IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 19-3034

C.Y. WHOLESALE, INC., et al.,

Plaintiffs-Appellees,

v.

ERIC HOLCOMB, et al.,

Defendants-Appellants.

Appeal from the United States District Court,
Southern District of Indiana, Indianapolis Division
The Honorable Sarah Evans Barker, Judge
Civil Action No 1:19-cv-02659-SEB-TAB

BRIEF OF PLAINTIFFS-APPELLEES

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-3034

Short Caption: C.Y.Wholesale, Inc., et al v. Eric Holcomb, et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The CBD Store of Fort Wayne, LLC, Indiana CBD Wellness Inc., C.Y. Wholesale Inc.,
Indy E Cigs LLC, 5 Star Medical Products, LLP, Dreem Nutrition, Inc., Midwest Hemp Council, Inc.,
and El Anar, LLC

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Bose McKinney & Evans, LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: s/ Paul D. Vink Date: October 31, 2019

Attorney's Printed Name: Paul D. Vink

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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None

Attorney's Signature: s/ Tyler J. Moorhead Date: November 6, 2019

Attorney's Printed Name: Tyler J. Moorhead

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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None

Attorney's Signature: s/ Justin E. Swanson Date: November 18, 2019

Attorney's Printed Name: Justin E. Swanson

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Plaintiffs-Appellees ("Plaintiffs"), by counsel, pursuant to Federal Rule of Appellate Procedure 28 and Seventh Circuit Rule 28, respectfully submit this Brief of Plaintiffs-Appellees in response to the appeal filed by Defendants-Appellants, Governor Eric Holcomb and The State of Indiana (collectively, "the State").

RESPONSE TO THE COURT'S NOVEMBER 1, 2019 ORDER ON JURISDICTION

On September 13, 2019, the United States District Court for the Southern District of Indiana, Indianapolis Division, issued its Order Granting Plaintiffs' Motion for Preliminary Injunction (the "Order"), which enjoined certain provisions of Indiana's Senate Enrolled Act 516 ("SEA 516") relating to smokable hemp. (D. 31.) In its Order, the district court provided its factual analysis and legal reasoning for granting the preliminary injunction along with the injunction it issued. The district court did not issue a second, standalone document that solely contained the injunction. On October 17, 2019, this Court asked the parties to address this issue in a brief memorandum, and on November 1, 2019, this Court asked that the parties address this issue fully in their respective appeal briefs.

Plaintiffs agree with the State that the district court's non-compliance with the technical requirements of Federal Rules of Civil Procedure 65(d)(1)(C) and 58(a) are immaterial and do not deprive this Court of jurisdiction to hear this appeal.

Federal Rule of Civil Procedure 65(d)(1)(C) states that: "Every order granting an injunction and every restraining order must . . . describe in reasonable detail–and not by referring to the complaint or other document–the acts or acts retrained or required." Rule 58(a) then states that "Every judgment and amended judgment

must be set out in a separate document . . . .” Nonetheless, when a district court fails to issue a standalone injunction order under these Rules, the Court of Appeals maintains jurisdiction to preside over the appeal as long as the district court’s order identifies what conduct is precluded by the injunction. *See, e.g. Auto Driveaway Franchise Sys., LLC v. Auto Driveaway Richmond, LLC*, 928 F.3d 670, 678-79 (7th Cir. 2019) (The combined analysis / order issuing the injunction “had the practical effect of an injunction on the parties, despite the district court’s failure to comply with the letter of Rule 65(d). . . . This is ample for purposes of appellate jurisdiction; there is thus no need to remand this case to cure the Rule 65(d) defect.”); *Calumet River Fleeting, Inc. v. Int’l Union of Operating Engineers, Local 150*, 824 F.3d 645, 650 (7th Cir. 2016) (same, discussing Rule 58). This Court has continued to reiterate that as long as the district court’s order adequately specifies what conduct is being enjoined, the spirit of Rules 58 and 65 are satisfied, and this Court maintains appellate jurisdiction. *See BankDirect Capital Finance, LLC v. Capital Premium Financing, Inc.*, 912 F.3d 1054, 1057 (7th Cir. 2019). Similar to Rule 65, “violations of Rule 58 are not jurisdictional.” *Metzl v. Leininger*, 57 F.3d 618, 619 (7th Cir. 1995). The Supreme Court holds that “parties to an appeal may waive the separate-judgment requirement of Rule 58,” *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978), and Federal Rule of Appellate Procedure 4(a)(7)(B) states that “failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.”

For these same reasons, the district court's Order is sufficient for appellate jurisdiction even though the injunction was not contained within a standalone document. The Order is clearly titled as a court order granting the injunction. Further, the district court's Order reads like an injunction and expressly details the conduct that is being enjoined, stating in part: "Defendants are hereby PRELIMINARYILY ENJOINED until further order of this Court from enforcing the portions of SEA 516 that criminalize the manufacture, financing, delivery, or possession of smokable hemp, which are codified at Indiana Code § 35-48-4-10.1 (criminal penalties for smokable hemp)." (D. 31 at 17) (emphasis original). The district court's Order is sufficiently detailed to put the parties on notice that the State of Indiana may not enforce the provisions of SEA 516 that criminalize the manufacture, financing, delivery, or possession of smokable hemp. Indeed, the State expressed that it "understands what it is prohibited from doing and considers itself bound by the order." (Br. at 6.) Further, both parties in this matter agree that the technical non-compliance of Rules 58 and 65 are of no consequence, and the parties waive any requirement that the Order should have been in a standalone document. *Bankers Trust*, 435 U.S. at 387.

The principles of judicial economy also support this conclusion. Because the district court's Order is sufficiently clear and definite, the *only* reason to remand here would be for the district court to copy and paste the final page of its Order into a separate document. The State would then re-initiate this same exact appeal, and the last three months of the appellate process would be repeated. The resources of

the parties, district court, and this Court would be best served continuing with this present appeal. The Plaintiffs respectfully request that the Court retain jurisdiction and proceed with this matter.

INTRODUCTION

Plaintiffs are a group of wholesalers and retailers of hemp products who brought their Motion for Preliminary Injunction challenging the constitutionality of a recent Indiana statute that criminalizes the possession and transportation of smokable hemp – despite federal laws declaring all hemp derivatives to be legal and transportable.

Starting with the Agricultural Act of 2014, Pub. L. No. 113-79 (the "2014 Farm Bill"), the federal government asserted its intention to make hemp a legal agricultural commodity once again for farmers to pursue in America. Indiana followed the federal government's lead soon thereafter by passing Senate-Enrolled Act 357, P.L. 165-2014 ("SEA 357") which declared hemp an agricultural product and encouraged the production of hemp in Indiana. The federal government then passed the Agriculture Improvement Act of 2018, Pub. L. 115-334 (the "2018 Farm Bill"), which again affirmed Congress's intent to promote the production and sale of hemp in the United States and which expressly precluded states from inhibiting the transportation of hemp or changing the definition of hemp. Despite this clear intent, on May 2, 2019, Indiana signed into law SEA 516 which narrows the definition of hemp by carving out smokable hemp, and prohibits its transportation in the State of Indiana by criminalizing the manufacture, financing, delivery, and possession of

smokable hemp. SEA 516 is unconstitutional because it is preempted by the 2018 Farm Bill pursuant to the Supremacy Clause of the United States Constitution, and it is an impermissible restriction on interstate commerce in violation of the Commerce Clause of the United States Constitution. The district court was right to grant the preliminary injunction, and this Court should affirm that decision.

JURISDICTIONAL STATEMENT

The jurisdictional statement of the State is complete and correct.

STATEMENT OF THE ISSUE

Did the district court err when it preliminarily enjoined SEA 516 by finding that the State's prohibition on the manufacture, finance, delivery, and possession of smokable hemp conflicted with the 2018 Farm Bill?

STATEMENT OF THE CASE

A. Relevant Statutory History

On February 7, 2014, President Barack Obama signed into law the 2014 Farm Bill, which permitted states to grow industrial hemp under certain conditions. A month and a half later, on March 26, 2014, then Indiana Governor Mike Pence signed into law SEA 357, authorizing the production, possession, scientific study, and commerce of industrial hemp in Indiana pursuant to Indiana Code § 15-15-13 *et seq.* SEA 357 also removed industrial hemp from the state's definition of "marijuana" in recognition that it is a regulated agricultural commodity – not a dangerous controlled substance – and the low THC concentration is non-psychoactive. Ind. Code § 35-48-1-19(b).

On December 20, 2018, President Donald Trump signed into law the 2018 Farm Bill, which permanently removes hemp from the Controlled Substances Act and requires the United States Department of Agriculture to be the sole federal regulator of hemp production. The 2018 Farm Bill explicitly states that "no State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products . . . ." (2018 Farm Bill, Section 10114(b), D. 1-2 at 14.) The Conference Report for the 2018 Farm Bill reiterates this prohibition: "While states and Indian tribes may limit the production and sale of hemp and hemp products within their borders, the Managers, in Section 10122, agreed to not allow such states and Indian tribes to limit the transportation or shipment of hemp or hemp products through the state or Indian territory." (Conference Report for Agricultural Improvement Act of 2018, p. 739, D. 1-3 at 3.)

The 2018 Farm Bill also broadened the definition of hemp to include "the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and ***all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not***, with a delta-9 tetrahydrocannabinol [THC] concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C.A. § 1639o(1) (emphasis added). The Conference Report for the 2018 Farm Bill establishes Congressional intent to preclude states from altering the definition of hemp: "state and tribal governments are authorized to put more restrictive parameters on the production of hemp, but are not authorized to alter the definition of hemp or put in place policies

that are less restrictive." (Conference Report for Agricultural Improvement Act of 2018, p. 738, D. 1-3 at 2.)

On May 2, 2019, in direct response to the 2018 Farm Bill, Indiana Governor Eric Holcomb signed into law SEA 516. While SEA 516 initially defines hemp in the same way as the 2018 Farm Bill, SEA 516 subsequently narrows that definition by carving out "smokable hemp" and criminalizing its manufacture, finance, delivery, and possession. Ind. Code § 35–48–4–10.1(a). Smokable hemp is defined as "a product containing not more than three-tenths percent (0.3%) delta-9-tehtrahydrocannabinol (THC), including precursors and derivatives of THC, in a form that allows THC to be introduced into the human body by inhalation of smoke" and includes the derivatives "hemp bud" and "hemp flower." Ind. Code § 35-48-1-26.6(a).

B. Procedural Background and Disposition Below

On June 28, 2019, days before SEA 516 was to become effective, Plaintiffs filed their Complaint and Motion for Preliminary Injunction in this matter challenging the provisions of SEA 516 that narrow the definition of hemp by excluding smokable hemp and that criminalize the manufacture, finance, delivery, and possession of smokable hemp. (D. Nos. 1, 3, 4.) In their Motion, Plaintiffs argued that these provisions violate the Supremacy Clause of the United States Constitution because they were preempted by the 2018 Farm Bill and violated the Commerce Clause because they restricted the transportation of an interstate good. After briefing and oral argument, on September 13, 2019, the district court agreed with Plaintiffs and

granted their Motion for Preliminary Injunction. (D. No. 31.) In its Order, the district court concluded that the Plaintiffs showed a likelihood of success on their express and conflict preemption claims and showed that they would suffer irreparable harm, had an inadequate remedy at law, the harms weighed in Plaintiffs' favor, and the injunction served the public interest. (*Id.*) Because the district court found that Plaintiffs proved a likelihood of success on their preemption claims, it did not address the Commerce Clause claim. (*Id.* at 13, n.1.)

SUMMARY OF ARGUMENT

As for the first element required to obtain a preliminary injunction, Plaintiffs are likely to succeed on the merits of their claims that SEA 516 is unconstitutional. First, the 2018 Farm Bill expressly preempts the State's attempt to criminalize the transport of smokable hemp. Section 10114(b) of the 2018 Farm Bill unequivocally states, "No State or Indiana Tribe shall prohibit the transportation or shipment of hemp or hemp products . . . ." Despite this express prohibition, SEA 516 impermissibly precludes the transportation of hemp by criminalizing its delivery and possession. Ind. Code § 35-48-4-10.1(a).

Second, conflict preemption renders SEA 516 unconstitutional because it alters (and narrows) the definition of hemp, and thereby places it in direct conflict with both the language and intent of the 2018 Farm Bill. The 2018 Farm Bill purposefully broadened the definition of hemp to include all hemp derivatives and extracts – like hemp bud and hemp flower (i.e., smokable hemp) – and removed it from the Controlled Substances Act. Moreover, Congress specifically stated in the

Conference Report for the 2018 Farm Bill that states "are not authorized to alter the definition of hemp . . . ." (Conference Report for Agricultural Improvement Act of 2018, p. 738, D. 1-3 at 2.) Yet despite this clear legislative intent, SEA 516 altered the definition of hemp by carving out smokable hemp and making it illegal. Ind. Code § 35-48-4-10.1(a). This stands in direct conflict with Congress's intent with the 2018 Farm Bill and is therefore conflict preempted.

Third, the State's attempt to preclude the transportation of smokable hemp is an impermissible restriction on interstate commerce in violation of the Commerce Clause of the United States Constitution. The dormant Commerce Clause prevents states from curtailing the movement of articles of commerce through the state. SEA 516 impermissibly restricts interstate commerce because it seeks to stop smokable hemp from ever entering Indiana's borders, as the mere possession of smokable hemp in Indiana is illegal. Ind. Code § 35-48-4-10.1(a).

As for the balancing factors required for a preliminary injunction, Plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities favors Plaintiffs, and an injunction would serve the public interest. The State's "police power" arguments for passing an unconstitutional statute fail as a matter of fact and law. The Indiana General Assembly has already addressed many of the concerns raised by the State by providing more funding for field tests to distinguish between low-THC hemp and marijuana, and has passed laws with severe punishments for anyone who seeks to pass off marijuana for low-THC hemp.

STANDARD OF REVIEW

To obtain a preliminary injunction, the Plaintiffs must establish that: (1) they are likely to succeed on the merits of their claim; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities favors the plaintiffs; and (4) an injunction would serve the public interest. *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 20 (2008). The Seventh Circuit does not consider the independent strength of each of these factors, but rather evaluates them on a sliding scale, such that a powerful claim on the merits requires a lesser showing that the equities tilt in favor of the Plaintiffs, and vice versa. *See Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015). "The threshold for establishing likelihood of success is low." *Michigan v. United States Army Corps of Eng'rs*, 667 F.3d 765, 782 (7th Cir. 2011). The Seventh Circuit has said that a plaintiff must show only "that it has a better than negligible chance of success on the merits of at least one of its claims." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1096 (7th Cir. 2008) (quotations omitted).

This Court's "review of a district court's grant of a preliminary injunction is deferential. 'The question for [this Court] is whether the judge exceeded the bounds of permissible choice in the circumstances, not what we would have done if we had been in his shoes.'" *Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999) (internal citation omitted) (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 390 (7th Cir. 1984)). In reviewing the appeal of a preliminary injunction order, this Court reviews the district court's findings of fact for "clear error", its legal

conclusions "*de novo*", and the balancing factors required for a preliminary injunction for "abuse of discretion." *Id.*; *see also Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 474 (7th Cir. 2001).

ARGUMENT

I. Plaintiffs established that they are likely to prevail on their claim that SEA 516 is unconstitutional.

The district court correctly concluded that SEA 516 is likely unconstitutional because its preclusion of the transportation of smokable hemp is expressly preempted by the 2018 Farm Bill, and its attempt to alter the definition of smokable hemp is preempted because it conflicts with the intent and purpose of the 2018 Farm Bill. (*See generally*, D. 31.) Because the district court was able to reach its conclusion on the preemption claims alone, it did not address Plaintiffs' Commerce Clause claim. (*Id.*) Plaintiffs are likely to prevail on each of these three claims.

A. The 2018 Farm Bill expressly preempts the State's attempt to criminalize the transportation of smokable hemp.

SEA 516 is unconstitutional because the 2018 Farm Bill expressly preempts the State's prohibition on the transportation of smokable hemp. The Supremacy Clause of the United States Constitution gives Congress the power to preempt state law. *See generally Arizona v. United States*, 567 U.S. 387 (2012). When analyzing express preemption, the Supreme Court has stated that courts "must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress's pre-emptive intent." *Sprietsma v. Mercury Marine, a*

Div. of Brunswick Corp., 537 U.S. 51, 62-63 (2002) (quotations omitted). Here, the express preemption provision in the 2018 Farm Bill prohibiting states from interfering with the transportation of hemp is unequivocal:

> SEC. 10114. INTERSTATE COMMERCE.
>
> (a) Rule of Construction. Nothing in this title or an amendment made by this title prohibits the interstate commerce of hemp (as defined in section 297A of the Agricultural Marketing Act of 1946 (as added by section 10113)) or hemp products.
> (b) Transportation of Hemp and Hemp Products. ***No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products*** produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (as added by section 10113) through the State or the territory of the Indian Tribe, as applicable.

(D. 1-2 at 14) (emphasis added) (*see also* 7 U.S.C.A. § 1639o(1) (defining hemp broadly to include all hemp derivatives or extracts, i.e. including smokable hemp).

Despite the plain language in the 2018 Farm Bill, SEA 516 interferes with the transportation of smokable hemp by criminalizing it:

> (a) A person who:
> (1) knowingly or intentionally:
> (A) manufactures;
> (B) finances the manufacture of;
> (C) delivers;
> (D) finances the delivery of; or
> (E) possesses smokable hemp; or
> (2) possesses smokable hemp with intent to:
> (A) manufacture;
> (B) finance the manufacture of;
> (C) deliver; or
> (D) finance the delivery of smokable hemp;
>
> commits dealing in smokable hemp, a Class A misdemeanor.

Ind. Code § 35–48–4–10.1(a). By criminalizing the possession and delivery of smokable hemp (which is unquestionably a hemp "derivative" or "extract"), the

State has prohibited its transport through Indiana, in direct violation of the express preemption provision of the 2018 Farm Bill. 7 U.S.C.A. § 1639o(1). Indeed, General Counsel for the USDA has authored a memorandum on this exact issue, concluding that the 2018 Farm Bill "preempts State law to the extent such State law prohibits the interstate transportation or shipment of hemp. . . ." (USDA Memorandum Sec. II(B), D. 1-5 at 9.) Congress's intent to prevent states from blocking the transportation of hemp is undeniable, and SEA 516's attempt to do so violates the plain language of Section 10114(b) of the 2018 Farm Bill.

The State defends the constitutionality of SEA 516 on four grounds: (1) states are permitted to regulate the production of hemp, which the State argues is akin to its manufacture; (2) precluding the possession and delivery of smokable hemp does not affect the transportation of it; (3) the state regulates the possession and delivery of controlled substances, so it should be able to do the same with smokable hemp; and (4) even if the State's ban on the transportation of smokable hemp is expressly preempted, the injunction Order was too broad because it went beyond transportation. Each of the State's arguments fail.

First, the State's attempt to equate "production" with "manufacture" finds no support in SEA 516 or in common agriculture parlance. While the 2018 Farm Bill permits states to regulate the "production" of hemp, production in an agricultural setting refers to the *growing* of crops or livestock. "The General Assembly defined an agricultural operation as 'any facility used for the production of crops, livestock, poultry, livestock products, poultry products, or horticultural products or for

growing timber.'" *Lindsey v. DeGroot*, 898 N.E.2d 1251, 1257 (Ind. Ct. App. 2009) (quoting Ind. Code § 32–30–6–1 (2003)); *see also Adkins v. Silverman*, 899 F.3d 395, 399 (5th Cir. 2018) ("Congress recently amended the methodology used to calculate actual production history with the Agricultural Act of 2014, known as 'the 2014 Farm Bill.' Pub. L. No. 113-79, 128 Stat. 649. Farmers now have a right to 'elect to exclude' certain low-production years from being calculated into their actual production history."). Black's Law Dictionary (11th ed. 2019) defines "production" as "**1.** The act or process of making or growing things, esp. those to be sold <the production of consumer goods>. **2.** The amount of goods that are made or grown; esp., the tangible result of industrial or other labor <annual production> . . . ."

General Counsel for the USDA, in a detailed memorandum discussing the 2018 Farm Bill, concluded that the anti-preemption provision is limited to hemp "production," meaning the "growing of hemp:"

> It is important for the public to recognize that the 2018 Farm Bill preserves the authority of States and Indian tribes to enact and enforce laws regulating the **production** of hemp that are more stringent than Federal law. Thus, while a State or Indian tribe cannot block the shipment of hemp through the State or Tribal territory, it may continue to enforce State or Tribal laws prohibiting the **growing** of hemp in that State or Tribal territory.

(USDA Memorandum at 2, D. 1-5 at 2) (first emphasis in original, second added).

By contrast, as the State acknowledges, "manufacture" refers to the creation of a good from raw materials, which generally involves the use of machinery to fabricate a product. Thus, regulations concerning the "production" of hemp could entail limiting the acres of hemp or number of plants a farmer could grow, while the

"manufacture" of smokable hemp refers to the act of converting hemp into a smokable hemp product. The two terms are not synonymous, and the State cannot justify a prohibition on the manufacture of smokable hemp by leaning on Congress' statement that states can regulate hemp production.

Regardless, even if "production" is a proxy for "manufacture," it would make no difference to the outcome of this case. SEA 516 goes far beyond just prohibiting the "manufacture" of smokable hemp, including changing the federal definition of "hemp" by carving out smokable hemp and prohibiting all possession of hemp. Thus, the district court was entirely correct to find SEA 516 unconstitutional.

Second, the State contends that outlawing the possession and delivery of smokable hemp does not affect whether or not it can be transported in Indiana. With all due respect to the State, this contention is baffling. How can one transport smokable hemp through Indiana without possessing it? It is true, as the State contends (Br. at 23), that a person could possess smokable hemp and not be said to be transporting it, but the opposite is not true. In every case in which a person transports hemp in or through Indiana, he or she necessarily is in possession of it. Similarly, the "delivery" of smokable hemp – also prohibited by SEA 516 – also intrudes on the Congressional mandate that states not restrict the transport of hemp. Thus, the criminalization of smokable hemp possession and delivery in SEA 516 conflicts with Congress's mandate in the 2018 Farm Bill that states may not interfere with the transportation of hemp.[1]

[1] The State acknowledges the district court's analogy that a truck driver transporting smokable hemp from Ohio to Illinois would be subject to arrest if the truck entered Indiana, but claims that "[t]here is no reason to read SEA 516

The State also argues that SEA 516 is not preempted because it only applies to the *intra*state transportation of smokable hemp and not the *inter*state transportation of it. But nowhere in SEA 516 is there language drawing that distinction. Indeed, SEA 516 simply outlaws all possession of smokable hemp, regardless of where it is being transported. Criminalizing smokable hemp from the moment it enters Indiana is a *per se* restriction on interstate transportation. *See, i.e. Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 665 (1981) (Iowa statute precluding 65-foot trailers on its highways interfered with interstate commerce).

Despite the State's attempt to muddy the water, the application of the 2018 Farm Bill to SEA 516 is not confusing. The 2018 Farm Bill expressly says that states cannot prohibit the transportation of hemp or hemp products like smokable hemp. SEA 516 violates this provision by making it illegal to possess or deliver smokable hemp. Simply put, if one cannot possess smokable hemp in Indiana without facing criminal sanction, one also cannot transport it through the state. No amount of convoluted argument changes this basic concept.

Third, the State attempts to justify the ban on smokable hemp in SEA 516 because the State is allowed to regulate controlled substances in that same manner. The State even goes so far as to compare its restriction of smokable hemp to possession and an intent to distribute for dealing in controlled substances. The State's argument is the type of fearmongering that highlights their

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this way" because "[p]ossessing hemp is distinct from moving it around." (Br. at 23) Plaintiffs respectfully disagree and cannot envision an instance where someone is transporting hemp through Indiana without being in "possession" of it.

misunderstanding of Indiana and federal law. Low-THC hemp products like smokable hemp are explicitly *not* a controlled substance at the state nor federal level. The 2014 Farm Bill permits states to grow hemp. SEA 357 declares hemp an agricultural product, encourages Hoosier farmers to produce hemp through pilot programs, and removes it from the definition of marijuana. And the 2018 Farm Bill broadened the definition of hemp and permanently removed hemp from the Controlled Substances Act. These laws show the intent of Congress and the Indiana General Assembly to destigmatize hemp and instead treat it like an agricultural commodity once again. The State's attempt to associate low-THC hemp with controlled substances cannot be squared with the fact that these laws establish hemp as an agricultural commodity, not a controlled substance.

Fourth and finally, the State argues that even if the district court's conclusion that SEA 516 is unconstitutional was correct, the preliminary injunction was too broad because it applied to the manufacture, finance, delivery, and possession of smokable hemp, rather than solely to interstate transportation. (Br. at 24-26.) But the State never argued for a narrower injunction before the district court, meaning the State has waived its right to develop this argument on appeal. *See United States v. Ritz*, 721 F.3d 825, 827–28 (7th Cir. 2013) ("Because the specific theory [the appellant] now urges was never actually presented to the district court, we find it waived for purposes of this appeal."); *Williams v. Dieball*, 724 F.3d 957, 961 (7th Cir. 2013) (The Seventh Circuit has "repeatedly stated that a party may not raise an issue for the first time on appeal. Consequently, a party who fails to adequately

present an issue to the district court has waived the issue for purposes of appeal.") (Quotation omitted). From the outset Plaintiffs sought to enjoin SEA 516 in its entirety because it impermissibly targeted smokable hemp. At no time did the State argue to the district court that an injunction granting Plaintiffs' request would be too broad or that it should be tailored to address only the transport of smokable hemp. The State cannot do so now. *Id.*

Even if not waived, the States' argument that the injunction should be limited to transportation fails because (1) as discussed above, the blanket prohibition on "possession" and "delivery" of smokable hemp also violate the 2018 Farm Bill because both involve the transport of hemp, and (2) it ignores a second basis for preemption – that the State is also precluded from altering the definition of hemp, as discussed in more detail in the conflict preemption section in I.B. below. The district court's preliminary injunction Order was properly applied to SEA 516 as a whole. The State waived its right to claim otherwise on appeal, and the argument should be disregarded by this Court.

In conclusion, each of the State's express preemption arguments fail. SEA 516 is unconstitutional under the Supremacy Clause of the United States Constitution because the 2018 Farm Bill expressly preempts Indiana's prohibition on the transportation of smokable hemp.

B. Conflict preemption also compels SEA 516 to be enjoined because narrowing the definition of hemp by carving out smokable hemp violates Congressional intent in the 2018 Farm Bill.

Plaintiffs have contended from the inception of this litigation that SEA 516's attempt to narrow the definition of "hemp" by carving out and criminalizing smokable hemp conflicts with Congressional intent in the 2018 Farm Bill. The district court agreed that Plaintiffs had a likelihood of success on this very claim. (D. 31 at 9-13.) Despite the centrality of this argument in briefing below and the district court's holding, the State does not address it in its Brief.

To determine whether conflict preemption exists, a court should ask whether "the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objections of Congress." *Arizona*, 567 U.S. at 387 (quotation and citation omitted); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874 (2000). In so doing, a court should look to "the federal statute as a whole and identify its purpose and intended effects." *Id.* "Congressional intent may be construed from the language of the statute and legislative history . . . ." *Levin v. Madigan*, 692 F.3d 607, 615 (7th Cir. 2012); *see also Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1050 (7th Cir. 2013) (in conflict preemption analysis looking to language of statute and legislative history to determine congressional intent).

Here, Indiana's attempt in SEA 516 to amend – and narrow – the definition of hemp falls squarely within conflict preemption. The 2018 Farm Bill purposefully broadly defines hemp as "plant Cannabis sativa L. and any part of that plant,

including the seeds thereof ***and all derivatives, extracts***, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol [THC] concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C.A. § 1639o(1) (emphasis added). SEA 516 initially defines hemp in this same manner (*see* Ind. Code § 15-15-13-6), but it then goes on to expressly carve out smokable hemp, which is defined as:

> a product containing not more than three-tenths percent (0.3%) delta-9-tetrahydrocannabinol (THC), including precursors and derivatives of THC, in a form that allows THC to be introduced into the human body by inhalation of smoke. The term includes:
> (1) hemp bud; and
> (2) hemp flower.

Ind. Code § 35-48-1-26.6(a). The State does not dispute that hemp bud and hemp flower (i.e., smokable hemp) are derivatives and extracts of hemp that are expressly included in the definition of hemp in the 2018 Farm Bill. 7 U.S.C.A. § 1639o(1). Thus, while using the same definition initially, SEA 516 subsequently narrows the definition of hemp by prohibiting the derivatives and extracts hemp bud and hemp flower, i.e., smokable hemp.[2]

The best indication of Congressional intent is the language of the statute: "When interpreting congressional statutes, we first look at the plain language of the statute because that is the best way to determine congressional intent." *O'Kane v. Apfel*, 224 F.3d 686, 688 (7th Cir. 2000). Here, the Court need not look any further than the text of the 2018 Farm Bill for evidence of Congressional intent to include

[2] During oral argument before the district court, Judge Barker and counsel discussed the analogy that this case is like Congress enacting a law declaring that farmers may sell beef, including all extracts and derivatives of a cow, and then the Indiana legislature passing legislation to criminalize the sale of steak. The State statute would be in direct conflict with the federal statute because beef encompasses steak.

hemp bud and hemp flower within hemp's broad definition. Congress included "all derivatives [and] extracts" of hemp in the definition of hemp (7 U.S.C.A. § 1639o(1)), and the Court is to presume this language was purposeful. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) (The Supreme Court "ha[s] stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (Quotation omitted).

Further, Congress's intent is clearly stated in the legislative history for the bill. The Conference Report for the 2018 Farm Bill provides that states:

> In Sec. 297B, the Managers intend to authorize states and tribal governments to submit a state plan to the Secretary for approval to have primary regulatory authority over the growing and production of hemp. The Managers do not intend to limit what states and tribal governments include in their state or tribal plan, as long as it is consistent with this subtitle. For example, states and tribal governments are authorized to put more restrictive parameters on the production of hemp, ***but are not authorized to alter the definition of hemp*** or put in place policies that are less restrictive than this title.

(Conference Report for Agricultural Improvement Act of 2018, p. 738, D. 1-3 at 2) (emphasis added). *See Geier*, 529 U.S. at 874 (looking to comments of the federal act in question and its legislative history to determine the purpose and intent of the act). Because it was Congress's intent to prohibit states from altering the definition of hemp, and because SEA 516 narrows the definition of hemp by carving out smokable hemp and criminalizing it, the portions of SEA 516 relating to smokable hemp are preempted by federal law.

Additionally, Indiana's attempt to criminalize smokable hemp conflicts with Congressional intent to treat hemp like a regulated agricultural commodity rather

than a controlled substance. There is ample evidence that Congress feels strongly about legalizing low-THC hemp and its derivatives. Nearly six years ago, the 2014 Farm Bill legalized "industrial hemp" and permitted farmers to grow hemp in the United States. In 2015, Congress included language in Section 763 of the Consolidated Appropriations Act of 2016, an omnibus spending bill, stating that no federal money could be spent "to prohibit the transportation, processing, sale, or use of industrial hemp that is grown or cultivated in accordance with [the 2014 Farm Bill]." This same language was repeated in the 2017 spending bill, and slightly expanded language was used in the 2018 spending bill. *See United States v. Mallory*, 372 F. Supp. 3d 377, 382 (S.D.W. Va. 2019). Then, in 2018, Congress passed the 2018 Farm Bill, which expanded the definition of hemp and removed the qualifier "industrial" when referring to hemp. In the 2018 Farm Bill, Congress evinced its intent to treat hemp like any other regulated agricultural commodity by removing low-THC hemp products from a list of controlled substances, permitting farmers to obtain crop insurance for hemp, and boosting hemp research, among other things.

Congress's intent to normalize all hemp products and encourage its production by farmers is further evidenced by statements from the sponsors of the 2018 Farm Bill. Senator Mitch McConnell, one of the authors of the 2014 Farm Bill and 2018 Farm Bill, tweeted on April 12, 2018:

> It's time the federal gov changes the way it looks at #hemp, which is why Senator @RonWyden and I, along with @SenJeffMerkley, are introducing legislation that will modernize federal law in this area & empower American farmers to explore this promising new market.

https://twitter.com/SenateMajLdr/status/984442796798087170. Senator Wyden, who also authored the 2018 Farm Bill, concurred in a press release dated December 11, 2018:

> "For too long, the outrageous and outdated ban on growing hemp has hamstrung farmers in Oregon and across the country," Wyden said. "Hemp products are made in America, sold in America, and consumed in America. Now, hemp will be able to be legally *grown* in America, to the economic benefit of consumers and farmers in Oregon and nationwide."

(https://www.wyden.senate.gov/news/press-releases/wyden-statement-on-hemp-legalization) (emphasis original).

The federal government's intent in the 2014 and 2018 Farm Bills was to legalize and destigmatize low-THC hemp (including all derivatives such as smokable hemp) so that farmers could utilize it as a crop. The State's attempt in SEA 516 to nevertheless criminalize the manufacture, financing, delivery, or possession of hemp derivatives that the federal government legalized contradicts this federal intent. There *is* a substantial federal interest in legalizing all low-THC hemp products and derivatives, and the State's restriction on that federal interest conflicts with both the plain language of the 2018 Farm Bill and statements demonstrating Congressional intent. The portions of SEA 516 relating to smokable hemp are preempted by federal law.

Tellingly, the State does not address this conflict preemption argument at all. Instead, the State devotes several pages to a defense of states' ability to regulate hemp "production" and the long-standing ability of states to regulate cannabis,

which the State contends was left undisturbed by the 2018 Farm Bill. (Br. at 27-31) But these arguments ignore the plain language of Congress, both in the 2018 Farm Bill and the legislative history associated with it. To be sure, states can regulate the "production" of hemp pursuant to 7 U.S.C. § 1639p(a)(3)(A) (i.e., licensing requirements, how many acres of hemp can be grown, what types of seeds can be used, etc.), but SEA 516 goes far beyond that by criminalizing all manufacture, financing, delivery, or possession of smokable hemp. And while marijuana remains a controlled substance at the federal level and in a handful of states, SEA 516 has nothing to do with such regulation because low-THC hemp is explicitly not a controlled substance at the federal level or under Indiana law. *See* 2018 Farm Bill, Section 12619 (removing hemp from Controlled Substances Act), D. 1-2 at 19; *see also* Ind. Code § 35-48-1-19(b) (removing hemp from the definition of marijuana).

The State argues that it must have been Congress's intent to allow states to ban smokable hemp because a 2018 report by the Congressional Research Service did not reference smokable hemp as an industrial use for hemp. (Br. at 29.) First, it is not clear that this research paper is sufficiently authoritative to indicate legislative intent, but regardless, the State is incorrect. The paper does discuss smokable hemp by referring to hemp flower. (Hemp as an Agricultural Commodity, D. 23-1 at 25, 31.) But more importantly, after this paper was published, the 2018 Farm Bill removed the qualifier "industrial" when referring to hemp, and it broadened the definition of hemp to include all derivatives and extracts of hemp (i.e., hemp bud and hemp flower that comprises smokable hemp). 7 U.S.C.A. § 1639o(1). The

research paper the State cites is outdated in that it predates the 2018 Farm Bill in which Congress demonstrated its intent to control the definition of hemp.

Finally, as with express preemption, the State argues that the district court erred by striking down all of SEA 516 that related to smokable hemp instead of narrowly tailoring the injunction to transportation. (Br. at 30-31.) As discussed above, the State never argued for a narrower injunction so it is waived. *Ritz*, 721 F.3d at 827–28; *Williams*, 724 F.3d at 961. Moreover, SEA 516 prohibits the possession and delivery of smokable hemp, which violates the express statement in the 2018 Farm Bill that states may not prohibit the transportation of hemp. The district court did not err by enjoining all aspects of SEA 516 that relate to smokable hemp given the breadth of the language in the state statute.

In summary, the 2018 Farm Bill states that "[n]o State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products" and prohibits states from changing the definition of hemp. (Section 10114; Conference Report for Agricultural Improvement Act of 2018, p. 738, D. 1-3 at 2.) SEA 516 does *both*. Consequently, the district court was correct to conclude that, at a minimum, Plaintiffs have a "better than negligible chance" of demonstrating that SEA 516 is unconstitutional under the doctrines of express preemption and conflict preemption. *Girl Scouts of Manitou Council*, 549 F.3d at 1096.

C. Criminalizing the transportation of smokable hemp is an impermissible restriction on interstate commerce in violation of the Commerce Clause.

By way of criminalizing the mere possession of smokable hemp, the State has precluded any carrier attempting to transport smokable hemp from traveling through Indiana. As such, SEA 516 impermissibly restricts interstate commerce in violation of the Commerce Clause of the United States Constitution.

The Commerce Clause grants Congress the power to regulate commerce among the States. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978). The Supreme Court of the United States recognizes that "the 'negative' or 'dormant' aspect of the Commerce Clause prohibits States from advancing their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state." *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat. Res.*, 504 U.S. 353, 359 (1992) (quotations omitted). Despite this clear principle, SEA 516 seeks to "curtail[] the movement of [smokable hemp] either into or out of the state" of Indiana. *Id.* Because SEA 516 attempts to preclude the interstate transport of smokable hemp – a product declared legal and authorized for interstate trade among the states by the 2018 Farm Bill – SEA 516 is unconstitutional under the Commerce Clause.

The State raises three incorrect arguments in support of their belief that SEA 516 does not violate the Commerce Clause. ***First***, the State claims that SEA 516 only applies to *intra*state travel and not *inter*state travel, and thus is not subject to the Commerce Clause at all. As addressed above, there is absolutely nothing in the

text of SEA 516 that limits its application to intrastate commerce. To the contrary, SEA 516 plainly states that any "delivery" or "possession" of smokable hemp in the State of Indiana is a criminal act. Ind. Code § 35–48–4–10.1(a). Possession equals arrest regardless of whether it is intrastate or interstate transportation. Therefore, SEA 516 prohibits the interstate transportation of hemp and violates the Commerce Clause.

In *City of Philadelphia v. New Jersey*, 437 U.S. 617, 619 (1978), a New Jersey statute forbid waste which originated outside of the state from entering New Jersey. The plaintiffs (who were a series of private landfill operators who relied upon outside waste to generate revenue) sought an injunction declaring the statute unconstitutional under the Commerce Clause. *Id.* The Supreme Court of the United States concluded that by banning waste from entering New Jersey, the statute unconstitutionally impeded interstate commerce in violation of the Commerce Clause. *Id.* at 629. *See also Pittston Warehouse Corp. v. City of Rochester*, 528 F. Supp. 653, 664 (W.D.N.Y. 1981) (concluding city ordinances that banned roll-on/roll-off trailer ship cargo were "unconstitutional and invalid insofar as they impede or obstruct the free flow of interstate and international commerce by virtue of the commerce clause"). Similarly, SEA 516 criminalizes smokable hemp the moment it enters Indiana, which would prevent the transport of smokable hemp through the state in violation of the Commerce Clause.

Second, the State contends that SEA 516 does not violate the Commerce Clause because the Commerce Clause only pertains to state laws that discriminate against

out of state commerce, which SEA 516 does not do. While that is certainly one way to violate the Commerce Clause, it is not the only way. The Commerce Clause also precludes state laws that impose a substantial burden on interstate commerce. As the Supreme Court has stated:

> That the ordinance does not discriminate against interstate commerce does not, however, end the Commerce Clause inquiry. Even a nondiscriminatory regulation may nonetheless impose an excessive burden on interstate trade when considered in relation to the local benefits conferred. See *Brown–Forman Distillers,* 476 U.S., at 579, 106 S.Ct., at 2084. Indeed, we have long recognized that a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to ... the people of the State enacting such statute.

C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 405 (1994) (quotation omitted). Here, SEA 516 precludes smokable hemp from ever entering the state. Such a ban is a burden on interstate commerce.

For example, in *Kassel v. Consol. Freightways Corp. of Delaware*, Iowa enacted a law that precluded trucks from pulling 65-foot trailers on its highways. 450 U.S. at 665. A trucking company filed suit challenging the law as a violation of the Commerce Clause due to the substantial burden, and additional cost, imposed on trucking companies. *Id.* While reviewing Commerce Clause jurisprudence, the Supreme Court stated:

> The Clause requires that some aspects of trade generally must remain free from interference by the States. When a State ventures excessively into the regulation of these aspects of commerce, it "trespasses upon national interests," *Great A & P Tea Co. v. Cottrell*, 424 U.S. 366, 373, 96 S.Ct. 923, 928, 47 L.Ed.2d 55 (1976), and the courts will hold the state regulation invalid under the Clause alone.

Id. at 669. The Court struck down the law as a violation of the Commerce Clause because it "substantially burdens the interstate flow of goods by truck." *Id.* at 671.

Federal district courts have reached similar conclusions. *See, e.g., Funtana Vill., Inc. v. City of Panama City Beach*, No. 5:15CV282-MW/GRJ, 2016 WL 7638470, at *3 (N.D. Fla. Jan. 19, 2016) ("[A] nondiscriminatory law may still violate the Dormant Commerce Clause if it imposes an excessive burden on interstate commerce."); *De Jesus v. Am. Airlines, Inc.*, 532 F. Supp. 2d 345, 351 (D.P.R. 2007) (holding that regulations on airline advertising was a violation of the Commerce Clause and was preempted without relying upon economic protectionism or discrimination). Holding state or local laws invalid that unduly intrude on interstate commerce has been the law for nearly two centuries:

> Since *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat 1, 6 L.Ed. 23 (1824), the Supreme Court has consistently held invalid state and local laws which substantially impede the free flow of interstate commerce under the commerce clause. … The nation's interest in the free flow of commerce must remain paramount; it must not be burdened by parochial local legislation which seeks to halt commerce and thereby unilaterally redefine a city [or State] as an independent economic unit, separate and apart from federal polity.

Pittston Warehouse Corp., 528 F. Supp. at 660. Thus, the Commerce Clause applies to laws such as SEA 516 that impose a substantial burden on interstate commerce.

Given the expanding nature of the hemp market, ensuring it can be transported through states like Indiana is more important now than ever. The entire hemp CBD industry is expected to exceed $20 billion by 2022. (D. 27-3.) The smokable hemp market alone is projected to grow to $70.6 million in 2019 according to the Brightfield Group, a research and consulting firm who analyzes hemp markets. (D.

27-4.) Indiana – the "crossroads of America" – is not permitted to stem the flow of interstate commerce involving hemp derivatives like smokable hemp by criminalizing its possession or delivery. Like in *Kassel*, those transporting hemp bud or hemp flower, or any other smokable hemp, would have to route around Indiana due to the risk of arrest by transporting the products through the state. 450 U.S. at 671. Such a burden on interstate commerce of a good declared legal by the federal government violates the Commerce Clause. *Id.* Plaintiffs are likely to prevail on the merits of their claims.

II. The remaining factors required for a preliminary injunction weigh in Plaintiffs' favor.

In addition to showing the likelihood of success on at least one of their claims, in order to obtain a preliminary injunction Plaintiffs must also establish that: (1) they are likely to suffer irreparable harm in the absence of preliminary relief; (2) the balance of equities favors the plaintiffs; and (3) an injunction would serve the public interest. *Winter*, 555 U.S. 7, 20 (2008).[3] These remaining balancing factors are reviewed for "abuse of discretion." *Anderson*, 274 F.3d at 474.

A. The district court correctly found that Plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief.

To preclude a grant of equitable relief, "an available remedy at law must be plain, clear and certain, prompt or speedy, sufficient, full and complete, practical, efficient to the attainment of the ends of justice, and final." *Interstate Cigar Co. v. United States*, 928 F.2d 221, 223 (7th Cir. 1991) (quotation omitted). Here,

[3] The State did not address the first two of these factors in its Brief, but Plaintiffs will nonetheless briefly address them.

Plaintiffs will suffer irreparable harm in the absence of preliminary relief because they have no other adequate remedy at law. No such "plain, clear, [or] certain" avenue for recovery exists for Plaintiffs outside of seeking injunctive relief. *Id.* SEA 516 and/or the 2018 Farm Bill do not provide for a specific remedy when a state statute is challenged as unconstitutional. An injunction is the proper remedy when challenging the constitutionality of a state statute. *See, e.g. Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544, 545 (7th Cir. 2007) (seeking injunctive relief when challenging constitutionality of state statute).

As businesses operating in the quickly expanding hemp market, Plaintiffs will suffer further irreparable harm in the form of financial distress if this preliminary injunction is not affirmed. The projections show that the smokable hemp market nationally grew to $70.6 million in 2019, up from $11.7 million in 2018. (D. 27-4.) That represents a 603% increase in one year, to say nothing of 2020 and beyond. The prohibition on smokable hemp, including derivatives like hemp bud and hemp flower (which are the most profitable part of the hemp plant for a CBD farmer), would have a substantial adverse effect on farmers, wholesalers, and retailers, including Plaintiffs. The hemp industry, including smokable hemp, is new to Indiana, and Plaintiffs have no historical sales to use as a baseline for calculating lost revenues due to SEA 516 (which just became operative July 1, 2019). Where damages are unknown and cannot be calculated reliably, there is no adequate remedy at law. *See Promatek Indus., Ltd. v. Equitrac Corp.,* 300 F.3d 808, 813 (7th Cir.2002) (concluding that the plaintiff lacked an adequate remedy at law "[b]ecause

of the difficulty in assessing the damages associated with a loss of goodwill"); *Lawson Prods., Inc. v. Avnet, Inc.,* 782 F.2d 1429, 1440 (7th Cir. 1986) (noting that "the difficulty in calculating future profits can often justify the finding of an irreparable injury with no adequate remedy at law").

Further, Plaintiffs face the irreparable harm of criminal sanctions while this unconstitutional statute remains effective. *See Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (holding that likelihood of irreparable harm established by "demonstrat[ing] a credible threat of prosecution under the statute"). In fact, a misdemeanor drug conviction for smokable hemp would prevent any Plaintiff from obtaining a license to grow or handle legal hemp in Indiana. Ind. Code 15-15-13-7(c)(5)). The district court did not abuse its discretion in concluding that without this preliminary injunction, Plaintiffs will suffer irreparable harm.

B. The balance of equities weighs in Plaintiffs' favor.

"In balancing the harms, the court must weigh the error of denying a preliminary injunction to the party who would win the case on the merits against the error of granting an injunction to the party who would lose." *Foodcomm Int'l v. Barry*, 328 F.3d 300, 305 (7th Cir. 2003). The Court can also consider the potential harm to interested third parties. *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994).

Here, the balancing of the equitable harms weighs in favor of Plaintiffs. If the Court does not affirm this preliminary injunction, Plaintiffs' businesses will face financial harm by no longer being able to sell, finance, or deliver smokable hemp – a

derivative of hemp that the federal government has declared legal. Further, without this injunction, Plaintiffs must face this harm or be subject to criminal prosecution and the loss of their business licenses to handle hemp. In contrast, if the Court affirms the preliminary injunction, the State will suffer no harm. It would merely preclude the State from enforcing a statute that violates the 2018 Farm Bill and United States Constitution. "[U]nder Seventh Circuit precedent 'there can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute . . . .'" *Annex Books, Inc. v. City of Indianapolis*, 673 F. Supp. 2d 750, 757 (S.D. Ind. 2009), aff'd sub nom. *Annex Books, Inc. v. City of Indianapolis*, Ind., 624 F.3d 368 (7th Cir. 2010) (quoting *Joelner v. Village of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004)). The district court did not abuse its discretion in holding that the balancing of equities weighs in Plaintiffs' favor.

C. A preliminary injunction serves the public interest.

Protecting Indiana citizens from unconstitutional laws is a *per se* public interest. "[U]nder Seventh Circuit precedent . . . 'it is always in the public interest to protect [Constitutional] liberties.'" *Annex Books, Inc.*, 673 F. Supp. 2d at 757, aff'd sub nom. *Annex Books, Inc.*, Ind., 624 F.3d 368, (quoting *Joelner*, 378 F.3d at 620). This injunction further serves the public's interest because without it, the 2018 Farm Bill's goal of allowing states to enjoy low-THC hemp as a profitable agricultural commodity would be undermined. This injunction allows the Indiana public to

purchase, transport, or sell hemp products that federal law gives them the right to access.

The State claims that the public interest is not served because it is difficult for Indiana police officers to distinguish between legal smokable hemp and illegal marijuana by sight and smell alone. But Indiana has already addressed the concerns of law enforcement in other legislation by providing funding for the State Police to purchase the proper THC testing equipment and by substantially enhancing penalties for passing off illegal drugs as a low THC hemp product.

- House Enrolled Act 1001 appropriates $300,000 in fiscal year 2020 to the Indiana State Police for THC testing equipment to help distinguish between legal hemp products and marijuana by determining the levels of THC. (D. 27-5.)
- Indiana Code § 6-2.5-8-7(k) permits the Indiana Department of Revenue to suspend the retail license for one year if someone violates Indiana Code § 35-48-4-10(d)(3) (imposing a level 5 felony on a retailer who knowingly sells marijuana, hash oil, hashish, or salvia that is packaged as low THC hemp extract). Thus, the penalty for a retailer (which most Plaintiffs are) for disguising marijuana as low-THC hemp is severe.
- Indiana Code § 35-48-4-11(b)(2) provides an enhanced punishment (class A misdemeanor) for anyone who is convicted of knowingly possessing marijuana, hash oil, hashish, or salvia that is packaged in a manner that appears to be low-THC hemp extract.

Indiana lawmakers have heard the concerns of law enforcement and addressed them by supplying additional money for proper THC testing equipment and punishing offenders who attempt to exploit the difficulty of distinguishing between hemp and marijuana with the naked eye. Indiana's decision to outlaw smokable hemp – and disregard the definition of hemp in the 2018 Farm Bill – is an unconstitutional overreaction to the challenge facing law enforcement. Notably, the State can only cite to two other states who have adopted similar smokable hemp bans (and one – North Carolina) that is apparently considering it. (Br. at 34-35.) This suggests that the vast majority of states have figured out how to distinguish between low-THC hemp and marijuana. Additional dollars for proper testing equipment, additional training, and stiffer penalties for violators are all appropriate legislative responses that avoid a conflict with federal law.

To be clear, even if the State's law enforcement concerns were legitimate and even if Indiana had not been able to address those concerns through other legislation, it would not preclude the entry of an injunction. Given that Plaintiffs have established a likelihood of success on the merits, the Court must balance any potential harm to the State and the public on a "sliding scale" that strongly favors injunctive relief. *Turnell* 796 F.3d at 662. Indeed, it is always in the public interest to strike down unconstitutional laws. *Annex Books, Inc.*, 673 F. Supp. 2d at 757, aff'd sub nom. *Annex Books, Inc.*, Ind., 624 F.3d 368, (quoting *Joelner*, 378 F.3d at 620). State police powers must yield to conflicting federal law.

Finally, it is worth noting that the entire purpose of the 2014 and 2018 Farm Bills was to expand the availability of low-THC hemp as a crop for farmers by removing it from a list of illegal substances and to open up new applications for it use. The federal government is doing away with antiquated notions that low-THC hemp is akin to marijuana and should be off limits to struggling farmers. There is no psychoactive effect of low-THC hemp, meaning that there is no reason to speak of hemp in the same sentence as marijuana or list it as a controlled substance. The purpose of the 2018 Farm Bill to destigmatize hemp and open up a new crop for farmers is undermined by SEA 516, which criminalizes all those in the public – from farmers to retailers – who wish to legally sell low-THC hemp in the form of smokable hemp. The State's concern about distinguishing between hemp and marijuana, no matter how well meaning, does not justify the passage of an unconstitutional statute. *See Planned Parenthood of Ind. and Ky. v. Comm'r of Ind. State Dep't of Health*, 984 F. Supp. 2d 912, 931 (S.D. Ind. 2013) (recognizing that the public "do[es] not have an interest in the enforcement of a statute that . . . [the plaintiff] has shown likely violates the [Constitution].").

The district court's ruling that the preliminary injunction serves the public's best interest was not an abuse of discretion.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court affirm the district court's Order granting Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted,

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WORD COUNT CERTIFICATE

The undersigned furnishes the following in compliance with Federal Rule of Appellate Procedure 32(a)(7):

I hereby certify that this Brief conforms to the rules contained in Federal Rule of Appellate Procedure 32(a)(7) and Circuit Rule 32 for a brief produced with a Century style proportionally-spaced font in 12 point type. The length of this Brief is 9,783 words. This word count was calculated by Microsoft® Office Word 2010 and according to Rule 32(a)(7) does not include the Cover, Disclosure Statement, Table of Contents, Table of Authorities, Signature Block, Certificate of Service, and this Word Count Certificate. This word count does include headings, footings, and quotations but does not include embedded images.

I affirm under the penalties for perjury that the foregoing statements are true and correct as calculated by the word count of the word processor used to prepare this brief.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25, I certify that on January 21, 2020, a copy of the "Brief of Plaintiffs-Appellees" was electronically filed and was served electronically on all registered counsel through the Court's EM/ECF system.

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