ALAN WILSON

September 16, 2024

The Honorable G. Murrell Smith, Jr.
Speaker of the House
South Carolina House of Representatives
P.O. Box 11867
Columbia, SC 29211

[redacted]

explicitly state whether possession or sale of products containing hemp-derived THC with concentrations of delta-9 THC not more than 0. 3% are legal in South Carolina.

Manufacturers and distributors in South Carolina need clear guidance on whether

> [d]espite its industrial uses and value as an agricultural crop, hemp was ultimately criminalized under federal and state law. The origins of its criminalization under federal law is found in the "Marihuana Tax Act of 1937," which "was to treat industrial-use and drug-use marijuana differently by taxing them at different rates, or not at all." United States v. White Plume, 447 F.3d 1067, 1071 (8th Cir. 2006). When the Controlled Substances Act was enacted by Congress in 1970, the Tax Act was repealed in favor of criminalizing the growing of marijuana. Id. at 1072. However, the Tax Act's definition of marijuana was adopted verbatim criminalizing

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"the growing of marijuana whether it was intended for industrial-use or drug-use." Id. That same definition is contained in the current version of the Controlled Substances Act.

Under the Controlled Substances Act, marijuana is defined as follows:

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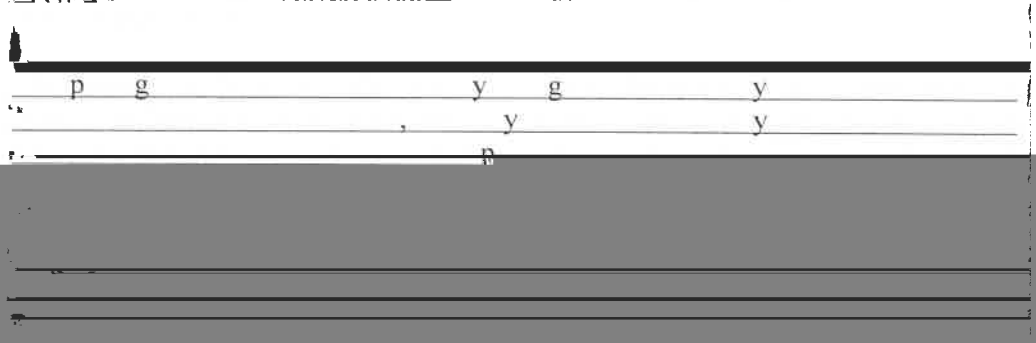
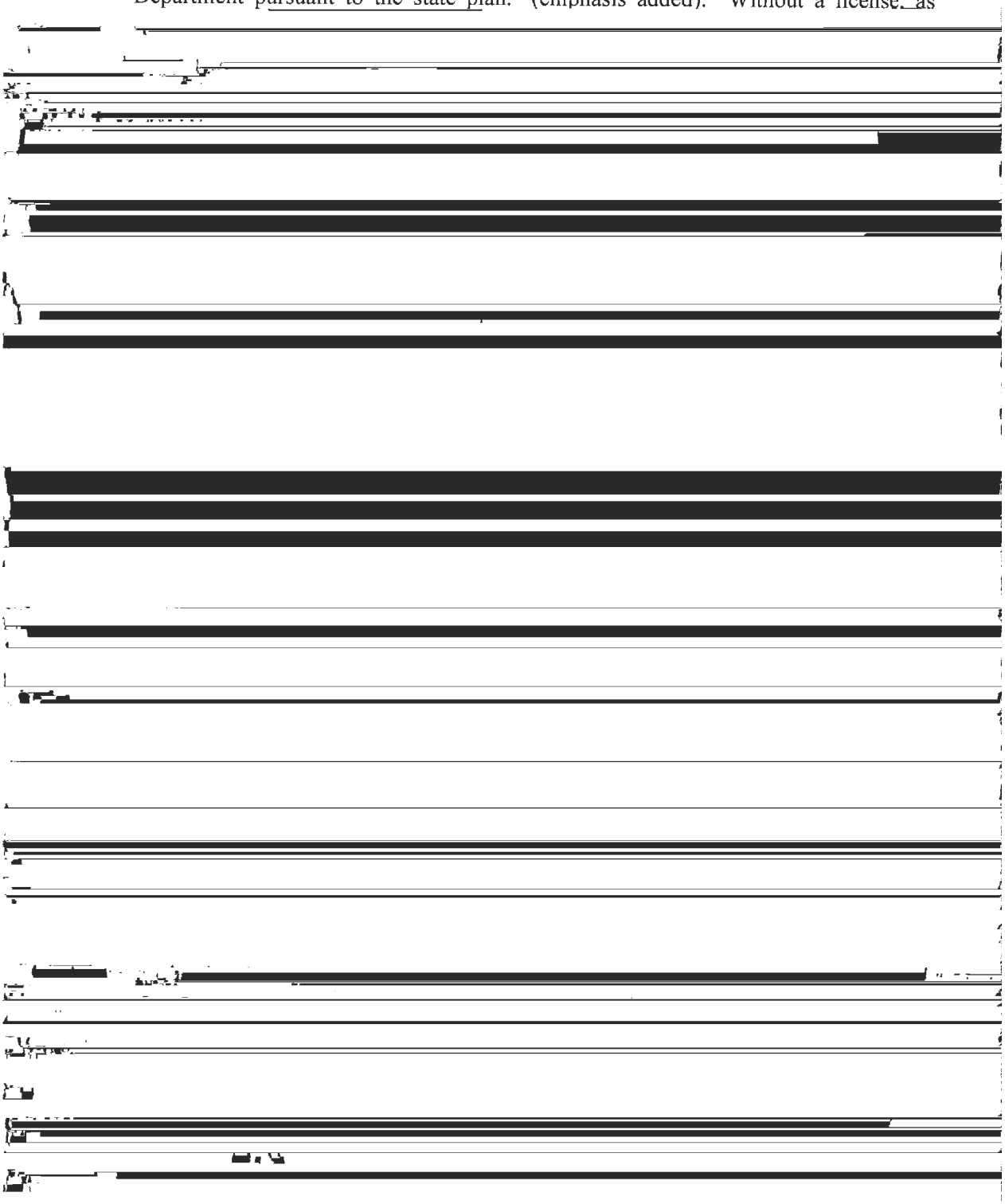
an "institute of higher education," or in the alternative, meet Section 7606(b)(3)'s definition of a "state department of agriculture," federal law continues to prohibit the cultivation of industrial hemp despite terms of Act 216.

However, enactment of the 2018 Farm Act by Congress dramatically revised the

As described by the National Conference of State Legislatures



cultivate, handle, or process hemp in this State without a hemp license issued by the Department pursuant to the state plan." (emphasis added). Without a license, as



percent on a dry weight basis.' § 46-55-10(6); see also 7 U.S. C. § 5940(a)(2)." While certainly this is the law, and if such standard is met, the hemp or THC-infused drink is lawful, the problem is determination of the THC content in a particular drink or category of drinks sold. Just as with respect to the legality of any other substance, this is a factual question, beyond the scope of an opinion of this Office, and is an issue for law enforcement and the courts to determine. [redacted]

Hembrook v. Seiber, 2022 WL 3702091 at *9, report and recommendation approved, 2022 WL 4358771 (M.D. Tenn. 2022) ["It is impossible to visually distinguish whether a cannabis plant is either marijuana or hemp by looking at it – it has to be scientifically tested and hemp and marijuana smell the same and are indistinguishable based on smell alone."].

One court has commented with respect to the complexities of determining whether food [redacted]

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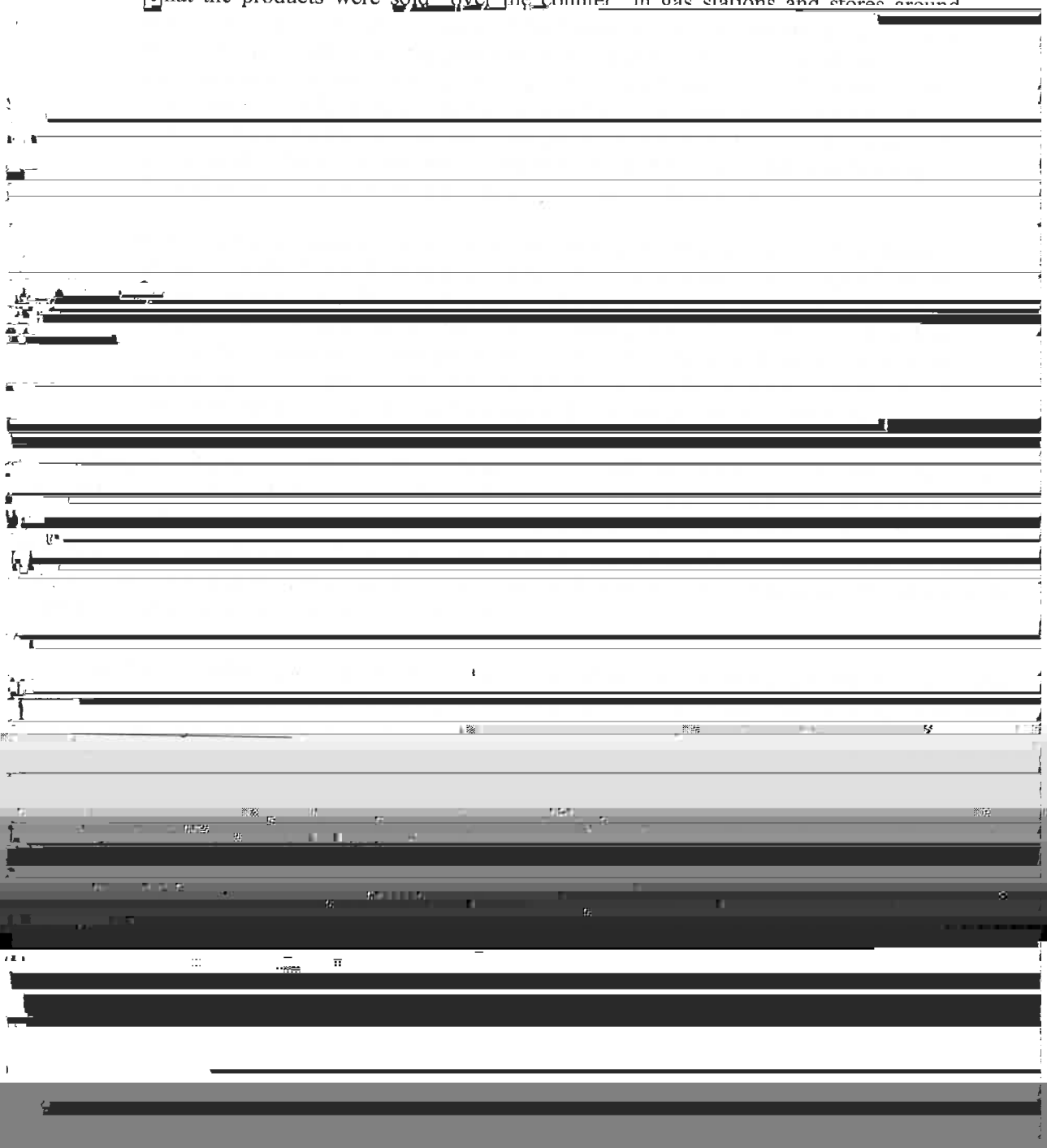
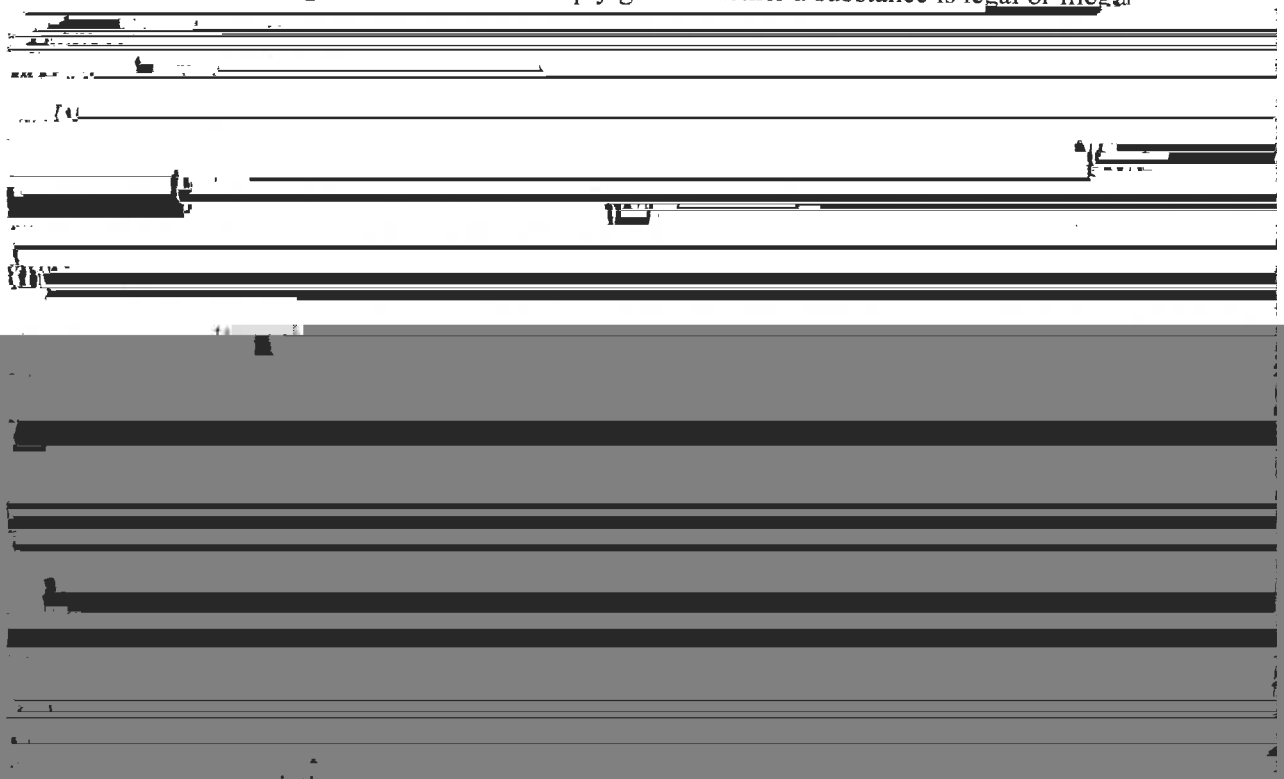
The Fourth Circuit concluded that Anderson "offered no evidence about the delta-9 THC concentration of the purportedly lawful products she used such that we could determine whether those products were legal under state or federal law." Such a factual showing was crucial. According to the Fourth Circuit,

> [t]hat the products were sold "over the counter" in gas stations and stores around



> to prove that the proscribed substance was in fact in defendant's possession. Leaving the fact-finder to simply guess whether a substance is legal or illegal

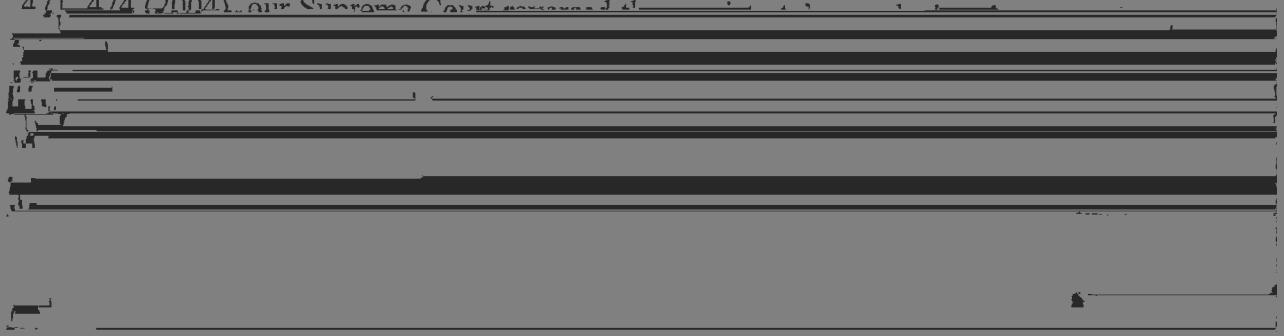


> conviction.

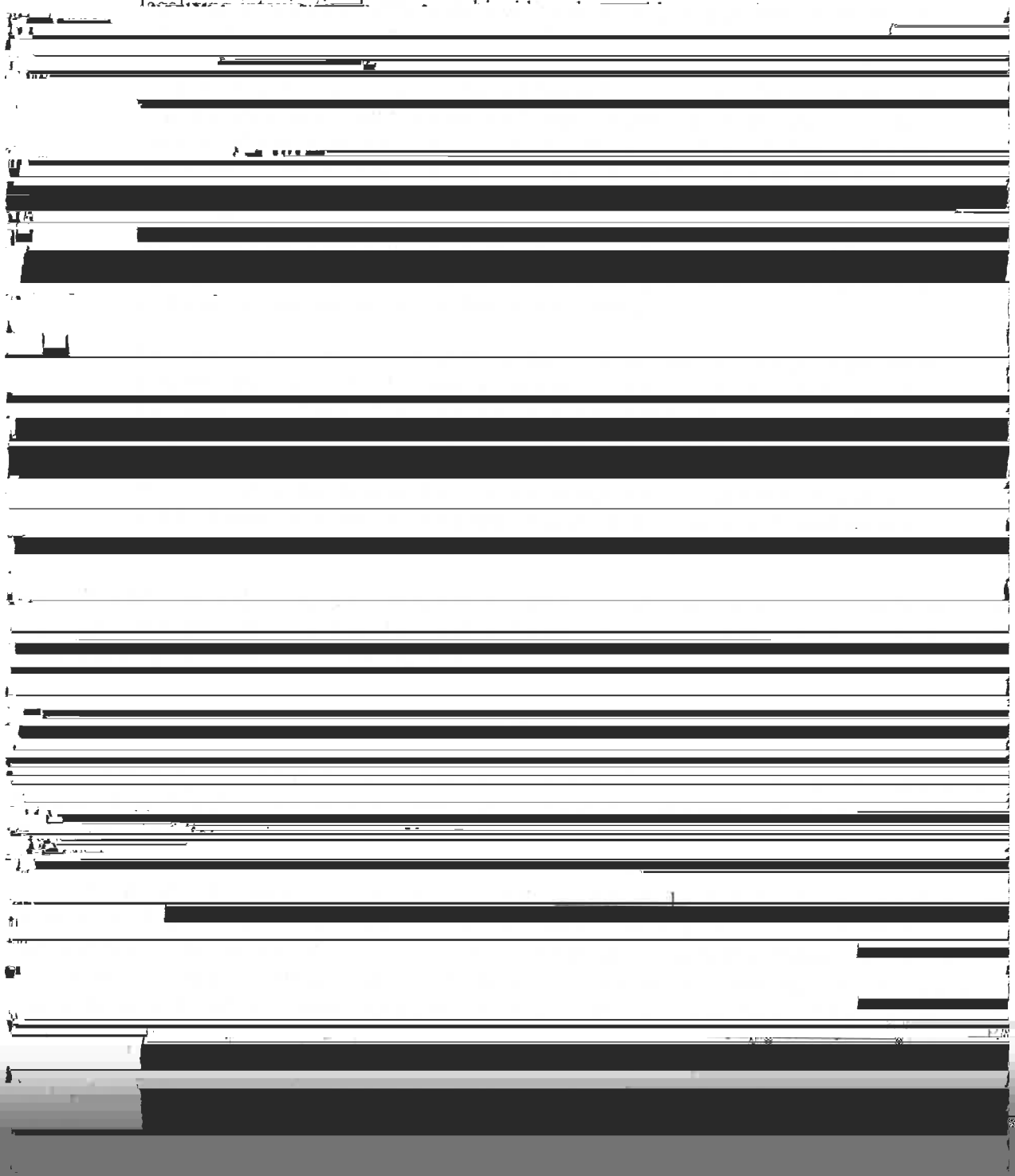
Id. at 709.

Again, individual case-by-case analysis is imperative; otherwise, it is pure "guesswork" as to the concentration of THC in a particular canned drink.

Moreover, by analogy, the legality of gaming machines in South Carolina is instructive. In Allendale C . Sheriff's Office v. Two Chess Challen e II, 361 S.C. 581, 586-87, 606 S.E.2d 471, 474 (2004), our Supreme Court reversed the



It's apparent that members of Congress didn't fully appreciate that they were



Further, courts have determined that the amount of THC in hemp in the field may not be always the same as that of hemp in a canned drink. Federal and state law legalizes the delta-9 0.3% THC content to be calculated on a "dry weight basis." In this regard, as courts have found, a delta-9 0.3% THC level on a d wei ht basis may not always translate into that same level of THC when placed in a drink or beverage. As one court has put it, "although a 0.3% limit on a

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dry weight basis for THC would preclude its intoxicating effects if it were consumed as an inhalant, when infused into beverages and other foods, these products may be very intoxicating even under the statutory potency limit." Climbin Kites LLC v. Iowa, supra. The Court in Climbin Kites noted that Congress's intent in passing the 2018 Farm Bill "may have been to deregulate hemp to facilitate its use in agriculture and the production of commodities," but not necessarily to allow [or regulate] THC's placement in consumable products.

While Congress and the General Assembly have declared that a delta-9 concentration of THC below the 0.3% level is legal, a "blanket" conclusion of legality beyond stating the

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certain restrictions have already passed the House. Such legislative clarification – which we have emphasized the need for in previous opinions, in other contexts – may be determined by the General Assembly to greatly serve the public interest, and public health and safety. Your questions regarding the sale of THC-infused drinks is one such area.

In summary, the Hemp Farming Act of 2019, as now written, makes non-alcoholic drinks containing concentrations of delta-9 THC of 0.3% or less on a dry weight basis legal. If such a drink meets this statutory requirement, it is legal under [redacted]

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