

**IN THE CIRCUIT COURT OF MONTGOMERY COUNTY ALABAMA**

**TSTL HOLDINGS, LLC**

**Plaintiff,**

v.

**Case No: CV-2023-099643.00**

**THE ALABAMA DEPARTMENT OF  
PUBLIC HEALTH, SCOTT HARRIS, MD,  
in his official capacity as STATE HEALTH  
OFFICER**

**Defendants.**

**PLAINTIFF'S POST-TRIAL MEMORANDUM OF LAW**

COMES NOW, Plaintiff TSTL Holdings, Inc., and hereby respectfully presents its Post-Trial Memorandum of Law.

**INTRODUCTION**

This matter boils down to one direct and simple question: did the Alabama Legislature legalize the manufacture and sale of hemp products, including edible hemp products, in Alabama. The inescapable and unequivocal answer based on the plain language of the statute is yes. Given that the Alabama Legislature expressly included “food” in its definition of “hemp products” which it was legalizing, the Department of Public Health (the “Department”) simply has no basis on which to make its blanket accusation that all food products containing hemp are illegal.

The Department is exercising authority that it does not have to shut down TSTL Holdings (“TSTL”) and if not checked, the Department’s position will force the shut down an entire industry, undermining the express intentions and purposes declared by the Alabama Legislature when it created the industry by statute. The unlawfulness of the Department’s conduct is rooted in the fact that its actions are based solely on pre-existing food regulations that simply cannot be applied to the Legislature’s newly created category of “hemp products.”

It is worth noting at the outset that the Department's Orders are inherently inconsistent, if not duplicitous. The duplicity of the Department has been on displays throughout this matter. On one hand, the Department claims that no “food products” containing hemp may be manufactured or sold in Alabama, and on the other hand it claims that TSTL should have obtained from the Department a permit to manufacture or sell what the Department claims is an illegal product. On one hand, the Department claims that there is no safe level of hemp that can be consumed, and on the other hand the Department tells consumers they can mix any amount of CBD in their food or drink. On the one hand, the Department claims edible hemp products pose dangers to the public, and on the other hand the Department has admitted that it does not take

any action to enforce the same regulations against out of state manufacturers selling the same products. The list goes on and on. As set forth herein, the Department is operating far outside the bounds of Alabama law.

This Court raised questions at the end of a two day hearing about certain aspects of this matter. To address those questions, TSTL offers the following in response.

### **ARGUMENT**

The Department has based all its suspect actions on food regulations (not hemp regulations) that, as this Court noted, existed for quite some time before the Legislature acted in 2016 to legalize hemp products. But, this case has never been about whether the Department has authority to regulate food products; this case is about whether the Legislature legalized the manufacture and sale of edible hemp products and encouraged the growth of a commercial hemp products industry. If so, then all questions about the nuances of Departmental authority become secondary, if not irrelevant.

The Department has not offered any evidence that the Alabama Legislature gave it any authority over hemp products. The Department has not offered any evidence that the Alabama Legislature authorized it to implement new regulations under the Act, nor did it, as the Department points out with regard to the Federal Farm Bill and the U.S. Food & Drug Administration, expressly preserve the authority of the Department. The fact is that the Legislature in passing the hemp legalization law completely ignored the Department altogether. Having been ignored in the statute, the Department's position now requires this Court to ignore not only the plain language of the statute, but also the intent of the Legislature and, in so doing, allow the Department to completely undermine the intent of the Legislature.

There is no lawful interpretation of the Department's actions that could make its self-serving interpretation of its own regulations reasonable or deserving of any deference. In the past eight years, the Department has either never sought nor obtained from the Legislature express authority to regulate, much less "condemn and/or prohibit," hemp products. In the past eight years, the Department has never attempted to exercise the inherent jurisdiction that it *claims* to issue new regulations to regulate the newly created category of hemp products consistent with the language and purposes of the Legislature. Instead, the Department has chosen to declare that the Legislature was wrong in legalizing the manufacture and sale of consumable hemp products, to declare that the Legislature was wrong in calling for the creation of commercial markets for hemp products, including the markets for edible hemp products, to the greatest extent possible, and to declare that the Department has the inherent authority to interpret its own regulations to ban both the manufacture and sale of edible hemp products in Alabama. This is not only unreasonable, it is the height of bureaucratic hubris.

#### **I. THE COURT IS BOUND BY LONG-ESTABLISHED SUPREME COURT PRECEDENT TO ENFORCE THE PLAIN LANGUAGE OF THE STATUTE WHICH REJECTS THE DEPARTMENT'S CLAIMS.**

The Department has aptly framed the central and only issue in this matter as follows: "whether the Department is authorized to condemn and/or prohibit the sale of foods that contain

cannabinoid derivatives such as cannabidiol.” *See*, Motion for Preliminary Injunction, Exh. D, p.1. The unequivocal and undeniable answer to this question is “No” for four straightforward reasons. *First*, the plain language of Alabama’s hemp legalization law expressly legalized the very products that the Department wants to declare as illegal. *Second*, the Department is attempting to use its pre-existing regulations to undermine the purposes of the hemp product legalization law and thwart the intentions of the Alabama Legislature. *Third*, the Department can cite to no regulatory authority granted it by the Legislature to regulate hemp products. *Fourth*, the Department cannot attempt to rely on shifting and unsettled *federal* regulatory rationale to undermine and ban what Alabama state law expressly permits.

**A. The Department’s Actions and Proffered Interpretation of the Law Is a Direct Attack on Legislative Supremacy.**

Throughout this entire proceeding, the Department simply failed to present any case law that justifies it ignoring the plain language of the applicable statute. In *Alabama State Board of Health v. Chambers*, 255 Ala. 144, 51 So.2d 849 (1951), the Alabama Supreme Court held that administrative agencies must not enact regulations that conflict with state statutes, underscoring the supremacy of legislative will. In this case, the Department has usurped the legislative will claiming the authority and taking action in this case to “condemn and/or prohibit” an entire category of products in direct conflict with the statute and the intent of the Legislature.

Importantly, the Department’s position is so broad that the Orders at issue in this case state that “Food or food products containing cannabidiol or cannabinoid derivatives shall not be manufactured or sold within the state of Alabama.” The fatal defect in the Department’s position is that TSTL’s products are “hemp products” under Alabama law, not merely “food products” that just happen to have hemp in them, and the applicable statute has in fact authorized their manufacture and sale. The Department cannot change, by its own fiat, the definition of “hemp products” set forth by the Legislature to meet its own ends.

In 2016, the State of Alabama legalized the manufacture of industrial hemp. Specifically, Alabama amended the definition of marijuana, which had been an illegal substance banned for sale in any form, to exclude industrial hemp: “Marijuana does not include industrial hemp as defined in Sections 1 to 4 of the act amending this subdivision.” *See*, Act #2016-293, signed by the Governor on May 10, 2016; AL Code §20-2-2 (hereafter, the “2016 Hemp Act”). The 2016 Hemp Act defined “Industrial Hemp” as follows:

**INDUSTRIAL HEMP.** All parts and varieties of the plant *Cannabis sativa* cultivated or possessed by a licensed grower, whether growing or not, that contain a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis. Industrial hemp shall be considered an agricultural crop or an agricultural commodity, or both, in all respects under state law. The term excludes marijuana as defined in subdivision (14) of Section 20-2-2.

AL Code §2-8-381(4).

Then, in 2019, the Legislature amended and *expanded* the definition to specifically include “all derivatives, extracts, [and] cannabinoids” of the hemp plant with a very low THC concentration:

INDUSTRIAL HEMP OR HEMP. All parts and varieties of the 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, cultivated or possessed by a licensed grower or otherwise in accordance with the state's USDA-approved regulatory plan, whether growing or not, that contain with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis. Industrial hemp shall be considered an agricultural crop or an agricultural commodity, or both, in all respects under state law. The term excludes marijuana as defined in subdivision (14) of Section 20-2-2.

*See*, Ala. Act #2019-502, signed by the Governor on June 10, 2019, attached hereto as Exhibit F (reflecting changes from the 2016 law; emphasis supplied); AL Code §2-8-381(3) (hereafter, the “2019 Hemp Act”). Despite raising numerous questions about the propriety of certain cannabinoids (i.e., Delta-8, Delta-9, etc.), the Department simply cannot deny that the Legislature legalized *all* such hemp derived cannabinoids.

**1. The Department’s position requires this Court to ignore the plain language of the statute, which the Court cannot do.**

No matter how much it tries, the Department cannot escape or explain away the plain language of the statute which expressly included food in the new law’s definition of “hemp products.” Alabama’s statutes must be read in a manner consistent with their plain language and intent:

The polestar of statutory construction is to ascertain and give effect to the Legislature's intent in enacting a statute. *Norfolk S. Ry. v. Johnson*, 740 So.2d 392, 396 (Ala.1999). When a court construes a statute, “[w]ords used in [the] statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says.” *IMED Corp. v. Systems Eng'g Assocs. Corp.*, 602 So.2d 344, 346 (Ala.1992).

*In re Jason Roger Berryhill v. State of Alabama*, 801 So.2d 7, 9-10 (Ala.2001). The Supreme Court in *Mobile v. Tyler* similarly explained the foundational requirement of giving plain meaning to the words in a statute:

The fundamental principle of statutory construction is that words in a statute must be given their plain meaning. See *Simcala, Inc. v. American Coal Trade, Inc.*, 821 So.2d 197, 202 (Ala.2001) (citing *Ex parte Smallwood*, 811 So.2d 537, 539 (Ala.2001); *Ex parte Krothapalli*, 762 So.2d 836, 838 (Ala.2000); and *IMED Corp. v. Systems Eng'g Assocs. Corp.*, 602 So.2d 344, 346 (Ala.1992)); *Archer Daniels Midland Co. v. Seven Up Bottling Co. of Jasper, Inc.*, 746 So.2d 966, 969 (Ala.1999) (citing *John Deere Co. v. Gamble*, 523 So.2d 95 (Ala.1988)).

Mobile v. Tyler, 981 So. 2d 1077, 1104-05 (Ala. 2007). Thus, it is axiomatic that this Court must give effect to the plain meaning of the hemp legalization statute which completely contradicts the Department’s position by making clear that the “hemp products” it legalized included “food” and other edible products.

At the same time as it legalized hemp in 2016, the Alabama Legislature created a new category of legal “hemp products”:

**HEMP PRODUCTS. Any and all products** made from industrial hemp, **including, but not limited to,** cloth, cordage, fiber, **food**, fuel, paint, paper, particleboard, plastics, seed, seed meal and seed oil for consumption, and seed for cultivation if the seeds originate from industrial hemp varieties.

AL Code §2-8-381(2) (emphasis supplied). Here the plain and ordinary meaning of the statute is clear. “Any and all products” means what it says and the breadth of this definition should be enough to strike the Department’s Orders and issue a declaratory judgment. However, the Legislature went even further and expressly included “food” and other products “for consumption” in its non-exhaustive list of “hemp products.” *Id.*

Given this, the Court cannot rule in favor of the Department without ignoring the plain and ordinary meaning of the statute. Because the Legislature plainly used the word “food” when it created its new category of hemp products, this “court is bound to interpret that language to mean exactly what it says.” *In re Berryhill*, 801 So.2d at 10. The Department cannot square its position with this plain language or otherwise suggest that the Alabama Legislature did not legalize the addition of hemp inclusion in foods and a variety of other products, so long as those hemp products contained no more than the specified legal limit.<sup>1</sup>

In fact, to even consider the Department’s actions, this Court would have to not only ignore the plain language of the statute, but it would have to disassemble the definition of “hemp products” created by the Legislature and treat hemp first as “additive” to food. But, the Legislature carefully crafted its definition of hemp products to include food, AL Code §2-8-381(2), containing hemp with an express limitation on the amount of delta-9 tetrahydrocannabinols of no more than 0.3% by dry weight. AL Code §2-8-381(3). Thus, a food which contains no more than the specific amount of tetrahydrocannabinols is no longer a food, but a “hemp product” taking it outside the authority of the Department. Of course, if an edible product contains *more than* the statutory amount of hemp, it would fall outside the statutory language and the Department could plausibly argue that it is a food product which has been adulterated outside the confines of the law. But, importantly, the Department admitted it is not asserting “that Petitioner’s products are illegal because they exceed a THC concentration of 0.3%.” *See*, Motion for Preliminary Injunction, Exh. G, p. 1. The Department is stating that there is no amount of hemp that could be included in food.

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<sup>1</sup> Importantly, the Department has made clear that it is not asserting that any of TSTL’s products at issue in the Orders exceeded the legal hemp limit. In fact, the Department declared that it is neither, “asserting jurisdiction over the growing of hemp as an agricultural commodity; nor does it assert that [TSTL’s] products are illegal because they exceed a THC concentration of 0.3%.” *See*, Department Response to Jurisdictional Issues Raised by Petitioner, p. 1, March 30, 2023, attached hereto as Exhibit G.

To be sure, in the 2019 expansion of the hemp legalization law, Alabama amended its controlled substances act to make clear that it was exempting “hemp, as defined by 2-8-381” from its ban on “tetrahydrocannabinols.”<sup>2</sup> See, 2019 Hemp Act, AL Code §20-2-23(b)(3)(q). This clarification in the law, which had been requested by Alabama pharmacies concerned about their licenses if they sold hemp products, paved the way for an even broader market for the sale of commercial hemp products through pharmacy outlets. It was established at the hearing and through the evidence that, today, retailers all across the state, including Alabama pharmacies, sell a variety of products containing hemp, including edible CBD products.

**2. The Department’s position requires this Court to read and write words into the statute, both of which the Court cannot do.**

The only way to reconcile the Department’s position with the plain language of the statute would be to read and write words into it, something which the Alabama Supreme Court clearly prohibits. “We cannot read into the statute a provision which the legislature did not include.” *Ex parte Jones*, 444 So. 2d 888, 890 (Ala. 1983); *see also*, *Elmore Cnty. Comm’n v. Smith*, 786 So. 2d 449, 455 (Ala. 2000) (“We will not read into a statute what the Legislature has not written”); *Siegelman v. Chase Manhattan Bank (USA)*, Nat’l Ass’n, 575 So. 2d 1041, 1045 (Ala. 1991) (“[A] court may explain the language but it may not detract from or add to the statute”).

The Department’s reasoning necessarily boils down to asserting that the correct reading of the statute is that the Legislature legalized the use of hemp in food “if and when” or “so long as” or “provided that CBD is authorized by the U.S. Food and Drug Administration as a food additive.” But, that is *not* what the Legislature said and this Court is barred from reading or writing such words into the statute to make lawful the Department’s actions. *Echols v. State*, 24 Ala. App. 352, 353, 135 So. 410, 411 (1931) (“[C]ourts are without authority to add to or take from the written statutory law as passed by the Legislature and approved”).

The Court raises the question of whether the regulations are in flux and whether this impacts the analysis in this case. To be sure, at best, the Department’s position devolves into asserting that there is a gap in the statute – i.e., by the Legislature not specifying whether the Department has any authority to regulate hemp products – which it should be able to fill in and which this Court should allow it to do so. However, it is well settled that courts may not interpret statutes to compensate for omissions. “[I]t is not the office of the court to insert in a statute that which has been omitted[;] ... what the legislature omits, the courts cannot supply.” *Pace v. Armstrong World Indus., Inc.*, 578 So. 2d 281, 284 (Ala. 1991) (quoting 73 Am. Jur. 2d Statutes § 203 (1974)); *see also*, *Ex parte Jackson*, 614 So. 2d 405, 407 (Ala. 1993) (“The judiciary will not add that which the Legislature chose to omit”); *Dale v. Birmingham News Co.*, 452 So. 2d 1321, 1323 (Ala. 1984) (“[W]e deem it inappropriate to engraft by judicial fiat a change the legislature has apparently not chosen to make”).

Thus, this Court may not construe the language of the statute to meet the Department’s desired reading to change what the Legislature expressly stated even if it would improve the statute. “Indeed, we have held that ‘to change the statute under guise of construction, [is] an

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<sup>2</sup> This change was requested by Alabama pharmacies which could not previously sell CBD products because they were still subject to Alabama’s controlled substances act.

infringement upon the legislative prerogative.” *Holt v. Long*, 234 Ala. 369, 372, 174 So. 759, 760 (1937), *see also* *Alabama Indus. Bank v. State ex rel. Avinger*, 286 Ala. 59, 62, 237 So. 2d 108, 110–11 (1970) (“The office of interpretation is not to improve the statute; it is to expound it”).

This is a matter of black letter law. If the Alabama Legislature wanted to impose limitations other than those it already included, it would have done so (as discussed below). But, the Legislature did not say that edible hemp products could be sold only *if* CBD was authorized as a food additive by the U.S. FDA. Neither the Department nor this Court can ignore the language of the statute, read words into the statute, or fill perceived omissions in the statute.

**B. The Legislature Knew Exactly What It Was Doing In Legalizing the Addition Of Hemp In Food Notwithstanding The Department’s Pre-Existing Regulations, And It Intended To Do So.**

Under well settled law, this Court must presume that the Legislature in passing the landmark 2016 and 2019 Hemp Acts knew that Alabama’s “food law” barred the addition of hemp or CBD to any food. Taken to its unreasonable conclusion, the Department’s reading of the statute is that the Legislature’s legalization of a *previously illegal* category of products, and its inclusion of food in the definition of hemp products being legalized, must have been a mistake. However, this Court must presume that the Legislature knew the existing law as it pertained to the subject on which it was legislating. The Supreme Court, in *Ex parte Ford Motor Co.*, stated, “It is an ingrained principle of statutory construction that ‘the Legislature is presumed to be aware of existing law and judicial interpretation when it adopts a statute,’ 73 So. 3d 597, 603 (Ala. 2011) (quoting *Carson v. City of Prichard*, 709 So. 2d 1199, 1206 (Ala. 1998)); *see also* *Water Works Bd. of Birmingham v. Ala. Surface Mining Comm’n*, 177 So. 3d 1167, 1170 (Ala. 2014) (“In enacting statutes, the legislature is presumed to know the state of the existing law. *See* *Wright v. Childree*, 972 So.2d 771, 778 (Ala.2006)”). The legislature’s knowledge of existing law also includes rules and regulations. “[T]he generally accepted theory is that rules, regulations and general orders of administrative authorities pursuant to the powers delegated to them have the force and effect of laws, when they are of statewide or national application, and so set up as that information of their nature and effect is readily available, or has become a part of common knowledge.” *McCullar v. Univ. Underwriters Life Ins. Co.*, 687 So. 2d 156 (Ala. 1996) (quoting *State v. Friedkin*, 244 Ala. 494, 497, 14 So.2d 363, 365 (1943)).

As the Court correctly pointed out at the end of the hearing, and as the Department affirmed, the “food” regulations at issue in this case have long barred the inclusion of any “additive” to food that was not authorized by the U.S. Food & Drug Administration. Specifically, then, long before the passage of the 2016 statute, according to the Department, it was illegal to manufacture or sell any food with CBD in it. Nonetheless, the Legislature expressly acted and clearly included food in its non-exhaustive list of hemp products that it was legalizing.

So, to answer the Court’s question, the passage of the 2016 Hemp Act did, in fact, change the law – making products previously illegal, legal – and therefore it changed or barred the applicability of the Department’s pre-existing general regulations. In so doing, the Legislature’ knowingly authorized the manufacture and sale of food containing hemp, making the

Department's pre-existing food rules inapplicable altogether and the Department's interpretation of its own rules patently unreasonable and unlawful.

Moreover, if and when the Legislature has wanted to restrict "foods" containing certain substances, it clearly has done so. For example, in medicinal cannabis law the Legislature expressly prohibited food products, with the exception of gelatin cubes (also known as gummies), evidencing the Legislature's clear ability to make decisions on whether and/or which food products should and should not be sold. Ala. Code §20-2A-14 (expressly including and excluding certain foods from the definition of "medical cannabis"). Here, the Legislature did not impose any such limits and also legalized other consumable or ingestible products containing hemp. However, taken to its logical conclusion, the Department's position is that it has inherent authority over all food products and could step into the realm of medicinal cannabis to ban cannabis gummies.

Perhaps most importantly, the Alabama Legislature has recently spoken again on the issue of hemp products and did not restrict edible hemp products. In 2023, pursuant to Public Act 2023-0169, the Legislature chose to protect public health by requiring that hemp products not be sold to anyone under the age of 21, requiring that hemp products be sold in child resistant containers, and that hemp products may not be sold in an area where individuals under 21 years of age are permitted. Specifically, the Legislature amended the hemp law to specify that products containing hemp cannot be sold, distributed, marketed to, or possessed by anyone under the age of 21:

Except as provided in Chapter 2A of Title 20, Code of Alabama 1975, psychoactive cannabinoids derived from or found in hemp as defined in Section 2-8-381, Code of Alabama 1975, including, but not limited to, delta-8-tetrahydrocannabinol and delta-10-tetrahydrocannabinol, shall not be sold, distributed, marketed to, or possessed by an individual who is under 21 years of age.

Ala. Act 2023-2019-0169; see AL Code §13A-12-214.

See, Public Act 2023-0169. This is the third time that the Alabama Legislature has passed a law addressing hemp products. This particular law was focused on protecting public health as it passed through the House Health Committee and the issue of whether the most popular form of hemp products – edible hemp products – was addressed.

In 2023, while this case was pending and the Alabama Position Statement was public, the Legislature could easily have stated that edible hemp products could not be manufactured or sold in Alabama if they considered such products a public health threat – but it did not. Instead, the Legislature took reasonable actions to restrict who should be able to purchase them and how. In this latest example, the Legislature spoke clearly. The 2023 law is further evidence that the Legislature had no intention to ban edible hemp products but, rather, it chose to ensure that such edible or consumable hemp products were not easily accessed by children requiring that containers be child resistant, and that they not be sold to anyone under 21 or in places where individuals under 21 are permitted. To be clear, no similar need could be found for any of the other "hemp products" defined under the 2016 Hemp Act – "cloth, cordage, ... fiber, fuel, paint, paper, particleboard, plastics, seed, seed meal and seed oil for consumption, and seed for

cultivation if the seeds originate from industrial hemp varieties” – other than edible or ingestible products made with hemp.

The Legislature knows exactly what it is doing and the Department, try as it might, cannot undo it.

**C. The Court May Not Enforce the Department’s Interpretations of its Rules In A Manner that Directly Contradicts the Intent of the Alabama Legislature, and Undermines the Purpose of the Statute and Shuts Down an Industry.**

The frailty of the Department’s forbidden statutory interpretation argument is only amplified when the Court considers the fact that the Department’s position directly conflicts with the plainly stated statutory intent of the Legislature. Under the Alabama Administrative Procedures Act, regulations must be consistent with the statutes they purport to implement. (Of course, the Department has not adopted any regulations specific to hemp products.) This was highlighted in *Ex parte City of Orange Beach Board of Adjustment*, 833 So.2d 51 (Ala. 2001), where the Alabama Supreme Court struck down an administrative rule that was found to be inconsistent with the legislative intent. As explained by the Alabama Supreme Court *Norfolk Southern*, construction of a statute must give effect to the intent of the Legislature:

This Court has held that the fundamental rule of statutory construction is to ascertain and give effect to the intent of the Legislature in enacting a statute. *IMED Corp. v. Systems Engineering Assocs. Corp.*, 602 So.2d 344, 346 (Ala.1992). [...] The legislative intent may be gleaned from the language used, the reason and necessity for the act, and the purpose sought to be obtained by its passage. *Tuscaloosa County Comm'n v. Deputy Sheriffs' Ass'n of Tuscaloosa County*, 589 So.2d 687, 689 (Ala.1991) (citing *Ex parte Holladay*, 466 So.2d 956 (Ala.1985)).

*Norfolk Southern Ry. Co. v. Johnson*, 740 So. 2d 392, 396 (Ala.1999).

As clearly as it defined the hemp products being legalized, which included food, the Legislature also clearly declared its purpose with respect to hemp products under the statute:

The purpose of this act is to assist Alabama in the development of a more permanent, profitable, and diversified agriculture by moving to the forefront of industrial hemp production, development, **and commercialization of hemp products in agribusiness, and other business sectors**, both nationally and globally and **to the greatest extent possible.**”

AL Code §2-8-382(a) (emphasis supplied). In addition, the Legislature stated:

The Legislature hereby finds and declares that the authority granted in this act and the purposes accomplished hereby are **proper governmental and public purposes, and that development of industrial hemp production and commercial markets for hemp products within the state is important to the economic well-being of the state.**

AL Code §2-8-382(b) (emphasis supplied).

Here, the Department is not seeking to “regulate” edible hemp products it is claiming the right and authority to “prohibit and/or condemn” the manufacture or sale of edible hemp products in Alabama altogether, thus eliminating the largest commercial market that has grown within the state since passage of the 2016 Hemp Act. The Department’s actions will affect hundreds of retailers and manufacturers throughout the State of Alabama by forcing them to close, like TSTL.

The Department’s only argument on legislative intent is summed up in this statement: “While the law does encourage the development of the hemp industry, there is no indication that anyone anticipated the rapid proliferation of edibles that contain cannabinoid derivatives, or that the Alabama Legislature intended to legalize a broad range of food items and supplements that have not been proven safe.” *See*, Motion for Preliminary Injunction, Exh. G, p. 6. Putting aside the fact that this Court cannot rule on the Department’s post-hoc speculation of legislative intent, its words are belied by what the Legislature actually stated. The Legislature not only anticipated the rapid proliferation of hemp products – defined broadly to include food and even products that were not specified – by plainly stated its intent to move Alabama to the forefront of “commercialization of hemp products...to the greatest extent possible” and its declaration of the “proper governmental and public purposes” of the new law, specifically, that the “development of...commercial markets for hemp products within the state is important to the economic well-being of the state.”

This stated legislative intent is critical to this analysis and stands apart from issues of industrial hemp processing as it relates specifically to the *commercialization* (i.e., manufacture and commercial sale) of hemp products. Had the Legislature not defined “hemp products” and included its statement of intent then, perhaps, the Department would have a case. Put another way, the Legislature defined the term “hemp products” so that it could make clear its intent was to grow commercial markets for hemp products, including food.

Since 2016, the hemp products industry in Alabama has grown steadily. TSTL and dozens of other manufacturers and retailers of edible hemp products did just what the Alabama Legislature called for by developing and expanding the commercial markets for hemp products in the state. The Act was amended in 2019 to ensure a broader classification of products.

There is no reading of or ambiguity in the statute that the Department has offered which would justify its blanket prohibition of edible products containing any amount of hemp. To be clear, regardless of whether the Department has any authority at all, it has no ability to ban the products that the Legislature expressly legalized or otherwise ask that its regulations be interpreted in a manner that would allow it to shut down an entire new industry and commercial marketplace that the Legislature expressly called for.

## **II. THE DEPARTMENT HAS NO REGULATORY OVER THE LEGISLATURE’S NEWLY CREATED CATEGORY OF HEMP PRODUCTS AND ANY AUTHORITY IT IS EXERCISING IT IS EXERCISING ILLEGALLY.**

The Court raised questions at the end of the hearing that focused on the reasonableness of the Department’s actions. Specifically, the Court inquired about the fact that the regulations

relied upon by the Department long pre-existed the passage of the Alabama hemp legislation and whether the law's charge to the Department of Agriculture and Industries make the asserted rules unreasonable. The Court also noted that it was unclear whether the legislature charged the Department with creating rules about edible hemp products. The Court also inquired about whether the Department is interpreting its rules unreasonably.

Given the law set forth in Section I above, the Court need not reach these nuanced questions of the Department's exercise of authority which patently contradicts and undermines the fundamental principles of statutory construction and interpretation, as well as Alabama's principles of legislative supremacy. But, even if these issues are considered, they all militate against the Department for myriad reasons set forth below. By every measure, the Department's actions in this case and the broad legal power it has bestowed on itself are unreasonable.

#### **A. The Alabama Legislature Delegated Authority Over Hemp Products to the Department of Agriculture and Industries, Not the Department of Public Health.**

It is axiomatic that an administrative agency derives its powers for regulating under a statute from the Legislature. In this case, we are dealing with an unlawful *appropriation* of power by the Department because the Legislature neither in 2016 nor in 2019 granted any authority to the Department under the hemp legalization law. Rather, the Alabama Department of Agriculture & Industries (ADAI) is the only entity authorized by the Legislature to regulate hemp products. AL Code §2-8-383.

The Alabama Department of Agriculture has its own Division of Food Safety which “conducts food retail establishment inspections” and issues “permits for retail food establishments.”<sup>3</sup> To be sure, the Alabama Safe Foods Act of 2000 gives the ADAI the authority to “enter and inspect any premises or vehicle where any food, drug or cosmetic regulated by this chapter is manufactured, harvested, processed, compounded, refined, packed, packaged, stored, sold or transported.” AL Code §20-1-3.

The Department proffered at the hearing the testimony of Andy Tipton, the Head of the Division of Food Safety, who acknowledged that ADAI not only has a “food safety program” but also the ability to inspect companies for contaminated foods. (See Transcript, p. 29) Mr. Tipton could not offer any explanation for why the ADAI took the position that it was not responsible for conducting inspections related to the manufacture or sale of hemp product manufacturers or sellers, stating “that’s outside of my pay grade.” *Id.* Thus, if any agency has authority to assert inspection and permitting authority over the manufacturing, processing, packaging and sales of edible hemp products, it can only be the agency to which authority was delegated in the hemp statute – ADAI.

The Court raised the question of whether the legislature “charged them [ADAI] with creating rules about food, even though they put food in the definition.” One thing is certain: the Legislature did not charge the Department with creating rules pertaining to hemp products and the Department has never created any such rules. Like the Department, the ADAI already has statutory authority and rules that pertain to food inspections. The mere fact that the ADAI has

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<sup>3</sup> See <https://agi.alabama.gov/foodsafety/about/>.

not yet issued regulations specific to the manufacture or sale of hemp products, or is “taking the position they don’t administer that” as the Court noted, does not mean that it could not or should not. Nor does it permit a finding that, in the absence of ADAI regulation, the Department has authority to use its pre-existing regulations in a manner which would undermine the stated purpose of the statute.

The Department tries to rely on its existing food *sanitation* regulations not because they expressly prohibit the use of hemp in food, but because, it claims, the federal government has not yet authorized hemp or CBD in food products. The Department does not appear to care that the Legislature authorized the addition of hemp in foods so in issuing the Orders, the Department is attempting to elevate its general food authority over the Alabama hemp legalization statute, an act that is not permitted. *al. Dept. of Rev. v. Jim Beam Brands*, 11 So. 3d 858 (Ala. Civ. App. 2008) (affirming appeal of the reversal of “the ALJ’s final order” on grounds “that the Department had improperly elevated an agency regulation over a statute”).

Knowing that it was promoting commercial markets for the sale of hemp products, including food containing cannabidiol, the Legislature could have made hemp products subject to the Department’s authority, but it did not do so. Moreover, at any time before or after the Alabama Legislature acted in 2016 and 2019 to legalize and expand markets for hemp products which expressly included food, the Department could have sought legislative authority to regulate hemp products. If the Department did so, the Department clearly was not given such authority in any hemp law passed by the Legislature. If the Department did not do so, the Department cannot now claim that it has authority to “condemn or prohibit” this new category of hemp products that the Alabama Legislature created and sought to expand “to the greatest extent possible”.

#### **B. The Court May Not Give Deference to a Department Attempting to Ban, Rather than Regulate, Products Legalized by the Legislature.**

The “food sanitation” regulations on which the Department attempts to base its authority predate Alabama’s hemp legalization law and the creation of a new category of products – hemp products – under Alabama law. So, the Department now asks this Court to allow it to enforce its pre-existing regulations regarding food “additives” in the face of subsequent legislative action. Under the Department’s theory of the case, it can ban cannabidiol in foods regardless of the Legislature’s actions. If that was the case, then the Department necessarily must argue that the Legislature’s decision to include food in the new category of hemp products is meaningless or a nullity. But, Alabama courts say otherwise.

Alabama courts do not give deference to agency actions which conflict with and/or undermine the statutes they are attempting to enforce. *Smith v. LeFleur*, 329 So. 3d 598, 608 (Ala. Civ. App. 2019) (“Section 41-22-10, Ala. Code 1975, provides that a trial court can declare an administrative rule invalid “if it finds that [the rule] violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without substantial compliance with rule-making procedures provided for in this chapter”) (rev’d on standing grounds). The Court went on to explain that:

An administrative rule out of harmony with statutory law is a nullity, *Alabama Dep't of Revenue v. Jim Beam Brands Co.*, 11 So. 3d 858, 864 (Ala. Civ. App. 2008), because an administrative agency has no power to adopt a rule or regulation that subverts or enlarges upon statutory policy. *Ex parte Jones Mfg. Co.*, 589 So. 2d 208, 210 (Ala. 1991).

*Id.*; *Al. Dept. of Rev. v. Jim Beam Brands*, 11 So. 3d 858, 865 (Ala. Civ. App. 2008) (reversing ALJ order on grounds that the regulation as enforced conflicted with the statute).

To absurdity of the Department's position is that its regulations governing *how* food is manufactured give it the authority to ban those products outright regardless of whether the manufacturer is "permitted or not permitted." (See Ron Dawsey testimony). As set forth above in Section I, the application of the Department's pre-existing food rules are now out of harmony with the statute and, therefore, a nullity. The Department's regulatory position is that it is entitled to regulate products out of existence, i.e., ban them. *See, State v. Vaughan*, 4 So. 2d 5 (Ala. Crim. App. 1941) ("For the purpose in hand it is sufficient to say that it is our opinion that if the State can prohibit the sale, offer or possession for sale of game fish in Alabama, it must do so by law and not by a regulation of the Conservation Commissioner approved by the Conservation Board").

### **C. The Department Cannot Rely on Its General Food Statutory Authority to Regulate A Highly Specific Statute.**

As argued in the Motion for Preliminary Injunction, even if the Department argues that Alabama's hemp product law conflicts with the existing food and drug laws, that does not form the basis for jurisdiction. In *Jim Beam Brands*, the court affirmed the reversal of an ALJ order finding:

The court in *Ex parte Jones* noted that, under the Department's interpretation of its authority, a conflict between two statutes would be created. Although the court concluded that no conflict between the two statutes existed because it held that the Department had no authority to adopt regulations that violated existing statutes, the court noted that, even if a conflict were found, the more specific statute would govern as to its specific field of operation.

*In re Jim Beam Brands*, 11 So. 3d at 865 (citations omitted). The same is true here.

Citing only to federal statutes and a treatise, the Department argued that in a conflict between statutes its food statute is more specific and should govern. The Department has it backwards. The Department's food authority is so broad it covers everything from vegetables to shellfish and everything in between, but the 2016 Hemp Act only covers a very narrow subset of food – that containing hemp. Hence, if any conflict exists, according to Alabama law, the specific hemp statute must govern. Just as in *Ex parte Jones* and *In re Jim Beam*, not only does the applicable statute not grant the Department any express or implied authority, the exercise of the Department's general food authority in a manner that is contradictory to the more specific hemp products statute cannot be permitted.

#### **D. The Department’s Reliance on a Non-Existent Federal Regulatory Scheme Undermines Its Only Claim for Bootstrapped Authority.**

It wasn’t until September 2022, six years after Alabama legalized edible hemp products and three years after Alabama expanded its law to include expressly legalize all cannabinoids, that the Department first publicly offered its theory that “CBD [cannabidiol] is not Generally Recognized as Safe (GRAS) by FDA and, therefore, is not approved as a food additive in Alabama.” See, Department’s Position Statement on CBD in Food, September 30, 2022 (Exhibit G to Motion for Preliminary Injunction). To support its “Position Statement”, the Department cited to an April 2, 2019, press release from the former FDA Commissioner discussing “new steps to advance the agency’s continued evaluation of potential regulatory pathways for cannabis-containing and cannabis-derived products.” Interestingly, the former commissioner’s statement did not even mention GRAS at all. But, even if it did, it does not matter because that press release in 2019 *predates* the Alabama Legislature’s inclusion of “food” in the definition of hemp products while urging a broad expansion of commercial markets for such products. In other words, to the extent that the Alabama legislature is presumed to know the law, which the Department claims is premised on the FDA’s decision-making process, this Court must presume that the Legislature legalized hemp in food *despite* whatever questions or concerns were raised by the FDA Commissioner.

Regardless, the Department’s desire to rely on federal food regulations as a basis for shutting down TSTL’s Alabama business was dealt a fatal blow by, of all entities, the FDA itself. On January 26, 2023, the FDA released another public statement in which it declared the inapplicability of FDA’s food regulations to CBD altogether. FDA, *FDA Concludes that Existing Regulatory Frameworks for Foods and Supplements are Not Appropriate for Cannabidiol, Will Work with Congress on a New Way Forward*, January 26, 2023 (Preliminary Injunction Motion, Exhibit H). FDA declared that its “existing foods and dietary supplements authorities provide only limited tools for managing many of the risks associated with CBD products” and for this reason, the FDA said it “does not intend to pursue rulemaking allowing the use of CBD in dietary supplements or conventional foods.” *Id.* In other words, even the FDA does not have any regulations governing the use of CBD, or any other hemp derived cannabinoid in food. Instead, FDA said: “Today we are announcing that after careful review, the FDA had concluded that a new regulatory pathway for CBD is needed that balances individuals’ desire for access to CBD products with the regulatory oversight needed to manage risks.” *Id.* What this new regulatory pathway will look like is anybody’s guess at this point.

Regardless of what the FDA says, it does not prohibit the State of Alabama from acting *legislatively* to chart a different path. To wit, the legalization of cannabis in Alabama and states around the country make that abundantly clear. Moreover, the State of Alabama has a proud history of adopting legislation that conflicts with federal law. And, while the Department may have tied its regulations to US FDA regulations, no administrative regulation could ever supersede the Legislature’s supremacy in making law.

#### **III. THE HARDSHIP IMPOSED ON TSTL FAR OUTWEIGHS ANY HYPOTHETICAL HARDSHIP RAISED BY DEFENDANT.**

TSTL's preliminary injunction motion the Department from enforcing its Food Condemnation Order is required to prevent both the closure of TSTL's business, the destruction of lawfully manufactured hemp products, as well as the threat of prosecution from the Department pending the resolution of this matter.

The actual hardship imposed on TSTL far outweighs any hypothetical hardship of the Department. Any action by the Department to enforce the Orders would result in the closure of TSTL's business. The Facility was established to manufacture hemp products in a food format. Those products make up 90% of TSTL's business making it impossible to remain open should the Department's Orders be enforced. (Testimony of Stacey Hamilton). Moreover, the Department's Orders do not simply forbid the sale of the products in question in the State of Alabama. Instead, the ordered destruction of the products would deprive TSTL of lawfully selling its product in other jurisdictions altogether. Finally, enforcement of the Department's Orders would cause hardship to all of TSTL's employees who would become unemployed with the closure of the Facility.

The Department cannot articulate any hardship it or the public would suffer that has not already been addressed by the Legislature. The Department waited years after the hemp legalization law was passed and expanded before it announced its position, undermining any argument that there is some imminent public health concern. The Department waited years before it took action against TSTL and did so only because it was responding to an anonymous complaint. Edible hemp products are being manufactured and sold throughout the State of Alabama. Even though the Department's regulations are not applicable, the Department's inspectors actually informed TSTL that TSTL's manufacturing processes at the Facility met all the Department's requirements and that nothing needed to be changed. (Testimony of Stacey Hamilton; Testimony of Rita Wagnon.)

Finally, the Department cannot claim to be protecting Alabama consumers given its inherently contradictory positions. As noted earlier, in September of 2022, the Department first published its formal "Position Statement on CBD in Foods." There, the Department explained that it allows "food establishments to sell food or drinks and allow a customer to add their own separately purchased CBD to the food or beverage." (Preliminary Injunction Motion, Exhibit J) If the Department had serious concerns about CBD or hemp, it would not find it permissible that customers could mix their own CBD into those same food and drinks – at unregulated amounts which could easily exceed the statutorily prescribed limit of 0.3% THC required by the Legislature. So, while the Department takes the position that TSTL's products, which do not exceed the statutory content limit are somehow problematic, it is somehow okay for consumers to use whatever amount of cannabinoids they desire.

While this Department wants to belatedly declare edible hemp products as a "public nuisance" the agency cannot use its judgment to replace that of the Alabama legislature which declared the development of this industry in the public's interest. The Department cannot claim any hardship for having to abide by the will of the Alabama Legislature and certainly cannot claim any hardship for being unable to assert authority over hemp products not delegated to it by the Legislature.

Regardless, the Legislature already acted in the way and to the extent that the Legislature wanted in 2023, to ban the sale of any edible (edible) hemp products to anyone under 21. The Legislature did not ban sales to everyone, as enforcement of the Department's Orders and endorsement of the Department's position would do. Nothing the Department has argued or could argue can undo the expressly declared will of the Legislature in the appropriateness of edible hemp products being sold within the legal limit, the packaging prescribed by the Legislature, and only to adults.

### **CONCLUSION**

For these reasons, TSTL Holdings respectfully requests that this Court grant the relief requested in the Verified Complaint.

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