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

3C, LLC d/b/a 3Chi, MIDWEST HEMP COUNCIL, INC., and WALL'S ORGANICS LLC, Plaintiffs, vs. ATTORNEY GENERAL TODD ROKITA, in his official capacity, Defendant.	Civil Action No. 1:23-cv-1115

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO THE ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT

On September 29, 2024, this Court entered its order on Defendants' Motion for Judgment on the Pleadings and Motions to Dismiss (the "Order.") (ECF No. 140.) The Court dismissed Plaintiffs' state law claims against all Defendants, dismissed the Huntington Police Department, Detective Sergeant Darius Hillman, Hunting County Prosecutor Jeremy Nix, Evansville Police Department, Detective Sergeant Nathan Hassler,[1] and Vanderburgh County Prosecutor Diana Moers from the case, and denied State Defendants' Motion to Dismiss as it related to the federal claims against Attorney General Todd Rokita, in his official capacity (the "Attorney General" or "Defendant"). (*Id.*) The Order affirmatively holds that "Plaintiffs **can proceed** on their federal claims against Attorney General Rokita." (*Id.* at 16) (emphasis original.) As such, Plaintiffs limit their discussion in this brief to solely their federal claims against the Attorney General.

[1] Though the Order does not directly state that Sergeant Nathan Hassler, in his official capacity, is dismissed from this lawsuit, that is how Plaintiffs interpret the Order. (*Id.*)

I. Introduction

The Attorney General made the strategic decision to wholly ignore the merits of this lawsuit on summary judgment, and instead, to argue that Plaintiffs' claims were not justiciable, that Plaintiffs lacked standing, that sovereign immunity barred their claims, that the Official Opinion is not binding law, and that precedent already controls the situation. (ECF No. 132.) ***These are the exact same arguments advanced in the Attorney General's Motion to Dismiss (ECF No. 81), which the Court rejected in its recent Order as it applies to Plaintiffs' federal claims against him***. (ECF No. 140.) The Court's rulings on these issues do not change on summary judgment, as they are questions of law unaffected by any designated evidence. Indeed, the Attorney General ignores the designated evidence as it relates to these issues. Plaintiffs have standing, their claims are justiciable, and they have legitimate theories of recovery that stand unrebutted on the summary judgment record.

Plaintiffs, on the other hand, focused substantially on the merits of their claims on summary judgment. (ECF No. 113.) They asserted that the Official Opinion is preempted by the 2018 Farm Bill because the Farm Bill's broad definition of hemp includes the very same hemp the Official Opinion deems illegal. They explained how the Official Opinion's fabricated distinction between "synthetic" and "naturally occurring" hemp is contrary to the 2018 Farm Bill and lacks any semblance of a statutory foundation. And they explained how the Official Opinion is again preempted by the Farm Bill and violates the Commerce Clause because it restricts the flow of legal hemp across state lines. The Attorney General ignored all of these arguments, conceding their merit and waiving his opportunity to counter them.

The fact that all of the Attorney General's arguments were just carefully evaluated and rejected by this Court's Order, and that Plaintiffs' arguments on the merits are undisputed and

uncontested, leads to only one reasonable conclusion: Plaintiffs' Motion for Partial Summary Judgment on its declaratory judgment claims should be granted, and the Attorney General's Cross-Motion for Summary Judgment should be denied.

II. Statement of Material Facts in Dispute

Plaintiffs do not dispute the nine material facts asserted by the Attorney General (ECF No. 132 at 21-22), as they do not create issues of fact and do not preclude granting summary judgment in Plaintiffs' favor.

III. Legal Argument

A. This Court already correctly ruled that Plaintiffs' claims are justiciable and that they have standing to pursue their federal claims against the Attorney General.

In his Brief in Support of Cross-Motion for Summary Judgment (ECF No. 132) ("Brief"), the Attorney General repeats the same arguments advanced in his Motion to Dismiss: that Plaintiffs claims are not justiciable, that Plaintiffs do not have standing, that because the Official Opinion is not binding law that there is no injury traceable to the Attorney General, and that Plaintiffs seek an advisory opinion which is not a redressable injury. (*Id*. at 23-35.) These arguments can be quickly disposed of, as the Court already ruled against each of these arguments in its September 29, 2024 Order. (ECF No. 140.)

In response to the Attorney General's arguments that Plaintiffs seek "an impermissible advisory opinion," that the Official Opinion "is not binding law," and that that he does not "prosecute" Indiana's controlled substance laws, the Court correctly determined in its Order that "This argument ignores the fact that Attorney General Rokita is the source of the Official Opinion and understates the impact of the state's top law enforcement official on the decisions of local prosecutors and police." (ECF No. 140 at 12.) In terms of redressability, the Court correctly held that "A favorable decision against the Attorney General would redress Plaintiffs' injuries because

without the Official Opinion, there would no longer be a reason for local law enforcement to target them . . . .” (*Id*.) And it held that “a favorable decision may permit [Plaintiffs] to resume operations without fear of prosecution or withdrawal of financial support based on the Official Opinion.” (*Id*. at 13.) In sum, “***[t]his is a justiciable case or controversy, and there is standing to proceed against Attorney General Rokita***.” (*Id*.) (emphasis added.)

The Court is correct in every facet. The Attorney General cannot bury his head in the sand and ignore the real harm his Official Opinion caused Plaintiffs, yet that was the strategy for his entire Brief. (ECF No. 132 at 24) (“Plaintiffs cannot identify any legal injury traceable to State Defendants.”); (*Id*.) (Plaintiffs “have supplied no facts showing that Official Opinion 2023-1 has injured them in any way traceable to State Defendants”); (*Id.* at 25) (“Plaintiffs here have not demonstrated that any State Defendant has caused them any legal injury”); (*Id*. at 26) (“Plaintiffs have not demonstrated any injury traceable to the Attorney General because of the Official Opinion.”)

In reality, after the Attorney General issued the Official Opinion (and in reliance on it), police departments and prosecutors across the state issued threatening letters to retailers – including Plaintiff Wall’s Organics – forcing them to remove low THC hemp extract products from their shelves or face arrest; and each and every one of these letters cited to the Official Opinion for their authority to do so. (Campbell Petty Decl., ¶ 7, ECF No. 112-3 at 2); (ECF No. 31-6) (letter from Wayne County Prosecutor citing the Official Opinion); (Wall Decl., ¶ 7, ECF No. 112-4 at 2) (Sergeant Hassler handed Wall’s Organics a copy of the Official Opinion and demanding it remove all low THC hemp extract products from its shelves.); (Campbell Petty Decl., ¶ 7, ECF No. 112-3 at 2) (ECF No. 31-8) (letter from Huntington Police Department citing the Official Opinion). Further, Plaintiff 3Chi’s Indiana-based financial institution ceased doing

business with it, citing the official opinion as the reason for doing so. (Journey Decl., ¶ 8, ECF No. 112-1 at 2.) Furthermore, MHC members have been refused financing and other banking services in Indiana that are critical to running a business because of the Official Opinion. (Campbell Petty Decl., ¶ 6, ECF No. 113-2 at 2.) The Court correctly concluded that the Attorney General's Official Opinion was the catalyst that caused this harm, and that a favorable ruling from the Court would redress these real injuries. (ECF No. 140 at 12-15.)

The Court also correctly held that the fact that the Official Opinion is not binding law does not preclude standing. (ECF No. 140 at 12-13.) *See e.g. Butler Univ. v. State Bd. of Tax Comm'rs*, 408 N.E.2d 1286, 1290 (Ind. Ct. App. 1980) ("The opinion of the Attorney General is not controlling, yet the practical construction given to legislation by the public officers of the state and acted upon by those interested and by the people is influential . . . .") (Citation and quotation omitted); *see also Zoercher v. Indiana Associated Tel. Corp.*, 7 N.E.2d 282, 286 (Ind. 1937); *Welliver v. Coate*, 114 N.E. 775, 780 (Ind. Ct. App. 1917); *see also Pueblo of Taos v. Andrus*, 475 F. Supp. 359 (D.D.C. 1979) (ruling the court did have jurisdiction to review an attorney general opinion and holding that the "complaint presents a justiciable case or controversy brought by a party aggrieved" by actions taken "to conform to the opinion of the Attorney General" and "[a]fter reviewing the relevant legal principles . . . the facts . . . and the relevant documents . . . the opinion of the Attorney General was in error.")

The Court's rulings in Plaintiffs' favor as it relates to standing do not change on summary judgment because they are questions of law. This is evident by the fact that the Attorney General's Brief argues exclusively legal argument and case law without reference to designated evidence.[2]

[2] The sole reference to designated evidence related to State Defendants' argument that Plaintiffs lacked standing against ***the prosecutors – not the Attorney General***. (ECF No. 132 at 27-28.) The prosecutors suggested that some products distributed by 3Chi and sold by Wall's Organics (allegedly) have other controlled substances in them, so they would be prosecuted as illegal even if the Official Opinion was wrong. (*Id.*) That is irrelevant, as it has nothing

This Court already correctly ruled that Plaintiffs have standing to pursue their federal claims against the Attorney General, and there is no basis to turn away from that ruling now.

B. The Court already correctly ruled that sovereign immunity does not apply as it relates to Plaintiffs' federal claims against the Attorney General.

Recycling from his Motion to Dismiss, the Attorney General next argues that Plaintiffs' federal claims against him are precluded by sovereign immunity because he cannot initiate prosecutions of Indiana's controlled substance laws, he can only join them when he sees fit. (ECF No. 132 at 35-40.) The Court already disposed of this same argument in its Order. (ECF No. 140.) As the Order explained, the *Ex parte Young* doctrine allows a plaintiff to proceed against the attorney general where "the law involves criminal penalties" and where the attorney general "has played a role in its enforcement." (*Id*. at 14.) The Order correctly found that the doctrine applies here, where Indiana's controlled substance laws at issue in the Official Opinion are "directly criminally enforceable" and have serious penalties, and where Attorney General Rokita "has the power to help enforce the law if he deems it" and would "defend a conviction on appeal or otherwise consult with and advise local prosecutors on the law's enforcement." (*Id*. at 14-15) (quotation omitted).

The Court's holding that sovereign immunity does not preclude Plaintiffs' federal claims against the Attorney General is directly on point with the law on this issue. In *Whole Woman's Health All. v. Hill*, 377 F. Supp. 3d 924, 936 (S.D. Ind. 2019), for example, a nonprofit sued the Indiana Attorney General, as well as other state actors, under Section 1983 challenging the constitutionality of Indiana statutes and regulations regarding abortions. *Id*. at 928. The defendants

to do with the Attorney General (and it is disputed by Plaintiffs). But regardless, this argument has no effect on 3Chi and Wall's Organics' standing as it relates to the myriad of other low THC hemp products they sell for which there is no evidence to suggest that they contain other controlled substances, and it does not affect Midwest Hemp Council's standing at all. This has no effect on Plaintiffs' standing to pursue their federal claims against the Attorney General.

filed a motion to dismiss, arguing in part, that the Attorney General was not the proper party and should be dismissed. *Id*. at 930. To determine whether the Attorney General could be sued under the *Ex parte Young* doctrine, this Court first analyzed *Doe v. Holcomb*, 883 F.3d 971.

This Court distinguished *Doe* by explaining that "We do not read *Doe* to hold that, because the Attorney General cannot initiate criminal prosecutions, the Attorney General is never a proper party to a lawsuit which, as here, [the Complaint] challenges the constitutionality of criminally enforceable statutes." *Id*. at 935. The defendant in *Hill*, (***just like the Attorney General does in this lawsuit***) argued that under Indiana statute, the Attorney General "cannot enforce Official Opinion 2023-1 and cannot even initiate criminal prosecutions . . . ." (ECF No. 132 at 39.) This Court was not persuaded, and denied the motion to dismiss because the Attorney General can properly be sued under the *Ex parte Young* doctrine when criminal punishment is threatened:

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

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

The exact same arguments advanced by the Attorney General here were systematically rejected by this court in *Hill*. And the case here is even stronger, where the Attorney General ***has*** threatened action under the Official Opinion by declaring that low THC hemp extracts are now

illegal despite no change in state or federal law. (DKT 31-5.) *See also Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1153 (S.D. Ind.), *aff'd*, 766 F.3d 648 (7th Cir. 2014) ("Because the Attorney General has broad powers in the enforcement of such criminal statutes [related to unpermitted marriages], he has a sufficient connection and role in enforcing such statutes for purposes of *Ex parte Young*, 209 U.S. at 157, 28 S.Ct. 441. Therefore, the court DENIES the Attorney General's motion for summary judgment on that ground."); *Arnold v. Sendak*, 416 F.Supp. 22, 23 (S.D. Ind. 1976), *aff'd*, 429 U.S. 968, 97 S.Ct. 476, 50 L.Ed.2d 579 (1976) (finding "[t]he Attorney General thus has broad powers in the enforcement of criminal laws of the state, and is accordingly a proper defendant."); *Gary–Northwest Indiana Women's Services, Inc. v. Bowen*, 496 F.Supp. 894 (N.D. Ind. 1980) (attorney general as a party to a law challenging statute criminalizing abortion); *Andrus*, 475 F. Supp. at 364–65 ("Plaintiff challenges that legal interpretation of the Attorney General. This is a classic case seeking review of administrative action, and sovereign immunity is thus no bar to the action.")

The Court's prior ruling that the Attorney General cannot hide behind sovereign immunity remains true on summary judgment. Again, the Attorney General's Brief presented only argument and case law with no citation to the designated evidence, meaning this is a question of law already decided by this Court in Plaintiffs' favor. (ECF No. 140.)

C. The Court already denied the Attorney General's argument that because the Official Opinion is not binding law, it cannot preempt federal law.

In his Motion to Dismiss, the Attorney General argued that because the Official Opinion is not "binding" and does not have "any independent force of law," then the Official Opinion "cannot be preempted and cannot 'violate' . . . federal law." (ECF No. 82 at 25, 26.) The Attorney General alleged that "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." (*Id.* at 27.) Here, on summary judgment, the Attorney General restated this same argument, that Plaintiffs have failed to "allege that any state *law* violates federal law, [so] there is nothing to preempt or declare unconstitutional." (ECF No. 132 at 40) (emphasis original).

The Court already addressed this argument in part in its Order, explaining that the Attorney General's argument that "the Official Opinion is not binding law" "ignores the fact that Attorney General Rokita is the source of the Official Opinion and understates the impact of the state's top law enforcement official on the decisions of local prosecutors and police." (ECF No. 140 at 12.) The Court did not directly address this issue as it related to preemption or the Commerce Clause, but the Court did deny the Attorney General's Motion to Dismiss as to the federal claims, meaning it denied this argument as well. Again, this determination does not change on summary judgment. The Attorney General did not cite to a single piece of designated evidence in his Brief on this argument (ECF No. 132 at 40), because it is simply a question of law already weighed and denied by this Court. (ECF No. 140.)

Indeed, the Attorney General's argument on this front misses the point. The fact that the Official Opinion is not binding law is irrelevant. It is his interpretation of Indiana's controlled substance laws addressed in the Official Opinion that triggered prosecutors and police departments to take action against low THC hemp extract products, and that is the vehicle through which preemption lies. In short, while the Official Opinion is not itself binding law, it interprets Indiana law in a way that brings Indiana criminal statutes into conflict with federal law. That is why the Official Opinion creates a preemption issue—because if the Attorney General's interpretation of Indiana criminal statutes is correct, it directly conflicts with federal law on the treatment of low THC hemp. Law enforcement and county prosecutors, acting pursuant to an interpretation from

the highest legal officer in the State, would be violating federal law if they arrest and prosecute retailers selling low THC hemp.

It is important to recall that when Indiana flipped the switch in January 2023 and decided to start treating low THC hemp like a schedule 1 controlled substance despite years of it being perfectly legal, there was no change in Indiana law. The *only* change is that the Attorney General issued the Official Opinion to Indiana's prosecutors and police departments informing them that low THC hemp should now be treated as a controlled substance. The prosecutors and police departments listened to the State's chief legal officer, and they started making threats and arrests based upon the Official Opinion's interpretation. If that cannot be challenged, then what is Plaintiffs' alternate course of action?

What is ironic is that the Attorney General takes the position that there is no state law conflicting with federal law. If that is the case, then he is conceding that Indiana's current controlled substance laws ***do not*** make low THC hemp extract products illegal – because that is the only way state law would not conflict with the 2018 Farm Bill. And if that is the case, then what is the basis of the Attorney General's position in the Official Opinion? Upon which laws did the county prosecutors rely in threatening and arresting Plaintiffs and others for selling hemp? Upon which laws did Sergeant Hassler and Sergeant Hillman base their threats, seizures, or arrests of Plaintiffs and others?

This dichotomy perfectly exemplifies the hypocrisy of the Attorney General's position and disregard for the real harm his actions caused Plaintiffs. This is not a theoretical harm. The Attorney General's Official Opinion lost Plaintiffs customers, profits, and security in their liberty; all because the Attorney General's Official Opinion deemed illegal what is declared legal by the 2018 Farm Bill without any change in Indiana law by the Indiana General Assembly. Preemption

applies where state laws are applied in a way that conflicts with federal law. That is precisely the situation here. The Court dismissed this argument in the Attorney General's Motion to Dismiss, and it should do so again here.

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

Just as he did in his Motion to Dismiss (ECF No. 82 at 27-29), the Attorney General again argued in his Brief that the Seventh Circuit's decision in *C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541 (7th Cir. 2020) precludes Plaintiffs' claims. (ECF No. 132 at 43-45.) Though the Court did not feel the need to address this argument specifically in its Order, it did deny the Attorney General's Motion to Dismiss Plaintiffs' federal claims, which means the Court already weighed and rejected this argument. (ECF No. 140.)

Indeed, the Attorney General attempts to over-leverage the Seventh Circuit's decision in *C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541 (7th Cir. 2020) in an effort to apply it to this case. *C.Y. Wholesale* upheld the authority of the Indiana General Assembly to ***change*** their state laws to criminalize smokable hemp. But in this case, there has been no change in state or federal law whatsoever, a fact conceded by Defendant. Instead, the Attorney General, through the Official Opinion, ***unilaterally*** declared that which has been legal since 2018 to suddenly be illegal. Unlike *C.Y. Wholesale*, this case does not involve legislative action to limit or regulate hemp production (i.e., farming), but it is actually the polar opposite. The Official Opinion is an end run around the Indiana General Assembly by misinterpreting state and federal laws that have been on the books since 2018 that expressly exempt products derived from hemp so long as they are below .3% Delta-9 THC. In fact, the Indiana General Assembly in 2022 ***rejected*** an amendment that attempted to narrow the definition of "hemp product" to require that all THCs (like Delta-8 THC) be below .3% among other restrictions. (*See* ECF No. 87-1.) Having failed in the legislature, the Attorney

General took matters into his own hands and simply declared low THC hemp products illegal in the Official Opinion. Inasmuch as this case does not involve legislative action to regulate hemp, *C.Y. Wholesale* does not help the Attorney General.

E. Plaintiffs are entitled to a permanent injunction, and Defendant's Cross-Motion should be denied on this claim.

To be clear, Plaintiffs did not move for summary judgment on their permanent injunction claim. Plaintiffs moved for summary judgment solely on their declaratory judgment claim seeking that this Court declare that the Attorney General's Official Opinion is preempted by federal law and violates the Commerce Clause. (ECF No. 111.) As a practical matter, a ruling in Plaintiffs' favor on the declaratory judgment claims would have the same effect as a permanent injunction. Such a ruling by this Court would establish the correct interpretation of Indiana law as it relates to low THC hemp extract products. (*See* Order, ECF No. 140 at 12, 13) ("A favorable decision against the Attorney General would redress Plaintiffs' injuries because without the Official Opinion, there would no longer be a reason for local law enforcement to target them . . . ." And "a favorable decision may permit [Plaintiffs] to resume operations without fear of prosecution or withdrawal of financial support based on the Official Opinion.") As such, there is no need to address the permanent injunction claim when the declaratory judgment claims resolve the issue.

Nonetheless, the Attorney General moved for summary judgment on Plaintiffs' permanent injunction claim. The Attorney General's motion should be denied because he cannot establish by a preponderance of the evidence that Plaintiffs do not have a likelihood of success on the merits. In fact, the Attorney General's brief ignored the merits of this lawsuit completely, instead putting all eggs in the standing basket. Those arguments failed, as explained in the Court's Order and as addressed above. Plaintiffs, on the other hand, established the merits of their claims in their brief.

(ECF No. 113.) The Court can deny the Attorney General's Cross-Motion on the likelihood of success element, alone, without weighing the remaining elements for an injunction.[3]

Further, the Attorney General's argument that a permanent injunction against him would somehow be meaningless is incorrect. (ECF No. 132 at 32) ("injunctive relief against the Attorney General would not restrain anyone from doing anything" and "the Attorney General could simply reissue the same Official Opinion the next instant, which the Court could again declare invalid, which the Attorney General could again reissue, and so on *ad infinitum*"); (*id*. at 47) ("even if this Court 'enjoined' Official Opinion 2023-1 . . . it does not change the 'potential criminal sanctions' Plaintiffs would face . . ."); (*id*. at 48) ("Any potential criminal sanctions Plaintiffs faced today, they faced before Official Opinion 2032-1 was issued and will continue to face even if the court enters an injunction 'with respect to the Official Opinion.'")

It borders on the edge of contempt to suggest that if this Court entered an order explicitly stating that the Official Opinion's conclusions regarding low THC hemp extract products were incorrect – meaning they are legal under Indiana and federal law – that the Attorney General would just reissue another Official Opinion to the contrary, thereby encouraging prosecutors and police departments across the state to again attack Plaintiffs' legal hemp businesses despite this Court's order. The Attorney General's continual claim that the Official Opinion isn't technically law so it has not effect on anybody defies common sense, reality, and this Court's authority. The Attorney General's Cross-Motion on Plaintiffs' permanent injunction claim should be denied.

[3] Plaintiffs incorporate by reference as if fully stated herein, the same arguments and analysis regarding the remaining elements for their injunction claim that they made in response to Defendant's Motion to Dismiss on this issue. (ECF No. 87 at 24-32.)

F. Plaintiffs' arguments on the merits of their claims are uncontested by the Attorney General, conceding their merit and waiving his opportunity to counter them.

The Attorney General made the strategic decision to ignore the merits of Plaintiffs' claims throughout this entire lawsuit, and his Cross-Motion for Summary Judgment is no different. His motion argued justiciability, standing, sovereign immunity, and related issues (all of the same arguments from his Motion to Dismiss), but it never addressed whether the Official Opinion was correct; whether low THC hemp extract products, like Delta-8, are legal under federal and Indiana law. (ECF No. 132). That strategic decision proved to be unsuccessful when this Court's September 29, 2024 Order denied these same arguments during motion to dismiss briefing. (ECF No. 140.)

Plaintiffs' Motion for Partial Summary Judgment, on the other hand, focused substantially on the merits. It explained that the Official Opinion was preempted by and in direct conflict with the 2018 Farm Bill because the broad definition of hemp under the 2018 Farm Bill encompasses all "derivatives, extracts, cannabinoids, [and] isomers" as long as the "delta-9 tetrahydrocannabinol concentration [is] not more than .3 percent" so the Official Opinion's invention of a distinction between "synthetic" and "naturally occurring" cannabinoids is contrary to law. (ECF No. 113 at 9-13.)[4]

Plaintiffs' brief identified courts across the country that addressed this same issue – the broad definition of hemp as it applies to delta-8 and the "synthetic" vs. "naturally occurring" argument – that all fell in Plaintiffs' favor. (ECF No. 113 at 13-19.) *See AK Futures LLC v. Boyd St. Distro, LLC*, 35 F.4th 682, 692 (9th Cir. 2022); *Kentucky Hemp Association, et al. v. Ryan Quarles, in his Official Capacity as Kentucky Commissioner of Agriculture, et al.* (Commonwealth

[4] This Court's Order seemed to agree with this conclusion. (ECF No. 140 at 2-3) ("as long as the concentration of delta-9 is less than or equal to .3% on a dry weigh basis, the substance is hemp; if it smore than .3%, the substance is marijuana").

of Kentucky, Boone County Circuit Court Division 1, Case No. 21-CI-00836, ECF 112-6); *Bio Gen, LLC v. Sanders*, No. 4:23-CV-00718-BRW, 2023 WL 5804185 (E.D. Ark. Sept. 7, 2023); *Elements Distribution, LLC v. State of Georgia* No. A23A0842, 2023 WL 7210306 (Ga. Ct. App. Nov. 2, 2023); *Chad Zini v. City of Jerseyville*, No. 3:23-CV-02120-GCS, 2024 WL 1367806 (S.D. Ill. Mar. 30, 2024); *Fedij v. State*, 186 N.E.3d 696 (Ind. Ct. App. 2022).

Plaintiffs' brief explained how these cases all supported the conclusion of their expert, Mark Krause, who affirmed that terms used in the definition of hemp, such as "derivatives, extracts, cannabinoids, isomers, acids", derived from the plant "whether growing or not" establishes that Congress did not intend to limit the definition of hemp to naturally occurring compounds. (ECF No. 113 at 18-19.) But regardless, on a purely scientific level, the conversion of CBD to Delta-8 is not "synthetic" because it occurs ***naturally*** in the plant when exposed to sunlight. (*Id*.)

Plaintiffs' brief also explained how the Official Opinion prohibited the transportation of hemp through Indiana, in violation of the 2018 Farm Bill and the Commerce Clause. (ECF No. 113 at 19-21.)

The Attorney General decided to ignore these arguments and case law wading into the merits of this case. A consequence of that decision is that the Attorney General has conceded these arguments in favor of Plaintiffs and waived his opportunity to argue against the merits on summary judgment. *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument—as the Bontes have done here—results in waiver" and "silence leaves us to conclude" that the silent party is making a concession); *Kentucky Lodge No. 681, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Anderson*, No. 421CV00066JMSKMB, 2023 WL 2456339, at *3 (S.D. Ind. Mar. 10, 2023) ("It is well settled in the Seventh Circuit that a party's failure to

respond to an opposing party's argument implies concession."); *Ford v. Colvin*, No. 1:14-CV-00731-TWP, 2015 WL 3604765, at *6 (S.D. Ind. June 5, 2015) ("To the extent that Ford intended to assert that the ALJ rejected additional functional findings in step three, such argument has been waived by Ford's failure to develop his argument.")

Given this undisputed and uncontested evidence, the merits of Plaintiffs' claims clearly fall in their favor. Plaintiffs' Motion for Partial Summary Judgment should be granted, and the Attorney General's Motion for Summary Judgment should be denied.

IV. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Partial Summary Judgment and deny the Attorney General's Cross-Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was filed using the Court's electronic case filing system, and a copy of the same was served via that system on the following counsel of record, on October 3, 2024.

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