Cause No. _____

FARM AND RANCH FREEDOM ALLIANCE,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff	§	
	§	
v.	§	
	§	TRAVIS COUNTY, TEXAS
TEXAS DEPARTMENT OF AGRICULTURE AND SID MILLER, in his Official Capacity as Commissioner of the Texas Department of Agriculture,	§	
	§	
Defendants	§	_____ JUDICIAL DISTRICT

PLAINTIFF'S VERIFIED ORIGINAL PETITION FOR DECLARATORY JUDGMENT AND APPLICATION FOR INJUNCTIVE RELIEF

To the Honorable Judge of the District Court:

NOW COMES Plaintiff, Farm And Ranch Freedom Alliance, ("FARFA"), a Texas nonprofit corporation, and files this verified original petition complaining of actions taken by the Texas Department of Agriculture ("TDA") and Sid Miller, in his official capacity as Commissioner of the Texas Department of Agriculture (the "Commissioner"), and for cause of action shows as follows:

I. BACKGROUND OF THIS LAWSUIT

1. On January 4, 2011, then-President Barack Obama signed the Food Safety Modernization Act ("FSMA"). P.L. 111-353, 21 U.S.C. § 301 et. seq. FSMA represented a significant expansion of food safety authorities in the United States, and, as directed by Congress, the United States Food and Drug Administration ("FDA") has promulgated rules to implement and enforce FSMA. One of the most significant FSMA rules is known as the FSMA Final Rule on Produce Safety, ("the

Produce Safety Rule") published on November 11, 2015. *See generally* 21 C.F.R. Part 112.[1] The rule concerns the safety of "produce," which are foods humans regularly consume without cooking (i.e. fruits, vegetables, mushrooms, and sprouts). *See generally id.* In response to the Produce Safety Rule, the Texas legislature passed TEX. AG. CODE § 91.009 in 2017, granting the TDA authority to act as the lead agency for the "administration, implementation, and enforcement of, and education and training relating to, the [Produce Safety Rule]." *Id.* In turn, the TDA recently issued a new administrative rule purportedly implementing FSMA, the Produce Safety Rule, and TEX. AG. CODE § 91.009. TDA's new post-FSMA rule is the subject of this lawsuit. *See TDA's Proposed Rule and Final Action (to be codified at 4 TAC §§11.1 - 11.4, 11.20-11.22, and 11.40 - 11.43), Exhibit 1.*

2. As set forth in more detail below, FARFA pleads that the TDA failed to follow proper administrative procedures in passing the rule, that TDA exceeded its statutory authorities in passing the rule and is acting ultra vires, and that the TDA's rule – as written – authorizes the TDA to violate the constitutional rights of small-scale Texas farmers.

II. JURISDICTION AND VENUE

3. FARFA brings this suit for declaratory relief under the authority of TEX. GOV'T CODE § 2001.038 and the Uniform Declaratory Judgment Act, TEX. CIV. PRAC. & REM. CODE § 37.001 et seq. FARFA brings its application for injunctive relief under the authority of TEX. GOV'T CODE § 2001.038 and TEX. CIV. PRAC. & REM. CODE §65.001, et seq. These statutory authorities provide this court with jurisdiction over this lawsuit and serve as a waiver of sovereign immunity. This suit is also brought under the Texas and United States constitutions, and this

[1] Available online at https://www.federalregister.gov/documents/2015/11/27/2015-28159/standards-for-the-growing-harvesting-packing-and-holding-of-produce-for-human-consumption

court has inherent jurisdiction over claims of unconstitutional and *ultra vires* state action. The District Courts of Travis County are the appropriate, statutorily prescribed, venue for this case.

III. DISCOVERY

4. Plaintiff intends to conduct discovery under Level 2, Texas Rules of Civil Procedure 190.3.

IV. STANDING

5. FARFA is a national organization with a Texas focus; it supports independent family farmers and protects a healthy and productive food supply for American consumers. *See Affidavit of Judith McGeary, Exhibit 2.* FARFA is an advocate for independent farmers, ranchers, livestock owners, and homesteaders, as well as the consumers who support them. *See id.* One of FARFA's goals in protecting independent food producers is to ensure the safety, quality, and availability of the food in Texas and throughout America. *See id.* FARFA's membership includes many farmers who would themselves have standing to file this lawsuit. *See id.* Further the interests this lawsuit seeks to protect are germane to the FARFA's nonprofit corporate purpose. *See id.* Finally, the claims asserted and the relief requested by FARFA do not require significant participation of individual FARFA members. The TDA rule at issue in this case is likely to affect, and has already affected, the legal rights of FARFA members. *See id.*

V. PARTIES AND SERVICE OF PROCESS

6. Farm and Ranch Freedom Alliance is a Texas nonprofit domiciled and doing business in Cameron, Texas and throughout the State.

7. Defendant Texas Department of Agriculture is a state agency charged with administration of agriculture and food safety in the State. Defendant Sid Miller is being sued solely in his official capacity as the Commissioner of the TDA. Service of process on the Texas Department of Agriculture may be made by serving two separate citations and copy of this petition to: Sid

Miller, Commissioner of the Texas Department of Agriculture, 1700 N. Congress, 11th Floor Austin, TX 78701. Notice to the Attorney General is being served by U.S. mail in accordance with Tex. Civ. Prac. & Rem. Code. § 30.004.

VI. FACTUAL & LEGAL BACKGROUND

FSMA creates exemptions and exclusions for small farms

8. Both FSMA and its implementing FDA regulations recognize that small-scale produce farms should not have the same onerous regulatory burdens of large, commercial farming operations. The regulatory scheme recognizes two tiers of small-scale farms:

Qualified Exempt Farms	Under $500,000* in annual revenue from the sale of all foods, and more than half sold directly to "qualified end users," i.e. consumers and local businesses
Non-Covered Farms	Under $25,000* in annual revenue from the sale of produce

*The cut-offs for both exemptions are indexed for inflation; the 2019 tiers for qualified exempt and non-covered farms are $550,551 and $27,528, respectively.

The exemption and exclusion are vital to save small farms and do not create a public risk

9. Without the exemption and exclusion for small farms, the cost of FSMA compliance would literally cause farms to go out of business. U.S. government research estimates that small fully regulated farms would have to pay many thousands of dollars comply with FSMA in the first year of compliance alone. *Final Regulatory Impact Analysis, Docket No. FDA-2011-N-0921, Table 34. See also Exhibit 3, Estimated Costs for Fruit and Vegetable Producers to Comply with the Food Safety Modernization Act's Produce Rule, USDA-ERS (Aug. 2018) at Table 4 (estimating average costs of compliance for a small farm that was fully regulated at $21,136).*

10. In addition, Congress recognized that small farms, particularly those selling direct to consumers, pose a different level of risk than the conventional large farms that use complex distribution and sourcing chains to provide the majority of the produce sold in this country. Senator Tester, the sponsor of the statutory language that created the qualified exemption, stated: "[Family-scale producers] raise food; they don't raise a commodity as happens when these operations get bigger and bigger. And there is a direct customer relationship with that customer or that farmer that means a lot. And if a mistake is made, which rarely happens, it doesn't impact hundreds of thousands of people. We know exactly where the problem was. And we know exactly how to fix it."[2]

11. In promulgating the Produce Safety Rule, FDA estimated that non-covered and qualified exempt farms account for only 5% of the produce acres grown in this country, even though they account for over half of the number of farms. *See* Final Regulatory Impact Analysis, Standards for the Growing, Harvesting, Packing and Holding of Produce for Human Consumption (Docket No. FDA-2011-N-0921) at Table 3.

12. Because of the financial risks FSMA posed to small farmers and the lower level of risk that would justify the imposition of expensive new regulation, Congress and the FDA created the "qualified exempt" and "non-covered farm" framework. Put differently, the Federal government carefully balanced the risks to food safety with the interest of maintaining the economic viability small-scale American farms. Congress chose to keep small farmers in business to provide food for their local communities.

TDA's FSMA-implementing rules

[2] *See* Press Release of Senator Jon Tester, November 30, 2010. Available online at: https://www.tester.senate.gov/?p=press_release&id=1078

13. TDA published its proposed FSMA-implementing rules to the Texas Register for public comment on June 14, 2019.[3] In response, FARFA filed an extensive public comments by letter dated July 9, 2019, from plaintiff's executive director, Judith McGeary. Exhibit 4. FARFA's public comments are comprehensive and contain critically important factual and procedural background to this lawsuit; for that reason they are incorporated by reference into this petition in their entirety. *Id.* TDA subsequently adopted its proposed rules on September 6, 2019, "without change" to almost all of the provisions and without adequately responding to FARFA's letter.[4] By way of comparison, FARFA's public comments contained approximately 4,500 words, while TDA's substantive response to FARFA's comments was comprised of fewer than 350 words.

The TDA rules disrupt the balance between food safety and protecting small farmers

14. The TDA rules contain numerous concerning provisions that exceed TDA's constitutional and statutory authority, and put small farmers at risk of facing high compliance costs and being victims of government overreach.

15. *The TDA rules effectively requires "farm registration" for qualified exempt farms*: Farms that are "qualified exempt" under the provisions of 21 C.F.R. § 112.5 are required under the TDA rules to face a pre-assessment review and biennial verifications. *See Exhibit 1, TDA rules to be codified at 4 TAC §11.21-11.22.* The pre-assessment review is subject to TDA's discretion, but the biennial verification is a requirement directly imposed on qualified exempt farms. TDA's rules do not specify, however, what information the qualified exempt farmer will have to

[3] *See* https://www.sos.state.tx.us/texreg/archive/June142019/Proposed%20Rules/4.AGRICULTURE.html#2

[4] *See* https://www.sos.state.tx.us/texreg/archive/September62019/Adopted%20Rules/4.AGRICULTURE.html#83

submit. Neither FSMA, nor the Produce Safety Rule require or even explicitly authorize such assessment and verifications.

16. *The TDA "right of entry" rule allows for entry onto "qualified exempt" farms for purposes not allowed under the FSMA and the Produce Safety Rule*. Under FSMA and the Produce Safety Rule, a "qualified exempt" farm is only subject to inspections to confirm its exemption – essentially such inspections should be limited to ensuring qualified exempt farms are maintaining proper records of business transactions to show the farm's gross revenue is below the threshold amount and the majority of sales are to qualified end users. The TDA rule gives the TDA far more sweeping authorities, including the authority to "conduct inspections" on "qualified exempt," farms. *See* rule to be codified at 4 TAC §11.40(b).

17. *The TDA legislated a new "egregious conditions" right of entry out of whole cloth*. The TDA's new rule grants itself authority "to conduct an inspection in response to an egregious condition," as well as to halt sales of perishable produce "upon a finding of an egregious condition." *See* rule to be codified at 4 TAC §§ 11.40(c), 11.42(a). Neither the term "egregious conditions," nor the asserted authority to inspect farms with "egregious conditions" appear anywhere in FSMA or the related Product Safety Rule.

18. TDA has claimed authority to inspect qualified exempt farms, yet such authority is absent from FSMA, and contradicts provisions of FSMA and FDA's implementing FSMA regulations. The FDA rule provides that a farm's qualified exemption can be withdrawn in the event of an active investigation of a foodborne illness linked to that farm, or if the agency determines that it is necessary to protect the public health and prevent or mitigate a foodborne illness outbreak. 21 CFR §112.201. The FDA rule provides a specific process, including notice and a right to appeal, for such a withdrawal. 21 CFR §§112.202 – 112.212. TDA's rule, in contrast, effectively

removes part of the exemption (the exemption from physical inspections) with no due process at all.

19. Similarly, the "egregious conditions" standard undermines and contradicts the provisions of FSMA and the FDA's FSMA-implementing regulations. The failure to comply with the substantive provisions of the Produce Safety Rule is subject to enforcement under the Federal Food, Drug, and Cosmetic Act, which provides for mandatory recalls, injunctive relief, and civil and criminal penalties – all under specific standards. Creating a new, ambiguous, standard and imposing it on both exempt and covered farms is unnecessary and undermines the careful structure created by FSMA and the FDCA.

20. *Excessive penalties for failure to allow an inspection.* Under the current scheme, a farmer who refuses an inspection – even an inspection the farmer in good faith believes to be unlawful overreach by the TDA – can be fined $500 per day for the first day. On the second day, the fine increases to $1,000, and every day thereafter the fine increases to $1,500 per day.

21. *Excessive penalties for "egregious conditions."* TDA's rule imposes higher penalties and more extreme actions for so-called "egregious conditions," above and beyond those imposed for violations that pose a risk to the public health. Notably, TDA's rule calls for both a "stop sale" order and a significant monetary penalty. Since produce is perishable, a stop sale order very quickly creates significant financial losses for the farm; paying a financial penalty on top of that can effectively drive even a medium-sized farm out of business quickly. The federal statute and regulations have specific provisions and procedures for both administrative detention and recall of adulterated foods, making this stop-sale provision unnecessary, punitive, and inconsistent with the federal framework and rules. *See 21 CFR section 1.377 – 1.406 (administrative detention); 21 CFR sec. 7.40-7.59 (recalls).*

Figure: 4 TAC §11.41(a)

TEXAS OFFICE OF PRODUCE SAFETY VIOLATION AND PENALTY MATRIX

Violation	First Occurrence	Second Occurrence	Subsequent Occurrence(s)
Non-Compliant, Does not pose a risk to public health	Written warning; must submit corrective action plan; and follow up within 2 weeks.	$500 penalty; must submit corrective action plan; and follow up within 1 week.	$1,000 penalty; must submit corrective action; and follow up within 1 day.
Non-Compliant, Potential public health risk, corrected immediately during inspection.	Written warning; must submit corrective action plan; follow up within 2 weeks.	$750 penalty; must submit corrective action plan; and follow up within 1 week.	$1,500 penalty; must submit corrective action plan; and follow up within 1 day.
Non-Compliant, Poses risk to public health. Not corrected on site	Written warning; must submit corrective action plan; and follow up visit within 2 days.	$1,000 penalty; must submit corrective action plan; and follow up visit within 1 day.	$2,000 penalty; must submit corrective action plan; Stop Sale Order; and follow up visit within 1 day.
Non-Compliant, Egregious condition	Stop Sale Order; must submit corrective action plan; and follow up visit within 1 day.	Stop Sale Order; $2,500 penalty per day; must submit corrective action plan; and follow up visit within 1 day.	Stop Sale Order; $5,000 penalty per day; must submit corrective action plan; and follow up visit within 1 day.
Violation of Stop Sale Order	$1,500 penalty per day and follow up visit within 1 day.	$2,500 penalty per day and follow up visit within 1 day.	$5,000 penalty per day and follow up visit within 1 day.
Failure to allow inspection as authorized by Texas Agriculture Code §91.009.	$500 penalty per day and follow up visit within 1 day.	$1,000 penalty per day and follow up visit within 1 day.	$1,500 penalty per day; Stop Sale Order; and follow up visit within 1 day.

1. "Respondent" means a person who is alleged to have or has committed one or more violations.
2. "Inspection" means an initial or follow up visit for the purpose of inspecting covered produce, processing of RAC, a covered farm, or records related to the Produce Safety Rule.
3. "Non-compliant" means a finding of a single violation during an inspection. Multiple findings of the same violation during one inspection are considered instances and are not multiple occurrences and may be subject to multiple penalties.
4. "Occurrence" means a violation which occurs during an inspection.
5. "Violation" means a finding made during an initial or follow-up inspection. There may be multiple violations found during one inspection. A violation occurs on the date the respondent failed to comply with the law, including a department order, or if that date is uncertain the first date on which the violation was discovered by the department.

Figure 4 TAC §11.41(a) Available online at https://www.sos.state.tx.us/texreg/archive/June142019/tables-and-graphics/201901644-1.pdf [circles added for emphasis].

TDA has already begun enforcing the rule – even requesting to enter "non-covered" farms

22. TDA has sought to enforce its new rule against at least one non-covered farm operated by a FARFA member who averaged under $27,000 per year in gross produce revenue. The FARFA member in question asserted that she was not covered by the rule, and offered to provide proof that her gross produce revenue was under the threshold amount. TDA refused the offer of financial information. Instead, TDA subjected the farmer to multiple communications and even

requested to enter and inspect her property; TDA cited FSMA, the Produce Safety Rule, and the new TDA rule as authority for its actions.

VII. CAUSES OF ACTION

First Cause of Action: The TDA's rule violates the Texas Administrative Procedures Act

23. The TDA's new rule was passed in a manner that was not compliant with the Texas Administrative Procedures Act, TEX. GOVT. CODE §§ 2001.0225-2001.034. Accordingly, the new TDA rule – or at least the non-compliant portions of the rule – are voidable. FARFA offered timely public comments by way of letter that were not addressed (or were not addressed adequately) by TDA prior to the adoption of the new rule.

24. The Texas Administrative Procedures Act requires that agencies adequately address public concerns raised during the comment period. TDA ignored many of FARFA's comments, and those comments the TDA did address were dismissed in a perfunctory and inadequate manner.

25. One example of the TDA's inadequate response is its failure to properly respond to FARFA's public comment concerning the term "egregious conditions;" the comment asserted that TDA lacked authority to create a new "egregious conditions" standard and to craft remedies to address such conditions. The term "egregious conditions" is not found in FSMA or FDA regulations. TDA completely failed to explain how it conceptualized this term and why it claims to have the power to regulate "egregious conditions" and create an enforcement mechanism for addressing "egregious conditions."

26. In another example, TDA ignored the extensive comments provided by FARFA about the statutory language, legislative history, and purpose of the exemptions to FSMA with a perfunctory claim that requiring farms to submit information on a biennial basis to the agency

wasn't registration. The agency provided no response whatsoever to the substance of the concerns.

27. The basis for the foregoing cause of action is that it challenges the validity of an agency's rule, and is brought pursuant to TEX. GOV'T CODE § 2001.038.

Second Cause of Action: TDA and the Commissioner lack statutory authority to adopt and enforce numerous portions of the rule – and are acting *ultra vires*

28. *TDA's purported authority for passing the rule in question is TEX. AGRIC. CODE § 91.009*:

> (a) The department is the lead agency for the administration, implementation, and enforcement of, and education and training relating to, the United States Food and Drug Administration Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption (21 C.F.R. Part 112) or any successor federal produce safety rule or standard.
>
> (a-1)-(c) [omitted]
>
> (d) The department may adopt rules to administer, implement, and enforce this section. In the development of rules under this section, the department may consider relevant state, federal, or national standards and may consult with federal or state agencies.

29. *TDA had no express conferral of authority to pass these contested sections its new rule:*

There is no express authority in either the Texas Agriculture Code, § 91.009 or the Food Safety Rule (21 C.F.R. Part 12) that allows for the TDA to pass the contested sections of the new rule. More specifically, there is no express provisions directing or authorizing TDA to pass a rule that in any way addresses "non-covered" farms. Such farms are non-covered for a reason, because FSMA and its implementing regulatory scheme are per se inapplicable to such farms. Second, there is no express provision authorizing TDA officials to require qualified exempt farms to register with the TDA. Additionally, there is no express provision allowing TDA to adopt the provisions at § 11.40, subsections (a)-(b) of the new rule. These provisions are broad, allowing

TDA the right to enter on non-covered and qualified exempt farms to determine the exemption; the provisions also allow TDA the right to enter qualified exempt farms to conduct general inspections. Last, there is no express provision authorizing the creation of the "egregious conditions" standard or its use in requiring inspections or increasing the penalties imposed on non-covered, qualified exempt, and covered farms. Since there is no express statutory or Federal regulatory provision to support these rules, TDA must rely on implied authority to pass the rule in question.

30. *Any reliance on TDA's implied rulemaking authority is misplaced:* When the Legislature expressly confers a power on an agency, it also impliedly intends that the agency have whatever powers are reasonably necessary to fulfill its express functions or duties. *PUC of Tex. v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 316 (Tex. 2001). An agency may not, however, exercise what is effectively a new power, or a power contradictory to the statute, on the theory that such a power is expedient for administrative purposes. *Id.* In this case, the TDA exercised an *ultra vires* extension of its rulemaking authority over non-covered and qualified exempt farms. The drafters of FSMA and the Produce Safety Rule ensured the rules reduced administrative burdens on small farmers and "mom and pop" agricultural operations. Out of step with these authorities, TDA passed rules that all but guarantee government intrusion into the lives of every gardener or small farmer who sells any amount of produce. TDA's rule subverts the clear intent of the very laws and regulations it is meant to implement – increasing the burdens on small farms and farmers for no apparent reason other than the administrative convenience of the TDA. No other state legislature or department of agriculture has passed a FSMA-implementing law or rule similar to, or as broad, as the rule in question. *See Exhibit 2, para. 10.*

31. There are two bases for the foregoing cause of action, one is a request for declaratory judgment; the authority is the Declaratory Judgments Act, codified in chapter 37 of the TEX. CIV. PRAC. & REM. CODE. The second is basis is that this cause of action challenges the validity of an agency's rule, and is brought under the authority of TEX. GOV'T CODE § 2001.038.

Third Cause of Action: the rule's inspection provisions violate the Fourth Amendment of the Federal constitution

32. Property owners, including owners and operators of commercial businesses, have a constitutional right to privacy under the Fourth Amendment of the United States Constitution. The right to privacy includes a right to be free from unreasonable and warrantless searches. TDA's new rules openly disregard the constitutional right to be free from unreasonable searches. Instead, the rules explicitly authorize TDA to enter onto small Texas farms and conduct inspections in the name of food safety. These small farms are typically not commercial establishments, but the primary home to most of the Texans who own them. Further, qualified exempt and non-covered farms that are targeted by the TDA's new rule are often farmer-owned sole proprietorships, and should be subject to the normal constitutional standards that allow them to be free from state intrusion onto their private property. The TDA rule is unconstitutional as-applied to qualified exempt and non-covered farms.

33. The basis for the foregoing cause of action is a request for declaratory judgment; the court has inherent authority to hear this cause of action, and it also has authority to hear this cause of action under the Declaratory Judgments Act, codified in chapter 37 of the TEX. CIV. PRAC. & REM. CODE.

Fourth Cause of Action: the rule's inspection provisions violate warrantless search provision of the Texas constitution

34. Like the Federal constitution, the Texas constitution, Article 1, Section 9, provides that the people have a right to be secure from warrantless searches. For the same reason TDA's new rule

violates the Federal constitution, it violates the Texas constitution. Further, unlike some businesses in Texas, farming – particularly on qualified exempt and non-covered farms – is not and should not be a regulated activity subject to registration or occupational licensure. The TDA rule is unconstitutional under the Texas constitution as applied to qualified exempt and non-covered Texas farms.

35. The basis for the foregoing cause of action is a request for declaratory judgment; the court has inherent authority to hear this cause of action, and it also has authority to hear this cause of action under the Declaratory Judgments Act, codified in chapter 37 of the TEX. CIV. PRAC. & REM. CODE.

Fifth cause of action: unconstitutional vagueness of "egregious conditions"

36. The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits laws that are so impermissibly vague that an ordinary person would not understand what conduct the law prohibited, or so standardless as to invite arbitrary enforcement. The concept of "egregious conditions," as used in the TDA's new rule, is unconstitutionally vague.

37. The term "egregious conditions" is not found in FSMA or FDA regulations. TDA completely failed to explain how it conceptualized this term and why it claims to have the power to regulate "egregious conditions" and create an enforcement mechanism for addressing "egregious conditions."

38. The TDA's definition of the term "egregious condition" is "[a] practice, condition, or situation on a covered farm or in a packing facility that is undertaken as part of a covered activity that directly causes, or is likely to directly cause: (A) serious adverse health consequences or death from the consumption of or exposure to covered produce; or (B) an imminent public health hazard."

39. The enforcement mechanism includes a wide-ranging ability to enter and search property, as well as the ability to issue a "stop sale" order pertaining to the produce in question.

40. As contained in TDA's new rule, the definition of the term "egregious condition" is wholly inadequate. There is no limiting principle or definition articulated by any administrative or judicial authority to determine what "egregious conditions" means in this context.

41. Additionally, an ordinary person could not determine the scope and definition of "egregious conditions" based on insufficient definition contained in TDA's new rule.

42. Law enforcement officials, administrators, and any judges needing to enforce the "egregious" conditions rule have no authoritative guidance about when or how to apply the "egregious conditions" definition, which will lead to arbitrary and discriminate enforcement of the provision.

43. The "egregious conditions" provisions of TDA's new rule are unconstitutionally vague.

44. The basis for the foregoing cause of action is a request for declaratory judgment; the court has inherent authority to hear this cause of action, and it also has authority to hear this cause of action under the Declaratory Judgments Act, codified in chapter 37 of the TEX. CIV. PRAC. & REM. CODE.

Sixth cause of action: unconstitutional vagueness of provisions governing qualified exempt farms

45. The provisions for pre-assessment review and biennial verification of qualified exempt farms is also unconstitutionally vague. First, the so-called pre-assessment review invites arbitrary enforcement because there is nothing for it to be "pre" to. The FSMA Produce Safety Rule is already in effect, and requires qualified exempt farms to have been keeping records since 2016. Since qualified exempt farms do not have to register or take other actions, TDA's addition

of a pre-assessment review requirement is not required or authorized under the regulatory scheme. Further, the rule is unnecessarily confusing for those who must follow it.

46. The TDA rule also provides that TDA to inspect non-covered and qualified exempt farms to "determine coverage and/or verify exceptions." 40 TAC sec. 11.40(a). Yet the issue of whether a farm is not covered or qualified exempt is based entirely on its financial history: whether it has sold less than the cut-off amounts of produce and/or foods, and who it has sold those items to. Inspecting a farm, rather than its records, is not relevant to determining coverage or exemptions. The TDA rule further provides that the agency can enter qualified exempt farms to conduct inspections of any area where "covered activities occur," yet, by definition, qualified exempt farms are not subject to inspections for their growing practices. Both of these provisions thus purport to create a right to inspect, yet neither the farmer nor the courts can reasonably determine the proper scope of such inspections.

47. The basis for the foregoing cause of action is a request for declaratory judgment; the court has inherent authority to hear this cause of action, and it also has authority to hear this cause of action under the Declaratory Judgments Act, codified in chapter 37 of the TEX. CIV. PRAC. & REM. CODE.

VIII. REQUEST FOR DISCLOSURE

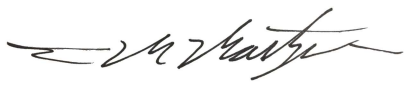
48. The following request for disclosure is made under the Texas Rules of Civil Procedure, Rule 194. Pursuant to Rule 194, you are requested to disclose, within 50 days of service of this request, the information or material described in Rule 194.2 (a)-(c), (f).\

49. Defendants are notified pursuant to Rule 193.7 of the Texas Rules of Civil Procedure that Plaintiff intends to rely upon the authenticity of any document produced by defendant in response to written discovery in this matter.

IX. PRAYER

WHEREFORE, premises considered, Farm and Ranch Freedom Alliance asks the Court to declare the Texas Department of Agriculture's post-FSMA rules (to be codified at 4 TAC §§11.1 - 11.4, 11.20-11.22, and 11.40 - 11.43) as invalid in its current form and unconstitutional. Further, Farm and Ranch Freedom Alliance requests a permanent injunction enjoining enforcement of the rule in its current form. Farm and Ranch Freedom Alliance asks for costs of suit, attorney fees, and all other relief, at law or in equity, to which it may be entitled.

Respectfully submitted,



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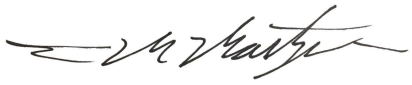
Attorney for Plaintiff

CERTIFICATE OF SERVICE

This certifies that on this 19th day of December, 2019, a true and correct copy of the foregoing document, along with its attachments, was delivered to the US Postal service for delivery via certified mail on the parties listed below as required by TEX. CIV. PRAC. & REM. CODE. § 30.004:

Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711



Ernst Mitchell Martzen

VERIFICATION

STATE OF TEXAS §

§

COUNTY OF Milam §

Before me, the undersigned Notary Public, on this day personally appeared Judith Ilana McGeary, who, after being duly sworn, stated under oath that she is the duly authorized agent for the plaintiff in this action; that she has read the above document titled "Plaintiff's Verified Original Petition for Declaratory Judgment and Application for Injunctive Relief;" and that every statement of fact contain in it is within her personal knowledge and belief and is true and correct.

Judith M3

Judith I. McGeary, Affiant

SUBSCRIBED AND SWORN TO BEFORE ME on December 19, 2019.

Kellie Whitmire (signature)

Kellie Whitmire (name)

Notary Public in and for the State of Texas. My commission expires 5-20-2023.

KELLIE WHITMIRE
NOTARY PUBLIC
STATE OF TEXAS
ID # 13202029-4
My Comm. Expires 05-20-2023