IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

BIO GEN, LLC, DRIPPERS VAPE SHOP, LLC, THE CIGARETTE STORE LLC d/b/a SMOKER FRIENDLY, and SKY MARKETING CORPORATION d/b/a HOMETOWN HERO, **PLAINTIFFS**

v. **Case No. 4:23-CV-718 (BRW)**

THE STATE OF ARKANSAS; GOVERNOR SARAH HUCKABEE SANDERS, in her official capacity; ATTORNEY GENERAL JOHN TIMOTHY GRIFFIN in his official capacity; TODD MURRAY, SONIA FONTICIELLA, DEVON HOLDER, MATT DURRETT, JEFF PHILLIPS, WILL JONES, TERESA HOWELL, BEN HALE, CONNIE MITCHELL, DAN TURNER, JANA BRADFORD, FRANK SPAIN, TIM BLAIR, KYLE HUNTER, DANIEL SHUE, JEFF ROGERS, DAVID ETHREDGE, TOM TATUM, II, DREW SMITH, REBECCA REED MCCOY, MICHELLE C. LAWRENCE, DEBRA BUSCHMAN, TONY ROGERS, NATHAN SMITH, CAROL CREWS, KEVIN HOLMES, CHRIS WALTON, and CHUCK GRAHAM, each in his or her official capacity as a prosecuting attorney for the State of Arkansas; ARKANSAS DEPARTMENT OF FINANCE AND ADMINISRTATION; ARKANSAS TOBACCO CONTROL BOARD; ARKANSAS DEPARTMENT OF AGRICULTURE; and ARKANSAS STATE PLANT BOARD **DEFENDANTS**

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER OR ALTERNATIVE MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs bring this motion for a temporary restraining order or alternatively for a preliminary injunction to challenge the constitutionality of Act 629 of the 94th General Assembly of Arkansas that recriminalizes certain hemp-derived cannabinoid products and obstructs the shipment and transportation of the same, in direct conflict with well-

established federal laws encouraging the redevelopment of a domestic supply chain of hemp and hemp products in Arkansas and across the country. Act 629 purports to declare an emergency need to prohibit certain products, but instead destroys the ability to cultivate hemp of any kind, creates insurmountable confusion, and goes on to add a sham dysfunctional regulatory framework effective only if and when the initial portion of the law is enjoined.

Since the United States Congress passed the Agricultural Act of 2014 permitting the growth and cultivation of hemp, the State of Arkansas had been making strides to "in moving to the forefront of industrial hemp production, development, and commercialization of hemp products." Ark. Code Ann. § 2-15-402 (2017) (repealed by Act 565). The federal government then doubled-down on its effort to create a market for hemp by passing the Agriculture Improvement Act of 2018 (the "2018 Farm Bill"), which removed hemp from the Controlled Substances Act and broadly defined hemp to include all derivatives and isomers of the plant as long as the Delta-9 concentration was not more than 0.3 percent on a dry weight basis. Since that time, Arkansas farmers, retailers, and consumers have grown, sold, and purchased hemp and hemp products pursuant to the 2018 Farm Bill.

That all changed on April 11, 2023, when Defendants signed Act 629 into law. It impermissibly narrows the broad definition of hemp by making production infeasible and by recriminalizing certain popular hemp-derived cannabinoid products. In fact, Act 629 goes so far as to recriminalize all hemp products "produced as a result of a synthetic chemical process" – including Delta-8 and Delta-9; despite no such "synthetic" distinction permitted under federal law. It goes even a step further to recriminalize "[a]ny other psychoactive substance derived [from hemp]."

Act 629 is preempted by the 2018 Farm Bill, which declares all derivatives and isomers of hemp to be legal and mandates that states are not permitted to alter the definition of hemp in an attempt to criminalize it. The 2018 Farm Bill also preempts Act 629 because the bill expressly declares that states cannot inhibit the interstate commerce of hemp, which Act 629 has done by criminalizing its possession in Arkansas. For the same reason, Act 629 violates the Commerce Clause of the United States Constitution due to its restriction on the interstate transportation of hemp. Further, Act 629 constitutes an impermissible regulatory taking, because it effectively creates a total ban of hemp containing any amount of tetrahydrocannabinol, which impermissibly infringes upon the investment-backed expectations and industries in which Plaintiffs, and other Arkansas citizens, have built their livelihoods. Finally, Act 629 violates the Due Process Clause of the Fifth and Fourteen Amendments of the Unites States Constitution because numerous sections contradict one another and use undefined terms but garner criminal consequences, failing to provide clarity and fair warning to persons of ordinary intelligence as to their requirements. As such, Act 629 is unconstitutional and should be enjoined because it violates the Supremacy Clause and Commerce Clause of the United States Constitution, constitutes an impermissible regulatory taking, and is void for vagueness.

RULE 65(b) CERTIFICATION

Pursuant to Rule 65(b), accompanying affidavits from Plaintiffs' representatives establish the immediate and irreparable nature of the injuries they will suffer if Act 629 goes into effect. Further, undersigned counsel certifies that prior to filing Plaintiffs' Motion, a copy of the Complaint, the Motion, this Brief, and its Exhibits were forwarded by email to Solicitor General Nicholas Bronni as a matter of courtesy. Additional notice

should not be required, however, because Act 629 becomes effective on August 1, 2023, and Plaintiffs' will suffer irreparable injury if notice must first be provided to Defendants. As demonstrated by Exhibit 1, Defendants intend to begin enforcement of Act 629 immediately. **Exhibit 1**, *Arkansas Tobacco Control Board Advisory*.

FACTUAL BACKGROUND

The Plaintiffs in this case cultivate, wholesale, distribute, and retail hemp plants and hemp-derived products in and out of Arkansas who, until August 1, 2023, had benefitted for several years from operating within a legal market through a supply chain of thousands of farmers, processors, wholesalers, and retail shops throughout Arkansas and most of the nation. Bio Gen, LLC, is a hemp farm providing a variety of hemp flowers and consulting services to Arkansas farmers. (ECF No. 1, ¶ 11.) Additionally, Drippers Vape Shop, LLC, is a small business with multiple retail stores throughout Arkansas that offer, among other things, hemp extract products to Arkansas consumers and businesses. (*Id.*, ¶ 12.) Additionally, The Cigarette Store, LLC operates close to 300 retail stores across thirteen states, 58 of which are in Arkansas, offering, among other things, hemp extract products to Arkansas consumers and businesses. (*Id.*, ¶ 13.) Finally, Sky Marketing Corporation is a distributor of, among other things, hemp products, wholesaling to Arkansas businesses in addition to retailing directly to Arkansas consumers. (*Id.*, ¶ 14.)

Since President Barack Obama signed into law the Agricultural Act of 2014 ("2014 Farm Bill"), the federal government has made a strong effort to once again treat hemp as an agricultural commodity in the United States. (*Id.*, ¶ 52.) Arkansas recognized this effort and signed into law Act 981 in 2017, with the intent to move Arkansas "to the forefront of industrial hemp production, development, and commercialization of hemp products . . ." (*Id.*, ¶ 56.) Specifically, Act 981 permitted the state to adopt rules to administer an

industrial hemp research program and to license persons to grow industrial hemp for research in Arkansas. (*Id.*)

In 2018, President Donald Trump signed into law the 2018 Farm Bill which permanently removes hemp from the Controlled Substances Act and requires the United States Department of Agriculture ("USDA") to be the sole federal regulator of hemp production leaving no role for the Drug Enforcement Agency ("DEA"). (*Id.*, ¶¶ 57-58); (ECF No. 1-1.) The 2018 Farm Bill expands the definition of hemp by defining it as the "plant Cannabis sativa L. and any part of that plant, including the seeds thereof ***and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not,*** with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 16390(1) (emphasis added); (*Id.*, ¶ 59.) In order to protect its legalization of hemp, the 2018 Farm Bill prohibits states from blocking the transportation or shipment of hemp and hemp products. (Section 10114); (*id.*, ¶ 64.)

In 2019, in response to the 2018 Farm Bill, Arkansas passed Act 504 which decoupled hemp from marijuana by removing from the State's Uniform Controlled Substances Act a broad definition of hemp including all such hemp containing not more than 0.3% of tetrahydrocannabinol on a dry weight basis from the State's Uniform Controlled Substances Act. (*Id.*, ¶ 69.) Then, in 2021, Arkansas passed Act 565 which amended its hemp program to remove the requirement that a research plan be provided in order to obtain a hemp license, thus officially opening up a full commercial market. (*Id.*, ¶ 70.)

Despite the federal government's protections and the Arkansas legislature's prior advancement of those protections for hemp and "all derivatives, extracts, cannabinoids,

[and] isomers" thereof, on April 11, 2023, Governor Sanders signed Act 629 into law, which impermissibly narrows the definition of hemp, makes hemp production infeasible, and recriminalizes certain popular hemp-derived cannabinoid products, including Delta-8 and Delta-9 THC. (*Id.*, ¶ 72). Act 629 recriminalizes all hemp products "produced as a result of a synthetic chemical process," without any such distinction found in federal statute. (*Id.*) Act 629 goes even a step further to recriminalize "[a]ny other psychoactive substance derived [from hemp]," which would encompass cannabidiol ("CBD"), which is understood to be "psychoactive" by industry experts (as are caffeine and sugar). (*Id.*)

As a result of Act 629, Plaintiffs are in jeopardy of criminal prosecution and are precluded from cultivating, shipping, transporting, wholesaling, packaging, processing, and retailing hemp plants and hemp extract products deemed legal by federal law. (*Id.*, ¶¶ 73-77.)

ARGUMENT

To obtain a temporary restraining order or preliminary injunction, Plaintiffs must establish that: (1) they are likely to succeed on the merits of their claim; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities favors Plaintiffs; and (4) an injunction would serve the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). A preliminary injunction requires notice to the adverse party, but a temporary restraining order only requires the establishment, by affidavit, of immediate and irreparable injury, loss, or damage before the adverse party can be heard in opposition where the movant's counsel certifies in writing any efforts made to give notice and the reasons why notice should not be required.

The decision to issue or not issue preliminary relief should not be made upon mechanical application of these four factors, but upon whether the balance of equities so

favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined. *Wood Manufacturing Co. v. Schultz*, 613 F. Supp. 878 (W.D. Ark. 1985).

The grant of preliminary relief under Rule 65 is largely within the discretion of the District Court. *Dataphase Sys., Inc.*, 640 F.2d 109; *Aaron v. Target Corp.*, 357 F. 3d 768 (8th Cir. 2004). The purpose of such a temporary restraining order or preliminary injunction is "merely to preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Here, Plaintiffs satisfy all four factors. Relief is warranted to prevent Defendants from enforcing an unconstitutional Act and to prevent irreparable harm to Plaintiffs and the public alike.

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

Plaintiffs are likely to succeed on their claims that Act 629 is unconstitutional because it: (A) is preempted by the 2018 Farm Bill, which solidifies the broad definition of hemp and declares hemp and all derivatives and isomers thereof legal; (B) is preempted by the 2018 Farm Bill by precluding the interstate commerce of hemp; (C) impermissibly restricts the interstate commerce of hemp in violation of the Commerce Clause; (D) its regulatory scheme results in an impermissible regulatory taking, effectively creating a total ban of hemp containing any amount of tetrahydrocannabinol and thus infringing upon Plaintiffs' businesses; and (E) is void for vagueness due to its failure to provide clarity and fair warning to persons of ordinary intelligence as to its requirements.

A. The 2018 Farm Bill preempts Act 629's attempt to alter the definition of hemp to criminalize certain hemp-derived cannabinoid products and place those back on the controlled substances list.

Plaintiffs are likely to prevail on their claim that the 2018 Farm Bill preempts Act 629's attempt to alter the definition of hemp to criminalize and reclassify certain hemp-derived cannabinoids, including Delta-8, as illegal controlled substances. This preemption makes Act 629 unconstitutional under the Supremacy Clause of the United States Constitution, and it is therefore unlawful and should be enjoined.

The Supremacy Clause of the United States Constitution gives Congress power to preempt state law. *See generally Arizona v. United States*, 567 U.S. 387 (2012); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). Preemption is typically applied in three forms: (1) express preemption, where a statute contains a provision precluding state conduct; (2) field preemption, where Congress has determined an area is under its exclusive federal governance; or (3) conflict preemption, where "state laws are preempted when they conflict with federal law, including when they stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 567 U.S. at 387 (2012). Here, Act 629 falls squarely under conflict preemption because it conflicts with the 2018 Farm Bill's definition and protection of hemp, and all derivatives thereof.

The 2018 Farm Bill expands the definition of hemp by defining it as the "plant Cannabis sativa L. and any part of that plant, including the seeds thereof ***and all derivatives, extracts, cannabinoids, isomers,*** acids, salts, and salts of isomers, whether growing or not, ***with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis***." 7 U.S.C. § 16390(1) (emphasis added). Thus, the 2018 Farm Bill broadly defines hemp as including ***all*** products derived from hemp, so long as the Delta-9 THC concentration is not more than 0.3%. (*Id.*) That

is the sole metric for determining whether a product is hemp under federal law: if the Delta-9 THC level is 0.3 percent or less, then it is hemp; if it is more than 0.3 percent, then it is not. To solidify the federal government's protection of this broad definition of hemp, the 2018 Farm Bill permanently removed hemp and THCs in hemp from the Controlled Substances Act. (2018 Farm Bill, Section 12619 (amending the Controlled Substances Act to state that the term marijuana "does not include . . . hemp."))

Despite this clear directive, on April 11, 2023, Defendants signed Act 629 into law, narrowing the definition of hemp to that which contains "a total delta-9 tetrahydrocannabinol concentration of no more than three-tenths of one percent (0.3%) ***of the hemp-derived cannabadiol*** on a dry weight basis," and recriminalizing all hemp products "produced as a result of a synthetic chemical process" – including Delta-8 ***and*** Delta-9, along with "[a]ny other psychoactive substance derived [from hemp]." Although Act 629 properly excluded hemp derived-cannabinoid products from the state's definition of marijuana, it nonetheless impermissibly narrows the definition of hemp by inventing a distinction for "synthetic" hemp derived cannabinoids, despite no such cannabidiol limitation nor any "synthetic" distinction permitted under federal law.

In determining whether conflict preemption exists, the Supreme Court of the United States asks whether "the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objections of Congress" and that to conclude as such the Court should look to "the federal statute as a whole and identify[] its purpose and intended effects." *Arizona*, 567 U.S. at 387 (2012) (quotation omitted); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874 (2000). In other words, the Court starts by analyzing the text in question.

Here, the 2018 Farm Bill unambiguously defined hemp as the "plant Cannabis sativa L. and any part of that plant, including . . . all derivatives, extracts, cannabinoids, [and] isomers, . . . with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 16390(1). There is no limitation that the THC be a percentage of the cannabidiol (which is not even feasible to grow). There is no distinction between Delta-8 versus Delta-9. There is no distinction between synthetic or non-synthetic hemp. The legislature could have chosen to make those distinctions, but it chose not to. The common sense, plain reading of that definition is that if the hemp plant or ***any derivative[1] or isomer thereof*** has a Delta-9 concentration of less than 0.3 percent, then it is legal hemp protected from state criminalization.

Act 629 directly violates this provision of the 2018 Farm Bill by ignoring the fact hemp plants naturally grow in a manner that is not dictated by its cannabidiol levels and further ignores that hemp includes "all derivatives" and "isomers" thereof such as Delta-8 and instead declares impossible hemp production standards and declares hemp plants a hemp-derived products illegal and prosecutable under Arkansas law, and it places federally protected hemp back on the controlled substance list. Because the plain language of the 2018 Farm Bill controls the definition of hemp and removes it from the list of controlled substances – and because Act 629 does precisely the opposite – federal law preempts Act 629, and it is unconstitutional under the Supremacy Clause of the United States Constitution. Though this Court could end its analysis after analyzing the

[1] A "derivative" is a "compound that can be imagined to arise or actually be synthesized from a parent compound by replacement of one atom with another atom or group of atoms" – just like the difference between Delta-8 and Delta-9. https://www.chemicool.com/definition/derivative.html (last visited July 27, 2023).

plain language of the 2018 Farm Bill, the intent and legislative history behind the bill provides further support.

The Conference Report for the 2018 Farm Bill makes it clear that Congress intended to preclude states from adopting a more restrictive definition of hemp in an attempt to criminalize it: "state and Tribal governments are authorized to put more restrictive parameters on the production of hemp, ***but are not authorized to alter the definition of hemp***" (ECF No. 1-2 at 738) (emphasis added); *Geier*, 529 U.S. at 874 (looking to comments of the federal act in question and its legislative history to determine the purpose and intent of the act). In furtherance of the federal government's goal to treat hemp like an agricultural commodity rather than a criminal substance, the government even assigned the USDA to be the sole federal regulator of hemp production, leaving no role for DEA. (*See generally*, ECF No. 1-1); (ECF No. 1, ¶ 58.) This intent is also evidenced by a letter from the Chairman of the House Agriculture Committee Congressman David Scott and the House Appropriations Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies to the United States Department of Justice and the DEA:

> Congress did not intend the 2018 Farm Bill to criminalize any stage of legal hemp processing, and we are concerned that hemp grown in compliance with a USDA-approved plan could receive undue scrutiny from the DEA as it is being processed into a legal consumer-facing product under this IFR. That is why the 2018 Farm Bill's definition of hemp was broadened from the 2014 Farm Bill's version to include derivatives, extracts and cannabinoids. It was our intent that derivatives, extracts and cannabinoids would be legal if these products were in compliance [with] all other Federal regulations.

(ECF No. 1-4.)

Even the DEA itself has confirmed that hemp extracts like Delta-8 are ***not*** controlled substances under the 2018 Farm Bill.

> I also want to expand beyond delta-8. There's delta-8, there's delta-10, there's all kind of different cannabinoids that are associated with cannabis sativa l that are kind of out there and making the rounds. So what I want to say, and I'll be very, very deliberate and clear. At this time, I repeat again, at this time, per the Farm Bill, the only thing that is a controlled substance is delta-9 THC greater than 0.3% based on a dry weight basis.[2]

Moreover, on September 15, 2021, in response to a request regarding the control status of Delta-8 THC under the Controlled Substances Act, the DEA concluded that "…cannabinoids extracted from the cannabis plant that have a Δ 9 -THC concentration of not more than 0.3 percent on a dry weight basis meet the definition of 'hemp' and thus are not controlled under the CSA." (ECF No. 1-4.) Furthermore, according to the response, the DEA considers unlawful "synthetic" THC products to be those that are "produced from non-cannabis materials." (*Id.*)

In sum, both the express language and the legislative history of the 2018 Farm Bill confirm that hemp and all derivatives and isomers thereof are mandated to be legal under and protected by federal law. This is the identical conclusion reached by the Ninth Circuit in *AK Futures LLC v. Boyd St. Distro, LLC*, 35 F.4th 682, 692 (9th Cir. 2022).

In *AK Futures*, two entities litigated a copyright infringement claim over the plaintiff's Delta-8 product, and the defendant relied on the defense that there was no copyright protection for the product because Delta-8 is illegal under federal law. *Id.* The plaintiff moved for a preliminary injunction confirming that Delta-8 is legal, and the district court granted the preliminary injunction because the 2018 Farm Bill "legalized

[2] https://tinyurl.com/mr2n28hx at 10:30 (last visited July 28, 2023).

the company's delta-8 THC products." *Id*. In a strongly-worded opinion, the Ninth Circuit affirmed on appeal.

The Ninth Circuit started with the plain language of the 2018 Farm Bill which confirmed a broad definition of hemp including all derivatives and extracts and that hemp was removed from the Controlled Substances Act. *Id*. at 690. The Court concluded that because "the only statutory metric for distinguishing controlled marijuana from legal hemp is the delta-9 THC concentration level" and because the definition of hemp "extends beyond just the plant to 'all derivatives, extracts, [and] cannabinoids'" that the protections of the 2018 Farm Bill thus expressly "extends to downstream products and substances, so long as their delta-9 THC concentration does not exceed" 0.3 percent on a dry weight basis. *Id*. As such, Delta-8 is legal and protected by federal law. *Id*. at 691 ("[T]he delta-8 THC in the e-cigarette liquid is properly understood as a derivative, extract, or cannabinoid originating from the cannabis plant and containing not more than 0.3 percent delta-9 THC. AK Futures is thus likely to succeed in showing its products are not illegal under federal law.") (Quotations and citations omitted). Importantly, the Ninth Circuit expressly rejected the defendant's argument regarding "synthetically derived" hemp because it was not supported by the plain language of the statute (which synthetic argument is the basis relied upon in Act 629).

The Ninth Circuit stated that it could end its analysis after analyzing the unambiguous statutory text, but it went ahead and entertained the defendant's remaining arguments regarding the intent of the 2018 Farm Bill. *Id*. at 693. The Court quickly rejected the argument that Delta-8 and similar hemp extracts were not meant to be protected by the 2018 Farm Bill, because if Congress had wanted to exempt certain

derivatives or isomers from the broad definition of hemp (such as Delta-8, Delta-10, etc.) it could have, but it specifically chose not to do so. *Id.* This was plain evidence of Congress's intent to keep Delta-8 and similar hemp extracts within the federally protected definition of hemp. *Id.*[3]

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In short, the express language and intent behind the 2018 Farm Bill legalized hemp with low levels of delta-9 THC (including all derivatives such as Delta-8). Defendants attempt to redefine hemp to criminalize certain hemp-derived cannabinoid products and place those products back on the controlled substance list, which conflicts with Congress's purpose. Act 629 stands in direct conflict with the 2018 Farm Bill and is preempted by federal law based on the Supremacy Clause of the United States Constitution. Plaintiffs' Motion should be granted for this reason alone.[4]

B. By criminalizing legal hemp derivatives, Act 629 prohibits the transport of hemp products through Arkansas in direct contradiction to Section 10114 of the 2018 Farm Bill.

A second, independently sufficient reason to grant Plaintiffs' Motion is that federal law expressly preempts Act 629's attempt to criminalize hemp derivatives like

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[3] *See also Kentucky Hemp Association, et al. v. Ryan Quarles, in his Official Capacity as Kentucky Commissioner of Agriculture, et al.* (Commonwealth of Kentucky, Boone County Circuit Court Division 1, Case No. 21-CI-00836) (enjoining the agricultural commissioner and state police from prosecuting Delta-8 hemp extracts because under the 2018 Farm Bill "[c]learly, the definition of hemp includes derivatives, extracts, and isomers" which includes Delta-8.) (February 28, 2022 Order attached as **Exhibit 2**).

[4] *See also Sky Marketing Corp., et al. v. Texas Department of State Health Services et al.* (in the 126th Judicial District of Travis County, Texas, Cause No. D-1-GN-21-006174) (enjoining the Texas Department of State Health Services and its Commissioner from, in part, amending state rules to reflect "that Delta-8 THC in any concentration is considered a Schedule I controlled substance") (November 8, 2021 Order is attached as **Exhibit 3**).

Delta-8, which effectively precludes their transport through Arkansas. Such preemption makes Act 629 unconstitutional under the Supremacy Clause of the United States Constitution, and it is therefore unlawful and should be enjoined.

When analyzing an express preemption clause, the Supreme Court of the United States has determined that courts "must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress's pre-emptive intent." *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 62-63 (2002) (quotations omitted). Here, the express preemption provision regarding the transportation of hemp in the 2018 Farm Bill is unequivocal:

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

(emphasis added) (*see also* 7 U.S.C. § 16390(1) (defining hemp broadly to include all hemp derivatives or extracts)).

Act 629 further interferes with the interstate transportation and shipment of hemp and hemp products in direct violation of the express language of the 2018 Farm Bill. On its face, if one cannot possess certain hemp and hemp products declared legal under federal law, then one cannot transport or ship it, either. Act 629 attempts, but fails, to

cure this defect by inserting the following opaque (and internally contradictory) provisions:

> This section does not prohibit the continuous transportation through Arkansas of 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 percent (0.3%) on a dry weight basis, produced in accordance with 7 U.S.C. § 20 16390 et seq.

(*Id.*, Section 7 at 5-64-215(d).)

> This subchapter does not prohibit in any form the continuous transportation through Arkansas of 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 total delta-9 tetrahydrocannabinol concentration of not more than three-tenths percent (0.3%) on a dry weight basis, ***from one licensed hemp producer in another state to a licensed hemp handler in another state***.

(*Id.*, Section 10 at 20-56-412(d) (emphasis added).)

The latter provision specifies which types of licensees *outside* of Arkansas are permitted to transport through the state, in further direct violation of the 2018 Farm Bill's interstate commerce protections.

Act 629 states that Sections 6-14 of the Act become effective only if Sections 2-5 are enjoined. (*Id.*, Section 17.) The interstate commerce provisions quoted above are in Section 7 and Section 10, meaning they are not currently effective. As a result, no such protection on the transportation of hemp exists in Act 629, and the interstate commerce of hemp and hemp products would be unduly burdened as employees would have to route around Arkansas due to the ever-present risk of arrest by transporting the hemp products through the state.

Specifically, Plaintiffs Sky Marketing and Smoker Friendly transport and ship hemp-derived cannabinoid products like Delta-8 THC into and through Arkansas. Under Act 629, their employees face potential criminal liability for transporting and shipping hemp products if they failed to demonstrate the products were "in continuous transportation" and "produced in accordance with 7 U.S.C. § 16390 et seq."

General Counsel for the USDA has authored a memorandum on this exact issue, concluding that the 2018 Farm Bill "preempts State law to the extent such State law prohibits the interstate transportation or shipment of hemp. . . ." (ECF No. 1-3) (Memorandum Sec. II(B).) Because the 2018 Farm Bill expressly preempts any prohibition on the interstate transport of legal hemp extracts such as Delta-8, Act 629 is unconstitutional under the Supremacy Clause of the United States Constitution.

C. Act 629's criminalization of hemp extracts and effective prohibition of the transportation of hemp also violates the Commerce Clause.

Act 629's attempt to criminalize certain hemp-derived cannabinoids and effectively prohibit their possession and transportation through Arkansas impermissibly restricts interstate commerce. A truck driver transporting hemp extracts to Tennessee from a farm in Oklahoma faces criminal sanction were his truck to be stopped by law enforcement in Arkansas. Such a restriction on interstate commerce of a product declared legal by the federal government renders Act 629 unconstitutional under the Commerce Clause of the United States Constitution.

The Commerce Clause grants Congress the power to regulate commerce among the States. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978). The Supreme Court of the United States recognizes that "the 'negative' or 'dormant' aspect of the Commerce Clause prohibits States from advancing their own commercial interests by curtailing the

movement of articles of commerce, either into or out of the state." *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat. Res.*, 504 U.S. 353, 359 (1992) (quotations omitted). Despite this clear principle, Act 629's prohibition on the possession of hemp-derived cannabinoids, and its express prohibition on the transportation of all such hemp products unless from a license producer to a licensed handler, is a substantial burden on interstate commerce as there is no federal license to transport finished hemp products. Because Act 629 precludes the interstate transport in and through Arkansas of hemp-derived cannabinoids products – products declared legal and authorized for interstate trade among the states by the 2018 Farm Bill – the Act is unconstitutional under the Commerce Clause of the United States Constitution.

D. Act 629's criminalization and prohibition of hemp containing any amount of tetrahydrocannabinol impermissibly deprives Plaintiffs of all, or substantially all, beneficial economic use of their businesses without just compensation.

In anticipation of the likely determination of the unconstitutionality of Act 629, Section 17 recriminalizes certain hemp-derived products by automatically imposing an onerous regulatory scheme if Sections 2-5 are enjoined:

> Sections 6-14 of this act shall become effective only upon the certification of the Arkansas Attorney General that the State of Arkansas is currently enjoined from enforcing Sections 2-5 of this act relating to delta-8 tetrahydrocannabinol and delta-10 tetrahydrocannabinol, but no earlier than August 1, 2023.

Defendants' intent to chill dissent is clear: if members of the hemp industry are successful in defeating the unconstitutional provisions in Sections 2-5 of Act 629, then Defendants will penalize the industry by enforcing an even more restrictive (and infeasible) regulatory scheme found in Sections 6-14. However, the problem with Defendants' regulatory scheme is that its provisions are also unconstitutional. The

scheme results in an impermissible regulatory taking because it effectively creates a total ban of hemp containing any amount of tetrahydrocannabinol.

Specifically, Section 10 permits the sale of hemp-derived products, but it states that a hemp-derived product "shall ***not*** be combined with or contain any of the following: . . . any amount of tetrahydrocannabinol." This effectively bans all hemp-derived products containing tetrahydrocannabinol, even if the product contains 0.3% or less of Delta-9 tetrahydrocannabinol as encompassed by the broad definition of hemp under the 2018 Farm Bill. 7 U.S.C. § 16390(1). For example, popular full spectrum CBD products—long since accepted as legal—would be criminalized under this approach.

Defendants overstep their authority with Act 629 and its emergency nature infringes upon Plaintiffs' constitutional rights so as to amount to a regulatory taking under the Constitution of the United States. The Supreme Court delineated a three-factor test for regulatory takings in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). The Supreme Court in *Lingle v. Chevron U.S.A. Inc.* further explained that the *Penn Central* Court had "identified 'several factors that have particular significance.' Primary among those factors are '[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.'" 544 U.S. 528, 538–39 (2005) (quoting *Penn Central*, 438 U.S. at 124). It additionally identified the "character of the governmental action" as another factor which "may be relevant." *Id.*

As to the first factors, the economic impact and the distinct investment-backed expectations, both of these are heavily implicated by Act 629. The Act precludes Plaintiffs and other individuals and businesses throughout Arkansas from cultivating hemp and from selling, transporting, and shipping certain hemp-derived cannabinoid products,

including Delta-8, in contradiction to the protections afforded by federal law. Moreover, prior to Act 629, Arkansas enacted legislation in conformity with federal law's protection of hemp and hemp products with the goal of expanding the commercialization of hemp and hemp products throughout the state. *See* Acts 981, 504, 565. The existing hemp-derived cannabinoid market that farmers, small business owners, and consumers have built throughout Arkansas over the last five years would be eliminated under Act 629 by impermissibly narrowing the definition of hemp to make cultivation infeasible and to recriminalize the possession, manufacturing, transportation, and shipment of certain popular hemp-derived cannabinoid products. This would lead to thousands of lost jobs around the state and turn farmers, business owners, and consumers – including Plaintiffs – into criminals overnight despite no change in federal law.

Farmers with plants in the ground awaiting harvest, including Plaintiff Bio Gen LLC have no other course of remedy but the bring this lawsuit; and, as of August 1, 2023, Plaintiffs' investments, inventory, and entire segments of their businesses will be deemed worthless. Act 629 infringes upon the investment-backed expectations and industries in which Plaintiffs, and other Arkansas citizens, have built their livelihoods. For this same reason, the regulatory scheme in Act 629 amounts to a deprivation of all, or substantially all, beneficial economic use of Plaintiffs' businesses in Arkansas.

Second, the character of the governmental action also weighs in favor of finding a taking in this case. As stated above, the taking deprives Plaintiffs of all, or substantially all, beneficial economic use of their businesses. For example, the owner and operator of Bio Gen, LLC, has invested his entire retirement savings into his vertically integrated operation. Bio Gen grows one acre of hemp in Arkansas for CBD which is processed into approximately 50 kilos of fractional distillate to produce salves and tinctures to sell to

consumers. Bio Gen's entire investment is exposed and threatened by Act 629. Thus, the taking is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owners from his domain." *Lingle*, 544 U.S. at 539. By way of Act 629's infringement upon Plaintiffs' businesses, it has overly burdened Plaintiffs and taken their property without just compensation.

E. Act 629 is unconstitutionally vague under the Due Process clause of the Fifth and Fourteenth Amendments.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Laws and ordinances must give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id*. A vague law leads "citizens to 'steer far wider of the lawful zone … than if the boundaries of the forbidden areas were clearly marked.'" *Id*. at 108-09 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

Act 629 fails to give a person of ordinary intelligence fair notice as to what contemplated conduct is forbidden and what is permitted with regard to the production, possession, transportation, and shipment of the products it seeks to ban. Plaintiffs and the end-users in the stream of commerce will be left to guess as to the meaning of the new law.

For instance, based on the newly-narrowed definition of "industrial hemp" in Section 2 of Act 629, farmers awaiting harvest and those intending the plant seeds have no idea how to grow a plant which is required to meet a total delta-9 THC concentration level that is a specific fraction of the CBD concentrations. No seeds on the market can guaranty this ratio. The plant itself produces very low levels of CBD until decarboxylated

CBDa is converted into it, either naturally based on exposure to light and heat or intentionally based on combustion. Pre-harvest crop testing regularly yield levels of CBD around the low single-digit range, meaning the total delta-9 THC concentration (which accounts for both delta-9 THC and a portion of the THCa levels) would be impossibly minuscule produce, and certainly not in any reliable and repeatable capacity.

In another example, Section 6 of Act 629 bans hemp containing any "psychoactive substance," a term which is undefined and overly broad so as to potentially ban any hemp-derived cannabinoid product, including CBD isolate with no THC. Act 629 is further void for vagueness because "psychoactive substance" is undefined and does not have a known definition in the industry. It is also internally inconsistent because it attempts to permit hemp-derived products containing "delta-9 tetrahydrocannabinol greater than three tenths percent (.3%)" and in the next section precludes "marijuana" under the exact same definition. (*Id*. Section 10 at p. 5-6, lns. 36-17.)

Furthermore, Sections 6-14 of Act 629 would not become effective unless and until the Attorney General certifies that Sections 2-5 are enjoined. At the same time, Section 18 provides that Section 6, which criminalizes the possession of "a product derived from industrial hemp that was produced as a result of a synthetic chemical process that converted the industrial hemp or a substance contained in the industrial hemp into Delta-8, Delta-9, Delta-6a, 10a, or Delta-10 tetrahydrocannabinol including their respective acetate esters," becomes effective on or after August 1, 2023 for persons who are twenty-one years of age or older. Section 17 and 18 of Act 629 are internally inconsistent, and a person of average intelligence cannot know whether possession, transportation, or shipment of hemp-derived products is subject to criminal sanctions.

The confusion only abounds when viewing Sections 6, 17, and 18 in context of Section 5. Section 5 of Act 629 amended Ark. Code Ann. § 5-64-215(a)(2)(B)—a section of the criminal code identifying Schedule VI substances—to specifically exclude THC contained in hemp-derived cannabidiol that is not more than three-tenths of one percent (0.3%) of delta-9 THC in the hemp-derived cannabidiol on a dry weight basis as verified by a nationally accredited laboratory for quality, purity, and accuracy standards that is not approved by the FDA for marketing as a medication. In other words, Section 5 excludes hemp-derived products from Schedule VI, while Section 6 specifically includes them in Schedule VI.

* * *

In conclusion, Act 629 should be enjoined because (A) pursuant to the doctrine of conflict preemption, its attempt to redefine hemp and reclassify certain hemp-derived cannabinoids as a controlled substance conflicts with, and is preempted by, the 2018 Farm Bill; (B) criminalizing the interstate transport of legal hemp-derived cannabinoids is expressly prohibited and preempted by the 2018 Farm Bill; (C) substantially burdening the transport of certain hemp-derived cannabinoids by prohibiting the transportation of all such hemp products unless from a licensed producer to a licensed handler violates the Commerce Clause; (D) its regulatory scheme effectively creates a total ban of hemp containing any amount of tetrahydrocannabinol and thus depriving Plaintiffs' businesses without just compensation, thus, resulting in an impermissible regulatory taking; and (E) it is unconstitutionally vague under the Due Process clause of the Fifth and Fourteenth Amendments. As discussed above, Plaintiffs are likely to succeed on the merits of their claims regarding the constitutionality of Act 629.

II. There is a threat of irreparable harm to Plaintiffs, and Plaintiffs have no adequate remedy at law.

"The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Planned Parenthood Minnesota v. Rounds,* 530 F.3d 724, 732 n. 5 (8th Cir.2008). Without a temporary restraining order or preliminary injunction, Plaintiffs have no adequate remedy at law. Plaintiffs have no such adequate legal remedy because monetary losses are unknowable and potential criminal sanctions constitute irreparable harm. *See*; *MKB Mgmt. Corp. v. Burdick*, 954 F. Supp. 2d 900, 912 (D.N.D. 2013) (finding that "[t]he threat of criminal prosecution, the potential for the closing of the clinic, and the violation of patient rights is more than sufficient to show a threat of irreparable harm not compensable by money damages."). Moreover, if a party can establish a sufficient likelihood of success on the merits of a constitutional claim, "the party will also have established irreparable harm as a result of the deprivation." *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).

As explained above in Section I, Act 629 is unconstitutional as it deprives Plaintiffs from cultivating, distributing, transporting, and selling hemp plants and hemp-derived products that are declared legal under the 2018 Farm Bill. If law enforcement acts on Act 629 to arrest and prosecute those like Plaintiffs who cultivate, sell, possess, or transport hemp-derived cannabinoid products, Plaintiffs will suffer irreparable harm. In addition, Plaintiffs face additional irreparable harm as Act 629 renders their inventory of hemp-derived products utterly worthless. In addition to the threat of prosecution, the enforcement of Act 629 will result in unknowable financial harm to Plaintiffs. Moreover, the severability clause found in Section 19 of Act 629 does not cure the irreparable harm Plaintiffs will continue to suffer because it is impossible to sever any of its operative

provisions in such a manner as to comport with federal law. *See Combs v. Glens Falls Ins. Co.*, 237 Ark. 745, 748, 375 S.W.2d 809, 811 (1964).

An injunction is the proper remedy when challenging the constitutionality of a state action. *See i.e., Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021), *aff'd sub nom. Brandt by & through Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022) (seeking declaratory and injunctive relief when challenging state statutes as unconstitutional). Consequently, Plaintiffs seek an order from this Court to enjoin Act 629.

III. The balance of harms weighs in Plaintiffs' favor.

In balancing the harms, the court examines the harm of granting or denying the injunction upon both of the parties to the dispute and upon other interested parties. *Dataphase,* 640 F.2d at 114; *see also Glenwood Bridge,* 940 F.2d 367, 372 (8th Cir. 1991). To determine what must be weighed, the court must consider the threat to each of the parties' rights that would result from granting or denying the injunction. *Baker Elec. Co-op.*, 28 F.3d 1466, 1473 (8th Cir. 1994). Also, the potential economic harm to each of the parties and to interested third parties of either granting or denying the injunction is relevant. *Id.*

Here, the balance of harms favors Plaintiffs. As a result of Act 629, Plaintiffs are in jeopardy of criminal prosecution for possessing, selling, or transporting federally legal hemp-derived products such as Delta-8. *See Wooley v. Maynard,* 430 U.S. 705, 712 (1977) (threat of future criminal prosecutions justifies grant of injunctive relief). The consequences of Act 629 have now become a reality, as the Arkansas Department of Finance and Administration and the Arkansas Tobacco Control issued and distributed a flyer to retailers threatening retailers to stop selling or possessing "products that were produced by a synthetic chemical process that converted help into Delta-8, Delta-9, Delta-

6a, 10a, Delta 10-THC, or any other psychoactive substance derived therein" on August 1, 2023. ***Exhibit 1***. While already obvious, Plaintiffs have explained why Act 629 will cause them irreparable injury. *See* **Exhibit 4**, *Declaration of Cynthia Cabrera* (Sky Marketing Corporation); **Exhibit 5**, *Declaration of William Bill Morgan* (Bio Gen, LLC); **Exhibit 6**, *Declaration of Scout Stubbs* (Drippers Vape Shop, LLC); **Exhibit 7**, *Declaration of Mary Szarmach* (The Cigarette Store LLC). In comparison, Defendants will suffer no harm because a temporary restraining order or injunction would merely preserve the status quo, placing Defendants back within the confines of the law.

IV. Plaintiffs' Motion is in the public's interest.

The public's interest supports preventing Arkansas and its state actors from violating federal law and the United States Constitution. It is axiomatic that the public interest is served by upholding the Constitution and preventing the enforcement of unconstitutional laws. *Phelps–Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir.2008) ("[I]t is always in the public interest to protect constitutional rights."), overruled on other grounds by *Phelps–Roper v. City of Manchester*, Mo., 697 F.3d 678 (8th Cir. 2012). Protecting Arkansas citizens from unconstitutional restrictions is a *per se* public interest. Because the Act is unconstitutional and attempts to criminalize conduct that has been declared legal under federal law, the public interest will be served by an injunction preventing the enforcement of Act 629.

V. Plaintiffs do not need to provide security.

Plaintiffs need not provide security in this case under Rule 65(c) of the Federal Rules of Civil Procedure because there is no danger that Defendants will incur costs or monetary damages from the issuance of a temporary restraining order or preliminary injunction. Enjoining Act 629's unconstitutional restrictions on hemp extracts will not

alter the status quo; it will simply bring Defendants back into compliance with federal law. As such, a district court may waive the requirement of an injunction bond "where the damages resulting from a wrongful issuance of an injunction have not been shown." *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1043 (8th Cir. 2016). This case presents a challenge to the constitutionality of a state statute, not a case where Defendants will incur damages. The temporary restraining order or preliminary injunction sought by Plaintiffs does not cause Defendants to incur costs and damages apart from the costs of defending this suit generally, which do not increase through entry of a temporary restraining order or preliminary injunction. Plaintiffs should not be required to provide security.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for a Preliminary Injunction and for all other just and equitable relief.

Respectfully submitted,

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