

No. 15-26-00099-CV

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IN THE FIFTEENTH COURT OF APPEALS  
AUSTIN, TEXAS

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**Texas Department of State Health Services, *et al.***  
***Appellants,***

V.

**Texas Hemp Business Council, *et al.***  
***Appellee.***

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ON INTERLOCUTORY APPEAL FROM THE 455TH DISTRICT COURT OF TRAVIS COUNTY,  
TEXAS; CAUSE No. D-1-GN-26-002511; HON. DANIELLA DESETA LYTTLE

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**APPELLEES' MOTION FOR REHEARING ON DENIAL OF  
TEMPORARY RELIEF UNDER RULE 29.3**

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Andrew J. Alvarado  
Texas Bar No. 24118811  
**DICKINSON WRIGHT PLLC**  
607 West Third Street  
Suite 2500  
Austin, Texas 78701  
Tel: (512) 770-4200  
  
LEAD COUNSEL FOR  
APPELLEE HEMP INDUSTRY &  
FARMERS OF AMERICA

Charles ("Chad") Baruch  
Texas Bar No. 01864300  
Brandon Tobey  
Texas Bar No. 24150206  
**JOHNSTON TOBEY**  
**BARUCH, P.C.**  
12377 Merit Drive  
Suite 880  
Dallas, Texas 75251  
Tel: (214) 741-6260  
  
LEAD COUNSEL FOR  
APPELLEES ELEVATE ONE  
TX, LLC, ET AL.

Amanda G. Taylor  
Texas Bar No. 24045921  
J.R. Johnson  
Texas Bar No. 24070000  
**BUTLER SNOW LLP**  
1400 Lavaca Street  
Suite 1000  
Austin, Texas 78701  
(737) 802-1800  
  
LEAD COUNSEL FOR  
APPELLEES TEXAS HEMP  
BUSINESS COUNCIL, ET AL.

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TO THE HONORABLE FIFTEENTH COURT OF APPEALS:

## INTRODUCTION

A critical development has occurred since the Court denied Appellees' Rule 29.3 Motion, which warrants rehearing and reinstating the temporary injunction pending appeal—at a minimum for the named plaintiffs and their members.

In opposing the Appellees' request for temporary relief, the State adamantly claimed that it would be harmed if the injunction prevented DSHS's enforcement of the 2026 Challenged Rules pending appeal.

But within a week of this Court lifting the injunction, DSHS took the opposite position. Namely, in recorded calls with industry participants, a DSHS inspector explained that the agency's legal team and management have instructed to *not* enforce the Challenged Rules regarding the total THC compliance metric and the heightened fees. Exhibits A-B (Affidavits of Kallan Salganik and Lukas Gilkey).<sup>1</sup> This demonstrates both that (1) the agency will not be harmed by reinstating

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<sup>1</sup> True and correct copies of these recorded calls, as verified and authenticated by the affidavits, are being provided to the Court and counsel contemporaneously with this motion via an electronic file. To protect the privacy of the inspector's name and other personal information provided during the calls, the affidavits refer to him only by initials and address only the statements pertinent to enforcement.

the injunction pending appeal, and (2) the need for an injunction is immediate.

Without clear instruction from this Court, what should a licensed manufacturer or registered retailer do? If they trust the agency's word and continue manufacturing/selling products that would not comply with the new "total THC" metric, they risk the future imposition of significant penalties (retroactively calculated on a daily, escalating basis) and potential revocation of their licenses/registrations, in the event that DSHS opts to enforce the new rules in the future.

Alternatively, if manufacturers and retailers cease their operations to comply with the total THC metric and pay the higher fees—despite DSHS telling them it is not necessary to do so—they risk losing their businesses altogether. The regulatory whiplash of the agency's changing positions creates industry chaos and opportunities for administrative entrapment. This is not how Texas is supposed to operate.

Fortunately, a simple solution exists: This Court should rehear and grant the Appellees' Rule 29.3 motion to reinstate the injunction pending appeal. Doing so will provide certainty about which rules must be followed while the Court reviews the merits of this case in a manner that

prevents businesses (which are trying to follow the law) from being significantly harmed by relying on DSHS’s stated guidance. Temporary relief under Rule 29.3 may be granted when “necessary to preserve the parties’ rights” pending appeal. That is exactly the purpose of relief sought by this motion.

In further support of that request, Appellees provide citations to evidence in the record of the temporary injunction hearing, which was not available to this Court when the original Rule 29.3 motion or reply was filed. And while Appellees believe that DSHS’s flip-flopping further demonstrates the need for an industry-wide injunction, they suggest as an alternative on rehearing that the Court grant relief to reinstate the temporary injunction only as to the named plaintiffs, including the members of THBC and HIFA.

## ARGUMENT

### **I. The Injunction Should be Reinstated to Protect the Parties’ Rights by Providing Regulatory Stability and Preventing Detrimental Reliance Pending Appeal.**

Appellees—who are DSHS licensed and registered participants of Texas’s consumable hemp industry—must comply with the statutes and administrative rules governing their operations and products. *See Tex. Dep’t of State Health Services v. Sky Mktg. Corp.*, 733 S.W.3d 689, 698-

99 (Tex. 2026) (“[A]s a department-licensed business in a highly regulated industry, [Sky Marketing] must refrain from engaging in illegal conduct or else face civil penalties or revocation of its license and registration.”). But it is impossible to play by the rules when DSHS keeps changing them.

On May 15, 2026, the State represented to this Court that retaining the injunction pending appeal would unfairly prevent DSHS from enforcing the total THC metric and collecting the heightened fees imposed by the Challenged Rules. *State’s Response to Rule 29.3 Motion* at 1, 36. Yet after the Court lifted the injunction, DSHS took the opposite position at the apparent instruction of its legal team and managing supervisor. Exhibits A-B.

As heard in the calls recorded by licensed consumable-hemp business representatives speaking to a DSHS senior inspector, the agency has now decided **not** to enforce these Challenged Rules—at least not until after the November election, presumably to avoid public backlash at the polls against legislators who have sought to eliminate the consumable hemp industry. Specifically, the inspector explained to Mr. Salganik:

- “Don’t worry about THCA. We are not going to enforce anything with total THC....”
- “Even though the injunction has been lifted, I spoke with my legal team and my supervisor who is Jessica Fierros, who is the manager of our department, and we’re not going to enforce total THC. In regards to the timeframe, I do know that November I’m pretty sure midterms and a lot of other stuff comes open, so I am pretty sure that’s the timeline....”
- In response to Mr. Salganik’s question, “So I am good to keep THC on my shelf at this time until you guys issue further guidance after November?,” the inspector responded, “Correct. Exactly. Correct.”

Exhibit A (with recording electronically provided).

And the inspector explained to Mr. Gilkey:

- “Don’t worry about the total THC or anything like that. I spoke to our legal team last week....”
- “Something has changed. We’re not doing total. Yeah, so total THC is not being enforced....”
- The licensing fees are now back to the original price.... I don’t know what November is going to look like but currently, the fees have changed from the \$5,000 and \$10,000 to the original \$156 and \$158....”

Exhibit B (with recording electronically provided).<sup>2</sup>

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<sup>22</sup> The inspector’s statements are admissions of a party opponent. Tex. R. Evid. 801(e)(2)(D). The recordings were made with the consent of the parties initiating the calls, Mr. Salganik and Mr. Gilkey. *Taylor v. State*, 555 S.W.3d 765, 776 (Tex. App.—Amarillo 2018, pet. ref’d) (“Under Texas law, it is not unlawful to record a telephone call if the person making the recording is a party to the call or one of the parties to the call has given prior consent.”) (citing Tex. Penal Code § 16.02(c)(4)).

As the inspector noted in these conversations, many other industry participants have been calling the agency with questions about enforcement of the Challenged Rules. Recordings A-B. As a leader in this industry who is “in close contact” with many other licensed manufacturers and distributors and registered retailers, Mr. Gilkey confirmed that several others have received the same or similar responses as he did from DSHS, resulting in “widespread confusion and concern.” Exhibit B.

As a matter of due process and fair notice, these regulated parties should be entitled to trust the stated enforcement positions of the agency regulating their operations and products. But if the industry participants regulated by DSHS opt to structure their business affairs in reliance on the guidance currently being provided, they risk significant and cognizable harm if DSHS changes course in the future and decides to impose retroactive penalties and other enforcement mechanisms.

In that event, the industry participants *might* be protected under an estoppel defense but there is no guarantee that they would be. *See PDT Holdings, Inc. v. City of Dallas*, 712 S.W.3d 597, 600 (Tex. 2025) (“[I]n exceptional cases,” “estoppel may be necessary to prevent manifest

injustice [ ] where a citizen relies on affirmatively misleading government statements and suffers substantial loss as a result.”) (holding City was estopped from denying variance after it affirmatively represented to builder in response to his request for guidance and following a site inspection that builder could complete construction of a house with 36-foot ceilings, in excess of 26-foot restriction under written ordinance, where builder detrimentally relied on guidance; these circumstances were considered “exceptional”).

To prevent significant harm potentially resulting from actions taken in reliance on DSHS’s stated guidance that consumable hemp manufactures and sellers currently need not comply with the total THC metric contained in the Challenged Rules, and to provide clarity in response to the regulatory whiplash of DSHS’s shifting enforcement positions, the Appellees respectfully urge the Court to reinstate the temporary injunction pending appeal.

Because DSHS has decided not to enforce two critical portions of the Challenged Rules (the total THC metric and the heightened fees), the State cannot now claim that any harm will result from reinstating the injunction pending appeal. Doing so will provide legal clarity during the

remainder of this proceeding so that businesses can operate effectively, without the risk of being subsequently embroiled in administrative disputes with DSHS over events transpiring in the interim.

## **II. The Record Supports the Appellees' Likelihood of Success on the Merits.**

When Appellees originally presented their Rule 29.3 motion and reply to this Court, the Reporter's Record from the temporary injunction hearing was not yet available. As a result, Appellees relied on portions of the Clerk's Record and demonstrative exhibits, which reflected the evidence that was admitted at the hearing.

Now with the benefit of the transcript on file, Appellees summarize the key testimony demonstrating their likelihood of success on the merits, which supports the trial court's grant of a temporary injunction based on a finding of imminent and irreparable harm to members of the hemp industry and supports this Court's reinstatement of the injunction pending appeal.

Dr. Andrea Holmes—a Ph.D. in synthetic and physical organic chemistry whose expert qualifications went unchallenged (2RR76-79)—testified that the total THC standard under the Challenged Rules differs from the statutory requirement, and that products which are lawful

under the statute will be deemed unlawful under the rules, even if the products are never intended to be smoked or even heated by a consumer (meaning no THCA will convert to THC in the product). 2RR90-97, 105-106. Dr. Holmes explained the severe supply chain disruptions that the Challenged Rules will cause. 2RR97-98.

Beau Whitney—an economist with 12 years of experience in the consumable hemp industry whose expert qualifications went unchallenged (2RR108-114)—testified that if the Challenged Rules take effect, they will likely result in a negative impact on the State’s economy of \$7.2 billion, including 36,000 lost jobs and \$1.4 billion in wage reductions. 2RR119-120, 134, 137. He explained in detail how the agencies failed to conduct the economic impact analysis that was required. 2RR120-127, 130-134, 136-137, 153-154 (describing the analysis as “surface level and incomplete” and “not credible”). He also explained how the heightened fees will generate revenue beyond what is needed for administrative enforcement and will have devastating impacts on the industry. 2RR127-128.

Several consumable-hemp business owners testified about the efforts they have made to fully comply with the law, and the devastating impact the Challenged Rules will have on their businesses.

Lauren Bridges, owner of Alchemy TX Consulting LLC, a consumable hemp product manufacturer and retailer, focuses on products used for wellness, including hair serums, pain creams, tinctures, gummies, and drinks, and sells primarily to customers in their 50s. 2RR155-168, 173-174. She has a positive and collaborative relationship with local law enforcement, and prioritizes education for her customers. 2RR168-172. Ms. Bridges testified that imposition of the total THC compliance standard and the heightened license and registration fees would likely put her out of business and would be financially devastating to her family. 2RR161-165, 172, 176-177, 183-184. She believes her customers would, unfortunately, turn to out of state or black-market options. 2RR174-175, 177-178.

Melanne Carpenter, owner of CPRT & Company LLC d/b/a Serenity Organics Your Apothecary, also focuses her sales on wellness products to suburban customers in their 40s to 60s seeking relief from common ailments like pain, sleeplessness, anxiety, and menopause; and seeking

natural alternatives to alcohol. 2RR229-233, 237. These include items like pet treats, topicals and CBD balms, tinctures, and gummies—which are never intended to be heated or smoked but would nevertheless fail the total THC standard because they contain THCA. 2RR253-256. Many of her customers are veterans. 2RR237-240. Like Ms. Bridges, Ms. Carpenter maintains a positive and collaborative relationship with law enforcement in her community. 2RR237-240. The Challenged Rules would cause her business to lose approximately 40% of its sales revenues, and imposition of the heightened fees would cause her to seriously consider closing altogether. 2RR242-247, 250-251.

Kenneth Berner, owner of A to Z Investments and an Army veteran with a physics degree, testified that this business provides his family’s only source of income. 3RR8-18.<sup>3</sup> He operates the business with his wife, a former FBI analyst and Texas State Trooper, and they employ a staff primarily comprised of former service members. 3RR12, 16-17. Carefully following the law is very important to his business, which supports consumer safety regulations and agency enforcement against “bad actors.” 3RR31-33, 54. Many of his customers are veterans seeking

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<sup>3</sup> The legal spelling of this business name includes the word “Investments,” not “Investments.”

natural relief from arthritis, sleeplessness, and anxiety. 3RR25-30. Mr. Berner explained, based on his personal awareness of multiple situations, that for some veterans facing suicidal decisions, the instant-acting nature of a hemp inhalable is the only lawful product effective to prevent a fatal outcome. 3RR30.

At the time of the TI hearing, the Challenged Rules already had a significant, negative impact on Mr. Berner's business, including the inability to obtain another license, lost revenues, and forthcoming layoffs if a TI was not granted. 3RR18-25, 33-39. He explained that "if THCA flower is now banned, that's the base of our entire industry. It's what all of our products are made from.... So there will be no more natural products." 3RR38. If the Challenged Rules took full effect, he believed his customers would turn to out of state or "street dealers," in an unsafe manner. 3RR42-45.

Mitch Fuller, the Chairman of the VFW Department of Legislative Affairs and an Iraq veteran representing 1.5 million Texas veterans, (2RR198-207), provided unchallenged expert testimony that veterans use consumable hemp products as an effective, accessible, and affordable alternative to opioids, antidepressants, and alcohol. 2RR201, 207-208,

210-212, 221-222. He and other veterans have grave concerns about the negative health and safety impacts of the Challenged Rules on their community. 2RR200-201, 207-208, 215, 225-227.

Additionally, testimony was provided by representatives of two industry groups who are named plaintiffs in this suit—the Texas Hemp Business Council (THBC) and the Hemp Industry & Farmers of America (HIFA). Mark Bordas, the Executive Director of THBC, testified that the Challenged Rules impact its members across the supply chain, including producers, distributors, retailers, and farmers. 3RR57, 63-64. He discussed the widespread opposition to these rules, which constitute “regulators legislating.” 3RR69-76. Importantly, THBC sought guidance from DSHS prior to implementation of the Challenged Rules regarding the enforcement timeline—but the agency refused to communicate with stakeholders. 3RR74-81.

Similarly, the agencies failed to conduct or provide the required economic analysis prior to adopting the new rules. 3RR83-84. Mr. Bordas also testified about the draconian nature of the heightened fees, which are designed to shut down the industry; and the escalating penalties, which provide no notice or opportunity to cure. 3RR86-87.

Brian Swenson, Executive Director of HIFA (2RR186-188), testified that its members are active across the hemp industry supply chain, and that they support the consumer safety regulations added in 2026. 2RR186-190. HIFA is very concerned about the detrimental impacts of the Challenged Rules on its business members and veterans. 2RR190, 195-197.

The State presented only a single witness, Dr. Timothy Stevenson, the DSHS Deputy Commissioner for Consumer Protection, who was not qualified or offered as an expert on any issue in this case. 4RR8-11, 57. Dr. Stevenson testified that THCA can convert to THC when heated, and that DSHS wanted to amend its rules to be enforceable against consumable hemp products based on a conversion factor. 4RR12-17, 31. He described various “certificates of authenticity” (COAs) showing that lawful products were previously tested for total THC, notwithstanding that “testing” is distinct from a compliance standard. 4RR35-38, 49-50. Dr. Stevenson acknowledged that Appellees do not challenge any of the consumer safety rules (such as age restrictions and increased packaging/labeling requirements) and that nothing about the requested

injunction prevents DSHS from bringing enforcement actions against “bad actors” who are not following the law. 4RR58-60.

**III. At a Minimum, the Temporary Injunction Should be Maintained Pending Appeal for the Named Plaintiffs.**

Appellees contend that the Challenged Rules exceed the agencies’ authority and violate the Texas Constitution and the APA in a manner detrimental to the entire supply chain of consumable hemp products in Texas. Because the named plaintiffs cannot operate when the supply chain is shut down, and because the Challenged Rules are indivisibly harmful to the entire industry, Appellees’ primary request is that the Court reinstate the temporary injunction for all licensed/registered commercial participants in Texas’s consumable hemp industry—as previously briefed.

In the alternative on rehearing, if the Court has concerns about the scope of the injunctive relief awarded, Appellees respectfully request that the temporary injunction be reinstated pending appeal only as to the named plaintiffs, including the members of THBC and HIFA. Especially considering DSHS’s sudden change in enforcement positions, such relief is necessary to protect the interests of the named plaintiffs pending appeal. Tex. R. App. P. 29.3.

## PRAYER

In light of DSHS's voluntary decision to not enforce the critical portions of the Challenged Rules, and based on the evidence in the record to support the likelihood of success on the merits of the Appellees' claims, the Appellees respectfully request that the Court rehear their Rule 29.3 motion and reinstate the effectiveness of the temporary injunction for the pendency of this interlocutory appeal.

While the Appellees contend the full scope of the injunction should be reinstated for the reasons previously briefed, in the alternative they request that the injunction be reinstated for the benefit of the named plaintiffs in this litigation, including the members of THBC and HIFA.

Respectfully submitted,

BUTLER SNOW LLP

By: /s/ Amanda G. Taylor  
Amanda G. Taylor  
Texas Bar No. 24045921  
Amanda.Taylor@butlersnow.com  
J.R. Johnson  
Texas Bar No. 24070000  
JR.Johnson@butlersnow.com  
1400 Lavaca St., Suite 1000  
Austin, Texas 78701  
Tele: (737) 802-1800

*Counsel for Texas Hemp Business Council; Alchemy TX Consulting, LLC; A To Z Investments and Wholesale; CPRT and Company, LLC; and Texas Green Craft, LLC aka TexaKana Organics*

DICKINSON WRIGHT PLLC

Andrew J. Alvarado  
Texas Bar No. 24118811  
aalvarado@dickinsonwright.com  
607 West Third Street, Suite 2500  
Austin, Texas 78701  
Tele: (512) 770-4200  
Fax: (844) 670-6009

*Counsel for Appellees Hemp Industry & Farmers of America*

JOHNSTON TOBEY BARUCH, P.C.

Charles (“Chad”) Baruch  
Texas Bar No. 01864300  
chad@jtlaw.com  
Brandon Tobey  
Texas Bar Number 24150206  
brandon@jtlaw.com  
12377 Merit Drive, Suite 880  
Dallas, Texas 75251  
Tele: (214) 741-6260

*Counsel for Appellees Elevate One TX, LLC dba Elevate Wellness Dispensary, LLC; Clutch City Gas LLC dba Texas High Council; and Salganik Services, Inc.*

## CERTIFICATE OF COMPLIANCE

This motion complies with Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a conventional typeface of 14-point for text and 12-point for footnotes. This brief also complies with Rule 9.4(i) because, according to the word count tool in Microsoft Word©, it contains 2,984 words, excluding any parts exempted by Rule 9.4(i).

*/s/Amanda G. Taylor*

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Amanda G. Taylor

# **Exhibit A**

Affidavit of Kevin Salganik  
(Salganik Services, Inc.)

Texas Court of Appeals for the Fifteenth District

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**Texas Department of State Health Services, et al.,  
Appellant**

v.

**Texas Hemp Business Council, et al.,  
Appellees**

---

On Interlocutory Appeal from the  
455th Judicial District Court, Travis County, Texas  
Cause Number D-1-GN-26-002511

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**Affidavit of Kallan Salganik**

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Kallan Salganik, being first duly sworn on oath, states as follows:

1. "My name is Kallan Salganik. I am over 21 years of age and competent to make this affidavit. All facts stated in this affidavit are true, correct, and based on personal knowledge."

2. "I am the President of Salganik Services, Inc., a named plaintiff in the pending lawsuit, and am acting on its behalf. I am a consumable hemp products license holder.

3. "After the Fifteenth Court of Appeals denied the Rule 29.3 Motion for Temporary Order that the Appellees filed to retain the temporary injunction during the appeal, I called DSHS at 512-751-

4218 on June 9, 2026, at 3:22pm. The call went to voicemail. The next day, on June 10, 2026, I received a call back from 512-751-4218 at 1:02pm. The person on the line identified himself by his name and said he was a senior inspector with DSHS. Though he provided his full name (as the Court can hear on the call), I refer to him in this affidavit only as JJ.”

4. During the call, I asked questions about the current status of DSHS’s enforcement of the 2026 Challenged Rules (as identified in the pending lawsuit) and JJ provided answers. From this conversation, as confirmed by the recording, I learned that DSHS is not currently enforcing the Challenged Rules.”

5. “More specifically, among other things, JJ told me that:

Don’t worry about THCa. We are not going to enforce anything with total THC . . . .

Even though the injunction has been lifted, I spoke with my legal team and my supervisor who is Jessica Fierros, who is the manager of our department, and we’re not going to enforce total THC. In regards to the timeframe, I do know that November I’m pretty sure midterms and a lot of other stuff comes open, so I am pretty sure that’s the timeline....

Chapter 300 is not going to change ... It’s still going to be in there at the moment ... but we’re not going to be enforcing it at the moment.

Not saying it could not be done ... in the future but at the moment, don’t worry about it....

[Q: So I am good to keep THC on my shelf at this time until you guys issue further guidance after November?] Correct. Exactly. Correct.

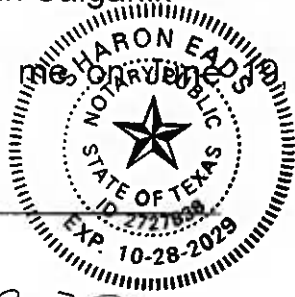
5. “I provided a true and correct copy of this recorded conversation to the legal team representing the Appellees in this matter. This true and correct copy of the recorded conversation that I

made is now being provided to the Court and to counsel for the Appellants in connection with the Appellees' Motion for Rehearing. I have reviewed the copy of the recording being provided with the motion and attest that it is a true and correct recording of the full conversation I had with the DSHS representative, JJ, on June 10, 2026."

Kallan Salganik  
Kallan Salganik

Subscribed and sworn to before me on June 10, 2026, by Kallan Salganik.

[Signature]  
Notary Public, State of Texas



My commission expires: 10-28-29

# **Exhibit B**

Affidavit of Lukas Gilkey

(Sky Marketing LLC d/b/a Hometown Hero)

Texas Court of Appeals for the Fifteenth District

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**Texas Department of State Health Services, *et al.*,  
Appellant**

v.

**Texas Hemp Business Council, *et al.*,  
Appellees**

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On Interlocutory Appeal from the  
455th Judicial District Court, Travis County, Texas  
Cause Number D-1-GN-26-002511

---

**Affidavit of Lukas Gilkey**

---

Lukas Gilkey, being first duly sworn on oath, states as follows:

1. “My name is Lukas Gilkey. I am over 21 years of age and competent to make this affidavit. All facts stated in this affidavit are true, correct, and based on personal knowledge.”

2. “I am the Chief Executive Officer of Sky Marketing LLC d/b/a Hometown Hero, which is a consumable hemp products license holder and is a member of the Texas Hemp Business Council, a named plaintiff in this lawsuit.

3. “After the Fifteenth Court of Appeals denied the Rule 29.3 Motion for Temporary Order that the Appellees filed to retain the temporary injunction during the appeal, I called DSHS at 512-719-3521 on June 10, 2026, at 12:26 pm. I was connected to a senior inspector with DSHS, who provided his full name (as can be heard in the recording of our conversation), identified herein by his initials, J.J.”

4. During the call, I asked questions about the current status of DSHS’s enforcement of the 2026 Challenged Rules (as identified in the pending lawsuit) and J.J. provided answers. From this conversation, as confirmed by the recording, I learned that DSHS is not currently enforcing the Challenged Rules.”

5. “More specifically, among other things, J.J. told me that:

.... Don’t worry about the total THC or anything like that. I spoke to our legal team last week....

Something has changed. We’re not doing total. Yeah, so total THC is not being enforced....

The licensing fees are now back to the original price.... I don’t know what November is going to look like but currently, the fees have changed from the \$5,000 and \$10,000 to the original \$156 and \$158....

And the other part ... was with the total THC, total delta 9. That decision was said that we would not enforce that right now....

5. “I provided a true and correct copy of this recorded conversation to the legal team representing the Appellees in this matter. This true and correct copy of the recorded conversation that I made is now being provided to the Court and to counsel for the Appellants in connection with the Appellees’ Motion for Rehearing. I have reviewed the copy of the recording being

provided with the motion and attest that it is a true and correct recording of the full conversation I had with the DSHS representative, J.J., on June 10, 2026.”

6. “For the last six years, I have been an advocate and one of the leaders of Texas’s consumable hemp industry. In this role, I am in close contact with many industry participants, including licensed manufacturers and distributors, and registered retailers. I am aware that several other of these industry participants have recently received the same or similar guidance from DSHS representatives when they have called to inquire about the current enforcement status of the 2026 Challenged Rules.

7. The conflicting positions taken by DSHS in this lawsuit versus what is currently being told by DSHS representatives to industry participants has created widespread confusion and concern. While this lawsuit remains pending, Texas businesses in this industry need clarity about which rules they are required to follow, in a manner they can confidently rely on to operate in a compliant manner without the risk of future penalties and other adverse enforcement actions. To provide this clarity and legal confirmation, THBC and the other Appellees request that the Court reinstate the temporary injunction pending appeal.

*Lukas Gilkey*

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Lukas Gilkey

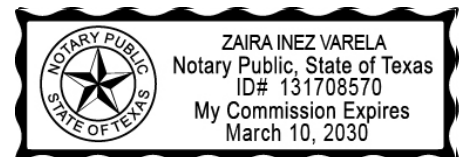
Subscribed and sworn to before me on June 22, 2026, by Lukas Gilkey.

*ZV*

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Notary Public, State of Texas

My commission expires: March 10, 2030



## Automated Certificate of eService

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Mahita Shankar on behalf of Amanda G. Taylor

Bar No. 24045921

mahita.shankar@butlersnow.com

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Temporary Relief Under Rule 29.3

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### Case Contacts

| Name                      | BarNumber | Email                          | TimestampSubmitted   | Status |
|---------------------------|-----------|--------------------------------|----------------------|--------|
| Heidi ACoughlin           |           | hcoughlin@w-g.com              | 6/22/2026 4:14:02 PM | SENT   |
| Brantley RossPringle, Jr. |           | rpringle@w-g.com               | 6/22/2026 4:14:02 PM | SENT   |
| Chad Baruch               | 1864300   | chad@jtlaw.com                 | 6/22/2026 4:14:02 PM | SENT   |
| Amanda Taylor             |           | amanda.taylor@butlersnow.com   | 6/22/2026 4:14:02 PM | SENT   |
| Andrew Alvarado           | 24118811  | aalvarado@dickinsonwright.com  | 6/22/2026 4:14:02 PM | SENT   |
| Cory Scanlon              |           | cory.scanlon@oag.texas.gov     | 6/22/2026 4:14:02 PM | SENT   |
| Lauren Ross               |           | lross@w-g.com                  | 6/22/2026 4:14:02 PM | SENT   |
| J.R. Johnson              |           | jr.johnson@butlersnow.com      | 6/22/2026 4:14:02 PM | SENT   |
| Brandon Tobey             | 24150206  | brandon@jtlaw.com              | 6/22/2026 4:14:02 PM | SENT   |
| Teagen Fessenden          |           | teagen.fessenden@oag.texas.gov | 6/22/2026 4:14:02 PM | SENT   |
| Zachary Berg              |           | zachary.berg@oag.texas.gov     | 6/22/2026 4:14:02 PM | SENT   |
| Steven Loomis             |           | steven.loomis@oag.texas.gov    | 6/22/2026 4:14:02 PM | SENT   |
| Jacob Dustin              |           | jacob.dustin@oag.texas.gov     | 6/22/2026 4:14:02 PM | SENT   |
| Jim Rich                  |           | jim.rich@oag.texas.gov         | 6/22/2026 4:14:02 PM | SENT   |
| Ali Thorburn              |           | ali.thorburn@oag.texas.gov     | 6/22/2026 4:14:02 PM | SENT   |
| Keith Ingram              |           | keith.ingram@oag.texas.gov     | 6/22/2026 4:14:02 PM | SENT   |
| Mahita Shankar            |           | mahita.shankar@butlersnow.com  | 6/22/2026 4:14:02 PM | SENT   |
| Bowie Duncan              |           | Bowie.Duncan@oag.texas.gov     | 6/22/2026 4:14:02 PM | SENT   |