

No. 15-26-00099-CV

**IN THE FIFTEENTH COURT OF APPEALS
AUSTIN, TEXAS**

TEXAS DEPARTMENT OF STATE HEALTH SERVICES, ET AL.,
APPELLANTS,
V.
TEXAS HEMP BUSINESS COUNCIL, ET AL.,
APPELLEES.

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

**Brief of Amici Texas Hemp Constitutional Alliance and
TSVL LLC in Support of Appellees**

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ORAL ARGUMENT REQUESTED

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STATEMENT OF INTERESTS AND IDENTITY OF AMICUS¹

Amicus TSVL LLC d/b/a Green Nation is a Texas corporation based in Tyler. Green Nation is a manufacturer and retailer of consumable hemp products, with customers in Texas and in other states outside Texas.

Amicus Texas Hemp Constitutional Alliance (sometimes “THC Alliance”) is not-for-profit trade association operating under Section 501(c)(6) of the Internal Revenue Code and registered with the Texas Secretary of State. THC Alliance’s official purpose as described in its Certificate of Formation is to “promote, protect, and advance the interests of hemp businesses in Texas through advocacy, education, and legal action,” including “litigation.” Its members are limited to businesses in the hemp-derived products industry, including manufacturers, distributors, and retailers. Convenience stores are excluded from membership. All of THC Alliance’s members are businesses active in various aspects of the chain of production to retail sale of consumable hemp products in Texas.

¹ All fees paid for preparation of this brief have been or will be paid by amici TSVL LLC and THC Alliance.

SUMMARY OF THE ARGUMENT

Amici support Appellees with respect to all rules enjoined, but file this brief to elaborate specifically as to why DSHS's purported new rules imposing the total delta-9 THC standard and related testing requirements are ultra vires. See Appellees' Br. at 56-62.

This case is not about hemp. It is, rather, about the constitutional lawmaking process in this State. This Court can only approve DSHS's importation of the total THC standard—requiring accounting for THCA as part of the “total delta-9 concentration” for purposes of Health and Safety Code chapter 443—by ignoring the material textual distinctions between the Agriculture Code and chapter 443. The Court cannot adopt the State's position because it would render specific, additional language in the Agriculture Code's testing provision nugatory—mere surplusage. The premise underlying the State's argument is that the Legislature simply was not aware of the presence or function of THCA in hemp or otherwise overlooked it in drafting the statutes. But this is untenable; the Legislature clearly knew about THCA and accounted for it by requiring testing that factors it in for cultivators' pre-harvest tests. The same bill, by the same Legislature, ushered in the relevant statutes in

both the Agriculture Code and Health and Safety Code. The distinct language in chapter 443 cannot, then, be written off as a mere oversight, but must be given substantive effect if statutory language means anything.

It is clear, moreover, that the new rules exceed the agency's legitimate authority because they would actually nullify several compliance pathways available under the plain text of chapter 443 for marketing consumable hemp products. The discussion provided below illustrating this effect of the rules inarguably demonstrates that the new rules are ultra vires, because no public official has the authority to override statutes or repeal them by implication.

Any suggestion that the new total THC standard and related testing requirements merely fill an unintended gap is further belied by the fact the Legislature specifically considered legislation that would have amended chapter 443 to do something very similar, but no such amendment emerged from the lawmaking process.

Ironically, therefore, it is actually the State, not Appellees, that is inviting the Court to ignore plain statutory text to bless *the agency's* hemp policy preferences to the detriment of established rules of statutory

construction and contrary to the Texas Constitution's deliberative lawmaking process.

While the subject matter of this particular dispute involves hemp, the principle is not so limited. If an executive branch official can dictate regulations that conflict with and nullify statutory rights (like the clear statutory compliance pathways negated here), lawmaking is no longer in the legislative province but subject to the executive's whim. This is, quite obviously, anathema to our system and the constitutional separation of powers.

STATUTORY BACKGROUND

A brief summary of certain relevant statutes is in order to highlight certain aspects of the statutory framework that, while referenced by the parties, bear further emphasis.

Texas Adopts H.B. 1325

In House Bill 1325 the Legislature enacted chapters 121 and 122 of the Texas Agriculture Code, generally permitting and regulating the cultivation and handling of hemp within the state (Tex. Agric. Code §§ 121.001 - 122.004), and added chapter 443 to the Texas Health and Safety Code (HSC), generally permitting and regulating the manufacture

and sale of consumable hemp products (HSC §§ 443.001 - .207). Act of May 22, 2019, 86th Leg., R.S., ch. 764, 2019 Tex. Gen. Laws 2085.

H.B. 1325 provided a comprehensive regulatory scheme over the entire chain of production for CHPs in Texas, from cultivation to manufacturing to retail. As the Supreme Court observed in *Texas Department of State Health Services v. Crown Distributing LLC*, H.B. 1325 followed the federal approach to distinguishing between marijuana and legal hemp. 647 S.W.3d 648, 661-62 (Tex. 2022). Whereas Texas law had previously reflected federal law in its anatomy-based approach to defining marijuana, H.B. 1325 defined “hemp” by reference to its delta-9 content. Tex. Agric. Code § 121.001 (“‘Hemp’ means the plant *Cannabis sativa* L. and any part of that plant, including the seeds of the plant and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.”). The bill amended the Texas Controlled Substances Act to specify “[t]he term [controlled substance] does not include hemp, as defined by Section 121.001, Agriculture Code, or the tetrahydrocannabinols in hemp,” and amended the definition of “marijuana” to declare the term “does not

include ... hemp, as that term is defined by Section 121.001, Agriculture Code.” H.B. 1325 (amending HSC §§ 481.002(5), (26)).

Beyond adopting the new definition of “hemp” keyed to the Cannabis plant’s delta-9 content, H.B. 1325 further specified the points in the chain of production when testing must be conducted to establish that consumable hemp products are compliant.

On the cultivation side, the Agriculture Code limits hemp cultivation in Texas to license holders (§ 122.151), and requires pre-harvest testing of a representative sample of a plot. Specifically, it provides:

A license holder may not harvest a hemp plant or plant intended or believed to be hemp unless a representative sample of plants from the plot where the plant is grown is collected before harvest and subsequently tested using post-decarboxylation, high-performance liquid chromatography, or another similarly reliable method to determine the delta-9 tetrahydrocannabinol concentration of the sample in the manner required by this subchapter.

Tex. Agric. Code § 122.153(a).

This requirement to use post-decarboxylation or high-performance liquid chromatography means that this test is specifically required to measure delta-9 content following conversion of the plant’s THCA into delta-9.

Moving from the cultivation side, H.B. 1325 enacted a new subsection of the Health and Safety Code, chapter 443, governing the manufacture, distribution, and sale of consumable hemp products (CHPs). Chapter 443 applies a licensure requirement and substantive regulations to any person or entity that “processes” hemp or manufactures a CHP. § 443.101. The statutes provide three options for a hemp processor or CHP manufacturer to demonstrate that a certain CHP is compliant.

Section 443.151, entitled “TESTING REQUIRED,” provides “[a] consumable hemp product must be tested as provided by (1) subsections (b) and (c); **or** (2) Subsection (d).”

Amici refer to the testing under Subsections 443.151(b) and (c) collectively as the “**pre-manufacturing tests.**” This option requires two tests—one of the hemp *plant* prior to processing and one of the *material extracted* from the plant after processing:

(b) Before a hemp plant is processed or otherwise used in the manufacture of a consumable hemp product, a sample representing the plant must be tested, as required by the executive commissioner, to determine:

- (1) the concentration of various cannabinoids; and
- (2) the presence or quantity of heavy metals, pesticides, and any other substance prescribed by the department.

(c) Before material extracted from hemp by processing is sold as, offered for sale as, or incorporated into a consumable hemp product, the material must be tested, as required by the executive commissioner, to determine:

- (1) the presence of harmful microorganisms; and
- (2) the presence or quantity of:
 - (A) any residual solvents used in processing, if applicable; and
 - (B) any other substance prescribed by the department.

HSC §§ 443.151(b), (c) (emph. added).

Note that it is only the processor’s first test—of the hemp plant before processing—that calls for testing the concentration of various cannabinoids. Moreover, H.B. 1325 expressly provides that the pre-harvest test conducted by a licensed cultivator satisfies this requirement. HSC § 443.152(b) (pre-harvest test serves “as proof that the delta-9 tetrahydrocannabinol concentration of the hemp does not exceed 0.3 percent, including for purposes of Section 443.151(b)(1).”). The second test does not measure levels of cannabinoids or other expected components of hemp itself but only byproducts or accretions picked up in processing.

Regarding finished CHPs, two compliance pathways are provided to allow marketing of any particular product. Under the first method

(which amicus refers to as the “**pre-retail test**”), a sample of the finished CHP can be tested:

(1) by a laboratory that is accredited by an accreditation body in accordance with International Organization for Standardization ISO/IEC 17025 or a comparable or successor standard to determine the delta-9 tetrahydrocannabinol concentration of the product; and

(2) by an appropriate laboratory to determine that the product does not contain a substance described by Subsection (b) or (c) in a quantity prohibited for purposes of those subsections.”

HSC § 443.151(d). This provision specifies the testing must be conducted in an accredited lab but, unlike Agriculture Code § 122.153(a), does not specify any particular method of testing. This pre-retail test was reflected in the former version of DSHS Rule 300.302, which required the sample to have been “tested by an accredited laboratory and found to have a delta-9 tetrahydrocannabinol content concentration level on a dry weight basis ... of 0.3 percent or less[.]” 25 TAC § 300.302(b)(1).

The second method to demonstrate compliance for a particular CHP is referred to by amicus as the “**constituent compliance**” method. Under this method, instead of testing a sample of the particular finished CHP, the CHP is compliant if each hemp-derived *ingredient* of the product was shown to “not have a delta-9 tetrahydrocannabinol

concentration of more than 0.3 percent,” *either* by the pre-manufacturing test or pre-retail test. *Id.* § 443.151(e).

The regime enacted in H.B. 1325 thus provides two pathways to market a finished CHP in Texas. Under the constituent compliance method, the CHP is legal so long as each hemp-derived ingredient met the pre-manufacturing tests (which can be satisfied by the pre-harvest test) or the pre-retail test (which requires measuring actual delta-9 only). Under this method, *the final CHP itself is never tested*.

Alternatively, under the pre-retail method, a sample of the final CHP can be tested for actual Delta-9. If the pre-retail test is applied to a particular finished CHP, the pre-manufacturing tests are not required.

DSHS’s new rules materially altered this regime. Not only do the new rules impose a new “total delta-9 [THC] concentration” standard that requires accounting for THCA as “potential” delta-9 THC, 25 Tex. Admin. Code §§ 300.101(44), (45), they also compel testing the “total d-9 THC” at *three distinct phases*. First, the hemp plant must be tested prior to any processing. 25 TAC § 300.301(a). Second, any “hemp-derived ingredients used for further processing into another [CHP]” must be

tested again. *Id.* § 300.301(b). Third, a representative sample of every particular finished CHP must be tested again. *Id.* § 300.302(b).

ARGUMENT

DSHS’s new total THC standard, and accompanying compliance regime, are ultra vires. The State writes that Appellees THBC et al. “never identify a conflict between the Rules and any statutory provision.” State Reply 2. To the contrary, as Appellees have stated, the total THC standard conflicts with the plain language of HSC §§ 443.151 and .152 because, in light of the distinct language of the Agriculture Code, those provisions cannot be read to permit any regulatory requirement that considers THCA as part of the delta-9 concentration. The associated testing requirements also conflict with and nullify compliance pathways available under H.B. 1325 for processors and manufacturers.

I. In H.B. 1325, the Legislature Requires Accounting for THCA Pre-Harvest but Not Subsequently.

H.B. 1325 imposes a pre-harvesting test requirement that specifically requires methods of testing that will account for post-conversion THCA as a component of the delta-9 THC content of the plant, but omits any such language from any testing requirements applicable

at subsequent stages. This difference in statutory language must be given effect.

A court must “presume the Legislature chose statutory language deliberately and purposefully.” *Levinson Alcoser Assocs., L.P. v. El Pistolon II, Ltd.*, 513 S.W.3d 487, 493 (Tex. 2017) (quoting *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 390 (Tex. 2014)). It must “endeavor to interpret each word, phrase, and clause in a manner that gives meaning to them all.” *Id.* (quoting *PlainsCapital Bank v. Martin*, 459 S.W.3d 550, 556 (Tex. 2015)). Accordingly, the court must “read statutes as a whole so as to render no part inconsistent, superfluous, or devoid of meaning.” *Id.*

The State’s argument cannot be accepted because it would erase rather than respect the distinct language deployed in the Agriculture Code relative to the language used in the Health and Safety Code. In *Railroad Commission of Texas v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619 (Tex. 2011), the question was whether, in considering the “public interest” as it pertained to approving an injection well permit for oil and gas waste, the Railroad Commission was required to consider traffic safety effects. *Id.* at 624. “Public interest” was not

defined and the Court held it was “subject to more than one interpretation.” *Id.* at 628. Despite its ambiguity, the Court nonetheless concluded *clear limitations* were imposed in light of analogous, but distinct, statutory language. Specifically, the Court held the term “public interest” as it pertains to the Railroad Commission’s inquiry “is intended to be a narrow one *precluding* consideration of traffic-safety concerns.” 336 S.W.3d at 628 (emph. added). This was because the Injection Well Act set out an analogous authority for the Texas Commission on Environmental Quality (to consider the “public interest” in whether to permit injection wells for industrial or municipal waste), but the TCEQ was specifically required to consider traffic safety as part of the inquiry. *Id.* at 626 n.9. The Court observed that, “[w]hen the Legislature uses a word or phrase in one portion of a statute but excludes it from another, the term should not be implied where it has been excluded.” *Id.* at 628 (quoting *Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex.1995)). Notably, three Justices concurred in the judgement, writing separately to state that the statute was not ambiguous at all: the fact the Legislature specified traffic safety as a factor for TCEQ but not for the Railroad Commission “unambiguously precludes the Railroad

Commission from considering traffic safety factors.” *Id.* at 633 (JEFFERSON, J., concurring, joined by Willett and Lehrmann, JJ.).

For the same reasons, the consistent references to a simple “delta-9 tetrahydrocannabinol concentration” in HSC §§ 443.151 and .152 cannot be read as indistinct from the Agriculture Code’s specification of testing methods to account for THCA. If testing required by H.B. 1325 at all junctures was to require accounting for latent THCA, then the specific language in Agriculture Code § 122.153(a) was “an exercise in ‘unwarranted superfluity.’” SCALIA & GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 169 (WEST 2012) (quoting *In re Stinson*, 285 B.R. 239 (Bankr. W.D. Va. 2002)). Because the Legislature’s deliberate choice of distinct language must be given effect, DSHS’s new rules are ultra vires to the extent they purport to require accounting for THCA in testing stages subsequent to a Texas cultivator’s pre-harvest test.

The State’s reply brief seeks to characterize the Commissioner’s unilateral decision to switch from an actual delta-9 standard to the “total delta-9” standard as a “fact-bound” matter within her discretion. State Reply 1. This argument is necessarily premised on the notion that the

term “delta-9 [THC] concentration” as used in chapter 443 is ambiguous, such that the Commissioner has the discretion to determine “the scientific methodology for determining that threshold.” *Id.* This argument must be rejected for the reasons already expressed. Even if the term “delta-9 [THC] concentration,” standing alone, is amenable to more than one interpretation, the distinct language of the Agriculture Code *precludes* any interpretation of the Health and Safety Code that would require testing that counts THCA as part of the delta-9 concentration for CHPs. Reading it any other way would render the specificity in the Agriculture Code meaningless. The State’s argument would be stronger if the Agriculture Code merely referred to a “delta-9 [THC] concentration” without the added specificity regarding testing methodologies required for cultivators. Just like in *Texas Citizens—even for the majority for whom the term “public interest” was ambiguous*—the scope of the ambiguity is limited by specificity provided elsewhere.

II. DSHS’s New Total THC Standard and Testing Regime Would Nullify Statutory Compliance Pathways.

While the new “total delta-9” THC standard itself is in clear enough conflict with chapter 443, additional aspects of the testing required under

new rules 300.301 and .302 confirm, without any doubt, the Commissioner overstepped her authority.

For example, as described above, the statutes provide a manufacturer or retailer assurance that a particular CHP is legal for sale in Texas if they followed the constituent compliance pathway, where each hemp-derived ingredient can be supported by a Texas cultivator's pre-harvest test, which serves as proof of the allowable delta-9 content without any need to ever test the delta-9 content subsequently in the chain of production, and without a test of the finished CHP itself. *See* HSC §§ 443.151(e)(1), 443.152(a), (b).² Alternatively, under the pre-retail

² Section 443.152(b) provides that a Texas-licensed cultivator shall provide the results of its test to a license holder under chapter 443, which can satisfy *the processor's* requirement to test the hemp plant prior to processing (the first "pre-manufacturing" test, required by § 443.151(b)(1)). The State's brief at 20-22 attributes more work to this provision than it actually does. Whereas § 443.152(b) says the cultivator's pre-harvest test is sufficient for the processor's pre-processing test of the hemp plant, the State presents it as if it were a subtle portal, infusing chapter 443 testing requirements with the specific post-decarboxylation (or like) methods required by cultivators. State Br. 21 (claiming that "[t]o make sure that the CHP complies with section 443.152(a), section 443.152(b) *says that the hemp should be tested under the terms of chapter 122 of the Agriculture Code*"). That is *not* what it says. One indication the State is hallucinating here is the fact § 443.152(b) itself says the cultivator's test must be provided "if available." In other words, contrary to the State's argument, § 443.152(b) does not even mandate that the cultivator's test is the only way to satisfy the processor's own pre-processing test of the plant, much less that the Agriculture Code's distinct testing requirement is somehow imported throughout chapter 443. As the State has acknowledged, "legislatures don't hide elephants in mouseholes." State Br. 28 (quoting *Tex. DSHS v. Sky Marketing*, 733 S.W.3d at 704).

method, a manufacturer or retailer can be assured a particular CHP is legal if a sample of the finished CHP is tested for actual delta-9, without having to test the hemp plant prior to processing or test the extracted material before it goes into the finished product. *Id.* §§ 443.151(a) (note the disjunctive), (d). Notably, even if the State were right that the Commissioner could unilaterally inject the total THC standard into the distinct language under chapter 443—which she clearly cannot without rendering portions of the Agriculture Code’s language superfluous—the rules are *still* ultra vires because they require testing at all three junctures without exception, displacing less burdensome *statutory* pathways.

If an official action would contradict and nullify a statute, it is ultra vires. *Combs v. Health Care Services Corp.*, 401 S.W.3d 623, 630 (Tex. 2013) (“There is no ambiguity... with the unassailable rule that agency interpretations cannot contradict statutory text.”); *Texas Citizens*, 336 S.W.3d at 626 (even where an agency is applying an ambiguous term, the construction must be “reasonable and ... not contradict the plain language of the statute”); *Texas Citizens, supra*, at 625 n.6 (citing additional cases). The fact the new rules would foreclose *statutory*

compliance pathways demonstrates the agency has exceeded its authority to implement the statutes.

III. The State’s Arguments Are Unavailing.

a. Any suggestion that the new rules fulfill the original intent of H.B. 1325 is misleading.

The State writes, “shortly after the [2018] Farm Bill passed, under Texas’s USDA-approved hemp plan, both the Texas Department of Agriculture ... and the federal government utilized a method of calculating the delta-9 THC content of hemp substances by accounting for THC acid, or THCA.” State’s Br. 7 (some punctuation omitted) (citing 7 CFR 990.1) and 4 Tex Admin Code § 24.26). This sentence is true, as far as it goes. But it does not mean what the State suggests.

It is true the Texas Department of Agriculture and at least a part of “the federal government” “utilized” a method of calculating delta-9 THC that includes THCA. Specifically, they both “utilized” such method in their agricultural testing requirements, which are distinct federally and in Texas from processing, manufacturing, and retail. On the federal side, the part of “the federal government” that prescribed testing accounting for THCA is the Department of Agriculture (USDA). The 2018 Farm Bill requires post-decarboxylation testing for hemp “produced in

the State[.]” 7 U.S.C. 1639p(a)(2)(A)(ii) (emph. added). In the rulemaking adopting the federal rule the State relies upon, USDA’s Agricultural Marketing Service (AMS) stated it was “following the plain statutory language [in the 2018 Farm Bill] that states that a State or Tribal plan shall be required to include ‘a procedure for testing, using post-decarboxylation or other similarly reliable methods, delta-9 tetrahydrocannabinol concentration levels of hemp produced in the State or territory of the Indian Tribe.” Agricultural Marketing Service, *Establishment of a Domestic Hemp Production Program*, 86 Fed. Reg. 5596, 5602, 5621 (Jan. 19, 2021). AMS reiterated: “This final rule covers hemp production. *Hemp products are regulated under the Food and Drug Administration and its various statutes.*” 86 Fed. Reg. at 5605 (emph. added).

Similarly, the Texas Department of Agriculture was given authority to “monitor and regulate the *production of hemp* in this state.” Tex. Agric. Code § 121.003(a). Its rulemaking authority, naturally, is limited to the production of hemp. *Id.* § 121.004. TDA’s licensing and testing requirements apply only to persons cultivating hemp in Texas. *See, generally*, Tex. Agric. Code ch. 122. The testing requirements apply

to such cultivators. *Id.* § 122.153(a) (“A license holder *may not harvest a hemp plant* or plant intended or believed to be hemp unless a representative sample of plants from the plot where the plant is grown is collected before harvest and subsequently tested using post-decarboxylation”). Chapter 122 expressly recognizes that its scope is limited to cultivation. *Id.* § 122.101(b) (“A person is not required to hold a license under this subchapter to manufacture a consumable hemp product in accordance with Subtitle A, Title 6, Health and Safety Code.”). Accordingly, 4 Tex. Admin. Code § 24.26—like its federal counterpart—applies to the testing required of the cultivator, not downstream entities and their activities.

b. There is no gap or loophole for the court to fix.

There is no gap in the legislation; the plain text of H.B. 1325 uses different language in different places and such distinctions have meaning.

But even if there were an unforeseen gap, in presuming to fill the gap, the court (or an agency) presumes to know what the Legislature would have wanted. Any such presumption is demonstrably out of place following the recent legislative sessions, in which proposals to impose a

total THC standard, including a specific requirement of post-decarboxylation testing, were all defeated.

On the retail side, S.B. 3 (vetoed by Gov. Abbott) would have amended §§ 443.151 and .152 such that, instead of requiring testing to determine only the delta-9 THC concentration in a CHP and prohibiting the sale of any CHPs with more than 0.3 percent delta-9 THC, tests would have been required to determine “the identity and concentration of any cannabinoids contained in the product”—with new subsection (d-1) requiring the pre-retail test to account for conversion of THCA into THC to determine the “total [THC] concentration in a tested product.” Specifically, new subsection 443.151(d-1) would have specified the “testing required under Subsection (d) must use post-decarboxylation, high-performance liquid chromatography, or a similar method that includes the conversion of tetrahydrocannabinolic acid into tetrahydrocannabinol to determine the total tetrahydrocannabinol concentration in a tested product.” Acts 2025 (S.B.3) sec. 6.

Governor Abbott called special sessions and urged the Legislature to pass more reasonable regulations that could pass constitutional muster. However, the Senate continued insistence on a general ban (S.B.

5, S.B. 6) on anything other than CBD or CBG. The House refused, instead advancing bills to more strictly regulate the hemp products industry rather than imposing a general ban. Lacking agreement between the Houses, no legislation passed in the 2025 special sessions.

The deliberative legislative process that ultimately resulted in no amendments to the governing statutes—despite multiple dogged attempts—belies the notion that DSHS is merely clarifying what the Legislature wanted or filling a gap. The Legislature specifically refused to import a total THC standard or require accounting for THCA in Chapter 443 testing requirements. So DSHS is implementing *its own* policy preference, not that of the elected Legislature, in adopting these rules. *See Combs*, 401 S.W.3d at 631 (“If the Legislature considered this a loophole worth closing, it could have done so.”). *Cf.* FRANK H. EASTERBROOK, *STATUTE’S DOMAINS*, 50 U. CHI. L. REV. 533, 548 (1983) (“Judicial interpolation of legislative gaps would be questionable even if judges could ascertain with certainty how the legislature would have acted. Every legislative body’s power is limited by a number of checks The foremost of these checks is time The unaddressed

problem is handled by a new legislature with new instructions from the voters.”) (quoted in SCALIA, *supra*, at 94).

c. An amendment to the federal hemp definition does not authorize DSHS to nullify Texas statutes.

Reflective, perhaps, of the weakness of its overall position, the State relies heavily on the notion that amendments to the federal hemp definition³ somehow authorize the Commissioner to unilaterally import post-decarboxylation measurement into chapter 443. State’s Br. 20, 25-26; State’s Reply Br. 1. There are many problems with this.

This argument relies on § 443.051, which the State erroneously calls “[t]he only relevant limitation” on the executive commissioner’s rulemaking. State Br. 20. Section 443.051 provides that “[t]he executive commissioner shall adopt rules and procedures necessary to administer and enforce this chapter” [ch. 443], and such rules “must be consistent with” Texas’s approved state hemp plan and 7 U.S.C. chapter 38, Subchapter VII, and implementing regulations.

First, setting aside (for a moment) the separation of powers concerns, the State has still more *textual* obstacles to the Commissioner’s

³ As the State notes, the amended definition of “hemp” is now to be effective Dec. 11, 2026, but the amendments regarding cannabinoids that cannot naturally be present in the cannabis plant will become effective Nov. 12, 2026. State’s Reply Br. 1 n.1.

preferred hemp policy prescription. The rulemaking authority is limited to rules administering and enforcing “this chapter,” and the state’s approved hemp plan is, quite literally, H.B. 1325. USDA, Agricultural Marketing Service, “TX Approved Plan,” <https://www.ams.usda.gov/sites/default/files/media/TexasDeptofAgHempPlan.pdf> (last visited Sept. 30, 2026).⁴ So even if an inconsistency arises between federal hemp statutes and Chapter 443, this provision does not provide the commissioner carte blanche to ignore statutory law.

Second, as a matter of state constitutional law, the commissioner has no authority to contradict Texas statutes, as discussed above. If and when the policies need reconciliation, it is the Legislature’s job.

There are several other problems raised by the State’s position on this point that are left entirely unaddressed. Even if the commissioner had authority in some circumstances to contradict the very hemp statutes she is charged with administering (she does not) in order to “harmonize” them with a federal amendment, these rules do no such

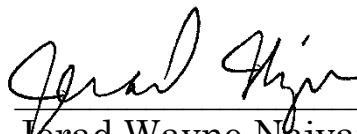
⁴ The approved plans for each state and tribe are available at USDA, Agricultural Marketing Service, “List of USDA-approved hemp plans,” <https://www.ams.usda.gov/rules-regulations/hemp/state-and-tribal-plan-review> (last visited Sept. 30, 2026).

thing. Substantively, they are distinct in several ways from the amended federal law. For one, nothing about the federal amendments requires the repeated and redundant testing imposed under these rules. Also, the rules here were adopted and made effective *long before* the amended federal definition goes into effect. For both of these reasons, they create further disharmony rather than reconcile state and federal law.

CONCLUSION

The injunction against DSHS's new rules imposing the total delta-9 THC standard and associated testing requirements should be affirmed.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Based on the word count provided by the computer program used to prepare this petition, below-signed counsel states that the number of words in the document is 4,840.

A handwritten signature in black ink, appearing to read "Gerald Hryn", is written over a horizontal line.

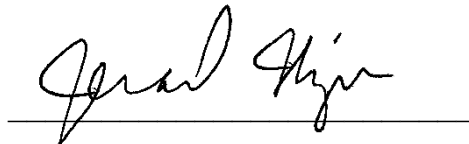
CERTIFICATE OF CONFERENCE

Undersigned counsel conferred by email with counsel for all parties to ascertain whether they were opposed or unopposed to the filing of this brief. Counsel for all Appellees responded to state they were not opposed. Counsel for the Appellants declined to take a position.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document, along with any accompanying exhibits, has been served by eService on all counsel of record on October 1, 2026.

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