A20-1254

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,
Respondent,

Amicus Brief of the Minnesota Industrial Hemp Association and Minnesota Cannabis Association in Support of the Petitioner Jason James Loveless

Jason James Loveless,
Petitioner.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Membership of the Minnesota Cannabis Association and the Minnesota Industrial Hemp Association (the "Associations") consists of hemp farmers, hemp processors, CBD[1] retailers, and ancillary professionals serving the nascent hemp and CBD industries. The Minnesota Department of Agriculture ("MDA"), which regulates Minnesota's industrial hemp program, issued licenses to 461 hemp farmers and 232 hemp processors in 2020. According to the MDA, there was nearly 300,000 hemp acreage planted in Minnesota in 2020. Although the precise number is unknown, there are 150 or more CBD retailers throughout Minnesota (approximately 50 percent of whom are owned by women or people of color) who sell CBD in the forms of liquids, solids and topical creams. In addition, approximately 2000-2500 tobacco shops and a multitude of gas stations sell CBD products. Consumers report that CBD aids with pain, sleep and stress.

The Associations' members and their customers, therefore, are directly impacted by *Loveless*, which potentially exposes all of the Associations' members and their customers to criminal liability.

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[1] "CBD" is an abbreviation for "cannabidiol," which is one of dozens of cannabinoids, including delta-9 tetrahydrocannabinol (commonly known as "THC"), found in the hemp plant.

The Associations have specialized knowledge regarding hemp and its derivatives and can provide this Court with particularized expertise on the cannabis industry and the legal framework impacting that industry. Because the Associations are uniquely qualified to address these issues, participation as amicus curiae will assist the Court.

INTRODUCTION

Amici Minnesota Cannabis Association and the Minnesota Industrial Hemp Association submit this brief to assist the Court in assessing the legality of trace amounts of hemp-derived delta-9 tetrahydrocannabinol ("THC") in light of Minnesota's 2018 adoption of the Minnesota Industrial Hemp Development Act, Minn. Stat. § 18K.01, *et. seq.* ("the Act"), which expressly provides for the growing, processing, labeling, testing, and sale of hemp and hemp-derived products containing trace amounts of THC.

This Court should reject the appellate court's myopic and, therefore, incorrect interpretation of Minnesota's Controlled Substances Act. This interpretation failed to acknowledge the Act, its prescribed robust licensing program (including substantial consumer safeguards), and Minnesota's multi-million-dollar industry that relies upon the sales of hemp and hemp-derived products.

ARGUMENT

II. Minnesota's Legalization of Hemp Derivatives Directly Led to the Creation of Hundreds of Minnesota Businesses and Thousands of Jobs.

Through the Act, Minnesota expressly allows the possession, transport, growing, processing and sale and purchase of hemp and hemp-derived products.[2] As indicated above, the MDA issues licenses to hundreds of hemp farmers and processors each year. Hemp is rapidly becoming one of the nation's – and Minnesota's – biggest crops. Furthermore, thousands of retail establishments throughout Minnesota sell CBD and other hemp-derived products.

Genetically, marijuana and hemp are essentially the same plant: *Cannabis sativa L*. Typically, hemp plants are shorter and bushier than tall, thin marijuana plants. As discussed below, however, the primary difference between marijuana and hemp is a legal distinction relating to the THC concentration.

In 2014, the federal government adopted the Agricultural Act of 2014 (commonly referred to as the "2014 Farm Bill") which, as codified in 7 U.S.C. § 5940(b), provided that "[n]otwithstanding the Controlled Substances Act . . . or any other Federal law, an institution of higher education . . . or a State department of agriculture may grow or cultivate industrial hemp," provided it is done "for

[2] Minn. Stat. §18K.03, Subd. 1.

purposes of research conducted under an agricultural pilot program or other agricultural or academic research" and those activities are allowed under the relevant state's laws. AGRICULTURAL ACT OF 2014, PL 113-79, February 7, 2014. The 2014 Farm Bill defined "industrial hemp" as the plant Cannabis sativa or any part of such plant, "with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 5940(a)(2).

On December 20, 2018, President Trump signed the Agriculture Improvement Act of 2018, commonly referred to as the "2018 Farm Bill," which distinguished hemp from marijuana and removed hemp from federal controlled substance schedules. The 2018 Farm Bill also expanded the definition of "industrial hemp" beyond the 2014 Farm Bill to include not only "the plant Cannabis sativa L. and any part of that plant," but also "the seeds thereof and all derivatives, extracts, cannabinoids, . . . with a [THC] concentration of not more than 0.3 percent on a dry weight basis."

Following suit, in 2018, Minnesota adopted the Act, which defines "industrial hemp" as "the plant Cannabis sativa L. and any part of the plant, whether growing or not with [delta-9 THC] of not more than 0.3 percent on a dry weight basis." Minn. Stat. § 18K.02, subd. 3. Pursuant to the Act, "[a] person may

possess, transport, process, sell, or buy industrial hemp that is grown pursuant to [the Act]." Minn. Stat. § 18K.03.

With the passage of the Act, Minnesota's "CBD industry" was born. As indicated above, cannabidiol, or "CBD," is one of more than 100 cannabinoids, including THC, found in the cannabis plant.[3] The human body has a complex endocannabinoid system, which has receptors for the cannabinoids found in the cannabis plant. Because cannabis has been a federally illegal drug for so long, however, there is scant scientific research because the plant has been unavailable for testing. Anecdotally, however, many consumers use CBD in place of aspirin to treat aches and pains. Some people claim that it helps them with sleep because they report that it has a calming effect.

II. The Appellate Court was Wrong to Ignore the Supremacy of the Act that Expressly Legalizes the Sale of Hemp Derivatives Containing Trace Amounts of THC.

The federal 2018 Farm Bill and the Act expressly legalized the sale and possession of hemp-derived products containing trace amounts of THC. Because the Act specifically authorized the sale and possession of these products, it

[3] "Cannabis" is a catch-all term that refers to both hemp and marijuana.

overrides the general statements of Minnesota's Controlled Substances Act ("CSA").

The Act defines "industrial hemp" as:

> the plant Cannabis sativa L. and any part of the plant, whether growing or not, including the plant's seeds, and all the plant's ***derivatives***, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis. ***Industrial hemp is not marijuana as defined in [the CSA] section 152.01, subdivision 9***.

Minn. Stat. § 18K.02, Subd. 3 (emphasis added). Furthermore, the Act provides that "[a] person may possess, transport, process, sell, or buy industrial hemp that is grown pursuant to this chapter or lawfully grown in another state." Minn. Stat. §18K.03, Subd. 3.

The primary goal of statutory interpretation is to give effect to the Legislature's intent. *Do v. Am. Fam. Mut. Ins. Co.*, 779 N.W.2d 853, 858 (Minn. 2010). "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16. When interpreting a statute, therefore, the court must read it in the context of other statutes. *See 328 Barry Ave., LLC v. Nolan Props. Gp.*, LLC, 871 N.W.2d 745, 749 (Minn. 2015).

When two statutes address the same topic, the more specific statute is supreme to the more general statute. Ordinarily, when a general provision of a statute conflicts with a specific provision of another statute, a court should construe the statues to give effect to each of them. Minn. Stat. § 645.26, Subd. 1. But when the statutes' provisions irreconcilably conflict, the more specific provision prevails over the more general provision unless the legislature intended the general provision to control. *State v. Kalvig*, 209 N.W.2d 678, 680 (Minn. 1973), *citing Beck v. Groe*, 245 Minn. 28, 41, 70 N.W.2d 886, 895 (1955).

In this case, the CSA identifies a wide range of substances for inclusion on Minnesota's list of prohibited drugs. In contrast, the Act expressly, specifically authorizes the sale and possession of hemp-derived products with trace amounts of THC. Applying the above-recited doctrines of statutory construction, this Court should hold that the specific provisions of the Act control over the general pronouncements of the CSA.

III. The Appellate Court was Wrong to Create a Distinction Between "Leafy" Products and Non-Leafy Products

As indicated above, the appellate court decision is incorrect because it ignores the supremacy of the Act. Furthermore, the appellate court's distinction

between "leafy plant material" and "oil containing THC" has no basis in law or in fact. Indeed, such a distinction is expressly contradicted by the CSA and the Act.

Mr. Loveless was convicted for possession of a liquid containing THC. In upholding that conviction, the appellate court held that "leafy plant material" containing less than 0.3% THC – but not hemp derivatives containing less than 0.3% THC – is exempt from the CSA. To reach this incorrect conclusion, the appellate court underwent the following flawed analysis:

- The appellate court noted that the CSA, Minn. Stat. §152.02, subd. 2(h), provides that marijuana and THC are Schedule I controlled substances unless specifically excepted;

- The appellate court then looked to the definition of marijuana in the CSA, Minn. Stat. § 152.01, subd. 9, which expressly excepts "hemp" from the definition of marijuana; and

- Finally, because Schedule I lists marijuana and THC as separate substances, the appellate court concluded the exception for marijuana only applies to leafy plant material, and not hemp derivatives containing trace amounts of THC.

The appellate court's analysis completely disregards the definitions of hemp, marijuana and hemp derivatives in the CSA and the Act.

First, the CSA, Minn. Stat. § 152.01, Subd. 9 defines "[m]arijuana" as "all parts of the plant of any species of the genus Cannabis, including all agronomical varieties, whether growing or not; the seeds thereof; *the resin extracted from any part*

of such plant; and *every compound, manufacture, salt, derivative, mixture, or preparation of such plant*, its seeds or resin . . . " (emphasis added).

Next, the CSA notes that "marijuana" that qualifies as "hemp" is not a controlled substance. In this regard, the CSA adopts the Act's definition of "hemp" as its own definition of "hemp." Minn. Stat. § 152.01, Subd. 9 ("Marijuana does not include hemp as defined in section 152.22, subdivision 5a"); *see* Minn. Stat. § 152.22, Subd. 5(a) ("Hemp" has the meaning given to industrial hemp in section 18K.02, subdivision 3").

Thus, the CSA and the Act *each* define "hemp" as:

> "Industrial hemp" means the plant Cannabis sativa L. and any part of the plant, whether growing or not, including the plant's seeds, *and all the plant's derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers*, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis. Industrial hemp is not marijuana as defined in section 152.01, subdivision 9.

Minn. Stat. § 18K.02, subdivision 3 (emphasis added). Consequently, any "marijuana," including hemp derivatives such as oils, liquids or other "extracts," containing 0.3 percent or less THC is <u>not</u> a controlled substance.

Here, because neither the CSA nor the Act distinguishes between leafy plant material and other hemp derivatives, the appellate court's distinction is baseless.

The THC in "oil containing THC" is a compound or preparation of "such plant." There is no language in the statutes allowing for distinct categories between "leafy plant material" and other forms of marijuana, including oil containing THC.

IV. "Dry Weight" Does not Create a Distinction Between One Form of Cannabis Relative to Another

If the Appellate Court's holding that the use of the term "dry weight" implies that liquid materials are somehow not covered under statutory 0.3% THC exemptions were to be upheld, the result would be that Minnesota would be the only state to treat liquid materials derived from hemp different from other hemp materials, despite similar statutory language in other states using "dry weight" to determine whether hemp-derived material is below 0.3% THC or otherwise relying upon Federal law.[4]

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[4] *See, e.g.,* Ala Code § 2-8-381; Alaska Stat. Ann. § 03.05.100; Ariz. Rev. Stat. Ann. § 3-311(7); Ark. Code Ann. § 2-15-503; Cal. Food & Agric. Code § 81000; Colo. Rev. Stat. Ann. §§ 35-61-101(1), (7); Conn. Gen. Stat. Ann. § 22-61 ("Hemp" has the same meaning as provided in the federal act); Del. Code. Ann. Tit. 3, § 2801; Fla. Stat. Ann. § 581.217; Ga. Code Ann. § 2-23-3; Haw. Rev. Stat. Ann. §328G-1; Idaho Code Ann. § 37-2701; 505 Ill. Comp. Stat. Ann. 89/5; Ind. Code Ann. § 15-15-13-6; Iowa Code Ann. § 204-2; Kan. Stat. Ann. § 2-3901(7); Ky. Rev. Stat. Ann. § 260.850(5); La. Stat. Ann. § 3:1481; Me. Rev. Stat. tit. 7, § 2231; Md. Code Ann., Agric. § 14-101; Mass. Gen. Laws Ann. Ch. 128, § 116; Mich. Comp. Laws. Ann. § 333.27953; Miss. Code. Ann. § 69-25-203; RSMo § 195.207 (defining "hemp extract"); Mont. Code. Ann. § 80-18-101; Neb. Rev. Stat. Ann. § 2-503; Nev. Rev. Stat. Ann. § 557.160(1); N.H. Rev. Stat. Ann. § 439-A:2; N.J. Stat. Ann. § 4:28-8; N.M. Stat. Ann. § 76-24-4; NY CANBS § 90; N.C. Gen. Stat. Ann. § 106-568.51; N.D. Cent. Code Ann. § 4.1-

The definition of "dry weight" under Federal law is as follows:

> Dry weight basis. The ratio of the amount of moisture in a sample to the amount of dry solid in a sample. A basis for expressing the percentage of a chemical in a substance after removing the moisture from the substance. Percentage of THC on a dry weight basis means the percentage of THC, by weight, in a cannabis item (**plant, extract**, or other derivative), after excluding moisture from the item.

7 C.F.R. § 990.1. *Liquid chromatography* or *LC* is defined as a type of chromatography technique in analytical chemistry used to separate, **identify, and quantify each component in a mixture**. LC relies on pumps to pass a pressurized liquid solvent containing the sample mixture through a column filled with a solid absorbent material to separate and analyze compounds. These definitions do <u>not</u> separate "solid" components (plant) of liquid ones. Federal law defines the % even in "extracts", so even though the Minnesota statue does not explicitly reference "liquids", it is implied in the regulation.

In the case of hemp, "The FDA's guidelines do not require hemp extract makers to "dry" liquid extracts. Rather, they use a calculation to determine the

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18.1-01; Ohio Rev. Code Ann. § 928.01; Okla. Stat. Ann. tit. 2, § 3-402; Or. Rev. Stat. Ann. § 571.269; 3 Pa. Stat. and Cons. Stat. Ann. § 702; 2 R.I. Gen. Laws Ann. § 2-26-3; S.C. Code Ann. § 46-55-10; S.D. Codified Laws § 38-35-1; Tenn. Code Ann. § 39-17-1503; Tex. Agric. Code Ann. § 121.001; Utah Code Ann. § 4-41-102; Vt. Stat. Ann. tit. 6, § 562; Va. Code Ann. § 3.2-4112; Wash. Rev. Code Ann. § 15.140.020; W. Va. Code Ann. § 19-12E-3; Wis. Stat. Ann. § 94.55 Wyo. Stat. Ann. § 11-51-101.

percentage of water that is in a liquid substance and derive from that the percentage THC level by determining the mass of THC present in the liquid. Volume or percentage testing seems to have also been applied by various states, although using differently expressed calculations. For example, Oregon regulations require measuring THC on a dry weight basis as follows: "A laboratory must report total THC and Total CBD content by dry weight calculated as follows: P total THC(dry) = P total THC(wet) / [1-(P moisture/100)].[5] Thus, the fact that the term "dry weight" is used in determining THC concentration does not mean that one form of hemp is legal as opposed to any other form of hemp. This is particularly true in light of the fact that the Act's definition of hemp includes "all the plant's derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight." If hemp includes the plant's "extracts" (which it does), then there is no way that "dry weight" creates a distinction between "leafy plant material" and liquid forms of hemp.

[5] *See* Thorne, Griffen, "Hemp Extracts: The Dry Weight Problem", LACBA Cannabis Newsletter, https://www.lacba.org/docs/default-source/section-documents/cannabis-law/cannabis-newsletter-jan-2021/4_thorne.pdf.

CONCLUSION

For the reasons set forth above, the Court should reverse the decision of the Appellate Court with regard to Count 4 and reverse the conviction for insufficient evidence – without proof beyond a reasonable doubt that the oil contained more than .3% THC, there can be no conviction.