CAUSE NO. D-1-GN-19-008742

IN THE 250TH JUDICIAL DISTRICT COURT
OF TRAVIS COUNTY, TEXAS

FARM AND RANCH FREEDOM ALLIANCE
Plaintiff,

v.

TEXAS DEPARTMENT OF AGRIGULTURE and
SID MILLER,
in his official capacity as Commissioner of the Texas Department of Agriculture,
Defendants.

PLAINTIFF'S REPLY BRIEF

ERNST MITCHELL MARTZEN
Texas State Bar No. 24055916
Martzen Law Firm PLLC
10440 N. Central Expressway
Suite 800
Dallas, Texas 75231
Telephone: (214) 444-7200
Facsimile: (214) 613-1558
mitch@martzenlaw.com

ATTORNEY FOR PLAINTIFF

October 24, 2022

IDENTITY OF PARTIES AND COUNSEL

Plaintiff:

Farm and Ranch Freedom Alliance

Attorney for Plaintiffs:

Ernst Mitchell Martzen
MARTZEN LAW FIRM PLLC
10440 N. Central Expressway
Suite 800
Dallas, Texas 75231

Defendants:

Texas Department of Agriculture
and
Sid Miller, in his official capacity
as Commissioner of the Texas
Department of Agriculture

Attorney for Defendant:

Harold Liller
Assistant Attorney General
OFFICE OF THE ATTORNEY
GENERAL OF TEXAS
P.O. Box 12548
Austin, Texas 78711

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Pages

Constitutional Provisions

Cases

Statutes

Regulations

PARTIES AND REFERENCES TO APPENDICES OF EXHIBITS

- Plaintiff, the Farm and Ranch Freedom Alliance, will be referred to as "Plaintiff" or "FARFA."

- Defendants Texas Department of Agriculture and Sid Miller in his official capacity as Commissioner of the Texas Department of Agriculture will be referred to either as "Defendants" or as "TDA."

- Cites to evidence found in Plaintiff's Appendix of Exhibits will be referred to as Plaintiff's Appendix (appendix number). More particular pinpoint citations are provided when available within the context of the particular documents.

- Cites to evidence found in TDA's Appendix of Exhibits will be referred to as TDA Appendix (appendix number).

ARGUMENT

PART I: RIPENESS

A. The issue is ripe because small farms have suffered injury in the form of compliance costs and unreasonable entries onto their property.

TDA's overbroad rule injures small farms in three ways: (1) compliance costs, (2) unreasonable entries on private properties, and (3) penalties for non-compliance. An appropriately ripe controversy requires only an injury that, at the time the lawsuit is filed, "has occurred or is likely to occur." *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851-52 (Tex. 2000). Unlike an abstract issue, decisions on ripe controversies have a binding impact on the parties, and courts should be concerned that they do not render advisory opinions. *See Heckman v. Williamson County*, 369 S.W.3d 137, 147-48 (Tex. 2012). Here, this Court must determine whether an active rule that places requirements on every Texas produce farm represents a ripe controversy.

The TDA's response equates its failure or hesitance to enforce with a failure to injure. This response overlooks established law: "there is no requirement that an agency undertake an enforcement action before the potential subject of that action can file suit for declaratory judgment." *Tex. Dep't of Banking v. Mount Olivet Cemetery Ass'n*, 27 S.W.3d 276, 282 (Tex. App.–Austin 2000, pet. denied). TDA's lack of enforcement does not relieve Texas farmers of the burden to comply with the rules – including rules that allow the government entry onto their properties

under the threat of enforcement. *See generally* 4 T.A.C. Chapter 11 (referred to in this brief as "the Rule").

Instead of arguing that qualified exempt farms have not suffered injury from compliance costs, the TDA simply offers an alternative estimated cost of $1,738. Defendants' Br. at 9. Instead of arguing that entry onto a not-covered or qualified exempt property has not occurred, the TDA describes such entry as reasonable. *See* Defendants' Br. at 39. Instead of arguing that it would not impose penalties on a qualified exempt property, the TDA simply notes that it has not exercised its authority to do so to date. *See* Defendants' Br. at 8. TDA downplays the scope of the injuries suffered by small farmers, but that does not erase their existence.

The challenges regarding egregious conditions, stop sale, and penalty provisions of the rule are likewise ripe. In determining whether an issue is ripe, a court must "consider whether, at the time a lawsuit is filed, the facts are sufficiently developed 'so that an injury has occurred or is likely to occur, rather than being contingent or remote.'" *See Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d at 851-52. The fact that TDA has not yet enforced these rules does not weigh on whether the issue is ripe. "In order to establish ripeness of their constitutionality challenge, the practitioners are not required to demonstrate that the statute has been enforced against them, but only that an enforcement action is 'imminent or sufficiently likely.'" *See Mitz v. Tex. State Bd. of Veterinary Med.*

Exam'rs, 278 S.W.3d 17, 25 (Tex. App.—Austin 2008, pet. dism'd)(*Citing Atmos Energy Corp. v. Abbott*, 127 S.W.3d 852 (Tex. App.—Austin 2004, no pet.), which in turn quotes *City of Waco v. Tex. Nat. Res. Conservation Comm'n*, 83 S.W.3d 169 (Tex. App.—Austin 2002, pet. denied)).

Under the Rule, TDA has broad powers to inspect not-covered and qualified exempt farms – powers that it has exercised. These inspections, in turn, make the application of the egregious condition, stop sale, and penalty portions of the same rule sufficiently likely.

FARFA has put a ripe controversy before this Court because Texas farmers have both suffered an injury and will likely suffer additional injuries. The fact that there is **some** cost of compliance appears to be undisputed – therefore the active Rule represents an actual and ongoing injury. The fact that TDA claims such broad authority to enter not-covered and qualified exempt farms also represents an actual and ongoing injury. The fact that the Rule on its face grants TDA the authority to issue penalties for non-compliance is also undisputed, and represents an injury likely to occur. Any decision will have a binding and immediate impact on the parties. For these reasons, FARFA has properly put this controversy before this Court.

PART II: CONSTITUTIONAL PROTECTIONS

A. Small scale produce farmers may have cultivated crops within the curtilage of their home, and searches of those crops are afforded Fourth Amendment Protections and Article I, Section 9 protection.

Defendants argue that the "expectation of privacy in open fields is not an expectation that society recognizes as reasonable." Defendants Br. at 12 (*quoting Oliver v. United States*, 466 U.S. 170, 178-79 (1984)). But the judicially created exception to the warrant requirement for "open fields" does not broadly settle the question of whether a farmer's land and crops are protected by the Fourth Amendment, or Article 1, Section 9 of the Texas Constitution. In particular, this case deals with small farmers, some of whom no doubt grow produce for sale within the traditional curtilage of the home. The Court of Criminal Appeals of Texas held in *McTyre v. State*, "that an unreasonable search is one which trenches upon the peaceful enjoyment of the house in which he dwells or in which he works and does business, and those things connected therewith, such as **gardens**, outhouses, and appurtenances necessary for the domestic comfort of the dwelling house **or that in which the business is conducted**." 113 Tex. Crim. 31, 33-34, 19 S.W.2d 682, 583-584 (1929)(Emphasis added, internal citations omitted). In *McTyre*, the Texas court specifically contemplates gardens as well as business activities to be within curtilage.

One of FARFA's chief contentions is that TDA's rules are at their most intrusive – and least constitutional – when applied upon the smallest of produce growers. Such growers could reasonably cultivate their market garden within the curtilage of their home. Yet the Rule makes no allowance for such privacy interests within the framework of its sweeping "right of entry" provisions.

Additionally, curtilage remains subject to common sense application. Defendants cite *Rosalez v. State* for the contention that an individual may not expand the curtilage of their home with fences, gates, and no-trespassing signs. *See* 875 S.W.2d 705, 714 (Tex App.—Dallas 1993). But that case is distinguishable, as it simply holds that an individual may not fence an entire property – one that includes many acres and naturally wooded spaces – and try to claim all of it is within the curtilage protected by the Fourth Amendment. *Id.* In contrast, some of the not-covered farms and qualified exempt farms in Texas are on small parcels of land and have growing areas next to their houses.[1]

In 1987 in *United States v. Dunn*, the United States Supreme Court listed four factors that should be considered when determining the extent of a home's curtilage: 1) the distance from the home to the location, 2) whether the location is

[1] The United States Department of Agriculture's 2017 agricultural census found that there are 1,331 farms in Texas with 1-9 acres that sell fruit, tree nuts, and berries, and another 593 of that size that sell vegetables or melons. *See* USDA, National Agricultural Statistical Service, 2017 Census, Table 71, available at https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/Texas/st48_1_0071_0071.pdf.

in an enclosure surrounding the home, 3) the nature of the use to which the location is put, and 4) the steps taken by the resident to protect the area from observation by people passing by. *See United States v. Dunn, 480 U.S. 294, 300-305* (1987). Implicit in *Dunn's* holding is the requirement that agents of the state must consider the potential for intrusion upon curtilage when entering upon the land of farmers and landowners. There is no indication in the Rule that TDA considers these factors and privacy interests; instead, Defendants' brief dismisses such interests under the sweeping framework of "open fields." Because the Defendants' right of entry provisions in the Rule do not make allowances for constitutionally protected privacy zones (zones which specifically include gardens), the right of entry provisions should be held to be unconstitutional – either on their face, or as-applied to farms and farmers where the right of entry violates the farmers' rights to privacy (such as when crops lie within the curtilage of the farmer's residence).

Plaintiff contends that its foregoing arguments are sufficient to overturn TDA's current, untailored rule. However, if this Court ultimately holds against Plaintiff on account of current open fields jurisprudence, Plaintiff expressly preserves the right to challenge on appeal, and seek to overturn any current precedent in Texas that could be construed to hold that Article I, Section 9 of the

Texas Constitution denies private landowners in Texas any privacy interest whatsoever in their open fields.

B. Implied licenses to enter a produce farmer's curtilage must be revocable.

Defendants suggest that their officers have unfettered access to conduct entrance upon curtilage for the purpose of conducting "knock and talks." *See* Defendants' Br. at 13-14. The Defendants' arguments echo those of law enforcement officers in *United States v. Carloss*, in which now-Supreme Court Justice Gorsuch criticized sweeping government reliance on "knock and talks" in his dissent as a Circuit Judge; then-Judge Gorsuch noted that the government believes its "officers enjoy an irrevocable right to enter a home's curtilage to conduct a knock and talk…A homeowner may post as many No Trespassing signs as she wishes. She might add a wall or a medieval-style moat, too. Maybe razor wire and battlements and mantraps besides. Even that isn't enough to revoke the state's right to enter." *United States v. Carloss*, 818 F.3d 988, 1004 (10th Cir. 2016)(Gorsuch, J., dissenting). Then-Judge Gorsuch criticized what he saw as a misinterpretation of *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409 (2013), noting:

> [The] Court in *Jardines* took pains to emphasize that the implied license that might have permitted the officers to enter the curtilage in that case was the same common law license generally enjoyed by private visitors — one entitling the officers to do 'no more than any private citizen

> might.'…If anything, then, *Jardines* reaffirmed the fact that the implied license on which the knock and talk depends is just that — a license, not a permanent easement, and one revocable at the homeowner's pleasure. *United States v. Carloss*, 818 F.3d 988, 1006-1007.

The facts of the present case paint a picture of why it is important that an implied license is subject to the common law right of revocation. In multiple cases, TDA first contacted the farmers and at least implied that they must allow TDA officials to come onto their farms to remain compliant. *See e.g.* Plaintiff's Appendix 14, 15, & 21 (emails to farmers in which TDA staff states "the Texas Department of Agriculture is now in the process of Verification of the Exempted status for all farms under $25K. This will be done after a short visit to your farm by an Outreach Specialist."). *Id.* The farmers were not told that allowing government officials on their farms were optional. *Id.*

In at least one case, where the farmer explicitly told TDA officials that they were not welcome to come to the farm, TDA officials entered the farm anyway. *See* Plaintiff's Appendix 16. Such action by TDA officials is a clear violation of *Jardines* itself, where Justice Scalia wrote, the "implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Jardines*, 569 U.S. at 8. TDA vastly overstepped the limits of its implied license by returning to the farm after being told they were unwelcome. Moreover, that farmer was written up

by TDA for refusing an on-site visit, which TDA's document states makes him subject to an "administrative penalty, including a monetary penalty not to exceed $1,000 per day, per occurrence." *See* Plaintiff's Appendix 17, TDA_TOPS 3285. These facts show that even if the initial entry were done pursuant to an implied license, TDA officials persist in claiming a right of entry that far exceeds the *Jardines* license framework and removes their rule from the scope of the common law implied license framework.

PART III: ULTRA VIRES

A. Defendants' authority derives from, and is limited to, the power provided by the Texas Legislature.

FARFA simply seeks to have TDA comply with the Texas Legislature's statutory directive.

"The correct interpretation of a statute is a matter of law, which [appellate courts] review de novo." *Sirius XM Radio, Inc. v. Hegar*, 643 S.W.3d 402, 406 (Tex. 2022)(*Citing Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018)). The canons of statutory construction demand that the court considers the plain language of the statute. The law requires the same; "[i]f the statute is clear and unambiguous," courts "must read the language according to its common meaning" without consulting "rules of construction or extrinsic aids." *See Crosstex Energy Servs., L.P. v. Pro Plus, Inc*., 430 S.W.3d 384, 389 (Tex. 2014). In a 2022 decision,

the Texas Supreme Court added that "Texas courts have not adopted the agency-deference doctrines employed by Federal courts." *Sirius XM Radio, Inc. v. Hegar*, 643 S.W.3d 402, 407 (Tex. 2022). The Court continued, "a court must always endeavor to decide for itself what the statutory text means so that it can determine whether the agency's construction contradicts the statute's plain language." *Id.*

An agency may not exercise a "new power, or a power contradictory to the statute, on the theory that such a power is expedient for administrative purposes." *PUC of Tex. v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 316 (Tex. 2001).

B. The Texas Legislature specifically tied the TDA's authority to 21 C.F.R. Part 112.

TDA's authority over produce safety originates with Section 91.009(a), which directs the agency to implement the Federal Produce Safety-Regulation, explicitly identified as the "United State Food and Drug Administration Standards for the Growing, Harvesting, Packing, and Holding of Produce from Human Consumption (21 C.F.R. Part 112)…." TDA seeks to broaden its powers by citing to its rulemaking authority and other portions of Federal law, in contradiction of the fundamental premise that a state agency has only such power as the state Legislature provides. Here, the Texas legislature granted authority to the TDA within the confines of 21 C.F.R. Part 112. Instead of explaining how the specific

provisions of the Tex. Agric. Code § 91.009 or 21 C.F.R. Part 112 justify their regulation, TDA points out purported flaws in Plaintiff's *supporting* arguments about legislative intent in an attempt to boost the aura of authority. *See e.g.* Defendants' Br. at 16-17. However, a plain reading of Agric. Code § 91.009 illustrates just how narrow the grant of authority to the TDA really is – and TDA is left arguing that it has implicit authority to interpret rules and should receive deference. *See* Defendants' Br. at 25. The Defendants never directly address Plaintiff's core textual argument to support TDA's view that it is allowed to regulate in direct contradiction to key features of Food Safety Modernization Act ("FSMA") and the Produce Safety Regulation. Most notably, the TDA never explains how it has any explicit textual authority to pass rules with respect to not-covered farms. Accordingly, this Court should find that TDA engaged in an *ultra vires* expression of power contradictory to their legislative grant.

C. The Federal Food, Drug & Cosmetic Act (FFDCA) does not give TDA authority to impose additional requirements on not-covered and qualified exempt farms.

In TDA's view, it has absolute authority to decide how and when to apply the exemptions to the Federal Produce Safety Regulation. As previously noted, however, the state statute granting the agency's authority specifically ties it to 21 C.F.R. Part 112 by the terms contained in Tex. Agric. Code § 91.009(a). Rather than focus on the C.F.R. that provides its sole source of authority, TDA attempts to

broaden its discretion by leapfrogging those regulations and pointing to other provisions of the Federal Food Drug & Cosmetic Act (FFDCA), a portion of which is FSMA, and a very small portion of which is the statutory provision that authorized the Federal Produce Safety Regulation (found at 21 U.S.C. § 350h).

1. The Federal statute does not provide a basis for imposing additional requirements on not-covered or qualified exempt farms.

Defendants also seem to argue that the simple fact that FSMA directed the FDA to define "small business" and "very small business" somehow creates a basis for regulating not-covered and qualified exempt farms. *See* Defendant's Br. at 17 (*Citing* 80 Fed. Reg. 228 at 74409). Not only is such an argument illogical in light of the exclusion of not-covered farms from FSMA, but it conflates the definitions of "small business" and "very small" business with the uniquely different provisions delineating which farms are covered (and not-covered), and which farms receive a qualified exemption. The latter description is the relevant provision of the rule; to reiterate, the Produce Safety Regulation clearly establishes which farms are *not-covered* by FSMA and the Regulation in the following section:

> § 112.4 Which farms are subject to the requirements of this part?
>
> (a) Except as provided in paragraph (b) of this section, a farm or farm mixed-type facility with an average annual monetary value of produce (as "produce" is defined in § 112.3) sold during the previous 3-year period of more than $25,000 (on a rolling basis), adjusted for inflation

> using 2011 as the baseline year for calculating the adjustment, is a "covered farm" subject to this part. Covered farms subject to this part must comply with all applicable requirements of this part when conducting a covered activity on covered produce. 21 C.F.R. § 112.4.
>
> (b) A farm is not a covered farm if it satisfies the requirements in § 112.5 [for qualified exempt farms] and we have not withdrawn the farm's exemption in accordance with the requirements of subpart R of this part.

In contrast, the "small business" and "very small business" definitions are not coterminous with the description of not-covered or qualified exempt farms. Rather, they were included to allow for extended deadlines for compliance and possible additional exemptions. *See* 21 U.S.C. §§ 350h(a)(1)(B) & 350h(b)(3). The inclusion of these definitions in the Code of Federal Regulations and discussions in the Federal Register does not in any way undermine the protections for not-covered and qualified exempt farms, or somehow provide greater authority for state agencies to add more requirements.

2. TDA is bound by the C.F.R. provisions.

Even accepting the notional premise that TDA draws its authority directly from FFDCA or FSMA, it still does not provide a basis for TDA's actions under its Rule. To apply and enforce the Federal statute, one must look to the C.F.R. TDA's reasoning does not provide any authority for TDA to directly contradict the C.F.R. Citing to the Senate's "broad policy goals," TDA asserts that it carries them out by conducting inspections and exempting "**certain** farms from **specified** regulatory

requirements" (emphasis in original). *See* Defendants' Br. at 19. TDA never specifies who it exempts or from what requirements.

The C.F.R, on the other hand, clearly explains what farms the exemption applies to and what requirements they must follow. *See* 21 C.F.R. §§ 112.4-112.7. Contrary to TDA's assertion, FARFA does not rely solely on a press release to determine legislative intent, but rather on the enacted regulations that bind the TDA. Plaintiff contends the Federal regulations in question are consistent with the legislative intent discussed in Plaintiff's opening brief. The Federal regulations impose no scheme on not-covered farms and very specific, limited requirements for qualified exempt farms: recordkeeping, record retention and signage. *See* 21 C.F.R. §§ 112.6, 112.7. There is no reference to registration (or "pre-assessment review"), farm visits, or farm inspections for qualified exempt farms, nor any requirements whatsoever for not-covered farms.

3. FDA's regulations do not give TDA authority to contradict the exemption for small farms.

Defendants claim that their rules "fill the void in the FDA regulations for renewal of a qualified exemption." Defendants' Br. at 36. Yet there is no such void; the lack of a "renewal" is because FDA, consistent with the statute, requires no registration of qualified exempt farms to begin with.

TDA's approach to filling this so-called void contradicts the meaningful omission from the Federal regulation. The Federal Produce Safety Regulation has a detailed, extensive process by which a qualified exempt farm's status can be withdrawn. *See* 21 C.F.R. §§112.201-112.213. In contrast, TDA's rule provides that it will **presume** that a farm is not qualified exempt if the farm doesn't return the verification form to TDA within 60 days. 4 T.A.C. § 11.21(c). This effective change in the farm's status, without any due process, would subject these farms to the very costly full set of regulatory requirements for covered farms.

4. FDA's regulatory guidance does not give TDA authority to physically inspect not-covered and qualified exempt farms.

While overlooking the plain language of the Federal regulation, TDA cites to a single comment on the Federal Register to demonstrate intent. Specifically, one commentor claimed that small farms "may resist a financial evaluation to determine the applicability of this rule at the beginning of an inspection," and the FDA's response was that farms would be expected to "be willing to provide supporting documentation to FDA at relevant times, including during an inspection." 80 Fed. Reg. 228 at 74407-08. Since qualified exempt farms are required to keep certain records, it is logical that they would have to produce such records for inspection upon request. That does not mean that the regulations include provisions for physically inspecting qualified exempt farms, which is what

TDA's regulations provide. Indeed, as FARFA raised in its comments on the proposed rule, TDA's final Rule provides that not only may it physically enter farms to "determine coverage" (4 T.A.C. § 11.40(a)), it goes further and provides for physical entering qualified exempt farms to "conduct inspections" without specifying the scope of such inspections (4 T.A.C. § 11.40(b)). Inspection of the relevant documents is all that is needed to determine eligibility. Inspecting the farm – or, as TDA calls it, doing "farm visits" – is neither contemplated by, nor necessary to apply the rule.

Other than to argue that it's not bound by Federal guidance, TDA fails to address the FDA's protocol for agency staff, which states: "If, during this pre-announcement, the farmer provides information that places his or her farm in the not-covered category, the agency staff is directed to thank the farmer for their time and inform the farmer why the farm will not be inspected at this time." Plaintiff's Appendix 13, pp. TDA_TOPS 3216. This guidance is consistent with the Federal statutory and regulatory provisions, requiring that qualified exempt farms keep records, but not be subject to physical inspection.

Note that FARFA does not argue that Federal guidance documents directly bind TDA. Rather, since the Texas Legislature's grant of authority to TDA was specifically limited to 21 CFR Part 112, TDA's authority is thus inextricably bound to that Federal authority. To the extent that TDA goes beyond the scope of

the Federal Produce Safety Regulation, it acts *ultra vires* because of the scope of the state statute. The FDA's guidance documents serve as persuasive evidence as to the scope of the Federal Produce Safety Regulation.

D. Other states' statutes do not provide authority for TDA's interpretation of the Texas statute.

In defense of TDA's claim that its interpretation requires "serious consideration" and "deference," TDA defends its stance as reasonable using other states as examples. Defendants' Br. at 24-25. Yet TDA overlooks the fact that the majority of states it cites to with "similar practices" draw the authority for their right-of-entry provisions from specific legislative grants, not agency interpretations of 21 C.F.R. Part 112. Seemingly due to the obvious problem of contravening 21 C.F.R. Part 112, other states with similar provisions relating to small farms rely on separate grants of authority to enter, confirm eligibility, and penalize.

1. TDA's right of entry rules are not a reasonable interpretation of the Texas statute.

TDA points to Kentucky, Georgia, Maryland, Idaho, and South Carolina as states with similar rules on right of entry. With the exception of Georgia, however, all of these states derive the authority for the right of entry from a state statute, not from agency regulations. Kentucky statutory law specifically grants their agency the ability to inspect, collect samples, and make copies of documents. KRS 260.767. Maryland similarly has a statute that allows entry onto a covered farm,

"including a farm that has a qualified exemption." Md. Code, Agric. § 16-105. The Idaho Legislature did the same, granting a specific right on entry onto qualified exempt farms and directing officials to obtain a warrant if the farmer refuses. Idaho Code 22-5045(1). Finally, South Carolina allows for the right of entry onto qualified exempt farms solely to review records or investigate an instance of foodborne illness. S.C. Code 39-26-60(a)(1), (b)(1).

In contrast to these states that chose through legislative action to grant that right, the Texas Legislature limited TDA's rulemaking to the provisions found in 21 C.F.R. Part 112. The TDA has in turn granted itself an inappropriate right of entry. As recognized by the legislative actions of the above states, however, this is an unreasonable interpretation. 21 C.F.R. Part 112, alone, does not provide a basis for an unfettered right of entry onto a qualified exempt farm.

2. TDA's registration rules are not reasonable.

In addition to the overreaching "right of entry" provisions, TDA has also imposed a de facto registration requirement in the Rule for qualified exempt farms. Though it insists on branding the requirement as a "renewal," the plain language of 4 T.A.C. § 11.21 requires farmers to register every two years or face an on-site visit and the potential revocation of their exemption without due process. As noted above, unlike other states, the Texas Legislature has not granted TDA the authority for on-site visits of qualified exempt farms. That alone makes this requirement

unreasonable – because a farm's status as a qualified exempt farm is not based upon its failure follow the TDA's paperwork requirements, but upon its status as defined under the 21 C.F.R. Part 112. Thus, the registration requirement represents yet another unreasonable interpretation by TDA.

3. TDA's "egregious condition" and penalty rules are not reasonable.

Following its ability to illegally enter a qualified farm without a grant of legislative authority, and conduct a search/inspection, TDA then has the ability to impose a penalty. TDA represents that a specific procedure will be followed with egregious conditions, citing to deposition testimony of its staff. Defendants' Br. at 52. Yet this procedure is not contained in the Rule, and this lawsuit challenges the text of the actual Rule rather than the claimed approach provided by a single official.

Defendants seek to imply that FDA has directed them to apply "egregious conditions" standards on account of FDA memoranda and because there is a line in a report that they submit under the cooperative agreement for egregious conditions. Defendants' Br. at 28. However, cooperative agreement reporting is not a source of legal authority for a state agency, and TDA fails to point to the Produce Safety Regulation for any authority related to so-called egregious conditions; as mentioned at length before, the Produce Safety Regulation is where TDA derives its produce safety authority because of the plain language of the Texas statute, and

that regulation, 21 C.F.R. Part 112, does not define or even contain the term "egregious conditions." Accordingly, the egregious conditions and penalty rules are not reasonable.

E. TDA acted *ultra vires* in applying regulatory requirements to not-covered farms.

While the above arguments address both not-covered and qualified exempt farms, there is an additional argument specifically for not-covered farms.

The plain language of the Federal rule subjects certain farms to 21 C.F.R. Part 112 by defining the term "covered." *See* 21 C.F.R. §112.4 (full text excerpt above). By definition, farms smaller than that (i.e. that sell less than $25,000 per year of produce, an amount now inflation-adjusted to a higher figure) are "not-covered." Yet TDA's rule explicitly subjects these not-covered farms to inspection, both to verify their status and to inspect for "egregious conditions." 4 TAC §§ 11.21(d), 11.40(a), & 11.40(c) (note that the TDA rule appears to use "exempt" in place of not-covered). Moreover, TDA has contacted many of these farms and informed them that the agency must conduct a "farm visit." *See e.g.* Plaintiff's Appendix 14, 15, & 21. Illogically, while the test for whether a farm is or is not-covered is entirely a financial one (i.e. how much produce they sell), the Defendants informed these not-covered farms that, while they must allow this government intrusion onto their land, "no paperwork is required." *See* Plaintiff's

Appendix 14 & 15. TDA has thus ignored the plain language of the Federal regulation in creating requirements on these not-covered farms.

F. Conclusion – *Ultra Vires*

TDA goes to great lengths to justify its actions, but never addresses the application of 21 C.F.R. Part 112 to its rules. Because the Texas Legislature limited its grant of authority to TDA based on 21 C.F.R. Part 112, this is a fatal flaw. TDA has taken drastic action to fill in perceived "gaps" in the name of execution, even though FDA's guidance document and actions clearly provide a path for how the FSMA and the Produce Safety Regulation can be implemented without these overreaching provisions. *See* Plaintiff's Appendix 13, p. TDA_TOPS 3216. As an administrative agency, TDA has limited authority and must tie its actions to a legislative grant. Here, the Texas Legislature, unlike a handful of other states, elected **not** to expand TDA's ability to regulate either not-covered or qualified exempt farms. By entering not-covered and qualified exempt farms, requiring renewals/registration for qualified exempt farms, and including provisions for penalties, without a grant of authority from either the C.F.R. or the Texas Legislature, the TDA is committing *ultra vires* acts.

PART IV: VAGUENESS

A. TDA's monetary penalty scheme and its "stop sale" authorities are quasi-criminal in nature, requiring the courts to apply a more stringent vagueness analysis.

Defendants argue that in *Ford Motor Co. v. Texas Dept. of Transp.*, the Fifth Circuit applies a "less stringent standard" to regulation of economic activity. *See* 264 F.3d 493, 507 (5th Cir. 2001). However, Defendants fail to acknowledge the draconian impact its own penalties could have if a farmer were to persist in refusing a pre-assessment review or to refuse entry during the "renewal" process. Under TDA's penalty matrix, penalties of up to $500 per day could apply for the first refusal "to allow inspection," escalating to up to $1,500 per day. 4 Tex. Admin. Code § 11.41(a) Figure.[2] In addition, the application of the term "egregious conditions" increases penalties from a single $1,000 penalty to a $2,500 penalty **per day** combined with a stop sale order, which would itself have significant economic consequences. Consider that a Class A Misdemeanor, the most serious misdemeanor, has a penalty not to exceed $4,000. Texas Penal Code section 12.21. Yet a small farm that has twice been found to have an egregious condition could face a higher penalty in just two days, on top of having its sales of perishable

[2] The relevant penalty matrix is linked as a graphic from the webpage that displays 4 Texas Administrative Code § 11.41(a) and is available at https://texreg.sos.state.tx.us/fids/201902864-1.pdf.

products stopped for an indeterminate amount of time, making the economic impact similar or exceeding that of a state jail felony. Texas Penal Code §12.35.

In *Ford*, the Fifth Circuit acknowledged that significant civil penalties could change the court's analysis of vagueness from an "economic" to a "quasi-criminal" rubric – in which case the court applies the tougher standard:

> "An economic regulation is invalidated only if it commands compliance in terms 'so vague and indefinite as really to be no rule or standard at all'…or if it is 'substantially incomprehensible.'" *United States v. Clinical Leasing Service, Inc.*, 925 F.2d 120, 122 n.2 (5th Cir. 1991) (quoting *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239, 69 L. Ed. 589, 45 S. Ct. 295 (1925) and *Exxon Corp. v. Busbee*, 644 F.2d 1030, 1033 (5th Cir. 1981)). There is, however, a caveat to this general rule. Civil statutes or regulations that contain quasi-criminal penalties may be subject to the more stringent review afforded criminal statutes.
>
> The Supreme Court applied the more stringent standard in reviewing an ordinance that required stores to obtain a license to sell "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs…." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 at 500, 71 L. Ed. 2d 362, 102 S. Ct. 1186. Customers that purchased such goods were forced to sign their names and addresses to a register that would be available to police. *Id.* at 500 n.16. The Court concluded that, while the statute nominally imposed civil penalties, its prohibitory and stigmatizing effect warranted quasi-criminal treatment. *Id.* at 489.
>
> In *United States v. Clinical Leasing Service, Inc.*, 925 F.2d 120, 122 (5th Cir. 1991), this Court reviewed a Federal statute prescribing civil penalties for "any party who distributes or authorizes the distribution of controlled substances without adequate registration." Although the statute authorized civil penalties, this Court determined that "its prohibitory effect is quasi-criminal and warrants a relatively strict test." *Id.* As such, the statute was required to define the offense "'with

> sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Id.* (citing *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858, 75 L. Ed. 2d 903 (1983)). Similarly, this Court found that where a statute permits "potentially significant civil and administrative penalties, **including fines and license revocation**," quasi-criminal treatment is appropriate and thus the more strict standard of review applies. *Women's Medical Center of Northwest Houston v. Bell*, 248 F.3d 411, 2001 WL 370053 (5th Cir. 2001). *Ford*, 264 F.3d at 507-08 [emphasis added].

In the present case, TDA has granted itself the ability to impose significant monetary fines and simultaneously to issue a stop sale order (preventing the farm from conducting business), the combined financial impact of which is consistent with significant misdemeanor or state jail felony monetary punishments. The impact of these penalties on small scale farmers should lead this court to apply the more stringent standards mentioned in *Ford*, and require that TDA's rules in this case be drafted with "sufficient definiteness that ordinary people can understand those rules." The present rules are so vague as to defy the required level of definiteness for both the challenged provisions: "pre-assessment review" and "egregious conditions."

B. Other jurisdictions' use of the term "egregious conditions" do not solve TDA's failure to clearly define it.

In defending against FARFA's claims of vagueness, TDA points out that "egregious conditions" is also used by an FDA workgroup and in a few other states' statutes.

First and foremost, the use of the same term by an FDA workgroup and a few other states does not defend the TDA from a charge of vagueness. First, those other definitions are not tied in any legally binding way to the Texas rule, and the Defendants have further not made any claim that other states' courts have approved of the term after a challenge.

Moreover, in at least two of TDA's examples, the other jurisdiction did provide significantly greater clarity than what TDA provides. The FDA workgroup document includes both specific factors and examples of what constitute egregious conditions, things that TDA chose not to include in its rule. *See* TDA APP. 9 at 41-42. Arizona also provided examples in the text of its regulations:

> The following is a nonexclusive list of practices, conditions or situations on a farm that is substantially likely to lead to serious adverse health consequences or death from the consumption of or exposure to covered produce. A regulated person shall not:
>
> 1. Allow the harvest, packing or distribution of covered produce that is visibly contaminated with animal or human excreta;
> 2. Allow the harvest, packing or distribution of covered produce that is visibly contaminated with sewage, or the contents of a septic system or toilet facilities; or
> 3. Allow the harvest, packing or distribution of covered produce that has had raw manure in direct contact with the edible portion of the plant. Ariz. Admin. Code § R3-10-1605 - Egregious Violation.

Providing examples such as these to help farmers understand the scope of "egregious conditions" and give the rule "definiteness" as required by the Constitution. As stated in FARFA's formal comments to TDA on the proposed rule, at an April 2019 meeting, FARFA and multiple organizations urged the agency to revise the proposed rule to include specific examples of egregious conditions to provide some level of clarity and objectivity. *See* Plaintiff's Appendix 4, p. 6 of 12. Despite comments from FARFA and others, the TDA made no such change, instead finalizing the rule with its current vague and overbroad language. *See Id.*

Pointing to other jurisdictions, that either provide greater clarity or lower penalties, does not rebut FARFA's argument that the definition used by TDA is so vague and lacking objective standards that an ordinary person could understand what it means. The inherent subjectivity of the "egregious conditions" standard is what makes it unconstitutional, because it invites arbitrary enforcement at the whim of Defendants' officers.

PART V: ADMINISTRATIVE PROCEDURES ACT

A. TDA can provide no justification for failing to adequately respond during the rulemaking process or for applying right-of-entry provisions to qualified exempt farms.

During the rulemaking process, FARFA pointed out the deficiencies in TDA's proposal repeatedly. Despite a record of objections, TDA contends that its

dismissive replies to FARFA were legally adequate. TDA then contends that it "substantially complied" with the requirement to reply. TDA cannot meet this standard, however, because it cannot provide a "reasoned justification" for its overbroad right-of-entry provisions. The record shows that FARFA sent its comment letter prior to adoption of the rule. *See generally* Plaintiff's Appendix 4. The letter contains a detailed list of objections. *See Id*.

B. TDA did not substantially comply with the reasoned justification requirements of the APA.

In response to Plaintiff's comments, TDA gave inadequate replies. TDA in turn, argues that it was in "substantial compliance" with Tex. Gov't Code § 2001.033. "A state agency substantially complies with the requirements of Section 2001.033 if the agency's reasoned justification demonstrates in a relatively clear and logical fashion that the rule is a reasonable means to a legitimate objective." Tex. Gov't Code § 2001.035(c). An "arbitrary and capricious" standard applies, looking at the four corners of the order adopting the rule. *See Lambright v. Texas Parks & Wildlife Dep't*, 157 S.W.3d 499, 505 (Tex. App.—Austin 2005). FARFA must make a "showing of prejudice to a given right or privilege." *See Off. of Pub. Util. Couns. v. Pub. Util. Comm'n of Texas*, 104 S.W.3d 225, 235 (Tex. App.—Austin 2003).

As demonstrated throughout this brief, TDA draws the power for its right-of-entry provisions from itself. Rather than relying on a legislative grant of authority tied to 21 C.F.R. Part 112, TDA arbitrarily and capriciously stepped into the role of the legislature and decided it needed to do more to "fill the void" and regulate qualified exempt farms. Though TDA repeatedly contends that its rule is based upon its statutory grant of authority, its actions in passing provisions applicable to qualified exempt and not-covered farms contradict the plain language of FSMA and the Produce Safety Regulation. By refusing to honor the specific exclusions for not-covered farms and exemptions granted to qualified exempt farms in 21 C.F.R. Part 112, TDA has prejudiced small farmers in Texas. FARFA has demonstrated prejudice of a given right or privilege.

Perhaps due to the lack of reasoned justification, TDA never directly responded, as required, to the twelve-page letter sent by FARFA. Instead, for example, on the central issue of right of entry, TDA merely referenced its response to a comment made by *another* organization, even though the organizations raised different objections to the right-of-entry provisions. *See* Plaintiff's Appendix 1, at 44 TexReg 4855-56; *see also* Plaintiffs' Brief at p.20-21. On the issue of registration, for which FARFA wrote three pages with detailed legal analysis, TDA responded by again referencing another organization's comment and dodging the issue by saying in a conclusory fashion that there is no "mandatory registration."

Id. On the topic of egregious conditions, TDA's response claimed that it clarified and narrowed the definition, even though it used almost identical language in the proposed and final rule. *See Id.* These responses provided no analysis regarding the objections raised regarding TDA's lack of authority, the plain language of 21 C.F.R. Part 112, or the legislative intent behind the exemption. TDA never provided a sufficiently reasoned justification, and cannot do so now, because its actions in adopting the challenged provisions were arbitrary and capricious.

PRAYER

WHEREFORE, for the foregoing reasons, Plaintiff Farm and Ranch Freedom Alliance asks the Court to declare the Texas Department of Agriculture's post-FSMA administrative rules to be unconstitutional and invalid in their current form, and to permanently enjoin the Texas Department of Agriculture from enforcing the rules at issue in their current form. Finally, Plaintiff respectfully requests that the Court award costs of suit, attorney fees, and all other relief which the Court deems just and appropriate.

Respectfully submitted,

Ernst Mitchell Martzen
Texas Bar No. 24055916
mitch@martzenlaw.com
Martzen Law Firm PLLC
10440 N. Central Expressway, Ste 800
Dallas, Texas 75231
Tel. (214) 444-7200
Fax. (214) 613-1558
Attorney for Plaintiff

CERTIFICATE OF COMPLIANCE

I certify that the computer program used to prepare this document reported that there are 7,030 words in the pertinent parts of the document, per Texas Rules of Appellate Procedure, Rule 9.4(i).

Ernst Mitchell Martzen

CERTIFICATE OF SERVICE

This certifies that on the 24th day of October 2022, a true and correct copy of the foregoing document was served, via efiling service, to the following counsel of record:

Harold Liller
Assistant Attorney General
Office of the Attorney General of Texas
Administrative Law Division
P.O. Box 12548
Austin, Texas 78711
Telephone: (512) 475-3206
Facsimile: (512) 320-0167
harold.liller@oag.texas.go
Counsel for Defendants

Ernst Mitchell Martzen

PLAINTIFF'S
INDEX OF APPENDICES

Appendix 19: Excerpt from FDA statement about FSMA Final Rule

Appendix 20: Document explaining “egregious conditions” definition

Appendix 21: TDA correspondence with small Texas farmer