UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

3C, LLC d/b/a/ 3Chi and MIDWEST HEMP COUNCIL, Plaintiffs, v. ATTORNEY GENERAL TODD ROKITA, in his official capacity, and STATE OF INDIANA, Defendants.	))))))))))))	Case No. 1:23-cv-01115-JRS-MKK

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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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. 27-2 at 52–54 (Deposition of Justin Journay ("Journay Dep.") at 51:6–9, 14, 52:14–24, 53:19–21); ECF No. 25-2; ECF No. 25-3. Among 3Chi's products are "OG Kush," "Blue Dream," and "Mind Trip," which are delta-8-THC vape cartridges and pods. ECF No. 27-2 at 32–35 (Journay Dep. 31:15-18, 33:11-15; 34:12-16); ECF No. 27-3 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. 27-3 at 2; *see* ECF No. 27-2 at 28–29 (Journay Dep. 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. 1-5 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. 1-5 at 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 below .3% Delta-9 THC on a dry weight basis." ECF No. 1 at 1; ECF No. 5 at 2. Plaintiffs have sued the wrong defendants, targeted the wrong legal instrument, set forth the wrong claims and asked for the wrong injunction. Plaintiffs want free rein to get people high on Delta-8, but they improperly ask this Court to issue its own advisory opinion about the Attorney General's advisory opinion.

Plaintiffs "challenge" an attorney general opinion they admit "is not law and not binding on the courts." ECF No. 6 at 1, 14. They have named as defendants the State of Indiana and the Attorney General, which both enjoy sovereign immunity in this situation, particularly as to Plaintiffs' state law claim. And the Seventh Circuit has already rejected Plaintiffs' preemption and Commerce Clause claims in *C.Y. Wholesal*e, *Inc. v. Holcomb*, 965 F.3d 541 (7th Cir. 2020). And Plaintiffs request an injunction that inappropriately targets future enactment of laws and orders non-parties to follow existing law. For many reasons, no preliminary injunction is warranted.

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 (April 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.*

The Controlled Substances Act of 1970 created schedules of controlled substances, and included "marihuana" as a schedule I drug. *See* Pub. L. 91-513, Title II, § 202, 84 Stat. 1249. 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.* at § 102, 84 Stat. 1242, 1244. Then in 1986, Congress enacted the Controlled Substance Analogue Enforcement Act (CSAEA), which provides, "[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, § 203 (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." 21 U.S.C. § 802(32)(A)(i). Not long after, Indiana enacted its own controlled substances schedules in line with federal law, also to include marijuana. Ind. Code § 35-48-2-4 (as added by Acts 1976, P.L. 148, § 7).

Decades later, Congress revised federal law governing cannabis via the Agricultural Act of 2014 ("the 2014 Act"), which 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. 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 also* CONG. RSCH. SERV., *Defining* Hemp*: A Fact Sheet* 3 (March 22, 2019), https://crsreports.congress.gov/product/pdf/R/R44742. The 2014 Act classified industrial hemp by its percentage concentration of delta-9 THC because by that time it was known to be "the primary (but not the only) psychoactive chemical compound (cannabinoid) in cannabis." Sacco, *supra*, at 1.

While allowing for greater production of industrial hemp, the 2014 Act also expressly allowed States to regulate hemp production more stringently. It permitted institutions to "grow or

cultivate industrial hemp" "for purposes of research" so long as "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." Pub. L. No. 113-79, § 7606(a) (emphasis added).

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 (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* Pub. L. No. 115-334, § 12619 (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 for this case, the Farm Bill further states, "nothing 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." 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." Pub. L. No. 115-334, § 10114 (codified at 7 U.S.C. § 1639o note).

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 (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." P.L. 165-2014 (codified at Ind. Code § 15-15-13-6). And it removed industrial hemp from the State's definition of "marijuana." *See* P.L. 165-2014 (codified at Ind. Code § 35-48-1-19).

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: "the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9-tetrahydrocannabinol 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 also 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 checmical 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-based regulation, manufacturers of cannabis-derived products began infusing their products with Delta-8 THC. Britt E. Erickson, *Delta-8-THC Craze Concerns Chemists*, Chemical & Engineering 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. And, compared with Delta-9, Delta-8 does not bind as well to brain receptors and so it has reduced intoxicating properties. 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. 27-2 at 51 (Journay Dep. 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*.

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."

On January 12, 2023, Attorney General Todd Rokita, responding to a request by the Superintendent of the Indiana State Police (ISP) and the Executive Director of the Indiana Prosecuting Attorneys Council (IPAC), published Official Opinion 2023-1. ECF No. 1-5 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) "More specifically, do 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: "[T]he [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. 1-5 at 2, 14. The Agriculture Improvement Act (AIA, or "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 [AIA] 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 (quotation 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 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 to be "low-THC hemp extracts." ECF No. 27-2 at 20 (Journay Dep. 18:1–17); ECF No. 27-3. 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. 27-3 at 2; ECF No. 27-2 at 33, 35, 36, 50 (Journay Dep. 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. 27-2 at 53, 55 (Journay Dep. 51:6–23; 53:19–21); ECF No. 25-2 (3Chi First Video Exhibit); ECF No. 25-3 (3Chi Second Video Exhibit).

3Chi authorized a video advertisement to represent its products publicly. ECF No. 27-2 at 44 (Journay Dep. 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. 25-2 (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 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).

Queue 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 viewers 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 of its products. *See also* ECF No. 25-3 (3Chi Second Video Exhibit) (Journay Dep. 48:17–25, 49:1–15); ECF No. 25-5.

Still, 3Chi contends its Delta-8 products are legal because they are chemically derived from CBD. ECF No. 27-2 at 24-25 (Journay Dep. 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, even *heroin*, if it could be chemically derived from CBD, would be exempt from the Controlled Substances Act. *Id.* at 25 (Journay Dep. 23:22–25).

Plaintiffs brought this lawsuit "challenging the Attorney General's Official Opinion 2023-1." (Compl. ¶ 1). They allege that Official Opinion 2023-1 has prompted prosecutors to threaten retailers with prosecution for the sale of its 3Chi's delta-8 products and has also prompted some banks to refuse to do business with retailer that sell 3 Chi's delta-8 products. They argue that Official Opinion 2023-1 "is preempted" by federal law, violates the Commerce Clause, and contravenes SEA 52 (Ind. Code § 35-48-1-17.5). *Id.* at 10–15 (Compl. ¶¶ 53, 63, 67). It names the State of Indiana and the Attorney General as defendants, and seeks declaratory and injunctive relief. *Id.* at 4 (Compl. ¶¶ 17–18).

Plaintiffs filed a motion for "a preliminary injunction that enjoins Defendants . . . from taking any steps to criminalize or prosecute the sale, possession, manufacture, financing, or distribution of low THC hemp extracts that are below .3% Delta-9 THC on a dry weight basis." ECF No. 5 at 2. They request that the injunction extend not only to the named Defendants, but also to "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." *Id.*

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)). 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).

PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS

I. Plaintiffs Raise No Justiciable Claims

A. Sovereign immunity bars all claims against the State of Indiana

Sovereign immunity bars this suit against the State of Indiana as a named defendant. "For over a century [the Supreme Court has] reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996). Sovereign immunity plainly bars Plaintiffs' claims against the State of Indiana. Relatedly, Plaintiffs bring their federal claims under 42 U.S.C. § 1983, but only "persons" are suitable defendants under § 1983, and States are not "persons" for such purposes. *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 64 (1989). Plaintiffs cannot succeed on any claims against the State of Indiana.

B. Plaintiffs raise no justiciable claims against the Indiana Attorney General

1. The Attorney General enjoys sovereign immunity from all federal and state law claims Plaintiffs assert

Sovereign immunity bars Plaintiffs' federal law claims against the Attorney General because the suit against him "is equivalent to a suit against the state of Indiana, the entity of which the Attorney General is an agent." *Whole Woman's Health All. v. Hill*, 377 F. Supp. 3d 924, 934 (S.D. Ind. 2019) (citing *Kentucky v. Graham*, 473 U.S. 159, 169 (1985)); *Pennhurst State Sch. &*

Hosp. v. Halderman, 465 U.S. 89, 99–101 (1984) (explaining sovereign immunity "bars a suit against state officials when the state is the real, substantial party in interest").

a. Because the Attorney General does not enforce Indiana's controlled substances laws, the *Ex Parte Young* exception to sovereign immunity does not apply

Ex Parte Young, 209 U.S. 123, 192 (1908), does not authorize this suit because the Attorney General does not enforce Indiana law prohibiting production, possession, and sale of controlled substances. "*Young* does not apply when a defendant state official has neither enforced nor threatened to enforce the allegedly unconstitutional state statute." *Doe v. Holcomb*, 883 F.3d 971, 977 (7th Cir. 2018) (quoting *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1415 (6th Cir. 1996)). Here, not only has the Attorney General not taken any action to enforce or threaten to enforce the criminal laws Plaintiffs cite, he *cannot* do so. "[T]he general rule in Indiana is that the Attorney General cannot initiate prosecutions; instead, he may only join them when he sees fit." *Id.* Instead, the duty to "conduct all prosecutions for felonies, misdemeanors, or infractions" belongs to county prosecutors, Ind. Code § 33-39-1-5. And nowhere does the legislature extend direct enforcement power to the Attorney General regarding controlled substances.

Some county prosecutors have sent some entities cease-and-desist letters that cite Official Opinion 2023-1. But reliance on AG opinions and guidance does not render the Attorney General subject to suit. Plaintiffs have not attempted to show, nor could they establish, that the Attorney General has sufficient "connection with the enforcement" of the law to render him subject to suit. *Doe*, 883 F.3d at 976 (quoting *Young*, 209 U.S. at 157).

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* Ind. Code § 4-6-1-6, does not grant him control over prosecutors, who

are the ones who enforce the law, Ind. Code § 33-39-1-5 ("[P]rosecuting attorneys, within their respective jurisdictions, shall . . . conduct all prosecutions for felonies, misdemeanors, and infractions . . . ."). Indeed, Official Opinion 2023-1 expressly states that he "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. 1-5 at 2, 14.

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. Ultimately, however, prosecutors may file suit only when authorized by statute, as tempered by their own prosecutorial discretion, for which they are electorally accountable. In other words, the Attorney General's official opinion is just that: an opinion. And even Plaintiffs agree that "Official Opinions from the attorney general are not law and are not binding on courts." ECF No. 6 at 14; *see also McPeek v. McCardle*, 888 N.E.2d 171, 177 n.4 (Ind. 2008) ("Attorney General opinions are not binding on the Court."); *Thompson v. Hays*, 867 N.E.2d 654, 659 n.9 (Ind. Ct. App. 2007) ("Attorney General Opinions are without precedential effect and are not binding on this court.").

The Attorney General's "broad authority" to issue opinions and advice to the elected prosecuting attorneys is simply "too attenuated" to render him a proper defendant, "especially considering that the Attorney General could not initiate the prosecution himself." *Doe*, 883 F.3d at 977. 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 v. Jackson*, 142 S. Ct. 522, 534 (2021) (rejecting argument that Texas Attorney General could be sued under *Ex Parte Young*). Because "[t]he Attorney General has not threatened to do anything, and *cannot* do anything, to prosecute a violation of [Indiana Code § 35-48-2-

4(d)(32)]," *Doe*, 883 F.3d at 977 (emphasis added), sovereign immunity bars this lawsuit brought against him, and Plaintiff's claims cannot even get to the merits, let alone succeed on the merits.

b. Even if the Attorney General could be sued using *Ex Parte Young*, he retains sovereign immunity against state law claims under *Pennhurst*

Separately, the Complaint seeks declaratory and injunctive relief against the Attorney General on the claim that "[t]he Official Opinion violates Indiana law." ECF No. 6 at 14. But sovereign immunity also 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 also 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."). Again, Plaintiffs' claims are non-starters and cannot succeed on the merits.

2. The Attorney General can provide no redress to Plaintiffs

Another way to conceptualize the barrier to Plaintiffs' suit against the Attorney General is that he can provide them with no meaningful redress, which deprives them of Article III standing. To have standing, Plaintiffs must "demonstrate" that their claimed injuries "would likely be redressed by the requested judicial relief." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020). Plaintiffs cannot make the required showing because their claims are not redressable by injunction against the Attorney General.

a. With respect to controlled substances, the Attorney General lacks power to criminalize, decriminalize, prosecute or not prosecute

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. 1 at 13 (Compl. ¶ 63), "impose[]" statutory definitions, *id.* at 11 (Compl. ¶¶ 56–57), or "modif[y] . . . statute[s]," *id.* at 14 (Compl. ¶ 74). 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.").

Despite making those erroneous assertions at various points in their Complaint and memorandum, Plaintiffs nevertheless agree that "Official Opinions from the attorney general are not law and are not binding on courts." ECF No. 6 at 14 (citing *McPeek v. McCardle*, 888 N.E.2d 171 n.4 (Ind. 2008)). They also acknowledge that Official Opinion 2023-1 created "no statutory changes under Indiana law." ECF No. 1 at 11 (Compl. ¶ 57).

The Attorney General also does not "prosecute," ECF No. 1 at 16, 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). *Doe*, 883 F.3d at 977 ("[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 such prosecutions. 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*, 140 S. Ct. at 1618.

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. 1 at 9–10 (Compl. ¶ 45–48). 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 weighing in on an underlying legal question. 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 treat Plaintiffs more favorably. Maybe, maybe not. But the moral force of a federal court's decisions is irrelevant for standing purposes. What matters for purposes of discerning the possibility of effective redress under Article III is the impact of the judgment or injunction as it adjusts the relations between the parties to the suit. *California v. Texas*, 141 S. Ct. 2104, 2115 (2021) ("Remedies . . . ordinarily 'operate with respect to specific parties.'" (quoting *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring))). It does not matter whether courts can reliably predict how others will react—all that

matters is the direct legal consequence of adjudication. *See Haaland v. Brackeen*, 143 S. Ct. 1609, 1639–40 (2023) ("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."). No adjudication here could meaningfully adjust the legal relationship between Plaintiffs and Defendants to addresses the injuries claimed by the Plaintiffs, so Plaintiffs lack Article III standing to sue the Attorney General.

b. Plaintiffs' request that an injunction extend beyond named Defendants cannot be granted

Plaintiffs also request a broader injunction that would "enjoin[] . . . other persons in concert or participation with [Defendents] . . . from taking any steps to criminalize or prosecute the sale, possession, manufacture, financing, or distribution of low THC hemp extracts that are below .3% Delta-9 THC on a dry weight basis." ECF No. 5 at 2. Such an injunction is beyond the power of the Court to grant in this case. Surely, Plaintiffs do not think the Court could enjoin all prosecutors and State Police from considering the content or reasoning of Official Opinion 2023-1 in subsequent cases. Neither other independently elected officials, nor state employees appointed by other independently elected officials (such as IPAC officials or State Police officials) are in privity with the Attorney General. Each has independent public accountability and independent authority to interpret and effectuate Indiana law. The Attorney General does not control what they do or act in concert with them in policing and charging crimes. Nor, surely, do Plaintiffs demand an injunction restraining the Indiana General Assembly from enacting its own laws criminalizing conduct. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 534 (2021) ("[U]nder traditional equitable principles, no court may 'enjoin the world at large,' or purport to enjoin challenged 'laws themselves.'" (internal citations omitted)). Suing the Attorney General is not a substitute for suing the proper public official responsible for enforcing a law a plaintiff wishes to challenge.

To the extent Plaintiffs simply want the Court to review whether Official Opinion 2023-1's conclusions are accurate statements of federal and state law, *see* ECF No. 1 at 10 (Compl. ¶ 50) (alleging "[a]n actual and justiciable controversy exists between Plaintiffs and Defendants regarding the lawfulness of low THC hemp extracts"), such an order would amount to an impermissible advisory opinion. "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*, 141 S. Ct. at 2116 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 129 (1983) (Marshall, J., dissenting)); *see also 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))). As it happens, an advisory opinion on the subject already exists—from the Attorney General of Indiana. Disagreement with it is no justification to run to federal court seeking an alternative viewpoint.

II. On the Merits, Precedent and Plaintiffs' Admissions Foreclose All Claims

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 follow for their claims. According to Plaintiffs, "Official Opinions from the attorney general are not law and are not binding on courts." ECF No. 6 at 14. So, Plaintiffs have accepted—correctly—that Official Opinion 2023-1 is not a state law or regulation, and has no binding effect. But one consequence of that conclusion is that the AG's official 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. Trust 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[]," *id.* at 6, 12–14, must fail because Official Opinion 2023-1 is "not law and not binding on courts" or anyone else, *id.* at 14.

Even putting aside that obvious impediment to Plaintiffs' federal theories, however, precedent also forecloses their preemption and Commerce Clause claims.

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

What Plaintiffs really want is a declaration that existing Indiana *statutes* do not prohibit their products, but 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 6 at 12–13, 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) (titled "No preemption" and providing "[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") indicating that Congress had 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. 6 at 6–11, explaining that the Farm Bill clearly allows States to regulate hemp within their own borders. *See C.Y. Wholesale*, 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).

Likewise, *C.Y. Wholesale* governs Plaintiffs' Commerce Clause claim. Plaintiffs assert that "[b]ecause the Official 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—Official Opinion 2023-1 is unconstitutional under the Commerce Clause of the United States Constitution." ECF No. 6 at 13–14. 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 the opinion "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, as Plaintiffs observe, ECF No. 6 at 14—such a regulation withstands review against the preemption and Commerce Clause claims.

C. Plaintiffs lack a cause of action for their state 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. 6 at 14. Again, adjudication of this claim is barred under sovereign immunity doctrine by *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99–100 (1984). But even besides that insurmountable barrier, it is unclear on what basis Plaintiffs believe they can bring a claim that a state AG advisory opinion is wrong about 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. 6 at 14. But they cite no cause of action and assert no theory suggesting 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 Attorney General stands by Official Opinion 2023-1. 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. 1-5 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.

PLAINTIFFS HAVE NOT DEMONSTRATED IRREPARABLE HARM

Plaintiffs have failed to show that they will suffer irreparable harm without a preliminary injunction. *Mays v. Dart*, 974 F.3d 810, 822 (7th Cir. 2020) (stating this standard "requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an

injunction" (emphasis in original)). Plaintiffs cite the threat of criminal sanctions and loss of financial institutions, but it is not at all clear how the requested preliminary injunction against the State of Indiana and the Attorney General would remove these supposed harms.

Plaintiffs claim they will suffer irreparable harm "if law enforcement acts on the Official Opinion to arrest and prosecute those like 3Chi who sell or possess low THC hemp products." ECF No. 6 at 15. 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 is "not law," ECF No. 6 at 14, and so it does not change the "potential criminal sanctions" Plaintiffs face by producing, selling, and possessing these products. ECF No. 6 at 15. Any potential criminal sanctions the 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. 6 at 15. Any loss of bank financing, however, comes from banks' evaluations of the hemp industry's risk profile, not as a directive from the State of Indiana or the Attorney General. 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 successfully found another banking institution, so it is not suffering irreparable harm on the banking front. ECF No. 27-2 at 52–53 (Journay Dep. 50:14–25, 51:1–7) (explaining 3Chi "found a partner in Indiana willing to explore working with [it]," and now "ha[s] banking secured" to a large extent). Plaintiffs

have not demonstrated they face irreparable harm warranting the exceptional relief of a preliminary injunction.

PUBLIC POLICY AND THE BALANCE OF EQUITIES WEIGH AGAINST RELIEF

The equities and public interest weigh against a preliminary injunction. *Mays v. Dart*, 974 F.3d 810, 818 (7th Cir. 2020) ("[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 prosecutors, criminal statutes and financial services even if granted an injunction here.

In contrast, the State has a vital interest in effectively 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); *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). Plaintiffs request an injunction that would invade the State's prerogative to make and enforce its laws and the Attorney General's legal duty to issue opinions on certain questions of law. Such an invasion would 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. 27-2 at 53–55 (Journay Dep. 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.

CONCLUSION

The Court should deny the motion for a preliminary injunction.

Respectfully submitted,

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