FILED
23-0887
5/24/2024 11:00 AM
tex-88106794
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 23-0887

In the Supreme Court of Texas

TEXAS DEPARTMENT OF STATE HEALTH SERVICES, AND DR. JENNIFER A. SHUFORD, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES,

Petitioners,

v.

SKY MARKETING CORP., D/B/A HOMETOWN HERO; CREATE A CIG TEMPLE, LLC; DARRELL SURIF; AND DAVID WALDEN,

Respondents.

On Petition for Review
from the Third Court of Appeals, Austin

RESPONSE TO PETITION FOR REVIEW

Craig T. Enoch
State Bar No. 00000026
cenoch@enochkever.com
Elana S. Einhorn
State Bar No. 06502455
eeinhorn@enochkever.com
ENOCH KEVER PLLC
7600 N. Capital of Texas Hwy
Building B, Suite 200
Austin, Texas 78731
Tel: (512) 615-1200

Amanda G. Taylor
State Bar No. 24045921
amanda.taylor@butlersnow.com
D. Todd Smith
State Bar No. 00797451
todd.smith@butlersnow.com
Marshall A. Bowen
State Bar No. 24096672
marshall.bowen@butlersnow.com
BUTLER SNOW LLP
1400 Lavaca St., Suite 1000
Austin, Texas 78701
Tel: (737) 802-1800

COUNSEL FOR RESPONDENTS

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

TO THE HONORABLE SUPREME COURT OF TEXAS:

INTRODUCTION

The Legislature expressly defined hemp in the Agricultural Code in 2019 intending to expand its lawful production and sales. All hemp naturally contains tetrahydrocannabinol (THC) and its isomers, including delta-8. In 2021, the Commissioner of the Department of State Health Services (DSHS) altered the State's list of Schedule I controlled substances to include all but one of the THC isomers (THC delta-9 of less than 0.3% dry weight), effectively outlawing Texas hemp production contrary to the Legislature's intent.

Texas's constitutionally mandated separation of powers regime prevents the Commissioner's action.[1] Further, the Commissioner's action violated relevant statutory provisions such that the Commissioner's actions were ultra vires, both as a matter of substance and procedure. And DSHS's October 15, 2021 notice on its website, declaring all products that contain delta-8 as Schedule I controlled

[1] Any debate about balancing policy goals between supporting Texas's agricultural industry and regulating how hemp and its derivatives may be used in Texas must be resolved by the Legislature—not the courts, and certainly not by unilateral action of the Commissioner. Indeed, the Texas Senate is currently studying these issues pursuant to interim charges in advance of the 2025 session.

substances, was rule-making in violation of the Administrative Procedures Act (APA).

At bottom, the narrow questions presented in this interlocutory appeal are: (1) whether Respondents' live pleading, when liberally construed, sufficiently invoked the trial court's subject-matter jurisdiction; and (2) whether Respondents (business participants in the hemp industry and individual consumers of hemp products) proved they face probable, imminent, and irreparable injuries as a result of the Commissioner's actions. The answer to both questions is "yes." Consequently, the Third Court properly affirmed the district court's orders denying the State's plea to the jurisdiction and granting Respondents a temporary injunction.

At this early procedural posture of the case, Respondents have sufficiently demonstrated a right to proceed to trial on the merits. Respondents respectfully request that the Court deny the State's petition for review.

STATEMENT OF FACTS

For much of the past century, "all parts of the cannabis plant, whether growing or not"—including hemp and all of its isomers—were federally defined as Schedule I controlled substances. 21 U.S.C. § 802(16) (2017). This changed under the 2018 Farm Bill, signed by President Trump, which removed "hemp" from the definition of "marijuana" and excluded "tetrahydrocannabinols [THC] in hemp" from the definition of THC. Pub. L. No. 115-334, 132 Stat. 4490 (2018); 21 U.S.C. §§ 802(16), 812(c) (2018). In doing so, Congress broadly defined hemp:

> The term "hemp" means the plant Cannabis sativa L. and any part of that plant, including the seeds thereof 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.

7 U.S.C. § 1639*o*. Thus, the 2018 Farm Bill decriminalized hemp and all of its isomers, including delta-8 THC.[2]

[2] If the plant or any part thereof or product made therefrom contains more than 0.3 percent delta-9 THC on a dry weight basis, then it is "marijuana" and remains a Schedule I controlled substance. 21 U.S.C. § 802(16).

In June 2019, Governor Abbott signed the Texas Farm Bill, amending Title 5 of the Texas Agriculture Code to track the federal statute and establish Texas's retail hemp program, including regulations for consumable hemp products. Act of May 2022, 2019, 86th Leg., R.S., ch. 764, HB 1325, 2019 Tex. Gen. Laws 2085; *see* Tex. Agric. Code § 443.141. Texas adopted the exact same, broad definition of "hemp" as in the federal Farm Bill. Tex. Agric. Code § 121.001. The Commissioner adopted conforming amendments to the Texas Schedules for 2019-2020, stating that THC is a Schedule I controlled substance "except for [THCs] in hemp." CR338-43 (44 Tex. Reg. 2514 (May 17, 2019); 45 Tex. Reg. 2249 (March 27, 2020)).

In 2019, Respondents, along with other similarly situated businesses and individuals, entered the burgeoning Texas hemp market as sellers and consumers of products containing hemp-derived delta-8 THC. CR449. Businesses in this industry thereafter made significant financial investments to our state's economy in reliance on the Texas Farm Bill's plain text that hemp, and THCs derived from hemp, are not controlled substances. *Id.*; *see also Amicus Brief of Hemp Industries Association at Tab A*, filed in Third Court of Appeals on 08.29.2023.

In the summer of 2020, the Drug Enforcement Agency (DEA) published an Interim Final Rule (IFR) conforming the federal regulations to the federal Farm Bill by (1) adding language to the definition of THC to exclude from Schedule I "any material, compound, mixture, or preparation that falls within the definition of hemp"; and (2) implementing the 0.3% delta-9 THC content limit in the definition of "marihuana extract" to confirm that "hemp-derived extracts containing less than that . . . are also decontrolled along with the plant itself." CR598-604 (85 Fed. Register No. 163 (Aug. 21, 2020)), amending 21 CFR § 1308.11(d)(31), (58).

Despite the Texas Legislature adopting Congress's definition of hemp and authorizing production and sales of hemp and hemp-derived products, the DSHS Commissioner objected to and signed a decision order refusing to adopt the DEA's IFR. CR454, 609-10. Several months later, DSHS published the Texas 2021 Schedules, deleting the broad exemption for "[THCs] in hemp" and replacing it with a definition that made all THCs "except for up to 0.3 percent delta-9 [THCs] in hemp" Schedule I controlled substances. CR335-37 (46 Tex. Reg. 1763 (March 19, 2021)).

Because *all* hemp products contain several other isomers, including delta-8 THC, the Commissioner's unilateral action, if allowed, would ban the production, manufacturing, sale, and use of all hemp products in the Texas agricultural industry. This directly conflicts with the Legislature's authorization of hemp production and sales, including its comprehensive statutory regime intended to support and regulate a consumable hemp products industry in Texas.

On October 15, 2021, DSHS published a notice on its website that "[a]ll other forms of THC, including Delta-8 in any concentration and Delta-9 exceeding 0.3%, are considered Schedule I controlled substances." CR449. Law enforcement agencies acted in response to this newly announced rule. 3RR174, Ex. P-9.

Respondents filed the present lawsuit against DSHS/the Commissioner and obtained an injunction to prevent further enforcement of the Commissioner's unilateral attempt to outlaw all hemp products containing delta-8 and other THC isomers other than delta-9 THC up to 0.3% dry weight. CR3. Thereafter, the Legislature twice rejected bills to outlaw delta-8 in the 2021 and 2023 sessions.

SUMMARY OF THE ARGUMENT

The court of appeals correctly affirmed the trial court's denial of the State's plea to the jurisdiction. The Commissioner's unilateral modification of the Schedules and announcement of a new rule were ultra vires acts that purported to make all hemp products illegal in contravention of the 2019 Texas Farm Bill. The Commissioner also did not follow the procedural requirements for modifying the Schedules or for adopting a new rule.

Additionally, the court of appeals correctly affirmed the trial court's issuance of a temporary injunction enjoining the effectiveness going forward of the Commissioner's alteration to the Schedules and the new rule published on DSHS's website. Respondents demonstrated a concrete injury traceable to the Commissioner's unlawful actions and brought their claims against the only parties capable of modifying the Schedules or amending the rules. Moreover, Respondents satisfied their burden to demonstrate (1) existence of a valid cause of action; (2) a probable right of recovery; and (3) probable, imminent, and irreparable harm absent the injunction.

For these reasons, the State's petition should be denied.

ARGUMENT

I. The Commissioner's Alteration of the Schedules Was Ultra Vires as a Matter of Substance.

The court of appeals correctly upheld the trial court's denial of the State's plea to the jurisdiction because the Commissioner's alterations to the definition of THC in the 2021 State Schedules contravened the Texas Farm Bill's plain text, as enacted by our Legislature in 2019. The Texas Constitution explicitly divides the "powers of the Government . . . into three distinct departments, each of which shall be confided to a separate body of magistracy." Tex. Const. art. 2, § 1. "[N]o person . . . of one of these departments[] shall exercise *any* power properly attached to either of the others[.]" *Id.* (emphasis supplied). Respondents' ultra vires claim properly seeks to reign in the Commissioner's actions to a constitutionally permissive scope.

A. The Texas Farm Bill legalized hemp and THC in hemp.

In the Texas Farm Bill, the Legislature made the explicit decision to legalize "any part of [the hemp] plant," including "the seeds of the plant and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not." Tex. Agric. Code § 121.001. Hemp is a cannabis plant. It contains naturally occurring THC, which in

turn has many isomers. The only THC-related limitation the Legislature placed on hemp products is they may not have a *delta-9* THC isomer concentration of "more than 0.3 percent on a dry weight basis." *Id.* Delta-9 THC is "the primary psychoactive component of cannabis." 25 Tex. Admin. Code § 300.101(10).

Indeed, the 0.3 percent delta-9 THC limit is what differentiates hemp from marijuana. Hemp and marijuana share the same parent plant—cannabis Sativa L. Both plants contain naturally occurring THC, including isomers like delta-8 and delta-9. But marijuana and hemp are expressly defined as separate substances, exclusive of one another by reference to the delta-9 isomer. *Compare* Tex. Health & Safety Code § 481.002(26) (marijuana), *with* Tex. Agric. Code § 121.001 (hemp).

The Agriculture Code and Health and Safety Code thus provide a simple framework for assessing the legal status of hemp and marijuana products in Texas. Hemp—which is the plant Cannabis sativa L. with a delta-9 THC concentration of 0.3 percent or less—and all its isomers and derivatives are legal; marijuana—which is the plant Cannabis sativa L. with a delta-9 THC concentration greater than 0.3 percent—and all its isomers and derivatives are controlled substances. *See* Appx.1

(demonstrative flow chart). Delta-8 THC in hemp, or delta-8 extracted or derived from hemp, is not a controlled substance under the 2019 Texas Farm Bill.

The Legislature made an intentional choice to regulate products exclusively based on their delta-9 THC concentration as this is the primary psychoactive component of cannabis. Critically, nothing in *any* Texas statute targets a product based on its delta-8 THC isomer concentration. As discussed below, the Commissioner committed an ultra vires act by attempting to unilaterally amend the Schedules contrary to the Legislature's intent.

B. Consumable hemp products containing delta-8 THC are not "synthetic" products.

In an effort to avoid the Texas Farm Bill's plain text, the State recasts delta-8 products as "synthetics." *Pet.* at 1-2. As a threshold matter, the State did not present any witness to support this contention. On that basis alone, the Court should reject the State's argument.

In any event, the presence of delta-8 in a product does not render the product "synthetic." The State admits, as it must, that the delta-8 THC isomer naturally originates from the hemp plant. *Pet.* at 5. The State then suggests that "delta-8 THC manufactured from CBD is

synthetic THC." *Id.* But this position ignores the reality that CBD is also naturally derived from hemp; and it ignores the Texas Farm Bill's plain text, which exempts from the definition of "controlled substance" "hemp," including "*all* derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers," and "the [THCs] in hemp." Tex. Health & Safety Code § 481.002(5); Tex. Agric. Code § 121.001 (emphasis added).

Moreover, the State ignores the Legislature's explicit decision to legalize the processing and manufacturing of hemp into consumable products. The Texas Farm Bill lays out a comprehensive statutory scheme for "consumable hemp products," defined as a "food, a drug, a device, or a cosmetic . . . that contains hemp or one or more hemp-derived cannabinoids, including cannabidiol." Tex. Agric. Code § 443.001(1). The statute expressly allows for "production" of consumable hemp products, which means to "extract a component of hemp, including cannabinoids [CBD and THC]" and incorporate that component into a consumable hemp product. Tex. Health & Safety Code § 443.001(9). And Texas regulations recognize the manufacturing of consumable hemp products to include "synthesizing, preparing, treating, modifying or manipulating hemp or . . . hemp ingredients." 25 Tex. Admin. Code § 300.101.

The Legislature clearly intended there to be production and manufacturing of hemp into consumable products. *See Bonsmara Nat. Beef Co. v. Hart of Texas Cattle Feeders*, 603 S.W.3d 385, 391 (Tex. 2020) ("[I]n construing statutes, [w]e give effect to legislative intent as it is expressed by the statute's language and the words used, including any definitions provided, unless the context necessarily requires a different construction.") (internal quotation marks and citations omitted). Adopting the State's characterization of delta-8 THC isomer products as synthetic would render meaningless this entire statutory scheme.

C. The Commissioner exceeded his authority in the March 2021 Schedules.

In the March 2021 Schedules, the Commissioner reverted hemp to a Schedule I controlled substance. 46 Tex. Reg. 1768 (March 19, 2021). By manipulating the definition of THC, the Commissioner attempted to outlaw all but one THC isomer (delta-9 up to 0.3% dry weight), which would make illegal *all* hemp products in Texas because they *all* contain many other isomers, including delta-8 THC. These are products that the Legislature chose to legalize and that the 2019-2020 Schedules decontrolled.

The Commissioner's March 2021 amendments violated the limits on the Commissioner's authority. To be sure, the Commissioner "shall annually establish the schedules of controlled substances." Tex. Health & Safety Code § 481.034(a). But "[t]he [C]ommissioner may not . . . add a substance to the schedules if the substance has been deleted from the schedules by the legislature." *Id.* § 481.034(c). This is precisely what the Commissioner did through the March 2021 amendments.

The Texas Farm Bill made clear that "[r]ules adopted by the [HHSC] executive commissioner regulating the sale of consumable hemp products must[,] to the extent allowed by federal law[,] reflect the principle [that] (1) hemp-derived cannabinoids . . . are not considered controlled substances or adulterants [and] (2) products containing one or more hemp-derived cannabinoids . . . intended for ingestion are considered foods, not controlled substances." *Id.* § 443.204. To allow the Commissioner to unilaterally amend the Schedules in a contrary manner would render meaningless the entire statutory regime the Legislature carefully enacted to legalize and regulate the manufacturing, processing, selling, possession, and use of consumable hemp products.

II. The Commissioner's Alteration of the Schedules Was Ultra Vires as a Matter of Procedure.

In promulgating the March 2021 amendments, the Commissioner employed improper procedures and thus exceeded his statutory authority. Before the Commissioner can modify the Schedules, the Commissioner must comply with specific legislatively mandated safeguards. *See* Tex. Health & Safety Code § 481.034. These statutory requirements are an important cabin on the Commissioner's authority because, without such limits, the grant of his rulemaking authority would be an unconstitutional delegation of legislative authority. *See Southwest Sav. & Loan Ass'n of Houston, Tex. v. Falkner*, 331 S.W.2d 917, 921 (Tex. 1960) ("Generally, a legislative delegation of rule-making authority must fix standards in order to be valid.").

The State contends that the Commissioner's amendments were proper under Health and Safety Code section 481.034(g). *Pet.* at 9-10. Section 481.034(g) gives the Commissioner thirty days following "publication in the Federal Register of a final order designating a substance as a controlled substance or rescheduling or deleting a substance" (a triggering event) to either take similar action or object. Tex. Health & Safety Code § 481.034(g). "If the [C]ommissioner objects,

the [C]ommissioner shall publish the reasons for the objection and give all interested parties an opportunity to be heard." *Id.* "At the conclusion of the hearing, the [C]ommissioner shall publish a decision, which is final unless altered by statute." *Id.*

The State contends that the DEA's August 21, 2020 IFR supplied the necessary triggering event. *Pet.* at 9. But as the DEA made clear, the IFR merely conformed the federal schedules to match the amendments made in the 2018 Farm Bill:

> This interim final rule **merely conforms** DEA's regulations to the statutory amendments to the CSA that have already taken effect, and **it does not add additional requirements to the regulations**.

CR598 (emphasis added). The IFR did not designate, reschedule, or delete a substance from the federal schedules of controlled substances. *Id.* Thus, it was not a triggering event within the meaning of subsection-(g). *See Hemp Industries Ass'n v. DEA*, 36 F.4th 269, 271 (D.C. Cir. 2022) (accepting the federal government's position that "the DEA did not intend any difference between the regulatory language and the statute").

Even if the Court were to conclude that the DEA's IFR supplied a sufficient triggering event, the Commissioner's March 2021 amendments nevertheless suffer critical procedural defects. First, objecting to the IFR could only produce authority to *not alter* the Schedules. Nothing in the statute permitted the Commissioner to shoehorn wholesale changes to the Schedules into the limited objection section 481.034(g) contemplates. Second, the Commissioner never gave any form of public notice about the proposed amendments or his reasons for them, much less did he conduct a public hearing as required by subsection-(g). The Commissioner's objection did nothing to change the Schedules and provided no public notice of any impending revisions to the Schedules. Instead, the objection notice was filed under a non-rule, miscellaneous action. 3RR at P-Ex. 7. Third, the Commissioner failed to comply with the statute's requirements to obtain the "approval of the executive commissioner," to make "findings" on eight statutory factors, and to provide "written notice" within 10 days of the amended Schedules "to each state licensing agency having jurisdiction over practitioners." Tex. Health & Safety Code §§ 481.034(a)(3), (d), (e), (h).

Because the amendments made by the Commissioner were not authorized, much less "required," by subsection-(g), the Commissioner was required to "hold[] a public hearing on the matter [of altering the Schedules] in Austin" before any such amendments could be made. *Id.* § 481.034(b). No such hearing was conducted.

In sum, by failing to comply with the statutory boundaries imposed on the Commissioner's authority—and instead engaging in surprise, ad-hoc rulemaking—the Commissioner violated the separation of powers doctrine and trampled on the important reliance interest that businesses and citizens depend on for the orderly administration of government.

III. Respondents' APA-Based Claims Provide an Independent Jurisdictional Basis.

The APA authorizes a plaintiff to bring an action for declaratory judgment against a state agency if the action alleges that a "rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff." Tex. Gov't Code § 2001.038(a). The APA defines a "rule" as "a state agency statement of general applicability that . . . implements, interprets, or prescribes law or policy . . . or describes the procedure or practice requirements of a state agency." *Id.* § 2001.003(6).

DSHS's October 15, 2021 notice on its government website constituted a rule under the APA. The notice read, in relevant part:

> Texas Health and Safety Code Chapter 443 (HSC 443), established by House Bill 1325 (86th Legislature), allows Consumable Hemp Products in Texas that do not exceed 0.3% Delta-9 tetrahydrocannabinol (THC). All other forms of THC, **including Delta-8 in any concentration** and Delta-9 exceeding 0.3%, are considered Schedule I controlled substances.

CR478 (emphasis added). This statement is one "of general applicability," and, on its face, "implements, interprets, or prescribes law or policy." *Id.* § 2001.003(6)(A). This website announcement was a sudden and significant departure from the legalization of hemp under the Texas Farm Bill signed by Governor Abbott.

DSHS seeks to defend against the allegation that its October 15, 2021 post was improper rule-making by asserting the post was mere notice. But "mere notice" can be a rule, and this notice was. *See Teladoc, Inc. v. Tex. Med. Bd.*, 453 S.W.3d 606, 620-21 (Tex. App.—Austin 2014, pet. denied) (concluding a letter from the Texas Medical Board to tele-medicine physicians was a "rule" subject to the APA); *Combs v. Ent. Publ'n*, 292 S.W.3d 712, 720-21 (Tex. App.—Austin 2009, no pet.) (holding

letters from the Comptroller to an association of fundraising suppliers constituted a "rule" for purposes of the APA because the letters were statements implementing or prescribing law or policy). Accordingly, DSHS violated the APA through its October 15, 2021 website notice, rendering the rule void and unenforceable.

IV. The Trial Court Did Not Abuse Its Discretion in Granting Respondents' Application for a Temporary Injunction.

Finally, the trial court properly granted Respondents' application for a temporary injunction.

A. Respondents had standing to seek a temporary injunction.

There is no standing issue in this case. Respondents properly demonstrated the particularized harm they would suffer if the effectiveness of the Commissioner's unlawful modifications to the Schedules was not enjoined. The Commissioner's modifications were a sudden change to the legality of products containing delta-8 THC and would severely harm Respondents' businesses and use of the products to battle severe mental and physical challenges. CR459-60.

Respondents traced this harm to specific action by the Commissioner and DSHS as the only parties that can remedy

Respondents' injuries. *Texas Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993). It is of no moment that the Commissioner and DSHS are not responsible for criminal enforcement of laws prohibiting the possession or distribution of controlled substances. Rather, the issue here is whether the Commissioner's change to the Schedules violated Texas law.

B. Respondents satisfied the temporary injunction standard.

To obtain a temporary injunction, the applicant must show: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). An order granting a temporary injunction is reviewed for an abuse of discretion. *Davis v. Huey*, 571 S.W.2d 859, 861-62 (Tex. 1978).

1. Respondents pleaded valid causes of action.

As discussed above, Respondents pleaded valid ultra vires and APA causes of action based on the Commissioner and DSHS's unlawful modification to the definition of "tetrahydrocannabinols" in the 2021 Schedules. CR459-65. Respondents' pleadings satisfy the first

requirement for obtaining a temporary injunction. *See Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993).

2. Respondents demonstrated a probable right to recovery.

An applicant for a temporary injunction need not prove conclusively that it will ultimately prevail on the merits. *Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, 610 S.W.3d 911, 917 (Tex. 2020). Rather, the applicant must offer only "some evidence which, under applicable rules of law, establishes a probable right or recovery." *Camp v. Shannon*, 348 S.W.2d 517, 519 (Tex. 1961).

In the trial court, Respondents offered evidence of their probable recovery under both the ultra vires and APA causes of action. For the reasons stated above, the modifications made to the Schedules are invalid as a matter of law because they contravene the Legislature's legalization of hemp, including delta-8 THC in hemp, and because the Commissioner failed to follow the procedural requirements in section 481.034 of the Texas Health and Safety Code to amend the Schedules. Additionally, the APA applies to the Commissioner's amended rule, and the Commissioner failed to comply with APA rule-making procedures. Accordingly, the trial

court did not err in concluding that Respondents demonstrated a probable right to the relief sought.

3. Respondents showed a probable, imminent, and irreparable injury in the interim.

Respondents presented the trial court with ample testimony that they would suffer probable, imminent, and irreparable injury absent the temporary injunction. The State offered no controverting witnesses.

Without the injunction, the business plaintiffs testified that they and others in the consumable hemp industry would lose the ability to manufacture and sell hemp-derived products that were expressly legalized under the Texas Farm Bill. *E.g.*, 2RR67, 3RR174 at P-Ex.9 (Jahoon Kim, a retailer of delta-8 products, testified that he received a letter from the City of Copperas Cove threatening criminal prosecution if Mr. Kim continued to sell delta-8 products, which would eliminate over fifty percent of his revenue.); 2RR68-69 (Jonathan Hamer, CFO of Respondent Sky Marketing, testified that the State's erroneous modification to the Schedules caused significant harm to his business, including more than a fifty percent reduction in revenue and irreparable reputational damages.); 2RR74 (Respondent Darrell Surif, a manufacturer and retailer of delta-8 products, testified that DSHS's

modification to the Schedules would force his companies to lay off up to twelve employees and damage to his companies' work environment.).

The individual plaintiffs offered testimony demonstrating the specific imminent harm they would suffer unless the trial court entered a temporary injunction. *See, e.g.*, 2RR61-62 (Mitch Fuller, Director of Government and Public Affairs for the Department of Texas Veterans of Foreign Wars, testified about veterans' use of delta-8 products to combat physical and mental health issues.); 2RR77-78, 80-81 (David Walden, a combat military veteran, testified that delta-8 products enabled him to overcome his addiction to opioids, provide relief from his combat-related injuries, and allow him to be a high-functioning member of society.).

Respondents' evidence of probable, imminent, and irreparable injury was sufficient to warrant temporary injunctive relief.

C. Respondents sought prospective relief.

A plaintiff who brings an ultra vires claim against a state official is entitled to prospective declaratory and injunctive relief, as measured from the date of the injunction. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 376 (Tex. 2009). This Court recently reaffirmed the criteria for evaluating whether a request for injunction in the ultra vires context

seeks prospective relief. *See Hartzell v. S.O.*, 672 S.W.3d 304, 319 (Tex. 2023). In *S.O.*, the Court concluded that a university graduate who brought ultra vires claims against Texas State University officials based on the university's revocation of the graduate's degree properly sought prospective injunctive relief. *Id.* Specifically, the Court explained that the graduate "asserts that the University officials acted ultra vires in revoking her Ph.D. without providing due process and requests restoration of her degree on a forward-looking basis. If she succeeds on that claim, she is entitled to such relief." *Id.* at 319-20. The Court further explained that the university's "certification" of the graduate's educational achievement "is not an isolated event but a continuing one." *Id.* at 320.

The same is true here. Respondents sought to enjoin the effectiveness of the Commissioner's March 2021 amendments to the Schedules on a forward-looking basis from the date of the injunction, and this is the exact relief the trial court awarded.

PRAYER

Respondents respectfully pray the Court deny the petition and grant Respondents any other such relief to which they are justly entitled.

Respectfully submitted,

BUTLER SNOW LLP

/s/ Amanda G. Taylor
Amanda G. Taylor
State Bar No. 24045921
amanda.taylor@butlersnow.com
D. Todd Smith
State Bar No. 00797451
todd.smith@butlersnow.com
Marshall A. Bowen
State Bar No. 24096672
marshall.bowen@butlersnow.com
1400 Lavaca Street, Suite 1000
Austin, Texas 78701
Tel: (737) 802-1800

ENOCH KEVER PLLC

Craig T. Enoch
State Bar No. 00000026
cenoch@enochkever.com
Elana S. Einhorn
State Bar No. 06502455
eeinhorn@enochkever.com
7600 N. Capital of Texas Hwy
Building B, Suite 200
Austin, Texas 78731
Tel: (512) 615-1200

COUNSEL FOR RESPONDENTS

CERTIFICATE OF COMPLIANCE

This response to petition for review complies with Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a conventional typeface of 14-point for text and 12-point for footnotes. This petition also complies with Rule 9.4(i) because, according to the word count tool in Microsoft Word, it contains 4,446 words, excluding any parts exempted by Rule 9.4(i).

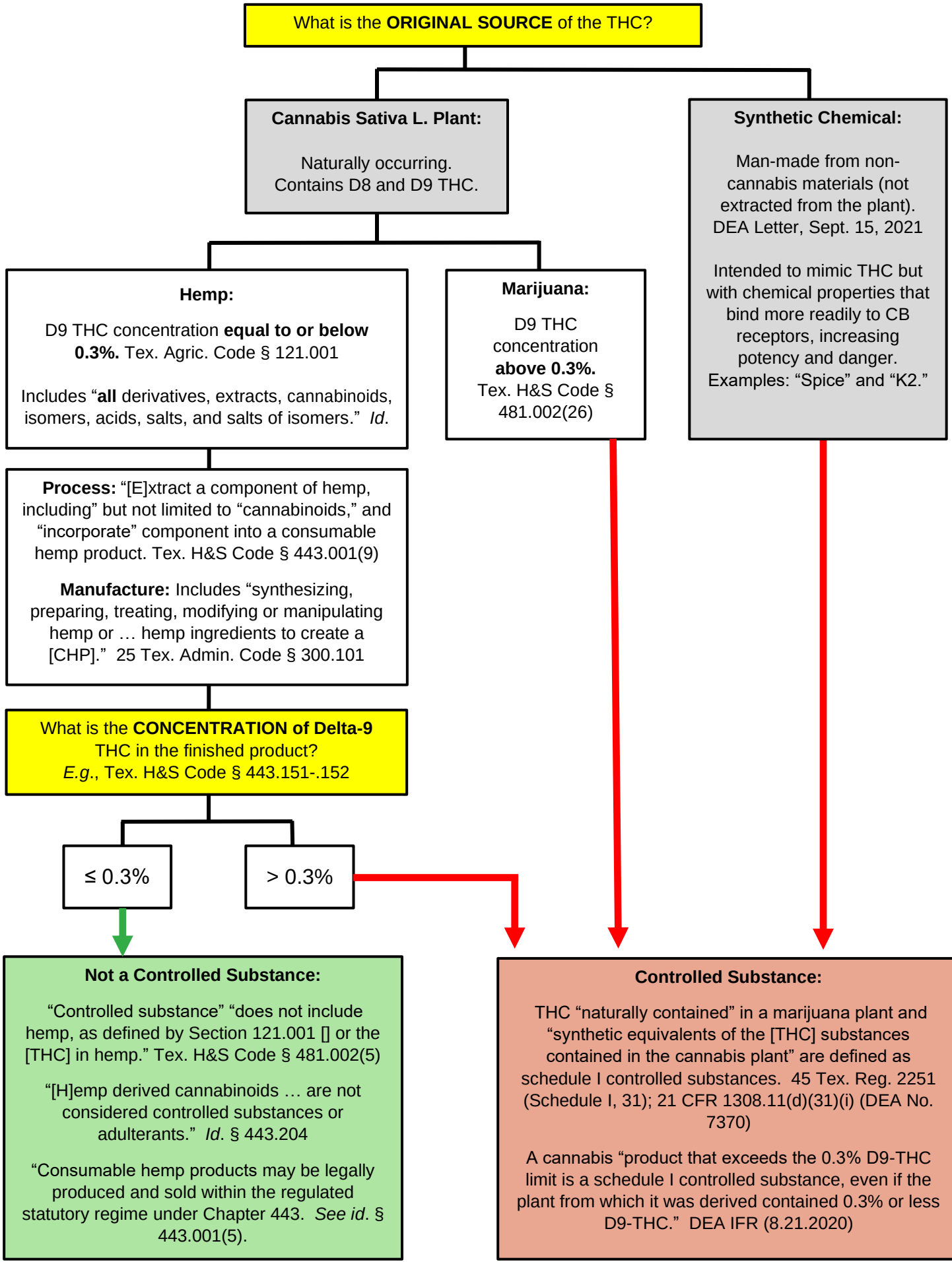
/s/Amanda G Taylor
Amanda G. Taylor

CERTIFICATE OF SERVICE

I certify in compliance with Texas Rule of Appellate Procedure 9.5(e) that this document has been electronically-served on all counsel of record through the electronic filing service provider, as confirmed by the provider's automatically-generated certificate of service.

/s/Amanda G Taylor
Amanda G. Taylor

Appendix 1:
Demonstrative Flow Chart


What is the **ORIGINAL SOURCE** of the THC?
Cannabis Sativa L. Plant:
Naturally occurring.
Contains D8 and D9 THC.
Synthetic Chemical:
Man-made from non-cannabis materials (not extracted from the plant).
DEA Letter, Sept. 15, 2021
Intended to mimic THC but with chemical properties that bind more readily to CB receptors, increasing potency and danger.
Examples: "Spice" and "K2."
Hemp:
D9 THC concentration **equal to or below 0.3%.** Tex. Agric. Code § 121.001
Includes "**all** derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers." *Id*.
Marijuana:
D9 THC concentration **above 0.3%.** Tex. H&S Code § 481.002(26)
Process: "[E]xtract a component of hemp, including" but not limited to "cannabinoids," and "incorporate" component into a consumable hemp product. Tex. H&S Code § 443.001(9)
Manufacture: Includes "synthesizing, preparing, treating, modifying or manipulating hemp or … hemp ingredients to create a [CHP]." 25 Tex. Admin. Code § 300.101
What is the **CONCENTRATION of Delta-9** THC in the finished product?
E.g., Tex. H&S Code § 443.151-.152
≤ 0.3%
> 0.3%
Not a Controlled Substance:
"Controlled substance" "does not include hemp, as defined by Section 121.001 [] or the [THC] in hemp." Tex. H&S Code § 481.002(5)
"[H]emp derived cannabinoids … are not considered controlled substances or adulterants." *Id*. § 443.204
"Consumable hemp products may be legally produced and sold within the regulated statutory regime under Chapter 443. *See id*. § 443.001(5).
Controlled Substance:
THC "naturally contained" in a marijuana plant and "synthetic equivalents of the [THC] substances contained in the cannabis plant" are defined as schedule I controlled substances. 45 Tex. Reg. 2251 (Schedule I, 31); 21 CFR 1308.11(d)(31)(i) (DEA No. 7370)
A cannabis "product that exceeds the 0.3% D9-THC limit is a schedule I controlled substance, even if the plant from which it was derived contained 0.3% or less D9-THC." DEA IFR (8.21.2020)

Automated Certificate of eService

This automated certificate of service was created by the efiling system.
The filer served this document via email generated by the efiling system
on the date and to the persons listed below:

Harriet Marmah on behalf of Amanda Taylor
Bar No. 24045921
harriet.marmah@butlersnow.com
Envelope ID: 88106794
Filing Code Description: Response to Petition
Filing Description: Response to Petition for Review
Status as of 5/24/2024 11:06 AM CST

Associated Case Party: TX DSHS

Name	BarNumber	Email	TimestampSubmitted	Status
Ari Cuenin		ari.cuenin@oag.texas.gov	5/24/2024 11:00:01 AM	SENT
Coy Westbrook		Coy.Westbrook@oag.texas.gov	5/24/2024 11:00:01 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Amanda Garrett Taylor	24045921	amanda.taylor@butlersnow.com	5/24/2024 11:00:01 AM	SENT
ECF notifications		ecf.notices@butlersnow.com	5/24/2024 11:00:01 AM	SENT
Marshall Bowen		Marshall.Bowen@butlersnow.com	5/24/2024 11:00:01 AM	SENT
D. Todd Smith		todd.smith@butlersnow.com	5/24/2024 11:00:01 AM	SENT
Valeria Alcocer		valeria.alcocer@oag.texas.gov	5/24/2024 11:00:01 AM	SENT
Toni Shah		toni.shah@oag.texas.gov	5/24/2024 11:00:01 AM	SENT
Craig Enoch		cenoch@enochkever.com	5/24/2024 11:00:01 AM	SENT
Elana Einhorn		eeinhorn@enochkever.com	5/24/2024 11:00:01 AM	SENT