No. 15-26-00099-CV

# In the Court of Appeals for the Fifteenth Judicial District

TEXAS DEPARTMENT OF STATE HEALTH SERVICES; IMELDA GARCIA, IN HER OFFICIAL CAPACITY AS THE INTERIM COMMISSIONER OF THE DEPARTMENT OF STATE HEALTH SERVICES; TEXAS HEALTH AND HUMAN SERVICES COMMISSION; STEPHANIE MUTH, IN HER OFFICIAL CAPACITY AS EXECUTIVE COMMISSIONER OF HHSC; 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 IVESTMENTS 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; CLUTCH CITY GAS LLC DBA TEXAS HIGH COUNCIL; SALGANIK SERVICES, INC.,

*Appellees.*

On Appeal from the
455th Judicial District Court, Travis County

## REPLY BRIEF FOR APPELLANTS


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**ORAL ARGUMENT REQUESTED**

# TABLE OF CONTENTS

## Index of Authorities

Page(s)

**Cases:**

**Constitutional Provisions, Statutes and Rules:**

**Other Authorities:**

## References to Parties and Agencies

Appellees are collectively "Vendors."

Appellants are collectively "the State."

The Texas Health & Human Services Commission is "HHSC."

The Department of State Health Services is "DSHS."

The United States Department of Agriculture is "USDA."

The Texas Department of Agriculture is "TDA."

## Introduction

In less than three months, federal law clarifying the permissible level of THC in consumable hemp products (CHPs) and closely aligning with the State's position here will take effect and render Vendors' ultra vires and APA claims even more unlikely to succeed than they were at the time of filing.[1] Despite this, Vendors incredibly argue that the Texas Legislature intended for cannabis products to more freely proliferate in this State than what the federal government will allow. But the State's CHP rules (the Rules) that were recently amended—and which Vendors now challenge as ultra vires—are explicitly mandated by statute.

Every party agrees that federal and state law currently (for approximately the next fifteen weeks) sets the acceptable level of THC for CHPs at .3% for the delta-9 variant, but Vendors disagree with the scientific methodology for determining that threshold. That is a fact-bound matter within the agencies' scientific expertise to determine; it is not a legal determination that courts may ignore.[2] Vendors argue that

[1] Continuing Appropriations and Extensions Act, 2027, Pub. L. No. 119-103, § 2019, 140 Stat. 987, 1003 (2026). Under recently enacted stopgap legislation, the law extends the effective date for the new definition of hemp to December 11, 2026, but leaves the original November 26 effective date in place as to CHPs with cannabinoids that cannot be naturally produced by the cannabis plant. *Id.*

[2] "[A]lthough an agency's interpretation of a statute 'cannot bind a court,' it may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise.'" *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 402 (2024)) (second alteration in original) (quoting *Bureau of Alcohol Tobacco & Firearms v. FLRA*, 464 U.S. 89, 98 n.8 (1983); *see also PUC v. Luminant Energy Co.*, 691 S.W.3d 448, 463 (Tex. 2024) ("The Commission has the expertise to manage the electric utility industry; the courts do not.").

the Legislature intended separate enforcement regimes governing agricultural versus retail markets, but they never identify a conflict between the Rules and any statutory provision. In truth, the plain text of those statutes directly contradicts Vendors' position and mandates that every agency regulating CHPs set the permissible delta-9 threshold using consistent rules. Appellants.Br.19-25.

Vendors also challenge the State's rulemaking procedures, claiming that despite HHSC's extensive review of hundreds of comments and resulting adjustments to the fee schedule, they still lacked a meaningful opportunity to participate in the process. To the contrary, the State satisfied its notice-and-comment obligations, and the Legislature has made clear that minor procedural defects in rulemaking do not justify invalidating agency rules. Accordingly, this Court should reverse and remand with instructions to dismiss Vendors' ultra vires claims and vacate the temporary injunction.

# Argument

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

This case presents both substantive and procedural claims. Vendors first challenge the Rules' validity under Government Code section 2001.038 based on an ultra vires theory and then allege APA procedural violations. Neither set of claims justified a statewide injunction, and the ultra vires claims should have been dismissed. Appellants.Br.19-40.

When a state official's action is alleged to be contrary to law, the ultra vires claim cannot proceed without some statutory authority for the relevant official to act and conduct exceeding that authority. *See Hall v. McRaven*, 508 S.W.3d 232, 239 (Tex. 2017). The Texas Supreme Court has cautioned courts not to apply the ultra vires doctrine every time there is "an identifiable mistake" but only if the relevant state officials acted "without reference to or in conflict with the constraints of the law authorizing [them] to act." *Id.* at 242 (quoting *Hou. Belt & Terminal Ry. v. City of Houston*, 487 S.W.3d 154, 163 (Tex. 2016)).

### A. The agencies promulgated a permissible testing standard for legal hemp products.

#### 1. Total delta-9 THC is the scientifically and legally correct standard for compliance.

The State did not exceed its authority in adopting rules specifying the testing methodology for the statutory delta-9 THC threshold because all the actions challenged here fall squarely within the authority delegated to HHSC and DSHS by statute. *See id.* at 239. The relevant statutes operate in two important ways. First, HHSC "shall adopt rules and procedures necessary to administer and enforce" the CHP statutes. Tex. Health & Safety Code § 443.051. Second, the rules "must be consistent with" Texas's USDA-approved hemp plan and federal hemp laws. *Id.* Since federal and TDA standards require the delta-9 THC level to factor in the decarboxylated value of THCA, Appellants.Br.20-22 (citing 7 C.F.R. § 990.1 and CR.1264-65), adoption of the Rules closely hewed to delegated statutory authority.

Vendors' ultra vires claims fail because the acts are within the State's discretion. *See Aspire Power Ventures, LP v. PUC*, 733 S.W.3d 122, 131 (Tex. App.—15th Dist. 2026, pet. filed) (rejecting ultra vires claims against PUC's Commissioners for adopting rules requiring maintenance of backup power during a weather emergency because the rules were required by statute). Nothing in Vendors' ultra vires argument identifies any statute that the state officials have violated. Appellees.Br.34-35.

**2. Vendors' contrary arguments are meritless.**

**a.** Vendors' argument boils down to a policy disagreement with including THCA—a substance that all parties admit converts to delta-9 through a process called decarboxylation—within the calculation for determining permissible THC levels in CHPs sold to end consumers. *Id.* at 53-66. With no support in the text of chapter 443 governing CHPs, Vendors state that there is no problem with testing for THCA. *Id.* at 57. The tests just can't be used to accurately determine delta-9 levels for purposes of compliance. *Id.* But Vendors' argument fails to appreciate that the whole point of spending taxpayer dollars on expensive testing equipment is not simply to inform consumers, but to allow DSHS to accurately enforce THC concentration standards pursuant to its authority and obligation to protect "the health of the citizens of this state." 4.RR.11-19; *see* Tex. Health & Safety Code § 12.001. Testing serves no real purpose if it can't be used to limit the amount of psychoactive substance present in the food supply.

Similarly, Vendors' argument (at 57) that the CHP laws governing farmers should not apply equally to retailers lacks any textual basis. As the State explained in its brief, Vendors' interpretation leads to a bizarre outcome: Farmers would be subject to a stricter compliance standard for raw, non-intoxicating hemp going to retailers, while retailers would be allowed to sell a highly intoxicating product to consumers without strict regulations. Appellants.Br.27-28. Simply claiming farmers and retailers get to play by different THC rules doesn't make it so.

**b.** Vendors' argument (at 16) that the State did not establish the danger of allowing unregulated THC in commerce ignores the record. The Vendors' own witness admitted that five out of six hemp retailers are not following the rules right now. 3.RR.33. In his executive order, the Governor established that the marketplace is crying out for better regulations, reciting that "in the years since [the 2019 Farm Bill] was passed, legitimate agriculture, industrial and retail markets for hemp and hemp-derived products have developed, while bad actors have taken advantage of *a dangerously under-regulated* marketplace." 4.RR.23-24 (emphasis added). In his veto message, the Governor stated that Texans are concerned with "obtain[ing] a product more dangerous than what they expected." CR.268.

Nobody disputes that THC—through the cannabis plant—intoxicates its users, causes its users to get high, and affects users' judgments and thought processes. *See* 2.RR.99-100 (testimony of Vendors' chemist regarding psychoactive effects of

THC); *Tex. DSHS v. Crown Distrib. LLC*, 647 S.W.3d 648, 658 (Tex. 2022) ("more famously, THC has a psychoactive effect that produces a high when ingested by humans"). Indeed, one of Vendors' main representatives acknowledged that this effect is part of the appeal and the reason they make money. 2.RR.193-95; *see also* 4.RR.32-33 (advertising that: "[o]ne puff and you'll see why it's a staff and customer favorite for total body relaxation and a clear, happy headspace").

Suggesting that THC should not be regulated as a matter of public safety because the State didn't adequately establish its dangerousness defies decades of common knowledge and strict laws concerning the drug. Ultimately, Vendors' disagreement about whether THC poses a danger is a matter of public policy within the Commissioner's authority to regulate, as mandated by the Legislature; that policy disagreement forms no basis for an ultra vires challenge. *Tex. DSHS v. Sky Mktg. Corp.*, 733 S.W.3d 689, 694 (Tex. 2026) ("Those seeking a different result must look to the other branches of government.").

*Sky Marketing* dealt more directly with the DSHS Commissioner's authority over the Texas Controlled Substances Schedules rather than the CHP program, but the ruling still helps resolve this case. *Contra* Appellees.Br.60. Vendors' argument that THCA is an acid included within the statutory definition of hemp, *id.* at 61 (citing Tex. Agric. Code § 121.001), is simply another flavor of the argument rejected in *Sky Marketing*. The vendors in that case argued that delta-8 is another isomer of THC included in the statutory definition of legal hemp, and therefore the Commissioner was prohibited from including delta-8 in the schedule of controlled substances. *Sky Mktg.*, 733 S.W.3d at 704. But the Court rejected that interpretation by considering the "text, structure, and statutory history" of the relevant statute. *Id.*

That same reasoning applies here. Vendors claim (at 61) that "nothing in the statute" requires THCA to count toward the delta-9 threshold, but section 481.051 is such a statute and mandates consistency with TDA and federal hemp practices. Appellants.Br.20-25. As an acid with the potential to convert into delta-9 THC when heat is applied, thus transforming legal hemp into an intoxicating controlled substance, both scientific fact and statutory authorities permit this regulation. *Id.*

**c.** Vendors offer no contrary authority to the cases the State cited regarding decarboxylation and their attempts to distinguish those cases fail. *Contra* Appellees.Br.61-62 (citing *United States v. Sirois*, No. 1:21-cr-00175-LEW, 2026 WL 674125 (D. Me. Mar. 10, 2026); *Barlow v. State*, No. 05-21-00392-CR, 2022 WL 16847694, at *2 (Tex. App.—Dallas Nov. 10, 2022, no pet.) (mem. op.)).

First, *Sirois*'s application in the federal USDA context does not mean that retailers can escape compliance checks under Texas law. States may regulate hemp products more strenuously than what federal standards allow. *Green Room LLC v. Wyoming*, 157 F.4th 1196, 1203 (10th Cir. 2025); *Bio Gen LLC v. Sanders*, 142 F.4th 591, 602-03 (8th Cir. 2025) (citing 7 U.S.C. §§ 1639p, 1639q). Thus, applying USDA testing standards to retail sellers is permitted by state law. Tex. Health & Safety Code § 443.051 (requiring the CHP rules "be consistent with: . . . 7 U.S.C. Chapter 38, Subchapter VII").

Second, Vendors ignore the significance of *Barlow*'s reasoning: Their assertion that the test results there reflected items greatly exceeding the .3% threshold misses the point. The court rejected the defendant's argument that the court could not convict him without accounting for decarboxylation—his argument was that he could have possessed the vapes at a point in time when the decarboxylated value was below .3% and the testing occurred much later after police seized the vapes and allowed the THCA to convert. *Barlow*, 2022 WL 16847694, at *2, 8; Appellants.Br.23-24. The court reasoned that "the total delta-9 THC is the relevant concentration" and THCA must be factored into that calculation for purposes of convicting him of THC possession. *Barlow*, 2022 WL 16847694, at *8. If the total delta-9 standard is good enough to criminally convict a defendant for possession, it ought to be good enough for regulating stores offering such items for sale to the public.

### B. The Rules permissibly limit transport of noncompliant hemp material into Texas for further manufacturing.

Vendors do not grapple with the State's argument that nothing in the Rules prohibits transportation of hemp materials through the State. The Rules prohibit using out-of-state materials that are controlled substances under Texas law. These products do not comply with Texas's hemp standards. 25 Tex. Admin. Code §§ 300.206(c), .404. Vendors' true complaint concerns what they call the "compliance standard" tied to THCA as it applies to shipping non-compliant hemp to the manufacturer, Appellees.Br.58 & n.6, which is addressed above and in the opening brief, Appellants.Br.20-29.

### C. The sanctions provisions do not violate any statute or constitutional provision.

The Rules provide a cure provision for negligent or inadvertent violations. Appellants.Br.33 (citing 25 Tex. Admin. Code § 300.606(d)-(e), (i); 51 Tex. Reg. 1859, 1876-77 (2026); 50 Tex. Reg. 8486, 8499 (2025)). Vendors ignore that the Rules closely track statutes that they did not challenge as unconstitutional. *Id.* at 32-34. Although the Rules establish that a penalty is calculated based on each day the violation occurs (as is clearly statutorily authorized), Vendors offered no evidence to suggest that the State would not allow a regulated person in an appropriate enforcement proceeding to resolve its violations according to these statutory provisions and the Rules. *See* Tex. Health & Safety Code §§ 431.054(c)-(d), 443.002, 443.201(b).

#### 1. Vendors have no property or liberty interest in selling cannabis products under the Texas due course provision.

The Texas Supreme Court held that Vendors of CHPs have no vested due course interest in selling CHPs in any form they may prefer, specifically as a smokeable product. *Crown Distrib.*, 647 S.W.3d at 663-64. Vendors' brief does not respond to the argument that they lack a due process interest, so their due course claim should be dismissed. *See* Appellees.Br.70-72. The trial court's injunction was erroneous for the same reason. Appellants.Br.32-34. Alternatively, Vendors concede that the Rules contain procedural protections, and their argument that accumulation of penalties on a per-day basis while process is pending somehow violates section 19 is not supported with authority. Appellees.Br.71-72.

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

Vendors face a high burden to show that the penalty provisions at issue here are excessive; courts are required to uphold such statutory provisions unless the fines thereunder "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)). Despite this high burden, and despite a statutory provision allowing daily fines up to $25,000 that Vendors did not challenge, *compare* Tex. Health & Safety Code § 431.054(c) *with* 25 Tex. Admin. Code § 300.601, the trial court held that the rule provision authorizing daily fines likely violates the excessive fines clause of the Texas Constitution. CR.1331-33 (citing Tex. Const. art. I, § 13), 1341-43.

The injunction reflected a grave intrusion of the trial court into the province of the executive that itself likely violated the constitutional separation of powers. *See Sky Mktg.*, 733 S.W.3d at 707 (noting the "unacceptable intrusion by the judiciary into the work of a co-equal branch of government" posed by the injunction against the Commissioner's administration of the controlled-substance schedules). To be sure, any vendor may challenge assessment of penalties through available notice-and-hearing and judicial review in an individual enforcement proceeding, Tex. Health & Safety Code § 431.056(b)(2); 25 Tex. Admin. Code § 300.606(i), but judicial rulemaking through universal injunction should not be the first option.

Vendors' attempt (at 71) to distinguish the State's supporting authorities by the amount of the fine in those cases assumes facts not in evidence: Nothing in the record demonstrates that the State has or will charge any certain amount under section 300.601. Even with such evidence, section 431.054, which Vendors didn't challenge and which the trial court never referenced, allows fines up to $25,000 per day. Tex. Health & Safety Code § 431.054(c) ("The penalty *may not exceed* $25,000 a day for each violation.") (emphasis added). That number is a cap, not an instruction—the statute allows DSHS discretion in "determining the amount of the penalty" by considering prior violations, seriousness, "any hazard to the health and safety of the public," if the person acted in good faith, and "such other matters as justice may require." *Id.* § 431.054(b). Nothing in section 300.601(b), which simply states that a violation "counts" on a per day basis, deprives DSHS of its authority to assess penalties in an appropriate amount. *See* 25 Tex. Admin. Code § 300.601(b).

Similarly, the trial court's finding that the State violated the statutory notice provision in Texas Health and Safety Code section 443.201 was also an abuse of discretion because there was no evidence of any enforcement proceeding commenced without proper notice. Appellants.Br.34 (citing *Tex. State Bd. of Soc. Worker Exam'rs v. Youniacutt*, No. 15-25-00064-CV, 2026 WL 1595343, at *5 (Tex. App.—15th Dist. June 4, 2026, no pet. h.)). *Contra* CR.1331-33. Thus, the trial court erred by enjoining the State from carrying out its statutory penalty authority without evidence of penalties that "shock the sense of mankind." *See Morello*, 547 S.W.3d at 889.

### D. The fees are not an unconstitutional occupation tax.

The trial court erred by supplanting the State's statutory authority to charge appropriate fees for licensed CHP manufacturers and retailers. Appellants.Br.36-37 (citing Tex. Health & Safety Code §§ 12.0111(b), 443.103(3)). Vendors are not likely to prove that the license and registration fees under the Rules are a prohibited occupation tax rather than a permissible regulatory fee. *See* Tex. Const. art. VIII, § 1(c).

Regulatory fees are permissible under the Texas Constitution when a state agency requires payments for the "primary purpose" of covering the costs of regulation. *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 (Tex. 1952)). A fee is "regulatory" when the agency determines the fee is reasonably necessary to cover the costs of regulating the licensed person. *Id.* Courts should not substitute their judgment for that of the agency on the question of whether the amount required is reasonably necessary. *City of San Antonio v. Teague*, 54 S.W.2d 566, 569 (Tex. Civ. App.—San Antonio 1932, writ ref'd). Courts should hold such fees unconstitutional as an occupation tax when the governmental authority admits that the fees are imposed for purposes other than covering the costs of regulation. *Lowenberg v. City of Dallas*, 261 S.W.3d 54, 57-58 (Tex. 2008) (per curiam) (invalidating registration fees for commercial building owners when the city admits the purpose of the fees is to shift fire-prevention costs from taxpayers to building owners).

Vendors claim the "State offered no evidence" at the hearing to support the fees' purpose yet acknowledge DSHS's Deputy Commissioner for Consumer Protection, Dr. Stevenson's testimony in the same breath. Appellees.Br.63-64. That testimony established the need to rectify an inadequate six-year inspection cycle and account for going from zero licensees in 2020 to over 14,000 in 2025. Appellants.Br.38. In any event, the State was not required to explain this reasoning in a live hearing: it already did that in the administrative record. The fees' purpose was

> 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. 1859, 1861; *see also* Appellants.Br.5-6, 10-11, 37-38.

Further, Vendors cite no case holding a licensing fee unconstitutional as an occupation tax. Appellees.Br.62-65. The case they do cite did not reach the question of whether a city's charging a volume-based fee from a private trash-collection service was an unconstitutional occupation tax because the Court held that the city lacked statutory authority to charge any such fee in the first place. *Builder Recovery Servs., LLC v. Town of Westlake*, 650 S.W.3d 499, 505-06 & n.8 (Tex. 2022). That is not the case here: DSHS is expressly empowered to collect "*any fees* required by the department to be submitted with [Vendors'] application[s]." Tex. Health & Safety Code § 443.103(3) (emphasis added); *see also id.* § 12.0111.

Instead, Vendors quibble about the failure to call an agency official as a witness when his testimony would have duplicated that offered by Dr. Stevenson. *Compare* 4.RR.54-57 *with* CR.1176 (¶¶ 7-8). Moreover, Jim Charney's declaration was filed in briefing and was before the trial court—the State called attention to it during its opening. 2.RR.64. If Vendors took issue with that evidence, they should have objected to it but did not. The State demonstrated at the hearing that DSHS would need to greatly expand its current inspection capacity from seven to twenty-three inspectors and assume expensive testing-equipment costs to sufficiently regulate this "dangerously under-regulated marketplace." 4.RR.11-19, 23-24, 54-56; CR.1176 (¶ 6); *see Ex parte Cramer*, 136 S.W. 61, 63-65 (Tex. Crim. App. 1911). In *Cramer*, the Texas Court of Criminal appeals upheld an electrician licensing fee under article

VIII, section 1 as reasonable and within the city's discretion to establish in terms of the appropriate amount. 136 S.W. at 63-65. Those same principles control here where the fees in question are intended to increase CHP inspection capacity.

Contrary to their burden to establish a "primary purpose" other than recouping regulatory costs, Vendors never offered any evidence that the fees were raised for any other purpose, such as generating revenue—the evidence only points the other direction. *See Lowenberg*, 261 S.W.3d at 57-58; *Lewellen*, 952 S.W.2d at 461. Vendors are also wrong about the disclosure of cost variables in the administrative record. Appellees.Br.68. Their economist admitted that he did not consider the costs associated with cross-agency cooperation with TABC, DPS, and SOAH, 2.RR.146, which were disclosed in the adopted rules, 51 Tex. Reg. at 1861. Because Vendors' own economist admits that he did not factor in cost variables disclosed in the notice adopting the Rules, his conclusion that the agency seeks to collect fees beyond what it is necessary to regulate carries no weight. *Cramer*, 136 S.W. at 64 ("In fixing upon the fee, it is proper and reasonable to take into account not the expense merely of direct regulation, but all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed.").

At any rate, the licensing and registration fees for CHP operators are not significantly burdensome when compared with those under the compassionate-care program, as amicus Texas Original Compassionate Cultivation noted in its brief. TOCC.Br.9 (citing 37 Tex. Admin. Code § 12.14(a)). Under those rules, a licensee pays $7,356 just to apply and $488,520 for a two-year license. *Id.* The amounts Vendors must pay ($10,000 for manufacturers and $5,000 for retailers) are paltry by comparison. *See* 25 Tex. Admin. Code § 300.202(c)(1), 300.502(g)(1). Thus, Vendors' argument (at 63) that one member of the alcohol industry shoulders a lesser burden has no relevance.

## II. The Trial Court Otherwise Erred in Granting Injunctive Relief.

### A. The Rules were adopted in accordance with the APA.

Vendors bring both a rule-validity challenge and a procedural challenge under the APA. The rule-validity claim under Government Code section 2001.038 requires them to show that the Rules interfere with or impair a legal right or privilege, and that statute authorizes only declaratory relief declaring a rule invalid. The procedural challenge, by contrast, requires Vendors to show that the State failed to substantially comply with sections 2001.022 through 2001.034. Tex. Gov't Code § 2001.035(a). As explained above, the rule-validity challenge fails, and the procedural challenge fails for the reasons discussed in this Part. *See* Appellants.Br.41-46.

#### 1. The State substantially complied with the APA's requirements.

The Texas Supreme Court has held that "'[a]n agency's order substantially complies with' a procedural rulemaking requirement if it 'accomplishes the legislative objectives underlying the requirement' and 'comes fairly within [its] character and scope.'" *Luminant Energy Co.*, 691 S.W.3d at 465 (alterations in original) (upholding PUC's allegedly deficient finding of "imminent peril" in an emergency rulemaking when agency stated that the Governor issued a disaster declaration and extreme weather conditions required load shed) (quoting *Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins.* (*NAII*), 925 S.W.2d 667, 669 (Tex. 1996)). Agencies satisfy the reasoned-justification requirement when the administrative record demonstrates the agency "considered the comments in full and provided adequate rationale for its decisions." *Lower Laguna Madre Found., Inc. v. Tex. Nat. Res. Conservation Comm'n*, 4 S.W.3d 419, 428 (Tex. App.—Austin 1999, no pet.).

Here, HHSC accomplished the requirements of the APA by notifying the public with detailed explanations justifying the Rules and allowing a fulsome discourse of the Rules' impact. The State was not required to enter "detailed findings of fact and conclusions of law" to supply a reasoned justification. *Chrysler Motors v. Tex. Motor Vehicle Comm'n*, 846 S.W.2d 139, 143 (Tex. App.—Austin 1993, no writ) (per curiam).

**a.** Vendors' claim that HHSC did not comply with section 2001.033(a)(1)(B) is meritless. Appellees.Br.44-45. The State explained "how and why it reached the conclusion it did." *NAII*, 925 S.W.2d at 669. The "how": the State is required to bring its rules into compliance with chapter 443, which requires consistency with TDA statutes and the 2020 hemp plan. *See* 50 Tex. Reg. at 8488; 51 Tex. Reg. at 1861; Appellants.Br.20-25. The "why": As the Governor observed in the executive order, CR.283, a decarboxylation factor measuring the conversion of THCA to delta-9 will more accurately determine THC levels in CHPs through "clarifie[d] testing requirements," *see* 50 Tex. Reg. at 8486. Moreover, additional resources will be required to better enforce chapter 443, necessitating higher fees. *Supra* at 12-13.

Vendors complain that the State did not precisely articulate "estimates," "staffing projections," or costs related to "inspection frequency." Appellees.Br.46. But the agency cannot predict the future with the precision Vendors demand, nor is it required to. "[A]n administrative agency's failure to include every specific detail and anticipate unforeseen circumstances when promulgating rules does not invalidate the rules." *Tex. Workers' Comp. Comm'n v. Patient Advocs. of Tex.*, 136 S.W.3d 643, 655-56 (Tex. 2004) (citing *R.R. Comm'n v. Lone Star Gas Co.*, 844 S.W.2d 679, 689 (Tex. 1992)). Whether the hemp industry would continue booming or contract under improved regulations, which the Governor observed were needed "*immediately*," was uncertain. *See* Veto Message of Gov. Abbott at 1, Tex. S.B. 3, 89th Leg., R.S. (2025). The APA does not require agencies to predict such outcomes, only explain the reasons for their actions. The State substantially complied with that requirement.

Vendors are also wrong to claim that the State never explained why THCA should be included in measuring delta-9 THC. Appellees.Br.46. HHSC stated in response to comments:

> [TDA] 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. at 1861; *see also Tex. Med. Ass'n v. Tex. Workers Comp. Comm'n*, 137 S.W.3d 342, 355 (Tex. App.—Austin 2004, no pet.) (stating that the reasoned justification need not be recited in the notice of proposed rulemaking if it appears in the order adopting the rule).

HHSC's robust series of responses to the 1,421 comments it received demonstrated even more than required for a reasoned justification. 51 Tex. Reg. at 1860; *see Lower Laguna Madre Found.*, 4 S.W.3d at 424-28. Vendors' bare disagreement with this justification as a matter of policy provides no grounds for invalidation.

**b.** HHSC substantially complied with its obligations to (1) state whether the Rules would impact the local economy as required under section 2001.022 and (2) consider alternative methods to achieve the Rules' purpose under section 2006.002(c). 50 Tex. Reg. at 8487. The State explained that such alternatives "would not be consistent with ensuring the health and safety of adults and minors who have been targeted consumers of CHPs." *Id.* This was sufficient to satisfactorily demonstrate the consideration of alternatives under section 2006.002. *Sw. Pharmacy Sols., Inc. v. Tex. HHSC*, 408 S.W.3d 549, 563 (Tex. App.—Austin 2013, pet. denied) (citing Tex. Gov't Code § 2006.002(c)) (upholding rules challenged under section 2006.002 when agency explained that alternatives were not feasible).

Any alleged shortcomings in the notice of proposed rulemaking did not run counter to the legislative objectives of the APA because Vendors' claims that they did not know about the effects the Rules would have on their businesses is belied by the entirety of the administrative record and hundreds of strenuous objections to tighter regulations from the hemp industry that the State addressed at length. 51 Tex. Reg. at 1860-67. If Vendors had not received that opportunity, HHSC would not have altered its proposed rulemaking in the final adoption as it did by, for example, reducing the fee requirements, removing the language "attractive to children" in the

Rules' packaging requirements, or removing certain restrictions on advertising. *Compare* 50 Tex. Reg. at 8486, 8497, 8500, *with* 51 Tex. Reg. at 1861, 1865.

**2. The Rules cannot be declared invalid over a mere technical defect.**

The statutory hallmark of a "technical defect" under the APA is that it is the type of procedural error "that does not result in prejudice to a person's rights or privileges." Tex. Gov't Code § 2001.035(d). A procedural defect that does not prejudice the plaintiff because the plaintiff was already aware of the substance articulated in the rule is not actionable under section 2001.035. *Luminant*, 691 S.W.3d at 465-66.

The State explained that the Vendors were not prejudiced by any of the alleged procedural violations because they had an adequate opportunity to understand the impact of the Rules and develop responses. Appellants.Br.43-45. Specifically, THBC was not prejudiced by the lack of any employment impact statement because its own correspondence before the rules took effect shows that the hemp industry had detailed messaging on the "significant operational, legal, and public-facing consequences that will occur upon the effective date, including impacts to existing investment, Texas-based jobs, and ongoing business operations." 5.RR.35-36.

**3. Vendors' contrary arguments lack merit.**

**a.** Vendors' main point concerning their APA challenge appears to be that recent amendments to the APA during the 2025 legislative session contained in SB14 preclude the State's ability to defend against Vendors' claims here. Appellees.Br.37-39. But those points are irrelevant because the State has never asserted that it is owed deference as to any legal determination. True, SB14 also repealed a provision that would automatically leave a rule in effect if the only violation were of section 2001.022's local-employment-impact requirement. Act of April 9, 2025, 89th Leg., R.S., S.B. 14, § 9. But that change only means that a violation of that statute is included in section 2001.035's list of provisions, the violation of which merely renders the rule "voidable." Appellants.Br.43-44.

**b.** Further, *El Paso Hospital District v. Texas HHSC* (*El Paso I*)'s statement that a rule that does not comply with procedural requirements is "invalid" does not control here. *Contra* Appellees.Br.52 (quoting 247 S.W.3d 709, 715 (Tex. 2008)). The Supreme Court's opinion in 2013, after it declared the challenged rule invalid and enjoined its enforcement in 2008, expressly noted that it could not rely on section 2001.040 to remand the rule; but the current version of section 2001.040 is what the State relies upon here. *El Paso Cnty. Hosp. Dist. v. Tex. HHSC* (*El Paso III*), 400 S.W.3d 72, 75-77 (Tex. 2013). The Court also noted that the previous version of section 2001.035 relied on when HHSC adopted the challenged rule did not contain the "voidable" language the State relies upon in this case: The old version only allowed the rule to be declared "invalid." *Id.* at 76.

The 2008 opinion would have originally left the rule in place under section 2001.040 and was only withdrawn and substituted after a motion for rehearing from the rule challengers. *Tex. HHSC v. El Paso Cnty. Hosp. Dist.* (*El Paso II*), 351 S.W.3d 460, 468 (Tex. App.—Austin 2011), *aff'd*, *El Paso III*, 400 S.W.3d 72. The Court reasoned that section 2001.040, which was passed in 1999, did not apply to the hospitals' rule challenge because the challenged rule dated back to 1986. *Id.* The Texas Supreme Court has not applied section 2001.040 since that decision.

The State conceded in its opening brief that it was not asking the Court to render a judgment dismissing Vendors' APA claims at this time; the State asserted only that the ultra vires claims should be dismissed and that the temporary injunction should be vacated. Thus, Vendors' assertion that the State did not request a remand from the trial court is meaningless and their argument that "[i]f the court opts to not remand, [section 2001.040] never appl[ies]" is wrong. Appellees.Br.49.

First, the State should be allowed to amend its pleadings and request this relief at the appropriate time prior to trial, regardless of whether the temporary injunction remains in place. Tex. R. Civ. P. 63; *see El Paso II*, 351 S.W.3d at 468 (but for the fact that section 2001.040 was not the law when the hospitals' claims accrued, the Texas Supreme Court would have left the challenged rule in place under that statute); *Lane v. Tex. Med. Bd.*, No. 03-21-00593-CV, 2023 WL 4214945, at *10 (Tex. App.—Austin June 28, 2023, pet. denied) (mem. op.). For the same reasons, Vendors' reliance (at 41-42) on *Unified Loans, Inc. v. Pettijohn* is unhelpful here: Plaintiffs there were only requesting declaratory, and not injunctive, relief. 955 S.W.2d 649, 655 (Tex. App.—Austin 1997, no pet.).

Second, the argument that if section 2001.040 doesn't apply, then there is no other option than to enjoin the rule is not correct under the APA's text. If the court doesn't remand because the procedures were violated or because of some other substantive invalidity, then the rule remains in effect because an agency's rules are presumed valid. *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 616 S.W.3d 558, 569

(Tex. 2021). Vendors offer no alternative grounded in the APA's text. The APA requires that, if only a procedural violation of sections 2001.022-2001.034 occurs, the "rule is voidable." Tex. Gov't Code § 2001.035(a). "Voidable" means "[v]alid until annulled." *Voidable*, Black's Law Dictionary (10th ed. 2014). Accordingly, the Rules were required to remain in effect unless declared void. *See El Paso II*, 351 S.W.3d at 468; *cf. also Roccaforte v. Jefferson County*, 341 S.W.3d 919, 923-24 (Tex. 2011) (requiring a voidable trial court judgment to remain effective during subsequent appellate litigation in the absence of a timely objection to its voidability).

Moreover, the Texas Supreme Court has explained that when the Legislature articulates a specific consequence for a state actor's failure to "comply with a command," it is that consequence that controls, not some other consequence that the courts may invent without textual support. *In re Stetson Renewables Holdings, LLC*, 658 S.W.3d 292, 296 & n.8 (Tex. 2022) (orig. proceeding) (citing Tex. Gov't Code § 2001.035). Since the trial court did not declare the Rules void, and the only remedy the APA specifies requires either (1) the rule stays in effect, or (2) the rule is invalidated for good cause, the trial court was not empowered to enter a temporary injunction within the APA's textual waiver of immunity and could only do so as a matter of ultra vires doctrine to restrain the agency officials in their official capacities. Appellants.Br.43-46; *see Kensington Title-Nev., LLC v. Tex. DSHS*, 710 S.W.3d 225, 230 (Tex. 2025).

The State is mindful of Vendors' concerns over the equitable powers of this Court to issue appropriate injunctive relief—even as the Third Court's jurisprudence has recognized. But that power is not a trump card or license to run roughshod over sovereign immunity, and Vendors' argument is flawed whether or not it's inconsistent with the APA's text. Equitable liability is still liability, and suits which effectively seek to impose equitable liability on the State besides damages, such as this one, are suits against the State because they seek to "control state action." *See Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855-56 (Tex. 2002) (citing *W.D. Haden Co. v. Dodgen*, 308 S.W.2d 838, 840 (Tex. 1958)). An injunction against the sovereign is barred.

To be sure, remand will be unnecessary if this Court holds that the State substantially complied with the APA notice-and-comment procedures and is mentioned here both as an alternative form of relief and as statutory context demonstrating that the Legislature has directed the appropriate remedies for certain procedural, non-substantive violations. In either event, the temporary injunction should be vacated.

### B. Vendors' claim of irreparable harm does not outweigh the State and public's interests in a safe, stable legal hemp market.

For the reasons stated above, the Court should vacate the injunction below because Vendors are highly unlikely to establish a probable right to relief on their ultra vires and APA claims. But the Court may independently vacate the injunction because Vendors' claims of irreparable harm are vastly outweighed by the interests of the State, the public, and all other interested persons. *In re State*, 711 S.W.3d 641, 645 (Tex. 2024) (orig. proceeding). Both this Court and the Supreme Court have reiterated that suits by private actors to foreclose the immediate enforcement of Texas's laws requires consideration of "special provisions" allowing executive department prerogatives to operate normally. *In re Paxton*, 727 S.W.3d 490, 492-93

(Tex. 2025) (orig. proceeding) (per curiam). This flows from the bedrock principle that 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) (alteration in original)). These special provisions cannot be cast aside over simple policy disagreements. *See In re Paxton*, 727 S.W.3d at 492.

Vendors' arguments are policy preferences masquerading as equitable justification. *See* Appellees.Br.77-79. These arguments include suggestions that the Texas economy is better off with Vendors' products in it, many need THC products as a form of medicine (though in five years of litigating this issue between *Sky Marketing* and this case, hemp vendors have yet to offer the testimony of a single medical professional regarding the purported health benefits of hemp), and that people will turn to the black market if they cannot buy Vendors' products legally. *Id.* These arguments also fail to engage with the State and public's interests as explained above.

For one thing, if the State cannot pursue expanded enforcement because it is enjoined from collecting the necessary licensing fees, this "dangerously under-regulated marketplace" will continue to suffer from bad actors and a lack of accountability. 4.RR.23-24. This is obvious from Vendors' own witness testimony that five out of six hemp vendors are not following the rules. 3.RR.33. That is not equity for Vendors, it is carte blanche to legalize marijuana.

Vendors' up-front justification that the status quo was not altered because of *Sky Marketing* because Vendors challenge the current THCA testing standards, and not the right to sell delta-8, misapprehends the reach of that case. *Sky Marketing* was not limited to delta-8 products—it validated a controlled-substance determination regarding *all* forms of detectable THC present in hemp and clarified that the Commissioner had the authority to list psychoactive forms of THC on the schedules. 733 S.W.3d at 696-97, 707. Those principles must be allowed to inform DSHS's CHP civil-enforcement efforts to protect the health and safety of Texans.

Vendors' argument that the State "intended" to disrupt and harm the industry is an unfounded ad hominem. Appellees.Br.76. Trial counsel for the State stated in his closing that the State "want[s] a viable consumable hemp product industry in Texas." 4.RR.95. The State simply seeks to ensure compliance with chapter 443, the TDA hemp plan, and federal laws specifying acceptable levels of THC. Vendors preference for unfettered, THC laden products contradicts every authority discussed in this litigation and abuses the limited privilege initially granted by the 2018 Farm Bill.

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

**A.** The trial court expressly ruled that its injunction would apply to the entire industry and its participants, even though this is not a class-action suit. CR.1339. That order did not merely confer a secondary benefit upon third parties not before the court, it deliberately conferred a universal benefit to an unknowable number of Texans not party to this suit, in violation of general principles of equity. Appellants.Br.51-54 (citing *Sky Mktg.*, 733 S.W.3d at 707; *In re Abbott*, 645 S.W.3d 276, 283 (Tex. 2022) (orig. proceeding)).

Conversely, Vendors urge this Court to disregard important limits on its equitable powers to reinstate the injunction for "all commercial participants in Texas's consumable hemp industry." CR.1339. The order does not define who is a "participant" and could conceivably extend to any person wanting to buy a noncompliant CHP. Vendors' reliance (at 84-87) on *Campbell v. Wilder*, 487 S.W.3d 146, 153 (Tex. 2016), and other cases is no help; none dealt with the universal-injunction argument relied upon here in the wake of *Trump v. CASA, Inc.*, 606 U.S. 831, 837 (2025). Cases under the federal APA also do not answer this question—the statutory vacatur remedy in such cases is different from the Texas APA for reasons explained *supra* at 19-23 and in the opening brief. Appellants.Br.43-44.

**B.** The issue of whether the trial court erred by issuing a universal injunction on behalf of an entire industry is properly before this Court and is not waived. *Contra* Appellees.Br.82-83. Although the State did not use the phrase "universal injunction" or frame the issue as the trial court's power to award interim relief to nonparties, whether the district court could award an injunction related to nonparties was fairly included in the argument below. *See St. John Missionary Baptist Church v. Flakes*, 595 S.W.3d 211, 214 (Tex. 2020) (per curiam) ("[A] party sufficiently preserves an issue for review by arguing the issue's substance, even if the party does not call the issue by name.").

Specifically, Vendors and the State have disputed the reach of the judiciary's role in setting matters of policy from this litigation's inception, which is what the court would be doing by conferring universal relief. *E.g.*, 2.RR.72 (Vendors' opening: "According to our legislature, that is their policy choice. That is not a choice for this Court or for the agencies."); 4.RR.64 (State's closing: "[T]his is a separation of powers case . . . . It's not a policy case. We're not asking you to determine who is right or who is wrong with respect to the hemp industry."). The universal-injunction issue goes to the very heart of this separation-of-powers problem, as the Supreme Court recognized. *Sky Mktg.*, 733 S.W.3d at 707. Thus, the substance of this issue was fairly presented below.

The Court should also reach this issue as a matter of fundamental error. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 577 (Tex. 2006). A fundamental error must be either jurisdictional or "adversely affect[] the public's (as opposed to the current parties') interests." *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 512 (Tex. 2018). Here, the district court's error—issuing a temporary injunction with universal scope—adversely affects the public interest because it prevents the State from enforcing the CHP statutes and regulations—and collecting the fees necessary to perform adequate enforcement—against any person or entity, not merely Vendors. Addressing this issue would follow the preferred appellate practice of "reach[ing] the merits of an appeal whenever reasonably possible." *Weekley Homes, LLC v. Paniagua*, 646 S.W.3d 821, 827 (Tex. 2022) (per curiam) (quoting *Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008) (per curiam)). Certainly, Vendors are not surprised or prejudiced by this argument because they argued for a universal injunction from the start. *E.g.*, 4.RR.67 ("we're asking you to enter an order that will affect millions of Texans").

**C.** Last, Vendors conflate a trial court's discretion to consolidate similar cases with the authority to engage in statewide judicial policymaking. Vendors are incorrect and fail to support the proposition that, just because the State does not dispute that two other cases exist raising the same issues, that fact itself automatically allows the trial court to enter a universal injunction. Appellees.Br.88. To the contrary, the State explained why the mere possibility of a "multiplicity of suits" is no justification for upholding a universal injunction based on what the Supreme Court said in multiple recent opinions. Appellants.Br.55. Temporary relief is not automatically appropriate for "any and all nonparties who may find themselves in circumstances similar to the plaintiffs." *Sky Mktg.*, 733 S.W.3d at 707 (quoting *In re Abbott*, 645 S.W.3d at 283 (internal quotation marks omitted)).

## Prayer

For these reasons, this Court should reverse the trial court's order denying the State's plea to the jurisdiction as to Vendors' ultra vires claims, dismiss Vendors' ultra vires claims, and vacate the trial court's temporary injunction.

Respectfully submitted.

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