IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

3C, LLC d/b/a 3Chi, MIDWEST HEMP COUNCIL INC., and WALL'S ORGANICS LLC, Plaintiffs, v. ATTORNEY GENERAL TODD ROKITA, in his official capacity, HUNTINGTON POLICE DEPARTMENT, DETECTIVE SERGEANT DARIUS HILLMAN, in his official capacity, HUNTINGTON COUNTY PROSECUTOR, JEREMY NIX, in his official capacity, EVANSVILLE POLICE DEPARTMENT, DETECTIVE SERGEANT NATHAN HASSLER, in his official capacity, and VANDERBURGH COUNTY PROSECUTOR DIANA MOERS, in her official capacity, Defendants.	)	No. 1:23-cv-1115-JRS-MKK

PLAINTIFFS' COMBINED RESPONSE TO STATE DEFENDANTS' MOTION TO DISMISS AND REPLY IN SUPPORT OF AMENDED MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, 3C, LLC d/b/a 3Chi ("3Chi"), Midwest Hemp Council Inc. ("MHC"), and Wall's Organics LLC ("Wall's Organics"), by counsel, pursuant to this Court's September 27, 2023 scheduling order (DKT 62), hereby file their Combined Response to State Defendants' Motion to Dismiss and Reply in Support of Amended Motion for Preliminary Injunction against Defendants, Attorney General Todd Rokita, in his official capacity (the "Attorney General"), Huntington County Prosecutor Jeremey Nix, in his official capacity, Vanderburgh County Prosecutor Diana

Moers, in her official capacity,[1] Huntington Police Department, Evansville Police Department, Detective Sergeant Darius Hillman, in his official capacity ("Sergeant Hillman") and Detective Sergeant Nathan Hassler, in his official capacity ("Sergeant Hassler"), and in support thereof, state as follows:

INTRODUCTION

Defendants' briefing is almost exclusively focused on avoiding the merits of the case. The mantra throughout each of the Defendants' briefs is that the Attorney General Official Opinion 2023-1 ("Official Opinion") is an unimportant, non-binding document with no real-world impact, and that none of the Defendants is a proper party before the Court.

Defendants' position simply ignores the reality for Plaintiffs (and thousands of other wholesalers, retailers and consumers of low THC hemp extract products in Indiana). The truth—as demonstrated by the designated evidence—is that Defendants have made arrests, threatened felony charges, seized products off of shelves, and demanded through intimidating letters that retailers stop selling low THC hemp extract products or lose their freedom. The catalyst for this sudden uptick in law enforcement is one thing: the Official Opinion. Indeed, the letters circulated to retailers cite to, and rely exclusively on, the Official Opinion as authority for their threats.

Importantly, this is ***not*** a case where the Indiana General Assembly has determined that it wishes to restrict the manufacture or sale of low THC hemp extract products. Thus, Defendants' repeated references to the Seventh Circuit's decision *C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541 (7th Cir. 2020) are misplaced. Indeed, there has been ***no change in Indiana law since 2018*** regarding the definition of low THC hemp extracts. In fact, in 2022 the Indiana General Assembly

[1] The Attorney General, Huntington County Prosecutor, and Vanderburgh County Prosecutor are collectively referred to as "State Defendants," and the Huntington County Prosecutor and Vanderburgh County Prosecutor are jointly referred to as "County Prosecutors."

rejected an amendment that attempted to narrow the definition of "hemp product" to require that all THCs (like Delta-8 THC) be below .3% among other restrictions.[2] Having failed to convince the Indiana General Assembly to change the law, the Indiana Attorney General instead merely concludes, via executive fiat, that certain low THC hemp extract products are now illegal in Indiana and encouraged law enforcement and prosecutors to take aggressive action. And some have.

Plaintiffs' request that the Court declare that the Official Opinion is wrong does not seek an advisory opinion. The record is clear that there is real-world harm occurring throughout Indiana as a direct result of the Official Opinion. Ask the owner of Wall's Organic's, who was threatened with arrest and product seizure if he did not immediately remove his low THC hemp products, resulting in financial devastation to his business. Or ask retailers in Huntington County, who were actually arrested and threatened with 16-year prison sentences for selling low THC hemp products (like they have done for years) simply because the Attorney General changed his mind[3] and now says they are illegal. There is a ripe and justiciable controversy before this Court.

ARGUMENT

To obtain a preliminary injunction, Plaintiffs must establish that: (I) they are likely to succeed on the merits of their claim; (II) they are likely to suffer irreparable harm in the absence of preliminary relief; (III) the balance of equities favors Plaintiffs; and (IV) an injunction would serve the public interest. *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 20 (2008). The

[2] Attached as **Exhibit A**.

[3] As discussed in more detail below, the Attorney General actually met with Justin Journay, owner of 3Chi, in 2021 and was told all about 3Chi's production of low THC hemp. (The 30(b)(6) Deposition of 3Chi ("3Chi Dep.") at 75:2-76:2) (attached as **Exhibit B**.) The Attorney General expressed no concerns to Mr. Journay, and in fact, implied support for Mr. Journay's operations in Indiana. (3Chi Dep. at 76:25-78:22.)

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). Here, Plaintiffs satisfy all four factors. Injunctive relief is warranted to prevent Defendants from enforcing an unconstitutional Official Opinion and to prevent irreparable harm to Plaintiffs and the public alike.

I. Plaintiffs are likely to succeed on the merits of their claims.

Plaintiffs' original brief set forth in detail the manner in which the Official Opinion is unconstitutional because it is: (1) preempted by the 2018 Farm Bill, which solidifies the broad definition of hemp and declares hemp and all derivatives, extracts, and isomers whether growing or not thereof legal; (2) preempted by the 2018 Farm Bill by precluding the interstate commerce of hemp; (3) impermissibly restricts the interstate commerce of hemp in violation of the Commerce Clause; and (4) violates SEA 52, which uses the same broad definition of hemp as the 2018 Farm Bill to declare it is not a controlled substance in Indiana and permits manufacturing, distribution, retail sale, and possession of low THC hemp extracts. (DKT 33 at 7-17.) In response, Defendants ***largely ignore the merits*** and make no compelling argument to the contrary. Instead, Defendants assert a plethora of arguments ranging from standing, to immunity, to inapplicable precedent. None of Defendants' arguments has merit or preclude Plaintiffs' requested injunctive relief. Plaintiffs address each of these arguments in turn, establishing that they easily surpass the "low" threshold and certainly "ha[ve] a better than negligible chance of success on the merits of at least one of [their] claims." *Michigan v. United States Army Corps of Eng'rs,* 667 F.3d 765, 782 (7th Cir. 2011); *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).

A. Plaintiffs have standing to pursue their claims against all Defendants.

To establish Article III standing, plaintiffs must show that (1) they have an actual or imminent threat of suffering a concrete and particularized injury-in-fact; (2) this injury is fairly traceable to defendants' conduct; and (3) it is likely that a favorable judicial decision will prevent or redress the injury. *See Cook Cnty. v. Wolf*, 962 F.3d 208, 218 (7th Cir. 2020) (citations omitted). All Defendants argue in one form or another that Plaintiffs are unlikely to succeed on the merits because they lack standing. That is simply incorrect.

1. Plaintiffs have standing to pursue their claims against State Defendants, and specifically, the Attorney General.

State Defendants' brief is peppered with assertions that Plaintiffs merely seek an impermissible "advisory opinion," that Plaintiffs lack redressability because a "favorable decision on [their] claims will not entitle the plaintiffs to any relief," or that the Official Opinion is simply "an advisory document with no independent force of law" – as if this case is merely a theoretical debate Plaintiffs are asking this Court to resolve. (DKT 82 at 16-20, 25-27.) Nothing could be further from the truth. Try as State Defendants may to downplay the situation, the reality is that manufacturers and retailers of low THC hemp extracts face seizure of their product, and even arrest, due to the Official Opinion.

After the Attorney General issued the Official Opinion (and in reliance on it), police departments and prosecutors across the state issued threatening letters to retailers forcing them to remove low THC hemp extract products from their shelves or face arrest; and these letters all cited to the Official Opinion for their authority to do so. (DKT 31-6, 31-7, 31-8.) Indeed, Sergeant Hassler sent such a letter to Plaintiff Wall's Organics and Sergeant Hillman sent such a letter to MHC's member CravinVapes. (*Id.*) In turn, prosecutors listened to the state's chief legal officer and threatened felony charges against businesses selling these products. (DKT 31, ¶ 65.) Plaintiff

3Chi has been precluded from selling these products throughout Indiana, including in Evansville and Huntington. (DKT 31, ¶¶ 14; DKT 78-2 at 2.) And MHC is depleting its modest resources in an effort to combat the misinformation in the Official Opinion and threats by Sergeants Hassler and Hillman. (DKT 84; DKT 84-1.) Quite literally, Plaintiffs face criminal liability, felonies, and 16 years in prison if they sell low THC hemp extract products like Delta-8 THC – all because of the Official Opinion. The harm is real, and it is immediate.

Contrary to State Defendants' assertions, Plaintiffs' Amended Complaint is not a request for "an impermissible advisory opinion." (DKT 82 at 16.) An advisory opinion is "a legal declaration that could not affect anyone's rights." *Fendon v. Bank of Am., N.A.*, 877 F.3d 714, 716 (7th Cir. 2017). Plaintiffs specifically requested from this Court declaratory judgment that the Official Opinion violates the 2018 Farm Bill, SEA 52, and the United States Constitution on multiple grounds, for redress of the violation of their constitutional rights under Section 1983, and for injunctive relief to preclude Defendants from "taking any steps to criminalize or prosecute the sale, possession, manufacture, financing, or distribution of low THC hemp extracts that are not more than .3% Delta-9 THC on a dry weight basis." (DKT 31.) Here, such relief would certainly "affect [Plaintiffs'] rights" because it would permit 3Chi to again distribute low THC hemp extract products in Indiana, it would allow Wall's Organics to sell these products, and MHC could again pursue its mission to advocate for the whole hemp plant industry instead of seeking to protect its members from law enforcement.

The Seventh Circuit has explained that "[t]he difference between an abstract question calling for an advisory opinion and a ripe case or controversy is one of degree, not discernible by any precise test. Basically, the question in each case is whether there is a substantial controversy, between parties having adverse legal interests, of ***sufficient immediacy and reality*** to warrant the

issuance of a declaratory judgment." *Wisconsin's Env't Decade, Inc. v. State Bar of Wisconsin*, 747 F.2d 407, 410 (7th Cir. 1984) (emphasis added) (internal citations and quotations omitted). The Seventh Circuit is clear that its rulings on the constitutionality of state action do not amount to advisory opinions when the plaintiffs' liberties are at stake:

> In actions such as this one, where a plaintiff asks for a declaration that the law of a state violates the federal Constitution, a number of factors govern whether the substantial controversy threshold of ripeness has been reached. One is the magnitude of the threat that the challenged law will actually be enforced against the plaintiff. Another is the nature of the consequences risked by the plaintiff if the challenged law should be enforced against him. Related to this is the question of whether the plaintiff has actually been forced to alter his conduct as a result of the law under attack.

Id. at 410-11 (citations omitted).

Each of these elements is satisfied here. The "magnitude of the threat that the challenged law will actually be enforced against" Plaintiffs is already confirmed. *Id*. Defendants have and continue to rely on the Official Opinion to preclude Plaintiffs' participation in the low THC hemp extract market. Second, the "nature of the consequences" is severe. If Plaintiffs ignore the Official Opinion and the directives from Sergeants Hassler and Hillman, they could face felonies with up to 16 years in federal prison. (DKT 31, ¶ 65.) The loss of liberty is undoubtedly a severe consequence. And finally, it is clear that each Plaintiff has "been forced to alter [its] conduct" as a result of the Official Opinion. Defendants precluded 3Chi from distributing low THC hemp extract products throughout Indiana, Wall's Organics from selling in Evansville, and MHC from pursuing its mission across the state. A ruling on Plaintiffs' Amended Complaint will resolve these real harms, and this Court's decision will not amount to an advisory opinion.

State Defendants assertion that the Official Opinion is harmless because it is "an advisory document with no independent force of law" fares no better.[4] To be clear, Plaintiffs agree that the Official Opinion is not binding law on this Court (DKIT 82 at 25), but that by no means implies that it is not the catalyst for the harm Plaintiffs are experiencing, or that Plaintiffs cannot seek redress of the violation of their constitutional rights by Sergeants Hillman and Hassler and the County Prosecutors taken in reliance on the Official Opinion. Indeed, Indiana law upholds the position that Attorney General opinion's influence the practical actions of state officials, and that should be taken into consideration by courts when the opinions are at issue in the case. *Butler Univ. v. State Bd. of Tax Comm'rs*, 408 N.E.2d 1286, 1290 (Ind. Ct. App. 1980) ("The opinion of the Attorney General is not controlling, yet the practical construction given to legislation by the public officers of the state and acted upon by those interested and by the people is influential . . . .") (Citation and quotation omitted); *Welliver v. Coate*, 114 N.E. 775, 780 (Ind. Ct. App. 1917) ("Of course the . . . opinion of the Attorney General in construing such a statute, is not binding on the courts, but the fact of such opinions is entitled to weight in determining the bona fides of action based thereon.").[5]

Plaintiffs' Amended Complaint challenging an attorney general opinion, and the actions taken by others in reliance on such an opinion, is not a novel concept. In *Pueblo of Taos v. Andrus*, 475 F. Supp. 359 (D.D.C. 1979), for example, "Plaintiff challenge[d] [that] the legal interpretation

[4] Though State Defendants assert this argument in the failure to state a claim portion of their brief (DKT 82 at 25), it falls in lockstep with their argument that there is no case and controversy as it relates to standing.

[5] *See also Zoercher v. Indiana Associated Tel. Corp.*, 7 N.E.2d 282, 286 (Ind. 1937) ("While, of course, the opinions of the State Tax Board and the Attorney General are not controlling, the practical construction of a statute is influential….so the practical construction given to a statute by the public officers of the state, and acted upon by those interested, and by the people, is to be considered in cases of doubt.") (Citation and quotation omitted).

of the Attorney General" was incorrect regarding the proper boundary line between lands. The defendants claimed that the court did not have jurisdiction to review an attorney general opinion. *Id*. at 363-64. The Court rejected this argument:

> Defendants have moved to dismiss plaintiff's complaint, raising several purported obstacles to the prosecution of this action. Defendants first argue that this Court has no jurisdiction to review the opinion function of the Attorney General, and that any such review would clearly be precluded by precedent. The gravamen of this action, however, is not a challenge to the authority of the Attorney General to issue the opinion he did, but rather is a request seeking this Court's judicial interpretation of the same matter presented to the Attorney General. This Court is not bound by an opinion of the Attorney General. In *Perkins v. Elg*, 307 U.S. 325, 59 S.Ct. 884, 83 L.Ed. 1320 (1939), the Supreme Court was faced with a situation very similar to the circumstances of the present case. Mrs. Elg, born of Swedish parents in the United States, was residing in Sweden when she reached the age of majority and decided to elect United States citizenship. The Department of State issued her a passport in 1939. Sometime after that, however, the Department changed its policy, and Mrs. Elg was notified that she was an illegal alien in April, 1935. At the time departmental policy was changed, it apparently conflicted with an opinion of the Solicitor of the Department of Labor, and the Attorney General was therefore asked to give his opinion. The Attorney General resolved the conflict in favor of the Department of State's position. Notwithstanding the opinion of the Attorney General approving the Department of State's policy, however, the Supreme Court reached the opposite result with respect to Mrs. Elg, stating that "the conclusions of that opinion are not adequately supported and are opposed to the established principles which should govern the disposition of this case." Therefore, the Court finds nothing to preclude its review of the law and facts considered by the Attorney General."

Id. at 363-64 (citations omitted). The Court analyzed the opinion of the attorney general before it, even though the attorney general was not a party, and it ultimately held that the "complaint presents a justiciable case or controversy brought by a party aggrieved" by actions taken "to conform to the opinion of the Attorney General." *Id*. at 365. In fact, the Court concluded that "[a]fter reviewing the relevant legal principles . . . the facts . . . and the relevant documents . . . the opinion of the Attorney General was in error." *Id*. at 367. For these same reasons, Plaintiffs' Amended Complaint is properly before this Court because the Official Opinion, and the actions taken by Defendants in reliance on the Official Opinion, have caused Plaintiffs imminent, actual, and ongoing harm.

In sum, State Defendants effectively argue that Plaintiffs must wait to be arrested under Indiana's controlled substance laws, be charged with felonies threatening decades in prison, and then, and only then, bring suit against the state, police officers, and prosecutors for enforcement of the new unconstitutional interpretation of the existing controlled substance laws. (DKT 82 at 14-19.) That is not the law, and it certainly does not comport with common sense or preservation of judicial resources. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 118–19 (2007) ("Where threatened *government* action is concerned, a plaintiff is not required to expose himself to liability before bringing suit to challenge the basis for the threat.") (Emphasis original); *Kucharek v. Hanaway*, 902 F.2d 513, 516 (7th Cir. 1990) ("[P]laintiffs have made an adequate showing that they want to sell materials which the statute actually or arguably prohibits and that they are deterred from doing so by a reasonable fear of prosecution. So there is a real controversy between them and the state, and the suit can be maintained in a federal court without violating Article III of the Constitution."); *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (current irreparable harm established by "demonstrat[ing] a credible threat of prosecution"). The claims in the Amended Complaint are properly before the Court, and Defendants' standing arguments fail on the merits.

2. Plaintiffs have standing to pursue claims against Sergeants Hillman and Hassler and the County Prosecutors.

Sergeant Hillman asserts that Plaintiffs do not satisfy any of the elements of standing because "they have suffered no injury traceable to . . . Detective Sergeant Hillman," "none of the Plaintiffs even contend that they were harmed by . . . Detective Sergeant Hillman," that Plaintiffs have not "been threatened by . . . Detective Sergeant Hillman," and that MHC's members have not been "injured by . . . Detective Sergeant Hillman." (DKT 69 at 4-5.) That is not remotely true.

As MHC explained in response to this same argument advanced by Sergeant Hillman in his motion to dismiss (which response is incorporated by reference herein in its entirety) (DKT 84), MHC has standing because Sergeant Hillman's actions are thwarting its pursuit of its mission in Huntington, Indiana, his actions are depleting MHC's resources that the organization would otherwise be allocating to its other objectives, and he has created a culture of confusion for MHC staff, members, and the community regarding the legality of the sale, possession, and distribution of low THC hemp extract products. (DKT 84-1, ¶¶ 5-7); *see Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (Organization has standing itself if defendant's "practices have perceptibly impaired [organization's] ability to provide . . . services" and a "consequent drain on the organization's resources. . . ."); *Common Cause Indiana v. Lawson*, 937 F.3d 944, 952 (7th Cir. 2019) (When the actions at issue "created a culture of . . . confusion," "inflicted cost on" the organization, "thwarted" the organization's mission, and will "displace" the organizations resources it "is enough to allege injury in fact."); *Cook Cnty.*, 962 F.3d at 218–19 (Affirming the organization had Article III standing based on "the effect of the Rule on [organization's] ability to perform its core mission and operate its existing programs," where the "Rule would impair the organization's ability to achieve its mission," and the "Rule already has caused [organization] to divert resources from its core programs.").

In addition, MHC has associational standing against Sergeant Hillman because one of its members, CravinVapes Huntington, was forced to remove low THC hemp extract products off of its shelves after it received a letter from Sergeant Hillman threatening arrest. (DKT 84-1, ¶ 5; DKT 31-8.) *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1008 (7th Cir. 2021) ("Associational standing allows an organization to sue on behalf of its members even without a showing of injury to the association itself" where the member would have standing to

sue in its own right.) (Quotation omitted). Further, 3Chi has standing against Sergeant Hillman because it is being precluded from selling products in Huntington, Indiana to its former customer, Sky Vape. (DKT 78-7 at 2.) Sergeant Hillman's argument on this front can be disregarded for the same reason his motion to dismiss should be denied.

Sergeant Hassler, on the other hand, does not advance these same arguments because he concedes that Plaintiff, Wall's Organics, was overtly threatened with arrest by his letter if it did not remove low THC hemp extract products from its shelves. (DKT 31-7.) Instead, he summarily concludes that Plaintiffs lack standing because he "is not capable of redressing Plaintiffs' alleged injuries" since he "played [no] role in the promulgation of the Official Opinion," did not have "influence over the process of creating [the Official Opinion] or the authority to take action with respect to the Official Opinion." (DKT 79 at 4.) Sergeant Hassler's arguments miss the mark.

Plaintiffs do not allege that Sergeant Hassler had any hand in creating the Official Opinion – the Attorney General did that. Rather, Plaintiffs allege that Sergeant Hassler impermissibly threatened Wall's Organics; forced Wall's Organics to remove low THC hemp extract products from its shelves; is impermissibly thwarting MHC's pursuit of its mission, depleting its resources, and creating a "culture of confusion;" and is precluding 3Chi from selling these products to its customers in Evansville, Indiana. (DKT 31-7; DKT 78-7 at 2); *Havens*, 455 U.S. 363; *Lawson*, 937 F.3d at 952; *Cook Cnty.*, 962 F.3d at 218–19. To preclude Sergeant Hassler's continued harm to Wall's Organics, MHC, and 3Chi, Plaintiffs requested injunctive relief from this Court precluding him (and others acting in concert or participation with him) from taking criminal action against Plaintiffs for the sale, possession, or distribution of low THC hemp extract products

declared legal by a plain reading of relevant federal and state law.[6] (DKT 31 at 20-21.) Such relief against Sergeant Hassler would certainly "redress" Plaintiffs' injuries because it would permit Wall's Organics to sell these products, permit MHC to continue its mission in Evansville, and permit 3Chi to continue its wholesaling of these products in Evansville. Plaintiffs have standing against these Sergeants. *See e.g., Allee v. Medrano*, 416 U.S. 802, 804 (1974) (Enjoining "members of the Texas Rangers and the Starr County, Texas, Sheriff's Department" "from a variety of unlawful practices" pursued in enforcement of unconstitutional laws).

The County Prosecutors' arguments regarding redressability fall in line with Sergeant Hillman's and Hassler's. (DKT 82 at 20-22.) They summarily conclude that a judgment on Plaintiffs' Amended Complaint "does not bind prosecutors" and "would not prevent prosecutors from enforcing Indiana's criminal laws." (DKT 82 at 20.) But that position clearly ignores that the injunctive relief in this matter specifically requests that the County Prosecutors be enjoined "from taking any steps to . . . prosecute the sale, possession, manufacture, financing, or distribution of low THC hemp extracts that are not more than .3% Delta-9 THC on a dry weight basis." (DKT 31 at 20.) This injunction would undoubtedly "bind" the County Prosecutors and "prevent" them from enforcing the criminal laws that they incorrectly believe make legal low THC hemp extracts illegal based on the Official Opinion.[7] The redressability argument is a nonstarter.

Finally, only the Huntington County Prosecutor, and not the Vanderburgh County Prosecutor, argues that there is no direct harm alleged due to his conduct. (DKT 82 at 21-22.) But

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[6] Sergeant Hassler's argument that "any injunction against [him] is meaningless as other law enforcement officers are free to rely on the Official Opinion" (DKT 79 at 4) is not accurate, where the requested relief precludes all officers from doing so and there is no evidence to suggest other officers would ignore such a directive to cease these actions. (DKT 31 at 20-21.)

[7] *See infra*, Section I(E), explaining why the County Prosecutors' argument on the "synthetic" material found only in a 3Chi product – and not Wall's Organics' product or MHC's members' products – is meritless and does not affect the requested injunctive relief.

MHC has already explained above that there is direct harm where the arrests and threats of felonies in Huntington, Indiana establish its standing against Sergeant Hillman and the Huntington County Prosecutor on its own behalf and on behalf of its member, CravinVapes. (DKT 84-1.) Each Defendants' argument on standing fails. Plaintiffs have standing to pursue their claims advanced in the Amended Complaint.

B. Sovereign immunity has no application here.

A state official sued in his or her official capacity is equivalent to a suit against the State of Indiana. *Sow v. Fortville Police Dep't*, 636 F.3d 293, 300 (7th Cir. 2011). An unconsenting state is generally immune from suit in federal court except, as relevant here, under the doctrine articulated in *Ex parte Young*, 209 U.S. 123 (1908). "The *Ex parte Young* doctrine allows private parties to sue individual state officials for prospective relief to enjoin ongoing violations of federal law." *Council 31 of the Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO v. Quinn*, 680 F.3d 875, 882 (7th Cir. 2012) (quotations omitted). But the state official must have "some connection with the enforcement of an allegedly unconstitutional state statute" or else he is immune. *Doe v. Holcomb*, 883 F.3d 971, 975 (7th Cir. 2018) (quotation omitted).

State Defendants argue that sovereign immunity bars Plaintiffs' claims "because Defendants have neither enforced nor threatened to enforce the allegedly unconstitutional opinion against Plaintiffs." (DKT 82 at 22) (quotation omitted). State Defendants rely wholly upon *Doe v. Holcomb*, 883 F.3d 971 (7th Cir. 2018), claiming that the Attorney General and County Prosecutors have no connection to the enforcement of the Official Opinion so the *Ex parte Young* doctrine does not apply. Nothing could be further from the truth. This Court has already rejected the exact arguments (and case) advanced by State Defendants.

In *Whole Woman's Health All. v. Hill*, 377 F. Supp. 3d 924, 936 (S.D. Ind. 2019), a nonprofit sued the Indiana Attorney General, as well as other state actors, under Section 1983 challenging the constitutionality of Indiana statutes and regulations regarding abortions. *Id*. at 928. The defendants filed a motion to dismiss, arguing in part, that the Attorney General was not the proper party and should be dismissed. *Id*. at 930. To determine whether the Attorney General could be sued under the *Ex parte Young* doctrine, this Court first analyzed *Doe v. Holcomb*, 883 F.3d 971. In *Doe*, the plaintiff sued the Attorney General as part of a suit challenging the constitutionality of Indiana's name-change statute. The Court dismissed the Attorney General from the suit because he had no connection with the enforcement of the name-change statute because he "ha[d] not threatened to do anything, and [could] not do anything, to prosecute a violation" because the name-change statute carried "no criminal penalties" for its violation. (*Doe*, at 977.)

This Court quickly distinguished *Doe* from the situation at hand, explaining that "We do not read *Doe* to hold that, because the Attorney General cannot initiate criminal prosecutions, the Attorney General is never a proper party to a lawsuit which, as here, [the Complaint] challenges the constitutionality of criminally enforceable statutes. *Id*. at 935. The defendant in *Hill*, (***just like State Defendants do in this lawsuit***) argued that under Indiana statute, the Attorney General "cannot initiate prosecutions; instead, he may only join them when he sees fit," and that he can only "consult and advise" with state prosecutors regarding their duties. *Id*. (DKT 82 at 20-21.) This Court was not persuaded, and held that the Attorney General is directly connected with criminal statutes because the Attorney General "shall represent the state in all criminal cases in the Supreme Court," and he assumes criminal jurisdiction of criminal appeals just like the state appellate courts so that "the Attorney General has the exclusive right and duty to represent the State in all criminal appeals." *Id*. (citation omitted). As such, this Court correctly denied the motion

to dismiss because the Attorney General can properly be sued under the *Ex parte Young* doctrine when criminal punishment is threatened:

> Here, by contrast, the challenged statutes are directly criminally enforceable. And the Attorney General is intimately bound up with criminal enforcement at every stage after the initial charges are laid—at his option at trial, and by statutory command on appeal. We particularly emphasize the Attorney General's complete and exclusive control over the criminal appeals process, a point that was not raised or considered in *Doe* . . . . ***It seems incredible and unsustainable to hold that the state officer responsible for defending criminal convictions secured under a statute does not have some connection with the statute's enforcement***. Thus, it is not the case that the Attorney General would have no power to carry out an injunction invalidating the challenged statutes. ***To the contrary, the Attorney General could "consult with and advise" local prosecuting attorneys not to bring a prosecution under the statutes, Ind. Code § 4-6-1-6 (another power of the Attorney General not raised or considered in Doe)***; he could intervene in the trial of the case, if a prosecution were brought, *id*.; and he could confess error before the intermediate and high courts on appeal from a conviction. *Id*. § 4-6-2-1(a). That is sufficient to bring Plaintiffs' claims against him within *Ex parte Young*.

Id. at 936 (emphases added) (citation and quotation omitted)

The exact same arguments advanced by State Defendants here were systematically rejected by this court in *Hill*. And the case here is even stronger, where the Attorney General ***has*** threatened action under the Official Opinion by declaring that low THC hemp extracts are now illegal despite no change in state or federal law. (DKT 31-5.) The County Prosecutors, in turn, listened to the Attorney General when he "consult[ed] with and advis[ed] the several prosecuting attorneys of the state in relation to the duties of their office" (Ind. Code § 4-6-1-6), and they took action based upon his Official Opinion, as evidenced by the prosecutor letters explicitly citing the Official Opinion as the basis for their actions against Plaintiffs. (DKT 31-6; DKT 31-7; DKT 31-8; DKT 31, ¶¶ 63-73.) *See also Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1153 (S.D. Ind.), *aff'd*, 766 F.3d 648 (7th Cir. 2014) ("Because the Attorney General has broad powers in the enforcement of such criminal statutes [related to unpermitted marriages], he has a sufficient connection and role in enforcing such statutes for purposes of *Ex parte Young*, 209 U.S. at 157, 28 S.Ct. 441. Therefore, the court

DENIES the Attorney General's motion for summary judgment on that ground."); *Arnold v. Sendak,* 416 F.Supp. 22, 23 (S.D. Ind. 1976), *aff'd*, 429 U.S. 968, 97 S.Ct. 476, 50 L.Ed.2d 579 (1976) (finding "[t]he Attorney General thus has broad powers in the enforcement of criminal laws of the state, and is accordingly a proper defendant."); *Gary–Northwest Indiana Women's Services, Inc. v. Bowen*, 496 F.Supp. 894 (N.D. Ind. 1980) (attorney general as a party to a law challenging statute criminalizing abortion); *Andrus*, 475 F. Supp. at 364–65 ("Plaintiff challenges that legal interpretation of the Attorney General. This is a classic case seeking review of administrative action, and sovereign immunity is thus no bar to the action.") State Defendants cannot hide behind sovereign immunity because, pursuant to the *Ex parte Young* doctrine, it does not apply here.

C. The Seventh Circuit has not rejected Plaintiffs' claims.

The State Defendants attempt to over-leverage the Seventh Circuit's decision in *C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541 (7th Cir. 20220) in an effort to apply it to this case, but it is simply inapplicable. *C.Y. Wholesale* addressed whether the Indiana General Assembly had the authority to ***change*** their state laws to criminalize smokable hemp, and Plaintiffs do not dispute that the Seventh Circuit said "yes." But in this case, there has been no change in state or federal law whatsoever, a fact conceded by Defendants. Instead, the Attorney General, through the Official Opinion, unilaterally declared that which has been legal since 2018 to suddenly be illegal. Unlike *C.Y. Wholesale*, this case does not involve legislative action to limit or regulate hemp production (i.e., farming), but it is actually the polar opposite. The Official Opinion is an end run around the Indiana General Assembly by misinterpreting state and federal laws that have been on the books since 2018 that expressly exempt products containing THCs derived from hemp so long as they are below .3% Delta-9 THC. In fact, the Indiana General Assembly in 2022 ***rejected*** an amendment that attempted to narrow the definition of "hemp product" to require that all THCs (like Delta-8

THC) be below .3% among other restrictions. (*See* Ex. A). Inasmuch as this case does not involve legislative action to regulate hemp, *C.Y. Wholesale* does not help State Defendants.

D. A number of courts around the country have held that the sole legal metric distinguishing a hemp product from a controlled substance is the source material and the Delta-9 THC concentration.

In *AK Futures, LLC v. Boyd Street Distro, LLC*, 35 F.4th 682 (9th Cir 2022), the Ninth Circuit affirmed the district court's preliminary injunction in favor of AK Futures, LLC, a manufacturer of hemp derived Delta-8 THC products, in a copyright infringement action. AK Futures alleged that Boyd Street Distro, LLC was selling counterfeit versions of its products, one of which was registered with the United States Patent and Trademark Office (USPTO).

The court held that the 2018 Farm Bill definition of hemp is unambiguous in its definition. Therefore, a plain reading of the statute compels a conclusion that a product is a hemp product if it is derived from hemp and is below .3% Delta-9 THC: "the delta-8 THC in AK Futures' e-cigarette liquid appears to fit comfortably within the statutory definition of 'hemp.' According to the company's uncontradicted declaration, its delta-8 THC products are 'hemp-derived' and contain 'less than 0.3" percent delta-9 THC.'" *Id*. at 691. Defendants in this case have offered nothing to contradict 3Chi's evidence that its products are hemp derived and contain less than .3% Delta-9 THC.

Significantly, the *AK Futures* Court went even further to hold that this statutory metric compelled by the plain reading of the 2018 Farm Bill applies to all downstream products regardless of method of manufacture: "The Farm Act's definition of hemp does not limit its application according to the manner by which 'derivatives, extracts, [and] cannabinoids' are produced. Rather, it expressly applies to 'all' such downstream products so long as they do not cross the 0.3 percent delta-9 THC threshold." *Id*. at 692. In doing so, the Court rejected the defendant's attempt to

convince the court to ignore the plain reading of the 2018 Farm Bill in favor of an invented "synthetic" metric that lacks any semblance of statutory authority. State Defendants in this case mimic the same invented "synthetic" standard through their lengthy expert witness report, which, at bottom, does not dispute 3Chi's products are derived from hemp and below .3% Delta-9 THC. A verbose expert report should not compel this court to adopt an invented "synthetic" standard and ignore the plain reading of the 2018 Farm Bill.

The *AK Futures* Court also rejected Defendants claim that the DEA classifies Delta-8 THC as a controlled substance because it is "synthetic." As the court stated:

> [T]he DEA explains the Farm Act does not affect "the control status of synthetically derived tetrahydrocannabinols" because hemp, as defined by the statute, "is limited to materials that are derived from the plant Cannabis sativa L." This language suggests the source of the product—not the method of manufacture—is the dispositive factor for ascertaining whether a product is synthetic.

Id. at 692 (citation omitted). This is the same "synthetic" argument mimicked by Defendants in this case and should be rejected by this court in favor of a plain reading of the 2018 Farm Bill.

Finally, the *AK Futures* Court also rejected the defendants' claim that the DEA classifies Delta-8 THC as a controlled substance because it is listed on its website as such. "To the extent that this copy of the schedule suggests that hemp-derived delta-8 THC remains controlled regardless of its delta-9 THC concentration level, this is inconsistent with both statutory text and the DEA's own duly enacted regulations. *See* 7 U.S.C. § 1639o(1); 21 C.F.R. § 1308.11(d)(31)(ii), (d)(58). As a result, we would afford no deference to such an interpretation." *Id*. at 693. Again, State Defendants rely on this same rejected argument.

In *Bio Gen, LLC v. Sanders*, No. 4:23-CV-00718-BRW, 2023 WL 5804185 (E.D. Ark. Sept. 7, 2023), the Court granted a preliminary injunction to prohibit the enforcement of Act 629, which attempted to recriminalize certain hemp derived cannabinoids like Delta-8 THC and any

other "psychoactive substance derived therein" in Arkansas. Ark. Code § 5-64-215(a).[8] The court was unequivocal that "The THC substances listed above [Delta-6 through Delta-10] are likely legal under the 2018 Farm Bill." *Id*. at 6. This means that any THC that is below .3% Delta-9 and derived from hemp is a hemp product. *Id*. Like *AK Futures*, the Court adopted a plain reading of the 2018 Farm Bill and found that, "Under the 2018 Farm Bill's standard, the only way to distinguish controlled marijuana from legal hemp is the delta-9 THC concentration level. Additionally, the definition extends beyond just the plant to 'all derivatives, extracts, [and] cannabinoids.' The definition covers downstream products and substances, if their delta-9 THC concentration does not exceed the statutory threshold." *Id*.

Like the defendant in *AK Futures*, the defendants in *Bio Gen* also tried to convince the court to apply an invented "synthetic" standard rather than read the plain reading of the statute. Instead, the court concluded unambiguously, "the 2018 Farm Bill's definition of hemp does not limit its application to method 'derivatives, extracts, [and] cannabinoids' are produced. Instead, the definition covers all downstream products if they do not cross the 0.3 percent delta-9 THC threshold." *Bio Gen*, No. 4:23-CV-00718-BRW, 2023 WL 5804185, at *6. The court also rejected the defendant's notion that the DEA considers Delta-8 THC to be a controlled substance: "the Drug Enforcement Administration has incorporated the 2018 Farm Bill's definition into its regulations. The entry for tetrahydrocannabinols on the DEA's regulatory schedule I exempts "any material, compound, mixture, or preparation that falls within the definition of hemp set forth in 7 U.S.C. [§] 1639o." *Id*. at 5, fn. 57. These are, again, the same recycled arguments put forth by State Defendants.

[8] The Arkansas statute in question is similar to Indiana Code § 35-48-2-4(d)(32), which State Defendants rely on to argue hemp derived cannabinoids (low THC hemp extracts) are schedule I substances despite being explicitly exempted from the definition of a controlled substance.

Even more recently just last week, in *Elements Distribution, LLC v. State of Georgia* No. A23A0842, 2023 WL 7210306 (Ga. Ct. App. Nov. 2, 2023), a search warrant was executed based on an affidavit from a local law enforcement officer that Elements violated Georgia's controlled substances statute. Specifically, the warrant granted the search of Elements' warehouse and seizure of, "any and all items related to the sale and distribution of marijuana to include products labeled as Delta-8, Delta-9 or Delta-10." *Id*. at 1. The court in a plurality opinion held that the trial court erred in denying Elements' petition for the return of the seized inventory because the warrant was not supported by probable cause as hemp derived cannabinoids like Delta-8 THC are not controlled substances under state or federal law. *See generally*, *id*.

In doing so, the court examined Georgia's controlled substances statutes and the 2018 Farm Bill and found that both "expressly excludes tetrahydrocannabinol, or THC, 'when found in hemp or hemp products'" and further held that the plain reading of the relevant statutes, "provide that a derivative of the Cannabis sativa L. plant is 'hemp' and, therefore, not a controlled substance, unless it has more than a 0.3 percent concentration of Delta-9-THC. *Id*. at 2. Indiana statutes are remarkably similar to Georgia's statute as they both expressly exempt hemp derived THC products from the definition of a controlled substance so long as they are below .3% Delta-9 THC. (*See also* DKT 33-1, DKT 33-2) (Kentucky and Texas state court cases falling in Plaintiffs' favor).

In sum, courts across the country have wrestled with the identical issue before this Court, and several have concluded that if Delta-9 THC concentration does not exceed the .3%, then it is legal. As mentioned, Defendants spill precious little ink actually addressing the merits or explaining why all of these courts got it wrong. These decisions provide a compelling blueprint for this Court.

E. This Court should reject State Defendants' attempts to invent a new standard devoid of any statutory authority to distinguish hemp from a controlled substance.

Relying on their alleged expert, State Defendants seek to convince this Court to embrace an invented "synthetic versus naturally occurring" standard unambiguously rejected in *AK Futures*, *Bio Gen*, and *Elements*. State Defendants' witness fails to accurately point to any statutory authority for the invented "synthetic" standard,[9] and ignores relevant federal and Indiana law. To counter this fictional synthetic standard, Plaintiffs obtained an expert opinion from chemist Mark Charles Krause. (The Declaration of Mark Charles Krause is attached as **Exhibit C**.) Mr. Krause is a qualified chemist specializing in the hemp industry. *Id*. His expert opinion confirms that the terms used in the definition of hemp, such as "derivatives, extracts, cannabinoids, isomers, acids", derived from the plant "whether growing or not" establishes that Congress did not intend to limit the definition of hemp to naturally occurring compounds. *Id*., ¶ 7. But regardless, on a purely scientific level, the conversion of CBD to Delta-8 is not "synthetic" because it occurs ***naturally*** in the plant when exposed to sunlight. *Id*., ¶ 9. Even under State Defendants' invented standard, their argument fails on the science. *Id*.

Under the 2018 Farm Bill, the only requirement for testing hemp and hemp products is to use a "procedure for testing, using post-decarboxylation or other similarly reliable methods, delta-9 tetrahydrocannabinol concentration levels…" 297B(a)(2)(A)(ii). USDA's Final Rule calculates decarboxylation, "using a molecular mass conversion ratio that sums delta-9 THC and eighty-

[9] State Defendant's expert witness, who is not an attorney, nevertheless renders the legal conclusion that low THC hemp extracts are schedule I substances under Ind. Code 35-48-2-4(d)(31) because of the manner in which they are manufactured to responsibly meet consumer demand despite being expressly exempted from the definition of a controlled substance.

seven and seven tenths (87.7) percent of THC-acid ((delta-9 THC) + (0.877*THCA)).”[10] State Defendants’ expert does not dispute the fact that 3Chi is in compliance with the 2018 Farm Bill and USDA’s Final Rule testing requirements of using a post-decarboxylation testing method. Nor does the State Defendant’s witness dispute that fact that all of 3Chi’s products are derived from hemp and contain less than .3% Delta-9 THC. Further, under Indiana law, a low THC hemp extract product like Delta-8 THC may be sold if it contains a certificate of analysis prepared by an independent testing laboratory showing it is in compliance with Ind. Code § 24-4-21-3 and Ind. Code § 24-4-21-1. State Defendants’ expert does not dispute the fact that 3Chi is in full compliance with the relevant Indiana laws that expressly allow the sale of low THC hemp extract products.

Furthermore, the Indiana Court of Appeals has already confirmed the distinction between hemp and a controlled substance like marijuana. In *Fedij v. State*, 186 N.E.3d 696 (Ind. Ct. App. 2022), the Court held the State failed to present sufficient admissible evidence to support Fedij’s conviction for Class A misdemeanor possession of marijuana because it failed to confirm the THC concentration of the substance in question. Therefore, “as a matter of Indiana law, the difference between legal hemp and illegal marijuana is determined by the percent concentration of THC in a particular substance: to be illegal, the percent concentration of THC must be more than 0.3%.” *Id.* at 708. In short, if it is derived from hemp and below .3% Delta-9 THC, Indiana considers it to be a hemp product. This court should unambiguously reject State Defendants’ invented standard in favor of a plain reading of federal and state law.

[10] https://www.federalregister.gov/documents/2021/01/19/2021-00967/establishment-of-a-domestic-hemp-production-program (last visited November 9, 2023).

II. Plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief, and they have no adequate remedy at law.

If the Court agrees that Plaintiffs have a likelihood of success on at least one of its claims, then it must also find that Plaintiffs will suffer irreparable harm in the absence of preliminary relief. Here, Plaintiffs allege that the Official Opinion and Defendants' actions taken in reliance on the official opinion violate the Supremacy Clause, the Commerce Clause, and deprives Plaintiffs of their right to engage in the commercial sales of products declared legal by federal and state law. (DKT 31.) Any violation of Plaintiffs' constitutional rights on these fronts is *per se* irreparable harm – a notion that the Supreme Court of United States, the Seventh Circuit, and this Court all accept. *See Elrod v. Burns*, 427 U.S. 347, 373–74 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Indiana Fine Wine & Spirits, LLC v. Cook*, 459 F. Supp. 3d 1157, 1170 (S.D. Ind. 2020) ("'The existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest.'") (quoting *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978)).

But even in their own right, the actual harms Plaintiffs suffer warrant a finding of irreparable harm. Defendants do not dispute that Wall's Organics and MHC's member CravinVapes were forced to remove low THC hemp extract products from their shelves under threat of criminal arrest and are still being precluded from selling these products today. Defendants do not dispute that 3Chi is being precluded from selling these products to its customers in Evansville and Huntington (and throughout the state) or that it lost bank financing. Defendants do not dispute that MHC's pursuit of its mission is being thwarted or its resources depleted by these actions. Defendants do not dispute that other police departments, officers, and prosecutors across the state are taking similar action against retailers, sellers, and purchasers of these products. Nor

do Defendants dispute that all of these injuries were incurred as a direct result of parties taking action pursuant to the Official Opinion. (DKT 33 at 17-18.)

These harms are real, not theoretical. (DKT 31, ¶ 62; DKT 78-7 at 2; DKT 84-1, ¶ 5.) These are not simply mathematical financial damages. The hemp market is volatile and has seen a rapid growth in Indiana and surrounding states in the last few years.[11] It is impossible for Plaintiffs to make assumptions as to the amount of their losses, especially given the long-term loss of goodwill and customer confidence as a result of Defendants' actions. *Abbott Lab'ys v. Mead Johnson & Co.*, 971 F.2d 6, 16 (7th Cir. 1992) (overturning district court's finding of lack of harm where district court improperly concluded that "one could easily measure the sales [plaintiff] lost while waiting for final judgment").

The difficulty in quantifying these losses, or to even place a value on the loss of Plaintiffs' constitutional rights, also precludes Plaintiffs from obtaining an adequate remedy at law outside of injunctive relief. *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"). Indeed, there is no "plain, clear and certain, [or] prompt" remedy for Plaintiffs because SEA 52 and the 2018 Farm Bill do not provide for specific remedy when a state's position is challenged as unconstitutional. *Interstate Cigar Co. v. United States*, 928 F.2d 221, 223 (7th Cir. 1991) (quotation omitted); *Indiana Fine Wine & Spirits, LLC v. Cook*, 459 F. Supp. 3d 1157, 1170 (S.D. Ind. 2020) (""IFWS

[11] https://www.in.gov/isda/divisions/economic-development/hemp/ (last visited November 9, 2023); *see also* October 2023 National Cannabinoid Report (attached as **Exhibit D**); Indiana Hemp-Derived Cannabinoid Summary (attached as **Exhibit E**.)

also has no adequate remedy at law because it cannot pursue compensatory damages . . . .") Indeed, the threat of prosecution is, without more, sufficient to establish irreparable harm. *See Whiting*, 732 F.3d at 1029 (holding that likelihood of irreparable harm established by "demonstrat[ing] a credible threat of prosecution under the statute"). In fact, a misdemeanor drug conviction (let alone the felonies the County Prosecutors threatened in this case) would preclude any member of the industry, including Plaintiffs, from being properly licensed as a grower or handler in Indiana because an applicant must submit an FBI background check demonstrating the applicant has not been convicted of any drug related felonies or misdemeanors within the last ten (10) years.[12]

In response to this overwhelming showing of irreparable harm and inadequate remedy at law, the only argument Defendants advance is that "Any potential criminal sanctions Plaintiffs face today, they have faced for years, and will continue to face even if the court issues a preliminary injunction." (DKT 82 at 32.) In other words, Defendants take an overly simplistic view of this case to conclude that the Official Opinion isn't binding law so it hasn't changed anything. That is wholly ignorant of the realities of this matter. While it is true that Indiana law on the legality of hemp has not changed in the last few years, it is undisputed that the Indiana Attorney General, Indiana prosecutors, Indiana police departments, and Indiana police officers did not take action against low THC hemp extract products until the Attorney General issued the Official Opinion claiming that these products are now illegal and should be – and are being – prosecuted and arrested as such. (*See generally*, DKT 31.) Defendants cannot be serious by suggesting that if this Court concludes that the Official Opinion is wrong, that Defendants would still take criminal action

[12] https://oisc.purdue.edu/hemp/pdf/lsa_22-281_emergency_rule_eff_091522.pdf (last visited November 9, 2023) (Section 33(b)(6).)

against low THC hemp products under the guise that they have been illegal all along under Indiana law.

Preliminary injunctions are the proper method by which to combat unconstitutional laws and actions, and that is exactly what Plaintiffs seek here. *See i.e. Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r, Indiana State Dep't of Health in his official capacity*, No. 1:13-CV-01335-JMS, 2015 WL 4065441, at *1 (S.D. Ind. July 2, 2015) (seeking declaratory and injunctive relief when challenging state statutes as unconstitutional); *Allee*, 416 U.S. at 815 ("Where, as here, there is a persistent pattern of police misconduct, injunctive relief is appropriate."); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939) (Enjoining police from "exercising personal restrain over [the plaintiffs]" in enforcement of unconstitutional ordinances).

III. The balance of equities favors Plaintiffs, and an injunction serves the public's interests.

Sergeants Hillman and Hassler do not attempt to argue that the balance of harms weighs in their favor, and the State Defendants do so only by flaming the stigma that surrounds hemp, with little substance to support their position. The balance of harms clearly weighs in Plaintiffs' favor where the absence of an injunction inflicts upon them continuing violations of their constitutional rights and unknown financial harm. (*See Infra*, Section II.) On the other hand, granting the injunction against Defendants is simply maintaining the status quo and asking them to go back to treating low THC hemp extract products like legal commodities, which they were doing since 2018 until the Official Opinion was published.

State Defendants first suggest that this Court should be hesitant to grant an injunction that would curb the ability of the Attorney General to carry out his duty in giving opinions on the legality of certain topics. (DKT 82 at 33.) But this is pure sophistry. An injunction would have no

impact on the Attorney General's ability to render his opinion on legal matters. Plaintiffs challenge the accuracy of the Official Opinion, not the Attorney General's ability to give it.

State Defendants then assert that they have "strong interests in enforcing [the state's] criminal laws," and that the "Indiana General Assembly has chosen not to legalize medical or recreational marijuana," so low THC hemp extract products should likewise be prohibited. (DKT 82 at 33-34.) This argument is a non-starter. Plaintiffs agree that the State of Indiana has an interest in enforcing its drug laws – but low THC hemp extract products are not illegal under Indiana or federal law; so that interest does not apply here.

Plaintiffs note it is Indiana citizens that elected their federal and state representatives to draft and pass the 2018 Farm Bill and SEA 52 declaring hemp to be legal. (7 U.S.C.A. § 1639o(1); ECF 31-11.) If the Indiana legislature wanted to expressly outlaw hemp like it did marijuana and the other illegal drugs the State Defendants attempt to associate it with, it could have. But it chose not to. Hemp, including low THC hemp extract products, is legal. *Dean v. United States*, 556 U.S. 568, 573 (2009) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (Quotation omitted).

In fact, the Indiana General Assembly has already taken a stance against the ***exact*** perspective argued by State Defendants. During the 2022 legislative session, an amendment was added to Senate Bill 209 that narrowed the definition of "hemp product" in a way that required all THCs (like Delta-8 THC) to be below .3% and narrowed the definition of a low THC hemp extract to include all THCs as well as isomers of THCs (rather than just Delta-9) (*See* Ex. A.) Ultimately, the Indiana General Assembly rejected this effort by stripping the language from the bill.

Not to mention, the Attorney General himself previously rejected the stance he takes in the Official Opinion. When he met with the owner of 3Chi, Mr. Journay, in 2021, Mr. Journay explained 3Chi's business, its operations, and specifically, low THC hemp extract products like Delta-8. (3Chi Dep. at 75:2-76:22.) The Attorney General did not raise objections or concerns with 3Chi's business or the sale of Delta-8 THC. (3Chi Dep. at 77:11-13.) Nor did any of the members of Indiana's General Assembly that toured 3Chi's facilities in the previous years. (3Chi Dep. at 78:1-22.) Mr. Journey left this meeting with the understanding that the Attorney General and 3Chi were on good terms, and it was operating legally. (3Chi Dep. at 76:25-77:3.) It is difficult to see how the equities could favor an Attorney General that used the Official Opinion as an end-run around the legislature.

Regardless, and to be clear, even if Defendants' concerns were legitimate, 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 Defendants and the public on a "sliding scale" that strongly favors injunctive relief. *Turnell v. Centimark Corp.,* 796 F.3d 656, 662 (7th Cir. 2015). Stated differently, it is always in the public interest to strike down unconstitutional laws. *See Annex Books, Inc. v. City of Indianapolis,* 673 F. Supp. 2d 750, 757 (S.D. Ind. 2009) ("[U]nder Seventh Circuit precedent there can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute because 'it is always in the public interest to protect [Constitutional] liberties.'") (quoting *Joelner v. Village of Washington Park,* 378 F.3d 613, 620 (7th Cir.2004)).

IV. Plaintiffs do not need to provide security.

The purpose of the moving party posting a bond as security is to alleviate the danger that the defendants will incur costs or damages from the issuance of a preliminary injunction. Fed. R.

Civ. P. 65(C). There is no such danger here, where an injunction simply places the parties back to their status quo, and Defendants go back to treating low THC hemp extracts as legal commodities like they have since 2018. *Hope v. Comm'r of Ind. Dep 7 of Correction,* No. 1:16-cv-02865-RLY-TAB, 2017 WL 1301569, at *8-9 (S.D. Ind. Apr. 6, 2017) ("a district court may waive the requirement of an injunction bond when the court is satisfied that there's no danger that the opposing party will incur any damages from the injunction.") (Quotation omitted); *see also Habitat Educ. Ctr. v. United States Forest Serv.*, 607 F.3d 453, 458 (7th Cir. 2010)) (waiving bond requirement because based on finding that "Defendants will not suffer any damages if an injunction is ordered"). State Defendants do not attempt to argue that Plaintiffs need to provide a bond as security under Rule 65(c), and Sergeants Hillman and Hassler simply state that a bond should be required without alleging that they would suffer any harm from issuance of this injunction. (DKT 69 at 7-8, DKT 79 at 5.) With no harm to Defendants, there is no need for a bond.

V. The requested injunction is not overly broad or vague.

Plaintiffs specifically request an injunction from this Court "enjoining Defendants (including other persons in concert or participation with them, including but not limited to law enforcement personnel and prosecutors' offices, including the Indiana State Police and Indiana Prosecuting Attorneys Council) from taking any steps to criminalize or prosecute the sale, possession, manufacture, financing, or distribution of low THC hemp extracts that are not more than .3% Delta-9 THC on a dry weight basis." (DKT 31 at 20.) The State Defendants argue that this requested injunction is overly broad and vague. It is neither.

State Defendants first allege that the requested injunction is vague because no Defendants have authority to "criminalize" hemp products. (DKT 82 at 35.) But the simple definition of

"criminalize" is "to turn into a criminal or treat as criminal,"[13] which is exactly what the Attorney General did in the Official Opinion, what Sergeants Hillman and Hassler did in making their arrests, seizures, and threats, and what the County Prosecutors did in threatening prison time. There can be no serious confusion over the word criminalize. An injunction simply causes Defendants to revert back to treating low THC hemp extract products as legal commodities pursuant to the 2018 Farm Bill and SEA 52. *Russian Media Grp., LLC v. Cable Am., Inc.*, 598 F.3d 302, 307 (7th Cir. 2010) ("[T]he injunction must also be broad enough to be effective, and the appropriate scope of the injunction is left to the district court's sound discretion.")

State Defendants then summarily conclude that the requested injunction – ***which uses the exact definition of hemp from the 2018 Farm Bill and SEA 52*** – is overly broad because "it would prevent enforcement of criminal laws even where other controlled substances, not just delta-8 THC, are involved." (DKT 82 at 35.) That argument, based on the invented "synthetic" standard, fares no better here than it did in Defendants' argument on the merits. (*See infra*, Section I(E).) Nor is this an "obey-the-law" injunction (DKT 82 at 35) where Defendants are asserting that low THC hemp extract products are now illegal and continuing to deprive Plaintiffs of their constitutional rights daily. *Allee*, 416 U.S. at 814 (Enjoining police officers and sheriff's department from taking action pursuant to unconstitutional statutes where "the injunction does no more than require the police to abide by constitutional requirements; and there is no contention that this decree would interfere with law enforcement by restraining the police from engaging in conduct that would be otherwise lawful.")

Finally, State Defendants claim that the requested relief is greater than necessary because it seeks to enjoin "numerous non-parties" and "seemingly . . . anyone." (DKT 82 at 35.) That

[13] https://www.merriam-webster.com/dictionary/criminalize (last visited November 9, 2023).

hyperbole is simply not accurate. The requested injunction seeks to enjoin Defendants and "anyone acting in concert or participation with them" (DKT 31 at 20) because a request solely against Defendants would be thwarted if their coworkers could simply take their place and continue to criminalize, arrest, and prosecute sellers of low THC hemp extract products. This idea was already threatened by Defendants in their briefing: "any injunction against Sergeant Hassler individually is meaningless as other law enforcement officers are free to rely on the Official Opinion" to criminalize low THC hemp extract products. (DKT 79 at 4.) Similarly, the requested injunction also seeks to enjoin "law enforcement personnel and prosecutors' offices, including the Indiana State Police and Indiana Prosecuting Attorneys" because those are the exact entities to whom the Attorney General sent the Official Opinion directly advising them to take action. (DKT 31-5.) The request is narrowly tailored to combat directly those involved in the Official Opinion. *Cable Am., Inc.*, 598 F.3d at 306 (affirming injunction against defendants and those "in active concert or participation with Defendants"). Regardless, should this Court take any issue with the language of the requested injunction, it of course has the discretion to tailor the appropriate remedy. *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1272 (7th Cir. 1995) ("A district court ordinarily has wide latitude in fashioning injunctive relief.")

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Amended Motion for a Preliminary Injunction, deny Defendants' pending Motions to Dismiss and Motion for Judgment on the Pleadings, and for all other just and equitable relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 9, 2023, a copy of the foregoing was filed electronically. A copy of this filing will be sent to the following counsel of record by operation of the Court's electronic filing system.

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