FILED
21-1045
1/18/2022 4:33 PM
tex-60919744
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 21-1045

In the Supreme Court of Texas

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

Appellants,

v.

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

Appellees.

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

BRIEF ON THE MERITS FOR APPELLANTS

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

JUDD E. STONE II
Solicitor General
State Bar No. 24076720
Judd.Stone@oag.texas.gov

BILL DAVIS
Deputy Solicitor General

KYLE D. HIGHFUL
Assistant Solicitor General

CHRISTOPHER J.F. GALIARDO
Assistant Attorney General

Counsel for Appellants

Identity of Parties and Counsel

Appellants:
Texas Department of State Health Services
John Hellerstedt, in his official capacity as Commissioner of the Texas DSHS

Appellate and Trial Counsel for Appellants:
Ken Paxton
Brent Webster
Judd E. Stone II (lead counsel)
Bill Davis
Kyle D. Highful
Christopher J.F. Galiardo
Charles K. Eldred
Benjamin S. Walton
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Judd.Stone@oag.texas.gov

Appellees:
Crown Distributing LLC
America Juice Co., LLC
Custom Botanical Dispensary, LLC
1937 Apothecary, LLC

Appellate and Trial Counsel for Appellees Crown Distributing LLC and America Juice Co., LLC:
Constance H. Pfeiffer (lead counsel)
Matthew C. Zorn
Yetter Coleman LLP
811 Main Street, Suite 4100
Houston, Texas 77002
cpfeiffer@yettercoleman.com

Shane Pennington
Vicente Sederberg LLP
1115 Broadway, 12th Floor
New York, New York 10010

Chelsie N. Spencer
Paul C. Stevenson
Ritter Spencer PLLC
15455 Dallas Parkway, Suite 600
Addison, Texas 75001

Appellate and Trial Counsel for Appellees Custom Botanical Dispensary, LLC and 1937 Apothecary, LLC:
Susan Hays (lead counsel)
Law Office of Susan Hays, PC
P.O. Box 41647
Austin, Texas 78704
hayslaw@me.com

Table of Contents

Index of Authorities

Page(s)

Cases:

Constitutional Provisions, Statutes, and Rules:

Other Authorities:

Statement of the Case

Nature of the Case:	Appellees ("the Hemp Companies") sued the Texas Department of State Health Services and Commissioner John Hellerstedt ("Defendants"), challenging the constitutionality of Texas Health and Safety Code section 443.204(4) ("the Statute") and the validity of 25 Texas Administrative Code section 300.104 ("the Rule"), both of which relate to consumable hemp products for smoking. CR.631–63.
Trial Court:	345th Judicial District Court, Travis County The Honorable Lora J. Livingston
Course of Proceedings:	The trial court issued a temporary injunction prohibiting Defendants from enforcing the Rule. CR.285–87. Defendants filed an interlocutory appeal to the Third Court of Appeals. The court of appeals affirmed the injunction in part, reversed it in part, and remanded the case. *Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, No. 03-20-00463-CV, 2021 WL 3411551, at *8 (Tex. App.—Austin Aug. 5, 2021, no pet.) (mem. op.).
Disposition in the Trial Court:	Following a trial on the merits, the trial court declared the Statute unconstitutional, declared the Rule invalid in its entirety, and permanently enjoined Defendants from enforcing either the Statute or the Rule. CR.664–66. Defendants filed a direct appeal to this Court, and the trial court's judgment is thereby superseded. *See* Tex. Civ. Prac. & Rem. Code § 6.001; Tex. R. App. P. 24.2(a)(3); *Neeley v. W. Orange-Cove Consol. ISD*, 176 S.W.3d 746, 754 & n.19 (Tex. 2005).

Statement of Jurisdiction

The Court has jurisdiction under Texas Government Code section 22.001(c). The Court has noted probable jurisdiction and set this case for oral argument. *See* Tex. R. App. P. 57.4.

Issues Presented

Smoking cannabis was illegal under both federal law and Texas law for decades. Recently, Congress and the Texas Legislature legalized hemp but kept marihuana illegal. And the Texas Legislature prohibited the manufacturing and processing of consumable hemp products for smoking. Fulfilling his statutory mandate, the Commissioner issued a rule that prohibits, among other things, the manufacturing and processing of consumable hemp products for smoking. The Hemp Companies sued, arguing that Texas's statute is unconstitutional and its rule invalid. The trial court agreed with them.

The issues presented are:

1. Whether the Hemp Companies' alleged injuries are not redressable, and the Hemp Companies therefore lack standing to challenge the Statute and the part of the Rule related to manufacturing and processing, because an unchallenged statute independently prohibits the actions they seek to take.
2. Whether the trial court erred in declaring the Statute unconstitutional and enjoining its enforcement.
3. Whether the trial court erred in declaring the Rule invalid and enjoining its enforcement.

To the Honorable Supreme Court of Texas:

Cannabis is a divisive plant. Some view it as a valuable resource, capable of providing everything from rope to food to medicinal oils. Others view it as a scourge responsible for an assortment of societal ills. Such divergent views have caused cannabis to be regulated in very different ways by governments throughout the centuries.

How the law should treat cannabis and cannabis-derived products is a quintessential policy decision. The Texas Legislature has chosen to distinguish hemp from marihuana, making hemp legal but keeping marihuana illegal. And the Legislature has further decided that the manufacturing and processing of hemp products for smoking should be prohibited while allowing other types of hemp products to be made in Texas.

The Hemp Companies brought this lawsuit because they disagree with the Legislature's policy decisions. Perhaps foreseeing that the challenged Statute readily survives rational-basis review, the Hemp Companies sought more rigorous scrutiny by asking the trial court to expand the reach of *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015), in which this Court departed from federal precedent regarding due-process challenges to economic regulations. This Court should decline to extend *Patel* to categorical prohibitions on the manufacturing of controversial products. And, even if *Patel*'s framework applies, the Statute passes constitutional muster. The Court should honor the Legislature's policy decisions regarding cannabis and hold the Statute constitutional and the Rule valid to the extent it prohibits the manufacturing and processing of hemp products for smoking.

Statement of Facts

I. Background

A. Hemp was illegal under both federal and state law for decades.

Marihuana and hemp "are both varieties of the plant Cannabis sativa L." Lawrence J. Trautman et al., *Cannabis at the Crossroads: A Transdisciplinary Analysis and Policy Prescription*, 45 Okla. City U. L. Rev. 125, 131 (2021). Marihuana is cultivated to contain high levels of tetrahydrocannabinol ("THC"), which is "an intoxicating drug," while hemp is cultivated "to produce fiber, seeds, or oil." Julie Andersen Hill, *Cannabis Banking: What Marijuana Can Learn from Hemp*, 101 B.U. L. Rev. 1043, 1067 (2021). Since as early as 1378, governments across the globe have periodically prohibited cannabis. Trautman, *supra*, at 133–34. "In the United States, at the federal level, the Marihuana Tax Act enacted in 1937 effectively prohibited the production of all forms of cannabis—both hemp and marijuana." *Id.* at 134; *see* Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937) (repealed 1970). Later, "the Controlled Substances Act of 1970 (CSA) formally made cannabis of any kind (both hemp and marijuana) illegal under federal law by classifying cannabis sativa as a Schedule I drug." Trautman, *supra*, at 135; *see* Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified at 21 U.S.C. § 801). Under the CSA, "growing a hemp plant was treated as manufacturing a controlled substance." Hill, *supra*, at 1069–70.

B. The United States and the State of Texas recently legalized certain cannabis products.

The Agricultural Act of 2014 paved the way for federal hemp legalization by distinguishing between hemp and marihuana based on the plant's THC concentration. Trautman, *supra*, at 146; *see* Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649, 912 (2014) (current version at 7 U.S.C. § 5940); *C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541, 544 (7th Cir. 2020). The Agriculture Improvement Act of 2018 ("2018 Farm Bill") made the same distinction and "exclude[d] hemp from the definition of 'marihuana' in the CSA." Trautman, *supra*, at 147; *see* Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490 (2018); *C.Y. Wholesale*, 965 F.3d at 544. In response to the 2018 Farm Bill, Texas enacted HB 1325 in 2019. Act of May 22, 2019, 86th Leg., R.S., ch. 764, 2019 Tex. Gen. Laws 2085. Tracking the language of the 2018 Farm Bill, HB 1325 defines "hemp" as "the plant Cannabis sativa L. and any part of that plant, including the seeds of the plant and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." Tex. Agric. Code § 121.001; *see* Tex. Health & Safety Code § 443.001(5).

Chapter 443 of the Texas Health and Safety Code governs the manufacture, distribution, and sale of consumable hemp products. A "consumable hemp product" is "food, a drug, a device, or a cosmetic . . . that contains hemp or one or more hemp-derived cannabinoids, including cannabidiol." Tex. Health & Safety Code § 443.001(1). The statute requires the executive commissioner of the Health and

Human Services Commission to "adopt rules and procedures necessary to administer and enforce" Chapter 443. *Id.* § 443.051. And the Legislature has commanded that "[r]ules adopted by the executive commissioner regulating the sale of consumable hemp products must to the extent allowable by federal law reflect" certain principles, including that "the processing or manufacturing of a consumable hemp product for smoking is prohibited." *Id.* § 443.204(4). The Commissioner adopted the Rule at issue here, effective August 2, 2020. 45 Tex. Reg. 5199, 5199 (2020). It states: "The manufacture, processing, distribution, or retail sale of consumable hemp products for smoking is prohibited." 25 Tex. Admin. Code § 300.104.

II. This Litigation

In August 2020, the Hemp Companies filed this suit, arguing that certain provisions of HB 1325 violate the Texas Constitution's due-course-of-law clause, article I, section 19, as interpreted by this Court in *Patel*, and that the Rule is invalid. CR.5, 21–26. On August 20, the trial court issued a temporary restraining order prohibiting Defendants from enforcing the Rule. CR.119–21. And on September 18, the court issued a temporary injunction. CR.285–87. Defendants filed an interlocutory appeal, thereby superseding the injunction. CR.314–17; *see* Tex. Civ. Prac. & Rem. Code § 51.014(a)(4).

The court of appeals issued a temporary order providing that the trial court's temporary injunction be "reinstated." *Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, No. 03-20-00463-CV, 2020 WL 5778128, at *1 (Tex. App.—Austin Sept. 23, 2020, order) (per curiam) (citing Tex. R. App. P. 29.3). While that appeal was pending, the trial court held a trial on the merits. But before the trial court signed

a final judgment, the court of appeals issued its decision. 2021 WL 3411551. The court agreed with the Hemp Companies that the Rule goes beyond the Statute in prohibiting the distribution and retail sale of consumable hemp products for smoking. *Id.* at *4–7. But it also concluded that the trial court abused its discretion in enjoining the enforcement of the portion of the Rule prohibiting manufacturing and processing such products because the Hemp Companies "never provided a plain and intelligible statement of the grounds" for that relief. *Id.* at *3 (quotation marks omitted). The court therefore "reverse[d] that portion of the trial court's temporary injunction order insofar as it enjoins the enforcement of rule 300.104's bans on manufacturing and processing of consumable hemp products for smoking," affirmed the remainder of the order, and remanded the case for entry of a revised temporary injunction. *Id.* at *8.

The Hemp Companies subsequently amended their petition. CR.631–62. In their live pleading, the Hemp Companies asserted that Texas Health and Safety Code section 443.204(4) violates the Texas Constitution and that 25 Texas Administrative Code section 300.104 is invalid and unconstitutional, CR.648–53, and they sought declaratory and injunctive relief, CR.657.

On November 17, 2021, the trial court issued a final judgment declaring that Texas Health and Safety Code section 443.204(4) violates the Texas Constitution, declaring that 25 Texas Administrative Code section 300.104 is invalid in its entirety, and permanently enjoining Defendants from enforcing either the Statute or the Rule. CR.664–66. Defendants appealed directly to this Court, superseding the final judgment. CR.668–70; *see* Tex. Gov't Code § 22.001(c). The Court noted probable

jurisdiction, requested merits briefing, and set the cause for oral argument on March 22, 2022.*

Summary of the Argument

I. Standing requires that a ruling in the plaintiff's favor will redress the plaintiff's alleged injuries. Here, a statute that the Hemp Companies' live pleading did not challenge independently bars Defendants from authorizing the Companies to manufacture and process hemp for smoking. Accordingly, the Hemp Companies lack standing to challenge the Statute and the part of the Rule related to manufacturing and processing.

II. The trial court erred in declaring the Statute unconstitutional and enjoining its enforcement because the Hemp Companies lack a liberty interest or vested property interest in manufacturing or processing consumable hemp products for smoking. Accordingly, their due-course-of-law challenge fails.

Even if they had such an interest, the Statute is subject only to rational-basis review. It survives that review because it furthers the legitimate governmental interests of mitigating the difficulty that law-enforcement officials have in distinguishing hemp from marihuana and protecting the public from the harmful health effects of smoking.

---

* Despite Defendants' repeated requests and inquiries, the reporter's record has not yet been filed in this appeal.

Although *Patel* has no proper application here, the Statute also survives scrutiny under that decision. It is rationally related to legitimate governmental interests, and its real-world effects are not unconstitutionally oppressive.

III. The first part of the Rule merely tracks the Statute in prohibiting the manufacturing and processing of consumable hemp products for smoking. Because the Statute is constitutional, that part of the Rule is valid. The second part of the Rule prohibits the distribution and retail sale of consumable hemp products for smoking. Defendants no longer contend that the Rule's second part is authorized by statute.

Standard of Review

The trial court's permanent injunction is reviewed for an abuse of discretion. *See Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 792 (Tex. 2020); *Operation Rescue-Nat'l v. Planned Parenthood of Hous. & Se. Tex., Inc.*, 975 S.W.2d 546, 560 (Tex. 1998). "To be entitled to a permanent injunction, a party must prove (1) a wrongful act, (2) imminent harm, (3) an irreparable injury, and (4) the absence of an adequate remedy at law." *Tex. EMC Mgmt.*, 610 S.W.3d at 792. "A trial court abuses its discretion when it acts with disregard of guiding rules or principles or when it acts in an arbitrary or unreasonable manner." *In re Acad., Ltd.*, 625 S.W.3d 19, 25 (Tex. 2021) (orig. proceeding). "A trial court's failure to analyze or apply the law correctly is an abuse of discretion." *Id.* (quotation marks omitted). This Court reviews the trial court's interpretation of the Texas Constitution, statutes, and administrative rules *de novo*. *Odyssey 2020 Acad., Inc. v. Galveston Cent. Appraisal Dist.*, 624 S.W.3d 535, 540 (Tex. 2021); *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex.

2011). Statutes and agency rules are presumed to be constitutional, and a party challenging them must meet a high burden. *Patel*, 469 S.W.3d at 87.

ARGUMENT

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

"Because it is a component of subject matter jurisdiction, standing cannot be waived and may be raised for the first time on appeal." *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018). Standing requires (1) an injury in fact (2) that is fairly traceable to the defendant and (3) that will be redressed by a favorable decision. *Id.* at 485. To satisfy the third element—redressability—the plaintiff "must show that there is a substantial likelihood that the requested relief will remedy the alleged injury." *Id.* This Court is "duty-bound" to consider whether standing exists, even if it has not been raised by the parties. *Garcia v. City of Willis*, 593 S.W.3d 201, 206 (Tex. 2019).

The trial court's injunction prohibiting the enforcement of the Statute and the part of the Rule banning the manufacturing and processing of consumable hemp products for smoking is effectively meaningless. *See Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc) (dismissing for lack of redressability); *see also JDC/Firethorne*, 548 S.W.3d at 488 ("[i]f . . . a plaintiff suing in a Texas court requests injunctive relief . . . but the injunction could not possibly remedy his situation, then he lacks standing to bring that claim") (quoting *Heckman v. Williamson County*, 369 S.W.3d 137, 155 (Tex. 2012)). Although the trial court declared the Statute

unconstitutional and enjoined the enforcement of the Statute and the Rule, CR.665–66, it did not address Texas Agriculture Code section 122.301(b) or enjoin its enforcement. Section 122.301(b) provides: "A state agency may not authorize a person to manufacture a product containing hemp for smoking, as defined by Section 443.001, Health and Safety Code." This statute serves as an independent bar on manufacturing hemp products for smoking.

The Hemp Companies challenged the constitutionality of section 122.301(b) in their original petition. CR.5, 29. But, although their live pleading continued to characterize section 122.301(b) as "prohibit[ing] state agencies from authorizing the manufacture of products containing hemp for smoking," CR.633, and asserted that section 122.301(b) is unconstitutional, CR.634, it did not request any relief with respect to section 122.301(b), *see* CR.657. That explains the final judgment's silence concerning section 122.301(b). *See generally* CR.664–66. In any event, the Hemp Companies failed to file a cross-appeal and have forfeited that issue. *See* Tex. R. App. P. 25.1(c) ("The appellate court may not grant a party who does not file a notice of appeal more favorable relief than did the trial court except for just cause.").

Even if this Court were to affirm the trial court's judgment and the permanent injunction were to become effective, section 122.301(b) would still prohibit Defendants from authorizing the Hemp Companies to "to manufacture a product containing hemp for smoking." The relief the Hemp Companies sought does not redress their alleged injuries, so they lack standing to challenge the Statute or the part of the Rule that deals with manufacturing and processing.

In the trial court, Defendants argued that the Hemp Companies lacked standing to challenge the constitutionality of section 122.301(b) because the provision refers to nonconsumable hemp products, which the Hemp Companies do not manufacture. CR.206. That argument was misguided for the reasons that the Hemp Companies themselves pointed out to the court. Nothing in section 122.301(b) specifies that it applies only to nonconsumable hemp products. CR.272. Moreover, all hemp products for smoking are consumable because they are smoked—it makes no sense to speak of a nonconsumable hemp product for smoking. CR.273; *see* Ryan Golden, *Dazed & Confused: The State of Enforcement of Marijuana Offenses After the Texas Hemp Farming Act*, 72 Baylor L. Rev. 737, 754 n.110 (2020) ("Section 122.301(b) of the Texas Agricultur[e] Code and Section 443.204(4) of the Texas Health and Safety Code prohibit hemp being in the form for smoking or vaping.").

Standing is jurisdictional, *JDC/Firethorne*, 548 S.W.3d at 484, and must be considered *sua sponte*, *Garcia*, 593 S.W.3d at 206. Moreover, "[a]s a general rule, a court cannot acquire subject-matter jurisdiction by estoppel." *Wilmer-Hutchins ISD v. Sullivan*, 51 S.W.3d 293, 294 (Tex. 2001) (per curiam); *accord In re Crawford & Co.*, 458 S.W.3d 920, 928 n.7 (Tex. 2015) (per curiam) (orig. proceeding). Therefore, Defendants' prior arguments cannot prevent this Court from finding a lack of standing.

In short, because section 122.301(b) of the Agriculture Code is an independent bar to the Hemp Companies receiving authorization to manufacture hemp products for smoking, the relief they sought (and obtained from the trial court) does not redress their alleged injuries. They lack standing, and the Court should dismiss, for

want of subject-matter jurisdiction, their challenge to the Statute and the part of the Rule concerning manufacturing and processing. Moreover, because the Hemp Companies voluntarily abandoned their challenge to section 122.301(b), they are not entitled to amend their pleadings. "Generally, remand is a mechanism for parties, over whose claims the trial court may have jurisdiction, to plead facts tending to establish that jurisdiction, not for parties, over whose claims the trial court does not have jurisdiction, to plead new claims over which the trial court does have jurisdiction." *Clint ISD v. Marquez*, 487 S.W.3d 538, 559 (Tex. 2016).

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

Even if the Hemp Companies have standing to challenge the Statute, their challenge fails. The Hemp Companies cannot prevail on a due-course-of-law claim because they have no liberty interest or vested property interest in manufacturing or processing consumable hemp products for smoking. But, even if they did, the Statute is subject only to rational-basis review, not the standard articulated in *Patel*, and the Statute easily passes rational-basis review. The Statute is, however, also constitutional under *Patel*.

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

"Before any substantive or procedural due-process rights attach, . . . the citizen must have a liberty or property interest that is entitled to constitutional protection." *Honors Acad., Inc. v. Tex. Educ. Agency*, 555 S.W.3d 54, 61 (Tex. 2018) (citing *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 15 (Tex. 2015)). For a property

interest to give rise to a due-course-of-law claim, it must be a "vested right"—that is, "something more than a mere expectancy based upon an anticipated continuance of an existing law." *Id.* (quoting *City of Dallas v. Trammell*, 101 S.W.2d 1009, 1014 (Tex. 1937)). The Hemp Companies have neither a liberty interest nor a vested property interest in manufacturing or processing consumable hemp products for smoking.

The Hemp Companies have no liberty interest because, unlike the plaintiffs in *Patel*, they are not complaining of economic regulations that burden their exercise of a "lawful calling." *Patel*, 469 S.W.3d at 93 (Willett, J., concurring); *see also Tex. Dep't of Motor Vehicles v. Fry Auto Servs.*, 584 S.W.3d 138, 143 (Tex. App.—Austin 2018, no pet.). The plaintiffs in *Patel* sought to practice eyebrow threading, an entirely legal profession—not to produce or sell products in contravention of the law. The Constitution's guarantee of "the due course of the law of the land," Tex. Const. art. I, § 19, does not include the right to manufacture any product a person chooses. And there is no fundamental right to "hemp farming." *United States v. White Plume*, 447 F.3d 1067, 1075 (8th Cir. 2006).

Nor do the Hemp Companies have a vested property interest in manufacturing consumable hemp products for smoking. Until a few years ago, merely possessing such products was a crime. And at no point between hemp's legalization and the present has the Legislature allowed consumable hemp products for smoking to be manufactured in Texas. Therefore, the Hemp Companies have, at most, "a mere 'unilateral expectation'" of being able to manufacture or process such products.

Honors Acad., 555 S.W.3d at 61 (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).

Because the Hemp Companies lack a liberty interest or vested property interest, their due-course-of-law claim fails. *See id.* at 78; *see also Fry Auto Servs.*, 584 S.W.3d at 144.

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

Even if the Hemp Companies did have a liberty interest or vested property interest in manufacturing and processing consumable hemp products for smoking, their constitutional challenge would merit only rational-basis review. The Statute passes that review because it furthers the legitimate governmental interests of mitigating the difficulty that law-enforcement officials have in distinguishing hemp from marihuana and protecting the public from the harmful health effects of smoking.

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

The Hemp Companies argue that the Statute violates the Texas Constitution's guarantee of due course of law as applied by *Patel*. But the *Patel* framework does not apply here. Instead, the Statute is subject only to rational-basis review.

In *Patel*, the plaintiffs challenged statutes and administrative rules regulating eyebrow threading. *Patel*, 469 S.W.3d at 73. According to the plaintiffs, the laws violated the Texas Constitution's substantive-due-course-of-law protections. *Id.* at 75. The plaintiffs alleged that 710 of the required 750 training hours for the esthetician license needed to practice threading were not related to properly training threaders, and the State conceded that as many as 320 of the curriculum hours were irrelevant. *Id.* at 89. This Court held that:

> the proponent of an as-applied challenge to an economic regulation statute under [Article I,] 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.

Id. at 87. Applying that standard, the Court concluded that the plaintiffs had "met their high burden of proving that, as applied to them, the requirement of 750 hours of training to become licensed is not just unreasonable or harsh, but it is so oppressive that it violates Article I, § 19 of the Texas Constitution." *Id.* at 90.

Unlike the plaintiffs in *Patel*, the Hemp Companies do not challenge economic regulations that make it onerous for them to practice their profession. *Cf. id.* at 92–94 (Willett, J., concurring) (discussing the constitutional right to pursue a gainful trade). It is undisputed that the challenged law does not prohibit the Hemp Companies from participating in Texas's burgeoning hemp industry. Rather, the Statute prohibits the manufacturing and processing of only one subset of hemp products: consumable hemp products for smoking. Tex. Health & Safety Code § 443.204. That is not an oppressive barrier to engaging in otherwise lawful activity; it reflects a decision by the Legislature that certain hemp products should not be manufactured in Texas *at all*.

As then-Justice Willett emphasized in his concurrence in *Patel*, the federal and state constitutions protect "the right to pursue a *lawful* calling," *id.* at 93 (emphasis added)—not the right to pursue an *unlawful* one. Expanding *Patel*'s reach to this case would open the door for a wave of challenges to Texas's criminal drug laws, because

every penal statute prohibiting a controlled substance would be considered "an economic regulation statute." The Legislature's decision to ban a particular substance should be examined for a rational basis—nothing more. That is especially true for a substance like hemp, which was largely illegal under federal law until 2018 and under state law until 2019, and whose manufacture for smoking the Texas Legislature has consistently prohibited since 2019.

Because this case does not involve economic regulations burdening the practice of a lawful profession, *Patel*'s framework does not apply to the Hemp Companies' constitutional challenge. *See Fry Auto Servs.*, 584 S.W.3d at 144 (declining to expand *Patel*'s holding and noting that *Patel* "is 'properly limited to the particular legal framework[] in which [it] arose'") (quoting *Hegar v. Tex. Small Tobacco Coal.*, 496 S.W.3d 778, 788 n.35 (Tex. 2016)). Instead, the Statute is subject only to ordinary rational-basis review. *See Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 633 (Tex. 1996) (applying the rational-basis test to a challenge to a statute regulating water rights); *see also N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 398 (3d Cir. 2012) (explaining that a substantive-due-process challenge to a statute is subject to the rational-basis test).

2. The Statute survives rational-basis review.

Under the rational-basis test, a law is constitutional if it is at least fairly debatable that it is rationally related to a legitimate governmental interest. *City of San Antonio v. TPLP Office Park Props.*, 218 S.W.3d 60, 65 (Tex. 2007) (per curiam); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 938 (Tex. 1998); *Reynoso v. Dibs US, Inc.*, 541 S.W.3d 331, 339 (Tex. App.—Houston [14th Dist.] 2017, no pet.). "[T]he statutory

scheme does not need to be narrowly tailored to serve the State's controlling interest," so the Court "need not determine whether . . . there is a better way for the State to achieve its interests." *Reynoso*, 541 S.W.3d at 343. In addition, "[t]he interest the government asserts to show rationality need not be the actual or proven interest, as long as there is a connection between the policy and a 'conceivable' interest." *Reyes v. N. Tex. Tollway Auth., (NTTA)*, 861 F.3d 558, 563 (5th Cir. 2017) (quoting *FM Props. Operating Co. v. City of Austin*, 93 F.3d 167, 175 (5th Cir. 1996)). "The law's rational relation to a state interest need only be conceivable, and supporting empirical evidence is unnecessary." *Birchansky v. Clabaugh*, 955 F.3d 751, 757 (8th Cir. 2020) (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). "As the [United States] Supreme Court has stated on multiple occasions, rational-basis review 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 284 (2d Cir. 2015) (quoting *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 319 (1993)). "[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it[.]" *Am. Exp. Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 366 (3d Cir. 2012) (cleaned up) (quoting *Beach Commc'ns*, 508 U.S. at 315).

The Statute survives this review because it is rationally related to at least two legitimate governmental interests. The first governmental interest arose from the Texas Legislature's decision to keep marihuana illegal while legalizing hemp—a decision the Hemp Companies have not challenged. *See* CR.269 (the Hemp Companies acknowledging that "enforcing marijuana laws is a legitimate state interest").

Traditionally, law-enforcement officials have relied on their senses to recognize marihuana and "to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant." North Carolina State Bureau of Investigation, *Industrial Hemp/CBD Issues*, https://tinyurl.com/ncsbihemp (all websites cited in this brief last visited January 18, 2022); *see State v. Cuong Phu Le*, 463 S.W.3d 872, 879 (Tex. Crim. App. 2015) (noting that "the odor of marijuana" can "provide probable cause to support a search warrant"); *Osbourn v. State*, 92 S.W.3d 531, 538–39 (Tex. Crim. App. 2002) (holding that an officer's lay testimony that she identified marihuana by its odor was admissible).

As discussed above, however, both legal hemp and illegal marihuana are forms of the plant Cannabis sativa L., which creates a problem for law enforcement. As the North Carolina Bureau of Investigation has recognized:

> Hemp and marijuana look the same and have the same odor, both unburned and burned. This makes it impossible for law enforcement to use the appearance of marijuana or the odor of marijuana to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant . . . . Law enforcement officers cannot distinguish between paraphernalia used to smoke marijuana and paraphernalia used to smoke hemp for the same reasons.

North Carolina State Bureau of Investigation, *supra*. The Texas District and County Attorneys Association has also recognized this problem. As they explain:

> The biggest challenge to marijuana interdiction in the post-hemp world is determining what is what on the street. Just as in the courtroom, there is no field test or drug dog qualified to distinguish between legal hemp and illegal marijuana, and many other states that have legalized hemp have run into this same problem.

Texas District and County Attorneys Association, *Interim Update: Hemp* (June 24, 2019), https://www.tdcaa.com/legislative/interm-update-hemp (quoted in part at CR.144). The difficulty in distinguishing between marihuana and hemp may also create problems for prosecutors trying to prove beyond a reasonable doubt that a person possessed or used marihuana. Golden, *supra*, at 759–60.

Far from denying the difficulty hemp poses for law enforcement, both the Hemp Companies and their expert have recognized the "differentiation problem." CR.144–45 (expert report); CR.269 (the Hemp Companies stating: "The 'differentiation problem'—discerning the difference between hemp and marijuana—is real. Plaintiffs do not dispute that.") (citation omitted).

The Statute is rationally related to mitigating the differentiation problem because prohibiting the manufacturing and processing of consumable hemp products for smoking is a plausible way to reduce the incidence of hemp smoking in Texas. Consumers wishing to smoke hemp will have to either import smokable products or alter other products to make them smokable. It is common sense that importing the products will increase their cost, leading people to purchase them less often or in smaller quantities. And, as the Hemp Companies appear to recognize, it takes time and effort to convert another form of hemp into a smokable product. *See* CR.648 (referring to this process as an "unseemly workaround[]"). By reducing the prevalence of hemp smoking, the Statute makes it proportionally more likely that a smokable cannabis product observed by law enforcement will be marihuana rather than hemp, thereby mitigating the differentiation problem. Although the Statute does not prohibit *all* hemp smoking, the Legislature is not required to impose all-or-nothing

regulation or solve a problem with a single law. Rather, the Legislature "may tackle a problem one step at a time." *Person v. Ass'n of Bar of City of N.Y.*, 554 F.2d 534, 539 (2d Cir. 1977) (citing *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955)). "The Constitution requires rational distinctions, not perfect ones." *Smith v. State*, 737 S.W.2d 933, 939 (Tex. App.—Dallas 1987, pet. ref'd).

The Legislature may also have wanted to prohibit the manufacturing and processing of consumable hemp products for smoking in the interest of public health. The only difference between marihuana and hemp is the concentration of delta-9 THC, and the Legislature could reasonably have concluded that hemp smoking should be discouraged more than other forms of hemp use because smoking cannabis, or any other substance, poses significant risks to lung health:

> Smoke is harmful to lung health. Whether from burning wood, tobacco or marijuana, toxins and carcinogens are released from the combustion of materials. Smoke from marijuana combustion has been shown to contain many of the same toxins, irritants and carcinogens as tobacco smoke.
>
> * * *
>
> Smoking marijuana clearly damages the human lung, and regular use leads to chronic bronchitis and can cause an immune-compromised person to be more susceptible to lung infections.

American Lung Association, *Marijuana and Lung Health*, https://tinyurl.com/ala-lunghealth; *accord* National Academies of Sciences, Engineering, and Medicine, *Health Effects of Marijuana and Cannabis-Derived Products Presented in New Report* (January 12, 2017), https://tinyurl.com/cannabis-academies ("The evidence reviewed by the committee suggests that smoking cannabis on a regular basis is

associated with more frequent chronic bronchitis episodes and worse respiratory symptoms, such as chronic cough and phlegm production, but quitting cannabis smoking is likely to reduce these conditions."). And, according to the U.S. Food and Drug Administration, using cannabis products during pregnancy places both the mother and baby at risk. FDA, *What You Should Know About Using Cannabis, Including CBD, When Pregnant or Breastfeeding*, https://tinyurl.com/cannabis-pregnancy.

The Hemp Companies may disagree with the Legislature's policy decision to prohibit the manufacturing and processing of consumable hemp products for smoking, and they may be able to point to other ways—even better ways—the Legislature could have pursued the State's interests. But those alternatives are irrelevant to this Court's constitutional analysis. Because it is at least fairly debatable that the Statute is rationally related to a legitimate governmental interest, it survives rational-basis scrutiny and does not violate the Texas Constitution's due-course-of-law provision.

C. The Statute is constitutional under *Patel*.

As explained above, the Hemp Companies' constitutional challenge fails because they have no liberty interest or vested property interest in manufacturing and processing consumable hemp products for smoking. *Supra*, Part II.A. Even if they did, the Statute is subject only to rational-basis review, which it passes. *Supra*, Part II.B. If the Court nevertheless expands *Patel* to reach challenges to statutes that categorically prohibit the manufacturing of products that were illegal for decades, the Court should hold that the Hemp Companies have failed to meet their "high burden" under either prong of *Patel*. *Patel*, 469 S.W.3d at 87.

1. The Statute's purpose could arguably be rationally related to a legitimate governmental interest.

As explained above, the Statute is rationally related to at least two governmental interests: (1) mitigating the difficulty law-enforcement officials and prosecutors have in distinguishing hemp from marihuana and (2) protecting public health. *See supra*, Part II.B.2. The Hemp Companies have conceded that the "differentiation problem" is real, CR.269, and they have not argued that smoking hemp poses no health risks. The Hemp Companies have not met their burden to show that the Statute is unconstitutional under *Patel*'s first test.

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

In *Patel*, the Court concluded that the licensing requirements were unconstitutionally oppressive because of an unusual combination of factors: the threaders had to complete about 320 hours of training unrelated to the practice of their profession, they had to pay thousands of dollars for the training, and they had to forgo earning money by practicing their trade until they completed the training. 469 S.W.3d at 90. And the solution to overly burdensome licensing requirements was obvious—the law could have been more narrowly tailored to require fewer irrelevant hours.

Here, the governmental interests are at least as significant as those in *Patel*: the ability of law-enforcement officials to determine whether a person who is smoking a cannabis product is committing a crime and protecting public health by reducing hemp smoking. But, unlike the plaintiffs in *Patel*, the Hemp Companies do not argue that the government could have used less restrictive means to achieve its ends.

Rather, the Hemp Companies opine that the Statute is not restrictive *enough* to further the State's interests because consumers can still import consumable hemp products for smoking from other States or make their own. CR.645, 647–48.

In addition, any economic burden on the Hemp Companies must be evaluated in the context of the overall hemp market. Although the Hemp Companies may not manufacture or process hemp products for smoking in Texas, they may still manufacture and sell other hemp products or sell consumable hemp products for smoking.

In the light of the important governmental interests the Statute serves, the fact that the Legislature chose a reasonable and less-restrictive means to address hemp smoking, and the hemp-related economic opportunities available to the Hemp Companies, the Court should conclude that the Hemp Companies have failed to meet their high burden of showing that the Statute is unconstitutionally oppressive.

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

For the purposes of this case, the Rule can be divided into two parts. The first part prohibits the manufacture and processing of consumable hemp products for smoking, while the second part prohibits the distribution and retail sale of such products. 25 Tex. Admin. Code § 300.104. The first part is valid because it tracks the Statute. Defendants no longer defend the second part.

A. The Rule is valid to the extent that it prohibits the manufacturing and processing of consumable hemp products for smoking.

The Hemp Companies' challenge to the first part of the rule rests entirely on their argument that the Statute is unconstitutional. *See, e.g.*, CR.651 ("[T]he Rule is

invalid insofar as it implements the Legislative Ban on manufacturing and processing."). They have not argued that there is any other reason that the first part of the Rule is invalid. Nor could they, because the first part of the Rule directly tracks the statutory language. *Compare* Tex. Health & Safety Code § 443.204(4) ("Rules adopted by the executive commissioner regulating the sale of consumable hemp products must to the extent allowable by federal law reflect the following principles: . . . the processing or manufacturing of a consumable hemp product for smoking is prohibited."), *with* 25 Tex. Admin. Code § 300.104 ("The manufacture, processing . . . of consumable hemp products for smoking is prohibited.").

The first part of the Rule stands or falls with the Statute. And, for the reasons given in Parts I and II above, the trial court erred in holding the Statute unconstitutional. Therefore, it also erred in holding the first part of the rule invalid and enjoining its enforcement. CR.666. The Statute is constitutional, and the first part of the Rule is valid.

B. Defendants no longer contend that the Rule is valid to the extent that it prohibits the distribution and retail sale of consumable hemp products for smoking.

In the trial court, Defendants argued that the second part of the Rule is valid because it makes explicit the Statute's implications. *See, e.g.*, CR.418–23. Defendants now abandon that argument. Future legislative changes, however, could render the second part of the Rule valid and enforceable.

Prayer

The Court should reverse the trial court's judgment with respect to the Statute and the part of the Rule dealing with manufacturing and processing and dismiss those claims. In the alternative, if the Court concludes that the Hemp Companies have standing, the Court should reverse the trial court's judgment except to the extent that it declares invalid and enjoins the enforcement of the portion of the Rule that prohibits the distribution and retail sale of consumable hemp products for smoking. In that event, the Court should render judgment that the Hemp Companies take nothing on the remainder of their claims. Defendants also pray for all other relief to which they may be entitled.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Brent Webster
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

/s/ Judd E. Stone II
Judd E. Stone II
Solicitor General
State Bar No. 24076720
Judd.Stone@oag.texas.gov

Bill Davis
Deputy Solicitor General

Kyle D. Highful
Assistant Solicitor General

Christopher J.F. Galiardo
Assistant Attorney General

Counsel for Appellants

Certificate of Service

On January 18, 2022, this document was served on Constance H. Pfeiffer, lead counsel for Crown Distributing LLC and America Juice Co., LLC, via cpfeiffer@yettercoleman.com, and Susan Hays, lead counsel for Custom Botanical Dispensary, LLC and 1937 Apothecary, LLC, via hayslaw@me.com.

/s/ Judd E. Stone II
Judd E. Stone II

Certificate of Compliance

Microsoft Word reports that this document contains 6,273 words, excluding exempted text.

/s/ Judd E. Stone II
Judd E. Stone II

No. 21-1045

In the Supreme Court of Texas

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

Appellants,

v.

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

Appellees.

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

APPENDIX

Index

Tab

Tab A:
Final Judgment (November 17, 2021)

No. D-1-GN-20-004053

CROWN DISTRIBUTING LLC; AMERICA JUICE CO., LLC CUSTOM BOTANICAL DISPENSARY, LLC; 1937 APOTHECARY, LLC Plaintiffs v. TEXAS DEPARTMENT OF STATE HEALTH SERVICES; JOHN HELLERSTEDT, in his official capacity as Commissioner of the Texas DSHS Defendants.	§ § § § § § § § § § § § § § §	IN THE DISTRICT COURT TRAVIS COUNTY, TEXAS 345TH DISTRICT COURT

FINAL JUDGMENT

Trial in the above-styled matter occurred on March 22, 2021. Plaintiffs Wild Hempettes, LLC; Crown Distributing LLC; America Juice Co., LLC; Custom Botanical Dispensary, LLC; and 1937 Apothecary, LLC (together "Plaintiffs") appeared through their attorneys of record and announced ready for trial. Defendants Texas Department of State Health Services ("DSHS") and John Hellerstedt, in his official capacity as Commissioner for DSHS (together "Defendants") appeared through their attorneys of record and announced ready for trial.

After consideration of Defendants' Motion for Summary Judgment, Plaintiffs' Emergency Motion for Leave to Amend Pleadings, Defendants' Motion for the Court to Reform its Temporary Injunction or, Alternatively, Rule on Plaintiffs' Permanent Injunction, responses, replies, the pleadings, evidence, and arguments of counsel, the Court hereby rules as follows:

Plaintiffs' Emergency Motion for Leave to Amend Pleadings is **GRANTED**. Plaintiffs' Second Amended Petition presents no surprise or prejudice to Defendants. Plaintiffs raised the Rule invalidity due to the statute's unconstitutionality in their Amended Petition: "For the reasons

stated above, the rule is invalid and cannot be applied to Wild Hempettes insofar as the Legislative Ban violates Tex. Const. art. XI, § 19." Pl.'s Am. Verified Pet. at ¶ 75." This position echoes the position of Plaintiffs since the inception of the case and throughout trial on the merits. Despite this knowledge and notice of Plaintiffs' position, the Plaintiffs' Response to Motion for Summary Judgment, and this Court's Order on the Temporary Injunction on September 18, 2020, Defendants took no action to clarify the claims and filed no special exceptions. While the Amended Petition gives fair notice to Defendants,[1] the Second Amended Petition conforms to the evidence presented and the arguments made. Defendants cannot claim surprise or prejudice to the Amendment that the Plaintiffs seek. Therefore, the Motion is **GRANTED**.

Defendants' Motion for Summary Judgment is **DENIED**.

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

Every issue raised by the pleadings was tried and argued at the trial on the merits on March 22, 2021. Because the Second Amended Petition conforms to the trial, judgment is rendered in favor of Plaintiffs without additional evidence or hearing.

IT IS THEREFORE **ORDERED, ADJUDGED, and DECREED** that

- Texas Health and Safety Code Section 443.204(4) violates the Texas Constitution.

[1] While the Third Court of Appeals concluded the Original Petition failed to give fair notice, the same cannot be said of the Amended Petition, filed February 2, 2021, especially in the context of the case as the whole and the consistent position of Plaintiffs throughout this case.

- 25 Texas Administrative Code Section 300.104 is invalid in its entirety.
- A permanent injunction is granted enjoining Defendants from enforcing Texas Health and Safety Code Section 443.204(4) and 25 Texas Administrative Code Section 300.104.

Defendants' Motion for the Court to Reform its Temporary Injunction, or Alternatively, Rule on Plaintiffs' Permanent Injunction is **DENIED** as moot.

Plaintiffs' request for attorney's fees is **DENIED.**

This is a final judgment that disposes of all claims and all parties and is appealable.

SIGNED on November 16, 2021, at 10:53 pm.

HONORABLE JUDGE LORA J. LIVINGSTON

DISTRICT COURT OF TRAVIS COUNTY TEXAS

Tab B:
Texas Constitution, Article I, § 19

Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article I. Bill of Rights (Refs & Annos)

Vernon's Ann.Texas Const. Art. 1, § 19

§ 19. Deprivation of life, liberty, etc.; due course of law

Currentness

Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

Sections 1 to 8 appear in this Volume

O'CONNOR'S ANNOTATIONS

Mosley v. Texas H&HS Comm'n, 593 S.W.3d 250, 264 (Tex.2019). "Included among the protected liberty interests [of the due-course of law guarantee] is the right 'to engage in any of the common occupations of life.' Due process must also be satisfied 'where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him.' [EE] undoubtedly has a liberty interest entitled to due-process protection; the placement of her name on the [Texas Department of Aging and Disability Services Employee Misconduct] Registry threatens not only her right to engage in employment as a caregiver by effectively ending her career, but also damages her 'good name, reputation, [and] honor.' *At 265:* In the context of an administrative hearing, '[t]he ultimate test of due process of law ... is the presence or absence of rudiments of fair play long known to our law.' [¶] It is well-established that '[t]he failure to give adequate notice violates the most rudimentary demands of due process of law.' *At 268:* [W]e conclude the notice sent to [EE] and the regulation it quoted were so misleading as to prevent [EE] from filing the motion for rehearing the [Administrative Procedure Act] requires. [W]e hold that the Agencies violated [EE's] due-course-of-law rights." *See also* ***Texas Alcoholic Bev. Comm'n v. Live Oak Brewing Co.***, 537 S.W.3d 647, 654 (Tex.App.--Austin 2017, pet. denied) (right to pursue lawful occupation is liberty interest protected by due course of law).

Patel v. Texas Dept. of Licensing & Regulation, 469 S.W.3d 69, 86-87 (Tex.2015). "[W]e conclude that the Texas due course of law protections in [TX CONST] Art. 1, §19, for the most part, align with the protections found in the 14th Amendment to the U.S. Constitution. But … the drafting, proposing, and adopting of the 1875 [Texas] Constitution was accomplished shortly after the U.S. Supreme Court decision in the ***Slaughter-House Cases*** by which the Court put the responsibility for protecting a large segment of individual rights directly on the states. Given the temporal legal context, §19's substantive due course provisions undoubtedly were intended to bear at least some burden for protecting individual rights that the U.S. Supreme Court determined were not protected by the federal Constitution."

University of Tex. Med. Sch. v. Than, 901 S.W.2d 926, 929 (Tex.1995). "While the Texas Constitution is textually different in that it refers to 'due course' rather than 'due process,' we regard these terms as without meaningful distinction. As a result, in matters of procedural due process, we have traditionally followed contemporary federal due process interpretations of procedural due process issues. [¶] Our review of [P's] due course claim requires a two-part analysis: (1) we must determine whether [P] has a liberty or property interest that is entitled to procedural due process protection; and (2) if so, we must determine what process is due. *At 930:* Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. What process is due is measured by a flexible standard that depends on the practical requirements of the circumstances. This flexible standard includes three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of

additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Jefferson Cty. v. Jackson, 557 S.W.3d 659, 675 (Tex.App.--Beaumont 2018, no pet.). "Generally, a constitutionally protected right is a vested right; it is not merely an expectation that one might be able to obtain or maintain a classification or job. [¶] Generally, public employees do not have vested property interests in their jobs. While the Collective Bargaining Agreement [(CBA)] gave [EE] some rights, we find nothing in that [CBA] that purports to give employees ... a constitutionally protected interest in their rank. ... While the [CBA] creates a process for the handling of disciplinary matters as well as a process for qualifying candidates for promotion, the rights [EE] enjoys under the [CBA] do not give her any vested interest in her job."

Town of Shady Shores v. Swanson, 544 S.W.3d 426, 441-42 (Tex.App.--Fort Worth 2018), *rev'd in part on other grounds*, 590 S.W.3d 544 (Tex.2019). "A public employer may unconstitutionally deprive its employee of a liberty interest if it discharges him under stigmatizing circumstances without giving the employee an opportunity to clear his name. To plead a claim based on the deprivation of a constitutional right to a name-clearing hearing, a plaintiff must allege that she was a public employee, that she was discharged, that stigmatizing charges were made against her in connection with her discharge, that the charges were false, that the charges were made public, that she requested a name-clearing hearing, and that the hearing was denied. The process due such an individual is merely a hearing providing a public forum or opportunity to clear one's name, not actual review of the decision to discharge the employee. A party does not have a liberty interest in her reputation unless she can establish that the governmental employer's charges against her rise to such a level that they create a badge of infamy which destroys the claimant's ability to take advantage of other employment opportunities." (Internal quotes omitted.)

City of Houston v. Downstream Envtl., L.L.C., 444 S.W.3d 24, 38 (Tex.App.--Houston [1st Dist.] 2014, pet. denied). "The Texas Constitution authorizes suits for equitable or injunctive relief for violations of the Texas Bill of Rights. *At 40:* There is no implied right of action to recover money damages for violation of the due-course-of-law provision…."

Govant v. Houston Cmty. Coll. Sys., 72 S.W.3d 69, 75 (Tex.App.--Houston [14th Dist.] 2002, no pet.). "Due course of law exists to prevent government from depriving persons of liberty and property without notice and hearing. *At 76:* 'To have a protectable property interest in public employment, a person must have more than a unilateral expectation, he must have a claim of entitlement.' [EE] cannot show such an entitlement; [ER] did not terminate his employment before the expiration of the contract, it merely declined to offer him another year of employment. Moreover, the contract explicitly provides that [EE] 'shall have no expectation of continued employment or property interest in his … employment with [ER] beyond the term' of the agreement. At most, therefore, [EE] had only a unilateral and unreasonable expectation that his contract would be renewed for another year. 'Such an expectation is not a constitutionally protected property interest giving rise to due process requirements.' [EE's] due course of law claim fails as a matter of law…." *See also* ***Texas A&M Univ. Sys. v. Luxemburg***, 93 S.W.3d 410, 422-24 (Tex.App.--Houston [14th Dist.] 2002, pet. denied).

Continental Cas. Ins. v. Functional Restoration Assocs., 964 S.W.2d 776, 781 (Tex.App.--Austin 1998), *rev'd on other grounds*, 19 S.W.3d 393 (Tex.2000). "When a vested property right is affected by the action of an administrative agency, the affected party has an inherent right of appeal invoking due process of law. *At 782:* [A]n inherent right of judicial review does not invoke a de novo review of the merits of the decision. [¶] [I]n reviewing whether a person has been afforded due process, a district court has jurisdiction to determine whether the government action was arbitrary or capricious. … Decisions that are not supported by substantial evidence are deemed arbitrary and capricious."

Garay v. State, 940 S.W.2d 211, 218 (Tex.App.--Houston [1st Dist.] 1997, pet. ref'd). "There is no fundamental right to employment that is not subject to regulation or criminalization by the legislature if due process guarantees are satisfied. … The prerequisites for employment in any particular industry or position can be, and often are, governed by policy choices made by the legislature to protect the public interest."

Baca v. City of Dallas, 796 S.W.2d 497, 499 (Tex.App.--Dallas 1990, no pet.). "Due process requires a public employer to provide its employee: (1) oral or written notice of the charges against him; (2) an explanation of the employer's evidence; (3) a fair opportunity for the employee to present his side of the story; and (4) a full evidentiary post-termination hearing conducted at a meaningful time."

Alford v. City of Dallas, 738 S.W.2d 312, 316 (Tex.App.--Dallas 1987, no writ). "A state agency's failure to follow its own procedural rules governing employment will not create a property interest which otherwise does not exist. An individual does not have a property interest in the rules themselves or in his or her state employer's observance of the rules. Rather, a property interest protected by procedural due process arises where an individual has a legitimate claim of entitlement that is *created, supported, or secured by* rules or mutually explicit understandings. Thus, a state employer's rules or procedures governing employment merely evidence a property right, and to have a procedural due process cause of action, the plaintiff must establish a protectable property interest separate and apart from the rules themselves." *See also* ***Moreno v. TxDOT***, 440 S.W.3d 889, 897 (Tex.App.--El Paso 2013, pet. denied).

Vernon's Ann. Texas Const. Art. 1, § 19, TX CONST Art. 1, § 19
Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

End of Document

Tab C:
Texas Agriculture Code § 121.001

Vernon's Texas Statutes and Codes Annotated
Agriculture Code (Refs & Annos)
Title 5. Production, Processing, and Sale of Horticultural Products
Subtitle F. Hemp
Chapter 121. State Hemp Production Plan

V.T.C.A., Agriculture Code § 121.001

§ 121.001. Definition

Effective: June 10, 2019
Currentness

In this chapter, "hemp" means the plant Cannabis sativa L. and any part of that plant, including the seeds of the plant and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

Credits
Added by Acts 2019, 86th Leg., ch. 764 (H.B. 1325), § 2, eff. June 10, 2019.

V. T. C. A., Agriculture Code § 121.001, TX AGRIC § 121.001
Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

End of Document

Tab D:
Texas Agriculture Code § 122.301

Vernon's Texas Statutes and Codes Annotated
Agriculture Code (Refs & Annos)
Title 5. Production, Processing, and Sale of Horticultural Products
Subtitle F. Hemp
Chapter 122. Cultivation of Hemp
Subchapter G. Nonconsumable Hemp Products

V.T.C.A., Agriculture Code § 122.301

§ 122.301. Manufacture

Effective: June 10, 2019
Currentness

(a) Except as provided by Subsection (b), a state agency may not prohibit a person who manufactures a product regulated by the agency, other than an article regulated under Chapter 431, Health and Safety Code, from applying for or obtaining a permit or other authorization to manufacture the product solely on the basis that the person intends to manufacture the product as a nonconsumable hemp product.

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

Credits
Added by Acts 2019, 86th Leg., ch. 764 (H.B. 1325), § 2, eff. June 10, 2019.

V. T. C. A., Agriculture Code § 122.301, TX AGRIC § 122.301
Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

End of Document

Tab E:
Texas Government Code § 22.001

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 2. Judicial Branch (Refs & Annos)
Subtitle A. Courts
Chapter 22. Appellate Courts
Subchapter A. Supreme Court

V.T.C.A., Government Code § 22.001

§ 22.001. Jurisdiction

Effective: September 1, 2017
Currentness

(a) The supreme court has appellate jurisdiction, except in criminal law matters, of an appealable order or judgment of the trial courts if the court determines that the appeal presents a question of law that is important to the jurisprudence of the state. The supreme court's jurisdiction does not include cases in which the jurisdiction of the court of appeals is made final by statute.

(b) A case over which the court has jurisdiction under Subsection (a) may be carried to the supreme court by petition for review.

(c) Except as provided by this subsection or other law, an appeal may be taken to the supreme court only if the appeal was first brought to the court of appeals. An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state.

(d) The supreme court has the power, on affidavit or otherwise, as the court may determine, to ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction.

(e) Repealed by Acts 2017, 85th Leg., ch. 150 (H.B. 1761), § 4(1).

Credits
Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 1106, § 1, eff. June 20, 1987; Acts 2003, 78th Leg., ch. 204, § 1.04, eff. Sept. 1, 2003; Acts 2017, 85th Leg., ch. 150 (H.B. 1761), §§ 1, 4(1), eff. Sept. 1, 2017.

V. T. C. A., Government Code § 22.001, TX GOVT § 22.001
Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

End of Document

Tab F:
Texas Health & Safety Code
§ 443.001

Vernon's Texas Statutes and Codes Annotated
Health and Safety Code (Refs & Annos)
Title 6. Food, Drugs, Alcohol, and Hazardous Substances
Subtitle A. Food and Drug Health Regulations
Chapter 443. Manufacture, Distribution, and Sale of Consumable Hemp Products (Refs & Annos)
Subchapter A. General Provisions

V.T.C.A., Health & Safety Code § 443.001

§ 443.001. Definitions

Effective: June 10, 2019
Currentness

In this chapter:

(1) “Consumable hemp product” means food, a drug, a device, or a cosmetic, as those terms are defined by Section 431.002, that contains hemp or one or more hemp-derived cannabinoids, including cannabidiol.

(2) “Department” means the Department of State Health Services.

(3) “Establishment” means each location where a person processes hemp or manufactures a consumable hemp product.

(4) “Executive commissioner” means the executive commissioner of the Health and Human Services Commission.

(5) “Hemp” has the meaning assigned by Section 121.001, Agriculture Code.

(6) “License” means a consumable hemp product manufacturer's license issued under this chapter.

(7) “License holder” means an individual or business entity holding a license.

(8) “Manufacture” has the meaning assigned by Section 431.002.

(9) “Process” means to extract a component of hemp, including cannabidiol or another cannabinoid, that is:

(A) sold as a consumable hemp product;

(B) offered for sale as a consumable hemp product;

(C) incorporated into a consumable hemp product; or

(D) intended to be incorporated into a consumable hemp product.

(10) "QR code" means a quick response machine-readable code that can be read by a camera, consisting of an array of black and white squares used for storing information or directing or leading a user to additional information.

(11) "Smoking" means burning or igniting a substance and inhaling the smoke or heating a substance and inhaling the resulting vapor or aerosol.

Credits

Added by Acts 2019, 86th Leg., ch. 764 (H.B. 1325), § 7, eff. June 10, 2019.

V. T. C. A., Health & Safety Code § 443.001, TX HEALTH & S § 443.001
Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

End of Document

Tab G:
Texas Health & Safety Code
§ 443.051

Vernon's Texas Statutes and Codes Annotated
Health and Safety Code (Refs & Annos)
Title 6. Food, Drugs, Alcohol, and Hazardous Substances
Subtitle A. Food and Drug Health Regulations
Chapter 443. Manufacture, Distribution, and Sale of Consumable Hemp Products (Refs & Annos)
Subchapter B. Powers and Duties

V.T.C.A., Health & Safety Code § 443.051

§ 443.051. Rulemaking Authority of Executive Commissioner

Effective: June 10, 2019
Currentness

The executive commissioner shall adopt rules and procedures necessary to administer and enforce this chapter. Rules and procedures adopted under this section must be consistent with:

(1) an approved state plan submitted to the United States Department of Agriculture under Chapter 121, Agriculture Code; and

(2) 7 U.S.C. Chapter 38, Subchapter VII, and federal regulations adopted under that subchapter.

Credits
Added by Acts 2019, 86th Leg., ch. 764 (H.B. 1325), § 7, eff. June 10, 2019.

V. T. C. A., Health & Safety Code § 443.051, TX HEALTH & S § 443.051
Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

End of Document

Tab H:
Texas Health & Safety Code
§ 443.204

Vernon's Texas Statutes and Codes Annotated
Health and Safety Code (Refs & Annos)
Title 6. Food, Drugs, Alcohol, and Hazardous Substances
Subtitle A. Food and Drug Health Regulations
Chapter 443. Manufacture, Distribution, and Sale of Consumable Hemp Products (Refs & Annos)
Subchapter E. Retail Sale of Consumable Hemp Products

V.T.C.A., Health & Safety Code § 443.204

§ 443.204. Rules Related to Sale of Consumable Hemp Products

Effective: June 10, 2019
Currentness

Rules adopted by the executive commissioner regulating the sale of consumable hemp products must to the extent allowable by federal law reflect the following principles:

(1) hemp-derived cannabinoids, including cannabidiol, are not considered controlled substances or adulterants;

(2) products containing one or more hemp-derived cannabinoids, such as cannabidiol, intended for ingestion are considered foods, not controlled substances or adulterated products;

(3) consumable hemp products must be packaged and labeled in the manner provided by Section 443.205; and

(4) the processing or manufacturing of a consumable hemp product for smoking is prohibited.

Credits
Added by Acts 2019, 86th Leg., ch. 764 (H.B. 1325), § 7, eff. June 10, 2019.

V. T. C. A., Health & Safety Code § 443.204, TX HEALTH & S § 443.204
Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

End of Document

Tab I:
25 Texas Administrative Code
§ 300.104

Texas Administrative Code
Title 25. Health Services
Part 1. Department of State Health Services
Chapter 300. Manufacture, Distribution, and Retail Sale of Consumable Hemp Products
Subchapter A. General Provisions

25 TAC § 300.104

§ 300.104. Manufacture, Processing, Distribution, and Retail Sale of Hemp Products for Smoking

Currentness

<For validity of this section, see Texas Dep't of State Health Servs. & John Hellerstedt, in his Off. Capacity as Comm'r of the Texas Dep't of State Health Servs., Appellants v. Crown Distrib. LLC; Am. Juice Co. LLC; Custom Botanical Dispensary, LLC; & 1937 Apothecary, LLC, Appellees, No. 03-20-00463-CV, 2021 WL 3411551, at *7 (Tex. App. Aug. 5, 2021).>

The manufacture, processing, distribution, or retail sale of consumable hemp products for smoking is prohibited.

Credits

Source: The provisions of this §300.104 adopted to be effective August 2, 2020, 45 TexReg 5195.

Current through 46 Tex.Reg. No. 9126, dated December 24, 2021, as effective on or before December 31, 2021. Some sections may be more current. See credits for details.

25 TAC § 300.104, 25 TX ADC § 300.104

End of Document

Automated Certificate of eService

This automated certificate of service was created by the efiling system.
The filer served this document via email generated by the efiling system
on the date and to the persons listed below:

Maria Mendoza-Williamson on behalf of Judd Stone
Bar No. 24076720
maria.williamson@oag.texas.gov
Envelope ID: 60919744
Status as of 1/18/2022 4:38 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Delonda Dean		ddean@yettercoleman.com	1/18/2022 4:33:19 PM	SENT
Yetter Coleman		efile@yettercoleman.com	1/18/2022 4:33:19 PM	SENT
Charles Kenneth Eldred	793681	Charles.Eldred@oag.texas.gov	1/18/2022 4:33:19 PM	SENT
Chelsie Spencer	24094959	cspencer@ritterspencer.com	1/18/2022 4:33:19 PM	SENT
Kyle Highful	24083175	kyle.highful@oag.texas.gov	1/18/2022 4:33:19 PM	SENT
Hollis Duncan		hollis.duncan@oag.texas.gov	1/18/2022 4:33:19 PM	SENT
Shane Pennington		s.pennington@vicentesederberg.com	1/18/2022 4:33:19 PM	SENT
Courtney Smith		csmith@yettercoleman.com	1/18/2022 4:33:19 PM	SENT
Matthew Zorn		mzorn@yettercoleman.com	1/18/2022 4:33:19 PM	SENT
Samantha Richey		srichey@yettercoleman.com	1/18/2022 4:33:19 PM	SENT
Judd E.Stone		judd.stone@oag.texas.gov	1/18/2022 4:33:19 PM	SENT
Christopher Galiardo	24123952	Christopher.Galiardo@oag.texas.gov	1/18/2022 4:33:19 PM	SENT

Associated Case Party: Crown Distributing LLC

Name	BarNumber	Email	TimestampSubmitted	Status
Constance H. Pfeiffer	24046627	cpfeiffer@yettercoleman.com	1/18/2022 4:33:19 PM	SENT

Associated Case Party: Custom Botanical Dispensary, LLC

Name	BarNumber	Email	TimestampSubmitted	Status
Susan Lea Hays	24002249	hayslaw@me.com	1/18/2022 4:33:19 PM	SENT

Associated Case Party: 1937 Apothecary, LLC

Name

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below:

Maria Mendoza-Williamson on behalf of Judd Stone
Bar No. 24076720
maria.williamson@oag.texas.gov
Envelope ID: 60919744
Status as of 1/18/2022 4:38 PM CST

Associated Case Party: 1937 Apothecary, LLC

Susan Lea Hays	24002249	hayslaw@me.com	1/18/2022 4:33:19 PM	SENT