurisprudence that the Court conducted in *Patel* makes clear that its standard applies to all "economic regulation statutes" and "regulations

adopted by an agency." *Id.* at 87.[5] Moreover, this Court and lower courts have consistently reviewed Article I, Section 19 challenges to economic regulations brought by plaintiffs who were not being "absolutely prohibited" from their occupation or industry.[6] *But cf.* State's Reply Br. at 7 (faulting the Hemp Companies for "cit[ing] no precedent applying *Patel* to a statute that totally prohibits an activity"). The State is also wrong to charge the Hemp Companies with inviting an "expan[sion]" of *Patel*. *See id.* at 7. Under more than a century of Texas precedent, the Hemp Companies—like all Texans—are entitled to review under the constitutional standard synthesized in *Patel*.

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[5] *Accord St. Louis Sw. Ry. Co. of Tex. v. Griffin*, 171 S.W. 703, 704 (Tex. 1914) (observing that courts must "annul *any law* enacted by the Legislature which is clearly in violation of . . . constitutional rights" (emphasis added)).

[6] *See, e.g.*, *State v. Spartan's Indus., Inc.*, 447 S.W.2d 407, 410 (Tex. 1969) (Sunday closing law challenged by retailers as violating Article I, §§ 15, 17, 19 and the Fourteenth Amendment); *Tex. Power & Light Co. v. City of Garland*, 431 S.W.2d 511, 518 (Tex. 1968) (power company's Article I, § 19 challenge to law requiring permit before extending power lines); *San Antonio Retail Grocers, Inc. v. Lafferty*, 297 S.W.2d 813, 814–17 (Tex. 1957) (grocer challenging ban on loss-leader sales); *Bruhl v. State*, 13 S.W.2d 93, 94 (Tex. Crim. App. 1928) (striking down prohibition on non-optometrist eyeglass sales while declaring a "business has the inherent right to do any and all things necessary . . . to the carrying on of such business"); *St. Louis Sw. Ry. Co. of Tex.*, 171 S.W. at 703–04, 707 (at-will employee discharges); *Lens Express, Inc. v. Ewald*, 907 S.W.2d 64, 68–69 (Tex. App.—Austin 1995, no writ) (discount contact lens company's challenge to prescription requirement); *Retail Merchs. Ass'n of Hous., Inc. v. Handy Dan Hardware, Inc.*, 696 S.W.2d 44, 51 (Tex. App.—Houston [1st Dist.] 1985, no writ) (Sunday closing law challenged by trade association); *Tex. State Bd. of Pharm. v. Gibson's Disc. Ctr., Inc.*, 541 S.W.2d 884, 886–87 (Tex. App.—Austin 1976, writ ref'd n.r.e.) (licensed pharmacist's Article I, § 19 challenge to law barring the advertising of drug prices); *City of Houston v. Johnny Frank's Auto Parts Co.*, 480 S.W.2d 774, 780 (Tex. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.) (wrecking yard operators' Article I, § 19 challenge to law that "doesn't prohibit the operation of wrecking yards" but rather "regulates their operation"); *Humble Oil & Ref. Co. v. City of Georgetown*, 428 S.W.2d 405, 408 (Tex. App.—Austin 1968, no writ) (oil and gas company's Article I, § 19 challenge to law regulating the storage and delivery of gasoline).

Whatever the outcome of this case, therefore, this Court should apply its precedent and reaffirm that *Patel* governs all state constitutional challenges to "economic regulation statutes," 469 S.W.3d at 87, and any other exercise of the police power by state or local governments over a person's right to pursue a living. Any other approach would call into question the more than 125 years' worth of case law on which *Patel* is based, reintroducing confusion where today there is clarity.

3. Finally, we briefly address the State's chicken-little worry that applying *Patel* to a ban on smokable hemp will lead drug dealers to bring *Patel*-style challenges to criminal laws banning the possession and sale of drugs like cocaine and methamphetamine. *See* Reply Br. at 8–9.

The Court should reject this framing. For the reasons discussed above, the State is wrong to say that *Patel* applies only to regulations, not prohibitions, bans, or any other tool the Legislature might use to make something illegal. But it would be equally wrong to say that it is *irrelevant* whether a law operates as a prohibition or a regulation. Instead, the prohibition/regulation distinction matters because it goes to the State's *interest* in the law (and therefore also to whether the law's burden is undue). In the case of criminal drug laws, the State could persuasively argue, effectively, "our interest is in preventing anyone, anywhere in Texas from

possessing this substance." That same interest, of course, cannot be asserted here, where the State allows anyone, anywhere in Texas to possess and use smokable hemp. By contrast, a ban on the manufacturing of cocaine or methamphetamine plausibly pursues the State's interests in banning those substances everywhere in Texas. So, it seems safe to assume that the State's criminal drug laws actually carry the Legislature's legitimate interests into the real world. Equally plausible, in this case, would be the conclusion that the government cannot ban the manufacture of that which it allows to run rampant. In this sense, Texas's ban on the manufacture of smokable hemp bears less resemblance to Texas's ban on illegal drugs and more resemblance to a ban on grocery stores, mattresses making, or haberdashery.

The State's predictions of the sky's imminent collapse have proven wrong before. Indeed, the State and dissenting justices in *Patel* warned that the Court was "unleashing 'the *Lochner* monster.'" 469 S.W.3d at 91 (quoting 469 S.W.3d at 138 (Hecht, J., dissenting)). The *Patel* majority responded by reminding us that "Texas courts, including this Court, have expressed and applied various standards for considering as-applied substantive due process claims for over a century." *Id.* And that, if a due process monster ever existed, "this Court would have long ago decisively dealt with it." *Id.* And yet, the sky remains. Amicus searched exhaustively and found just five published cases

that have resolved the merits of a substantive due course of law claim since *Patel*, and the results are hardly radical. *See Draper v. City of Arlington*, 629 S.W.3d 777, 785–89 (Tex. App.—Fort Worth 2021, pet. denied) (holding that a city ordinance limiting short-term rentals was constitutional under *Patel*); *Transformative Learning Sys. v. Tex. Educ. Agency*, 572 S.W.3d 281, 292–93 (Tex. App.—Austin 2018, no pet.) (holding that a statute governing "the rights and obligations of recipients of state funding" for charter schools was constitutional); *City of Richardson v. Bowman*, 555 S.W.3d 670, 691–94 (Tex. App.—Dallas 2018, pet. denied) (holding that laws permitting the use of red-light cameras are constitutional); *Tex. Dep't of Motor Vehicles v. Fry Auto Servs.*, 584 S.W.3d 138, 143–44 (Tex. App.—Austin 2018, no pet.) (holding that the regulation of individuals performing public services is constitutional); *Tex. Alcoholic Beverage Comm'n v. Live Oak Brewing Co.*, 537 S.W.3d 647, 658–59 (Tex. App.—Austin 2017, pet. denied) (holding that a statute regulating the sale of territorial distribution rights for beer was constitutional).

As these cases demonstrate, applying the *Patel* standard does not dictate victory for a cheeky drug dealer or anyone else. Whatever the private burden on a plaintiff's right to earn a living, a real and substantial public interest, pursued without undue burden, will always outweigh it. *Patel*

articulates a test, not an outcome. That is part of its virtue: Texas's independent constitutional standard does not guarantee victory for the plaintiff any more than it guarantees victory for the government.

* * *

The State offers a distinction without a difference. *Patel* has no on/off switch triggered by whether the government bans a business or merely burdens it. Whether the Legislature has the power to put hemp producers and manufacturers out of business turns on the standard recognized in *Patel*. After all, our client, Ash Patel, was also being put out of business until this Court determined that the State's ban on unlicensed threaders was unconstitutional. There is no doctrinally meaningful difference between his predicament and that of the Hemp Companies. To put it plainly: If the State can put the Hemp Companies out of business, it better have its reasons.

CONCLUSION

Patel crystallized a long-established standard for deciding whether an economic regulation violates the Texas Constitution. No matter how this case comes out, this Court should faithfully apply the *Patel* standard and affirm its meaningful protections for the right to pursue a living.

RESPECTFULLY SUBMITTED this 17th day of March, 2022.

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This brief contains 3,222 words, excluding the portions of the brief exempted by Rule 3.4(i)(1) of the Texas Rules of Appellate Procedure.

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