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.

On Appeal from the United States District Court
for the Southern District of Indiana, No. 1:19-cv-02659-SEB,
The Honorable Sarah Evans Barker, Judge

BRIEF AND REQUIRED SHORT APPENDIX OF APPELLANTS GOVERNOR ERIC HOLCOMB AND THE STATE OF INDIANA

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JURISDICTIONAL STATEMENT

On June 28, 2019, the plaintiffs—C.Y. Wholesale, Inc., CBD Store of Fort Wayne, LLC, Indiana CBD Wellness Inc., Indy E Cigs LLC, 5 Star Medicinal Products, LLP, DREEM Nutrition, Inc., Midwest Hemp Council, Inc.*, and El Anar, LLC (collectively, C.Y. Wholesale)—filed a complaint against Governor Eric Holcomb and the State of Indiana (collectively, the State) alleging that Indiana's criminal prohibition of the manufacture, delivery, or possession of smokable hemp, *see* Ind. Code § 35-48-4-10.1, is preempted by the federal Agriculture Improvement Act of 2018 and barred by the Commerce Clause of the United States Constitution. ECF 1. Because these claims arise under federal law, the district court had jurisdiction over this case under 28 U.S.C. § 1331.

The same day it filed its complaint, C.Y. Wholesale moved for a preliminary injunction against enforcement of the State's prohibition of smokable hemp. ECF 3. On September 13, 2019, the district court granted the motion, issuing an order providing that "Defendants are hereby PRELIMINARILY ENJOINED until further order of this Court from enforcing the portions of [Indiana law] 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)." Short App. at 17. On October 15, 2019, the State timely filed a Notice of Appeal of the district court's preliminary injunction order. This Court has jurisdiction over this appeal of an interlocutory order granting an injunction under 28 U.S.C. § 1292(a)(1).

* The State notes that Midwest Hemp Council, Inc. has filed an unopposed motion to be removed as an appellee.

RESPONSE TO THE COURT'S ORDER OF NOVEMBER 1, 2019

Notably, in granting C.Y. Wholesale's preliminary injunction motion the district court did not issue a second document—apart from the opinion explaining its reasoning—that separately issued a preliminary injunction against the State. It therefore did not comply with the rule "requir[ing] that an injunction must be embodied in a standalone separate document." *Auto Driveaway Franchise Sys., LLC v. Auto Driveaway Richmond, LLC*, 928 F.3d 670, 676 (7th Cir. 2019) (citing *BankDirect Capital Finance, LLC v. Capital Premium Financing, Inc.*, 912 F.3d 1054, 1057 (7th Cir. 2019)) *see also MillerCoors LLC v. Anheuser-Busch Companies, LLC*, 940 F.3d 922, 922–23 (7th Cir. 2019) (per curiam). Accordingly, on October 17, 2019, this Court directed the parties to file "a brief memorandum addressing what consequences, if any, flow from this noncompliance." After receiving the parties' memoranda—which agreed that this Court has jurisdiction over the appeal—this Court issued an order on November 1, 2019 instructing the parties to "fully address in their respective briefs the issue identified in the court's order of October 17, 2019, the district court's failure to issue a separate, stand-alone injunction."

In compliance with this latter order, the State hereby explains why the district court's failure to issue a standalone injunction is of no practical consequence. As a jurisdictional matter, the district court's oversight does not undermine this Court's power to hear this appeal. And as a prudential matter, interests of judicial economy weigh heavily against remanding the case for entry of a separate document and then restarting the appellate process.

As to jurisdiction, as the State explained in the jurisdictional memorandum it filed in response to the Court's October 17 order, "the district court's intent to afford enforceable equitable relief is sufficiently clear to provide appellate jurisdiction despite the noncompliance" with the separate-document rule. *MillerCoors*, 940 F.3d at 923. This Court has grounded the separate-document rule in Federal Rules of Civil Procedure 65(d)(1)(C) and 58, and neither of these Rules make noncompliance fatal to appellate jurisdiction: As long as the order purporting to issue the injunction specifies what conduct is forbidden or required, the order can be reviewed on appeal. *See Auto Driveaway*, 928 F.3d at 677 (discussing Rule 65(d)(1)(C)); *Calumet River Fleeting, Inc. v. Int'l Union of Operating Engineers, Local 150*, 824 F.3d 645, 650 (7th Cir. 2016) (discussing Rule 58).

Take first Rule 65(d)(1)(C), which provides that "[e]very order granting an injunction" must "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." This Court has held that because "[l]anguage in an opinion does not comply" with this requirement, Rule 65(d)(1)(C) requires the district court to issue a separate document apart from the opinion specifying the terms of the injunction. *BankDirect*, 912 F.3d at 1057; *see also Auto Driveaway*, 928 F.3d at 676 ("We interpret Rule 65(d)(1)(C) to require that an injunction must be embodied in a standalone separate document."). And this Court has consistently held that noncompliance with Rule 65(d)(1)(C) does not destroy jurisdiction. In *BankDirect*, for example, the Court held that while the district judge failed to comply with the separate-document requirement, because she had "entered

a written order that she expected [the appellant] to obey," the Court had appellate jurisdiction to review the order. 912 F.3d at 1058; *see id.* at 1058–59 (observing that in *Schmidt v. Lessard*, 414 U.S. 473 (1974), the Supreme Court reversed an injunction that violated Rule 65(d)(1)(B), which "implies that at least some violations of Rule 65(d) do not defeat appellate jurisdiction"). And this Court has continued to reiterate that a district court's failure to comply with Rule 65(d)(1)(C)'s separate-document requirement does not undermine appellate jurisdiction. *See MillerCoors*, 940 F.3d at 923 (concluding that "the district court's intent to afford enforceable equitable relief [was] sufficiently clear to provide appellate jurisdiction despite the noncompliance with Rule 65(d)"); *Auto Driveaway*, 928 F.3d at 677 ("The Supreme Court has confirmed that compliance with Rule 65 and appellate jurisdiction are two different things, and that what matters for jurisdiction is the practical effect of the order.").

This Court's decisions addressing Rule 58 are similar. This Court has also found a separate-document requirement in this Rule, which provides that "[e]very judgment"—except orders disposing of motions under Rules 50(b), 52(b), 54, 59, or 60—"must be set out in a separate document." Fed. R. Civ. P. 58. It has applied Rule 58's separate-document requirement to injunctions on the ground that "[a] judicial opinion is not itself an order to act or desist; it is a statement of reasons supporting the judgment. The command comes in the separate document entered under Fed. R. Civ. P. 58, which alone is enforceable." *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 527 (7th Cir. 1988). This Court is not the only Circuit Court to do so. *See Chief Freight Lines Co. v. Local Union No. 886*, 514 F.2d 572, 578 n.6 (10th Cir. 1975) ("A

preliminary injunction is a 'judgment' that must be reduced to a written instrument under Rule 58.") (cited in *MillerCoors*, 940 F.3d at 923); *Beukema's Petroleum Co. v. Admiral Petroleum Co.*, 613 F.2d 626, 627 (6th Cir. 1979) ("[T]he express provisions of Rule 58 for entry of judgment on a separate document applies not only to final judgments in the ordinary sense but also to preliminary injunctions.").

And as with Rule 65, "violations of Rule 58 are not jurisdictional." *Metzl v. Leininger*, 57 F.3d 618, 619 (7th Cir. 1995). The Supreme Court itself has held 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) (per curiam), and Federal Rule of Appellate Procedure 4(a)(7)(B)—added in 2002—expressly provides that "[a] 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." *See also* Fed. R. App. P. 4 advisory committee's notes ("New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether to waive the requirement that the judgment or order be set forth on a separate document is the appellant's alone.").

This Court has thus consistently held that "the district court's failure to enter a separate Rule 58 judgment is not always decisive," and that it will retain jurisdiction if it is clear that the district court has in fact issued a judgment. *Calumet River Fleeting*, 824 F.3d at 650; *see also Wisconsin Cent. Ltd. v. TiEnergy, LLC*, 894 F.3d 851, 854 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 918 (2019) ("[A] district court's

failure to comply with the formal requirement is not fatal to our jurisdiction if the district court has otherwise indicated its intent to finally dispose of all claims.").

In sum, under both Rule 65(d)(1)(C) and Rule 58, the Court has appellate jurisdiction over an order purporting to issue an injunction—even if no separate document has been issued—so long as the order under review "had the practical effect of an injunction on the parties." *Auto Driveaway*, 928 F.3d at 678. And there can be no doubt that the district court's order here practically operates as an injunction. It quite clearly provides that the State is "PRELIMINARILY ENJOINED until further order of this Court from enforcing the portions of [Senate Enrolled Act] 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)." Short App. at 17. The State thus understands what it is prohibited from doing and considers itself bound by the order. "This is ample for purposes of appellate jurisdiction; there is thus no need to remand this case to cure the Rule 65(d) defect." *Auto Driveaway*, 928 F.3d at 679.

The only remaining question raised by the district court's failure to issue a standalone preliminary injunction is therefore whether prudential concerns counsel in favor of "order[ing] a limited remand with instructions to enter the injunction on a document separate from the opinions." *MillerCoors*, 940 F.3d at 923. They do not. Where, as here, the scope of the district court's injunction is clear, there is no need to remand back to the district court. Unlike in *MillerCoors*—where this Court remanded to permit the district court both to issue the injunction on a separate document and

"to avoid the potential jurisdictional problems that its modifications of the initial order . . . created"—the *only* purpose of remand here would be to allow the district court to copy the last page or two of its order to a separate document. Such a remand would do nothing to further the purposes of the separate-document requirement, which is to protect the enjoined party and facilitate appellate review by ensuring that "the precise scope of the injunction will be clear." *City of Chicago v. Sessions*, No. 17-2991, 2018 WL 4268814, at *2 (7th Cir. Aug. 10, 2018) (en banc).

Far from furthering these purposes, remanding here would undermine them: "If the appellant chooses to bring an appeal without waiting for the judgment or order to be set forth on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay." Fed. R. App. P. 4 advisory committee's notes; *see also BankDirect*, 912 F.3d at 1058 (noting that it only injures the appellant to hold that the appellant cannot "even obtain appellate review of an order that the district court sees as a long-term injunction"). Accordingly, the State respectfully requests that the Court retain jurisdiction of this case and proceed to review the merits of the district court's preliminary injunction decision.

STATEMENT OF THE ISSUE

May Indiana, consistent with the Farm Bill and the Commerce Clause, prohibit the manufacture, delivery, and possession of smokable hemp?

INTRODUCTION AND STATEMENT OF THE CASE

Even as they continue to combat illicit marijuana trafficking, federal and state governments have recently sought to encourage production of industrial hemp—which is also derived from the cannabis plant and which is distinguished by its lower concentration of psychoactive chemicals. As part of these efforts, in 2018 Congress passed a law that relaxes federal restrictions on industrial hemp and provides for a regulatory regime that contemplates a major role for state regulation: The law provides that a State "desiring to have primary regulatory authority over the production of hemp in the State" may submit a plan for federal-government approval and further provides that this cooperative state-federal framework does not preempt state laws that regulate hemp production in a manner "more stringent" than federal law. 7 U.S.C. § 1639p. The law's sole preemption provision merely bars States from prohibiting "the transportation . . . of hemp . . . through the State." *Id.* § 1639*o* note.

Indiana's General Assembly responded by passing the law at issue here, which—in addition to providing for the development of Indiana's industrial hemp industry—prohibits the possession, manufacture, and delivery of *smokable* hemp. Ind. Code § 35-48-4-10.1. This prohibition provides important assistance to the enforcement of the State's longstanding marijuana laws, but C.Y. Wholesale argues this federal statute and the Commerce Clause bar the State from enforcing it.

They do not. The federal statute preempts only those state laws that prohibit interstate transportation of hemp, and the Commerce Clause precludes only those that discriminate against out-of-state products. Indiana's law does neither.

The district court, however, concluded that Indiana's law could be construed to prohibit interstate transportation in *some* of its applications, and for that reason it preliminarily enjoined enforcement of the prohibition in *all* its applications. But this decision goes far beyond the bounds of what federal law authorizes: Because the *only* thing the statute preempts is state prohibition of interstate hemp transportation, the injunction should have gone no further than preventing the State from applying its law to interstate transportation—something, in light of its view of the meaning of Indiana law, the State has no desire to do. Because it is both overbroad and based on a misreading of federal and state law, the district court's order should be reversed.

I. Statutory Background

Cannabis sativa is a versatile plant: It can be used to produce both a powerful psychotropic drug and a variety of ordinary commercial products, "including foods and beverages, personal care products, nutritional supplements, fabrics and textiles, paper, construction materials, and other manufactured goods." ECF 23-1, Congressional Research Service Report RL32725, *Hemp As an Agricultural Commodity* (Jun. 22, 2018) at 2.

The distinction between these two uses of cannabis—as a dangerous recreational drug on the one hand and as a source of useful industrial products on the other—has long been a feature of American law, at both the state and federal level, though exactly how that distinction is drawn has varied from time to time and from place to place. Between 1914 and 1933, for example, 33 States adopted laws that provided that farmers could grow cannabis only for medicinal and industrial fiber

purposes. *See* Richard J. Bonnie and Charles H. Whitebread, *The Marihuana Conviction: A History of Marihuana Prohibition in the United States* (1974) at 51. And in 1937 Congress passed the Marihuana Tax Act, the first federal law regulating cannabis, which required anyone dealing in certain parts of the cannabis plant to register with and obtain a tax stamp from the federal government. *See* Pub. L. 75-238, 50 Stat. 551.

More recently, state and federal policymakers have revisited their cannabis regulations in order to determine how to facilitate a domestic market for cannabis as an agricultural and industrial commodity while retaining the crucial and longstanding criminal laws against trafficking and possessing the plant as a narcotic. Accomplishing both of these objectives is a difficult task and requires the state and federal governments to work cooperatively and creatively. For this reason, the regulatory regime that Indiana has adopted—and that is challenged here—complements and effectuates the federal regulatory framework.

Today, researchers customarily employ the terms marijuana and industrial hemp to differentiate between the narcotic and non-narcotic uses of cannabis: When the plant is used as a psychotropic drug it is referred to as *marijuana*, and when it is used for other, commercial purposes it is referred to as *industrial hemp*. *See* ECF 23-1 at 1–2 & n.3; Congressional Research Service Report R44742, *Defining* Hemp*: A Fact Sheet* (updated Mar. 22, 2019) at 1 & n.1. Marijuana is generally produced from the cannabis flower, where the plant's psychoactive chemicals are generally

concentrated, while industrial hemp can be produced from virtually any part of the plant, including the flower as well as the fiber and seeds. *See id.* at 2, 7–10.

Federal law, however, historically has regulated cannabis *without* directly distinguishing between how it is used. The Controlled Substances Act of 1970, which adopted language from the earlier 1937 Act, instead defined "marihuana" in terms of the *parts* of the plant: It included "all parts of the plant Cannabis sativa L., whether growing or not," but did not include "the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, . . . or the sterilized seed of such plant which is incapable of germination." Pub. L. 91-513, Title II, § 102, 84 Stat. 1242, 1244; *see also* ECF 23-1 at 13. The Senate Report to the 1937 Act explained that this definition exempts parts of the cannabis plant in order to distinguish roughly between marijuana and industrial hemp; the law defines the controlled substance "so as to bring within its scope all parts of the plant having the harmful drug ingredient, but so as to exclude the parts of the plant in which the drug is not present." S. Rep. 900, 75th Cong., 1st Sess. 1, 4 (1937) (quoted in *Hemp Indus. Ass'n v. Drug Enf't Admin.*, 333 F.3d 1082, 1088–89 (9th Cir. 2003)).

Under the 1937 Act and the Controlled Substances Act, the whole, growing cannabis plant fell under the definition of marihuana, which meant that cannabis could be lawfully cultivated only with a permit from the federal Drug Enforcement Agency. *See* ECF 23-1 at 13. This requirement inevitably limited the possibilities of industrial hemp as an agricultural crop in the United States, but the 1990s saw a surge of interest in cultivating industrial hemp more broadly, with several state

legislatures considering a variety of research initiatives related to growing and marketing cannabis for industrial purposes. *See id.* at 16.

On February 7, 2014, these state-level efforts led Congress, in the Agricultural Act of 2014, to revise federal law to permit States and research institutions to cultivate industrial hemp for research purposes without needing to first obtain approval from the Drug Enforcement Agency. *See* Pub. L. 113-79, Title VII, § 7606. This statute defined industrial hemp not by reference to an item's intended use or the part of the cannabis plant from which it comes, but by reference to its percentage concentration of delta-9 tetrahydrocannabinol (the principal psychoactive chemical in cannabis): Under the statute, industrial hemp is "the plant Cannabis sativa L. and any part of such plant, whether growing or not," with a delta-9 THC concentration of 0.3% or less. *Id.*; *see also Defining* Hemp*: A Fact Sheet* at 3 & n.6. Importantly, the statute recognized that States could and would continue to regulate cannabis, including hemp: It permitted cultivation of industrial hemp *only* if such cultivation "is allowed under the laws of the State." Pub. L. 113-79, Title VII, § 7606. As the federal government later explained, this statutory provision meant that "industrial hemp products . . . may not be sold in States where such sale is prohibited," and that "[i]ndustrial hemp plants and seeds may not be transported across State lines." *Statement of Principles on Industrial Hemp*, 81 Fed. Reg. 53,395 (Aug. 12, 2016).

The Indiana General Assembly quickly recognized the opportunity created by these revisions to federal law, and in March 2014 it responded with Senate Enrolled Act 357, which authorizes "the production of, possession of, scientific study of, and

commerce in industrial hemp" in Indiana in accordance with state regulations and the 2014 Farm Bill's requirements. Ind. Code § 15-15-13-7; *see generally* P.L. 165-2014 (codified at Ind. Code § 15-15-13-1 *et seq.*). This state law defined industrial hemp in the same way the federal statute did and removed industrial hemp from the State's definition of "marijuana," in recognition of its status as a regulated agricultural commodity and its low concentration of THC. *See* Ind. Code § 35-48-1-19.

In December 2018, Congress passed the Agriculture Improvement Act of 2018 (the Farm Bill), which continues the policies of the 2014 statute with the goal of facilitating a domestic hemp market to thereby reduce imports of foreign hemp products and relieve strains on American farmers facing challenges with tobacco, dairy, and soybean profitability. *See Defining* Hemp*: A Fact Sheet* at 4; David Carpenter, *Legal Hemp In 2019 May Be A Boon For Stressed Out American Farmers*, Forbes (Dec. 20, 2018), https://www.forbes.com/sites/davidcarpenter/2018/12/20/legal-hemp-in-2019-may-be-a-boon-for-stressed-out-american-farmers. In pursuit of this goal, the Farm Bill clarifies that, in addition to all parts of a cannabis plant that have a delta-9 THC concentration of 0.3% or less, industrial hemp also includes cannabis derivatives that have an equally lower delta-9 THC concentration. *See* Pub. L. 115-334, § 10113 (codified at 7 U.S.C. § 1639*o*(1)). And while federal law continues to classify marijuana as a Schedule I drug, *see* 21 U.S.C. § 812, the Farm Bill explicitly removes industrial hemp from the federal government's definition of marijuana and from its list of controlled substances. *See* Pub. L. 115-334, § 12619 (codified at 21 U.S.C. §§ 802(16)(B)(i), 812).

The Farm Bill also continues to facilitate state regulation of hemp alongside federal regulation. It does so both by providing a statutory framework for States "desiring to have primary regulatory authority over the production of hemp" to submit regulatory plans to the U.S. Department of Agriculture, as well as by explicitly providing that "nothing in [this statutory framework] preempts or limits any law of a State" that "regulates the production of hemp" and "is more stringent" than federal law. Pub. L. 115-334, § 10113 (codified at 7 U.S.C. § 1639p).

The Farm Bill's only limitation on state regulatory authority over industrial hemp is its provision preempting state laws that "prohibit the transportation or shipment of hemp or hemp products produced in accordance with [federal law] . . . through the State." Pub. L. 115-334, § 10114 (codified at 7 U.S.C. § 1639*o* note). The law's Conference Report explains that under these provisions States "*may limit the production and sale of hemp and hemp products within their borders*," but may not "limit the transportation or shipment of hemp or hemp products through the state." H.R. Rep. No. 115-1072 at 739 (2018) (Conf. Rep.).

In May 2019, the Indiana General Assembly responded to the Farm Bill with Senate Enrolled Act No. 516 (SEA 516). P.L. 190-2019. SEA 516 amends Indiana law's definition of industrial hemp to mirror the Farm Bill's definition, *see* Ind. Code § 15-15-13-6, and creates an advisory and regulatory framework to foster the Indiana hemp industry. SEA 516 establishes a hemp advisory committee to consult with the state seed commissioner regarding plans, policies, rules, fees, and procedures for hemp production. Ind. Code § 15-11-15-3. And in response to the Farm Bill's

provisions for state-federal cooperation, *see* 7 U.S.C. § 1639p, it requires the state department of agriculture and the superintendent of state police to submit a plan for monitoring and regulating hemp production to the United States Department of Agriculture, and requires these officials to amend and resubmit the plan if it is denied, *see* Ind. Code § 15-15-13-15.

SEA 516 also adds licensing requirements and standards for commerce in smokable hemp. For example, it requires the state seed commissioner to perform state or national criminal history background checks for all applicants seeking a license to grow or handle hemp. Ind. Code § 15-15-13-8(a)(1)(B). And it provides standards under which the state seed commissioner may revoke a license or discipline a licensee. Ind. Code § 15-15-13-9(e); Ind. Code § 15-15-13-13.5.

Finally, SEA 516 criminalizes dealing in "smokable hemp," defined as a product containing less than 0.3% THC "in a form that allows THC to be introduced into the human body by inhalation of smoke." Ind. Code § 35-48-1-26.6. It prohibits knowingly or intentionally possessing, manufacturing, delivering, or financing the manufacture or delivery of smokable hemp, and it prohibits possessing smokable hemp with the intention of doing any of these things. Ind. Code § 35-48-4-10.1.

This prohibition is meant to aid law-enforcement efforts to combat illicit marijuana trafficking. *See* Craig Lyons, *Indiana could soon allow hemp production but would make smoking its flowers illegal*, Chicago Tribune (Apr. 24, 2019), https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-indiana-legislature-hemp-bill-st-0425-story.html. Because hemp and marijuana come from the same

plant, it is often difficult to tell them apart. They have a similar appearance and smell, often can be distinguished only by measuring their THC content with sophisticated equipment in laboratory, and no field-test for THC is available. *See Legal hemp, pot's look-alike, creates confusion for police*, CNBC (Mar. 28, 2019), https://www.cnbc.com/2019/03/28/legal-hemp-pots-look-alike-creates-confusion-for-police.html. Prohibiting smokable hemp solves these problems by authorizing law enforcement officials to take action against smokable cannabis without being forced to conduct expensive and time-consuming chemical tests.

II. Procedural History

On June 28, 2019, C.Y. Wholesale filed its complaint against the State, challenging the provisions of SEA 516 that define "smokable hemp" and that prohibit its manufacture, finance, delivery, and possession. ECF 1. C.Y. The same day, C.Y. Wholesale moved for a preliminary injunction, seeking to prevent the State from enforcing these portions on the grounds that they are preempted by the Farm Bill (under express-preemption and conflict-preemption theories) and violate the Commerce Clause of the United States Constitution. *Id.* ECF 3; ECF 4.

On September 13, 2019, the district court granted C.Y. Wholesale's preliminary injunction motion. Short App. at 1. It concluded that C.Y. Wholesale had "shown a strong likelihood of success on the merits" of its express-preemption argument, *id.* at 9, and had "shown at least some likelihood of establishing" its conflict-preemption claim, reasoning that criminalizing smokable hemp "stand[s] as an obstacle to the accomplishment and execution of Congress's federal interest in

legalizing all low-THC hemp," *id.* at 13. Because the district court found C.Y. Wholesale demonstrated a likelihood of success on the merits of its preemption claims, it did not address C.Y. Wholesale's alternative argument under the Commerce Clause, though it noted that it found this argument "less convincing." *Id.* at 13, n.1.

SUMMARY OF THE ARGUMENT

Neither C.Y. Wholesale's preemption arguments nor its Commerce Clause argument is likely to succeed on the merits. Accordingly, particularly in light of the State's strong interest in carrying out its criminal laws, this Court should reverse the injunction barring the State from enforcing any part of its smokable hemp law.

With respect to preemption, the Supreme Court "has sometimes used different labels to describe the different ways in which federal statutes may displace state laws—speaking, for example, of express, field, and conflict preemption." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (plurality op.). C.Y. Wholesale relies on two of these approaches—express and conflict preemption—but neither is successful. Regardless of the particular preemption theory, a party challenging a state law "must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law." *Id.* (quoting *Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U. S. 495, 503 (1988)). For this reason, "two cornerstones" guide every preemption inquiry: "First, the purpose of Congress is the ultimate touchstone in every preemption case," and second, courts must "start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of

Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal quotation marks and citations omitted).

Here, the Indiana legislature exercised its police power to prohibit a substance—smokable hemp—in order to protect the public's health and safety, and nothing in the Farm Bill so much as hints at Congress's intention to interrupt the longstanding state practice of prohibiting such substances. As to express preemption, the Farm Bill expressly *permits* Indiana's regulation of hemp production, and the law's sole express preemption provision bars States only from prohibiting interstate hemp transportation, which Indiana does not do. Conflict preemption is also inapplicable here because, as the law's anti-preemption and express preemption clauses indicate, the Farm Bill's purpose was to balance the interest in encouraging hemp production with States' sovereign interest in regulating products produced and sold within their borders; SEA 516 vindicates, rather than undermines, this purpose.

C.Y. Wholesale's Commerce Clause argument is equally unsuccessful. The Supreme Court has interpreted the Commerce Clause to forbid any "state statute that clearly discriminates against interstate commerce . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat. Res.*, 504 U.S. 353, 359 (1992) (internal quotation marks and citation omitted). Indiana's prohibition of smokable hemp complies with this rule. It does not discriminate against interstate commerce, but bans commerce in all smokable hemp within Indiana, regardless of the product's origin. This prohibition is no different in form from the many other prohibitions of

banned substances in Indiana and other States; it is clearly constitutional. *See, e.g.,* Ind. Code § 35-48-1-0.1 *et seq.*; *see generally* National Criminal Justice Association, *A Guide to State Controlled Substances Acts* (Jan. 1999), https://www.ncjrs.gov/pdffiles1/Digitization/184295NCJRS.pdf.

Moreover, C.Y. Wholesale has not only failed to demonstrate any likelihood of success on the merits of its constitutional arguments, but has also failed to meet the other requirements for a preliminary injunction. Any slight chance C.Y. Wholesale might have of succeeding on its claims could not outweigh the State's interest in effectively enforcing its laws—including its marijuana laws—which are necessary to protect the public's health, safety, and welfare.

C.Y. Wholesale is not entitled to a preliminary injunction. The district court erred in concluding otherwise. Its judgment should be reversed.

STANDARD OF REVIEW

Federal courts weigh several factors to determine whether a preliminary injunction should be granted: (1) whether the plaintiff has demonstrated at least a reasonable likelihood of prevailing on the merits; (2) whether the plaintiff has no adequate remedy at law; (3) whether plaintiff's threatened injury outweighs the threatened harm the grant of the injunction will inflict on the defendant; and (4) whether granting the preliminary injunction would harm the public interest. *See, e.g.*, *HH-Indianapolis, LLC v. Consol. City of Indianapolis & Cty. Of Marion*, 889 F.3d 432, 437 (7th Cir. 2018).

After considering these factors, the court balances any irreparable harm that an injunction would cause to an opposing party, adjusting the calculus depending on the party's likelihood of success. *See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S. of America, Inc.,* 549 F.3d 1079, 1086 (7th Cir. 2008). The "far-reaching power" of a preliminary injunction is "never to be indulged except in a case clearly demanding it." *Roland Mach. Co. v. Dresser Indus., Inc.,* 749 F.2d 380, 389 (7th Cir. 1984) (internal quotations and citation omitted). A preliminary injunction is "an extraordinary remedy," which means the irreparable injury must be at least "likely," and the preliminary injunction "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997)).

When reviewing a district court's resolution of a preliminary injunction motion, this Court "review[s] the district court's findings of fact for clear error, its legal conclusions de novo, and its balancing of the factors for a preliminary injunction for abuse of discretion." *D.U. v. Rhoades*, 825 F.3d 331, 335 (7th Cir. 2016).

ARGUMENT

I. Federal Law Does Not Bar Indiana From Enforcing Its Prohibition of Smokable Hemp

A. The Farm Bill does not expressly preempt Indiana's prohibition of smokable hemp

Express preemption occurs "when Congress declares its intention to preempt state regulation through a direct statement in the text of federal law." *Fifth Third Bank ex rel. Trust Officer v. CSX Corp.*, 415 F.3d 741, 745 (7th Cir. 2005). And "when the text of a preemption clause is susceptible of more than one plausible reading,

courts ordinarily 'accept the reading that disfavors pre-emption.'" *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1046 (7th Cir. 2013) (quoting *Altria Group v. Good*, 555 U.S. 70, 77 (2008)). Here, the Farm Bill contains just one express preemption provision, which preempts States from "prohibit[ing] the transportation or shipment of hemp or hemp products produced in accordance with [federal law] . . . through the State." 7 U.S.C. § 1639*o* note. This provision plainly does not bar the State from prohibiting any of the three types of activities addressed by SEA 516—the manufacture, possession, and delivery of smokable hemp. Ind. Code § 35-48-4-10.1.

1. Start with SEA 516's prohibition of the manufacture of smokable hemp: Far from preempting this prohibition, the Farm Bill *permits* it. The Farm Bill expressly provides that nothing in its provisions "preempts or limits any law of a State" that (1) "regulates the production of hemp" and (2) "is more stringent" than federal law. 7 U.S.C. § 1639p(a)(3)(A).

SEA 516's prohibition of the manufacture of smokable hemp meets both of these requirements. It regulates hemp "production" by prohibiting the knowing and intentional "manufacture" of smokable hemp. Ind. Code § 35-48-4-10.1 "Production" and "manufacturing" are effectively synonymous here; in this context both words can only mean growing and processing the cannabis plant as an agricultural commodity. *Compare Production*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/production ("the making of goods available for use, *the act or process of producing*") *with Manufacture*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/manufacture ("something made from

raw materials by hand or by machinery, *the act or process of producing something*"). SEA 516 is also, of course, more stringent than federal law: It mirrors federal law in permitting commerce in most types of industrial hemp, but it is stricter than federal law in prohibiting commerce in smokable hemp, a narrow subset of industrial hemp.

Indeed, the Farm Bill expressly contemplates that States may completely prohibit hemp production: It provides that where the federal government has not yet approved a State's regulatory plan, industrial hemp may be grown in the State *only* (1) if the production is in accordance with federal laws and regulations *and* (2) "*if the production of hemp is not otherwise prohibited* by the State." 7 U.S.C. § 1639p(f) (emphasis added). Rather than expressly preempt Indiana from prohibiting the manufacture of smokable hemp, the Farm Bill expressly *permits* the State to do so.

2. The Farm Bill also does not preclude Indiana from enforcing SEA 516's provisions prohibiting the *possession* and *delivery* of smokable hemp. By specifically preempting only state laws that prohibit "*transportation . . . through* the State," the plain text of the Farm Bill's express preemption provision applies only to those state laws that prohibit *interstate transportation* of hemp—nothing more. As the United States Department of Agriculture's Office of the General Counsel explained, this provision "preempts State law *to the extent* such State law prohibits the *interstate transportation* or shipment of hemp." ECF 1-5 at 9 (emphasis added). Because this provision does not address *possession* at all, it is hard to see how it could possibly preempt Indiana's prohibition of possession of smokable hemp.

The district court was apparently concerned that Indiana's prohibition of possession would interfere with interstate transportation, speculating that "a driver traveling along I-74 from Ohio to Illinois who passes through Indiana with smokable hemp in the vehicle, including hemp bud or hemp flower, would be in 'possession' of smokable hemp and thus subject to arrest and criminal penalties under SEA 516." Short App. at 8. Yet there is no reason to read SEA 516 this way. Possessing hemp is distinct from moving it around, which is why SEA 516 separately prohibits possession *and* delivery. Ind. Code § 35-48-4-10.1. Indeed, SEA 516's prohibition of dealing smokable hemp precisely mirrors the State's prohibitions against dealing other controlled substances, which also separately enumerate delivery and possession. *See* Ind. Code §§ 35-48-4-1, -2, -3, -4, -10.

Federal law also distinguishes between transporting a substance—i.e., distributing it—and simply possessing it, a distinction that can have considerable significance to the sentence a controlled-substance violation will incur. *See* 21 U.S.C. §§ 841, 844. Indeed, under federal law even "possess[ing] *with intent to distribute* is an offense distinct from distributing." *United States v. Solis*, 841 F.2d 307, 309 (9th Cir. 1988) (emphasis added). Simply put, because "[p]ossessing is not . . . distributing," *id.*, Indiana's prohibition of possession of smokable hemp is not expressly preempted by the Farm Bill.

Nor does the Farm Bill expressly preempt SEA 516's prohibition of the "delivery" of smokable hemp. The Farm Bill does not expressly preempt this provision because the provision prohibits only *intrastate* transportation of smokable hemp: One

would not say that products that travel "*through*" Indiana, 7 § 1639*o* note (emphasis added), are "deliver[ed]" in Indiana, Ind. Code § 35-48-4-10.1.

The district court disagreed with this interpretation of Indiana law, concluding that SEA 516 does prohibit interstate transportation of hemp and that the Supremacy Clause therefore prohibits its enforcement. Short App. at 8. Yet no state-court decisions required this conclusion; there has not yet been any state court decision interpreting SEA 516's prohibition of smokable hemp, much less a decision holding that the provision prohibiting delivery of hemp extends to interstate transportation. "Courts properly turn somersaults to avoid difficult constitutional issues," but here the district court contorted Indiana law in order to invalidate it. *Citizens for John W. Moore Party v. Bd. of Election Comm'rs of City of Chicago*, 781 F.2d 581, 583 (7th Cir. 1986) (Easterbrook J., dissenting); *see also Dean Foods Co. v. Brancel*, 187 F.3d 609, 614 (7th Cir. 1999) ("Generally, courts interpret laws consistent with their meaning, but with an eye towards avoiding exposing any constitutional infirmities."); *Trustees of Indiana Univ. v. Curry*, 918 F.3d 537, 541 (7th Cir. 2019) (explaining that rather than invalidate a state law as unconstitutionally vague whenever there is "a tough question about just how far a statute reaches," federal courts should allow state courts to resolve in "future adjudication the inevitable questions at the statutory margin").

There is no need for this Court to resolve this state-law question, however, because even if the district court's interpretation of state law were correct, the preliminary injunction it issued would be far too broad. The district court could have

addressed its concerns by enjoining the State from enforcing SEA 516 against the interstate transportation of hemp—which is all that the Farm Bill preempts. Because the State believes SEA 516 does not apply to interstate transportation even on its own terms, the State would not object to such an injunction. But instead the district court issued an injunction prohibiting the State from prohibiting smokable hemp in *any* context. Short App. at 17.

The district court's expansive injunction contravenes the Supreme Court's and this Court's admonitions that equitable relief must be tailored to remedying the specific violation of federal law at issue. Any time a federal court issues injunctive relief, "the remedy must be tailored to the violation, rather than the violation's being a pretext for the remedy. Violations of law must be dealt with firmly, but not used to launch the federal courts on ambitious schemes of social engineering." *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 534 (7th Cir. 1997); *see also Whole Woman's Health All. v. Hill*, 937 F.3d 864, 874 (7th Cir. 2019) (explaining that the district court's preliminary injunction must be narrowed because "the injunction as written is overbroad"). And "[i]n a pre-emption case such as this, state law is displaced *only* to the extent that it actually conflicts with federal law." *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996) (per curiam) (emphasis added; internal quotation marks and citation omitted) (quoted in *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 985 (7th Cir. 2012)). Accordingly, "[t]he rule is that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Id.* at 476 (internal

brackets omitted) (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985)).

Here, however, the district court adopted an analytical process that turns these equitable principles upside down. The district court apparently agreed with the State that the only thing the Farm Bill expressly preempts is state interference "with the right to transport in interstate commerce hemp . . . that has been lawfully produced." Short App. at 9. This means that the Farm Bill permits application of SEA 516's smokable hemp provisions in many circumstances: Applying these provisions against *in-state* cultivation or consumption, for example, would obviously not interfere with *interstate* transportation of hemp. Nevertheless, the district court construed Indiana law to violate the Farm Bill's express-preemption provision in *some* applications and used those hypothetical violations to justify enjoining *any* possible application of the law. This is the opposite of the appropriate approach: In order to invalidate a statute on its face, the challenger cannot merely identify a handful of hypothetical unlawful applications, but "must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Because SEA 516's prohibition of smokable hemp undoubtedly "has potential constitutional applications," the district court erred in issuing what amounts to a facial injunction against its enforcement. *Daniels v. Area Plan Comm'n of Allen Cty.*, 306 F.3d 445, 469 (7th Cir. 2002).

B. There is no conflict preemption between the Farm Bill and Indiana's prohibition of smokable hemp

C.Y. Wholesale's preemption claim fares no better when cast in conflict-preemption terms. Indeed, the district court—which perceived "a *strong* likelihood of success" as to express preemption—concluded that conflict preemption was "admittedly a closer question," with C.Y. Wholesale merely showing "*some* likelihood of success" on this score. Short App. at 9 (emphasis added). And even this modest assessment goes too far.

"Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect," *Arizona v. U.S.*, 567 U.S. 387, 398 (2012) (internal citations omitted), and this principle affords States "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons," *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006). For this reason, conflict preemption analysis "begin[s] with the assumption that a state's historic police powers cannot be preempted by a federal act unless the preemption was the clear intent of Congress." *Patriotic Veterans*, 736 F.3d at 1049. Accordingly, "the burden is on [the challenger] to present a showing of implied preemption that is strong enough to overcome the presumption that state and local regulations can coexist with federal regulation." *Id.* In particular, the challenger must demonstrate that applying the state law would do "major damage" to clear and substantial federal interests. *Patriotic Veterans*, 736 F.3d at 1050 (quoting *Hillman v. Maretta*, 569 U.S. 483, 490–91 (2013)).

C.Y. Wholesale has come nowhere close to meeting this burden, for States have long exercised their police powers to regulate cannabis, and the Farm Bill carefully limits its preemption of this longstanding state authority to only those state laws that prohibit *interstate* transportation of hemp. Limiting the scope of preemption in this way makes eminent sense, as state laws prohibiting interstate transportation present unique concerns: They impede interstate commerce and thereby undermine *other* States' policy decisions to permit the production or sale of hemp products. Because *within-state* regulation of hemp does not impose such collateral effects on interstate commerce or other States, Congress did not preempt it.

"[T]he best way to determine congressional intent," is to "look at the plain language of the statute." *O'Kane v. Apfel*, 224 F.3d 686, 688 (7th Cir. 2000). The Farm Bill does, of course, relax federal restrictions on low-THC cannabis in order to facilitate a market for hemp and hemp products. But it also clearly contemplates that States will continue to regulate cannabis, including low-THC hemp: It specifically provides that States may "regulate[] the production of hemp" in a manner "more stringent" than federal law, 7 U.S.C. § 1639p(a)(3)(A), and provides for the possibility that "the production of hemp" may be "prohibited by the State," 7 U.S.C. § 1639p(f). And its sole express preemption provision is explicitly limited to preempting state laws that prohibit "transportation or shipment of hemp . . . through the State." *Id.* § 1639*o* note. This statutory language plainly demonstrates that Congress intended to develop a framework that both authorizes States to work with the federal government to encourage commerce in hemp *and* allows States to regulate hemp production more

stringently than federal law so long as they do not prohibit the interstate transportation of lawfully produced hemp.

SEA 516 does not conflict with this congressional intent, much less do "major damage" to a "clear" federal interest. *Patriotic Veterans*, 736 F.3d at 1050. On the contrary, SEA 516 furthers Congress's evinced intent. It uses the same definition of hemp as the Farm Bill. *Compare* Ind. Code § 15-15-13-6 *with* 7 U.S.C. § 1639*o*(1). And, in response to the Farm Bill's provisions for state-federal cooperation, *see* 7 U.S.C. § 1639p, requires state officials to work with the federal government to create a plan for state regulation of hemp production, *see* Ind. Code § 15-15-13-15.

And in furtherance of the State's longstanding interest in regulating cannabis trafficking, SEA 516 simply identifies a narrow category of low-THC cannabis—smokable hemp—that is prohibited in Indiana. This sort of state regulation is envisaged by the Farm Bill itself and is perfectly consistent with the goal of fostering hemp's value as an agricultural and industrial commodity. A 2018 report to Congress by the Congressional Research Service, issued several months prior to the passage of the Farm Bill, identified and focused on several industrial uses for hemp, none of which include smokable hemp and none of which are prohibited by Indiana law. *See* ECF 23-1, Congressional Research Service Report RL32725, *Hemp As an Agricultural Commodity* (Jun. 22, 2018) at 2–7. And subsequent Congressional Research Service Reports are similarly devoid of any references to smokable hemp. *See* ECF 23-2; ECF 23-3; ECF 23-4.

Rather than confine the Farm Bill's preemptive scope to the express terms of its preemption provision, the district court concluded that because the law relaxes federal restrictions on hemp—such as by removing low-THC hemp from the federal list of controlled substances—it "evinces a clear congressional objective to legalize all forms of low-THC hemp, including the hemp derivatives specifically criminalized under SEA 516." Short App. at 12. But an amorphous—and unsubstantiated—congressional "intent to de-stigmatize and legalize all low-THC hemp," *id.* at 10, does not justify invalidating state laws Congress left undisturbed. "[S]ome brooding federal interest or . . . judicial policy preference should never be enough to win preemption of a state law." *Nelson v. Great Lakes Educ. Loan Servs., Inc.*, 928 F.3d 639, 650–51 (7th Cir. 2019) (quoting *Virginia Uranium*, 139 S. Ct. at 1901 (plurality op.)).

It does not follow that because Congress removed *federal* criminal restrictions that it intended to preempt all *state* criminal laws touching on the same subject. After all, there are many substances and products that are legal under federal law that States prohibit: Kratom and salvia, for example, are not scheduled as controlled substances under federal law, but are criminally prohibited in many States, including Indiana. *See, e.g.,* Drug Enf't Admin Proposed Rule, *Schedules of Controlled Substances: Temporary Placement of Mitragynine and 7-Hydroxymitragynine Into Schedule I*, 81 Fed. Reg. 59,929, 59,932 & n.27 (noting that six States and the District of Columbia ban kratom); Ind. Code §§ 35-48-4-10, -11 (prohibiting trafficking and possession of salvia); Colo. Rev. Stat. §§ 18-18-406.1, -406.2 (same); Ky. Rev. Stat. §§

218A.1450, 218A.1451 (same); W. Va. Code § 60A-4-413 (same). And there is no suggestion that federal law, by failing to prohibit these substances, has implicitly preempted States' authority to do so.

Furthermore, here federal law clearly provides for the federal government *and* States to continue to jointly regulate cannabis as they have done for decades. Most importantly, the statute's sole preemption addresses this issue and gives Congress's answer: The only state laws that are preempted are those that prohibit interstate transportation of lawfully produced hemp. If Congress thought that state laws prohibiting the in-state commerce of hemp frustrated its objectives, it could have preempted them. It did not do so.

Conflict preemption analysis "does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor would undercut the principle that it is Congress rather than the courts that pre-empts state law." *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (internal quotation marks and citations omitted). Instead, courts should focus directly on the specific text Congress enacted. And here the careful tailoring reflected in the Farm Bill's preemption provisions "show[s] that Congress considered preemption issues and made its decisions. Courts should enforce those provisions, but we should not add to them on the theory that more sweeping preemption seems like a better policy." *Nelson*, 928 F.3d at 650. The Farm Bill and SEA 516's prohibition of smokable hemp "can exist in harmony here." *Id.* at 651. The Court should allow them to do so.

C. Indiana's prohibition of smokable hemp does not violate the Commerce Clause

Finally, SEA 516's prohibition of smokable hemp does not violate the Commerce Clause, which, insofar as it pertains to States, is directed toward "curbing state protectionism." *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459-60 (2019) (internal quotation marks and citations omitted); *see also Department of Rev. of Ky. v. Davis*, 553 U.S. 328, 337 (2008) (explaining that the Commerce Clause's limitation on state lawmaking authority "is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors'" (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)).

For this reason, the Commerce Clause's limitation on state laws "applies only to laws that *discriminate* against interstate commerce, either expressly or in practical effect." *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 501 (7th Cir. 2017) (emphasis in original). And even if a state law does interfere with interstate commerce, the law is not subject to the Commerce Clause when it is specifically authorized by Congress. *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983).

C.Y. Wholesale's argument fails on each of these grounds. Because Congress expressly authorized states to regulate hemp in the Farm Bill, SEA 516's provisions prohibiting smokable hemp are not subject to the Commerce Clause in the first place. *See* 7 U.S.C. § 1639p. In any case, these provisions, as explained above, do not prohibit *interstate* transportation of smokable hemp and therefore do not apply to interstate

commerce at all. And even if SEA 516 did apply to interstate commerce, it clearly does not *discriminate* against such commerce: It applies equally to all smokable hemp, regardless of its provenance. SEA 516's prohibition of smokable hemp does nothing to give Indiana a competitive advantage over other States, but is instead rooted in the State's police power to provide for the public health, safety, and morals by limiting any available routes for individuals to consume THC. As this Court has repeatedly explained: "No disparate treatment, no disparate impact, no problem under the dormant commerce clause." *Park Pet Shop*, 872 F.3d at 502 (quoting *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995)).

II. C.Y. Wholesale Has Failed to Meet the Other Requirements for a Preliminary Injunction

C.Y. Wholesale cannot demonstrate any likelihood of success on the merits of any of its claims, and it thus fails to satisfy the threshold requirement for granting a preliminary injunction. But even if this Court were to conclude that C.Y. Wholesale has demonstrated "some likelihood of success" on the merits of its claims, Short App. at 9, C.Y. Wholesale would still not be entitled to a preliminary injunction. In light of the State's powerful interest in enforcing its criminal laws, anything short of an overwhelming likelihood of success is insufficient to justify preliminarily enjoining Indiana's prohibition of smokable hemp in its entirety.

The preliminary injunction the district court issued completely exempts the plaintiffs from Indiana's restrictions on smokable hemp. But permitting smokable hemp production or possession impedes law enforcement's ability to enforce the

State's laws prohibiting marijuana trafficking and possession, which is why these provisions of SEA 516 were adopted in the first place.

It can be difficult for officers to distinguish between low-THC smokable hemp and high-THC marijuana in the field. *See, e.g., Lundy v. Commonwealth*, 511 S.W.3d 398, 404 (Ky. Ct. App. 2017) (noting that "[h]emp and marijuana are visually indistinguishable"). As a result, in South Carolina, where smokable hemp is legal, the State's Law Enforcement Division has announced that it is abandoning training that taught officers how to identify marijuana and will instead send suspected marijuana to a lab to determine its THC quantity; the State anticipates this will result in increased costs for the purchase of new equipment and a large backlog of marijuana cases. *See* Angie Jackson, *With Hemp Legal in SC, Police Change How They Test Plant Material for Marijuana*, Post & Courier (Feb. 23, 2019), https://www.postandcourier.com/news/with-hemp-legal-in-sc-police-change-how-they-test/article_31636e2a-264e-11e9-8100-63b46060051d.html (ECF 23-5).

Other States have followed Indiana in responding to these problems by prohibiting smokable hemp. Louisiana, for example, prohibits anyone from processing any part of hemp for inhalation. *See* La. Stat. Ann. § 3:1482. Kentucky also prohibits the manufacture of hemp cigarettes, hemp cigars, chew, dip, and other smokeless material consisting of hemp leaf or floral material. 302 Ky. Admin. Regs. 50:070. And in North Carolina the legislature is considering exempting "smokable hemp" from the definition of lawful hemp products and has prohibited possessing, manufacturing, selling, or delivering smokable hemp to an individual not possessing

a valid hemp license. *See* 2019 N.C. S.B. 315. These prohibitions, like Indiana's smokable hemp law, are valid acts of state police power aimed at protecting the health and safety of the public and helping law enforcement carry out longstanding criminal regulations on cannabis trafficking and use. *See, e.g.*, *North Carolina Bill OK'd in Senate Sets Smokable Hemp Ban*, U.S. News & World Report (Oct. 28, 2019), https://www.usnews.com/news/best-states/north-carolina/articles/2019-10-28/final-north-carolina-farm-bill-sets-smokable-hemp-ban-date.

The Indiana General Assembly chose to prohibit the production, possession, and delivery of smokable hemp in Indiana in order to protect the efforts of law enforcement in enforcing state drug laws and to avoid setbacks like those experienced in other States. This prohibition is a valid exercise of Indiana's traditional police powers, furthers significant public interests, and outweighs any remote chance C.Y. Wholesale has of prevailing on the merits. The district court's preliminary injunction prohibiting the State from enforcing the prohibition against the plaintiffs severely undermines the State's interests. It should be reversed.

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed.

Respectfully submitted,

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WORD COUNT CERTIFICATE

1. Pursuant to Fed. R. App. P. 32(g), the undersigned counsel for the Appellees certifies that this brief complies with the type-volume limitations of Circuit Rule 32(c) because the brief contains 9,218 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word Century Schoolbook typeface in font size 12 for the text and font size 11 for the footnotes. See Cir. R. 32(b).

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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REQUIRED SHORT APPENDIX

Pursuant to Circuit Rule 30, Appellants submit the following as their Required Short Appendix. Appellants' Required Short Appendix contains all of the materials required under Circuit Rule 30(a) and 30(b).

/s/ Kian J. Hudson
Kian J. Hudson
Deputy Solicitor General

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

C. Y. WHOLESALE, INC., et al. Plaintiffs, v. ERIC HOLCOMB, Governor, in his official capacity, et al. Defendants.	)	No. 1:19-cv-02659-SEB-TAB

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This cause is before the Court on Plaintiffs' Motion for Preliminary Injunction [Dkt. 3], filed on June 28, 2019. Plaintiffs C.Y. Wholesale, Inc.; CBD Store of Fort Wayne, LLC; Indiana CBD Wellness, Inc.; Indy E Cigs LLC; 5 Star Medicinal Products, LLP; Dreem Nutrition, Inc.; Midwest Hemp Council, Inc.; and El Anar, LLC (collectively, "Plaintiffs") seek to have Defendants Eric Holcomb and the State of Indiana (collectively, "the State") enjoined from enforcing certain provisions of Senate Enrolled Act No. 516 ("SEA 516" or "the Act"), which became effective July 1, 2019. The provisions of SEA 516 challenged in this lawsuit regulate "smokable hemp," including the derivatives "hemp bud" and "hemp flower" more strictly than other forms of hemp and criminalize the manufacture, finance, delivery, or possession of smokable hemp. Plaintiffs do not challenge any other sections of SEA 516. The Court heard arguments on August 28, 2019. Having now considered those arguments, the parties'

evidentiary and written submissions, and the controlling principles of law, we hereby GRANT Plaintiffs' Motion for Preliminary Injunction.

Factual Background

Plaintiffs are all Indiana businesses that are primarily wholesalers or retailers of hemp products, save for Plaintiff Midwest Hemp Council, Inc., which is an Indiana non-profit corporation that provides information and advocacy for the hemp industry in Indiana and surrounding states. In this lawsuit, Plaintiffs challenge the constitutionality of certain provisions of SEA 516 related to smokable hemp on grounds that they are preempted by federal law and thus violate the Supremacy Clause of the United States Constitution, and/or are violative of the Commerce Clause.

I. The 2014 Farm Bill

On February 7, 2014, President Barack Obama signed into law the Agricultural Act of 2014, Pub. L. No. 113-79 (the "2014 Farm Bill"), which permitted states to grow "industrial hemp" under certain conditions. "Industrial hemp" was defined in the 2014 Farm Bill as the plant Cannabis sativa L., or any part of such plant, "with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 5940(b). The 2014 Farm Bill did not remove industrial hemp from federal controlled substances schedules, however.

On March 26, 2014, then-Governor Mike Pence signed into law Senate Enrolled Act 357, P.L. 165-2014 ("SEA 357"), codified at Indiana Code § 15-15-13, *et seq.*, authorizing the production, possession, scientific study, and commerce of industrial hemp in Indiana in accordance with the 2014 Farm Bill's requirements. SEA 357 also removed

industrial hemp from Indiana's definition of "marijuana" in recognition of its status as a regulated agricultural commodity as well as its low THC-concentration, which renders it non-psychoactive. IND. CODE § 35-48-1-19.

II. The 2018 Farm Bill

On December 20, 2018, President Donald Trump signed into law the Agriculture Improvement Act of 2018, Pub. L. No. 115-334 (the "2018 Farm Bill"), which removes hemp from the federal schedule of controlled substances and amends the Agricultural Marketing Act of 1946, "to allow States to regulate hemp production based on a state or tribal plan." H.R. Rep. No. 115-__ at 738 (2018) (Conf. Rep.) (the "Conference Report"). The 2018 Farm Bill also expands the 2014 Farm Bill's 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. § 1639o(1) (emphasis added).

The 2018 Farm Bill explicitly states that "No Preemption" is intended of any law of a state or Indian tribe that "regulates the production of hemp" and "is more stringent" than federal law. 2018 Farm Bill § 10113. The 2018 Farm Bill is also clear in prohibiting states from restricting the transportation of hemp in interstate commerce, providing as follows:

> (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.

2018 Farm Bill § 10114. The Conference Report for the 2018 Farm Bill addresses these provisions, explaining that, "[w]hile states and Indian tribes may limit the production and sale of hemp and hemp products within their borders, … such states and Indian tribes [are not permitted] to limit the transportation or shipment of hemp or hemp products through the state or Indian territory." Conf. Rep. at 739.

III. SEA 516

In response to the 2018 Farm Bill, on May 2, 2019, Governor Eric Holcomb signed SEA 516 into law. Mirroring the 2018 Farm Bill, SEA 516 also defines "hemp" as 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 three-tenths of one percent (0.3%) on a dry weight basis." IND. CODE § 15-15-13-6. SEA 516 legalizes the commercial production of hemp in Indiana, but criminalizes the manufacture, finance, delivery, and possession of a particular subset of hemp, to wit, "smokable hemp," which SEA 516 defines 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," which specifically includes the derivatives "hemp bud" and "hemp flower." IND. CODE § 35-48-1-26.6. The provision of SEA 516 criminalizing dealing in smokable hemp provides as follows:

> (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. No reference to "production" appears in this list.

IV. The Instant Litigation

On June 28, 2019, Plaintiffs filed their Complaint, alleging that the portions of SEA 516 that carve out "smokable hemp" from the federal definition of "hemp," and criminalize its manufacture, finance, delivery, or possession are unconstitutional, either because they are preempted by the 2018 Farm Bill or because they violate the Commerce Clause of the United States Constitution. Plaintiffs simultaneously moved for a preliminary injunction, seeking to have the Court enjoin the State from enforcing these portions of SEA 516 until a final decision can be reached on the merits in this case.

Legal Analysis

I. Preliminary Injunction Standard

To obtain a preliminary injunction, the moving party must demonstrate: (1) a reasonable likelihood of success on the merits; (2) no adequate remedy at law; (3) irreparable harm absent the injunction. *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 972 (7th Cir. 2012). If the moving party fails to demonstrate any one of these three threshold requirements, the injunctive relief must be denied. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States, Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008) (citing *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992)). At this stage of the analysis, "the court decides only whether the plaintiff has any likelihood of success—in other words, a greater than negligible chance of winning …." *AM Gen. Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 804 (7th Cir. 2002).

If these threshold conditions are met, the Court must then assess the balance of the harm—the harm to Plaintiffs if the injunction is not issued against the harm to Defendants if it is issued—and determine the effect of an injunction on the public interest. *Girl Scouts*, 549 F.3d at 1086. "The more likely it is that [the moving party] will win [their] case on the merits, the less the balance of harms need weigh in [their] favor." *Id.* at 1100.

II. Likelihood of Success on the Merits

Plaintiffs claim that SEA 516's provisions criminalizing the manufacture, finance, delivery, or possession of smokable hemp conflict with portions of the 2018 Farm Bill and are thus preempted by federal law under either a theory of express or conflict

preemption. Alternatively, Plaintiffs argue that these provisions of SEA 516 are violative of the Commerce Clause. We address these arguments in turn below.

A. Express Preemption

"Express preemption applies when Congress clearly declares its intention to preempt state law." *Nelson v. Great Lakes Educ. Servs., Inc.*, 928 F.3d 639, 646 (7th Cir. 2019) (citing *Mason v. SmithKline Beecham Corp.*, 596 F.3d 387, 390 (7th Cir. 2010)). Here, the 2018 Farm Bill explicitly provides as follows: "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." 2018 Farm Bill § 10114.

Plaintiffs argue that, by criminalizing the manufacture, finance, delivery, or possession of smokable hemp, which is defined under SEA 516 to specifically include hemp bud and hemp flower, the Act precludes the transportation of hemp or hemp products in or through Indiana, in direct contravention of the 2018 Farm Bill's express prohibition on restricting the transportation of hemp and its derivatives in interstate commerce. *See* Pls.' Exh. 5 to Compl. at 9 (Memo. from USDA General Counsel) (concluding that the 2018 Farm Bill "preempts State law to the extent such State law prohibits the interstate transportation or shipment of hemp that has been produced in accordance with subtitle G of the [Agricultural Marketing Act]").

The State's only response to Plaintiff's express preemption claim is the contention that the challenged provisions of SEA 516 apply solely to *intra*state activity and therefore

are not preempted by the 2018 Farm Bill, which explicitly provides that it does not "preempt or limit[] any law of a State or Indian tribe that—(i) regulates the production of hemp; and (ii) is more stringent than this subchapter." 7 U.S.C. § 1639p(a)(3)(A); *see also* Conf. Rep. at 739 ("[S]tates and Indian tribes may limit the production and sale of hemp and hemp products within their borders …."). The State concedes, however, that there is no such limiting language in SEA 516. Thus, as Plaintiffs argue, a driver traveling along I-74 from Ohio to Illinois who passes through Indiana with smokable hemp in the vehicle, including hemp bud or hemp flower, would be in "possession" of smokable hemp and thus subject to arrest and criminal penalties under SEA 516. Similarly, if a driver were transporting smokable hemp from Ohio on that same route through Indiana for delivery in Illinois, he or she would be "possess[ing] smokable hemp with intent to … deliver it," in violation of SEA 516. Accordingly, the challenged provisions of the Act in effect prevent the "transportation" of hemp derivatives through Indiana and thus impede the interstate commerce of hemp in contravention of the 2018 Farm Bill's express prohibition on state laws that do so.

The State relies heavily on the fact that the 2018 Farm Bill permits states to impose stricter regulations on the "production" of hemp within state borders to support its argument that the challenged provisions of SEA 516 are not expressly preempted, and, in fact, are supported by the 2018 Farm Bill's anti-preemption language. However, this argument ignores the fact that SEA 516's provisions criminalizing smokable hemp on their face do not exclude interstate activity. Additionally, the anti-preemption language on which the State relies specifically references more stringent in-state regulation only of

the *production* of hemp, which the USDA's General Counsel has explained means that states may continue to enforce laws "prohibiting the *growing* of hemp" within their borders. Memo. from USDA Gen. Counsel at 2 (emphasis added). Thus, Indiana is free, for example, to place limits on the acreage that can be used to grow hemp, or to dictate the type of seeds that can be used, or to impose setback restrictions. The State concedes, however, that the challenged provisions of SEA 516 reach beyond the production or growing of hemp within Indiana.

In sum, the 2018 Farm Bill clearly provides that states may not pass laws that interfere with the right to transport in interstate commerce hemp—including hemp derivatives like hemp bud and hemp flower—that has been lawfully produced under a State or Tribal plan or under a license issued under the USDA plan. Indiana's law criminalizing the manufacture, finance, delivery, and possession of smokable hemp without limiting the prohibition to intrastate activity does just that. For these reasons, we find that Plaintiffs have shown a strong likelihood of success on the merits of their claim that the challenged provisions of SEA 516 are expressly preempted by the 2018 Farm Bill.

B. Conflict Preemption

Although admittedly a closer question, we also find, based on the limited record before us, that Plaintiffs have also shown at least some likelihood of success on their conflict preemption claim. "To show conflict preemption, [the plaintiff] must show either that it would be 'impossible' … to comply with both state and federal law or that state law … constitutes an 'obstacle' to satisfying the purposes and objectives of

Congress." *Nelson*, 928 F.3d at 650. Here, Plaintiffs contend that the challenged provisions of SEA 516 criminalizing smokable hemp constitute an obstacle to satisfying the 2018 Farm Bill's objective of legalizing all low-THC hemp products, including all hemp derivatives.

What constitutes a sufficient obstacle for conflict preemption "is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects…." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). "We ascertain the intent of Congress, however, through a lens that presumes that the state law has not been preempted." *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1046 (7th Cir. 2013). "In preemption analysis, courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress." *Arizona v. United States*, 567 U.S. 387, 400 (2012) (internal citations and quotation marks omitted).

"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 plain language of the 2018 Farm Bill, as well as statements from its legislative sponsors, reflect Congress's intent to de-stigmatize and legalize all low-THC hemp, including its derivatives and extracts, and to treat hemp as a regulated agricultural commodity in the United States. As discussed above, the 2018 Farm Bill expands the federal definition of hemp beyond that set forth in the 2014 Farm Bill to specifically include hemp derivatives and extracts, such as hemp bud and hemp flower, and removes low-THC hemp from federal controlled substance

schedules. Plaintiffs have shown at least some likelihood of establishing that the challenged provisions of SEA 516, which criminalize the manufacture, finance, delivery, and possession of hemp bud and hemp flower—hemp derivatives of the kind specifically legalized under the 2018 Farm Bill—frustrates these congressional purposes and objectives. *See Frank Bros., Inc. v. Wisconsin Dep't of Transp.*, 409 F.3d 880, 894 (7th Cir. 2005) ("[T]he crucial inquiry is whether [state law] differs from [federal law] in such a way that achievement of the congressional objective … is frustrated.") (citations and quotation marks omitted).

The State argues that Plaintiffs have not shown a likelihood of success on their conflict preemption claim because there is no evidence that Congress even contemplated, let alone had the purpose or objective of, legalizing smokable hemp with the passage of the 2018 Farm Bill. In support of this argument, the State cites a 2018 report to Congress by the Congressional Research Service ("CRS"), issued several months prior to the passage of the 2018 Farm Bill, which identifies and discusses industrial uses for hemp, including fiber, seed, and oil. The State argues that the report nowhere identifies smokable hemp as a use of hemp, and thus, that there is no evidence that Congress intended the 2018 Farm Bill to preempt states from restricting smokable hemp.

However, without addressing whether a CRS research paper is sufficiently authoritative in this context to inform a statutory analysis, we note that, while it does not discuss smokable hemp, it does address hemp flower in its discussion of industrial uses of hemp, referencing the fact that "[i]ndustry groups maintain that … naturally occurring THC in the leaves and flowers of cannabis varieties grown for fiber and food is already at

below-psychoactive levels ….” Defs.’ Exh. A at 21. The report also references confusion in the hemp industry following the passage of the 2014 Farm Bill and a 2016 joint statement on industrial hemp issued by the DEA, USDA, and FDA regarding whether the federal definition of “industrial hemp” set forth in the 2014 Farm Bill excluded hemp flower. Following issuance of this report, Congress removed the qualifier “industrial” when referring to hemp in the 2018 Farm Bill and broadened the definition to explicitly include derivatives and extracts of hemp (like hemp bud and hemp flower). The 2018 Farm Bill’s expansion of the federal definition of hemp and removal of all low-THC hemp from the federal list of controlled substances evinces a clear congressional objective to legalize all forms of low-THC hemp, including the hemp derivatives specifically criminalized under SEA 516.

The State also argues that the 2018 Farm Bill’s anti-preemption provision permitting states to enact stricter regulations on hemp production reveals the congressional intent to permit states to exercise their police powers to restrict hemp production within their own borders, thus establishing that the bill does not preempt Indiana’s criminalization of smokable hemp. We acknowledge, as Plaintiffs’ counsel did at the preliminary injunction hearing, that the anti-preemption provision in the 2018 Farm Bill permits states to regulate the production of hemp within their borders more strictly than does the federal government. However, as discussed above, the challenged portions of SEA 516 that criminalize smokable hemp reach well beyond growing restrictions and thus do not constitute regulations on hemp production that come within the 2018 Farm Bill’s express anti-preemption provision. Accordingly, while instructive as to Congress’s

intent in permitting states to individually regulate hemp production within their borders, the anti-preemption provision does not salvage the State's argument here. *See* Memo. from USDA Gen. Counsel at 8 n.15 (explaining that "the anti-preemption provision is limited to the *production* of hemp").

For these reasons, we hold that Plaintiffs have, at this early stage of the litigation, shown at least some likelihood of establishing that the challenged portions of SEA 516 criminalizing smokable hemp, including hemp bud and hemp flower, stand as an obstacle to the accomplishment and execution of Congress's federal interest in legalizing all low-THC hemp and its derivatives and extracts and are thus preempted.[1]

III. Irreparable Harm and Inadequate Remedy at Law

In addition to showing that they have a likelihood of success on the merits of their claims, Plaintiffs are also required to show that, absent injunctive relief, they will suffer irreparable injury for which there is no adequate remedy at law. These requirements merge in most cases, in recognition of the fact that irreparable harm is "probably the most common method of demonstrating that there is no adequate legal remedy." *Campbell v. Miller*, 373 F.3d 834, 840 (7th Cir. 2004) (citations and quotation marks omitted). "Irreparable harm is harm which cannot be repaired, retrieved, put down again, atoned for …. [T]he injury must be of a particular nature, so that compensation in money cannot atone for it." *Graham v. Med. Mut. of Ohio*, 130 F.3d 293, 296 (7th Cir. 1997) (internal

[1] Because we have found that Plaintiffs have shown a likelihood of success on the merits of their preemption claims, we need not address their alternative arguments under the Commerce Clause, which we find less convincing.

quotation and citation omitted). 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) (citation and quotation marks omitted).

Here, Plaintiffs have shown that, without the relief they seek, they will be subject to irreparable harm in the form of a credible threat of criminal sanctions. *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 …"). Moreover, a misdemeanor conviction under the smokable hemp provisions would prevent Plaintiffs from obtaining a license to grow or handle legal hemp in Indiana for at least ten years. IND. CODE § 15-15-13-7(c)(5). With regard to potential lost profits, we are not persuaded that Plaintiffs can be made whole with money damages as the financial losses they stand to suffer by complying with the likely unconstitutional portions of the statute cannot be easily measured or reliably calculated, given the novelty of the hemp industry in Indiana and the dearth of historical sales data to use as a baseline for calculating lost revenues stemming from SEA 516. *See Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1440 (7th Cir. 1986) (recognizing that "the difficulty in calculating future profits can often justify the finding of an irreparable injury with no adequate remedy at law").

For these reasons, we find that Plaintiffs have shown that, in the absence of preliminary injunctive relief, they are likely to suffer irreparable harm for which they have no adequate remedy at law.

IV. Balance of Harms and Public Interest

As discussed above, the Court uses a "sliding scale" when balancing the harms and the public interest. *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015). Because Plaintiffs have demonstrated a strong likelihood of success on the merits on their claim that the challenged provisions of SEA 516 are expressly preempted by federal law, "the court must issue an injunction even if the balance of harms does not overwhelmingly weigh in [their] favor." *Huntley v. Wexford of Ind., LLC*, No. 3:18-CV-205-PPS-MGG, 2018 WL 4039362, at * 20 (N.D. Ind. Aug. 22, 2018) (citing *id.*).

Absent an injunction, Plaintiffs will suffer the irreparable harms discussed above, namely, a credible threat of criminal prosecution that could affect Plaintiffs' subsequent ability to procure a license to grow or handle legal hemp as well as an untold amount of lost profits. On the other hand, if injunctive relief is granted and smokable hemp is legalized in Indiana, the State argues that law enforcement will likely face significant obstacles in their ability to enforce Indiana's laws against marijuana. The State has presented evidence that, due to the similarities in look and smell between smokable hemp and marijuana, law enforcement officers are generally unable to distinguish between the two substances without a laboratory-conducted scientific test of THC levels.

In support of this argument, the State cites difficulties faced in states where smokable hemp is legal, like South Carolina and Florida. In South Carolina, the state has

had to expend additional resources to purchase new equipment to conduct the necessary testing and law enforcement officials have reported anticipating a large backlog in the processing of marijuana cases. Defs.' Exh. E. In Florida, one state attorney expressed concern regarding whether law enforcement would still have probable cause to conduct searches based on the smell of marijuana, given that smokable hemp has the same odor, and also noted that scientific testing would have to be performed on suspected marijuana in every case before any criminal charges could be filed. Defs.' Exh. F.

We recognize that the State has a legitimate interest in protecting local law enforcement's efforts to enforce Indiana's drug laws and that, as is the case whenever a legislative change occurs, the State may face additional challenges during the adjustment period if the possession of smokable hemp is legalized in Indiana. Plaintiffs have countered with evidence demonstrating that the State has already begun to address these challenges, however, by earmarking additional funding to enable the State Police to purchase the proper THC testing equipment as well as by substantially enhancing penalties for knowingly selling marijuana that is packaged as low-THC hemp extract. In any event, as Plaintiffs argue, the fact that local law enforcement may need to adjust tactics and training in response to changes in federal law is not a sufficient basis for enacting unconstitutional legislation.

Accordingly, given that Plaintiffs have shown a likelihood of prevailing on the merits of their claim that the challenged provisions of SEA 516 are preempted by federal law, the balance of harms weighs in Plaintiffs' favor. For these same reasons, the public interest also supports the issuance of the injunction Plaintiffs seek. *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].").

V. Bond

In cases involving constitutional rights, this court and other district courts in this circuit have declined to require plaintiffs to post a bond. *See, e.g., Ogden v. Marendt*, 264 F. Supp. 2d 785, 795 (S.D. Ind. 2003); *see also BankDirect Capital Fin., LLC v. Capital Premium Financing, Inc.*, 912 F.3d 1054, 1058 (7th Cir. 2019) ("A judge might consider an indemnity of $0 (that is, no bond) 'proper' when the suit is about constitutional principles …."). Because this case involves constitutional principles and the State has put forth no argument as to the bond issue, no bond will be required of Plaintiffs.

VI. Conclusion

For the reasons detailed above, Plaintiffs' Motion for Preliminary Injunction is GRANTED. Defendants are hereby PRELIMINARILY 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). Defendants are HEREBY FURTHER ORDERED to inform forthwith all the affected Indiana state governmental entities of this injunction. All other provisions of SEA 516 shall remain in effect, pursuant to the Indiana Code's severability clause. *See* IND. CODE § 1-1-1-8 ("If any

provision of this Code as now or later amended or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions that can be given effect without the invalid provision or application.").

IT IS SO ORDERED.

Date: 9/13/2019

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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