

No. 15-26-00099-CV

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**In the Court of Appeals  
for the Fifteenth Judicial District**

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TEXAS DEPARTMENT OF STATE HEALTH SERVICES, JENNIFER SHUFORD, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF DSHS; TEXAS HEALTH AND HUMAN SERVICES COMMISSION; STEPHANIE MUTH, IN HER OFFICIAL CAPACITY AS EXECUTIVE COMMISSIONER OF HHSC; AND WARREN KENNETH PAXTON JR., IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF TEXAS,

*Appellants,*

v.

TEXAS HEMP BUSINESS COUNCIL; HEMP INDUSTRY & FARMERS OF AMERICA; ALCHEMY TX CONSULTING, LLC; A TO Z INVESTMENTS AND WHOLESALE, LLC; CPRT AND COMPANY, LLC D/B/A SERENITY ORGANICS; TEXAS GREEN CRAFT, LLC AKA TEXAKANA ORGANICS; ELEVATE ONE TX, LLC D/B/A ELEVATE WELLNESS DISPENSARY, LLC; CLUTCH CITY GAS LLC DBA TEXAS HIGH COUNCIL; AND SALGANIK SERVICES, INC.,

*Appellees.*

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On Appeal from the  
455<sup>th</sup> Judicial District Court, Travis County

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**APPELLANTS' RESPONSE TO APPELLEES' RULE 29.3  
MOTION FOR TEMPORARY RELIEF**

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## **TO THE HONORABLE FIFTEENTH COURT OF APPEALS:**

A small group of hemp sellers are once again invoking the authority of the court system to impose—on the entire State—their views about what the Texas Legislature permits in the areas of production, distribution, and retail sales of legal cannabis products. The trial court’s temporary injunction, which the hemp sellers’ motion seeks to perpetuate, prohibits the State from enforcing a vital public safety mechanism: pre-consumption testing to determine whether food products available to the everyday consumer contain dangerous levels of THC. The injunction also prohibits the State from collecting the licensing and registration fees necessary to conduct the statewide inspection and testing needed to enforce the State’s regulatory requirements. The Court should accordingly reject the Appellees’ invitation to perpetuate these errors.

As the Supreme Court of Texas very recently held, “courts exceed[] their authority” when they temporarily enjoin the Commissioner of the Texas Department of State Health Services (DSHS) from carrying out her statutory authority to curtail the proliferation of deregulated, high-inducing THC products. *Tex. DSHS v. Sky Mktg. Corp.*, No. 23-0887, 2026 WL 1190082, at \*1 (Tex. May 1, 2026). But that is exactly what the Appellants’ challenged rulemaking does: It sets (1) testing parameters under the statutory delta-9 threshold delineating acceptable levels of the psychoactive THC substance in consumable hemp products; and (2) necessary licensing fee levels. And, yet again, just because the Legislature “gave [an] inch,” that does not mean the Vendors were allowed to “claim a mile.” *Id.* at \*12. If the rules being

challenged applied to any other food, drug, or ingestible substance, there would be no question of the State’s broad authority to regulate in this arena.

To be clear, this response does not demand a total dismissal. Even if the trial court had jurisdiction to examine Appellees’ challenge to the validity of these rules under the Administrative Procedure Act, it nevertheless lacked jurisdiction to enjoin any State official’s action as *ultra vires*. In substance, the trial court’s decision to impose universal relief to nullify the rules is no less egregious than the temporary injunction struck down in *Sky Marketing* because it, too, “aggrandizes judicial power and transgresses the separation of powers.” *Id.* at \*13. At bottom, Appellees lack meritorious arguments that the rules exceed statutory authority or constitutional limits, and the Court should accordingly deny their motion.

Moreover, emergency relief is certainly unjustified. Vendors have had over four months since the challenged rules were proposed—in December 2025—to order their affairs and shift away from their dealings in an illicit THC market. Yet they demand this Court take immediate action to prohibit State health officials from carrying out their statutory duties to protect the health and safety of 31 million Texans.

## **STATEMENT OF FACTS**

### **I. Factual Background**

#### **A. Statutory and Regulatory Background**

Texas has long mirrored the Comprehensive Drug Abuse Prevention and Control Act (Pub. L. No. 91-513, 84 Stat. 1236 (1970)), in passing legislation to protect

the public by regulating the availability and distribution of controlled substances carrying the risk of abuse and dependence. Texas Controlled Substances Act, 63d Leg., R.S., ch. 429, §§ 2.01-.03, 1973 Tex. Gen. Laws 1132, 1135. Texas’s schedule of controlled substances initially designated seventeen substances in Schedule I,<sup>1</sup> including THC and marijuana. *Id.* § 2.03, 1973 Tex. Gen. Laws at 1137. The cannabis plant contains many different chemical compounds called cannabinoids; some cannabinoids produce psychoactive effects when consumed by humans and others do not. *Tex. DSHS v. Crown Distrib. LLC*, 647 S.W.3d 648, 657-58 (Tex. 2022).

THC, which occurs naturally in the cannabis plant, is the main cannabinoid that creates the “high” felt by marijuana users. *Id.* at 658. Although State and federal officials have, in more recent years, recognized hemp and marijuana as distinct due to their differing THC levels, both sovereigns’ laws have historically treated marijuana and hemp as controlled substances. *See, e.g.*, 21 U.S.C. § 802(16) (defining marijuana as “all parts of the plant Cannabis”); 42 Tex. Reg. 1271, 1273 (2017) (Tex. Dep’t of State Health Servs., Schedules of Controlled Substances); *Crown Distrib.*, 647 S.W.3d at 657-59 (explaining that the terms “hemp” and “marijuana” were both synonymous with all parts of the cannabis plant in the early days of the republic

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<sup>1</sup> As of April 28, 2026, the United States Attorney General has ordered that products containing marijuana approved by the Food and Drug Administration be placed in Schedule III. Schedules of Controlled Substances: Rescheduling of Food and Drug Administration Approved Products Containing Marijuana from Schedule I to Schedule III, 91 Fed. Reg. 22714 (April 28, 2026) (to be codified at 21 C.F.R. pts. 1300, 1301, 1308, and 1312). As the President explained in the executive order directing this action, the rescheduling will allow for expanded medical applications of the drug and further research. Exec. Order No. 14,370, 90 Fed. Reg. 60541 (Dec. 18, 2025).

before forty-six States passed prohibitions on marijuana possession in 1937). In 2015, Texas adopted a limited, low-THC cannabis program for medical patients experiencing certain enumerated conditions. Texas Compassionate-Use Act, 84th Leg., R.S., ch. 301, § 1, 2015 Tex. Gen. Laws 1419, 1419. As amicus curiae below, Texas Original Compassionate Cultivation, LLC (TOCC), notes, there are currently fifteen licensees authorized to dispense low-THC cannabis to qualifying patients. CR.685 & n.1.

In 2018, Congress passed the Agriculture Improvement Act of 2018 (2018 Farm Bill), which permitted commercial production and interstate transportation of hemp. Agriculture Improvement Act of 2018, Pub. L. No. 115–334, 132 Stat. 4490 (2018). The 2018 Farm Bill defined hemp as any part of the cannabis plant “with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.” *Id.* § 297A(1), 132 Stat. at 4908 (codified at 7 U.S.C. § 1639o(1)). Congress removed hemp from the definition of marijuana and removed the THC in “hemp” from the definition of THC under the federal Controlled Substances Act. *Id.* § 12619, 132 Stat. at 5018 (codified at 21 U.S.C. §§ 802(16), 812(c)(17)).

The Texas Legislature then passed House Bill 1325, which legalized the use and production of hemp and hemp-derived products such as cannabidiol, or CBD, which is a nonpsychoactive cannabinoid. Act of May 22, 2019, 86th Leg., R.S., ch. 764, 2019 Tex. Gen. Laws 2085; *Crown Distrib.*, 647 S.W.3d at 657-58. In that bill, hemp was defined essentially the same way as in the 2018 Farm Bill. § 2, 2019 Tex. Gen. Laws at 2086 (codified at Tex. Agric. Code § 121.001).

The Legislature delegated authority to the Executive Commissioner of the Health and Human Services Commission (HHSC) mandating that she “shall adopt rules and procedures necessary to administer and enforce” the laws regarding consumable hemp products (CHPs). Tex. Health & Safety Code § 443.051. Rules promulgated under these statutes “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.” *Id.* § 443.051.

HB 1325 established a licensing scheme to be overseen by DSHS, which authorized the collection of “any fees required by the department to be submitted with the application,” *id.* § 443.103(3), and “a registration fee schedule that establishes reasonable fee amounts” for locations where CHPs are sold, *id.* § 443.2025(f). For any licensing scheme overseen by DSHS:

[T]he executive commissioner by rule shall adopt and the department shall collect a fee for issuing or renewing a license that is in an amount designed to allow the department to recover from its license holders all of the department’s direct and indirect costs in administering and enforcing the applicable licensing program.

*Id.* § 12.0111(b). These new hemp statutes also incorporated the penalty and enforcement provisions of the Texas Food, Drug, and Cosmetic Act (FDCA), which allows assessment of a penalty in the amount of \$25,000 a day for each violation. *Id.* §§ 431.011(a), .054(c).

Testing to determine the acceptable THC level and the presence of other harmful substances is required at several points in the life of a CHP. A sample of the hemp

plant must be tested “[b]efore a hemp plant is processed or otherwise used in the manufacture of a [CHP].” *Id.* § 443.151(b). “Before material extracted from hemp by processing is sold as, offered for sale as, or incorporated into a [CHP],” the extracted material “must be tested.” *Id.* § 443.151(c). And when the CHP is “sold at retail or otherwise introduced into commerce in this state,” a sample of the CHP must be tested. *Id.* § 443.151(d). It is only when every “hemp-derived ingredient of the product” has been tested under both subsections (b) and (c) above and “does not have a delta-9 [THC] concentration of more than 0.3 percent” that the requirements of subsection (d)—to test CHP samples about to be sold—do not apply. *Id.* § 443.151(e). Hemp growers under chapter 122 of the Agriculture Code “shall provide” manufacturing and retail license holders “proof that the delta-9 [THC] concentration of the hemp does not exceed 0.3 percent” to satisfy the requirement under section 443.151(b)(1). *Id.* § 443.152(b). Testing is also required to detect the presence of other harmful substances in addition to THC, such as “residual solvents,” “harmful microorganisms,” “heavy metals, pesticides, and any other substance prescribed by the department.” *Id.* § 443.151. Chapter 443 prohibits retail sales of any CHP with a delta-9 THC concentration of .3% or more. *Id.* § 443.152(a).

Shortly after the Farm Bill passed, under Texas’s USDA-approved hemp plan, both the Texas Department of Agriculture (TDA) and the federal government utilized a method of calculating the delta-9 content of hemp substances by accounting for THC-acid, or THC-A. *See* 7 C.F.R. § 990.1 (effective Nov. 24, 2023); 4 Tex. Admin. Code § 24.26; CR.1179, 1245, 1255 (2020 Texas Hemp Plan). THC-A is an acidic precursor to delta-9 that converts to delta-9 THC when heat is applied

through a process called decarboxylation.<sup>2</sup> Establishment of a Domestic Hemp Production Program, 86 Fed. Reg. 5596, 5621 (Jan. 19, 2021). As the USDA put it in 2021, “[t]he term decarboxylated is also commonly used in science and is the precursor to the term ‘post-decarboxylation,’ which appears in the 2018 Farm Bill’s mandate on the acceptable cannabis testing methodologies for identifying THC concentration levels.” *Id.* Thus, the concept of determining the .3% delta-9 threshold for hemp substances after factoring in THC-A did not originate with DSHS in December 2025.

During the 2025 Legislative Session, the Legislature passed a bill to prohibit “any amount of a cannabinoid other than’ CBD or CBG,” which would have been more restrictive than the federal .3% standard for THC, but the Governor vetoed the bill. Veto Message of Gov. Abbott at 1, Tex. S.B. 3, 89th Leg., R.S. (2025). As a result, the .3% delta-9 threshold continues to be on the books in Texas for CHPs.

Earlier this year, however, Congress also updated federal hemp law to clarify that the .3% threshold for THC will apply to every form of THC, not just the delta-9 variant, which would ostensibly include THC-A. Continuing Appropriations, Agriculture, Legislative Branch, Military Construction and Veterans Affairs, and Extensions Act, 2026, Pub. L. No. 119-37, § 781, 139 Stat. 495, 558-61 (to be codified at 7 U.S.C. § 1639o). As for Texas’s hemp market, the Governor observed that “Texas must strongly regulate hemp, and it must do so *immediately*.” Veto Message at 1.

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<sup>2</sup> Exhibits are from the clerk’s record, which was filed in the Court on May 7, 2026. The Reporter’s Record is expected to be filed on Tuesday May 26, 2026. Letter granting extension of time to file the reporter’s record (May 8, 2026).

## **B. Executive Order and Rulemaking**

Shortly after he vetoed SB3, the Governor directed DSHS to “review[] existing agency rules,” regarding topics such as appropriate testing levels for total delta-9, license processing fees, labelling, and recordkeeping. The Governor of the State of Tex., Exec. Order GA-56, 50 Tex. Reg. 6267, 6268 (2025). Consistent with the 2020 hemp plan, and the USDA’s final rule, the order directs DSHS to establish a “total delta-9 THC content of a hemp-derived product by accounting for both delta-9 THC and the conversion of tetrahydrocannabinolic acid (THCA).” *Id.*

HHSC, on behalf of DSHS, then proposed rule changes to title 25, chapter 300 of the Texas Administrative Code. 50 Tex. Reg. 8486, 8486 (proposed Dec. 26, 2025). In the notice of proposed rulemaking, HHSC determined that the proposed rules would impact the local economy, small or micro businesses, and rural communities. *Id.* at 8487; *see also* Tex. Gov’t Code §§ 2001.022, 2006.002(c). The agency also found that “alternative methods to achieve the purpose of the proposed rules for small businesses, micro-businesses, or rural communities would not be consistent with ensuring the health and safety of adults and minors who have been targeted consumers of CHPs.” 50 Tex. Reg. at 8487; *see also* Tex. Gov’t Code § 2006.002(c).

After the notice-and-comment period, HHSC adopted final rules specifying the total delta-9 testing standard, establishing licensing fees, and making several non-substantive revisions to the language in chapter 300, effective March 31, 2026. 51

Tex. Reg. 1859, 1867-77 (2026) (collectively, “the Rules”).<sup>3</sup> The agency summarized and responded to comments from 1,421 different commenters. *Id.* at 1860-67. Citing the TDA rule at Texas Administrative Code, title 4, section 24.26, DSHS would apply a testing methodology that factored in the presence of THC-A when calculating the acceptable .3% THC threshold for legal hemp products when enforcing the Rules. *Id.* at 1861; 25 Tex. Admin. Code §§ 300.101(1), .101(25), .101(45), .301(a)(4), .301(b)(4), .302(b)(1), .302(c)(3), and .303(a). As HHSC explained in publishing the Rules:

The Texas Department of Agriculture rules at 4 TAC §24.26 state that testing methodology should account for the potential conversion of delta-9 tetrahydrocannabinolic acid (THCA) in hemp to delta-9 [THC]. HSC Section 443.051 requires rules to be consistent with federal laws and regulations; the federal regulations account for THCA conversion. Furthermore, the test results must accurately represent the total available THC, calculated as the sum of both THC and THCA content. Executive Order GA-56 directed DSHS that testing methods account for THCA conversion to THC.

51 Tex. Reg. 1861.

Licensing fees for hemp manufacturing locations and retail locations were set at \$10,000 and \$5,000, respectively. 25 Tex. Admin. Code §§ 300.202(c), .502(g).

HHSC explained in the notice adopting the Rules that the fee levels were established

to support regular inspection of manufacturers and retailers, including inspector salaries and travel, laboratory testing costs, related legal and State Office of Administrative Hearing costs for resulting compliance actions, and assistance from the TABC and the Texas Department of Public Safety (DPS) per Executive Order GA-56.

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<sup>3</sup> Appellees also challenge a penalty structure that has been in place since 2020. 45 Tex. Reg. 5195 (codified at 25 Tex. Admin. Code § 300.601).

51 Tex. Reg. 1861. Further, the agency noted that it lowered the fees in the proposed rules from \$25,000 for manufacturers and \$20,000 for retailers to the lower figures above. *Compare* 50 Tex. Reg. 8486 *with* 51 Tex. Reg. 1861.

## II. Procedural Background

Appellees are a group of businesses and affiliated organizations claiming the right to produce and sell in commerce intoxicating consumable hemp products (collectively, “Vendors”). Relevant to this temporary injunction proceeding, Vendors assert claims against Appellants Stephanie Muth, in her official capacity as Executive Commissioner of HHSC, Dr. Jennifer Shuford, in her official capacity as Commissioner of DSHS, and Ken Paxton, in his official capacity as Attorney General of Texas<sup>4</sup> (collectively, “the State”). Movants’ Ex. B at 1-2. According to Vendors, each Appellant has acted *ultra vires* by exceeding their authority under the Texas Constitution, the Health and Safety Code, and the Administrative Procedures Act by allowing the challenged Rules to be adopted.

After Vendors sued, they sought and received a temporary restraining order against enforcement of the total delta-9 testing standard. The restraining order, however, did not enjoin enforcement of the new fees. Movants’ Ex. C at 7. Before the temporary restraining order was set to expire, the trial court held a three-day hearing to decide whether it should enter a temporary injunction against enforcement of the

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<sup>4</sup> Vendors’ motion makes no mention of the Attorney General’s civil enforcement authority regarding hemp products. They have accordingly forfeited any right to temporary relief in the form of an injunction pending appeal against him under Rule 29.3.

Rules. During the temporary injunction hearing, the trial court mainly heard evidence explaining how the Vendors believed the Rules would impact their businesses.

The State presented evidence explaining how the Rules effectuate the most precise, scientifically correct testing standard for determining the presence of delta-9 THC in hemp products. Appellants' witnesses also demonstrated their justification for the increase in fee levels due to the need for expanded enforcement measures that would ensure adequate legal compliance in Texas's hemp market. CR.1176, ¶ 6. Specifically, the State's witness indicated the previous fee levels only allow for inspections every six to seven years, and the updated fees will allow inspections on a two-year schedule. *Id.* The trial court, apparently disagreeing with these justifications, ruled against the State.

Without addressing the State's assertions justifying the Rules, the trial court entered a nineteen-page temporary injunction order, which found that Appellees Muth and Shuford allowed the Rules to be adopted in excess of their statutory authority and in violation of the Texas Constitution. Movants' Ex. A at 3-7. First, the order held that Texas Administrative Code, title 25, sections 300.101(1), .101(25), .101(45), .301(a)(4), .301(b)(4), .302(b)(1), .302(c)(3), and .303(a) impose a "total delta-9 tetrahydrocannabinol (THC)" or "acceptable hemp THC level" compliance standard using decarboxylation in violation of chapter 443, Texas Health and Safety Code. *Id.* at 3-4. The order does not specify what provision of chapter 443 the Rules violate. *Id.* The order says sections 300.206(c) and .404 of title 25 prohibit transportation of noncompliant hemp under the acceptable level, which is also *ultra vires*. *Id.* at 4.

The trial court also held that the agencies and the named officials collectively violated one statutory provision and three provisions of the Texas Constitution. The order then states that Texas Administrative Code, title 25, sections 300.202(c) and .502(g) impose “dramatically increased license and registration fees, ownership-change fees, and late renewal application fees on manufacturers, processors, distributors, and retailers,” and that section 300.601(b) imposes an “escalating penalty structure” that together violate both the statutory notice provision in Texas Health and Safety Code section 443.201(b) and the Texas Constitution’s prohibitions on excessive fines, occupation taxes, and deprivation of property without due process. *Id.* at 4-6 (citing Tex. Const. art. I, §§ 13, 19, art. VIII, § 1(c)).

Last, the trial court held that DSHS and HHSC violated the APA. The trial court found that the agencies did not prepare the APA-mandated local employment impact statement required by Government Code section 2001.022 or the analysis to the rulemaking notice as required by sections 2001.024(a)(6) and .035. *Id.* at 7. Further, the trial court found, the agencies did not “meaningfully consider less burdensome alternatives” or “provide a reasoned justification and fair response to comments raising significant statutory objections” under sections 2006.002(c), 2001.033, and 2001.035, making the Rules likely invalid on their face. *Id.* at 7. Finally, the trial court decided its award of a temporary injunction “should extend to all commercial participants in Texas’s consumable hemp industry.” *Id.* at 13.

## **SUMMARY OF THE ARGUMENT**

Vendors assert no meritorious grounds for temporary relief because their claims are highly unlikely to succeed on the merits and because the public’s interest in a

safe, regulated hemp market vastly outweighs their speculative business interests in recreational cannabis products. Section 2001.038, though it may allow Vendors to argue the Rules' invalidity in this lawsuit, does not confer a statutory right to wholesale nullification of an agency's regulatory scheme on a temporary basis.

*First*, Vendors made no showing of likelihood of success on the merits of their *ultra vires* claims. Their baseless assertion that DSHS is not permitted to specify how the acceptable level of delta-9 THC in hemp is calculated ignores DSHS's broad authority over the manufacture, distribution, and sale of CHPs, similar to the broad authority over controlled-substance scheduling the Supreme Court confirmed just two weeks ago in *Sky Marketing*. Vendors' other constitutional and statutory claims fail because Vendors lack protected liberty or property interests in profiting from the sale of cannabis products in Texas and their arguments that the agencies violated the APA lack merit and do not confer a right to injunctive relief in any event.

*Second*, Vendors' interests in selling recreational cannabis products does not outweigh the State's interest in ensuring the health and safety of 31 million Texans. Texas's limited allowances for the sale of legal hemp products do not permit Vendors to dictate the terms of those transactions through expedited court action that disregards the limits of what the Legislature outlined. Rather, Vendors lack a legitimate basis to control state action in the manner the trial court authorized. The trial court thus had no basis to entertain a temporary injunction to halt statewide enforcement over these matters.

*Third*, assuming Vendors were entitled to any relief at all, the trial court lacked authority to grant relief beyond that necessary to satisfy the plaintiffs in this suit.

This Court should reject the trial court’s aggrandizement of judicial authority over legislative limitations and the prerogatives of executive actors charged with ensuring public safety from dangerous, psychoactive substances, just as the Supreme Court directed in *Sky Marketing*.

### **STANDARD OF REVIEW**

Texas Rule of Appellate Procedure 29.3 authorizes a court of appeals to “preserve the parties’ rights until disposition of the appeal.” Tex. R. App. P. 29.3. “A stay pending appeal is, of course, a kind of injunction, so the familiar considerations governing injunctive relief in other contexts will generally apply in this context as well.” *In re State*, 711 S.W.3d 641, 645 (Tex. 2024) (orig. proceeding). “To begin with, an appellate court can hardly endeavor to preserve the parties’ rights pending appeal without making a preliminary inquiry into what those rights are.” *Id.* Consequently, “the likely merits of the parties’ respective legal positions are always an important consideration when a court is asked to issue an order determining the parties’ legal rights pending appeal.” *Id.* “Another essential consideration . . . is the injury that will befall either party depending on the court’s decision.” *Id.* Thus, “[t]he equitable balancing of these harms is a required aspect of a court’s effort to preserve the parties’ rights pending appeal.” *Id.*

## ARGUMENT

### I. The State Is Likely to Succeed on the Merits, Meaning Appellees Have No Viable *Ultra Vires* Claim and No Injunction Can Issue.

Vendors' *ultra vires* claims fail on the merits. "To fall within [the] *ultra vires* exception [to sovereign immunity], a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). "An *ultra vires* claim based on actions taken 'without legal authority' has two fundamental components: (1) authority giving the official some (but not absolute) discretion to act and (2) conduct outside of that authority." *Hall v. McRaven*, 508 S.W.3d 232, 239 (Tex. 2017) (citing *Hous. Belt & Terminal Ry. v. City of Houston*, 487 S.W.3d 154, 158 (Tex. 2016)).

In deciding whether a government official has exceeded the available statutory authority, courts should take care not to reduce the *ultra vires* question to whether the officer simply made a mistake or "got it wrong" when the person is statutorily empowered to make that decision. *City of Austin v. Util. Assocs., Inc.*, 517 S.W.3d 300, 310 (Tex. App.—Austin 2017, pet. denied) (citing *Hall*, 508 S.W.3d at 242). Doing so by "requir[ing] nothing more than an identifiable mistake would not be a narrow exception to immunity: it would swallow immunity." *Hall*, 508 S.W.3d at 242-43.

To prove that the State acted without legal authority in carrying out a duty to interpret and apply the law, Vendors must show that the State "exercised discretion 'without reference to or in conflict with the constraints of the law authorizing [them]

to act.’” *Id.* at 242 (quoting *Hous. Belt*, 487 S.W.3d at 163). Vendors’ motion falls far short of showing they are likely to meet that burden.

**A. The agencies promulgated a permissible testing standard for legal hemp products and the transport into Texas of such products.**

1. Vendors have no basis to claim that the State cannot align the testing standard for CHPs with that used by TDA or the federal government—the statute demands the exact opposite of what Vendors claim. Tex. Health & Safety Code § 443.051. The governing statute requires that promulgated rules “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.” *Id.* As Agriculture Commissioner Sid Miller explained to Senator Charles Perry in 2025, TDA has historically applied a post-decarboxylation standard to measure acceptable hemp levels under the definition in Texas Agriculture Code section 121.001. CR.1264-65. The trial court held that post-decarboxylation delta-9 measurements are inconsistent with “Texas’s 2020 Approved Hemp Plan,” Movants’ Ex. A at 3-4, but that is plainly erroneous on the face of that plan and federal regulation passed in 2023. CR.1245, 1255; *see* 7 C.F.R. § 990.1 (effective Nov. 24, 2023); 4 Tex. Admin. Code § 24.26.

Thus, the State’s promulgation of Texas Administrative Code, title 25, sections 300.101(1), .101(25), .101(45), .301(a)(4), .301(b)(4), .302(b)(1), .302(c)(3), and .303(a) to impose a “total delta-9 tetrahydrocannabinol (THC)” or “acceptable hemp THC level” compliance standard using post-decarboxylation did nothing more than align the consumable hemp program standard with federal regulation, the

2020 hemp plan, the Governor’s Executive Order, and the newly passed federal statute. *Supra* at 4-10. Indeed, the federal hemp standard passed very recently, to be effective this fall, would factor in *every* form of THC at the .3% threshold, which would be stricter than just looking to delta-9 and the THC-A that converts to delta-9 when exposed to heat, as the Rules require. 139 Stat. at 558. The State’s alignment of CHPs with all these authorities is unambiguously mandated by section 443.051, and Vendors offer nothing in any statute allowing any court to logically conclude that any State official has acted *ultra vires*.

As this Court recently observed, “when a governmental entity is given broad power under a given statutory scheme, it will be given some leeway in construing statutory terms as well absent ‘manifest conflict’ with the statute, making an *ultra vires* claim unavailable” under this broad power. *Thoele v. Hinojosa*, No. 15-24-00008-CV, 2025 WL 2348070, at \*8 (Tex. App.—15th Dist. Aug. 14, 2025, no pet.) (quoting *Klumb v. Hou. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 10 (Tex. 2015)). Vendors present no “manifest conflict” with any statutory provision.

Despite what Vendors claim (at 18), the trial court’s temporary injunction is not a narrowly tailored form of relief—it is a wholesale bar to the valid regulatory framework. Amicus below presented hundreds of pages of lab test results showing that bad actors in the hemp industry regularly “introduce illegal and highly intoxicating consumables into the stream of commerce under the guise of the ‘hemp’ product label.” CR.685-86, 699-1090. But under Vendors’ theory, which they support with no statutory text, DSHS cannot test these bad actors’ CHPs to prevent marijuana from being passed off as legal hemp.

According to Vendors, the Legislature intended a strict, low-level definition of hemp for industrial and agricultural purposes (when the hemp wouldn't be consumed), but an open-ended, high-inducing THC standard for recreational and retail purposes (when the hemp *would* be consumed). Mot. at 21-23. Pursuant to that logic, hemp plants can have only so much THC in them before harvesting, but through the manufacturing process and the marketing of the hemp substances for sale, Vendors can *increase* the THC levels beyond those pre-harvest limits and escape pre-consumption testing. As the Supreme Court explained in *Sky Marketing*, “legislatures don't ‘hide elephants in mouseholes,’” and there is nothing in statute to suggest the Legislature hid this kind of elephant in the hemp mousehole. 2026 WL 1190082, at \*11 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)). The Vendors' reasoning is also completely backwards because it forbids imposition of a testing requirement just when the product is about to enter the stream of commerce and long after the THC content may have exceeded legal levels through extended decarboxylation. 86 Fed. Reg. 5622 (“The amount of THCA that actually decarboxylates, producing delta-9 THC, is dependent on multiple variables; primarily, the amount of heat it is exposed to and the amount of time it is exposed to that heat.”).

Vendors' desired result also does not follow from chapter 443. They cite section 443.204 for the proposition that “hemp-derived cannabinoids, including cannabidiol, are not considered controlled substances or adulterants” and that “products containing one or more hemp-derived cannabinoids, such as cannabidiol, intended for ingestion are considered foods.” Mot. at 22 (citing Tex. Health & Safety Code § 443.204). But THC is still a Schedule I controlled substance. Tex. Dep't of State

Health Servs., Schedule of Controlled Substances, 51 Tex. Reg. 1755 (2026), available at <https://tinyurl.com/2asw73bj>, at 10. The Supreme Court also already rejected Vendors’ argument as it applies to various forms of THC, and this argument assumes a compliant, not-more-than .3% delta-9 hemp product. *Sky Marketing*, 2026 WL 1190082, at \*12. As the Court said:

The legislature clearly defined ‘hemp’ to encompass the plant itself and the compounds as found in the plant. The legislature gave that inch, but the vendors claim a mile—that the legislature exempted all THC, even in non-naturally-occurring ways. We reject that contention, which would unsettle the structure of this highly regulated area of law and inject the judiciary into matters wholly occupied by the other branches.

*Id.* Thus, aligning the THC testing standard for CHPs with TDA practice, federal law, and the Executive Order is plainly within the State’s broad authority, *see Klumb*, 458 S.W.3d at 11, and the trial court had no legal basis to enjoin the State from enforcing the Rules on the ground that their enforcement would be *ultra vires*.

2. The claim that applying this testing standard to products transported into Texas from other States or tribes is *ultra vires* fares no better. *See Mot.* at 23-24. Both enjoined provisions read: “Substances containing total delta-9 THC levels above the acceptable hemp THC level may not be transported into Texas for further processing within Texas.” 25 Tex. Admin. Code §§ 300.206(c), .404; CR.1342. Vendors appear to argue that the Rules violate federal and state law prohibiting interfering with the interstate transport of hemp products under the 2018 Farm Bill, but the Rules do not prohibit hemp products moving *through* the State—they only prohibit delivering noncompliant hemp into Texas for purposes of manufacturing CHPs in

this State. 25 Tex. Admin. Code §§ 300.206(c), .404. The federal Farm Bill states, “No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (as added by section 10113) *through the State* or the territory of the Indian Tribe, as applicable.” Pub. L. No. 115-334, 132 Stat. 4490, § 10114(b) (2018) (emphasis added). Since the Rules don’t reach hemp moving through the State, the trial court needlessly and improperly enjoined the State from violations of federal law Vendors did not, and could not, establish during the temporary injunction hearing.

Vendors also cite (at 24) a provision of the Agriculture Code, titled “Documentation and Other Shipping Requirements,” in support of this argument. Tex. Agric. Code § 122.356. But the statute only says that “[a] person *may not* transport hemp plant material in this state” without being a USDA approved plan or otherwise compliant under federal law. *Id.* § 122.356(a) (emphasis added). This prohibitory language does not confer any affirmative right to receive other states’ noncompliant hemp products for further processing. The prohibition in the Rules does not apply to hemp products that may be legal under another state or tribal plan because those products would not be delivered to any Texas hemp seller for further manufacturing into a product sold in Texas—at best they would only pass through the State for delivery outside of Texas. *See id.* (“A person may not transport hemp plant material *in this state unless . . .*”) (emphasis added).

Vendors’ assertion (at 24) that the Rules interfere with the interstate transport of hemp products approved under federal, tribal, or other states’ plans is thus incorrect. Nor do the Rules fail to comport with chapter 443 as to purportedly “finished” CHPs (a term not found in that statute). That statute, unremarkably, says, “A person may possess, transport, sell, or purchase a consumable hemp product processed or manufactured in compliance with this chapter.” Tex. Health & Safety Code § 443.201(a). Thus, the trial court also had no basis to enjoin the Rules as to transporting non-compliant cannabis products into the State for further manufacturing.

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The Legislature imposed no limits on how to accurately test for the presence of THC to delineate safe CHPs from dangerous, psychoactive substances, and by accounting for THC’s precursor, THC-A, the State has done nothing more than fill the regulatory gaps by reference to pre-existing federal and TDA standards. *Supra* at 3-10. This does not an *ultra vires* case make. Vendors’ entreaty to this Court to allow the free flow of THC-ridden cannabis products in Texas should accordingly be rejected. Contrary to Vendors’ assertions (at 22-23), the Court need not defer to any agency interpretations because the statutory mandate in section 443.051 is clear—the consumable hemp plan must align with TDA’s USDA-approved hemp plan and federal law. Tex. Health & Safety Code § 443.051; *Young v. Tex. Parks & Wildlife Dept.*, No. 15-24-00052-CV, 2025 WL 1200947, at \*7 (Tex. App.—15th Dist. April 24, 2025, pet. filed).

**B. The registration fee amounts are not *ultra vires*.<sup>5</sup>**

The Rules were within DSHS’s broad authority to “adopt a registration fee schedule” for the sale of items containing CBD. Tex. Health & Safety Code §§ 12.0111(b); 443.2025(f). Vendors argue that because the State’s revenue would increase under the Rules, 50 Tex. Reg. at 8487, the fees are per se unreasonable under section 443.2025(f). Mot. at 24-25. That argument is wrong for the reasons stated *infra* at I.C. Vendors’ argument separately fails for two other reasons.

*First*, Vendors cite an economist’s report but fail to explain how it evidences *ultra vires* conduct. The report accuses the State of not conducting a “supportable” assessment of the costs and corresponding revenues needed to account for such costs. Movants’ Ex. F at 11. At best, this evidence merely accuses the State of “improvident actions,” which have never been actionable under the *ultra vires* rubric—this is classic sovereign immunity territory, and the Vendors’ suit to control state action should have been rejected in the trial court. *Hall*, 508 S.W.3d at 242-43 (“Only when these improvident actions are *unauthorized* does an official shed the cloak of the sovereign and act *ultra vires*.”).

*Second*, to the extent Vendors may argue this report creates a fact issue (which it does not) on the propriety of the Rules’ validity when contrasted with the State’s evidence supporting the increase in fees, *infra* at 24-25, that undermines their claim

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<sup>5</sup> Vendors are wrong to claim that two judges agreed with them on the required licensing fees—the trial court ruled against them at the temporary-restraining-order stage. Movants’ Ex. C at 7; *contra* Mot. at 11 (erroneously claiming “Two judges have concluded the Hemp Industry’s claims have merit.”). Neither the trial court’s temporary-injunction order nor Vendors mention this discrepancy or explain the change in judicial reasoning.

for temporary relief. Temporary injunctive relief cannot issue based on disputed issues of fact when resolving that fact issue leads to ultimate relief. *Pidgeon v. Turner*, 625 S.W.3d 583, 607 (Tex. App.—Houston [14th Dist.] 2021, pet. denied). As Texas courts have recognized, “[i]t is settled law that a court will not decide disputed ultimate fact issues in a hearing on an application for a temporary injunction; nor will a temporary injunction issue if the applicant would thereby obtain substantially all the relief which is properly obtainable in a final hearing.” *Ballenger v. Ballenger*, 694 S.W.2d 72, 78 (Tex. App.—Corpus Christi-Edinburg 1985, no writ) (citing *Tex. Foundries, Inc. v. Int’l Moulders & Foundry Workers’ Union*, 248 S.W.2d 460, 464 (Tex. 1952)). Here, a fact issue would allow further adjudication of ultimate questions in Vendors’ rule validity challenge should this case return to the trial court, but it does not supply any basis for enjoining the State’s actions as *ultra vires*. See also *infra* at 30-32.

### **C. The fees are not an unconstitutional occupation tax.**

The trial court erred in finding a substantial likelihood that Vendors would succeed on their claim that the increased fees operate as an occupation tax that DSHS is not authorized to charge under article VIII, section 1(c) of the Texas Constitution. The Legislature has plainly authorized the collection of “any fees required by the department to be submitted with [Vendors’] application[s].” Tex. Health & Safety Code § 443.103(3). And those licensing fees are mandated “in an amount designed to allow [DSHS] to recover from its license holders all of [DSHS]’s direct and indirect costs in administering and enforcing” the CHP program. *Id.* § 12.0111(b). The new regulations increase the licensing and registration fees for manufacturers and

retailers of CHPs to \$10,000 and \$5,000, respectively. *See* 25 Tex. Admin Code § 300.202(c) (requiring manufacturers to pay \$10,000 annual licensing fee); *id.* § 300.502(g)(1) (requiring retail locations to pay \$5,000 registration fee). These fee increases are necessary to effectively regulate Texas’s growing CHP industry and to ensure that businesses comply with regulations designed to keep the public safe. 51 Tex. Reg. 1861. Because their primary purpose is regulation, the fees are not, as Vendors claim, occupation taxes. Instead, they are regulatory fees.

The “primary purpose” of a fee determines whether it is a regulatory fee or an occupation tax. If the primary purpose of a fee “appears to be that of regulation, then the fees levied are license fees and not taxes.” *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 461 (Tex. 1997) (quoting *H. Rouw Co. v. Tex. Citrus Comm’n*, 247 S.W.2d 231, 234 (1952)). If “the primary purpose of the fee provided therein is the raising of revenue, then such fees are in fact occupation taxes.” *Id.* (quoting *H. Rouw*, 247 S.W.2d at 234). In drawing this distinction, the “critical issue is whether the assessment is intended to raise revenue *in excess* of that reasonably needed for regulation.” *Id.*

The primary purpose of the fees in this case is the regulation of the consumable-hemp industry in Texas. As the agency explained in adopting the rules, the fees are required

to support regular inspection of manufacturers and retailers, including inspector salaries and travel, laboratory testing costs, related legal and State Office of Administrative Hearing costs for resulting compliance actions, and assistance from the TABC and the Texas Department of Public Safety (DPS) per Executive Order GA-56.

51 Tex. Reg. 1861. Because hemp is visually indistinguishable from marijuana, inspections and testing are a critically important mechanism for ensuring that licensed companies are not selling unlawful marijuana or CHPs containing other dangerous substances beside THC. With the current resources appropriated to it, DSHS is only able to inspect each licensee every six to seven years. CR.1176, ¶ 6. So few inspections means that businesses may go for years selling THC-laden, high-inducing products without DSHS knowing it. *Id.*

The new fees are designed to rectify this suboptimal inspection regime. To increase the regularity of inspections to every two years, DSHS will need to hire an estimated twenty-three additional full-time employees (costing \$3.135 million) and spend hundreds of thousands of dollars on product testing, travel, IT support, and other infrastructure. *Id.* ¶ 7. Other agencies will also have a part in a more robust enforcement regime, including the Texas Alcoholic Beverage Commission (TABC), Department of Public Safety (DPS), and the Texas State Office of Administrative Hearings (SOAH), all of which will incur substantial costs. *Id.* ¶ 8.

The only on-point case Vendors cite, *Texas Boll Weevil*, upheld the challenged fees in that case as regulatory fees and not an impermissible occupation tax, so the authority is no help to them. Just as the “eradication of the boll weevil [wa]s a proper subject for regulation” in *Texas Boll Weevil*, 952 S.W.2d at 462, and the assessments levied there were needed to fund eradication programs, so too is the partially illegal cannabis market a proper subject for regulation, and the licensing fees are needed for DSHS to adequately oversee it. Moreover, the “assessments” charged to participants in that market were levied by a private board of a foundation created by the

Commissioner of Agriculture with the cooperation of local growers; the assessment amounts were not rigidly dictated by the Legislature. *Id.* at 457. Here, the agency itself is establishing the appropriate fee level—after APA notice-and-comment rule-making—and it was well within its legislatively delegated authority to do so. *See* Tex. Health & Safety Code §§ 443.051, .103(3), .2025(f).

Inherent, too, within the “primary purpose” test (which suggests other, ancillary purposes may be permissible) is that a perfect match between the money raised through the fees and the money spent on regulatory action is not required. *See H. Rouw Co.*, 247 S.W.2d at 234. Nearly every regulatory fee would be subject to invalidation through such strict reading of this constitutional provision. *Texas Boll Weevil* also said that it doesn’t matter if the money goes into the State’s general revenue fund. 952 S.W.2d at 461 (citing *Brown v. City of Galveston*, 75 S.W. 488, 496-97 (1903)). Vendors’ argument on this constitutional point (at 26-27) does not say, and they cite no evidence, that HHSC *intended* to raise revenue beyond that necessary to regulate the industry. *See id.* The occupation-tax argument thus lacks merit and does not allow for an *ultra vires* injunction.

**D. The sanctions provisions do not violate any statute or constitutional provision.**

**1. Vendors have no property or liberty interest in selling a controlled substance under the Texas due course provision.**

Under article I, section 19 of the Texas Constitution, “[n]o 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.” Tex. Const. art. I,

§ 19. In *Crown Distributing*, the Texas Supreme Court held that hemp vendors have no due process interest in selling consumable hemp products that can be smoked. 647 S.W.3d at 663-64. Vendors’ exploitation of loopholes and uncertainty in the law has “existed only by a temporary administrative quirk in the process of the substance’s partial ‘decriminalization.’” *Id.* at 664. Further, “[s]uch a fleeting ‘right’ was in no sense ‘vested’ in the Companies, which had, at most, a mere anticipation that the government would allow a right it created to continue in existence.” *Id.* The Court reasoned that due process does not protect hemp vendors’ demands to market cannabis in any form they please because those who deal in cannabis were historically and traditionally criminalized. *Id.* at 663. That analysis should apply with full force here.

Vendors do not appear to contest this on-point holding; rather, they vaguely gesture to the untethered notion that the sanctions provision lacks “procedural protections” in violation of the due course provision. Mot. at 27-28. But they never explain how the provision establishing per-day penalty assessment (which tracks almost word-for-word the governing statute they don’t challenge, *infra* at 28) equates to a deprivation of due process because of a failure of notice or hearing rights. In fact, the Rules provide for a written, detailed notice of violation, the “opportunity to resolve unintentional or negligent violations,” and the ability to request a hearing before SOAH. 25 Tex. Admin. Code § 300.606(d)-(e), (i); 51 Tex. Reg. 1876-77; 50 Tex. Reg. 8499. The Rules provide all the process Vendors could desire before an administrative penalty is assessed. Vendors citation to a procedural due process case mandating a medical student be afforded a hearing before he is expelled from school

should not control over the Court’s more on-point decision, *Crown Distributing*, as explained above. Mot. at 27-28 (citing *Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 930 (Tex. 1995)).

**2. The sanctions are not excessive under section 13.**

Under the excessive-fines provision, the Texas Constitution states that “[e]xcessive bail shall not be required, nor excessive fines imposed.” Tex. Const. art. I, § 13. When the Legislature directs that fines be imposed, the courts “will ‘not override the legislature’s discretion, ‘except in extraordinary cases, where it becomes so manifestly violative of the constitutional inhibition as to shock the sense of mankind.’”” *State v. Morello*, 547 S.W.3d 881, 889 (Tex. 2018) (quoting *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980)).

The Rule provision assessing per-day penalties is substantively identical to the statutory requirement under the Food, Drug, and Cosmetic Act explained above. *Supra* at 5. The governing statute already allows assessment of a penalty in the amount of \$25,000 a day for each violation. Tex. Health & Safety Code § 431.054(c); *see also id.* § 443.002 (incorporating FDCA penalty requirements into the CHP program). The Rule says, “[e]ach day a violation continues or occurs counts as a separate violation when calculating an administrative penalty.” 25 Tex. Admin. Code § 300.601(b) (as printed in 51 Tex. Reg. 1876). The Rule contains no language concerning “inadvertent or negligent violations” as to this penalty provision, Mot. at 27, which appears to be more gloss Vendors add for effect. But Vendors did not ask the Court to enjoin DSHS’s potential future application of section 431.054(c) against them, and their Motion does not address this statute.

Further, regulations establishing each day a violation persists as separate violations are commonplace under Texas law. *E.g.*, *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 457-58 (Tex. 1993) (Doggett, J., concurring and dissenting) (collecting statutes); *Duisberg v. City of Austin*, No. 07-20-00171-CV, 2020 WL 6122951, at \*4 (Tex. App.—Amarillo Oct. 16, 2020, no pet.) (collecting cases); *see also McKinney v. Wright*, No. 02-17-00100-CV, 2018 WL 2976420, at \*3 (Tex. App.—Fort Worth June 14, 2018, no pet.). And daily penalties are commonly upheld. *Morello*, 547 S.W.3d at 889 (“While the fine imposed against Morello is not insubstantial, the statute is clear that the amount accrues daily.”) (citing Tex. Water Code § 7.102).

Yet Vendors claim (at 27) in conclusory fashion that section 300.601(b) violates the constitutional prohibition against excessive fines. They make no attempt to explain that the Rules’ imposition of commonplace daily fines “shock[s] the sense of mankind,” as would be required to entertain such a claim, much less temporarily enjoin the responsible state actor under *ultra vires* doctrine. *See id.*

Vendors’ sole case on this point, *Pennington*, upheld DTPA *treble* damages against an excessive-fines challenge for a private seller of a boat, even while the Court acknowledged that the Legislature could impose such fines against someone violating the statute unknowingly. 606 S.W.2d at 690-91. That does not support the finding from the trial court that the potential for fines is excessive under section 13—it stands for the opposite proposition of law and Vendors’ argument thereunder does not entitle them to temporary relief in this Court.

### **E. The Rules were adopted in accordance with the APA.**

The APA has never required a wholesale temporary injunction against the agency's regulatory regime when the agency (1) has substantially complied with the APA's requirements and (2) any errors are correctly categorized as a "mere technical defect that does not result in prejudice to a person's rights or privileges." *See* Tex. Gov't Code § 2001.035(a), (d). Substantial compliance under the APA generally requires that the agency explain "how and why the agency reached the conclusions it did for adopting the rule . . . in a relatively clear, precise, and logical fashion." *Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 648 (Tex. 2004) (citing *Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins.*, 925 S.W.2d 667, 669 (Tex. 1996)).

As has been recounted, the State adequately summarized and responded to over 1,421 different commenters. 51 Tex. Reg. 1860-67; *see* Tex. Gov't Code § 2001.033. It explained its legal and policy justifications both for aligning the CHP testing requirements with the federal government and TDA and for the necessity of the required fees. *Supra* at 8-10; Tex. Gov't Code § 2001.033. Vendors' arguments asserting an inadequate response and reasoned justification (at 29-30) are nothing more than conclusory and assert no valid legal justification to dispute the State's substantial compliance; they identify no specific comments that went unaddressed. *See Off. of Pub. Util. Counsel v. Pub. Util. Comm'n of Tex.*, 104 S.W.3d 225, 235 (Tex. App.—Austin 2003, no pet.). Moreover, the State determined that despite the impact to the local economy and small and rural businesses and communities, alternatives to enforcement were unavailable that would adequately protect the public health. 50 Tex.

Reg. at 8487; *see* Tex. Gov't Code § 2006.002(c). Vendors' argument (at 29-30) that the State did not explain the need for increased fees has already been conclusively refuted twice in this Response. *Supra* at 9-10, 24-25. For all these reasons, the State substantially complied with all APA requirements.

Moreover, even if the Rules were not adopted in substantial compliance—and here, they were as explained *supra* at 8-10—that would render the Rules only “voidable,” not void. Tex. Gov't Code § 2001.035(a). And in that circumstance, the proper remedy for the rule challenger is for the court to remand to the agency, in which case the Court “shall provide a reasonable time for the agency to either revise or readopt the rule,” during which time, “the *rule shall remain effective* unless the court finds good cause to invalidate the rule . . . effective as of the date of the court's order.” *Id.* § 2001.040 (emphasis added). But the Texas APA provides no basis for a Court to strike down rules in an interlocutory posture. Vendors must invoke the *ultra vires* doctrine to attempt to enjoin the relevant officials from enforcing them and, as explained *supra* at 15-29, they cannot. Further, Vendors make no argument in their Motion that any *procedural* defect prejudiced their rights. Under those circumstances, the Legislature has directed that the rule should not be struck down. *See* Tex. Gov't Code § 2001.035(d).

The trial court erred in concluding that the State did not substantially comply with Government Code sections 2001.022, .024(a)(6), and .035. Those statutes relate to the requirement of the agency to “determine whether a rule may affect a local economy” when proposing a new rule, Tex. Gov't Code § 2001.022, which the State

has done, 50 Tex. Reg. at 8487 (“The proposed rules will impact the local economy”). That the agency may not have adequately described the impact to the Vendors’ liking did not bring the agency action outside the ambit of the substantial compliance required under the APA because any omission the agency may have made did not prejudice Vendors. *See* Tex. Gov’t Code § 2001.035(d) (“A mere technical defect that does not result in prejudice to a person’s rights or privileges is not grounds for invalidation of a rule.”); *Off. of Pub. Util. Counsel*, 104 S.W.3d at 235.

Vendors decry that they were “depriv[ed] . . . of the vital information they needed to understand the economic impact of the proposed rules and meaningfully engage in the rulemaking process.” Mot. at 29. But the lengthy recitation of comments, 51 Tex. Reg. at 1860-67, demonstrates that the Vendors were well aware of the impact the rulemaking would have on their businesses. For instance, the State observed that “[m]ost commenters oppose the proposed fees for consumable hemp manufacturers and retailers” and “[m]ultiple commenters oppose testing requirements.” *Id.* at 1861. In short, Vendors knew they would no longer be able to escape the Governor’s imperative to DSHS that “Texas must strongly regulate hemp, and it must do so *immediately*.” Veto Message at 1. They were not prejudiced by a lack of information.

## **II. Vendors’ Claim of Irreparable Harm Does Not Outweigh the State and Public’s Interests in a Safe, Stable Legal Hemp Market.**

When considering an application for temporary injunction, courts must “balance[] the equities” between the parties. *Univ. Health Servs., Inc. v. Thompson*, 24 S.W.3d 570, 578 (Tex. App.—Austin 2000, no pet.) (citation omitted). “Courts

must . . . consider the harm that other parties or the public will suffer if relief is granted—as well as any potential injury to non-parties caused by granting or denying relief.” *In re State*, 711 S.W.3d at 645. “The equitable balancing of these harms is a required aspect of a court’s effort to preserve the parties’ rights pending appeal.” *Id.* Vendors cannot show that their harms outweigh those of the State, the public, and all those who sought to comply with the Rules to their detriment, and so the trial court improperly valued Vendors’ profits over all other relevant interests, including the health of the citizens of this State. The Court should thus deny temporary relief.

A. As the “Supreme Court has repeatedly reaffirmed,” the State has “an ‘intrinsic right to . . . enforce its own laws.’” *State ex rel. Off. of Att’y Gen. of Tex. v. City of San Marcos*, 714 S.W.3d 224, 245 (Tex. App.—15th Dist. 2025, pet. denied) (quoting *State v. Hollins*, 620 S.W.3d 400, 410 (Tex. 2020) (per curiam)). That consideration must be given special weight “when the judiciary is asked to enjoin executive-branch action on matters of public import.” *In re Paxton*, 727 S.W.3d 490, 493 (Tex. 2025) (per curiam) (orig. proceeding). Considering the “[s]pecial provisions [that] have been made for the State for issues like supersedeas,” *id.* at 491 (citation omitted), preserving the overbroad injunction in this case will “stymie the state from exercising its lawful powers and from representing the public as it sees fit during the course of [this] appellate process that might take years to conclude,” *In re TEA*, 619 S.W.3d 679, 689 (Tex. 2021) (orig. proceeding).

After all, “[t]here is little justice in allowing a party,” like Vendors, “who will very likely lose on the merits to interfere with the legal rights of the opposing party during the appeal.” *In re State*, 711 S.W.3d at 645. It would also be “unjust to require

a party,” like DSHS and its Commissioner, “who [are] very likely to succeed on the merits to wait for the lengthy appellate process to play out before exercising [their] legal rights.” *Id.*; *see also Sky Marketing*, 2026 WL 1190082, at \*1 (reversing temporary injunction preventing DSHS Commissioner from exercising regulatory authority over the illicit cannabis market).

**B.** When “the State is the appealing party, as it is here, its interest and harm merge with the public.” *Vote.Org v. Callanen*, 39 F.4th 297, 309 (5th Cir. 2022) (citation modified). And contrary to Vendors’ position, the public here is not limited to just their businesses but broadly includes all Texans and their health and safety. It is the State, not Vendors, who protects that broader interest.

**C.** Vendors primarily complain of “disruptions . . . [to] a stable supply of compliant products . . . reductions in available inventory, elimination of product lines, and loss of revenue.” Mot. at 32. True enough, some businesses may need to “cease or significantly restrict operations in Texas,” *id.*, but that is the consequence of speculative ventures seeking to exploit what many in the industry have known for years is a “loophole.” *See AK Futures LLC v. Boyd St. Distro, LLC*, 35 F.4th 682, 693 (9th Cir. 2022) (“If . . . Congress inadvertently created a loophole legalizing vaping products containing delta-8 THC, then it is for Congress to fix its mistake.”). The Texas Constitution does not elevate the demands of those in such a speculative venture that has been historically criminalized over the State and public’s interests, *see Crown Distrib.*, 647 S.W.3d at 655, and neither should a court sitting in equity.

Vendors’ argument (at 20) also misunderstands the status quo. The vendors in that case scored an early victory in *Sky Marketing*, which has since been overturned,

and that was what allowed illicit THC products to proliferate in Texas for several years despite DSHS’s regulatory efforts to control illegal marijuana and THC. The Supreme Court has now clarified that the injunction in that case—which lasted nearly four and a half years—should never have been entered in the first place. *Sky Marketing*, 2026 WL 1190082, at \*4, \*13. Their assertions that they have always operated on sound legal footing accordingly lack merit and should form no basis for enjoining the State. Denial of temporary relief now is warranted to prevent the same circumstances from repeating over the next half decade.

Vendors tout their roster of witnesses (at 9) as experts in economics, the industry, and veterans’ issues. But not one of them is a medical doctor urging any sort of medical necessity to ingest THC. Vendors’ evidence that their customers need “access to long relied upon therapeutic remedies” is a PowerPoint demonstrative with flow charts they used in the trial court. Mot. at 34 (citing Movants’ Ex. E). To the extent medical applications of cannabis have been deemed appropriate under Texas law, at least one organization championing the Texas Compassionate Use Program has vigorously opposes Vendors’ efforts with extensive testing evidence showing that “many of these products are not hemp products at all, but high-potency marijuana products that violate Texas law under any reasonable understanding of the statute.” CR.686-87 (TOCC amicus curiae brief).

The Rules are thus vital to protect public safety against bad actors claiming that their hemp products somehow provide a medical cure-all. Putting the psychoactive effects of THC to the side, the protections the Rules afford—which are also present in the statute—guard against the same concerns present for any adulterated food

products, such as “residual solvents,” “harmful microorganisms,” “heavy metals, pesticides, and any other substance prescribed by the department.” *See* Tex. Health & Safety Code § 443.151. And there is no question that the State must generally protect the public against these dangers in our food supply; it should be no different for CHPs. But under Vendors’ theory, they cannot be required to test for these dangers once they receive the hemp from the growers. Mot. at 13 (“Compliance established at the agricultural stage thus carries forward into the commercial market.”). That may be a helpful standard for the Vendors’ profitability, but this Court cannot afford to continue enjoining the State’s enforcement of the Rules and impose that health risk on 31 million Texans.

While enjoined, DSHS is unable to carry out its mandate to protect the safety of Texans. The trial court disregards these important interests and the public’s interest in a safe, legalized hemp market in favor of Vendors’ speculative business interests. That is not enough to merit temporary relief overriding supersedeas of the State’s statutory, police-power functions from this Court. *See State v. Richards*, 301 S.W.3d 597, 602 (Tex. 1957) (“If there is room for a fair difference of opinion as to the necessity and reasonableness of a legislative enactment on a subject which lies within the domain of the police power, the courts will not hold it void.”); *cf. also MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 487 (Tex. 2010) (“Citizens’ health and safety are ““primarily, and historically, . . . matter[s] of local concern,”” and thus states have ““great latitude”” to protect ““the lives, limbs, health, comfort, and quiet of all persons.”””) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (alterations in original)).

### **III. The Trial Court Exceeded the Scope of Permissible Injunctive Relief.**

*In re Abbott* made clear that the courts of appeals may not award temporary relief under Rule 29.3 to non-parties to the case: “The text of Rule 29.3 plainly limits the scope of the available relief to that which is necessary to preserve *the parties’* rights.” 645 S.W.3d 276, 282 (Tex. 2022) (orig. proceeding). In that case, the court of appeals exceeded its authority by affording temporary relief “to ‘any and all persons’ who are not parties to this lawsuit.” *Id.* at 283. That is exactly what Vendors want this Court to improperly order. Mot. at 37-42. Vendors attempt to distinguish *In re Abbott* by asserting that, unless the entire market is forced to facilitate the transactions they desire to be made (read: without the necessary regulatory controls), they will suffer direct harm because all of the other compliant participants in this market will have no product for them. *Id.* at 37. The Court should reject this perverse framing of the necessity of injunctive relief, especially now that the Supreme Court has urged rejecting such a framing in the hemp-regulation context.

*Sky Marketing* cautioned Texas courts that they may not enter injunctions against state agencies beyond the relief necessary to satisfy the parties to the case. 2026 WL 1190082, at \*13. Instead of following that principle, the trial court erroneously nullified the agency’s rules under the guise of a temporary injunction, purporting to remedy alleged facial violations of law for the entire “marketplace.” Movants’ Ex. A at 13-14.

Vendors invoke the plain text of Rule 29.3 to argue that temporary relief is “necessary to preserve the parties’ *rights* until disposition of the appeal.” Mot. at 39 (emphasis added) (quoting Tex. R. App. P. 29.3). But what the Texas Supreme Court

made clear in *Crown Distributing* is that there is no “right” to traffic in any type of cannabis market Vendors may demand—the status quo in Texas for several decades has been that cannabis is subject to, at a minimum, tight regulatory controls. *Supra* at 26-28 (citing 647 S.W.3d at 663). That market has historically been “deemed ‘inherently vicious and harmful’” and it would be wrong for the court system to recognize such a right now just because Vendors make conclusory claims about their business activities complying with the CHP statutes. *Crown Distrib.*, 647 S.W.3d at 655 (quoting *Murphy v. California*, 225 U.S. 623, 628 (1912)).

What Vendors’ arguments also ignore is that Plaintiffs were the only ones who sought this temporary relief while the rest of the industry has agreed to play by the rules. Those are the same circumstances that the *Sky Marketing* Court advised trial courts to guard against. 2026 WL 1190082, at \*13. It would be fundamentally unfair to disregard those who have paid their licensing fees and reordered their businesses during the last five months to comply with the Rules and instead reward those who improperly invoke the authority of the courts to overturn clear legislative mandates and executive department prerogatives. And Vendors’ assertion (at 40-41) that such injunctive relief is necessary to provide complete relief—so that the law followers can be judicially compelled to participate in Vendors’ illicit trade—is equally disturbing. That should not be the law anywhere, and especially not in Texas.

## PRAYER

The Court should deny the motion for temporary relief.

Respectfully submitted.

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## CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this brief contains 10,580 words, excluding exempted text.

/s/ Cory A. Scanlon  
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