IN THE TEXAS COURT OF CRIMINAL APPEALS

ORDER [1]

The Texas Court of Criminal Appeals grants oral argument in *Marin v. State*, No. 15-23-00001-CR (Tex.App.—Nuevo Paso Feb. 20, 2023), on the following four questions presented:

1) Does the Universal Health and Safety Act (UHSA), which prohibits the possession of marijuana outside the territorial boundaries of Texas, violate the Dormant Commerce Clause of the United States Constitution?

2) Does the UHSA's criminalization of conduct performed in, and considered legal within, the territorial boundaries of the State of New Mexico violate a defendant's constitutional right to travel under the Privileges and Immunities Clause of the United States Constitution?

3) Did the trial court err by failing to suppress emails and health records obtained from a defendant's cell phone where the search was authorized by a warrant?

4) Did the State meet its burden of showing Marin possessed marijuana extraterritorially beyond a reasonable doubt?

[1] Texas Young Lawyers Association 2023 State Moot Court Competition Problem. Written by Kirk Cooper, Principal Attorney, Cooper Appeals, PLLC (kirk@cooperappeals.com); former SMC Committee Co-Chair (2020-2022) and former TYLA District 14 Representative (2018-2022).

COURT OF APPEALS FOR THE
FIFTEENTH DISTRICT OF TEXAS
NUEVO PASO, TEXAS

No. 15-23-00001-CR

RICHARD ANTHONY MARIN,

Appellant

v.

THE STATE OF TEXAS,

Appellee.

On Appeal from the 915th District Court of Nuevo Paso County
Trial Court No. 2022-CR001-MJ

EN BANC OPINION

CHIEF JUSTICE McQUOID-HUNT delivered the opinion of the Court, joined by DIMARCO, DAPHNE, and ETHAN, JJ.

Appellant Richard Anthony Marin challenges his conviction for possession of marijuana. We affirm the judgment of the trial court.

BACKGROUND

A. Legal Framework

On April 20, 2022, the President of the United States signed into federal law a controversial bill passed by both Houses of Congress called the Cannabis Interstate Nonprosecution Act (CINA), Pub. L. No. 2022-420, 915 Stat. 69 (to be codified in scattered sections of 18 U.S.C.). The CINA altered the federal criminal laws of the United States related to marijuana use and possession, decriminalizing possession of marijuana of two ounces or less at the federal level and leaving the regulation of cannabis-related businesses in large part to the several States.

Section 2 of the CINA defined a key portion of the law commonly referred to by the bill's sponsors as the "Green Compromise." It states:

> **SECTION 2. CANNABIS USE AND INTERSTATE COMMERCE.**
>
> (a) The possession of cannabis[2] under three ounces is no longer subject to criminal penalty at the federal level.
>
> (b) The Several States are free to regulate the possession of cannabis under three ounces under state law.

The passage of the CINA predictably resulted in a patchwork of legalization schemes around the country, with some States choosing to decriminalize cannabis use completely, and others choosing to treat cannabis possession as a crime.

[2] The parties do not dispute that the definition of "cannabis" and "marijuana" are interchangeable for purposes of this appeal

The State of New Mexico chose not to criminalize marijuana possession. In fact, prior to the passage of the CINA, New Mexico had already adopted a comprehensive Cannabis Regulation Act that, among other things, decriminalized ten specific marijuana-related personal possession activities, including possessing less than two ounces of marijuana while over age 21. *See generally* Cannabis Regulation Act, NMSA 1978, §§ 26-2C-25(A)(1)-(10) (2021).

The State of Texas, by contrast, chose not only to maintain its existing marijuana criminal laws, *see* TEX.HEALTH & SAFETY CODE ANN. §§ 481.121(a), (b)(1)-(2)(criminalizing possession of usable quantity of "marihuana" as a Class B misdemeanor for two ounces or less and Class A misdemeanor for between two and four ounces), but to enact a new law expanding the reach of its drug-related penal laws outside the territorial boundaries of the State.

At a special session called by the Governor of Texas in August 2022 to address "the growing public health threats caused by various domestic and international cross-border activities" and the "federal government's failure to enact meaningful legislation safeguarding the rights of Texans from public health threats occurring outside Texas' borders but adversely affecting those within the State," the Texas Legislature passed a single bill, HB 1, known as the Universal Health and Safety Act (UHSA). The Governor signed the bill, which took effect immediately upon his signature on August 31, 2022. The law stated:

CHAPTER ONE—EXTRATERRITORIAL APPLICATION

(1) The Legislature has deemed that violations of the Texas Health and Safety Code endanger the health and well-being of Texans, regardless of where they occur.

(2) The State of Texas may prosecute any violations of the Texas Health and Safety Code wheresoever they may occur, so long as the alleged offender is present within the territorial boundaries of Texas at the time of arrest.

See Universal Health & Safety Act, 87th Leg., 4th C.S, ch. 1 §§ 1-2, 2022 Tex. Gen. Laws 10000, 10001.

B. Factual History

Defendant Richard Marin is a resident of Nuevo Paso, Texas, located on the western edge of the Texas border across from the State of New Mexico. Marin was a well-known pro-cannabis activist and the president of the Nuevo Paso chapter of the National Organization for Reform of Marijuana Laws (NORML). Marin has been vocally advocating for Texans to travel across the state border into New Mexico to consume marijuana since before New Mexico fully legalized marijuana, even making social media posts coaching his followers on which doctors would grant medical marijuana prescriptions for common ailments like anxiety.

Following the passage of the CINA, on several occasions, Marin organized cross-border trips for NORML members using his RV—which was emblazoned with

the phrase "Pineapple Express"[3]—to travel to a dispensary 500 feet across the border in Chaparral, New Mexico, and stay overnight.

On February 12, 2023, Marin organized a camping trip for himself and several NORML members to Ruidoso, New Mexico, located more than 200 miles into the interior of New Mexico. On February 15, 2023, while returning to Nuevo Paso from Ruidoso, the Pineapple Express RV was stopped at a DWI checkpoint set up by the Nuevo Paso Police Department on the main road from New Mexico to Texas, 1,000 feet across the Texas state border.[4]

Police approached the RV, which Marin was driving. Officers attempted to communicate with Marin, but due to the height of the window of the RV, communication became difficult, so officers asked Marin to exit the vehicle.[5] Officer Sara Giddings testified that Marin stumbled a bit when descending from the RV to the ground. She further testified that Marin's eyes were bloodshot, and she smelled the odor of marijuana. Giddings performed a horizontal nystagmus test of Marin's eyes, but she did not detect any evidence of nystagmus. Giddings asked Marin to

[3] A narcotics officer testified at Marin's trial that the phrase "Pineapple Express" was likely a reference to the 2008 Columbia Pictures film "Pineapple Express," an "obscure stoner movie glorifying organized crime" in which two men who use marijuana heavily—played by actors named Seth Rogan and James Franco—engage in violence against police officers and members of a foreign drug gang.

[4] Marin did not challenge the constitutionality of the DWI checkpoint in his brief. The issue is waived.

[5] Three other members of the travel party were also asked to exit the vehicle.

perform other standard field sobriety tests (SFSTs), but Marin declined, explaining that he had previously undergone hip and foot surgeries that prevented him from standing on one leg or walking a straight line, even while not intoxicated. Marin did consent to a blood draw, which showed the presence of THC—the active psychoactive chemical in cannabis—along with other marijuana-related metabolites. Although the RV had an odor of marijuana, a sweep of the RV following its eventual impound turned up no narcotics.

Marin was arrested on suspicion of driving while intoxicated. Incident to his arrest, Officer Giddings filed an application for a warrant to search Marin's phone. Attached to her warrant application was a brief affidavit, stating as follows:

> **SEARCH WARRANT AFFIDAVIT**
>
> Defendant MARIN was stopped on a road entering Texas from New Mexico. I am familiar with Defendant MARIN because he is a known marijuana user and possible narcotics trafficker. Based on my training and experience, persons involved in drug possession or trafficking will often use their cell phone to facilitate transactions or document law-breaking. Therefore, I believe a search of Defendant MARIN's cell phone will turn up evidence of criminal activity.
>
> Further affiant sayeth naught.
>
> /s/ Sara Giddings

Based on the application and affidavit, a magistrate judge granted a warrant finding probable cause for "drug possession/trafficking" and allowing Nuevo Paso

Police permission to "search the contents of Marin's cell phone (text messages, phone logs, etc.)"

During the search of Marin's cell phone, Officer Giddings opened the Gmail app on Marin's phone and found an email from Mountain Ridge Healing, LLC, containing an automated receipt for $21.95. The receipt was not itemized. However, Officer Giddings determined through a Google search that Mountain Ridge Healing, LLC was a licensed dispensary of marijuana and marijuana-related products located in Ruidoso, New Mexico. Officer Giddings also opened the Google Maps app and determined through the use of Marin's Google Location History that from February 12 through 15, Marin had been presented in Ruidoso, New Mexico, and that on February 15, his location was registered as being 500 feet from the Mountain Ridge Healing dispensary for a period of nearly 45 minutes.

Officer Giddings also opened an app on Marin's phone called Portal2Health. The app, which was produced by HealthQuest Lab Services, serves as a portal allowing patients to view blood test results sent to them by their physicians. Officer Giddings viewed a PDF health record from Marin's most recent January 2, 2023, physical. The record stated, in relevant part: "Patient denies any recent usage of drugs, including marijuana/cannabis." The January 2, 2023, test results screened for THC and other marijuana-metabolites, but none were found.

C. Procedural History

The State indicted Marin on one count of driving while intoxicated and one count of possession of marijuana (extraterritorial).

Marin filed a pretrial writ of habeas corpus and a motion to dismiss the indictment, both predicated on the argument that the UHSA's extraterritorial application provision violated the Dormant Commerce Clause of the United States Constitution and Marin's constitutional right to interstate travel. The trial court denied the writ and the motion. Marin also filed a pretrial motion to suppress the results of the phone search, arguing there was insufficient probable cause to search the entirety of the phone. The trial court denied the motion to suppress, and the case proceeded to trial.

Officer Giddings testified as to her observations of Marin's demeanor during the stop, as well as the results of her search. She testified that she believed the evidence was sufficient to show that Marin was intoxicated because he physically stumbled while exiting the vehicle, he smelled of marijuana, and his eyes appeared "reddish." She also testified as to the blood test results and the results of her search of Marin's phone. She opined that she believed Marin had possessed marijuana in New Mexico based on (1) the Google Location geofencing data, (2) the receipt from the dispensary on Marin's phone, (3) the difference in blood test results between

January 2 and February 15 which suggested marijuana ingestion of some sort, and (4) the fact that he exhibited symptoms of intoxication at the time of his arrest.[6]

Marin testified at trial in his own defense. Marin denied smoking or ingesting marijuana during the Ruidoso trip, saying that he had gone to Ruidoso "on a spiritual journey of love for Valentine's Day" that required him to abstain from marijuana use. He lent his credit card to another member of the group so they could make a purchase at the dispensary, though he did not witness the transaction. Because the credit card was linked to his phone number and email address, he received the receipt for the transaction on his cell phone as an email.

Marin also called Dr. Charles Parker as an expert witness. Dr. Parker testified that it is possible for someone who is not smoking marijuana and who never touches a marijuana cigarette to nevertheless test positive for THC or THC-metabolites. He described this phenomenon as a "contact high" and stated this can occur if a person inhales sufficient secondhand marijuana smoke over a period of time, particularly if they are in a "hotboxing" situation involving an enclosed space with poor ventilation, such as a vehicle with its windows closed.

At the close of his case, Marin moved for a judgment of acquittal on multiple grounds. First, Marin argued that the extraterritorial application of the marijuana

[6] The State called two of Marin's companions, who were also in the Pineapple Express when it was pulled over, but each invoked the Fifth Amendment.

possession statute facially violated the Dormant Commerce Clause of the U.S. Constitution because it criminalized commercial transactions and other commercial conduct that were legal in another state. Second, Marin argued that the extraterritorial possession statute was unconstitutional as-applied to him because it violated his constitutional right to travel and engage in activity that was legal in another state under the Privileges and Immunities Clause of the U.S. Constitution. Third, Marin argued that the evidence was legally insufficient as to both the possession and driving while intoxicated charges.

The trial court granted Marin's motion in part, issuing a directed verdict of acquittal on the driving while intoxicated charge because the THC and marijuana metabolite levels in Marin's bloodstream were insufficient to demonstrate intoxication at the time of driving. However, the trial court denied the remainder of Marin's claims and submitted the extraterritorial possession charge to the jury.

The jury found Marin guilty of possession. He was assessed a punishment of 180 days in jail, fully probated. This appeal followed.

DISCUSSION

Marin raises four issues on appeal challenging his conviction. None have merit.

I. Dormant Commerce Clause

In Issue One, Appellant argues that his conviction should be overturned because the UHSA's extension of extraterritorial criminal jurisdiction violates the Dormant Commerce Clause. We disagree.

The Constitution of the United States empowers Congress to regulate commerce among the states. U.S. CONST. art. I, § 8, cl. 3. In addition to the express grant of authority to Congress, the Supreme Court has interpreted the Commerce Clause as an implicit restriction on the states' power to regulate interstate commerce even in the absence of conflicting federal regulation. *United Haulers Ass'n, Inc. v. Oneida–Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). A state enactment violates this implicit restriction, referred to as the Dormant Commerce Clause, if it discriminates on its face against interstate commerce by providing differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. *Ex parte Bradshaw*, 501 S.W.3d 665, 678 (Tex.App.—Dallas 2016, pet. ref'd). However, evenhanded local regulation intended to effectuate a legitimate local public interest that has only incidental effects on interstate commerce will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)

Here, the UHSA does not directly target out of state actors or favor Texas goods over New Mexico goods. Rather, it prohibits all goods of a certain type evenhandedly, so there is no interstate discrimination. Further, we find that the State has a legitimate local public interest in preserving the physical and moral health of its citizens and residents from the deleterious effects of marijuana, a narcotic that, until recent social changes in attitude, was historically subject to various criminal penalties and that remains subject to criminal penalties both in New Mexico and at the federal level for possession of three ounces or more. We do not believe the consumption of marijuana was the type of "commerce" the Founding Fathers envisioned protecting when enacting the Constitution. We also find that the effects of the UHSA on New Mexico's cannabis market would be minimal. Legalization remains relatively new, and it remains to be seen whether this burgeoning industry even lasts.

Without solid metrics, we cannot definitively say that UHSA's universal prohibition on the possession of marijuana would effect the New Mexico market. Even so, Texas' strong public health interest outweighs any de minimis effects on New Mexico's economy. The UHSA is constitutional.

Issue One is overruled.

II. Constitutional Right to Travel

In Issue Two, Appellant alternatively argues that his conviction should be overturned because the UHSA infringes on his constitutional right to interstate travel. We again disagree.

The State does not contest the existence of a constitutional right to travel. However, the scope of that ancient constitutional right is limited. The UHSA does not prevent Texas residents from entering New Mexico at all; it simply regulates Texans' behavior, independent of geographic consideration. *See Saenz v. Roe*, 526 U.S. 489 (1999) (strict scrutiny applies only to regulations that bar a traveler from entering a state completely). As such, Texas does not need to meet a high burden before the UHSA passes constitutional muster.

As for the argument Marin raises under the Privileges and Immunities Clause of the United States Constitution, we reject it. That Clause only protects Marin, as a Texan, from being subject to discriminatory treatment for being a Texan while in New Mexico—he enjoys the same "privileges and immunities" afforded by the State of New Mexico to any other person within its territory. *See Saenz*, 526 U.S. at 502. However, there is no authority for the proposition that Texas loses its ability to regulate Marin's behavior simply because his behavior might be legally privileged in another state.

In short, the Privileges and Immunities Clause protects him from being discriminated against as a Texan when traveling outside of Texas; it does not privilege him from answering to Texas' laws when he arrives back home, even if the conduct he engaged in outside of Texas was legal in that other state. *Cf. State v. Cooper*, 301 P.3d 331 (Kan. 2013) (Kansas could prosecute Colorado resident for simple possession where medical marijuana lawfully dispensed in Colorado under Privileges and Immunities Clause because that clause protects only federal rights, not state rights).

Issue Two is overruled.

III. Search of the Cell Phone

In Issue Three, Appellant argues that the search of his cell phone incident to arrest and pursuant to a search warrant violated the Fourth Amendment. We disagree.

A warrant is required before police may search a cell phone that is seized incident to arrest. *Riley v. California*, 573 U.S. 373, 401 (2014). Here, Nuevo Paso Police did obtain a warrant before searching Marin's cell phone, and Officer Giddings testified she relied on the warrant in good-faith while conducting her search of the phone. "Evidence should not be suppressed when law enforcement obtained it in good-faith reliance on a warrant." *United States v. Morton,* 46 F.4th 331, 335 (5th Cir. 2022); *see also Richardson v. State*, 282 A.3d 98, 126 (Md. 2022).

Marin argues that the good faith exception should not apply for two reasons. First, he maintains that the affidavit underpinning the warrant application was so vague that it was insufficient to authorize the issuance of a warrant in the first place. Second, he contends that Officer Giddings exceeded the scope of the warrant's authorization by opening various apps and "rummaging" through his emails, health records, and the like.

We address the second point first, and quickly dispatch it. The warrant authorized a broad review of Marin's "cell phone" including text messages, call records, "etc." That includes all portions of the cell phone, including the Gmail app and other apps that may contain information of criminal activity. Because the warrant authorized a broad search, Officer Giddings did not violate the good-faith requirement by opening and reviewing the contents of the Gmail, Google Maps, and Portal2Health apps.

As for Officer Giddings' affidavit, we find it sufficiently detailed to authorize the warrant. Officer Giddings identified Marin as a potential drug trafficker, she relayed her personal experience that cell phones are used in the course of committing drug trafficking, and she provided additional details sufficient to allow the magistrate judge to identify the object to be searched and to define the scope of that search. There was nothing improper with the affidavit, the search of the cell phone

was proper, and the trial court did not err when it refused to suppress the fruits of that lawful search.

Issue Three is overruled.

IV. Legal Sufficiency

Finally, in Issue Four, Appellant contends that on the record presented, the evidence is legally insufficient to establish he possessed marijuana beyond a reasonable doubt. We agree with the State that there is sufficient circumstantial evidence allowing us to uphold his conviction.

To prove unlawful possession of a controlled substance, the State must prove that: (1) the accused exercised control, management, or care over the substance; and (2) the accused knew the matter possessed was contraband. *Poindexter v. State*, 153 S.W.3d 402, 405 (Tex. Crim. App. 2005), *abrogated on other grounds by Robinson v. State*, 466 S.W.3d 166 (Tex. Crim. App. 2015). The State may prove a conviction through the use of direct or circumstantial evidence. *Poindexter*, 153 S.W.3d at 405.

Here, the State concedes that it does not have direct evidence establishing possession. However, the State has ample circumstantial evidence allowing a jury to reasonably infer beyond a reasonable doubt that, at some point anterior to the presentment of the indictment, Marin possessed marijuana.

Marin was a marijuana promotion activist. His RV was painted with a reference to a marijuana movie. Marin's credit card was used to purchase a product at a marijuana dispensary in New Mexico. Although he denies making the purchase, his denial is a credibility and demeanor issue for the jury. *See id.* A screenshot of the dispensary's website in evidence indicates the products it sells contained THC. Marin's blood tests show the presence of THC metabolites, which would allow for the reasonable conclusion that he consumed marijuana while in New Mexico, particularly in light of the blood test showing that as of January, Marin lacked the chemical markers for marijuana consumption. Marin denies consuming marijuana and tried to explain the presence of THC in his blood as being the result of passive secondhand smoke ingestion. But again, this is a credibility and demeanor issue for the jury.

Based on the strength of the evidence taken as a whole, we conclude that a jury could find beyond a reasonable doubt that Marin possessed marijuana at some point prior to the presentment of the indictment, and the new extraterritorial application statute makes that determining conclusive, regardless of whether it happened in Texas or New Mexico.

CONCLUSION

We overrule all four issues. The judgment of the trial court is affirmed.

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CONCURRING OPINION

ETHAN, J., concurring in the judgment.

There is nothing inherently wrong with a polity exercising extraterritorial criminal jurisdiction; the federal government does it all the time, even to conduct occurring in foreign countries. *See, e.g.*, *United States v. Baston*, 818 F.3d 651 (11th Cir. 2016) (upholding district court's extraterritorial jurisdiction to convict defendant of sex trafficking a minor in Australia).

Marin seeks to continue his campaign of legalization of marijuana in Texas through the courts because he and his ilk cannot obtain the social change they desire from the Texas Legislature—that is, they cannot obtain democratic assent to their plan. If Marin truly believes he should be allowed to smoke narcotics freely and without consequence, he must convince not this Court, but his fellow Texans. Yet upstanding Texans have already soundly rejected Marin's policy proposal of legalization by passing the UHSA. The remedy here is not for the U.S. Congress to regulate by implication, but to directly and explicitly assert its authority to legalize marijuana nationally. Until then, nothing in the Constitution prevents Texas from doing what it has done here.

With these comments, I concur.

FIRST DISSENTING OPINION

CAMERON, J., dissenting.

I vigorously dissent from the majority's lawless opinion. The UHSA represents a breathtaking, unprecedented, and sweeping assertion of State power over the individual. Thankfully, the Constitution places important checks on the powers of a state government over the rights of an individual—checks that the majority blithely breezes past. We must vacate Marin's conviction because the UHSA is unconstitutional.

First, HB 1 violates the Dormant Commerce Clause. There is no question that the growth and cultivation of marijuana is a matter implicating interstate commerce. *See generally Gonzalez v. Raich*, 545 U.S. 1 (2005).

There is also no question that Texas' UHSA law discriminates against interstate commerce by criminalizing activity that is legal in other states. "This 'negative' aspect of the Commerce Clause prevents the States from adopting protectionist measures and thus preserves a national market for goods and services." *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019) (cleaned up) (describing the Framer's intent in adopting the Constitution as helping to curb "the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation").

The enactment of UHSA represents the first step in the type of economic Balkanization that Dormant Commerce Clause principles and the passage of the U.S. Constitution to replace the Articles of Confederation sought to avoid. "[I]f a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to advance a legitimate local purpose. " *Id.* at 2461 (2019) (cleaned up). The UHSA fails on both the narrow tailoring and the legitimate local purpose prongs of this test.

On the issue of narrow tailoring, the UHSA grants Texas courts universal jurisdiction over possession of marijuana offenses, regardless of where they occur. This concept of universal jurisdiction is familiar in places like France, which also assert universal jurisdiction over criminal activity—albeit for crimes like genocide, war crimes, or other crimes against humanity. *See* Human Rights Watch, THE LEGAL FRAMEWORK FOR UNIVERSAL JURISDICTION IN FRANCE (2014).

Unlike other polities, which reserve the exercise of universal jurisdiction for international crimes of serious magnitude, the UHSA stretches the extraterritorial jurisdiction of Texas to embrace even misdemeanor-level crimes. This is patently absurd. The Legislature made no attempt to narrow the applicability of the law by carving out exceptions for economic activity permitted elsewhere, or to prohibit activity that had more of a direct connection to the State, such as by prohibiting smuggling across the state border. This lack of narrow tailoring is fatal.

Further, "where an evenhanded statute is founded upon a legitimate local purpose, the question of compliance with the Dormant Commerce Clause becomes one of degree; the extent of the burden that will be tolerated depends on the nature of the local interest involved, and whether it could be promoted just as well with a regulation having a lesser impact on interstate activities." *Ex parte Bradshaw*, 501 S.W.3d at 679.

Here, the local interest involved here is questionable, particularly given that as part of the Green Compromise, a majority of Americans voiced their belief that the possession of two ounces or less of marijuana is of no concern to the federal government. But even if Texas could establish a legitimate local interest, the majority avoids engaging entirely with the issue of whether the UHSA has downstream economic effects on commerce in other States. It clearly does.

The majority plays ignorant and pretends that cannabis legalization is a fad. It is not. Marin directed the trial court to statistics showing that the cannabis industry in New Mexico is booming, and that Texans are contributing. As Marin showed in his writ applications and motions, in the first seven days following legalization, dispensaries in New Mexico towns near the Texas border brought in six-figure profits—$259,332 in Sunland Park; $530,410 in Las Cruces; $150,870 in Ruidoso; and $255,049 in Carlsbad. *See* Angela Kocherga, *Texas drive up sales of recreational marijuana in New Mexico*, KERA NEWS,

https://www.keranews.org/business-economy/2022-04-13/texans-drive-up-sales-of-recreational-marijuana-in-new-mexico; *see also* Solomon Israel, *New Mexico cannabis firms prep for Texas shopping spree as adult-use sales launch*, MJBIZDAILY (Mar. 31, 2022), https://mjbizdaily.com/new-mexico-cannabis-firms-prep-for-texan-shopping-spree-as-adult-use-sales-launch/. The New Mexico market depends heavily on cross-border sales. The population of New Mexico is 2.1 million people. The population of Texas is more than 30 million. It would blink reality to pretend that criminally prohibiting 30 million people from engaging in conduct legal one state over would have zero effect on the next state's market.

The UHSA violates the Dormant Commerce Clause because it is not narrowly tailored to promote Texas' interests. Marin's conviction is unconstitutional.

Additionally, HB 1 also violates the constitutional right to interstate travel. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring) (recognizing that States may not criminalize activity legal in other states without violating an individual's constitutional right to interstate travel). Although the word "travel" is not found in the text of the Constitution, "the constitutional right to travel from one State to another is firmly embedded in our jurisprudence." *Saenz*, 526 U.S. at 499 (cleaned up).

Article IV Section 2 of the United States Constitution, also known as the Privileges and Immunities Clause, provides: "The Citizens of each State shall be

entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2. The majority relies on a Kansas Supreme Court case to hold that the Privileges and Immunities Clause does not shield someone who obtains legal medical marijuana in a pro-legalization State from being prosecuted for possession in anti-legalization State, because under the *Slaughterhouse Cases*, the Privileges and Immunities Clause only vindicates a small subset of federal rights, and does not apply to the states. *See Cooper*, 301 P.3d 331

The problem for the majority is that even with the specter of the *Slaughterhouse Cases* looming in the background, one of the few federal rights specifically recognized as inhering in the Privileges and Immunities Clause is the right to interstate travel. *See Saenz*, 526 U.S. 501. "[B]y virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits." *Id*. Persons present in the territorial boundaries of New Mexico enjoy the "privilege" under New Mexico law of possessing two ounces of marijuana or less; they are immune from prosecution by state authorities for their actions.

The text of the constitutional provision is clear: "The Citizens of each State shall be entitled to ***all Privileges and Immunities of Citizens in the several States***." U.S. CONST. art. IV, § 2 (emphasis added) Thus, the Privileges and Immunities

Clause is not a one-way ratchet; it protects Marin from having his individual right to travel and enjoy another state's privileges from being infringed on by any state, including his home state. Just as it would be a violation of the Privileges and Immunities Clause for New Mexico to deny Marin any rights on the basis that he is a Texan, it would be a violation of the Privileges and Immunities Clause to prosecute him for engaging in conduct that was legal, privileged, and immune from prosecution within the State of New Mexico—that would be just as much of a denial of "Privileges and Immunities of Citizens in the several States." I would hold that the right to travel protected by the Privileges and Immunities Clause protected the conduct that Marin engaged in while in New Mexico. Texas cannot make him answer for that conduct without violating the Constitution. His conviction here was a grave constitutional error.

I would reverse Marin's conviction and render a judgment of acquittal.

SECOND DISSENTING OPINION

HARPER, J., dissenting.

To quote United States Supreme Court Chief Justice John Roberts: "If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more." *See Dobbs*, 142 S. Ct. at 2311 (Roberts, C.J., concurring).

The majority, concurrence, and primary dissent split on the issue of whether Texas' extraterritorial jurisdiction law passes constitutional muster, either under the Dormant Commerce Clause or in light of an unenumerated constitutional right to travel freely throughout the United States. We need not answer this thorny question, because there is a much narrower ground resolving this appeal: the evidence is wholly insufficient to establish possession beyond a reasonable doubt.

First, the receipt and health records should have been suppressed. Marin was stopped and arrested on suspicion of driving while intoxicated. There is no logical connection between the crime of DWI, the crime of possession, or the conclusory allegations set out in the probable cause affidavit. *Morton*, 46 F.4th at 342–44. The conclusory allegations prevent the State from relying on the good faith exception here. *Id*. Thus, we must reach the merits of the Fourth Amendment issue. The sweeping statements made in the probable cause affidavit are no evidence of probable cause at all. *Id*. Admission of the receipt and the health records was

harmful, since without the receipt, the State cannot prove possession beyond a reasonable doubt. *See Bagheri v. State*, 119 S.W.3d 755, 764 (Tex. Crim. App. 2005).

But even if the receipt and the health records are included in the Court's analysis, the evidence is still insufficient to demonstrate possession. "Whether this evidence is direct or circumstantial, it must establish, to the requisite level of confidence, that the accused's connection with the drug was more than just fortuitous. This is the whole of the so-called 'affirmative links' rule." *Poindexter*, 153 S.W.3d at 405–06. Here, the evidence is sufficient to affirmatively link Marin to marijuana possession.

In the first place, drugs were never actually found in the RV or on Marin's person. In fact, drugs were never found *anywhere*. Officer Giddings' suspicion was that he had previously been in possession of drugs based on indicia of intoxication and the smell of marijuana in the RV. But Marin was not in sole possession of the RV—the majority conveniently ignores that three other people were also located inside the RV, and at least one other person may have had access to Marin's credit card and used it to purchase items at the dispensary. "When the accused is not in exclusive possession of the place where the substance is found, it cannot be concluded that the accused had knowledge of and control over the contraband unless

there are additional independent facts and circumstances which affirmatively link the accused to the contraband." *Id*. (cleaned up).

The State, in its zeal to chill conduct legal in other states, is attempting to prosecute a marijuana possession case as though it were a no-body murder case. While technically feasible in theory, this case shows the lengths the State must go to establish possession by inference. And even with all the evidence submitted, I would still find the State failed to show Marin ever possessed marijuana while traveling in New Mexico beyond a reasonable doubt.

The evidence is legally insufficient to support conviction. I would vote to reverse the conviction and render a judgment of acquittal.