



July 18, 2019

To: Texas District and County Attorneys

Dear District and County Attorneys:

Some of you have recently dismissed marijuana possession cases or announced you will not prosecute misdemeanor marijuana possession cases without a lab test. Such actions relate to House Bill 1325 taking effect, which aligns Texas law with federal law by distinguishing hemp from marijuana in the same way federal law does.

As explained below, marijuana has not been decriminalized in Texas, and these actions demonstrate a misunderstanding of how H.B. 1325 works. First, a person claiming to transport hemp must have a certificate. Failure to have the required certificate while transporting hemp is a separate crime. Second, lab tests are not required in every case and are more affordable than initial reporting indicated. Failing to enforce marijuana laws cannot be blamed on legislation that did not decriminalize marijuana in Texas.

## **I. Marijuana, Hemp, and the 2018 Farm Bill**

President Trump signed the 2018 Farm Bill on December 20, 2018,<sup>1</sup> which delegates primary authority to States to develop state plans to regulate the production and sale of hemp and hemp products. 7 U.S.C. § 1639p(a)(1). It differentiates hemp from marijuana by setting a tetrahydrocannabinol (THC) threshold concentration of .3%: above .3% is prohibited (marijuana), at or below that amount is regulated (hemp). *Id.* § 1639o(1). The Farm Bill's framework provides the essential contents of a State's plan, including procedures for testing, disposing of, and inspecting hemp and enforcing state law regulating production and sale. *Id.* § 1639p(a)(2). In addition, the Farm Bill removes lawfully produced hemp-derived products from a Schedule I status under the Controlled Substances Act. Pub. L. No. 115-661, § 12619 (codified at 21 U.S.C. §§ 802(16), 812(c)). Finally, it creates an enforcement system that involves both federal and state law enforcement officials. 7 U.S.C. § 1639p(e). If a

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<sup>1</sup> Agriculture Improvement Act of 2018, Pub. L. No. 115-661, § 10113 (codified at 7 U.S.C. §§ 1639o–1639s).

State does not adopt a state plan to regulate hemp under the Farm Bill, the federal government will adopt a plan to allow production of hemp in the State. *Id.* § 1639q.

## **II. H.B. 1325 Adopted the Federal Framework**

If the Legislature had not adopted the federal differentiation of hemp from marijuana and set its own regulatory course, Texas would be beholden to Washington's determination of what is best for Texans. Accordingly, in H.B. 1325, the Legislature adopted the .3% THC federal standard for distinguishing regulated hemp from prohibited marijuana<sup>2</sup> and set hemp policy for Texas. TEX. AGRIC. CODE § 121.001. H.B. 1325 requires the Texas Department of Agriculture to regulate hemp through a state plan approved by the federal government. *Id.* § 121.003. Development of the state plan is underway and must be submitted to the federal government within 90 days of when the bill took effect on June 10. H.B. 1325, § 9, 86th Leg., R.S. (2019).

H.B. 1325 also directs the Department of Agriculture to pass rules requiring hemp producers to be state-licensed and test their products to ensure .3% or less THC concentration. TEX. AGRIC. CODE §§ 122.051, 122.101. Importantly, the law also requires a Department-approved shipping certificate or cargo manifest that confirms the product in transport is legally compliant hemp. *Id.* §§ 122.055, 122.356. Failure to have the required certificate is a misdemeanor and also subjects the person to a civil penalty of up to \$500 per violation, collectible by the attorney general or any district or county attorney.<sup>3</sup> *Id.* §§ 122.359, 122.360. Currently, there is no state-approved hemp plan and thus no approved certificate for transportation.

This regulation of hemp did not abolish or reduce punishment for the possession of marijuana, which remains illegal under state law.

## **III. Prosecutors May Now Prove a Simple No-Certificate Case for Transporting Hemp Without Proper Documentation**

In addition to the marijuana laws that remain in effect, H.B. 1325 gave your offices a new simple prosecution tool. You have more tools now, not less, because you can prosecute a misdemeanor for failure to have a proper hemp certificate.

If a person is transporting hemp but has no certificate, you may now prosecute that person for the offense of failing to have a hemp certificate. TEX. AGRIC. CODE §§ 122.356, 122.360. This certificate is required of any person transporting hemp

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<sup>2</sup> S.B. 339 from 2015 created a compassionate use program for the treatment of certain medical conditions. S.B. 339, 84th Leg., R.S. (2015). Marijuana possession is otherwise illegal in Texas.

<sup>3</sup> It is a third-degree felony to alter or falsify the certificate or manifest with the intent to deceive law enforcement. *Id.* § 122.055(d).

plant material in Texas. *Id.*<sup>4</sup> If they have a certificate, which the Department has yet to promulgate, then it's a fake—which is a felony. *Id.* § 122.055(d).

Criminals should be on notice that they may continue to be prosecuted for possession of marijuana and may now be prosecuted for illegal possession of hemp without a proper certificate.

#### **IV. Lab Tests Are Only One of Multiple Established Ways to Prove Marijuana Possession Cases**

Some have expressed concern that H.B. 1325 carved out hemp from the definition of a controlled substance, and defined hemp as having .3% or less THC concentration. H.B. 1325, §§ 1, 8, 86th Leg., R.S. (2019). Adopting this federal definition of hemp did not limit the prosecutorial options for prosecuting marijuana cases. Criminal cases may be prosecuted with lab tests or with the tried and true use of circumstantial evidence, a point some of you have already made clear in this context.<sup>5</sup> Even before the passage of H.B. 1325, companies and labs were already developing THC concentration tests. As more companies enter the testing marketplace, the costs of the tests will certainly decline, and you may weigh which prosecution method is appropriate. In short, lab tests are not always needed, and they are not as costly as some initial reporting indicated.

#### **V. Conclusion**

The power to change the law is legislative and rests with the Texas Legislature under the Texas Constitution.<sup>6</sup> Since H.B. 1325 did not repeal the marijuana laws of Texas, as Judicial Branch Members, you should continue to enforce those laws by “faithfully

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<sup>4</sup> “Transporting” presumably would include anything from possession in a car to possession on a person who is moving. See BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “transport” to mean “[t]o carry or convey (a thing) from one place to another”).

<sup>5</sup> See Jolie McCullough, *Hemp law has most big-city prosecutors in Texas stepping back from marijuana charges. But not in El Paso*, TEXAS TRIBUNE, July 16, 2019, at <https://www.texastribune.org/2019/07/16/el-paso-marijuana-hemp-prosecution/> (quoting El Paso District Attorney Jaime Esparza as saying “[f]or unique drugs, we truly rely on the lab report. But when we talk about marijuana . . . we weren’t even using lab reports [before]”); Catherine Dominguez, *Montgomery County District Attorney to continue prosecution of marijuana cases in light of new hemp bill loop hole*, THE COURIER OF MONTGOMERY COUNTY, July 3, 2019, at <https://www.yourconroenews.com/neighborhood/moco/news/article/Montgomery-County-District-Attorney-to-continue-14067191.php> (quoting Montgomery County District Attorney Brett Ligon as saying “[w]hen a peace officer has developed probable cause to believe that an individual unlawfully possesses marijuana, the Montgomery County District Attorney’s Office will continue to accept and file appropriate criminal charges. And this office will continue to dispose of marijuana cases utilizing appropriate plea bargains and pretrial diversion programs.”).

<sup>6</sup> TEX. CONST. art. III, § 1 (“The Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled ‘The Legislature of the State of Texas.’”).

July 18, 2019

Page 4

execut[ing] the duties of the office of the [District or County Attorney], of the State of Texas, and . . . to the best of [your] ability preserve, protect, and defend the Constitution and *laws of the United States and of this State*["

Very truly yours,



GREG ABBOTT  
Governor of Texas



DAN PATRICK  
Lieutenant Governor of Texas



DENNIS BONNEN  
Speaker of the Texas House  
of Representatives



KEN PAXTON  
Attorney General of Texas

cc: Texas District and County Attorneys Association