UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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| 3C, LLC d/b/a/ 3Chi, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>ATTORNEY GENERAL TODD ROKITA, in his official capacity, et al.,<br><br>Defendants. | ) | Case No. 1:23-cv-01115-JRS-MKK |

**STATE DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' AMENDED MOTION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS**

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## INTRODUCTION

3Chi manufactures, markets, and sells products that induce an "altered state of mind" in consumers—namely by getting them "stoned," "baked," and "high." ECF No. 78-2 at 53–55 (Journay Dep. Tr. 51:6–9, 14, 52:14–24, 53:19–21); ECF No. 77-2; ECF No. 77-3. Among 3Chi's products are "OG Kush," "Blue Dream," and "Mind Trip," which are delta-8-THC vape cartridges and pods. ECF No. 78-2 at 33–36 (Journay Dep. Tr. 31:15-18, 33:11-15; 34:12-16); ECF No. 78-3 at 11–12 (3Chi Low THC Hemp Product List). 3Chi also sells ingestible THC products, like its "Delta 8 Comfortably Numb Mini-Pack Gummies." ECF No. 78-3 at 2; *see* ECF No. 78-2 at 29–30 (Journay Dep. Tr. 27:21–28:3). It brought this lawsuit to make Indiana a sanctuary for its high-inducing products, notwithstanding Indiana's longstanding prohibition against producing, selling, and possessing recreational drugs.

Earlier this year, in response to a request from two state officials and in compliance with his statutory authority, the Attorney General issued an Official Opinion "regarding whether tetrahydrocannabinol (THC) variants and other designer cannabinoid products are considered controlled substances as that term is defined" by state law. ECF No. 31-5 at 1. The Attorney General concluded that "[m]ost THC variants . . . fall under the statutory definition of a Schedule I controlled substance pursuant to Ind. Code § 35-48-2-4(d)(31)," but emphasized that his office "cannot opine on the charging or prosecution of individual cases and defers to the prosecuting attorneys and law enforcement officers for those decisions." ECF No. 31-5 at 1–2.

Five months later, Plaintiffs 3Chi and Midwest Hemp Council brought this lawsuit and moved for a preliminary injunction "enjoin[ing] 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." ECF No. 31 at 20; ECF No. 32 at 2. After the State and the Attorney General responded to the motion, pointing out that Plaintiffs sued the wrong defendants over non-binding advice, asserted claims barred by precedent, and asked for relief courts cannot award, Plaintiffs filed an amended complaint that added defendants and moved again for a preliminary injunction. They admit, however, that "the issue at the heart of the Amended Complaint" remains "whether the Attorney General is right or wrong." ECF No. 75 at 4. In other words, they continue to seek relief the judiciary lacks authority to give—an advisory opinion on a non-binding statement from the Attorney General.

Plaintiffs' amendments also fail to cure many other problems with their lawsuit, including that Plaintiffs lack standing to pursue claims against the Attorney General, Huntington County Prosecuting Attorney, and Vanderburgh County Prosecuting Attorney; assert claims indistinguishable from ones that the Seventh Circuit rejected in *C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541 (7th Cir. 2020); and request injunctive relief beyond what courts can lawfully give. The Court should deny Plaintiffs' motion for a preliminary injunction and dismiss the Amended Complaint.

## BACKGROUND

### I. Federal and State Regulation of Marijuana and Hemp

Cannabis plants contain various chemical components, including cannabidiol (CBD), a non-psychoactive compound, and tetrahydrocannabinol (THC), a psychoactive cannabinoid that binds to receptors in the brain and induces the psychotropic high that users experience from ingestion. *See* LISA N. SACCO, CONG. RSCH. SERV., *The Evolution of Marijuana as a Controlled Substance* 1–2 (Apr. 7, 2022). THC has several isomers of various potencies, with Delta-9 THC being its most abundant form and the most responsible for the high associated with cannabis. *Id.*

In 1970, the Controlled Substances Act created schedules of controlled substances, and included "marihuana" as a schedule I drug. *See* Pub. L. No. 91-513, Title II, § 202, 84 Stat. 1242, 1247 (1970) (codified at 21 U.S.C. § 812). The Act defined "marihuana" as "all parts of the plant Cannabis sativa L., whether growing or not," except for "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." *Id.* § 102, 84 Stat. at 1244 (codified at 21 U.S.C. § 802(16)). Then, in 1986, Congress enacted the Controlled Substance Analogue Enforcement Act (CSAEA), which provides that "[a] controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I." Pub. L. No. 99-750, Title I, § 1202, 100 Stat. 3207-13 (codified at 21 U.S.C. § 813(a)). A "controlled substance analogue" is "a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II." *Id.* § 1203, 100 Stat. at 3207-13 (codified at 21 U.S.C. § 802(32)(A)(i)). Not long after, Indiana enacted its own controlled substances schedules that classified marijuana similarly. Ind. Code § 35-48-2-4 (as added by Acts 1976, P.L. 148, § 7).

Decades later, in 2014, Congress enacted the Agricultural Act of 2014 ("the 2014 Act"). That statute permitted States and research institutions to cultivate industrial hemp—defined by reference to the volume of delta-9 THC—for research purposes. *See* Pub. L. No. 113-79, Title VII, § 7606, 128 Stat. 649, 912 (codified at 7 U.S.C. § 5940). It, however, provided that institutions may "grow or cultivate industrial hemp" "for purposes of research" only if "the growing or cultivating of industrial hemp *is allowed under the laws of the State* in which such institution of higher education or State department of Agriculture is located." *Id.* § 7606(a) (emphasis added). Under the 2014 Act, industrial hemp is "the plant Cannabis sativa L. and any part of such plant, whether

growing or not, with a delta-9 tetrahydrocannabinol [THC] concentration of not more than 0.3% on a dry weight basis." *Id.* § 7606(b)(2); *see* CONG. RSCH. SERV., *Defining* Hemp*: A Fact Sheet* 3 (Mar. 22, 2019), https://crsreports.congress.gov/product/pdf/R/R44742. The 2014 Act classified industrial hemp by concentration of delta-9 THC because it was known to be "the primary (but not the only) psychoactive chemical compound (cannabinoid) in cannabis." Sacco, *supra*, at 1.

In 2014, the Indiana General Assembly responded to the changes in federal law with Senate Enrolled Act 357, which authorized "the production of, possession of, scientific study of, and commerce in industrial hemp" and classifies it as "an agricultural product . . . subject to regulation by the state seed commissioner" in Indiana. P.L. 165-2014, § 1, 2014 Ind. Acts 1959, 1960 (codified at Ind. Code § 15-15-13-7). Like the federal 2014 Act, Indiana defined industrial hemp as "all nonseed parts and varieties of the Cannabis sativa plant, whether growing or not, that contain a crop wide average [THC] concentration that does not exceed . . . three-tenths of one percent (0.3%) on a dry weight basis." *Id.* (codified at Ind. Code § 15-15-13-6). And it removed industrial hemp from the State's definition of "marijuana." *See id.* § 3, 2014 Ind. Acts at 1966 (codified at Ind. Code § 35-48-1-19(b)(6)).

A few years later, Congress enacted the Agriculture Improvement Act of 2018 ("the Farm Bill"). Similar to the 2014 Act, the 2018 Farm Bill classifies as "hemp" all parts of a cannabis plant and its derivatives "with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." Pub. L. No. 115-334, § 10113, 132 Stat. 4490, 4908 (codified at 7 U.S.C. § 1639o(1)). The Farm Bill also expressly removes hemp from the definition of "marijuana" in the schedule of controlled substances. *See id.* § 12619, 132 Stat. at 5018 (codified at 21 U.S.C. §§ 802(16)(B)(i), 812). As the DEA's rule implementing the Farm Bill explained, the law

"d[id] not impact the control status of synthetically derived [THC]," and "[a]ll synthetically derived tetrahydrocannabinols remain schedule I controlled substances." Drug Enforcement Agency, Implementation of the Agriculture Improvement Act of 2018, 85 Fed. Reg. 51,639, 51,641 (Aug. 21, 2020).

Critically, the Farm Bill further states, "[N]othing in this subchapter preempts or limits any law of a State . . . that (i) regulates the production of hemp; and (ii) is more stringent than this subchapter." Pub. L. No. 115-334, § 10113, 132 Stat. 4490, 4909 (codified at 7 U.S.C. § 1639p(a)(3)(A)). The Farm Bill preempts *only* state laws that "prohibit the transportation or shipment of hemp or hemp products produced in accordance with [federal law] . . . through the state." *Id.* § 10114, 132 Stat. at 4914 (codified at 7 U.S.C. § 1639o note).

After the 2018 Farm Bill, the Indiana General Assembly responded with Senate Enrolled Act 516, P.L. 190-2019, which amended Indiana's definition of hemp to mirror the 2018 Farm Bill's definition: "[T]he 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 concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis, for any part of the Cannabis sativa L. plant." *See* Ind. Code § 15-15-13-6; 7 U.S.C. § 1639o(1). Among other provisions, SEA 516 details licensing requirements for all growers and handlers of hemp in Indiana. *See* Ind. Code § 15-15-13-7.

Indiana's Schedule I still includes "Tetrahydrocannabinols (7370), including synthetic equivalents of the substances contained in the plant, or in the resinous extractives of Cannabis, sp. and synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity," including "isomers" of "THC." Ind. Code § 35-48-2-4(d)(32).

## II. Delta-8-THC Products

Since the 2018 Farm Bill established its delta-9-THC regulation, manufacturers of cannabis-derived products began infusing their products with delta-8 THC. Britt E. Erickson, *Delta-8-THC Craze Concerns Chemists*, Chem. & Eng'g News (Aug. 30, 2021), https://cen.acs.org/biological-chemistry/natural-products/Delta-8-THC-craze-concerns/99/i31. Delta-8 THC and delta-9 THC are both THC isomers, which means they have a similar chemical structure and similar properties. *Id.* They differ, however, in their respective abundance and potency. Delta-9 occurs in great abundance in every cannabis plant, while delta-8 occurs naturally only in insignificant amounts. Sacco, *supra*, at 64. For example, one "study of over 17,000 plant samples" found that "98.5% had no measurable concentrations of delta-8-THC. Of the samples that did contain delta-8-THC, the average concentration was 0.0018% (by weight)." ECF No. 78-4 at 9 (Hudalla Decl. ¶ 25). Compared with delta-9, delta-8 does not bind as well to brain receptors and so it has reduced intoxicating properties. *Id.* (¶ 28). But make no mistake: Consuming delta-8 THC in higher quantities can induce the same psychotropic high associated with delta-9 THC. *See* Erickson, *supra*; ECF No. 78-2 at 53 (Journay Dep. Tr. 51:14–15).

Because cannabis plants can contain only trace amounts of delta-8 THC, producers of THC products perform a chemical synthesis to convert CBD, which is much more abundant in cannabis plants than the *naturally occurring* delta-8 isomer, to a *synthetic* delta-8 isomer (as well as to other THC isomers). *See* Erickson, *supra*; ECF No. 78-4 at 8–9 (Hudalla Decl. ¶¶ 22–27). This synthesis "can yield additional synthetic compounds, many of which have intoxicating properties similar to delta-9-THC" and do not occur naturally in cannabis. ECF No. 78-4 at 11–12, 19 (Hudalla Decl. ¶¶ 38–40, 43, 68). "There are more than 35 THC isomers possible" during synthetic transformation of CBD to THC, "including 4 isomers of delta-9-THC and 4 isomers of delta-8-THC," and "there is little control for which isomers are being created." *Id.* at 12 (¶ 42). Dr. Christopher Hudalla, the

lead chemist at ProVerde Labs, reviewed data on 3Chi vape products, finding "evidence of multiple isomers and unidentified synthetic byproducts observed in the analysis." *Id.* at 13–14 (¶¶ 47–49).

## III. Indiana Attorney General Official Opinion 2023-1

Under Indiana Code § 4-6-2-5, the Indiana Attorney General "shall give the attorney general's opinion" on certain legal questions in three contexts: (1) when requested by "the governor" for questions "touching upon any question or point of law in which the interests of the state shall be involved"; (2) to "other state officer[s]" for issues "touching upon any question or point of law concerning the duties of the officer"; and (3) "upon request by resolution of the house or legislative agency " to address "the constitutionality of any existing or proposed law." Ind. Code § 4-6-2-5.

On January 12, 2023, in response to questions from the Superintendent of the Indiana State Police (ISP) and the Executive Director of the Indiana Prosecuting Attorneys Council (IPAC), Indiana Attorney General Todd Rokita published Official Opinion 2023-1. ECF No. 31-5 at 1. Official Opinion 2023-1 addressed two questions: (1) "Can THC variants and other designer cannabinoids be prosecuted under Ind. Code § 35-48-2-4(d)(31) as a Schedule I controlled substance?"; and (2) "[D]o THC variants, including but not limited to delta-8 THC, delta-10 THC, THC-O, and THC-P as well as derivatives and isomers of these compounds, fall within the currently defined controlled substance 'Tetrahydrocannabinols' as scheduled within Ind. Code § 35-48-2-4(d)(31)?" *Id.*

Official Opinion 2023-1 stated several conclusions: "The [Office of the Indiana Attorney General] cannot opine on the charging or prosecution of individual cases and defers to prosecuting attorneys and law enforcement officers for those decisions." ECF No. 31-5 at 2, 14. The Farm Bill "does not preempt state law in the regulation of hemp," *id.* at 14, because the statute expressly disclaims preemption of "more stringent" state laws on the "production of hemp," *id.* at 13. "[T]he

plain language of the [Farm Bill] and the legislative history indicate a clear intent to declassify hemp . . . for agricultural purposes, not as a backdoor way to legalize THC." *Id.* at 13 (internal quotation marks omitted). And under Indiana Code § 35-48-2-4(d)(32), "Delta-8 THC and other THC variants, as well as designer cannabinoids are Schedule I controlled substances." *Id.* at 14.

## IV. Plaintiffs and This Lawsuit

Plaintiff Midwest Hemp Council, Inc., is a "non-profit trade organization" with members that "include farmers, manufacturers, laboratories, and consumers of low THC hemp extracts." ECF No. 31 at 4 (Am. Compl. ¶¶ 15–16). Its co-plaintiff 3C, LLC ("3Chi"), is a Colorado Limited Liability Company headquartered in Indianapolis, Indiana. ECF No. 1 at 3 (Compl. ¶ 12). Founded in 2018, 3Chi claims to be "the world's largest manufacturer and distributor of low THC hemp extract products like Delta-8 THC." *Id.* (Compl. ¶ 13).

3Chi boasts a large inventory of products it claims are "low-THC hemp extracts." ECF No. 78-2 at 20 (Journay Dep. Tr. 18:1–17); ECF No. 78-3. Among them are delta-8 THC vape cartridges and pods with names like "OG Kush," "Blue Dream," "White Runtz," and "Mind Trip," and ingestible THC gummies like "3Chi Delta 8 Comfortably Numb Mini-Pack Gummies," ECF No. 78-3 at 2; ECF No. 78-2 at 33, 35, 36, 50 (Journay Dep. Tr. 31:15–18, 33:11–15; 34:12–16, 48:11–13). 3Chi's designated witness freely admitted that its products get people "faded," "stoned," "baked," and "high" by "alter[ing] their current . . . state of mind." ECF No. 78-2 at 53, 55 (Journay Dep. Tr. 51:6–23; 53:19–21); ECF No. 77-2 (3Chi First Video Exhibit); ECF No. 77-3 (3Chi Second Video Exhibit).

3Chi authorized a video advertisement to represent its products publicly. ECF No. 78-2 at 44 (Journay Dep. Tr. 42:15–17). The video, authenticated at the deposition of 3Chi and included herewith as an exhibit, opens with a man surrounded by a cloud of smoke emanating both from his mouth and an electronic vaping device in his hand. "Everybody knows that 3Chi is the G.O.A.T.—

the greatest of all tokes," he says. ECF No. 77-2 (3Chi First Video Exhibit at 0:00-0:04). "Smoke it, eat it, sip it, or lick it . . . seriously, you are about to go on a trip," the character in the video goes on. *Id.* (3Chi First Video Exhibit at 0:06-0:11). The next scene cuts to the same man, this time sitting in church, wearing sunglasses and a Hawaiian shirt and sitting next to his mother. "Mom, you want some gummies?" he whispers, gesturing to his shirt pocket. "Please," she responds, rolling her eyes as she displays her own bag of 3Chi gummies, "I haven't been sober since prom." *Id.* (3Chi First Video Exhibit at 0:45-0:50).

Cue the next scene. Our protagonist is now in an indoor rock-climbing gym, suspended by rope and a safety harness. He gestures to another climber next to him while an arrow appears in the video to guide the viewer's eye to the other climber. "This rope that's just hemp, can only get you so high," he says, shaking his head disapprovingly. "But this rope made by 3Chi," he boasts, gesturing to his own rope, "was made in a freaking lab . . . to be the most powerful, strongest, longest lasting rope you can smoke!" *Id.* (3Chi First Video Exhibit at 0:51-1:04). The video advertisements make other thinly veiled references to recreational, high-inducing uses. *See* ECF No. 77-3 (3Chi Second Video Exhibit); ECF No. 78-2 at 50–51 (Journay Dep. Tr. 48:17–25, 49:1–15).

Still, 3Chi contends its delta-8 products are legal because they are chemically derived from CBD. ECF No. 78-2 at 24–25 (Journay Dep. Tr. 22:24–23:3) ("You can turn CBD into delta-8. . . . You're taking a molecule as it exists and essentially restructuring it."). According to 3Chi's founder and CEO himself, any substance that can be chemically derived from CBD—including (if it were possible) *heroin*—is exempt from the Controlled Substances Act. *Id.* at 25 (Journay Dep. Tr. 23:22–25).

On June 26, 2023, Plaintiffs 3Chi and Midwest Hemp Council sued the State of Indiana and the Attorney General "challenging the Attorney General's Official Opinion 2023-1." ECF No.

1 at 1 (Compl. ¶ 1). They also moved for a preliminary injunction. ECF No. 5. On August 16, 2023, Plaintiffs filed an Amended Complaint and an "Amended" Motion for Preliminary Injunction. ECF No. 31; ECF No. 32. The Amended Complaint adds parties on each side: Plaintiff Wall's Organics, "an Indiana [L]imited [L]iability [C]ompany with its principal place of business . . . in Evansville, Indiana," ECF No. 31 at 4 (Am. Compl. ¶ 17); Defendants Huntington and Evansville Police Departments, *id.* at 4–5 (Am. Compl. ¶¶ 19, 22); Detective Sergeants Hillman (Huntington PD) and Hassler (Evansville PD), in their official capacities, *id.* (Am. Compl. ¶¶ 20, 23); and Huntington County Prosecuting Attorney Nix and Vanderburgh County Prosecuting Attorney Moers, in their official capacities, *id.* at 5 (Am. Compl. ¶¶ 21, 24).

Plaintiffs' legal arguments remain the same as in the original complaint: that Official Opinion 2023-1 "violates the 2018 Farm Bill and is preempted by federal law," "contradict[s]" the Commerce Clause, and "violates" SEA 52 (Ind. Code § 35-48-1-17.5). ECF No. 31 at 14–19 (Am. Compl. ¶¶ 81, 91, 95). The Amended Complaint does not allege that SEA 52 itself violates federal law or ask the Court to declare the statute invalid. Plaintiffs instead seek a preliminary injunction that "enjoins 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." ECF No. 31 at 20.

To support the requested relief, the Amended Complaint alleges that Official Opinion 2023-1 has prompted prosecutors to threaten retailers with prosecution for the sale of 3Chi's delta-8 products and has also prompted some banks to refuse to do business with retailers that sell 3Chi's delta-8 products. ECF No. 31 at 11–14 (Am. Compl. ¶¶ 52–73). It also alleges that non-party

"Wayne County Prosecuting Attorney sent a letter to a Midwest Hemp Council member's [(Low Bob's Tobacco)] small business," ECF No. 31 at 11 (Am. Compl. ¶ 54); that Evansville police "informed Wall's Organics that it had to remove all low THC hemp extract products from its shelves," and "Wall's Organics removed all low THC hemp extract products," *id.* at 11–12 (Am. Compl. ¶¶ 55–61); that Huntington police "seized [non-party] Front Row LLC's low THC hemp extract products" as "controlled substances," *id.* at 12 (Am. Compl. ¶¶ 64–65); and that Huntington police told non-party Sky Vape Shop "they had to remove all of its low THC hemp extract products from its shelves," and "Sky Vape Shop removed all such products from its shelves," *id.* at 13 (Am. Compl. ¶¶ 66–71). Although Plaintiff Wall's Organics is a member of the Midwest Hemp Council, ECF No. 78-5, nonparties Front Row LLC and Sky Vape Shop Inc. are not members.

Since the Amended Complaint was filed, Defendant Evansville Police Department moved for judgment on the pleadings, ECF No. 65, on the ground that it is not an entity that can be sued. ECF No. 66. Plaintiffs responded that they "do not object to its dismissal," explaining that "[t]he point" of their allegations about the police department was "to illustrate" harm caused by "the Official Opinion." ECF No. 75 at 4. Defendants Huntington Police Department and Detective Sergeant Hillman have moved to dismiss the Amended Complaint as well. ECF No. 67; ECF No. 68. Plaintiffs have not yet responded to that motion to dismiss.

## STANDARD OF REVIEW

"A preliminary injunction is 'an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it.'" *Cassell v. Snyders*, 990 F.3d 539, 544 (7th Cir. 2021) (quoting *Orr v. Shicker*, 953 F.3d 490, 501 (7th Cir. 2020)). "The party seeking a preliminary injunction bears the burden of showing that it is warranted." *Speech First, Inc. v. Killeen*, 968 F.3d 628, 637 (7th Cir. 2020). To obtain this "extraordinary remedy," "[a] plaintiff seeking [one] must

establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). Demonstrating a likelihood of success on the merits requires a plaintiff to "make a *strong* showing that she is likely to succeed." *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020).

Federal Rule of Civil Procedure Rule 12(b)(1) governs motions to dismiss for lack of jurisdiction. As the party invoking the federal court's jurisdiction, a plaintiff has the burden of demonstrating that jurisdiction exists. *See Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1007 (7th Cir. 2021). If the factual basis for jurisdiction is challenged, it is the plaintiffs' burden to "advance 'proof to a reasonable probability" of the facts necessary to establish federal jurisdiction. *Anthony v. Sec. Pac. Fin. Servs., Inc.*, 75 F.3d 311, 316 (7th Cir. 1996).

To survive a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Two core principles underlie this standard. "First, although the complaint's factual allegations are accepted as true at the pleading stage, allegations in the form of legal conclusions are insufficient to survive a Rule 12(b)(6) motion." *McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873, 885 (7th Cir. 2012). "Second, the plausibility standard calls for a 'context-specific' inquiry that requires the court to 'draw on its judicial experience and common sense.'" *Id*. (quoting *Iqbal*, 556 U.S. at 679).

**ARGUMENT**

This Court lacks jurisdiction over Plaintiffs' claims that Official Opinion 2023-1 violates the 2018 Farm Bill and state law, and those claims fail on the merits in any event. So both denial of the preliminary injunction and dismissal are appropriate here. This Court may consider evidence

outside the pleadings for purposes of evaluating its jurisdiction over the claims and whether the plaintiffs have satisfied the preliminary-injunction factors. *See Anthony v. Sec. Pac. Fin. Servs., Inc.*, 75 F.3d 311, 316 (7th Cir. 1996); *Mays v. Dart*, 974 F.3d 810, 818 (7th Cir. 2020).

## I. Plaintiffs Raise No Justiciable Claims

### A. Plaintiffs lack standing to sue the Attorney General or the County Prosecuting Attorneys

Plaintiffs cannot succeed on their claims because they lack Article III standing. "When a party seeks a preliminary injunction before the district court, the burden rests on that party to demonstrate that it has standing to pursue its claims." *Speech First, Inc. v. Killeen*, 968 F.3d 628, 632 (7th Cir. 2020). Standing requires that plaintiffs show they have suffered "an 'injury in fact'" that is "'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court,'" and that it is "'likely' . . . that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations omitted). "[A] plaintiff must demonstrate standing for *each claim* he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (emphasis added); *see TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) ("[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek."). Plaintiffs cannot make the required showing as to the State Defendants.

#### 1. Favorable rulings on any of plaintiffs' claims will amount to an impermissible advisory opinion and will not redress their alleged injuries

Plaintiffs admit that "the point" of their Amended Complaint and Amended Motion for Preliminary Injunction is to get a "ruling" from this Court on "whether the Attorney General is right or wrong." ECF No. 75 at 4; *see also* ECF No. 31 at 14 (Am. Compl. ¶ 75) (alleging "[a]n actual and justiciable controversy exists between Plaintiffs and Defendants regarding the lawfulness of low THC hemp extracts"). "To find standing here to attack an unenforceable [opinion]

would allow a federal court to issue what would amount to 'an advisory opinion without the possibility of any judicial relief.'" *California v. Texas*, 141 S. Ct. 2104, 2116 (2021) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 129 (1983) (Marshall, J., dissenting)); *see Golden v. Zwickler*, 394 U.S. 103, 108 (1969) ("[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite. This is as true of declaratory judgments as any other field." (quoting *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947))). Plaintiffs request an advisory opinion disagreeing with the Attorney General's own opinion. Disagreement with that opinion is no justification to run to federal court seeking an alternative viewpoint.

Plaintiffs' theory of standing apparently is that, after this federal court issues an opinion interpreting the Farm Bill and SEA 52, "state courts are likely to defer to a federal court's interpretation of federal law, thus giving rise to a substantial likelihood that a favorable judgment will redress their injury." *Haaland v. Brackeen*, 143 S. Ct. 1609, 1639 (2023). "But '[r]edressability requires that the court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power.'" *Id.* (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring in part and concurring in judgment)). "It is a federal court's judgment, not its opinion, that remedies an injury; thus it is the judgment, not the opinion, that demonstrates redressability." *Id.* at 1640. Plaintiffs' legal challenges only address the legality of Official Opinion 2023-1. A favorable decision on those claims will not entitle the plaintiffs to any relief in state-court proceedings brought under Indiana statutes criminalizing the possession, distribution, or sale of controlled substances—none of which have been challenged by Plaintiffs in this lawsuit. *See Roe v. Dettelbach*, 59 F.4th 255,

261 (7th Cir. 2023) (no redressability where no remedies would be "available if [the Court] agreed with [the plaintiffs'] understanding of the governing law").

**2. No relief can be entered against the Attorney General or his opinion that would provide redress**

Plaintiffs are seemingly confused about the authority of the Attorney General and the legal import of an Official Opinion. The Attorney General cannot "criminaliz[e]" conduct, ECF No. 31 at 17 (Am. Compl. ¶ 91), "impose[]" statutory definitions, *id.* at 15 (Am. Compl. ¶¶ 84–85), or "modif[y] . . . statute[s]," *id.* at 19 (Am. Compl. ¶ 102). Only the Indiana General Assembly performs those legislative functions. Ind. Const. art. 4, § 1 ("The Legislative authority of the State shall be vested in a General Assembly . . . ."); Ind. Const. art. 3, § 1 ("The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."). At times, Plaintiffs appear to recognize this point. They concede that Official Opinion 2023-1 created "no statutory changes under Indiana law," ECF No. 31 at 15 (Am. Compl. ¶ 85), and "cannot trump enacted state law," ECF No. 33 at 16–17.

State law is likewise clear that the Attorney General does not "prosecute," ECF No. 31 at 20, or otherwise control the prosecution of crimes related to possession or dealing of controlled substances, Ind. Code § 35-48-2-4 (Schedule I controlled substances); Ind. Code § 35-48-4-2 (dealing in a controlled substance); *see Doe v. Holcomb*, 883 F.3d 971, 977 (7th Cir. 2018) ("[T]he general rule in Indiana is that the Attorney General cannot initiate prosecutions; instead, he may only join them when he sees fit."). County prosecuting attorneys exercise sole authority to initiate prosecutions for controlled-substance violations. Ind. Code § 33-39-1-5. Because Plaintiffs are simply wrong that Official Opinion 2023-1 represents any kind of criminalization or prosecution—

or anything else with force of law—Plaintiffs cannot make the requisite showing that their asserted injuries "would likely be redressed by the requested judicial relief" against the Attorney General. *Thole v. U.S. Bank, N.A.*, 140 S. Ct. 1615, 1618 (2020).

Were Plaintiffs to prevail on their claims that Official Opinion 2023-1 is preempted or in violation of some law, no order against the Attorney General would redress Plaintiffs' claimed injuries—*i.e.*, threats of criminal prosecution by prosecutors and denials of business by financial institutions, ECF No. 31 at 10–11 (Am. Compl. ¶ 51–54). County prosecuting attorneys retain full authority to prosecute criminal actions (and send cease-and-desist letters) as they deem appropriate—regardless whether the Attorney General has issued an Official Opinion on an underlying legal issue. Banks and other financial institutions likewise have independent authority to choose with whom to do business regardless of the Attorney General's input. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998). The Attorney General cannot prohibit prosecutors from prosecuting or require banks to open accounts for Plaintiffs.

Plaintiffs may be of the view that, were the court to issue a judgment and injunction against the Attorney General somehow requiring withdrawal or disavowal of Official Opinion 2023-1, prosecutors and banks would take their cues and treat Plaintiffs more favorably. Maybe, maybe not. But the moral force of a federal court's decisions is irrelevant for standing purposes. *See Haaland*, 143 S. Ct. at 1639–40 ("It is a federal court's judgment, not its opinion, that remedies an injury; thus it is the judgment, not the opinion, that demonstrates redressability."). What matters for purposes of discerning the possibility of effective redress under Article III is whether the judgment or injunction will adjust relations between the parties to the suit. *Whole Woman's Health v.*

*Jackson*, 142 S. Ct. 522, 535 (2021) ("[N]o court may 'lawfully enjoin the world at large' . . . or purport to enjoin challenged 'laws themselves.'") Plaintiffs' requested injunction is not warranted. *California*, 141 S. Ct. at 2115 ("Remedies . . . ordinarily 'operate with respect to specific parties.'"). No adjudication about the validity of Official Opinion 2023-1 could meaningfully adjust the legal relationship between Plaintiffs and Defendants to redress the alleged injuries, so Plaintiffs lack Article III standing.

**3. Plaintiffs identify no redressable injury fairly traceable to the Huntington County and Vanderburgh County Prosecuting Attorneys**

Plaintiffs have demonstrated no redressable injury fairly traceable to the Huntington County and Vanderburgh County Prosecuting Attorneys. Plaintiffs challenge only the correctness of the Attorney General's Official Opinion 2023-1, ECF No. 31 at 14–19 (Am. Compl. ¶¶ 74–106), arguing that the "heart" of this case is about the "whether the Attorney General is right or wrong." ECF No. 75 at 4. As discussed above, however, the Attorney General's opinion does not bind prosecutors; a judgment about the validity of the opinion would not prevent prosecutors from enforcing Indiana's criminal laws. *See* pp.15–16, *supra*. So Plaintiffs cannot demonstrate that succeeding on their claims challenging the basis for Official Opinion 2023-1 would prevent prosecution on the basis of unchallenged Indiana statutes. That defeats Plaintiffs' standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412 (2013); *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson*, 674 F.2d 1195, 1199 (7th Cir. 1982).

Plaintiffs' request for injunctive relief that enjoins Defendants from "taking any steps to criminalize or prosecute the sale, possession, manufacture, financing, or distribution of low THC hemp exacts that are not more than .3% Delta-9 THC on a dry weight basis," ECF No. 32 at 3, cannot remedy their alleged injuries for other reasons as well. Under Indiana law, prosecutors cannot "criminaliz[e]" conduct. That is something the General Assembly does through statute. *See*

Ind. Const. art. 4, § 1 ("The Legislative authority of the State shall be vested in a General Assembly"); Ind. Const. art. 3, § 1 ("The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."). So a preliminary injunction forbidding prosecutors from "taking any steps to criminalize" conduct would be empty.

Moreover, whatever the validity of Official Opinion 2023-1, selling a product containing no more than .3% Delta-9 THC is illegal if the product contains other controlled substances. Those substances include "synthetic equivalents" of Schedule I substances. Ind. Code § 35-48-2-4(d)(31). And there is evidence that 3Chi vape products contain "non-naturally occurring isomers, like delta-10-THC and/or delta-6a10a-THC," which remain illegal under Indiana law. ECF No. 78-4 at 13–14 (Hudalla Decl. ¶¶ 47–49). So Plaintiffs cannot demonstrate that any future injuries resulting from prosecution for selling products containing synthetic equivalents of Schedule I controlled substances (or other prohibited substances) are traceable to Official Opinion 2023-1 or redressable through this lawsuit. Prosecutors would still be entitled to prosecute offenses based on unchallenged provisions of Indiana law. The need for individualized examination of products makes it particularly inappropriate for Midwest Hemp Council to claim organizational standing. Organizational standing requires a claim that can be adjudicated without reference to individual circumstances. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975).

None of the Plaintiffs allege that the Huntington County Prosecuting Attorney has directed conduct at them or that they have suffered injury traceable to him. The Amended Complaint alleges conduct related to Front Row, LLC and Sky Vape Shop Inc., ECF No. 31 at 12–13, but neither are parties to this lawsuit nor members of the Midwest Hemp Council. *See* ECF No. 70-2 at 1; *Warth*,

422 U.S. at 499 (a plaintiff "generally must assert his own legal rights and interests"). Wall's Organics has no presence in Huntington County, ECF No. 70-1, and makes no allegations related to the Huntington County Prosecuting Attorney, *see* ECF No. 31 at 11–12. 3Chi likewise does not allege the Huntington County Prosecuting Attorney has taken any action against it or will imminently do so. *See id.* Indeed, it does not allege that any 3Chi products were seized by law enforcement at the Huntington County prosecutor's direction. Plaintiffs thus fail to show injury in fact traceable to the Huntington County Prosecuting Attorney, making an injunction against him improper. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

### B. Sovereign immunity bars all claims against the State Defendants

Sovereign immunity bars all of Plaintiffs' state-law claims against state officials under *Pennhurst* and Plaintiffs' federal-law claims because Defendants have "neither enforced nor threatened to enforce the allegedly unconstitutional" opinion against Plaintiffs. *Doe v. Holcomb*, 883 F.3d at 977 (quoting *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1415 (6th Cir. 1996)).

#### 1. Supreme Court precedent bars all state-law claims

Plaintiffs seek declaratory and injunctive relief against the Attorney General, Huntington County Prosecuting Attorney, and Vanderburgh County Prosecuting Attorney on the claim that "[t]he Official Opinion violates Indiana law." ECF No. 33 at 16. But sovereign immunity bars a federal court from deciding state-law claims brought against state officials. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984). The Supreme Court in *Pennhurst* held that "a claim that state officials violated state law in carrying out their responsibilities is a claim against the State that is protected" by sovereign immunity, including as to "state-law claims brought into federal court under pendent jurisdiction." *Id.*; *see Lukaszcyk v. Cook County*, 47 F.4th 587, 603–

04 (7th Cir. 2022) ("To the extent these plaintiffs allege violations of Illinois law [by state officials] . . . sovereign immunity bars their claims in this court."). Plaintiffs' state-law claim is a non-starter.

**2. The *Ex Parte Young* exception to sovereign immunity does not apply**

Sovereign immunity bars Plaintiffs' federal-law claims as well. The "Eleventh Amendment generally immunizes" state officials "from suit in federal court." *Doe*, 883 F.3d at 977. *Ex Parte Young*, 209 U.S. 123 (1908), establishes a limited exception to sovereign immunity that allows a plaintiff to proceed against a state official who has "enforced" or will "enforce [an] allegedly unconstitutional state statute." *Doe*, 883 F.3d at 977 (quoting *Deters*, 92 F.3d at 1415). In this case, however, Plaintiffs have not alleged that any state statute enforced by anyone is unconstitutional. They are "challenging the Attorney General's Official Opinion 2023-1," arguing that it is preempted by federal law. ECF No. 31 at 2 (Am. Compl. ¶ 1); *see id.* at 14–17 (¶¶ 74–93). As discussed above, no Defendant can or will "enforce[]" the opinion. Any prosecution would be brought under unchallenged state statutes. *See, e.g.*, Ind. Code §§ 35-48-1-17.5, 35-48-4-11. So "*Young* does not apply." *Doe*, 883 F.3d at 977 (quoting *Deters*, 92 F.3d at 1415).

That some prosecutors have cited Official Opinion 2023-1 in sending cease-and-desist letters to some entities, ECF No. 31-6, does not alter the analysis. County prosecutors may invoke any number of authorities to support their positions in cease-and-desist letters, including case law, law review articles, advice from colleagues in the bar, newspaper op-eds, and Attorney General official opinions. But the fact remains that state statutes—not the Attorney General's opinion—provide the authority for sending cease-and-desist letters and initiating prosecutions. Whatever the Attorney General's opinion says, the duty to "conduct all prosecutions for felonies, misdemeanors, or infractions" belongs to county prosecutors. Ind. Code § 33-39-1-5. And any prosecutions would have to be brought under unchallenged state statutes that criminalize the sale, distribution, and

manufacture of controlled substances. *See, e.g.*, *id.* §§ 35-48-1-17.5, 35-48-4-11. Any prosecutions would be enforcing those statutes, not the non-binding opinion Plaintiffs have challenged here.

The Attorney General's lack of enforcement authority makes the sovereign-immunity problem particularly clear. Plaintiffs "do not direct this Court to any enforcement authority the attorney general possesses in connection with [the challenged law] that a federal court might enjoin him from exercising." *Whole Woman's Health*, 142 S. Ct. at 534. As the Seventh Circuit recognizes, "the general rule in Indiana is that the Attorney General cannot initiate prosecutions; instead, he may only join them when he sees fit." *Doe*, 883 F.3d at 977. The Attorney General's authority to provide official opinions "to any other state officer touching upon any question or point of law concerning the duties of the officer," Ind. Code § 4-6-2-5, and "consult with and advise the several prosecuting attorneys of the state in relation to the duties of their office," *see id.* § 4-6-1-6, does not grant him control over "prosecuting attorneys" expressly charged with enforcing the law, *id.* § 33-39-1-5. That is why Official Opinion 2023-1 expressly states that the Attorney General "cannot opine on the charging or prosecution of individual cases and defers to the prosecuting attorneys and law enforcement officers for those decisions." ECF No. 31-5 at 2, 14. The Attorney General's "broad authority" to give advice to the elected officials is simply "too attenuated" to render him a proper defendant or support a conclusion that prosecuting attorneys would be enforcing his advice rather than unchallenged state statutes. *Doe*, 883 F.3d at 977.

* * *

At bottom, Plaintiffs seek from the Court nothing more than an advisory opinion judging whether "the Official Opinion is wrong." ECF No. 75 at 4. Federal courts lack authority to issue such an opinion under Article III. The case should be dismissed for lack of jurisdiction.

## II. Plaintiffs Fail To State a Claim for Relief on the Merits

Jurisdiction aside, Plaintiffs have failed to state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)—much less make a "*strong* showing" that they are likely to succeed on the merits, *Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020). So the case must be dismissed and the motion for preliminary injunction denied.

### A. Plaintiffs have not shown an advisory document with no independent force of law genuinely conflicts with federal or state law

Plaintiffs are challenging a non-binding opinion, and many problems for their claims follow. Plaintiffs previously acknowledged that "Official Opinions from the attorney general are not law and are not binding on courts," ECF No. 6 at 14, but omit that language from their new memorandum. Nevertheless, they accurately observe that "Official Opinions from the attorney general cannot trump enacted state law." ECF No. 33 at 16–17. The import of that change does not matter in any event because no authority supports Plaintiffs' erroneous view that the Official Opinion has any independent force of law or controls the actions of independently elected prosecutors. To the contrary, federal and Indiana courts have consistently concluded that Attorney General opinions are not binding legal authority, however persuasive their reasoning.

The U.S. Supreme Court has held that "views of the State's attorney general . . . do not garner controlling weight." *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. Ltd.*, 138 S. Ct. 1865, 1874 (2018) (citing *Virginia v. Am. Booksellers Assn., Inc.*, 484 U.S. 383, 393–96 (1988)). In *Virginia*, the Court observed that because "the [Virginia] Attorney General does not bind the state courts or local law enforcement authorities, we are unable to accept her interpretation of the law as authoritative." 484 U.S. at 395. Similarly, in *Stenberg v. Carhart*, 530 U.S. 914 (2000). the Court noted that "our precedent warns against accepting as 'authoritative' an Attorney General's interpretation of state law." *Id.* at 940. There, the Nebraska Attorney General's opinion did not

bind state court or "bind elected county attorneys, to whom Nebraska gives an independent authority to initiate criminal prosecutions." *Id.* at 941. These facts supported the Court's refusal to "accept the Attorney General's . . . interpretation of the Nebraska statute." *Id.* at 940.

In Indiana, specifically, the state courts have uniformly held that official opinions of the Attorney General are not binding law. In *McPeek v. McCardle*, the Indiana Supreme Court considered "whether a marriage solemnized in another state in violation of that state's law may be recognized as valid in [Indiana] if the marriage complie[d] with [Indiana] law." 888 N.E.2d 171, 172–73 (Ind. 2008). Answering in the affirmative, the court acknowledged that the Attorney General had issued an official opinion concluding otherwise but reiterated that "Attorney General opinions are not binding on the Court." *Id.* at 177 n.4. Likewise in *Common Council of City of Peru v. Peru Daily Tribune, Inc.*, 440 N.E.2d 726 (Ind. Ct. App. 1982). the Indiana Court of Appeals rejected the city council's interpretation of a statute that relied, in part, on an opinion of the Indiana Attorney General. *Id.* at 728–293. The court held that "official opinions of the attorney general are without precedential effect and not binding on this court." *Id.* at 728 n.4; *see Thompson v. Hays*, 867 N.E.2d 654, 659 n.9 (Ind. Ct. App. 2007) (observing that the court's interpretation of a statute conflicted with the Attorney General's interpretation in his official opinion but explaining that "Attorney General Opinions . . . are not binding on this court").

The natural consequence is that the Attorney General's opinion cannot be preempted and cannot "violate" state or federal law. Express preemption occurs when "a federal statute explicitly provides that it overrides state law." *Boomer v. AT&T Corp.*, 309 F.3d 404, 417 (7th Cir. 2002); *Fifth Third Bank ex rel. Tr. Officer v. CSX Corp.*, 415 F.3d 741, 745 (7th Cir. 2005) (explaining express preemption "can occur when Congress declares its intention to preempt state regulation through a direct statement in the text of federal law"). Conflict preemption, likewise, requires a

showing that "applying state law would do 'major damage' to clear and substantial federal interests." *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1050 (7th Cir. 2013) (quoting *Hillman v. Maretta*, 569 U.S. 483, 491 (2013)). And "the Commerce Clause prohibits a state from enacting any statute 'that clearly discriminates against interstate commerce,'" *C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541, 548 (7th Cir. 2020) (quoting *Fort Gratiot Sanitary Landfill Inc. v. Mich. Dep't of Nat. Res.*, 504 U.S. 353, 359 (1992)), "either expressly or in practical effect," *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 501 (7th Cir. 2017).

These doctrines all speak in terms of the relationship of federal law to state statutes and regulations, that is to say, to sources of binding law. But that is not what this case targets, and Plaintiffs fail to demonstrate that an advisory document like Official Opinion 2023-1 creates a genuine conflict giving rise to a cognizable claim of preemption or violation of other law. Plaintiffs' claims that Official Opinion 2023-1 "violates" the Commerce Clause and state law and that federal law "preempts the Official Opinion[]," ECF No. 33 at 8, 14–16, must fail because Official Opinion 2023-1 is "not law and not binding on courts" or anyone else, ECF No. 6 at 14, and, for that reason, "cannot trump enacted state law," ECF No. 33 at 16–17.

**B. The Seventh Circuit has already rejected Plaintiffs' federal claims**

Even putting aside the lack of a legal conflict, precedent forecloses Plaintiffs' preemption and Commerce Clause claims. What Plaintiffs really want is a declaration that existing Indiana *statutes* do not prohibit their products. *See* ECF No. 31 at 2 (challenging "[t]he Official Opinion['s] attempt[] to unilaterally reclassify low THC hemp extracts as Schedule I substances in direct conflict with well-established state and federal laws encouraging the redevelopment of a domestic supply chain of hemp and hemp products in Indiana and across the country"). Precedent bars those claims.

In *C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541 (7th Cir. 2020), the Seventh Circuit considered and rejected materially identical preemption and Commerce Clause claims targeting Indiana's regulation of hemp. *Id.* at 543 (challenging state law that prohibited "the manufacture, delivery, or possession of smokable hemp").

Just like the Plaintiffs in this case, ECF No. 33 at 14–15, the plaintiffs in *C.Y. Wholesale* argued that Indiana's law was expressly preempted by the Farm Bill's command that "[n]o State . . . shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946," Pub. L. 115-334, § 10114 (codified at 7 U.S.C. § 1639o note). *C.Y. Wholesale*, 965 F.3d at 546. The Seventh Circuit rejected that claim, pointing to 7 U.S.C. § 1639p(3)(A). That provision, titled "No preemption," states that "[n]othing in this subsection preempts or limits any law of a State . . . that regulates the production of hemp; and is more stringent than this subchapter." 7 U.S.C. § 1639p(3)(A). Thus, as the Seventh Circuit observed, Congress has expressly left States free "to continue to regulate the production of hemp, and [the Farm Bill's] express preemption clause places no limitations on a state's right to prohibit the cultivation or production of hemp." *Id.* at 547.

*C.Y. Wholesale* also considered and rejected the same conflict-preemption claim, ECF No. 33 at 8–14, explaining that the Farm Bill clearly allows States to regulate hemp within their own borders. *See* 965 F.3d at 548. The court found "nothing in the 2018 Farm Law that supports the inference that Congress was demanding that states legalize industrial hemp, apart from the specific provisions of the express preemption clause." *Id.* "Although Congress may have relaxed federal restrictions on low-THC cannabis in order to facilitate a market for hemp, the Law indicates that the states were to remain free to regulate industrial hemp production within their own borders." *Id.* This is similar to the federal "stance towards other psychoactive drugs, such as salvia, which are

not scheduled by the DEA but which some states nonetheless choose to criminalize." *Id.* The Seventh Circuit has thus given "clear indications of [its] rejection of [the] altered hemp definition argument." *C.Y. Wholesale, Inc. v. Holcomb*, No. 119-cv-02659, 2021 WL 694217, at *7 (S.D. Ind. Feb. 22, 2021). Plaintiffs cannot succeed on their preemption theories, especially given that in "areas of traditional state regulation," Congress's intent to preempt state law must be "clear and manifest." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

*C.Y. Wholesale* requires rejection of Plaintiffs' Commerce Clause claim as well. Plaintiffs assert that "[b]ecause the Official Opinion precludes the interstate transport of hemp extracts—a product declared legal and authorized for interstate trade among the states by the 2018 Farm Bill—the Official Opinion is unconstitutional under the Commerce Clause of the United States Constitution." ECF No. 33 at 16. The Seventh Circuit squarely rejected that argument. *C.Y. Wholesale*, 965 F.3d at 548. Plaintiffs' attempt to refashion the *C.Y. Wholesale* argument must go the same way: the argument that Official Opinion 2023-1 "burdens interstate commerce . . . by precluding a major industry from shipping its good through the state by truck" "does not show sufficient promise of success on the merits to warrant a preliminary injunction." *Id.* at 548.

Plaintiffs here have brought the same claims, simply repackaged for related products. But the Seventh Circuit was clear: The Farm Bill expressly left States broad discretion to regulate hemp "more stringent[ly] than federal law." *C.Y. Wholesale*, 965 F.3d at 546. So even if Official Opinion 2023-1 was binding Indiana law—and it is not, *see* pp.22–23, *supra*—such a regulation withstands review against the federal preemption and Commerce Clause claims.

### C. Plaintiffs lack a cause of action for their meritless state-law claim

Finally, Plaintiffs argue that "[t]he Official Opinion violates Indiana law" and assert this claim as an additional basis for granting an injunction. ECF No. 33 at 16. Again, *Pennhurst State*

*School and Hospital v. Halderman*, 465 U.S. 89, 121 (1984), bars these claims against the state defendants. *See* pp.19–20, *supra*. Even putting that aside, it is unclear on what basis Plaintiffs believe they can bring a claim that a state Attorney General advisory opinion has incorrectly interpreted state statutory law. Here, the relevant state statute, SEA 52 (codified at Indiana Code § 35-48-1-17.5), defines "Low THC hemp extract" the same as the Farm Bill—no more than 0.3% delta-9. 7 U.S.C. § 1639o(1). Plaintiffs contend that Official Opinion 2023-1's conclusions about delta-8 do not align with that definition. ECF No. 33 at 16. But they cite no cause of action and assert no theory providing legal grounds for adjudicating the correctness of Official Opinion 2023-1. And they point to no precedent for a court to "enjoin" a nonbinding Attorney General opinion simply on the theory that it conflicts with state law. Plaintiffs' state claim clearly fails.

In any event, the Official Opinion 2023-1 is correct. In short, as Official Opinion 2023-1 states, synthetic THC of all isomers remain Schedule I controlled substances, and "[i]t is clear from the plant biology that delta-8 THC products are by default mostly synthetic even if they have some natural component to them, and some delta-8 THC products are completely synthetic." ECF No. 31-5 at 11. Furthermore, as Official Opinion 2023-1 states, "[e]ven if it was not largely synthetic, however, delta-8 THC still falls into the definition of a Schedule I controlled substance because it is an extract of the cannabis plant species, and Ind. Code § 35-48-2-4(d)(3[2]) makes no distinction between the types of plants except by delta-9 THC concentration. Therefore, under Indiana law, delta-8 THC is a Schedule I controlled substance regardless of whether it is synthetic or a natural product." *Id.* at 12.

In sum, Plaintiffs fail to state a plausible claim for relief, so the case must be dismissed. Because they cannot demonstrate they are likely to succeed on the merits of any of their claims, the "extraordinary remedy" of a preliminary injunction is not warranted. *Winter v. Nat. Res. Def.*

*Council*, 555 U.S. 7, 20 (2008); *see Adams v. City of Chicago*, 135 F.3d 1150, 1154 (7th Cir. 1998) ("If the district court finds [likelihood of success on the merits] is not present, then the district court's analysis ends and the preliminary injunction should not be issued.").

## III. Plaintiffs Have Not Met the Remaining Requirements for a Preliminary Injunction

To obtain preliminary injunctive relief, plaintiffs must do more than demonstrate a likelihood of success on the merits. They must also show they will suffer irreparable harm absent the injunction and that the balance of harms and public interest weigh in favor of granting the injunction, but they fail to do so here. Plaintiffs request an injunction that would "enjoin[] 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." ECF No. 32 at 3. The other preliminary-injunction factors militate against granting this broad injunction.

### A. Plaintiffs have failed to demonstrate they will suffer irreparable harm

Plaintiffs have failed to show that they will suffer irreparable harm "in the absence of an injunction." *Mays v. Dart*, 974 F.3d 810, 822 (7th Cir. 2020). Plaintiffs claim that "irreparable harm is not a theoretical argument" because law enforcement have "act[ed] in direct response to the Official Opinion" and instruct[ed] retailers "to remove low THC hemp extract products from their shelves." ECF No. 33 at 17–18. Plaintiffs largely rely on the experiences of nonparties to argue they will suffer irreparable harm from law enforcement action. *See* ECF No. 31 at 14. Wall's Organics is the only named plaintiff to allege anything related to a named defendant, and Wall's

Organics already complied with law enforcement requests to remove those products. ECF No. 31 at 12 (Am. Compl. ¶ 61). No preliminary relief is required to prevent irreparable harm.

But even with an injunction, Plaintiffs would face no different criminal laws than those in place before Official Opinion 2023-1 was issued. As the plaintiffs admit, Official Opinion 2023-1 does not "trump state law," ECF No. 33 at 16–17, and so it does not change the "potential criminal sanctions" Plaintiffs face by producing, selling, and possessing these products. ECF No. 33 at 17. That is particularly true for products that contain "non-naturally occurring isomers, like delta-10-THC and/or delta-6a10a-THC," which would be illegal under any construction of Indiana law. ECF No. 78-4 at 13–14 (Hudalla Decl. ¶¶ 47–49). 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.

Plaintiffs also assert that "the loss of bank financing [] and inability to transport hemp results in unknowable financial harm that threatens the viability of those engaged in the production, manufacture, wholesale, or retail of Delta 8 products." ECF No. 33 at 18. Any loss of bank financing, however, comes from banks' evaluations of the hemp industry's risk profile, not as a directive from the Attorney General, county prosecutors, or any other public official. Moreover, Plaintiffs have not produced any evidence that the requested injunction would bring back any financing they have lost or prevent other institutions from deeming them too risky to finance. In any event, 3Chi "found a partner in Indiana willing to explore working with [it]," and now "ha[s] banking secured" to a large extent, so it is not suffering irreparable harm on the banking front. ECF No. 78-2 at 57 (Journay Dep. Tr. 55:3–14). Plaintiffs have not demonstrated they face irreparable harm warranting the exceptional relief of a preliminary injunction.

**B. Public policy and the balance of equities weigh against relief**

The equities and public interest weigh against a preliminary injunction as well. *Mays*, 974 F.3d at 818 ("[T]he court must weigh the harm the denial of the preliminary injunction would cause the plaintiff against the harm to the defendant if the court were to grant it."); *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 24 (2008) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982))). Plaintiffs, again, will be in no better position vis-à-vis Indiana criminal statutes and financial services even if granted an injunction here.

In contrast, an injunction would irreparably harm vital state interests. In asking this Court to enjoin any steps that would "criminalize" low THC hemp extract products, ECF No. 32 at 3, Plaintiffs appear to seek relief that would interfere with the Attorney General's discharge of his statutory duty to give advice to state officials, *see* Ind. Code § 4-6-2-5. The Court should be particularly wary of entering relief that constrains state officials from seeking counsel and that prevents state officials from expressing their views about what is or is not legal. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (recognizing a "government entity has the right to 'speak for itself'"); *cf. Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("prior restraints" are disfavored).

The State, moreover, has strong interests in enforcing its criminal laws, including its drug laws, to protect the health, safety, and welfare of the public. *See Price v. State*, 622 N.E.2d 954, 959 (Ind. 1993) ("The State may exercise its police power to promote the health, safety, comfort, morals, and welfare of the public."). And enjoining the State from "effectuating statutes enacted by representatives of its people" would "irreparabl[y] injur[e]" it. *Maryland v. King*, 567 U.S.

1301, 1303 (2012) (Roberts, C.J., in chambers); *see Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). An injunction interfering with the State's prerogative to make and enforce its laws and with prosecuting attorneys' duties to enforce the law would irreparably harm the State.

The Indiana General Assembly has chosen not to legalize medical or recreational marijuana, and Indiana has a public policy interest in protecting its citizens from illegal drugs and harmful substances. 3Chi wants to distribute and sell products to Hoosiers that will get them "stoned," "baked," and "high" by "alter[ing] their current . . . state of mind." ECF No. 78-2 at 53–55 (Journay Dep. Tr. 51:6–23, 52:14–24, 53:19–21). Plaintiffs market these products using the same cultural language, imagery, and aesthetic as any recreational marijuana dispensary you might find in Colorado or California. *See id.* Indiana has a weighty interest in avoiding the legalization of high-inducing THC products via judicial decree.

Some of these products, moreover, may contain controlled substances, so an injunction broadly prohibiting enforcement against products that contain "no more than .3% Delta-9 THC" would cause harm to people and society. ProVerde Labs analyzed samples of 3Chi's vape products and found "evidence . . . [of] non-naturally occurring isomers, like delta-10-THC and/or delta-6a10a-THC." ECF No. 78-4 at 13–14, 19 (Hudalla Decl. ¶¶ 47–50; 68). Thus, products that comply with the .3% delta-9 THC limit may nevertheless constitute controlled substances because they contain these "synthetic equivalents." Ind. Code § 35-48-2-4(d)(32).

**C. The injunction requested is impermissibly broad and vague**

In their amended motion, Plaintiffs request "a preliminary injunction that enjoins 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." ECF No. 32 at 3. Putting aside their meritless claims, Plaintiffs' request is improper for two additional reasons.

For one, Federal Rule of Civil Procedure 65 requires that an injunction "describe in reasonable detail . . . the act or acts restrained or required." Fed. R. Civ. P. 65(d). Plaintiffs' requested injunction flouts that requirement by requesting impermissibly vague injunctive relief. The first "act" it seeks to restrain is "taking any steps to criminalize . . . 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." ECF No. 32 at 3. It is unclear what that means because no defendant here has authority to "criminalize" conduct. *See* pp.15, 17–18, *supra*. The second "act" it seeks to restrain—"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"—fairs no better. Seemingly, it would prevent enforcement of criminal laws even where other controlled substances, not just delta-8 THC, are involved. *See* p.18, *supra*; Ind. Code § 35-48-2-4(d)(31) ("synthetic equivalents" are Schedule I controlled substances). And Plaintiffs' requested injunction gives no guidance as to what specific products would be covered. At bottom, it is an impermissible "obey-the-law injunction." *EEOC v. AutoZone, Inc.*, 707 F.3d 824, 841 (7th Cir. 2013).

For another, relief must be "no greater than necessary to protect the rights of the prevailing litigants." *Doe v. Rokita*, 54 F.4th 518, 519 (7th Cir. 2022). Yet Plaintiffs seek to enjoin numerous non-parties from criminalizing or prosecuting "low THC hemp extracts that are not more than .3% Delta-9 THC on a dry weight basis," seemingly as to anyone. ECF No. 32 at 3. Enjoining

"strangers to the suit" would "raise serious questions" under equity and Article III. *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in grant of stay); *see Doe*, 54 F.4th at 519. So too would "enjoin[ing] the world at large." *Whole Woman's Health*, 142 S. Ct. at 534. And the problems with broad relief are even more acute considering that products with less than 0.3% delta-9 THC on a dry weight basis could still contain controlled substances. Plaintiffs have not shown that there is "no set of circumstances" under which it would be contrary to federal and state law to enforce state criminal laws. *United States v. Salerno*, 481 U.S. 739, 743 (1987). The injunction requested is improper.

## CONCLUSION

The Court should deny the amended motion for a preliminary injunction and dismiss the amended complaint.

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