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

FARM AND RANCH FREEDOM ALLIANCE, *Plaintiff*,	§	IN THE DISTRICT COURT OF
v.	§	
TEXAS DEPARTMENT OF AGRICULTURE and SID MILLER in his official capacity as Commissioner, *Defendants*.	§	TRAVIS COUNTY, TEXAS 250TH JUDICIAL DISTRICT

SUR-REPLY OF DEFENDANTS TEXAS DEPARTMENT OF AGRICULTURE AND SID MILLER IN HIS OFFICIAL CAPACITY AS COMMISSIONER

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November 14, 2022

PARTIES AND REFERENCES TO APPENDICES OF EXHIBITS

Plaintiff Farm and Ranch Freedom Alliance will be referred to as "FARFA."

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

TDA Office of Produce Safety will be referred to as "TDA-TOPS."

The United States Food and Drug Administration will be referred to as the "FDA."

The Administrative Procedure Act, Chapter 2001 of the Texas Government Code, will be referred to as the "APA."

Cites to evidence found in TDA's Appendix of Exhibits will be referred to as [TDA APP ____ (appendix number) at ____ (page number)].

Cites to testimony found in TDA's Appendix of Exhibits will be referred to as [TDA APP ____ (appendix number) at ____ (page number): ____ (line number)].

Cites to evidence found in FARFA's Appendix of Exhibits will be referred to as [FARFA APP ____ (appendix number) at ____ (page number)].

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TO THE HONORABLE JUDGE MARIA CANTU HEXSEL:

COME NOW Defendants Texas Department of Agriculture and Sid Miller in his official capacity as Commissioner (collectively "TDA") and file this sur-reply in in the instant administrative rule challenge case.

ARGUMENT

It is important for this Court to understand exactly what FARFA is challenging in this APA Section 2001.038 case. FARFA challenges:

> (1) a one-time, on-site visit to a produce farm to verify its status which "shouldn't take more than 30 minutes;" a visit which is also utilized by TDA-TOPS officials to provide statutorily authorized (and FDA mandated) outreach, education, training, and assistance to produce

farmers on "produce safety issues."[1] *See* Tex. Agric. Code §§ 91.009(a), (a-1), (b), and (d); [FARFA APP 14 at 1]; [TDA APP 4 at 2]; [TDA APP 15 at 21:23-24:23; 44:11-45:7; 89:18-90:15, 93:17-94:16; 99:12-16];

(2) the submission of a renewal form by qualified exempt farmers to maintain their qualified exempt status in accord with FDA regulation limiting such exemptions to "a calendar year."[2] 21 C.F.R. § 112.5(a);

(3) the definition of "egregious condition," which is a "relevant state, federal, [and] national standard" used in the context of Produce Safety by the FDA, NASDA, and at least seven other Path C states.[3] *See* Tex. Agric. Code §§ 91.009 (a), (d); [FARFA APP 20 at 1];

(4) right of entry provisions which are supported by the well-established Texas and United States Supreme Court "Open Fields Doctrine." *See Oliver v. United States*, 466 U.S. 170, 178-79 (1984); *see also Rosalez v. State*, 875 S.W.2d 705, 714 (Tex. App.—Dallas 1993); and

(5) penalty provisions adopted by TDA which are supported by well-established Texas precedent that "[t]he choice of penalty is vested in the agency, not in the courts." *Sears v. Texas State Bd. of Dental Examiners*, 759 S.W.2d 748, 751 (Tex. App.—Austin 1988).

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[1] FARFA argues that "[u]nder the Rule, TDA has broad powers to inspect not-covered and qualified exempt farms – powers that it has exercised." FARFA Reply at 3. Contrary to FARFA's repeated assertion, the one-time, on-site visit to a produce farm to verify its status is not a full regulatory Produce Safety inspection. *See* TDA Br. at 43-46.

[2] FARFA argues that "TDA has also imposed a de facto registration in the Rule for qualified exempt farms." FARFA Reply at 18. Contrary to FARFA's repeated assertion, this is not "registration." *See* TDA Br. at 34-38.

[3] FARFA argues that TDA "acted *ultra vires* in minting a new legal standard in its regulations known as the 'egregious conditions' standard" and that the egregious condition standard "is completely untethered to any statutory, judicial, or administrative guidance." FARFA Br. at 27; FARFA Br. at 42. Contrary to FARFA's repeated assertion, egregious condition is an established national standard in produce safety regulation. *See* TDA Br. at 27-29.

To support these challenges, FARFA demands this Court overturn United States Supreme Court precedent and Texas constitutional jurisprudence to create a new privacy right for produce farmers in their open, cultivated fields and to limit the implied license that government enforcement officers possess to enter upon curtilage.[4] Additionally, FARFA demands this Court apply an artificially narrow interpretation of FDA's Produce Safety Regulations as well as an artificially narrow interpretation of Texas Agriculture Code Section 91.009.[5] FARFA makes these demands as necessary prerequisites to overturning the TDA rules it challenges. This Court should decline each of these demands and dismiss this APA Section 2001.038 administrative rule challenge case.

I. THIS COURT SHOULD NOT OVERTURN ESTABLISHED PRECEDENT RELATING TO THE OPEN FIELDS DOCTRINE AND THE IMPLIED LICENSE TO ENTER CURTILAGE.

The crux of FARFA's complaint is that TDA's right of entry "rules … allow the government entry onto [farmers'] properties under the threat of enforcement."[6] FARFA argues that non-covered and qualified exempt farmers suffer "unreasonable entries on private properties" because of the right of entry rules.[7] In attacking the

[4] *See* FARFA Reply at 4-9.

[5] *See* FARFA Reply at 9-21.

[6] FARFA Reply at 1-2.

[7] FARFA Reply at 1.

TDA rules at issue, FARFA seeks to enforce a privacy right that simply does not exist.

"The 'open fields' doctrine allows a law enforcement officer to enter and search an area of land without a warrant." *Carroll v. State*, 911 S.W.2d 210, 217 Tex. App.—Austin 1995). A right of privacy exists for "people in their persons, houses, papers, and effects, but that protection is not extended to 'open fields.'"[8] *Id.* The United States Supreme Court explained that "[t]here is no societal interest in protecting the privacy of those activities, ***such as the cultivation of crops***, that occur in open fields." *Oliver v. United States*, 466 U.S. 170, 179 (1984) (emphasis added). A narrow exception exists for curtilage which allows "an area immediately adjacent to the home [to] remain private." *State v. Serna*, 644 S.W.3d 712, 723 (Tex. App. 2021). As discussed in Section I(B) below, enforcement officials have an implied license to enter curtilage.

FARFA bears the burden of proof to demonstrate a "justifiable, a reasonable, or a legitimate expectation of privacy that has been invaded by government action." *Barry v. Freshour*, 905 F.3d 912, 914 (5th Cir. 2018) *quoting Smith v. Maryland*, 442 U.S. 735, 740 (1979). FARFA cannot meet this burden; instead, FARFA

[8] "An 'open field' need not be 'open' or a 'field' as those terms are commonly understood." *Carroll*, 911 S.W.2d at 217.

demands this Court overturn or modify various aspects of well-established legal precedent.[9] This Court should decline to do so.

A. This Court should not Overturn the Open Fields Doctrine.

FARFA asks this Court 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."[10] This Court should not overturn, or in any way limit, the Open Fields Doctrine.

Texas jurisprudence recognizes that claims under the Fourth Amendment and claims Article I, Section 9 of the Texas Constitution are analyzed identically. *See Schade v. Texas Workers' Comp. Comm'n,* 150 S.W.3d 542, 550 (Tex. App.—Austin 2004). "The Court of Criminal Appeals has held that article 1, section 9 of the Texas Constitution is to be construed in harmony with the United States Supreme Court's opinions interpreting the fourth amendment." *Bryant v. State*, 793 S.W.2d 59, 62 (Tex. App.—Austin 1990). As discussed above, a produce farmer has no constitutionally protected reasonable expectation of privacy in open, cultivated fields. *See Carroll*, 911 S.W.2d at 217*; see also Oliver*, 466 U.S. at 179. In Texas jurisprudence:

[9] FARFA Reply at 4-9.

[10] FARFA Reply at 6-7.

> the contention that article I, section nine of the Texas Constitution afforded greater protection than the Fourth Amendment with regard to "open fields" was rejected. It was held that the Texas Constitution does not prohibit the application of the "open fields" doctrine.

Carroll, 911 S.W.2d at 217.

TDA's right of entry rules are supported by the Open Fields Doctrine. This Court should reject FARFA's demand to overturn the Open Fields Doctrine in Texas, as there is absolutely no legal authority to repudiate this well-established precedent.

B. This Court should not Expand the Definition of Curtilage.

In the alternative, FARFA asks this Court to expand the definition of curtilage, contending that Texas law "specifically contemplated gardens as well as business activities to be within curtilage."[11] To circumvent the Open Fields Doctrine, FARFA clearly seeks to include all non-covered and qualified exempt farms under this new, expanded definition of curtilage.[12] Again, FARFA is incorrect.

To support its demand to expand the definition of curtilage, FARFA cites dicta found in a 1929 Texas Court of Criminal Appeals case.[13] *McTyre v. State,* 113 Tex. Crim 31 (1929). The holding of *McTyre* simply does not support FARFA's position. In *McTyre*, prohibition officers executed a search warrant of "the private residence

[11] FARFA Reply at 4.

[12] *See* FARFA Reply at 5.

[13] *See* FARFA Reply at 4.

of the appellant" to seize intoxicating liquor under the Volstead Act. *Id.* at 31-33. The prohibition officers "found mash and other material and articles suitable for and adapted to the making of intoxicating liquor" in an "inclosure (sic) of land about 125 yards east of the [private residence]." *Id.* at 31-32. In holding that the warrant did not extend to the enclosure, the Court of Criminal Appeals found that the enclosure was not within the curtilage of the private residence.

McTyre does not support FARFA's call to expand the curtilage exception to Open Fields Doctrine in Texas jurisprudence. The holding of *McTyre* was based upon a limited view of curtilage, not an expanded interpretation. *See id.* at 31-33. Moreover, curtilage is defined on a case-by-case basis "by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." *Serna*, 644 S.W.3d at 723. A general holding that all "gardens as well as business activities [are] within curtilage" is both unsupported and improper under Texas jurisprudence.

McTyre does not support the general proposition that Texas law extends curtilage to "gardens as well as business activities," nor does it support the contention that produce growing activities on not-covered and/or qualified exempt farms must somehow occur within curtilage. As such, this Court should not expand the definition of curtilage to all "gardens as well as business activities" as FARFA requests.

C. This Court should not Impose a New Burden on Agencies in the Drafting of Administrative Rules.

FARFA also attempts to impose a new burden upon the drafting of administrative rules by regulators by arguing that any federal or state agency enforcing FDA's Produce Safety Rule must include provisions concerning the "potential for intrusion upon curtilage when entering upon the land of farmers and landowners" or face having their rules struck as "unconstitutional – either on their face, or as applied to farms and farmers where … crops lie within the curtilage of the farmer's residence."[14] FARFA's new burden is premised upon an implied holding in *United States v. Dunn* which purportedly "require[s] that agents of the state must consider the potential for intrusion upon curtilage when entering upon the land of farmers and landowners."[15] The holding in *Dunn* does not support FARFA's premise nor does it support FARFA's conclusion that regulators must include such language in drafting rules. In fact, there is no legal support for FARFA's conclusion.

Dunn is a criminal case in which the United States Supreme Court determined whether "certain evidence obtained as a result of law enforcement officials' intrusion onto the area immediately surrounding [a] barn" located near a residence should be suppressed in the conviction of an individual on amphetamine manufacturing and other charges. *United States v. Dunn*, 480 U.S. 294, 296 (1987). After examining

[14] FARFA Reply at 6.

[15] FARFA Reply at 6.

the Open Fields Doctrine, the Supreme Court held that the "barn and the area around it lay outside the curtilage of the house." The Supreme Court reaffirmed that "curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself." *Id.* at 300. Importantly, the Supreme Court specifically rejected the argument that Dunn "possessed an expectation of privacy … in the barn and its contents, because the barn is an essential part of his business."

The holding in *Dunn* does not "require that agents of the state must consider the potential for intrusion upon curtilage when entering upon the land of farmers and landowners" as FARFA argues. *Dunn* does provide blanket prohibition on entry upon curtilage or search of curtilage; at best, *Dunn* stands for the long-held proposition that evidence seized from curtilage may be suppressed at some point in a future enforcement action. *Id.* at 296.

The holding of *Dunn* certainly does not require a state agency, be it a law enforcement agency or an agency enforcing the FDA's Produce Safety Rule, to include provisions in rule or policy concerning the "potential for intrusion upon curtilage when entering upon the land of farmers and landowners." There is simply no need for an additional provision requiring government enforcement agents to abide by clearly established constitutional law.

There is no caselaw holding that any federal or state agency enforcing FDA's Produce Safety Rule must include language concerning the "potential for intrusion upon curtilage when entering upon the land of farmers and landowners."[16] The FDA did not include language relating to curtilage in the relevant Code of Federal Regulations. *See* 21 C.F.R. § 112. No other state includes language relating to curtilage in its produce safety provisions. TDA's initial brief examined the right of entry provisions for enforcing FDA's Produce Safety Rule in Kentucky, Georgia, Maryland, Idaho, and South Carolina.[17] None of the right of entry provisions include language concerning the "potential for intrusion upon curtilage when entering upon the land of farmers and landowners." See 302 Ky. Admin. Regs. 60:010 Sec 3; Ga. Comp. R. & Regs. 40-7-20-.03; Md. Code Agric. § 16-105(a)(4); Idaho Code § 22-5405(1); S.C. Code § 39-26-60(a)(1), (b)(1). In fact, TDA has found no language relating to curtilage in any produce safety provision, whether state or federal.

FARFA's call to impose a new burden upon regulators to include language concerning the "potential for intrusion upon curtilage when entering upon the land of farmers and landowners" in its provisions enforcing FDA's Produce Safety Rule or face having right of entry provisions struck as unconstitutional has no legal basis. This Court should decline to impose this additional burden.

[16] FARFA Reply at 6.

[17] See TDA Br. at 42.

D. This Court should not Impose a New Limit on the Implied License to Enter Curtilage.

Even if FARFA prevails on its argument for expanded curtilage, this does not create a blanket prohibition against government officials entering a produce farmer's curtilage. "Officials generally have an implied license to enter property to visit and converse with the owner." *Hoffmann v. Marion Cnty., Tex.,* 592 F. App'x 256, 258–59 (5th Cir. 2014). In response, FARFA argues that "implied licenses to enter a produce farmer's curtilage must be revokable."[18] Stated differently, FARFA argues that an "implied license is subject to the to the common law right of revocation."[19] This Court should reject FARFA's demand to add a new limitation to the well-established implied license doctrine.

In support of its argument, FARFA cites only to the dissent in a case from a foreign circuit.[20] In *United States v. Carloss*, the Tenth Circuit examined whether "No Trespassing" signs placed on and about property revoked the implied license of government officials to enter curtilage to attempt to speak with the owner. 818 F.3d 988, 994-95 (2016). The majority of the Tenth Circuit held that "[i]t is well-established that 'No Trespassing' signs will not prevent an officer from entering privately owned 'open fields.'" *Id.* at 995. "That is true even though the officers'

[18] FARFA Reply at 7.

[19] FARFA Reply at 8.

[20] FARFA Reply at 7-8.

entry in the yard might be considered a trespass at common law," because "[i]n the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the application of the Fourth Amendment." *Id.* at 996. "[T]he Supreme Court has made it clear that the Fourth Amendment does not track property law." *Id.* Moreover, Texas law supports the implied license. "One cannot create a legitimate expectation of privacy in an open field or expand the curtilage of his home to include an open field by erecting fences, gates, and "No Trespassing" signs around it. *Rosalez v. State*, 875 S.W.2d 705, 714 (Tex. App.—Dallas 1993).

FARFA asks this Court to adopt the dissent of *Carloss* to limit clear United States Supreme Court precedent; precedent that is also well-established under Texas jurisprudence. This Court should not do so, as FARFA can present no binding legal authority to support its request. Moreover, FARFA fails to identify a relevant factual situation to justify such a radical departure from well-established precedent.

FARFA gives a factual example of why the implied license "must" be revokable, alleging "one case [] where the farmer explicitly told TDA officials that they were no welcome to come to the farm, [but] TDA officials entered the farm anyway."[21] FARFA does not allege, let alone prove, that the alleged entry in

[21] FARFA Reply at 8.

question was upon curtilage and not upon an open, cultivated field.[22] Examination of public records indicate that the farm in question is not on curtilage.

Public Fort Bend County Central Appraisal District records indicate that the farm in question, Harvest Green Village Farm located at 8939 Harlem Road in Richmond, is owned by a holding company. [FARFA APP 16 at 1]; [TDA APP 13 at 1-2]. Mr. Snodgrass, the individual FARFA identifies as the farmer, is the co-owner of Agmenity which merely manages the farm where the alleged entry occurred. [TDA APP 14 at 1-2]. FARFA cannot meet its burden to prove that Harvest Green Village Farm is "intimately linked to [Mr. Snodgrass'] home, both physically and psychologically" and "to which the activity of the home life extends." *Fla. v. Jardines*, 569 U.S. 1, 7 (2013); *see also Serna*, 644 S.W.3d at 723. Any alleged entry by TDA officials was not upon curtilage or any other "constitutionally protected area;" therefore, the alleged entry need not rely upon the implied license that FARFA challenges. *See id.* at 7-8. Indeed, a government official's "entry onto private property that was not curtilage, by opening a closed gate with a 'No Trespassing' sign and despite the homeowner telling the [official] he had no right to enter, d[oes] not violate the Fourth Amendment." *Carloss*, 818 F.3d at 996.

[22] FARFA Reply at 8-9. Presumably, FARFA relies upon this expanded view of curtilage which somehow includes the entirety of any non-covered or qualified exempt farm.

FARFA provides no binding legal authority that would allow this Court to limit the implied license by making it subject to the common law right of revocation, a right clearly repudiated by federal and Texas courts. Moreover, FARFA's factual allegation has no bearing on the implied license. This Court should deny FARFA's request to create a new limitation upon the implied license.

In summary, TDA's right of entry rules are supported by well-established constitutional precedent.[23] A core premise in FARFA's suit is the mistaken belief that produce farmers have an unfettered constitutionally protected privacy interest in the cultivated fields of their farms. This premise is demonstrably false. This Court should not create new constitutional standards based upon FARFA's erroneous understanding of privacy rights.

II. THIS COURT SHOULD NOT ADOPT FARFA'S IMPROPERLY NARROW INTERPRETATION OF THE FDA'S PRODUCE SAFETY REGULATIONS.

In addition to FARFA's mistaken belief that produce farmers have an unfettered constitutionally protected privacy interest in the cultivated fields of their farms, FARFA incorrectly asserts that the challenged TDA rules directly contradict FDA's Produce Safety Regulations found in 21 C.F.R. Part 112.[24] FARFA

[23] The right of entry rules in question are also authorized by the enabling statute, Texas Agriculture Code Section 91.009. *See infra*, Section III, *see also* Tex. Agric. Code §§ 91.009 (a), (a-1), (b), and (d).

[24] *See* FARFA Reply at 11.

incorrectly states that TDA "never address[ed] the application of 21 C.F.R. Part 112 to its rules."[25] As in its initial briefing, TDA maintains that it complies with the entirety of FDA's Produce Safety Regulations including 21 C.F.R. § 112.4 - 112.7.[26]

The underlying premise of FARFA's argument is that every Produce Safety procedure must be explicitly and textually referenced in 21 C.F.R. Part 112; that there is no latitude for TDA, FDA, or any other enforcement agency to interpret 21 C.F.R. Part 112.[27] Stated differently, FARFA contends that challenged TDA rules are invalid *per se* because "[t]here 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" in 21 C.F.R. Part 112.[28] Similarly, FARFA contends that any rule incorporating the term "egregious condition" is invalid *per se* because "21 C.F.R. Part 112 does not define or even contain the term."[29]

FARFA's narrow interpretation of the FDA's Produce Safety Regulations is directly contradicted by the FDA in its publication of the regulations themselves, its published procedural guidelines, and in the practical enforcement of 21 C.F.R. Part

[25] *See* FARFA Reply at 21. Contrary to FARFA's assertion, TDA addressed each of FARFA's *ultra vires* arguments in thirty-four pages of its initial briefing. *See* TDA Br. at 14-48.

[26] *See* TDA Br. at 19-22.

[27] *See* FARFA Reply at 14.

[28] FARFA Reply at 14.

[29] FARFA Reply at 20.

112. TDA relies on its initial briefing concerning the authority granted by the FDA regulations.[30] Additionally, TDA offers the following in response to FARFA's argument that "farm visits," "pre-assessment review," and "egregious condition" must be explicitly and textually referenced in 21 C.F.R. Part 112.[31]

A. "Farm Visits" are not Prohibited by 21 C.F.R. Part 112.

TDA's statutory authority regarding right of entry for "farm visits" (TDA's on-site verification procedure) is fully addressed in TDA's initial briefing.[32] Additionally, it is important to note that the FDA's Produce Safety Regulations contain no right of entry provision. *See* 21 C.F.R. § 112. Adopting FARFA's argument that every Produce Safety procedure or protocol must be explicitly and textually referenced in 21 C.F.R. Part 112 leads to the absurd result that an enforcement agency would have no right of entry for any purpose. This Court should not adopt FARFA's narrow interpretation of 21 C.F.R. Part 112.

[30] *See* TDA Br. at 19-22

[31] Alleged "registration" is fully addressed in TDA's initial briefing. *See* TDA Br. at 34-38. The difference between a visit to verify coverage and a full regulatory Produce Safety inspection is also fully addressed in TDA's initial briefing. *See* TDA Br. at 43-46. FARFA's conflation of the two visits is deliberately misleading. *See e.g.,* FARFA Reply at 3 ("Under the Rule, TDA has broad powers to inspect not-covered and qualified exempt farms – powers that it has exercised.").

[32] *See* TDA Br. at 32-34; 39-43; *see also supra,* Section I.

B. "Pre-Assessment Review" is not Prohibited by 21 C.F.R. Part 112.

TDA's statutory authority to adopt its "Pre-Assessment Review" procedure is fully addressed in TDA's initial briefing.[33] The need for a regulatory authority enforcing the FDA's Produce Safety Regulations to adopt some procedure to verify a produce farm's status as not covered, qualified exempt, or covered is also addressed.[34] FARFA now argues that 21 C.F.R. Part 112 does not explicitly and textually reference "pre-assessment review;" therefore, such a procedure is prohibited *per se*.[35] Yet, FARFA continually cites to the FDA's "pre-announcement" phone verification procedure as "consistent with the Federal statutory and regulatory provisions."[36] FDA's "pre-announcement" verification procedure is not explicitly and textually referenced in 21 C.F.R. Part 112. *See* 21 C.F.R. § 112. Adopting FARFA's argument that every Produce Safety procedure must be explicitly and textually referenced in 21 C.F.R. Part 112 would necessarily invalidate the very procedure that FARFA wishes this Court to impose upon TDA.[37] This Court should not adopt FARFA's narrow interpretation of 21 C.F.R. Part 112.

[33] *See* TDA Br. at 32-38; 52-54.

[34] *See* TDA Br. at 32-34.

[35] *See* FARFA Reply at 14.

[36] FARFA Reply at 16.

[37] *See* FARFA Br. at 32

C. Use of the Term "Egregious Condition" is not Prohibited by 21 C.F.R. Part 112.

TDA's statutory authority to adopt rules utilizing the term "egregious condition" is fully addressed in TDA's initial briefing.[38] FARFA contends that any rule incorporating the term "egregious condition" is invalid *per se* because "21 C.F.R. Part 112 does not define or even contain the term."[39] The term egregious condition is currently utilized by the FDA and is found in the current FDA procedure memorandum relating to "FY21-22 Produce Safety Inspections."[40] [TDA APP 9 at 18, 39-42]. This FDA procedure also contemplates "FDA enforcement strategy/corrective action with the farm" when egregious conditions are found. [TDA APP 9 at 18, 32-33]. Adopting FARFA's argument that every Produce Safety procedure must be explicitly and textually referenced in 21 C.F.R. Part 112 would necessarily invalidate FDA's procedures relating to egregious conditions.

"Implicit in [Section 91.009] is [TDA's] authority to interpret the rules and statutes it must administer and enforce." *LMV-AL Ventures, LLC v. Texas Dep't of Aging & Disability Servs.*, 520 S.W.3d 113, 125-27 (Tex. App.—Austin 2017). In summary, FARFA asks this Court to limit TDA's authority to adopt rules for the

[38] *See* TDA Br. at 27-32; 50-52.

[39] FARFA Reply at 20.

[40] Moreover, the FDA requires reporting on the number of egregious conditions identified within each bi-annual report submitted by TDA-TOPS. [TDA APP 10 at 1]; [TDA APP 11 at 88:17-89:17].

practical application of the FDA's Produce Safety Regulations, allowing only those procedures specifically referenced in 21 C.F.R. Part 112. There is no basis for such a strict interpretation, and its application would lead to absurd results. This Court should not adopt FARFA's narrow interpretation of 21 C.F.R. Part 112.

III. THIS COURT SHOULD NOT ADOPT FARFA'S IMPROPERLY NARROW INTERPRETATION OF SECTION 91.009.

In its initial brief, FARFA relied almost exclusively upon its interpretation of Congressional intent to support its *ultra vires* claim, asserting that "in a strikingly overreaching, unconstitutional, and *ultra vires* act, the TDA's administrative rule effectively gutted the protections afforded by the Tester Amendment and subverted the purpose of FSMA by imposing illogical and unreasonable compliance burdens onto the very farmers Congress expressly chose to protect in passing FSMA."[41] In support of its interpretation of Congressional intent, FARFA offered only a self-serving affidavit of its Executive Director and a press release from a United States Senator, neither of which are proper evidence of legislative intent.[42] [FARFA APP 2 at 1-2]; [FARFA APP 6 at 1-2]. The crux of FARFA's initial briefing was the alleged "inapplicability of FSMA to [small farms]."[43]

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[41] FARFA Br. at 13. FARFA argued Congressional intent in what it dubs as the "Tester Amendment" at least nineteen times in its initial brief. *See* FARFA Br. at 1-45. This argument is conspicuously absent in FARFA's reply. *See* FARFA Reply at 1-29.

[42] *See* TDA Br. at 16-17.

[43] FARFA Br. at 2.

In its initial briefing, TDA examined the actual, broader Congressional intent behind FSMA, published by the Senate, as well as portions of FSMA that actually increased the regulatory burden on non-covered and qualified exempt produce farms.[44] FARFA then shifted course in its reply.[45] FARFA now exclusively argues that "FARFA simply seeks to have TDA comply with the Texas Legislature's statutory directive" and pivots to its narrow interpretation of the Texas enabling statute, Texas Agriculture Code Section 91.009.[46] FARFA's narrow interpretation is not supported by the plain language of Section 91.009 or the intent of the Texas Legislature.

FARFA argues that the "Texas Legislature's grant of authority to TDA was specifically limited to 21 C.F.R. Part 112."[47] As described in Section II above, 21 C.F.R. Part 112 is not as strictly limited as FARFA alleges, nor do the challenged TDA rules directly contradict FDA Produce Safety Regulations as FARFA contends. Even if this Court adopts FARFA's narrow view of the FDA's regulatory intent,

[44] *See* TDA Br. at 16-18.

[45] FARFA incorrectly states that TDA did not "explain[] how the specific provisions of the Tex. Agric. Code § 91.009 … justify their regulation." FARFA Reply at 10-11. *See also* TDA Br. at 24-48. TDA provided a detailed examination of its statutory authority for each of the challenged rules in its initial briefing.

[46] FARFA Reply at 9. In its initial brief, FARFA argued Texas Legislative intent and Section 91.009 three times. *See* FARFA Br. at 6, 24, 29. In contrast, FARFA argued Congressional intent at least nineteen times. *See supra* note 41.

[47] FARFA Reply at 16.

FARFA's *ultra vires* claim still fails, because FARFA's narrow interpretation of Section 91.009 is incorrect and improper.

A. The Plain Language of Section 91.009(a) Demonstrates that FARFA's Narrow Interpretation is Incorrect.

An "agency rule is presumed valid, and the challenging party bears the burden to demonstrate its invalidity." *DuPont Photomasks, Inc. v. Strayhorn*, 219 S.W.3d 414, 420 (Tex. App.—Austin 2006). In determining whether a plaintiff meets this burden, this Court must consider the "entire statutory scheme, the goals and policies behind it, and the legislative history and intent" to determine whether an agency's interpretation is "reasonable and in harmony with the statute." *Sw. Pharmacy Sols., Inc. v. Texas Health & Hum. Servs. Comm'n,* 408 S.W.3d 549, 558, 562 (Tex. App.—Austin 2013). While Section 91.009(a) mentions 21 C.F.R. Part 112, the plain language of the "entire statutory scheme" is not nearly as limited as FARFA suggests. *See id.; see also* Tex. Agric. Code §§ 91.009(a), (a-1), (b), and (d). Moreover, "the goals and policies behind [the statute] and the legislative history and intent" do not support FARFA's narrow interpretation of TDA's authority.[48]

To support its narrow interpretation of legislative intent, FARFA strictly limits its analysis to a portion of Section 91.009(a) while wholly ignoring the remaining sections of the statute.[49] Specifically, FARFA contends that "TDA's

[48] *See supra,* Section III(A), (B), (C), and (D).

[49] FARFA Reply at 9-21.

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 States Food and Drug Administration Standards for the Growing, Harvesting, Packing, and Holding of Produce for Human Consumption (21 C.F.R. Part 112).'"[50]

The plain language of Section 91.009(a) as well as the remaining sections of the statute confer more authority to TDA than FARFA contends. "[TDA] 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)." Tex. Agric. Code § 91.009(a).

As discussed in TDA's initial briefing, right of entry is a necessary component to administer, implement, and enforce 21 C.F.R. Part 112 in accord with the plain language of Section 91.009(a).[51] *See* Tex. Agric. Code § 91.009(a). As demonstrated in Sections I and II above, there is no constitutional or regulatory prohibition on TDA-TOPS officials entering a produce farm.

As discussed in TDA's initial briefing, renewal of qualified exempt status is a necessary component to administer and implement 21 C.F.R. Part 112 in accord

[50] FARFA Reply at 10.

[51] *See* TDA Br. at 38-46.

with the plain language of Section 91.009(a).[52] *See* Tex. Agric. Code § 91.009(a). The plain language of the FDA regulation shows that a qualified exemption is not perpetual. The FDA Produce Safety Rule states that if a farm meets certain criteria, then it "is eligible for a qualified exemption and associated modified requirements ***in a calendar year***."[53] 21 C.F.R. § 112.5(a) (emphasis added). *Id.*

As discussed in TDA's initial briefing, verification is a necessary component to administer and implement 21 C.F.R. Part 112 in accord with the plain language of Section 91.009(a).[54] *See* Tex. Agric. Code § 91.009(a). To fulfill this necessary function, FDA utilizes a "pre-announcement call" to verify a produce farm's coverage, while TDA utilizes an on-site verification procedure.[55] [TDA APP at 13-16]; *see also* 4 Tex. Admin. Code § 11.21. Moreover, TDA provides Produce Safety education and training during the on-site verification procedure in accord with the plain language of 91.009(a) as well as 91.009(a-1), (b), and (d). [TDA APP 15 at 21:23-24:23; 44:11-45:7; 99:12-16].[56]

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[52] See TDA Br. at 34-38.

[53] The TDA Rule requires renewal of a qualified exemption every two years. 4 Tex. Admin. Code § 11.21.

[54] *See* TDA Br. at 32-34.

[55] *See* TDA Br. at 32-34; 39-42. Moreover, FDA requires TDA to report the number of farms verified as well as the total farms in each category within each bi-annual report submitted by TDA-TOPS. [TDA APP 10 at 7].

[56] The on-site verification visit also serves multiple purposes with respect to the FDA objectives of education, outreach, technical assistance, and farm inventory required under the cooperative agreement and TDA's mandatory reporting to FDA of such. [TDA APP 4 at 2]; [TDA APP 15 at 89:18-90:15, 93:17-94:16].

The plain language of Section 91.00(a) provides more authority than FARFA contends. The challenged TDA rules are consistent with the plain language of Section 91.009(a) which allows administration, implementation, and enforcement of 21 C.F.R. Part 112 as well as education and training relating to 21 C.F.R. Part 112. *See* Tex. Agric. Code § 91.009(a). This Court should not adopt FARFA's artificially narrow interpretation of Section 91.009(a).

B. The Plain Language of Sections 91.009(a-1) and 91.009(b) Demonstrate that FARFA's Narrow Interpretation is Incorrect.

In its initial form, Section 91.009 was effective on May 27, 2009. *See Safety of the Fresh Fruit and Vegetables Produced in this State*, 2009 Tex. Sess. Law Serv. Ch. 184 (H.B. 1908). In enacting the original statute, the Texas Legislature intended that "food safety must be a top state priority because an accidental or deliberate contamination of food or crops could be detrimental to the state's economy and would undermine consumer confidence in the integrity of food safety in this state" and that "this state should increase awareness of food safety among its growers and packers of fresh fruits and vegetables to avoid disastrous events." *Id.*

21 C.F.R. Part 112 went into effect on January 26, 2016. [TDA APP 3 at 1]. Section 91.009 predated 21 C.F.R. Part 112 by nearly seven years. The education, training, and outreach authority granted to TDA by the initial statute remain in effect

in Sections 91.009(a-1) and (b) of the current version. *See Tex. Agric. Code* §§ 91.009(a-1), (b). Under these provisions, TDA "shall assist the fresh fruit and vegetable industries with produce safety issues," and TDA "must inform and educate producers and packers regarding (1) sound agricultural practices, (2) proper produce handling procedures, (3) the prevention of accidental or deliberately planned outbreaks of disease, and (4) the enhancement of overall produce safety." *Id.* TDA uses its rules, particularly those relating to the on-site verification procedure, to provide the assistance and education mandated by Sections 91.009(a-1) and (b). [TDA APP 15 at 21:23-24:23; 44:11-45:7; 89:18-90:15, 93:17-94:16; 99:12-16].

The plain language of Sections 91.009(a-1) and (b) directly contradicts FARFA's strict contention that the "Texas Legislature granted authority to the TDA within the confines of 21 C.F.R. Part 112."[57] TDA was granted authority to conduct education, training, outreach, and assistance in produce safety matters years before 21 C.F.R. Part 112 was adopted. *See* Tex. Agric. Code §§ 91.009(a-1) and (b).

C. The Plain Language of Section 91.009(d) Demonstrates that FARFA's Narrow Interpretation is Incorrect.

In its initial briefing, TDA extensively analyzed each of the challenged rules in relation to the rulemaking authority granted to TDA by the rulemaking provision

[57] FARFA Reply at 10.

of the statute, Section 91.009(d).[58] TDA hereby incorporates these arguments by reference.

Section 91.009(d) provides that "[i]n the development of rules under this section, the department may consider relevant state, federal, or national standards." *Id.* Despite TDA's twenty-two pages of briefing on the rulemaking authority this confers, FARFA never mentions 91.009(d) in its *ultra vires* briefing.[59] Dismissing 91.009(d) completely, FARFA argues the numerous "relevant state, federal, and national standards" listed by TDA are somehow immaterial to "interpretation of the Texas statute."[60] The plain language of 91.009(d) makes TDA's survey of "relevant state, federal, and national standards" material, as they provide clear statutory authority for TDA to adopt similar rules. Tex. Agric. Code § 91.009(d).

The challenged TDA rules are consistent with the plain language of Section 91.009(d), which allows broad discretion to adopt rules to administer the entirety of

[58] *See* TDA Br. at 24-48. FARFA does not address these arguments; indeed, FARFA asserts that they were never made. FARFA's assertion that TDA did not "explain[] how the specific provisions of the Tex. Agric. Code § 91.009 … justify their regulation" is demonstrably incorrect. FARFA Br. at 10-11; *see* TDA Br. at 24-48. Each of the challenged rules is supported by "relevant state, federal, or national standards" as provided by Section 91.009(d).[58] Tex. Agric. Code § 91.009(d).

[59] *See* FARFA Br. at 22-34; *see also* FARFA Reply at 9-21.

[60] *See* FARFA Reply at 17-21. This is a marked departure from FARFA's initial briefing in which it assured the Court that "no other state legislature or department of agriculture is known to have passed a FSMA-implementing law or rule as broad as the TDA rule in question" to support the argument that the "lack of any similar rules in other states reflects the understanding of how the federal regulatory framework functions." FARFA Br. at 26, 27.

Section 91.009. *See* Tex. Agric. Code § 91.009(d). This Court should not adopt FARFA's artificially narrow interpretation of Section 91.009.

D. The Recent Legislative History of Section 91.009 Demonstrates that FARFA's Narrow Interpretation is Incorrect.

As described in TDA's initial briefing, FARFA drafted a proposed bill in 2021 to strictly limit TDA's authority in enforcing the FDA's Produce Safety Rule.[61] [TDA APP 5 at 1-7]. FARFA managed to get its bill sponsored in both the Texas Senate and House of Representatives. [TDA App 6 at 1-4]; [TDA APP 7 at 1-4]. Neither bill made it out of committee. [TDA App 6 at 1]; [TDA APP 7 at 1].

FARFA's bill proposed substantive changes to Section 91.009(a), the very section that FARFA exclusively relies upon to support its *ultra vires* claim. Specifically, FARFA proposed the follow changes to Section 91.009(a)

> (a) The department shall administer, implement, and enforce in this state [~~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. This section does not authorize the department to implement or enforce any other federal regulation.

[TDA APP 5 at 2-3]; [TDA APP 6 at 2]; [TDA APP 7 at 2]. Notably, FARFA sought to remove TDA's authority over "education and training" relating to the FDA

[61] *See* TDA Br. at note 3. This lawsuit was filed in 2019 and was pending during the 2021 Legislative Session. *See* FARFA's Orig. Pet. at 1.

Produce Safety Regulations; examples argued above to demonstrate TDA authority under the plain language of Section 91.009(a).[62] [TDA APP 5 at 2-3]; [TDA APP 6 at 2]; [TDA APP 7 at 2]. In the bill, FARFA also sought to limit TDA's authority specifically to 21 C.F.R. Part 112, mirroring its primary *ultra vires* argument currently before this Court. [TDA APP 5 at 2-3]; [TDA APP 6 at 2]; [TDA APP 7 at 2]. The Legislature chose not to enact these limitations. [TDA App 6 at 1]; [TDA APP 7 at 1].

Additionally, FARFA sought to add the following two new substantive sections to limit TDA's authority

> (e) With respect to a farm that is not subject to the federal rules or standards described by Subsection (a) because the farm does not generate more than the threshold amount of revenue from the sale of produce to be a covered farm, the department:
>
> (1) may not use the authority granted by this section as justification to physically enter the farm;
>
> (2) is limited to inquiring about whether the farm generates more than the threshold amount of revenue from the sale of produce to be a covered farm; and
>
> (3) may not conduct further investigative activity after receiving documentation indicating the farm generates less than the threshold amount of revenue from the sale of produce to be a covered farm.
>
> (f) The department's rules may not impose additional or more burdensome requirements than those provided by the federal rules or standards described by Subsection (a). Specifically, the department may not:
>
> (1) require registration of a farm that is not covered by, is exempt from, or is eligible for a qualified exemption from the rules or standards;

[62] *See supra* Section III(A).

> (2) without probable cause that the farm is violating an applicable law, conduct a physical inspection of a farm that is not covered by, is exempt from, or is eligible for a qualified exemption from the rules or standards; or
> (3) create a new or different standard, including a standard for imposing penalties, that is not contained in the federal rules or standards.

[TDA APP 5 at 3-6]; [TDA APP 6 at 2-3]; [TDA APP 7 at 2-3]. These limitations are identical to the demands made by FARFA in the instant suit. [TDA APP 5 at 3-6]; [TDA APP 6 at 2-3]; [TDA APP 7 at 2-3]. FARFA properly approached the Legislature to narrow TDA's enabling statute, and the Legislature chose not to enact these changes. This Court should not adopt FARFA's narrow interpretation of Section 91.009 because it is at odds with the "entire statutory scheme, the goals and policies behind it, and the legislative history and intent." *Sw. Pharmacy Sols., Inc.,* 408 S.W.3d at 558, 562 (Tex. App.—Austin 2013). This Court should dismiss FARFA's *ultra vires* claim.

IV. THIS COURT SHOULD NOT APPLY THE STRICT VAGUENESS STANDARD THAT FARFA PROPOSES.

In its reply, FARFA argues a heightened, quasi-criminal, vagueness standard should be applied to the definition of egregious condition.[63] FARFA cites two cases where the heightened quasi-criminal vagueness standard was applied, one relating to "prohibitory and stigmatizing" regulations on drug paraphernalia and the second

[63] *See* FARFA Reply at 22-26. FARFA is silent concerning its vagueness challenge to "pre-assessment review." *See id.*

involving a "statute prescribing civil penalties for 'any party who distributes or authorizes the distribution of controlled substances without adequate registration.'"[64] *See Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 500 (1982); *see also United States v. Clinical Leasing Service, Inc.,* 925 F.2d 120, 122 (5th Cir. 1991). These examples are readily distinguishable and not persuasive.[65] This Court should not apply FARFA's heightened, quasi-criminal, vagueness standard.

Even if this Court elects to apply the quasi-criminal vagueness standard to the definition of egregious condition, it satisfies even the more stringent test for regulations with quasi-criminal penalties. The definition of egregious condition a "relevant state, federal, [and] national standard" used in the context of Produce Safety by the FDA, NASDA, and at least seven other Path C states.[66] "[A]n ordinary [produce farmer] exercising common sense could understand" the definition. *Lamar Advert. Co. v. Texas Dep't of Transp.,* No. 03-06-00356-CV, 2007 WL 1790584, at *4 (Tex. App.—Austin 2007).

[64] *See* FARFA Reply at 23-24.

[65] *See supra* at 2. Moreover, TDA can identify no case, state or federal, where the heightened quasi-criminal vagueness standard was applied to an agricultural or farm regulation.

[66] *See* TDA Br. at 27-32.

FARFA also asserts that TDA's definition must include examples of egregious conditions or be facially deficient.[67] FARFA provides no legal citation, legal analysis, or factual analysis to support this conclusory argument.[68] FARFA fails to meet his burden to prove that an ordinary produce farmer could not understand this definition, which is used in the produce industry at the state, federal and national level. *See Ford Motor Co. v. Texas Dept. of Transp.*, 264 F.3d 493, 507 (5th Cir. 2001).

V. FARFA'S APA PROCEDURAL CHALLENGE ARGUMENTS WERE ADEQUATELY ADDRESSED IN TDA'S INITIAL BRIEFING.

In its reply, FARFA merely reiterates the reasoned justification arguments from its initial briefing.[69] These arguments were sufficiently analyzed in TDA's initial briefing.[70] As described in TDA's initial briefing, this Court lacks jurisdiction to overturn the challenged rules for the alleged violation of APA Sections 2001.029 or 2001.033.

[67] *See* FARFA reply at 24-26. In its initial briefing, FARFA argued that the egregious condition standard "is completely untethered to any statutory, judicial, or administrative guidance." FARFA Br. at 42. Now, FARFA argues that "other jurisdictions' use of the term" is not enough. FARFA reply at 24.

[68] *See* FARFA reply at 24-26.

[69] *See* FARFA Br. at 18-22; *see also* FARFA Reply at 26-29.

[70] *See* TDA Br. at 54-60.

VI. FARFA CANNOT DEMONSTRATE COGNIZABLE INJURY TO SMALL FARMERS.

With regard to the ripeness argument, FARFA alleges that "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."[71] For compliance costs, FARFA merely replaces the misleading figure of $21,136 with the equally misleading figure of $1,738 (the cost estimated for qualified exempt farmers to retain the records required by the FDA's Produce Safety Regulations.[72] [FARFA APP 3 at 14]. FARFA has not and cannot demonstrate that a one-time, on-site visit to a produce farm to verify its status which "shouldn't take more than 30 minutes" and/or the submission of a qualified exemption renewal form once every two years imposes more than a *de minimis* compliance cost.[73] The second alleged injury is to a non-existent privacy right.[74] The third alleged injury, penalties for non-compliance, are admittedly speculative.[75] As described in TDA's initial briefing, the unripe claims "depend on contingent or hypothetical facts, or they depend upon events that have not yet come to pass."[76] *See Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 852

[71] FARFA Reply at 1.

[72] *See* FARFA Reply at 2.

[73] *See* TDA Br. at 8-9.

[74] *See supra* Section I.

[75] *See* FARFA Reply at 2.

[76] *See* TDA Br. at 7-10.

(Tex. 2000). The fact remains that no small farmer has suffered a cognizable injury as a result of the challenged TDA rules.

CONCLUSION

As demonstrated in TDA's initial briefing and this sur-reply, this Court should deny the relief requested by FARFA in its petition.

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CERTIFICATE OF COMPLIANCE

I certify that this Brief of Defendants Texas Department of Agriculture and Sid Miller in his official capacity as Commissioner complies with Rule 10.5 of the Travis County Local Rules and the word count of this document is 7,491. The word processing software used to prepare this filing and calculate the word count of the document is Microsoft Word 2016.

Date: November 14, 2022

/s/ Harold J. Liller
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and forgoing document has been served on the 14th day of November 2022, on the following:

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