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Exhibits to Motion for Summary Judgment

Exhibit 1: Declaration of Thomas Monti

Exhibit 2: Declaration of Todd Harris of Happy Cactus

Exhibit 3: Declaration of Chris Oppenheimer of Botany Scientifics

TO THE HONORABLE JEFFREY V. BROWN:

Plaintiffs Thomas Monti, The Happy Cactus Apothecary LLC, and Botany Scientifics LLC move under Federal Rule of Civil Procedure 56 for summary judgment on Counts I and II of the First Amended Complaint.

NATURE AND STAGE OF THE PROCEEDING

Plaintiffs challenge the July 2026 Texas Schedule I classification by the Texas Department of State Health Services of tetrahydrocannabinols in hemp that Congress excluded from federal Schedule I. Following this Court's emergency TRO proceedings (Dkt. 16) and the filing of Plaintiffs' First Amended Complaint (Dkt. 23), Plaintiffs move under Rule 56 for summary judgment on Count I, their principal claim for positive-conflict preemption under 21 U.S.C. § 903, and on Count II, pleaded independently and in the alternative, for vagueness under the Fourteenth Amendment.

SUMMARY OF THE ARGUMENT

Congress excluded hemp—and the tetrahydrocannabinols ("THCs") in hemp—from federal Schedule I. Texas statutory law likewise excludes hemp and THCs in hemp from controlled-substance treatment.

7 U.S.C. § ~~1639~~**1639Q(1)** · TEX. AGRIC. CODE § 121.001

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

Bracketed text: [federal] Texas]. Federal lead-in: "The term 'hemp' means." Texas lead-in: "In this chapter, 'hemp' means."

In adopting its hemp program, Texas "followed the federal approach to distinguishing between marijuana and hemp." *Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 661 (Tex. 2022).

Yet the Texas Department of State Health Services (“DSHS”) used Texas’s controlled-substance scheduling authority—not Texas’s hemp laws—to classify those same THC’s as Schedule I controlled substances. Section 903 supplies Congress’s rule for that federal-state controlled-substance conflict: state law yields where there is a “positive conflict” such that the federal and state provisions “cannot consistently stand together.” That is the conflict presented here. The conflict is classification against classification: the same qualifying THC’s Congress affirmatively removed from federal Schedule I, DSHS re-listed on Texas Schedule I, and the two commands cannot consistently stand together.

Texas may regulate hemp, including through production, health, safety, licensing, testing, labeling, age, manufacture, and product rules. But the challenged action was not taken under those laws. DSHS acted under the Texas Controlled Substances Act, Tex. Health & Safety Code § 481.034(g), to alter Texas Schedule I. The Farm Bill expressly preserves more-stringent state laws regulating the “production of hemp,” 7 U.S.C. § 1639p(a)(3)(A), but the challenged classification reaches possession, use, distribution, and sale of finished products through controlled-substance law. Section 903 therefore supplies the rule of decision for the scheduling conflict.

Alternatively, if the Court rejects Count I and gives simultaneous effect to Texas’s statutory hemp exclusions and DSHS’s Schedule I classification, Count II follows. Texas law then points in materially different directions: it excludes hemp and THC’s in hemp from “controlled substance,” directs DSHS’s consumable-hemp rules to reflect that hemp-derived cannabinoid products are foods rather than controlled substances, places “tetrahydrocannabinols, other than marihuana” in Penalty Group 2 while excluding hemp

from “marihuana,” and nevertheless places qualifying hemp THC’s in Schedule I. No Texas statute, schedule, or rule says which provision controls. That scheme fails to provide fair notice at the felony line and permits arbitrary enforcement. The conflicting provisions supply the predicate for criminal liability under Tex. Health & Safety Code §§ 481.113, 481.116, and 481.119. Under Penalty Group 2, the criminal exposure is felony grade at every level: possession of less than one gram of a covered THC is a state jail felony, while larger quantities carry up to first-degree felony penalties. Tex. Health & Safety Code § 481.103(a)(1). Police, prosecutors, and regulators are left to resolve on an ad hoc basis whether a given hemp-derived THC is lawful or Schedule I contraband, with no ascertainable standard.

I. INTRODUCTION

This case presents a narrow conflict between federal and Texas controlled-substance classifications. The “Products at Issue” are hemp-derived products containing THC’s other than delta-9 THC, each containing no more than 0.3% delta-9 THC on a dry-weight basis. Congress expressly excluded “tetrahydrocannabinols in hemp” from federal Schedule I. Texas statutory law likewise excludes hemp and THC’s in hemp from controlled-substance treatment.

DSHS nevertheless used the Texas Controlled Substances Act to place those same THC’s within Texas Schedule I, except for up to 0.3% delta-9 THC. The question under § 903 is whether those contrary controlled-substance classifications can consistently stand together. Plaintiffs seek judgment first as applied to themselves and the Products at Issue

and, in the alternative, facially to the extent the new classification places within Texas Schedule I THC's in hemp that Congress excluded from federal Schedule I.

The Supremacy Clause supplies the starting point. U.S. CONST. art. VI, cl. 2. *Gonzales v. Raich* arose from California's authorization of medical marijuana in the face of the federal Controlled Substances Act. 545 U.S. 1, 5–7 (2005). In that context, the Court stated that “[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.” *Id.* at 29. The Tenth Circuit has repeatedly applied that principle to the federal Controlled Substances Act (the “CSA”). *Standing Akimbo, LLC v. United States*, 955 F.3d 1146, 1158 (10th Cir. 2020), summarized it: “the CSA reigns supreme.”

Defendants may characterize the challenged action as merely stricter “hemp regulation.” But DSHS did not use Texas's agriculture or consumable-hemp laws to create the challenged classification. Those laws regulate cultivation, licensing, testing, manufacture, and products; they do not authorize DSHS to create or amend Schedule I. DSHS acted under Tex. Health & Safety Code § 481.034(g), part of the Texas Controlled Substances Act. Congress separately preserved more-stringent state laws regulating the “production of hemp,” 7 U.S.C. § 1639p(a)(3)(A). The challenged Schedule I classification is not such a production rule: it supplies controlled-substance consequences for possession, use, distribution, and sale of finished products. Section 903 is Congress's specific rule for the resulting controlled-substance conflict.

If the Court rejects Count I and instead gives simultaneous effect to Texas's statutory hemp exclusions and the DSHS schedule, Count II follows. The enacted

provisions do not supply a comprehensible rule for deciding whether a qualifying hemp THC is excluded from controlled-substance treatment, treated as a consumable-hemp product, placed in Penalty Group 2, or treated as Schedule I contraband. A person who knows exactly what product he possesses can read Texas law and receive opposite answers. The Court should enter judgment for Plaintiffs on Count I or, independently and in the alternative, Count II.

II. UNDISPUTED MATERIAL FACTS AND BACKGROUND

The following material facts are not genuinely disputed:

1. Congress excluded “tetrahydrocannabinols in hemp,” as federally defined, from federal Schedule I. 21 U.S.C. § 812(c), Schedule I(c)(17).
2. Texas statutory law excludes “hemp” and “the tetrahydrocannabinols in hemp” from the definition of a controlled substance. Tex. Health & Safety Code § 481.002(5). Texas law also directs that DSHS’s consumable-hemp rules reflect that hemp-derived cannabinoid products are considered foods, not controlled substances. *Id.* § 443.204(1)-(2).
3. Both State and federal law define “hemp” to include *Cannabis sativa* L. and its derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers containing no more than 0.3% delta-9 THC on a dry-weight basis. Tex. Agric. Code § 121.001; 7 U.S.C. § 1639o(1).
4. On July 10, 2026, DSHS published the Texas Schedule I definitions of “Tetrahydrocannabinols” and “Marihuana extract” now in effect, under which the only

THC in hemp excepted from Schedule I is “up to 0.3% delta-9 tetrahydrocannabinols in hemp.” 51 Tex. Reg. 4597, 4600-02 (July 10, 2026).

5. Plaintiffs’ Products at Issue are hemp-derived and contain THC’s other than delta-9 THC, each containing no more than 0.3% delta-9 THC on a dry-weight basis. Ex. 1 (Monti Decl.) ¶ 7; Ex. 2 (Happy Cactus Decl.) ¶ 10; Ex. 3 (Botany Decl.) ¶¶ 5-6.

Figure 1: Text Comparison

	FEDERAL LAW	TEXAS LAW	NEW TEXAS THC CLASSIFICATION
Tetrahydrocannabinols	21 U.S.C. § 812(c), SCH. I(c)(17) "Tetrahydrocannabinols, except for tetrahydrocannabinols in hemp (as defined under section 1639g of title 7)." 21 C.F.R. § 1308.11(p)(31) "Tetrahydrocannabinols (i) Meaning tetrahydrocannabinols, except as in paragraph (d)(31)(ii) of this section (ii) Tetrahydrocannabinols does not include any material, compound, mixture, or preparation that falls within the definition of hemp set forth in 7 U.S.C. 1639g."	TEX. HEALTH & SAFETY CODE § 481.002(5) "Controlled substance" means a substance . . . listed in Schedules I through V or Penalty Group 1, 1-A, 1-B, 2, 2-A, 3, or 4. . . . The term does not include hemp, as defined by Section 121.001, Agriculture Code, or the tetrahydrocannabinols in hemp." TEX. HEALTH & SAFETY CODE § 481.103(A)(1) "Penalty Group 2 consists of: (1) any quantity of the following hallucinogenic substances . . . : Tetrahydrocannabinols, other than marihuana"	SCHEDULE I, ITEM *(31) "Tetrahydrocannabinols, meaning tetrahydrocannabinols naturally contained in a plant of the genus Cannabis (cannabis plant), except for up to 0.3% delta-9-tetrahydrocannabinols in hemp (as defined under Texas Agriculture Code 121)"
Marihuana	21 U.S.C. § 802(16)(B) "The terms 'marihuana' and 'marijuana' do not include—(i) hemp, as defined in section 1639g of title 7"	TEX. HEALTH & SAFETY CODE § 481.002(26) "Marihuana" means the plant Cannabis sativa L., whether growing or not, the seeds of that plant, and every compound, manufacture, salt, derivative, mixture, or preparation of that plant or its seeds. The term does not include: . . . (F) hemp, as that term is defined by Section 121.001, Agriculture Code."	—
Marihuana extract	21 C.F.R. § 1308.11(p)(58) "Meaning an extract containing one or more cannabinoids that has been derived from any plant of the genus Cannabis, containing greater than 0.3% delta-9-tetrahydrocannabinol on a dry weight basis, other than the separated resin (whether crude or purified) obtained from the plant."	—	SCHEDULE I, ITEM *(58) "Marihuana extract, meaning an extract containing one or more cannabinoids that has been derived from any plant of the genus Cannabis, except for extracts derived from hemp (as defined under Texas Agriculture Code 121) containing up to 0.3% delta-9-tetrahydrocannabinol on a dry weight basis, other than separated resin (whether crude or purified) obtained from the plant."

Notice Reinstating Clarifications to the Definitions of Tetrahydrocannabinols and Marihuana Extract to the 2021 Schedule of Controlled Substances, Pursuant to the Opinion Delivered by the Supreme Court of Texas on May 1, 2026, 51 Tex. Reg. 4597 (July 10, 2026). Emphasis added.

A. Congress Excluded Hemp THC’s from Federal Schedule I.

The CSA is a comprehensive federal controlled-substance regime—the “closed regulatory system” described in *Raich*. 545 U.S. at 13. In 2018 Congress defined hemp to include Cannabis sativa L. and its derivatives, extracts, cannabinoids, isomers, acids, salts,

and salts of isomers containing no more than 0.3% delta-9 THC on a dry-weight basis. 7 U.S.C. § 1639o(1).¹

Congress then amended the CSA itself. It excluded hemp from “marihuana,” 21 U.S.C. § 802(16)(B)(i), and amended Schedule I to exclude “tetrahydrocannabinols in hemp (as defined under section 1639o of title 7).” *Id.* § 812(c), Schedule I(c)(17).

B. Texas Adopted the Same Statutory Exclusion.

In 2019 Texas adopted the federal hemp definition and amended its Controlled Substances Act so that “controlled substance” does not include “hemp” or “the tetrahydrocannabinols in hemp.” Tex. Agric. Code § 121.001; Tex. Health & Safety Code § 481.002(5). Texas law also directed that DSHS’s consumable-hemp rules reflect that hemp-derived cannabinoid products are considered foods, not controlled substances. *Id.* § 443.204(1)-(2).

C. DEA Conformed its Regulations to Comply with Federal Law.

DEA conformed its regulations and excluded “any material, compound, mixture, or preparation that falls within the definition of hemp set forth in 7 U.S.C. 1639o” from Schedule I THC’s, explaining it had “no discretion” to draw a different line. Implementation

¹ Congress has amended § 1639o(1), but that amendment is not yet effective and does not affect the present governing definition. Continuing Appropriations, Agriculture, Legislative Branch, Military Construction and Veterans Affairs, and Extensions Act, 2026, Pub. L. No. 119-37, div. B, tit. VII, § 781, 139 Stat. 495, 558–61 (2025). Congress has since postponed the amendment’s original November 12, 2026 effective date to December 11, 2026 for most products, including Products at Issue. Continuing Appropriations and Extensions Act, 2027, Pub. L. No. 119-103, § 2019, 140 Stat. 987, 1003 (2026). Thus, the existing § 1639o(1) definition remains the operative federal definition for the Products at Issue unless and until the amendment takes effect.

of the Agriculture Improvement Act of 2018, 85 Fed. Reg. 51,639, 51,642 (Aug. 21, 2020) (interim final rule) (codified at 21 C.F.R. pts. 1308, 1312).

D. DSHS Put the Same Substances into Texas Schedule I.

On July 10, 2026, DSHS published the Texas Schedule I definitions of “Tetrahydrocannabinols” and “Marihuana extract” now in effect. 51 Tex. Reg. at 4600-02. Under those definitions, the only THC in hemp excepted from Schedule I is “up to 0.3% delta-9-tetrahydrocannabinols in hemp.” *Id.* at 4600 (the “New Texas THC Classification”). The New Texas THC Classification placed THC in qualifying hemp within Texas Schedule I, even though Congress excluded those THC from federal Schedule I.

On July 29, 2026, two days prior to its effective date, Happy Cactus received an email from the Texas Health and Human Services Commission notifying it that the New Texas THC Classification would go into effect and warning that affected products “may be detained and referred to law enforcement.” Happy Cactus Decl. ¶ 13. The classification supplies the controlled-substance predicate for criminal liability under, among other provisions, Tex. Health & Safety Code §§ 481.113, 481.116, and 481.119, and for civil, licensing, embargo, detention, and seizure consequences.

E. Plaintiffs Changed Their Conduct Because of the Classification.

Monti is a retired police officer and Texas hemp consumer who resides in League City, Galveston County, and manages a licensed hemp retail establishment in Bacliff. Before the New Texas THC Classification took effect, he possessed, used, and sold hemp-

derived consumable products containing THC's other than delta-9 THC that do not exceed 0.3% delta-9 THC on a dry-weight basis. He ceased that conduct because of the challenged classification and would resume it absent enforcement. Monti Decl. ¶¶ 3-4, 7-13.

Happy Cactus, a Texas consumable-hemp licensee, sold hemp-derived consumable products containing THC's other than delta-9 THC, including its flagship delta-8 THC gummy, that do not exceed 0.3% delta-9 THC on a dry-weight basis. It ceased selling those products because of the challenged classification and would resume possessing, packaging, distributing, and selling them absent the classification and threatened enforcement. Happy Cactus Decl. ¶¶ 4-5, 7, 12-16.

Botany, a Texas licensed hemp business, sells a hemp-derived delta-8 THC gummy that does not exceed 0.3% delta-9 THC on a dry-weight basis, including to customers in Texas. Because of the challenged classification, Botany ceased selling that product in Texas, altered its fulfillment and warehousing operations, and faces seizure or embargo of inventory. Botany Decl. ¶¶ 3, 5, 7-11.

III. STANDARD OF REVIEW

Summary judgment is proper when no genuine dispute of material fact exists and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The movant may discharge its initial burden by pointing to the absence of a genuine dispute on the elements at issue, whereupon the nonmovant must come forward with specific facts showing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986). Preemption is a question of law.

Franks Inv. Co. v. Union Pac. R.R. Co., 593 F.3d 404, 407 (5th Cir. 2010) (en banc). The material historical facts here are established by statutes, regulations, official notices, and declarations.

IV. STANDING AND PROPER DEFENDANTS

Each Plaintiff has standing under Article III to seek the declaratory and injunctive relief requested. To establish standing, a plaintiff must show (1) an injury in fact that is concrete, particularized, and actual or imminent, (2) that is fairly traceable to the challenged conduct, and (3) that is likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). The presence of one plaintiff with standing to pursue each form of relief satisfies Article III’s case-or-controversy requirement. *Book People, Inc. v. Wong*, 91 F.4th 318, 329 (5th Cir. 2024). A pre-enforcement plaintiff need not await arrest where he intends to engage in arguably proscribed conduct and faces a credible threat of enforcement. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–64 (2014); *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979). Each Plaintiff ceased or materially altered identified conduct because the New Texas THC Classification is in effect, and no Defendant has disclaimed enforcement. Plaintiffs would immediately resume such activity but for the New Texas THC Classification and threatened enforcement. Limiting activity to delta-9 THC products has required Plaintiffs to forgo selling the Products at Issue and forced Plaintiff Monti to further forgo personal possession and use. Declaratory and prospective injunctive relief would redress those injuries because each Defendant holds a distinct enforcement lever over the challenged

classification. Monti Decl. ¶¶ 11-17; Happy Cactus Decl. ¶¶ 14-21; Botany Decl. ¶¶ 7-12. Because Defendants are sued only in their official capacities and Plaintiffs seek no damages, Plaintiffs' economic losses cannot be remedied by damages in this action.

The Defendants have the particular enforcement connections required for prospective relief. *See Ex parte Young*, 209 U.S. 123, 157 (1908); *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). Specifically, the Defendants' connections include:

Garcia is charged with establishing and modifying Texas controlled-substance schedules. Tex. Health & Safety Code §§ 481.032(a), 481.034(a), (g).

Paxton has a statutory enforcement connection because Chapter 443 makes Chapter 431 applicable to consumable-hemp products and license holders, Tex. Health & Safety Code §§ 443.002, 431.011. DSHS may refer violations to him and, upon referral, § 431.060(a) makes his duty mandatory: he "shall initiate and prosecute appropriate proceedings without delay." The Attorney General may bring a civil action at DSHS's request under § 431.058 and may pursue specified civil and administrative penalties under § 431.0585. The Texas Supreme Court identified this civil-enforcement authority—including § 431.058—among the enforcement mechanisms ("teeth") that make the schedules enforceable. *Tex. Dep't of State Health Servs. v. Sky Mktg. Corp.*, 733 S.W.3d 689, 700 (Tex. 2026).

Cusick prosecutes Schedule I offenses in Galveston County, and Fullen also possesses arrest and seizure authority there.

No Plaintiff was a party to *Sky Marketing*, and no Plaintiff is subject to a pending state enforcement proceeding. *Sky Marketing* did not decide the federal claims asserted here, and nothing in that proceeding bars this Court from reaching them.

V. ARGUMENT

A. Congress' Controlled-Substance Classification Controls.

The CSA's supremacy principle is settled. *Raich* states that the Supremacy Clause requires federal law to prevail when federal and state law conflict. 545 U.S. at 29. Indeed, “[i]t is beyond peradventure that federal power over commerce is ‘superior to that of the States to provide for the welfare or necessities of their inhabitants,’” and “state action cannot circumscribe Congress’ plenary commerce power.” *Id.* (citation omitted).

Standing Akimbo states that “the CSA reigns supreme.” 955 F.3d at 1158. *Feinberg v. Comm’r* likewise explains that state marijuana legalization cannot overcome federal law. 916 F.3d 1330, 1338 n.3 (10th Cir. 2019); *see also Speidell v. United States*, 978 F.3d 731, 741 (10th Cir. 2020).

Most recently, the Sixth Circuit reiterated the same *Raich* principle in the marijuana context: “Through the CSA, Congress gave us our policy—state law notwithstanding.” *Hello Farms Licensing MI, LLC v. GR Vending MI, LLC*, No. 25-1759, 2026 WL 2664747, at *10 (6th Cir. Sept. 10, 2026). *Hello Farms* involved conduct federal law prohibited while state law permitted it. This case presents the converse scheduling conflict: Congress expressly removed qualifying hemp THCs from federal Schedule I, while Texas placed

those same THC's into Texas Schedule I. The direction changes; the supremacy principle does not.

The point is not that federal descheduling creates a general federal license to sell or possess hemp products free from all state regulation. It does not. The point is narrower: Congress made an express controlled-substance classification decision inside the CSA itself, and § 903 supplies the rule for determining whether a contrary state controlled-substance classification can consistently stand with that federal decision.

Fifth Circuit law confirms that conflict preemption can apply when state law prohibits conduct Congress affirmatively chose to leave outside a federal prohibition. *Teltech Sys., Inc. v. Bryant*, 702 F.3d 232, 236–40 (5th Cir. 2012). *Teltech* involved an express federal authorization and therefore is not factually identical. Its relevance is the principle that a State may not erase a federal statutory boundary simply by imposing a broader prohibition where doing so conflicts with Congress's enacted choice. Here, the textual anchor is stronger and more specific to controlled substances: Congress amended Schedule I itself to exclude "tetrahydrocannabinols in hemp," and § 903 expressly governs conflicts between the CSA and state controlled-substance law.

Congress did not merely decline to regulate hemp. It defined hemp broadly, excluded hemp from "marihuana," and separately amended Schedule I itself to exclude "tetrahydrocannabinols in hemp." 7 U.S.C. § 1639o(1); 21 U.S.C. §§ 802(16)(B)(i), 812(c), Schedule I(c)(17). DEA recognized that it had "no discretion" to draw a different controlled-substance line. 85 Fed. Reg. at 51,642. Congress therefore changed the

controlled-substance boundary of the CSA’s closed regulatory system by enacted text, not enforcement discretion.

The conflict is therefore classification against classification. Congress excluded these substances from federal Schedule I. DSHS put them into Texas Schedule I. This is not a difference in penalty, licensing, testing, labeling, or some supplementary condition capable of operating alongside federal law. It is a contrary controlled-substance classification.

B. The Products at Issue Are “Tetrahydrocannabinols in Hemp” That Congress Excluded from Federal Schedule I.

The federal exclusion turns on a single, source-based metric. “Hemp” means the plant *Cannabis sativa* L. and “all derivatives, extracts, [and] cannabinoids . . . with a delta-9 [THC] concentration of not more than 0.3 percent on a dry weight basis.” 7 U.S.C. § 1639o(1). Schedule I incorporates that same definition when it excludes “tetrahydrocannabinols in hemp.” 21 U.S.C. § 812(c), Schedule I(c)(17). The only statutory line between controlled marijuana and lawful hemp is the delta-9 THC concentration; the definition does not turn on the method of manufacture or the manner in which a cannabinoid is produced. *AK Futures LLC v. Boyd St. Distro, LLC*, 35 F.4th 682, 690–93 (9th Cir. 2022) (Section 1639o is “unambiguous and precludes a distinction based on manufacturing method”); *accord Anderson v. Diamondback Inv. Grp., LLC*, 117 F.4th 165, 185–88 (4th Cir. 2024).

Both requirements are established: each Product at Issue is derived from the *Cannabis sativa* L. hemp plant and contains no more than 0.3% delta-9 THC on a dry-weight basis. The Products at Issue are therefore “tetrahydrocannabinols in hemp” that Congress excluded from federal Schedule I. 21 U.S.C. § 812(c), Schedule I(c)(17).

The DEA’s regulation schedules THC’s but expressly exempts “any material, compound, mixture, or preparation that falls within the definition of hemp set forth in 7 U.S.C. 1639o.” 21 C.F.R. § 1308.11(d)(31)(ii). Source, not method of manufacture, is dispositive. *AK Futures*, 35 F.4th at 692; *Anderson*, 117 F.4th at 187–88. Because each Product at Issue is derived from the hemp plant and remains at or below 0.3% delta-9 THC, it falls within the federal exclusion regardless of any intermediate processing.

C. Texas’s Hemp Laws Do Not Supply the Scheduling Power DSHS Exercised.

Defendants are expected to characterize the challenged action as Texas merely “regulating hemp.” That characterization conflates the substance affected with the governmental power exercised. Hemp may be the substance affected; controlled-substance scheduling is the power DSHS exercised.

Texas’s agriculture laws authorize the Department of Agriculture to administer cultivation rules, sampling, inspection, testing, licensing, and related production requirements. *See* Tex. Agric. Code § 122.051. The consumable-hemp chapter authorizes rules to administer and enforce that chapter and establishes licensing and product regulation. Tex. Health & Safety Code §§ 443.051, 443.101 et seq. Neither statutory scheme authorizes DSHS to establish or amend Texas Schedule I.

That authority appears elsewhere: the Texas Controlled Substances Act charges DSHS with establishing and modifying controlled-substance schedules. Tex. Health & Safety Code §§ 481.032(a), 481.034(a), (g). DSHS invoked that controlled-substance power here. The Texas Supreme Court itself held that the Commissioner acted under § 481.034(g). *See Sky Marketing*, 733 S.W.3d at 701.

The distinction does not deny Texas authority to regulate hemp more strictly through lawful health, safety, licensing, testing, labeling, age, manufacture, or production rules. Indeed, Congress expressly preserved state laws regulating the “production of hemp” that are “more stringent than” federal requirements. 7 U.S.C. § 1639p(a)(3)(A). But the New Texas THC Classification is not a production rule. It is a controlled-substance classification adopted under § 481.034(g) that reaches possession, use, distribution, and sale of finished products. The specific savings clause for more-stringent production regulation therefore does not answer this controlled-substance scheduling conflict; § 903 does.

The contrary theory would have no evident limiting principle. A State could identify a substance as hemp for agricultural purposes, then characterize its use of an independent controlled-substance statute to place that same substance into Schedule I as “hemp regulation,” even where Congress affirmatively excluded it from the federal schedules. Nothing in Texas’s hemp statutes confers that scheduling power, and nothing in the CSA makes § 903 turn on the label a State gives the substance rather than the controlled-substance power it actually exercised.

D. Section 903 Expressly Resolves the Scheduling Conflict.

Congress expressly preserved concurrent state controlled-substance regulation, but supplied a boundary: state law yields when “there is a positive conflict” with the CSA “so that the two cannot consistently stand together.” 21 U.S.C. § 903.

Here the federal Schedule I listing says “Tetrahydrocannabinols, except for tetrahydrocannabinols in hemp.” 21 U.S.C. § 812(c), Schedule I(c)(17). The Texas Schedule I classification includes THC in hemp except for up to 0.3% delta-9 THC. 51 Tex. Reg. at 4600. The two governments assign contrary controlled-substance classifications to the same qualifying substances. This is a positive conflict in the statutory sense, not merely a state rule that imposes a higher penalty or an additional condition: federal law commands that these THC in hemp are outside Schedule I, while Texas law commands that they are inside Schedule I. Those opposite classification commands cannot “consistently stand together” within § 903.

Section 903 does not require the Court to decide which drug policy is preferable. Congress supplied the rule of decision. The CSA is the “closed regulatory system” described in *Raich*, 545 U.S. at 13, and Congress made an affirmative classification choice within that system—not a mere decision to remain silent or refrain from regulating. A contrary state classification is displaced to the extent it conflicts with that federal choice. *Teltech* reinforces the same principle, although it involved express federal authorization: a State may not criminalize what Congress affirmatively placed outside a federal prohibition where the state rule conflicts with the federal choice. *Teltech*, 702 F.3d at 236–40. Federal law controls to the extent of the positive conflict.

E. Plaintiffs Need Not Stop Their Conduct to Eliminate the Conflict.

Defendants cannot answer the conflict by saying Plaintiffs may comply with both laws simply by abandoning the affected conduct. *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 488 (2013), rejected that “stop-selling” rationale. Preemption analysis presumes the regulated actor is not required to cease acting altogether to avoid inconsistent legal commands; otherwise, impossibility preemption would become “all but meaningless.” *Id.* The Fifth Circuit applies that rule, rejecting the argument that a party avoids a conflict because it “could have complied with [its] duties under both federal and state law by declining to sell.” *Johnson v. Teva Pharms. USA, Inc.*, 758 F.3d 605, 613 (5th Cir. 2014).

The question under § 903 is whether the competing controlled-substance classifications can consistently stand together, not whether Plaintiffs can avoid experiencing the conflict by leaving the market or ceasing possession and use.

F. *Sky Marketing* Decided State Authority, Not Federal Preemption.

In *Sky Marketing*, the Texas Supreme Court held that DSHS lawfully modified the Schedule I terms under § 481.034(g) and that the modifications did not conflict with the 2019 Texas Farm Bill. 733 S.W.3d at 701-06. Plaintiffs do not ask this Court to relitigate that state-law holding.

That holding begins the federal inquiry. It does not end it. The Supremacy Clause necessarily operates on otherwise valid state law. *Sky Marketing* establishes the state-law source and validity of DSHS’s scheduling action. Section 903 determines whether the resulting Texas controlled-substance classification may stand with the CSA. This federal analysis assumes, as Plaintiffs’ Count I does, that DSHS’s action is valid Texas law, as *Sky*

Marketing held. The question, then, is what § 903 requires when that valid state classification conflicts with federal Schedule I.

G. Alternatively, the Combined Texas Provisions Are Unconstitutionally Vague.

Count II is independent and alternative. Plaintiffs plead an as-applied vagueness challenge as the primary theory and, in the alternative, a facial challenge. A penal enactment offends due process and is void for vagueness for either of two independent reasons: if it fails to give a person of ordinary intelligence fair notice of what it prohibits, or if it is so standardless that it authorizes or encourages arbitrary and discriminatory enforcement. U.S. CONST. amend. XIV; *Johnson v. United States*, 576 U.S. 591, 595 (2015); *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983); *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). The prohibition against vague criminal statutes is a fundamental due-process requirement, and a statute that fails to give adequate notice of the conduct it prohibits violates one of the most basic principles of due process. *See Johnson*, 576 U.S. at 595-96. Where a law carries criminal consequences, those concerns are at their strongest. Here, the conflicting provisions supply the predicate for criminal liability under Tex. Health & Safety Code §§ 481.113, 481.116, and 481.119; and under Penalty Group 2, the criminal exposure is felony-grade at every level: possession of less than one gram of a covered THC is a state jail felony, while larger quantities carry up to first-degree felony penalties. Tex. Health & Safety Code § 481.103(a)(1). The heightened vagueness standard for criminal statutes therefore applies. *See Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498–99 (1982); *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493,

507-08 (5th Cir. 2001) (distinguishing criminal and quasi-criminal enactments from purely civil economic regulation).

The vagueness doctrine's "more important aspect" is the requirement that a law "establish minimal guidelines to govern law enforcement;" a statute that "vests virtually complete discretion in the hands of the police" to decide what is lawful is void because it invites arbitrary enforcement. *Kolender*, 461 U.S. at 358, 361. Because Texas law simultaneously excludes the THC's in hemp from controlled-substance treatment, treats hemp-derived cannabinoid products as foods, and places the same THC's in Schedule I, no ascertainable rule tells police, prosecutors, or regulators which provision governs a given hemp product. The statute thus leaves the felony line to "ad hoc and subjective" judgment. *See Grayned*, 408 U.S. at 109.

Nor can Defendants save the scheme by pointing to some THC they contend is plainly covered. The Supreme Court has held that its "holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson*, 576 U.S. at 602. That a person possessing some amount and variant of a particular THC may be plainly within Schedule I does not cure the uncertainty here, where the law itself provides irreconcilable answers.

Texas law contains four provisions pointing in materially different directions. First, § 481.002(5) excludes "hemp" and "the tetrahydrocannabinols in hemp" from "controlled substance." Second, the New Texas THC Classification nevertheless places THC's in qualifying hemp within Schedule I except for up to 0.3% delta-9 THC. 51 Tex. Reg. at 4600. Third, § 481.103(a)(1) places "[t]etrahydrocannabinols, other than marihuana" in

Penalty Group 2, while § 481.002(26)(F) excludes hemp from “marihuana.” Fourth, § 443.204(1)-(2) directs DSHS’s consumable-hemp rules to reflect that hemp-derived cannabinoid products are considered foods, not controlled substances.

No Texas statute, schedule, or rule states which provision controls. *Sky Marketing* did not establish where the statutory exclusion ends, and Schedule I begins. Construed together, the provisions do not give a person of ordinary intelligence a comprehensible rule for determining whether a THC in hemp is excluded from controlled-substance treatment or instead constitutes a Texas Schedule I controlled substance. The uncertainty concerns what the law prohibits at all, not whether Plaintiffs know the facts of their conduct. A person who knows exactly what product he possesses can read Texas law and receive opposite answers. The same uncertainty leaves police, prosecutors, and regulators to decide on an ad hoc basis whether a given hemp-derived THC is lawful or Schedule I contraband, with no ascertainable standard to guide that determination.

That is not uncertainty at the margin. It is uncertainty at the felony line. The New Texas THC Classification supplies a predicate for felony liability under Tex. Health & Safety Code §§ 481.113, 481.116, and 481.119; Penalty Group 2 likewise carries felony consequences under § 481.103(a)(1). Yet Texas statutory law simultaneously excludes hemp THC’s from controlled-substance treatment and directs that qualifying consumable-hemp products be treated as foods rather than controlled substances. *Id.* § 443.204(1)-(2). The resulting scheme leaves police, prosecutors, regulators, and regulated parties without an ascertainable rule and permits arbitrary or inconsistent enforcement. Monti stopped possessing, using, and selling affected products rather than risk prosecution; Happy Cactus

stopped selling its flagship delta-8 product; and Botany altered its operations rather than risk seizure or embargo. If Count I does not resolve the conflict, Count II requires judgment for Plaintiffs.

Because Texas law at once excludes hemp THC's from controlled-substance treatment, directs that qualifying consumable-hemp products be treated as foods, and yet places the same THC's in Schedule I, an officer confronting a federally compliant hemp product has no ascertainable rule for deciding whether it is lawful or Schedule I contraband. The felony line thus turns on the enforcer's choice among contradictory provisions rather than on any standard the Legislature supplied—precisely the “standardless sweep” that “vests virtually complete discretion in the hands of the police” and supplies neither fair notice nor the minimal enforcement standards due process requires. *Kolender*, 461 U.S. at 358.

H. Relief Should Track the Conflict and *CASA*.

Conflict preemption renders state law without effect only to the extent of the conflict. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Plaintiffs therefore seek a declaration that the New Texas THC Classification is preempted under § 903 as applied to Plaintiffs and the Products at Issue and, in the alternative, facially, to the extent it places within Texas Schedule I THC's in hemp that Congress excluded from federal Schedule I. The requested declaration identifies the legal boundary created by § 903; it does not create a plaintiff-specific federal Schedule I.

On Count II, Plaintiffs likewise seek judgment first as applied to Plaintiffs and the Products at Issue and, in the alternative, facially. Consistent with *Trump v. CASA, Inc.*, 606

U.S. 831 (2025), Plaintiffs seek coercive injunctive relief only against the named Defendants, within their respective enforcement authority, and only as necessary to afford complete relief to the named Plaintiffs and persons properly covered by Rule 65(d)(2). Plaintiffs do not seek a universal injunction. A declaratory judgment adjudicates the federal preemption or constitutional vagueness question; the requested injunction is limited as *CASA* requires.

VI. CONCLUSION

Congress excluded THC_s in hemp from federal Schedule I. DSHS used Texas controlled-substance scheduling authority to place those same THC_s within Texas Schedule I. Section 903 supplies the rule for that controlled-substance conflict. Alternatively, if Texas's statutory exclusions and DSHS's Schedule I classification operate together, the resulting felony line is unconstitutionally vague.

Plaintiffs respectfully request summary judgment declaring the New Texas THC Classification preempted and without effect under § 903 as applied to Plaintiffs and the Products at Issue and, in the alternative, facially, to the extent of the identified federal conflict; alternatively, declaring the conflicting Texas provisions void for vagueness as applied to Plaintiffs and the Products at Issue and, in the alternative, facially; and granting prospective injunctive relief consistent with Rule 65(d) and *CASA*, together with such further relief as the Court deems proper.

Dated: September 29, 2026.

Respectfully submitted,

/s/ Andrea Hope Steel
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on September 29, 2026, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will serve as notice of electronic filing on all counsel of record.

/s/ Andrea Hope Steel
Andrea Hope Steel

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

THOMAS MONTI, THE HAPPY
CACTUS APOTHECARY LLC, and
BOTANY SCIENTIFICS LLC,

Plaintiffs,

S

Civil Action No. 3:26-cv-00254

V.

IMELDA GARCIA, in her official capacity as Interim Commissioner of the Texas Department of State Health Services, KEN PAXTON, in his official capacity as Attorney General of Texas; KENNETH A. CUSICK, in his official capacity as Galveston County Criminal District Attorney; and JIMMY FULLEN, in his official capacity as Sheriff of Galveston County,

Defendants.

**DECLARATION OF THOMAS MONTI IN SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT**
Declaration of Thomas Monti

I, Thomas Monti, declare as follows:

I. Introduction and Basis of Knowledge

1. My name is Thomas Monti. I am one of the Plaintiffs in this action.
2. I am over the age of eighteen and am competent to testify to the matters stated in this declaration. I make this declaration based on my personal knowledge and submit it in support of Plaintiffs' Motion for Summary Judgment. If called as a witness, I could and would testify competently to the facts stated below.

II. Background

3. I am a retired law enforcement officer residing in League City, Galveston County, Texas. I was employed by the Illinois State Police for 23 years from May 1, 1997, until I retired in good standing on August 31, 2020. Based on my training and experience, including work in narcotics enforcement, I am familiar with federal and state controlled-substance laws.
4. I am currently the manager at Burners Vape/Smoke/Herb, a DSHS-licensed retail storefront in Bacliff, Galveston County, Texas (the “Store”). Before July 31, 2026, a significant portion of the Store's sales came from hemp-derived products containing THC's other than delta-9 THC, with no more than 0.3% delta-9 THC on a dry-weight basis. I have also purchased, possessed, and used hemp-derived products for personal health and wellness use.
5. I was not a party to *Tex. Dep’t of State Health Servs. v. Sky Mktg. Corp.*, 733 S.W.3d 689 (Tex. 2026), and am not currently subject to a pending state enforcement proceeding.

III. The New Texas THC Classification and the Products at Issue

6. On July 10, 2026, the Texas Department of State Health Services published modifications to the Texas Schedule I definitions of “Tetrahydrocannabinols” and “Marihuana Extract,” 51 Tex. Reg. 4597 (July 10, 2026), effective July 31, 2026 (the “New Texas THC Classification”).

7. Before July 31, 2026, I possessed, used, and sold hemp-derived products derived from the Cannabis sativa L. plant that contain THC's other than delta-9 THC and no more than 0.3% delta-9 THC on a dry weight basis (the "Products at Issue").
8. Before July 31, 2026, I sold Products at Issue from the Store's inventory as part of my regular duties at the Store. Each of the Products at Issue was labeled as hemp-derived and accompanied by a certificate of analysis reflecting a delta-9 THC concentration of no more than 0.3% on a dry-weight basis. I am familiar with those certificates and reviewed them in the course of managing the Store and serving customers, and the Store maintains those certificates in the ordinary course of business and makes them available upon request.
9. The Products at Issue I personally used were likewise labeled as hemp-derived products containing THC's other than delta-9 THC, with no more than 0.3% delta-9 THC on a dry-weight basis. I purchased Products at Issue for my personal use from the Store, and each was accompanied at the time of purchase by a certificate of analysis reflecting a delta-9 THC concentration of no more than 0.3% on a dry-weight basis.
10. Before July 31, 2026, I understood my possession and use of the Products at Issue to be lawful.

IV. The Effect of the New Texas THC Classification on My Conduct

11. When the New Texas THC Classification took effect on July 31, 2026, I stopped possessing and using the Products at Issue. I stopped because I believe that possessing or using them would expose me to arrest, prosecution, and a felony conviction, and I

am not willing to take that risk. For the same reason, I also stopped selling the Products at Issue at the Store on or about July 31, 2026.

12. If Defendants were prohibited from enforcing the New Texas THC Classification against me and the Store, I would immediately resume possessing, using, and selling the Products at Issue.

13. No Defendant has stated that it will not enforce the New Texas THC Classification against me, the Store, or the Products at Issue. I was made aware by my employer that Products at Issue could subject those in possession to felony charges. The Store is a licensed consumable hemp retail storefront open to the public in Galveston County and is subject to inspection by DSHS.

V. Harm to Me

14. Because of the New Texas THC Classification, I have lost access to products I lawfully purchased and used before July 31, 2026. I am forced to forgo them or seek limited alternatives, such as traveling out of state or using the Compassionate Use Program at materially higher cost.

15. As Store manager, I am aware of the Store's sales trends and review its sales reports. Since July 31, 2026, the Store's sales of hemp-derived products have declined substantially, and I understand that continued full-time employment may not be sustainable if the New Texas THC Classification is enforced.

16. These harms are immediate and ongoing and will continue for so long as the New Texas THC Classification is enforced. Monetary damages would not compensate me for the

loss of access to the Products at Issue, the risk of criminal enforcement, or the risk to my employment, including reduced hours or loss of my job.

VI. The Uncertainty I Face Under Texas Law

17. Despite my 23 years in law enforcement, and even though I know exactly which products I possessed, used, and sold, and have certificates of analysis maintained in the ordinary course of business confirming that each contains no more than 0.3% delta-9 THC on a dry-weight basis, I cannot determine from Texas law whether those products are lawful hemp excluded from controlled-substance treatment or instead Texas Schedule I controlled substances that expose me to felony liability. Customers regularly ask me whether the Products at Issue are legal to possess in Texas, and I cannot give them an answer.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. 28 U.S.C. § 1746.

Executed on September 29, 2026, in League City, Texas.


Thomas Monti (Sep 29, 2026 12:37:16 CDT)

Thomas Monti

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

THOMAS MONTI, THE HAPPY	§	
CACTUS APOTHECARY LLC, and	§	
BOTANY SCIENTIFICS LLC,	§	
	§	
Plaintiffs,	§	Civil Action No. 3:26-cv-00254
	§	
v.	§	
	§	
IMELDA GARCIA, in her official capacity	§	
as Interim Commissioner of the Texas	§	
Department of State Health Services, KEN	§	
PAXTON, in his official capacity as Attorney	§	
General of Texas; KENNETH A. CUSICK,	§	
in his official capacity as Galveston County	§	
Criminal District Attorney; and JIMMY	§	
FULLEN, in his official capacity as Sheriff	§	
of Galveston County,	§	
	§	
Defendants.	§	

**DECLARATION OF TODD HARRIS ON BEHALF OF
THE HAPPY CACTUS APOTHECARY LLC
IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I, **Todd Harris**, declare as follows:

I. Introduction and Basis of Knowledge

1. My name is Todd Harris. I am the Vice President of The Happy Cactus Apothecary LLC ("Happy Cactus"), one of the Plaintiffs in this action, and I am authorized to make this declaration on its behalf.

2. I am over the age of eighteen and competent to testify to the matters stated herein. I submit this declaration in support of Plaintiffs' Motion for Summary Judgment. If called as a witness, I could and would testify competently to the facts stated below.
3. As Vice President, I am responsible for Happy Cactus's ordering, supplier relationships, and day-to-day operations, and I regularly review its sales and purchasing records. The statements in this declaration are based on my personal knowledge, including knowledge gained from my review of Happy Cactus's business records kept in the ordinary course of business.

II. Company Background

4. Happy Cactus is a Texas limited liability company, founded in early 2020, headquartered in Austin, Texas, and licensed by the Texas Department of State Health Services ("DSHS") to manufacture and sell consumable hemp products.
5. Happy Cactus's flagship product is a house-branded hemp-derived delta-8 THC gummy that is manufactured in Oregon and shipped in interstate commerce into Texas (the "Flagship Gummy").
6. Happy Cactus's business is approximately 98% consumable hemp products, with the remaining non-hemp sales limited to accessories such as candles, incense, and lighters.
7. Happy Cactus sells consumable hemp products containing THC's other than delta-9 THC, including its Flagship Gummy, which it has sold for years.
8. Happy Cactus was not a party to *Tex. Dep't of State Health Servs. v. Sky Mktg. Corp.*, 733 S.W.3d 689 (Tex. 2026), and is not currently subject to a pending state enforcement proceeding.

III. The New Texas THC Classification and the Products at Issue

9. On July 10, 2026, the Texas Department of State Health Services published modifications to the Texas Schedule I definitions of “Tetrahydrocannabinols” and “Marihuana Extract,” 51 Tex. Reg. 4597 (July 10, 2026), effective July 31, 2026 (the “New Texas THC Classification”).
10. Before July 31, 2026, Happy Cactus sold hemp-derived products made from the *Cannabis sativa* L. plant that contain THC_s other than delta-9 THC and no more than 0.3% delta-9 THC on a dry weight basis, including its Flagship Gummy (the “Products at Issue”).
11. As Vice President responsible for Happy Cactus’s product ordering and day-to-day operations, I order the Flagship Gummy as a hemp-derived product containing no more than 0.3% delta-9 THC on a dry-weight basis. Each shipment is labeled as hemp-derived, and each batch is accompanied by a certificate of analysis from an accredited laboratory reflecting no more than 0.3% delta-9 THC on a dry-weight basis. I review those certificates upon receipt, and Happy Cactus maintains them in the ordinary course of business and makes them available upon request.

IV. The Effect of the New Texas THC Classification on Happy Cactus’s Conduct

12. Before July 31, 2026, Happy Cactus sold its Products at Issue to customers in Texas and in approximately twenty-five other states, and the Products at Issue were shipped in interstate commerce, including in and out of Texas.

13. On July 29, 2026, two days prior to its effective date, Happy Cactus received an email from the Texas Health and Human Services Commission notifying it that the New Texas THC Classification would go into effect and warning that affected products “may be detained and referred to law enforcement.” Happy Cactus understood that notice to cover its Products at Issue.
14. Because of the New Texas THC Classification, Happy Cactus ceased selling the Products at Issue on or about July 31, 2026. Because Happy Cactus is unsure of whether it may lawfully possess or sell the Products at Issue from Texas, it also ceased selling and shipping them to customers in other states.
15. If Defendants were prohibited from enforcing the New Texas THC Classification against Happy Cactus, it would immediately resume packaging, distributing, and selling Products at Issue to customers in and out of Texas.
16. No Defendant has stated that it will refrain from enforcing the New Texas THC Classification against Happy Cactus or the Products at Issue. As a DSHS licensee, Happy Cactus is subject to DSHS inspection, embargo, and seizure.

V. Harm to Happy Cactus

17. During the month of July 2026, delta-8 THC products accounted for approximately 18.7% of Happy Cactus’s total sales. Since the New Texas THC Classification went into effect on July 31, 2026, Happy Cactus has suffered and continues to suffer lost sales, lost customers, lost goodwill, and erosion of market share. Its supplier relationships and workforce have also been affected, including the elimination of its warehouse packaging position.

18. Happy Cactus has retail lease obligations, with approximately two and a half years remaining on one lease and through year-end on the other; without delta-8 THC revenue, Happy Cactus faces staff reductions and further operational harm.
19. Happy Cactus has received a written quote from its manufacturer to reformulate its Flagship Gummy to use delta-9 THC instead of delta-8 THC (the “Reformulation Quote”). Based on that quote and my experience ordering Happy Cactus’s products, I estimate that establishing the same number of SKUs in a reformulated delta-9 product line would cost approximately \$50,000 to \$100,000. Under the Reformulation Quote, the manufacturer would package and label any new delta-9 THC line. Based on the Reformulation Quote and Happy Cactus’s prior in-house packaging costs, I estimate this would cost approximately \$7,592 per year more than when Happy Cactus packaged its own Flagship Gummies. The Reformulation Quote requires an initial payment of approximately \$46,000 for a manufacturer-packaged order of the reformulated delta-9 THC product. By comparison, based on Happy Cactus's prior orders, its delta-8 THC Flagship Gummy line, bought in bulk at a lower minimum order quantity and packaged in-house, cost approximately \$6,000 per order, about \$40,000 less per order.
20. Monetary damages would not adequately remedy the lost customers, lost goodwill, market-share erosion, reputational harm, disruption to supplier relationships, and workforce reductions that Happy Cactus faces. Because Plaintiffs sue Defendants only in their official capacities and seek no damages, Happy Cactus's economic losses cannot be remedied by an award of damages in this action.

VI. The Uncertainty Happy Cactus Faces Under Texas Law

21. Even knowing exactly which products Happy Cactus sells and holding certificates of analysis confirming those products contain no more than 0.3% delta-9 THC on a dry weight basis, Happy Cactus cannot determine from Texas law whether its Products at Issue are lawful hemp excluded from controlled-substance treatment, consumable-hemp products treated as foods, or Texas Schedule I controlled substances exposing it and its personnel to felony liability.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. 28 U.S.C. § 1746.

Executed on September 29, 2026, in Austin, Texas.



Todd Harris (Sep 29, 2026 14:37:41 CDT)

Todd Harris, Vice President
The Happy Cactus Apothecary LLC

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

THOMAS MONTI and THE HAPPY
CACTUS APOTHECARY LLC, AND
BOTANY SCIENTIFICS LLC,

Plaintiffs,

V.

IMELDA GARCIA, in her official capacity as Interim Commissioner of the Texas Department of State Health Services, KEN PAXTON, in his official capacity as Attorney General of Texas; KENNETH A. CUSICK, in his official capacity as Galveston County Criminal District Attorney; and JIMMY FULLEN, in his official capacity as Sheriff of Galveston County,

Defendants.

[illegible]

Civil Action No. 3:26-cv-00254

**DECLARATION OF BOTANY SCIENTIFICS LLC IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Declaration of Chris Oppenheimer

I, Chris Oppenheimer , declare as follows:

I. Introduction and Basis of Knowledge

1. My name is Chris Oppenheimer. I am the Founder and Chief Executive Officer of Botany Scientifics LLC (“Botany”), which I founded in 2019. I set the company’s direction and am responsible for its products, operations, distribution, and regulatory-compliance decisions. I am over the age of eighteen and make this declaration based on my personal knowledge and Botany’s business records, which are kept in the ordinary course of business.

2. I am competent to testify to the facts stated below and, if called as a witness, could and would testify competently to them. I submit this declaration in support of Plaintiffs' Motion for Summary Judgment.

II. Company Background

3. Botany Scientifics LLC is a Texas limited liability company with its principal place of business in San Antonio, Texas. Botany is a licensed hemp business operating an online retail and distribution business. Botany has maintained one Texas Department of State Health Services ("DSHS") hemp license/registration continuously since 2022.
4. Botany was not a party to *Texas Department of State Health Services v. Sky Marketing Corp.*, 733 S.W.3d 689 (Tex. 2026), and is not currently subject to a pending state enforcement proceeding.
5. Botany sells hemp-derived products that contain no more than 0.3% delta-9 THC on a dry weight basis, including Botany's hemp-derived delta-8 THC gummies, which are manufactured in Florida and shipped in interstate commerce into Texas and distributed across the nation.

III. The Products at Issue

6. The "Products at Issue" are hemp-derived products containing THC's other than delta-9 THC, each containing no more than 0.3% delta-9 THC on a dry-weight basis (including Botany's hemp-derived delta-8 THC gummy). As Botany's Founder and Chief Executive Officer, I am responsible for the specification and sourcing of Botany's products. Botany's delta-8 THC gummy is formulated and manufactured to a specification requiring that it be derived from *Cannabis sativa* L. and contain no

more than 0.3% delta-9 THC on a dry-weight basis. Each batch is tested by an accredited third-party laboratory. Botany maintains the related certificates of analysis in the ordinary course of business, and they are available upon request.

IV. The Challenged Classification, Cessation, and Enforcement Threat

7. Before July 31, 2026, Botany relied on the federal and Texas legal framework governing hemp in place at that time when it developed and formulated products, entered manufacturing and white-label relationships, purchased and stocked inventory, obtained testing and COAs, developed educational materials and training on the endocannabinoid system, labeling and packaging, built distribution, and made related business investments. These activities required contracts, inventory purchases, testing, labeling and packaging, distribution arrangements, and related business investments.
8. Because of the New Texas THC Classification, Botany has altered its fulfillment and warehousing operations with respect to its Products at Issue and faces seizure or embargo of affected inventory. Botany ceased the production, sale, marketing, distribution, and shipment of its delta-8 Products at Issue rather than risk enforcement under the New Texas THC Classification. Botany is declining recurring and AutoShip orders from established customers. Some customers relied on the product as a preferred alternative to opioids or other medications. But for the challenged classification and threatened enforcement, Botany would resume the production, sale, marketing, distribution, and shipment described above.

9. No Defendant has advised Botany that it will refrain from enforcing the New Texas THC Classification against it or its Products at Issue. Botany faces a credible threat of enforcement, including detention, embargo, seizure, and referral for prosecution.

V. Harm to Botany

10. Because of the New Texas THC Classification and the resulting regulatory uncertainty, Botany is considering establishing or duplicating fulfillment operations in Florida, where it already has manufacturing relationships. This is a costly, second-best contingency that Botany would not otherwise undertake; it would impose significant cost and operational disruption, would not make Botany whole, and would not cure the loss of its Texas business. Botany's preference is to remain in Texas.
11. Because of the New Texas THC Classification, Botany has incurred and continues to incur altered operations and associated costs, lost sales, lost customers, and threatened inventory. Monetary damages would not adequately remedy this harm. Because Plaintiffs sue Defendants only in their official capacities and seek no damages, Botany's economic losses cannot be remedied by an award of damages in this action.

VI. The Uncertainty Botany Faces Under Texas Law

12. Even knowing exactly which products Botany manufactures and sells, and holding Certificates of Analysis confirming those products contain no more than 0.3% delta-9 THC, Botany cannot determine from Texas law whether its Products at Issue are lawful hemp excluded from controlled-substance treatment, consumable-hemp

products treated as foods, or Texas Schedule I controlled substances exposing it and its personnel to felony liability.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. 28 U.S.C. § 1746.

Executed on September 28, 2026, in Bexar County, Texas.

Chris Oppenheimer

Chris Oppenheimer (Sep 28, 2026 13:15:16 CDT)

Chris Oppenheimer, Founder and CEO
Botany Scientifics LLC