UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

3C, LLC d/b/a 3CHI, MIDWEST HEMP COUNCIL, INC., and WALL'S ORGANICS LLC, Plaintiffs, v. TODD ROKITA, Attorney General, in his official capacity, HUNTINGTON POLICE DEPARTMENT, DETECTIVE SERGEANT DARIUS HILLMAN, in his official capacity, HUNTINGTON COUNTY PROSECUTOR JEREMY NIX, in his official capacity, EVANSVILLE POLICE DEPARTMENT, DETECTIVE SERGEANT NATHAN HASSLER, in his official capacity, and VANDERBURGH COUNTY PROSECUTOR DIANA MOERS, in her official capacity, Defendants.	)	No. 1:23-cv-01115-JRS-MKK

MEMORANDUM IN SUPPORT OF STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Article III sets out the bounds of a federal court's jurisdiction. Any plaintiff seeking to invoke the "judicial Power of the United States" must show that its claims are justiciable. To do so, a plaintiff must establish standing by demonstrating that it was injured by the defendant in a way the court can redress. And a plaintiff must sue an entity that *can* be sued and is not otherwise immune. Failure to do either ends the matter. As Chief Justice Marshall observed long ago, a federal court must exercise jurisdiction when it should and must not when it should not. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

Plaintiffs here—a hemp manufacturer, nonprofit, and retailer—challenge an advisory opinion of the Indiana Attorney General, Official Opinion 2023-1. The Official Opinion comments on the language of Indiana controlled substance laws, but it is not law. If local Indiana prosecutors (two of whom Plaintiffs sue) prosecute someone for a drug crime, they must do so under existing statutes. No prosecution can be brought under Official Opinion 2023-1. As for the Attorney General (whom Plaintiffs also sue), he cannot initiate prosecutions for drug crimes at all. Nor can he control prosecutors who do so. At bottom, Plaintiffs have not shown that an advisory opinion from an official with no power to charge any of them with a crime has injured them at all—much less that a court can redress such an injury. The State Defendants are entitled to summary judgment for jurisdictional reasons alone. *Contra* ECF No. 113 at 2–3.

Plaintiffs' claims fail on the merits as well. Plaintiffs argue that Official Opinion 2023-1 "violates" state law, federal law, and the dormant Commerce Clause. But any application of preemption doctrine or the Supremacy Clause assumes that a state *law* conflicts with a higher law. No such conflict exists here. Because Official Opinion 2023-1 is not law, there is nothing to obstruct the operation of federal law or the Constitution, and there is nothing for this Court to

preempt or declare unconstitutional. And even if this were not so, Seventh Circuit precedent forecloses plaintiffs' preemption and commerce clause claims. *See C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541 (7th Cir. 2020). Thus, Plaintiffs' claims on the merits are flawed at the outset—even if Plaintiffs could overcome standing and sovereign immunity. Ultimately, any opinion this Court might give on the question whether the Attorney General's Official Opinion 2023-1 is "right or wrong," ECF No. 75 at 4, would itself be an advisory opinion, which Article III does not sanction.

Accordingly, this Court should grant the State Defendants' Cross-Motion for Summary Judgment and deny Plaintiffs' Motion for Partial Summary Judgment.

BACKGROUND

I. Marijuana and the Delta-8 Isomer

Marijuana comes from the *Cannabis sativa* plant. *See* Lisa N. Sacco, Cong. Rsch. Serv., R44782, *The Evolution of Marijuana as a Controlled Substance and the Federal-State Policy Gap* 1 (2022). Cannabis contains various chemical compounds. One is cannabidiol (CBD), which is not psychoactive, meaning it does not bind to receptors in the brain or produce the "high" marijuana users often report experiencing. *See id.* at 2. Another is tetrahydrocannabinol (THC), which is psychoactive. *See id.* THC in turn has several "isomers"—structural forms—with varying psychoactive potencies. The most potent and abundant of these isomers is delta-9 THC. *See id.* at 1–2, 78. Delta-8 THC is another. *See id.* at 64, 78. Delta-8 is less abundant; one study of over 17,000 cannabis plants found that "98.5% had no measurable concentrations of [d]elta-8," and of those that did, the "average concentration was 0.0018% (by weight)." ECF No. 129-1 at 10 (Hudalla Decl. ¶ 25). Delta-8 is also less potent. *Id.* at 10–11 (¶ 28). Nevertheless, consuming enough delta-8 can produce the same psychoactive effects associated with delta-9. *Id.* (¶ 28).

To achieve higher amounts of delta-8, THC producers convert CBD into delta-8 via a synthetic chemical reaction. *Id.* at 11–12 (¶¶ 29, 31–36). But this synthesis yields several other unwanted products and byproducts. *Id.* at 13 (¶ 41). The byproducts include other THC isomers that do not occur in nature, "many of which have intoxicating properties similar to delta-9." *Id.* at 12 (¶ 38); *see id.* at 12–14 (¶¶ 38–44) (describing other isomers). There is "little control for" which isomers are produced, *id.* at 13 (¶ 42), and "little is known about the toxicity of these novel compounds," *id.* at 15 (¶ 46). The products include toxic solvents and acids left over from the chemical synthesis. *Id.* at 12 (¶¶ 36–37). Removing these "residual toxic reagents" is "technically challenging" and "often incomplete," and consumer products are "rarely tested" for them. *Id.* (¶ 37).

II. Federal and State Regulation of Marijuana

Congress began regulating marijuana in 1970, labeling it a schedule I controlled substance. *See* Controlled Substances Act, Pub. L. No. 91-513, Title II, § 202, 84 Stat. 1242, 1247 (1970) (codified at 21 U.S.C. § 812). Congress defined marijuana to include "all parts of the plant Cannabis sativa L., whether growing or not," except for particular parts of the plant's stalk and seeds. *Id.* § 102, 84 Stat. at 1244 (codified at 21 U.S.C. § 802(16)). In 1986, Congress extended Schedule I to include controlled substance analogues. The Controlled Substance Analogue Enforcement Act (CSAEA) defined "controlled substance analogue" as a substance whose "chemical structure" is "substantially similar to the chemical structure of a controlled substance in schedule I." Pub. L. No. 99-570, Title I, § 1203, 100 Stat. 3207-13, 3207-13 to -14 (1986) (codified at 21 U.S.C. § 802(32)(A)(i)). And CSAEA provided that a controlled substance analogue "shall, to the extent intended for human consumption, be treated . . . as a controlled substance in schedule

I." *Id.* § 1202, 100 Stat. at 3207-13 (codified at 21 U.S.C. § 813(a)). Indiana enacted its own controlled substance schedules, classifying marijuana similarly. *See* Ind. Code § 35-48-2-4.

In 2014, Congress carved out a limited exception for hemp research. The 2014 Agricultural Act ("2014 Act") defined hemp as any part of the cannabis plant "with a delta-9 . . . concentration of not more than 0.3 percent on a dry weight basis." Pub. L. No. 113-79, Title VII, § 7606(b)(2), 128 Stat. 649, 912–13 (codified at 7 U.S.C. § 5940). The 2014 Act then permitted State agencies and research institutions to cultivate industrial hemp, but only if the cultivation is for "purposes of research," if such cultivation "is allowed under the laws of the State," and if the agency or institution is located in that State. *Id.* § 7606(a), 128 Stat. at 912.

Shortly thereafter, Indiana decided to allow hemp research. Senate Enrolled Act 357 (2014) authorized the production, possession, scientific study, and commercialization of industrial hemp, as regulated by the state seed commissioner. *See* Pub. L. No. 165-2014, § 1, 2014 Ind. Acts 1959, 1960 (codified at Ind. Code § 15-15-13-7). Like the 2014 Act, S.E.A. 357 defined hemp based on a delta-9 concentration that "does not exceed . . . three-tenths of one percent (0.3%) on a dry weight basis." *Id.* (current version at Ind. Code § 15-15-13-6). And it removed industrial hemp from the State's definition of marijuana. *Id.* § 3, 2014 Ind. Acts at 1966 (current version at Ind. Code § 35-48-1-19(b)(6)).

A few years later, Congress enacted the Agricultural Improvement Act of 2018 ("Farm Bill"). Pub. L. No. 115-334, 132 Stat. 4490 (2018). The Farm Bill reaffirmed the 2014 Act's definition of hemp: all parts of the cannabis plant and its derivatives with a delta-9 concentration not exceeding 0.3%. *See id.* § 10113, 132 Stat. at 4908 (codified at 7 U.S.C. § 1639*o*(1)). And it removed hemp from the definition of marijuana in the federal schedule of controlled substances. *Id.* § 12619, 132 Stat. at 5018 (codified at 21 U.S.C. §§ 802(16)(B)(i), 812).

Crucially, the Farm Bill did not preempt or otherwise limit any State's regulation of marijuana, THC, or THC's synthetic isomers within the State's borders. As the DEA's implementing rule explains, the Farm Bill "does not impact the control status of synthetically derived" THC isomers; all such isomers—including synthetic delta-8—"remain schedule I controlled substances." Implementation of the Agriculture Improvement Act of 2018, 85 Fed. Reg. 51639, 51641 (Aug. 21, 2020). And the Farm Bill further states that "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." Pub. L. No. 115-334, § 10113, 132 Stat. at 4909 (codified at 7 U.S.C. § 1639p(a)(3)(A)). During the 2019 legislative session, Indiana responded to the Farm Bill with Senate Enrolled Act 516. Pub. L. No. 190-2019, 2019 Ind. Acts 2311. S.E.A. 516 mirrors the Farm Bill's definition of hemp: any part of the cannabis plant with a delta-9 concentration at or below 0.3%. Ind. Code § 15-15-13-6; *see* 7 U.S.C. § 1639*o*(1). And it imposes licensing requirements for all growers and handlers of hemp in Indiana. *See* Ind. Code § 15-15-13-7.

Thus, today Indiana's Schedule I encompasses all "[t]etrahydrocannabinols . . . including synthetic equivalents of the substances contained in the [cannabis] plant," as well as "synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity," including "isomers" of "THC." Ind. Code § 35-48-2-4(d)(32).

III. Official Opinion 2023-1

The Indiana Attorney General has a duty to "give the attorney general's opinion" on certain questions in three contexts: (1) when requested by "the governor" for "any question or point of law in which the interests of the state may be involved"; (2) to "other state officer[s]" for "any question or point of law concerning the duties of the officer"; and (3) "upon request by resolution of the house or legislative agency" to address "the constitutionality of any existing or proposed

law." Ind. Code § 4-6-2-5. The Attorney General "shall not be required to advise any other officer or person." *Id.*

After the Farm Bill and S.E.A. 516 took effect, the Superintendent of the Indiana State Police and the Executive Director of the Indiana Prosecuting Attorneys Council asked Attorney General Todd Rokita to opine on two questions: (1) whether "THC variants and other designer cannabinoids [can] be prosecuted under Ind. Code § 35-48-2-4(d)(31) as a Schedule I controlled substance"; and (2) whether "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)." ECF No. 31-5 at 1.

On January 12, 2023, the Attorney General responded to these questions in Official Opinion 2023-1, the advisory opinion at issue here. ECF No. 31-5. In response to the first question, regarding prosecution, the Attorney General stated 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." *Id.* at 2, 14. In response to the second question, regarding statutory interpretation, the Attorney General took the position that "Delta-8 THC and other THC variants, as well as designer cannabinoids are Schedule I controlled substances." *Id.* at 14. Official Opinion 2023-1 explained that the Farm Bill "does not preempt state law in the regulation of hemp," *id.* at 14, given that it expressly disclaims preemption of "more stringent" state laws on the "production of hemp," *id.* at 13 (emphasis omitted). Official Opinion 2023-1 further stated that both the text and legislative history of the Farm Bill "indicate a clear intent to declassify hemp . . . for agricultural purposes, not as a backdoor way to legalize THC." *Id*. at 13 (cleaned up).

IV. Legal Proceedings

Plaintiffs are 3C, LLC ("3Chi"), a "Colorado limited liability company headquartered in Indianapolis, Indiana," which claims to be "the world's largest manufacturer and distributor of low THC hemp extract products like Delta-8," ECF No. 31 at 3 (Am. Compl. ¶¶ 12–13); Midwest Hemp Council, Inc. (MHC), a "non-profit trade organization" with members that "include farmers, manufacturers, laboratories, retail owners, and consumers of low THC hemp extracts," *id*. at 4 (Am. Compl. ¶¶ 15–16); and Wall's Organics LLC, an Indiana limited liability company headquartered in Evansville that "sells low THC hemp extract products," *id.* (Am. Compl. ¶ 17).

3Chi boasts a large inventory of products it claims are "low-THC hemp extract[s]." Journay Dep. Tr. 48:14–16, ECF No. 78-2 at 50; ECF No. 78-3. Among them are delta-8 vape cartridges and pods, bearing names like "OG Kush," "Blue Dream," "White Runtz," and "Mind Trip," as well as ingestible THC gummies like "3Chi Delta 8 Comfortably Numb Mini-Pack Gummies," ECF No. 78-3 at 2, 3, 11–12; Journay Dep. Tr. 31:15–18, 33:11–15, 34:12–16, 48:11–13, ECF No. 78-2 at 33, 35, 36, 50. As 3Chi's designated witness freely testified, 3Chi's products get people "faded," "stoned," "baked," and "high" by "alter[ing] their current . . . state of mind." Journay Dep. Tr. 51:6–23, 53:19–21, ECF No. 78-2 at 53, 55; ECF No. 77-2 (3Chi First Video Exhibit); ECF No. 77-3 (3Chi Second Video Exhibit). 3Chi's video advertisements, authenticated at the deposition of 3Chi and included here as exhibits, make thinly veiled references to recreational, high-inducing uses. *See* ECF No. 77-3 (3Chi Second Video Exhibit) (showing a woman declaring "with 3Chi we can all get stoned" and "I'm hella baked"); Journay Dep. Tr. 48:17–25, 49:1–15, ECF No. 78-2 at 50–51. Still, 3Chi contends its delta-8 products are legal because they are chemically derived from CBD. Journay Dep. Tr. 22:24–23:3, ECF No. 78-2 at 24–25 ("You can turn CBD into delta-8. . . . You're taking a molecule as it exists and essentially restructuring it.").

According to 3Chi's founder and CEO himself, any substance that can be chemically derived from CBD—including (were it possible) *heroin*—is exempt from the Controlled Substances Act. Journay Dep. Tr. 23:22–25, ECF No. 78-2 at 25.

On June 26, 2023, 3Chi and MHC sued the State of Indiana and the Attorney General challenging Official Opinion 2023-1. ECF No. 1 (Compl.). They also sought a preliminary injunction against the Official Opinion's enforcement. ECF No. 5. In their amended complaint and amended motion for preliminary injunction filed a few months later, ECF Nos. 31, 32, 3Chi and MHC added Wall's Organics as a plaintiff. *See* ECF No. 31 at 4 (Am. Compl. ¶ 17). They named as defendants, in addition to the Attorney General,[1] Huntington County Prosecutor Jeremy Nix and Vanderburgh County Prosecutor Diana Moers, in their official capacities ("Prosecutors" and, collectively, "State Defendants"). *Id.* at 5 (Am. Compl. ¶¶ 21, 24). They also added as separate defendants the Huntington and Evansville Police Departments, *id.* at 4–5 (Am. Compl. ¶¶ 19, 22), and Detective Sergeants Darius Hillman (Huntington PD) and Nathan Hassler (Evansville PD), in their official capacities, *id.* (Am. Compl. ¶¶ 20, 23).

Throughout this case, the target of Plaintiffs' grievance has remained the same: Official Opinion 2023-1. ECF No. 1 at 1 (Compl. ¶ 1) ("This is a lawsuit challenging the Attorney General's Official Opinion 2023-1."); ECF No. 31 at 2 (Am. Compl. ¶ 1) (same); ECF No. 111

[1] In their initial complaint, Plaintiffs named the State of Indiana as a defendant. ECF No. 1 at 1 (Compl. at 1); *id*. at 4 (Compl. ¶ 18). In their amended complaint, however, Plaintiffs did not name the State as a defendant, and the State did not appear in the case caption. *See* ECF No. 31 at 1 (Am. Compl. at 1). Subsequent filings and orders have inconsistently listed the State as a party. *Compare, e.g.*, ECF No. 32 at 1 (Pls.' Am. Mot. Prelim. Inj. at 1) (party filing not listing State as defendant), *and* ECF No. 107 (order not listing the State as a defendant), *with* ECF No. 117 at 1 (Pls.' Statement of Claims & Defenses at 1) (party filing listing State as defendant), *and* ECF Nos. 72, 114 (routine orders listing State as defendant). While Plaintiffs have not filed a motion to remove the State as a named party under Rule 41, omitting a defendant from an amended complaint has been held sufficient to remove them from the case for later purposes. *Attys' Liab. Prot. Soc'y v. Klein*, 929 F. Supp. 1399, 1400 (D. Kan. 1996).

at 2. Plaintiffs make three claims about Official Opinion 2023-1. They claim that it is "preempted" by the Farm Bill, ECF No. 31 at 15 (Am. Compl. ¶ 81), and "contradict[s]" the dormant Commerce Clause, *id.* at 17 (Am. Compl. ¶ 91). And they claim that it "violates" Senate Enrolled Act 52, Pub. L. No. 153-2018 (Ind. Code § 35-48-1-17.5). ECF No. 31 at 18 (Am. Compl. ¶ 95).

Plaintiffs do not allege that any state law violates federal law, nor do they ask the Court to enjoin enforcement of any state law. Instead, Plaintiffs ask the Court to grant declaratory relief that the "Official Opinion[]"—not any state statutory provision—"is preempted by federal law," *id.* at 15 (Am. Compl. ¶ 81) (emphasis added), and "violates" state law, *id.* at 18 (Am. Compl. ¶ 95); *see* ECF No. 111 at 2. Plaintiffs also ask the Court to "[d]eclare all low THC hemp extracts as legal" under state and federal law. ECF No. 31 at 20. And Plaintiffs ask the Court to enjoin State Defendants from "taking any steps to criminalize or prosecute the sale, possession, manufacture, financing, or distribution of low THC hemp extracts that are not more than .3% Delta-9 THC." *Id.*

To support their claims for relief against the State Defendants, Plaintiffs say they "are in jeopardy of criminal prosecution" "[a]s a result of the Official Opinion." *Id*. at 10–11 (Am. Compl. ¶ 51). Plaintiffs adduce as evidence two cease-and-desist letters from local prosecutors that reference both Official Opinion 2023-1 and Indiana controlled substance laws. *See* ECF Nos. 31-6, 31-8. Wall's Organics alleges that defendant Sergeant Hassler visited the store and warned Wall's employees to remove low THC hemp extract products from shelves if they did not want to face prosecution. ECF No. 112-4 at 2 (Wall Decl. ¶¶ 6–8). Plaintiffs also allege that the Official Opinion has caused "lenders to pull out of financing commitments" with them, ECF No. 31 at 14 (Am. Compl. ¶ 76), and that Plaintiffs have removed products from their shelves, *id.* at 12 (Am. Compl. ¶ 61).

On October 30, 2023, the State Defendants moved to dismiss Plaintiffs' claims against

them. ECF No. 82. That motion remains pending. On March 29, 2024, the Court denied Plaintiffs' motion for a preliminary injunction, finding that "Plaintiffs have not established that they will suffer irreparable harm in the absence of an injunction." ECF No. 107 at 2. The Court concluded that the plaintiffs did not present concrete, quantifiable evidence of their losses or explain why a preliminary injunction was the only appropriate remedy for the alleged harms. *Id.* at 7–9. The Plaintiffs have moved for summary judgment on Counts I and II, which request a declaratory judgment from the Court on the merits, while the State Defendants have moved for summary judgment as to all claims. ECF Nos. 111, 128.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. Plaintiff 3Chi is a "manufacturer and distributor of low THC hemp extract products like Delta-8." ECF No. 112-1 at 1 (Journay Decl. ¶ 3).

2. Plaintiff Midwest Hemp Council, Inc. is a "non-profit trade organization" with members that include "farmers, manufacturers, laboratories, retailers, and consumers of low THC hemp products." ECF No. 112-3 at 1 (Petty Decl. ¶ 3).

3. Plaintiff Wall's Organics is a "retailer located in Evansville, Indiana that sold and marketed low THC hemp extract products." ECF No. 112-4 at 1 (Wall Decl. ¶ 3).

4. Congress enacted the Agricultural Improvement Act of 2018 ("Farm Bill"), Pub. L. No. 115-334, 132 Stat. 4490. ECF No. 31-1.

5. In 2018, the Indiana General Assembly enacted Senate Enrolled Act 52, Pub. L. No. 153-2018, 2018 Ind. Acts 1953, governing sales and distribution of "low THC hemp extract" as defined in statute in Indiana. ECF No. 31-11.

6. Indiana county prosecutors are empowered under state law to prosecute violations of Indiana's controlled substance laws. Ind. Code §§ 33-39-1-5, 35-48-2-4, 35-48-4-2.

7. The Indiana attorney general "shall give the attorney general's legal opinion" "to the governor upon request, touching upon any question or point of law in which the interests of the state may be involved"; "to any other state officer touching upon any question or point of law concerning the duties of the officer"; and "to either house of the general assembly or to any legislative agency created under action of the general assembly, on the constitutionality of any existing or proposed law, upon request by resolution of the house or legislative agency"; and the attorney general "shall not be required to advise any other officer or person." Ind. Code § 4-6-2-5.

8. On January 12, 2023, pursuant to Indiana Code § 4-6-2-5, Attorney General Rokita issued Official Opinion 2023-1 in response to an inquiry from Indiana State Police Superintendent Doug Carter and the Executive Director of the Indiana Prosecuting Attorneys Council, Chris Naylor, regarding Indiana Code § 35-48-2-4(d)(31). ECF No. 31-5 at 1.

9. This lawsuit challenges Official Opinion 2023-1. Journay Dep. Tr. 10:20–23, ECF No. 78-2 at 12; Petty Dep. Tr. 7:12–16, 29:23–30:5, ECF No. 78-1 at 9, 31–32; ECF No. 112-1 at 2 (Journay Decl. ¶ 7); ECF No. 112-3 at 2 (Petty Decl. ¶ 5); ECF No. 112-4 at 2 (Wall Decl. ¶ 5).

STANDARD OF REVIEW

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). At summary judgment, a court "construe[s] facts in the light most favorable" to the nonmovant and "draw[s] all reasonable inferences in [its] favor." *Khungar v. Access Cmty. Health Network*, 985 F.3d 565, 572 (7th Cir. 2021) (cleaned up); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The movant has the burden of demonstrating the absence of a factual dispute, and if carried the burden shifts to the nonmovant to produce facts creating a dispute for trial. *See Lewis v. Wilkie*, 909 F.3d 858, 866 (7th Cir. 2018).

ARGUMENT

Because Official Opinion 2023-1 is unenforceable and has no independent force of law, Plaintiffs have suffered no redressable injury and therefore lack standing. For the same reasons, Plaintiffs' claims of preemption and unconstitutionality must fail. Plaintiffs do not ask this Court to preempt any law or declare any state statutory provision unconstitutional. Even putting aside the lack of a legal conflict, the Seventh Circuit recently rejected preemption and Commerce Clause claims indistinguishable from Plaintiffs' claims here in *C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541 (7th Cir. 2020). So even if Official Opinion 2023-1 was binding Indiana law—and it is not—precedent forecloses Plaintiffs' claims on the merits. Neither are Plaintiffs entitled to a permanent injunction against any State Defendant. The State Defendants therefore ask this Court to grant their Cross-Motion for Summary Judgment and deny Plaintiffs' Motion.

I. Plaintiffs' Claims Are Not Justiciable

A. Plaintiffs have not demonstrated standing to sue State Defendants

"Article III confines the judicial power to the resolution of 'Cases' and 'Controversies.'" *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). A case or controversy exists "only if a plaintiff has standing to sue—a bedrock constitutional requirement." *United States v. Texas*, 599 U.S. 670, 675 (2023). Standing requires a plaintiff to show that it has suffered "an injury in fact caused by the defendant and redressable by a court order." *Id*. at 676 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). Standing "is not dispensed in gross"; rather, a plaintiff bears the burden of "demonstrat[ing] standing for each claim" pressed and for "each form of relief" sought. *TransUnion*, 594 U.S. at 431. Finally, the burden increases at summary judgment: A plaintiff "must supply evidence of specific facts that, taken as true, show each element of

standing." *Wadsworth v. Kross, Lieberman, & Stone, Inc.*, 12 F.4th 665, 667 (7th Cir. 2021) (cleaned up).

Plaintiffs have not carried their burden. They have supplied no facts showing that Official Opinion 2023-1 has injured them in any way traceable to State Defendants. Nor have they shown that the Court is capable of issuing anything other than another advisory opinion.

1. Because the Official Opinion is not law, Plaintiffs cannot identify any legal injury traceable to State Defendants

"To establish injury in fact," the plaintiff must show "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan*, 504 U.S. at 560). The plaintiff must show that the injury "fairly can be traced to the challenged action of the defendant" and does not "result[] from the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976).

As relevant here, a defendant who has been charged with or convicted of a crime can demonstrate a concrete and particularized injury in fact and has standing to challenge the statute under which the criminal proceedings took place. *Bond v. United States*, 564 U.S. 211, 217 (2011). *Threats* of enforcement can also suffice only if the threat is imminent, not "'imaginary or speculative.'" *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)); *see Mueller v. Raemisch*, 740 F.3d 1128, 1132 (7th Cir. 2014); *Kucharek v. Hanaway*, 902 F.2d 513, 516 (7th Cir. 1990). Regardless of whether the plaintiff imagines that a government official threatens to enforce a statute, if it is not possible for that official to enforce the statute, there is no injury. *See, e.g.*, *Haaland v. Brackeen*, 599 U.S. 255, 292–93 (2023) (no standing where federal defendants had no power to enforce challenged statute); *Doe v. Holcomb*, 883 F.3d

971, 978–79 (7th Cir. 2018) (no standing where state defendant had no authority to enforce challenged statute); *see also Shell Oil Co. v. Noel*, 608 F.2d 208, 213 (1st Cir. 1979) (same).

Plaintiffs here have not demonstrated that any State Defendant has caused them any legal injury. Start with the Attorney General. Plaintiffs have not alleged that the Attorney General has initiated any criminal proceedings against them or that he can do so. And they appear confused about whether the Attorney General even "criminalize[d]" anything. *Compare* ECF No. 113 at 1, 3, 9, 19, 20, 21, and 22 (Official Opinion "unilaterally criminalizes" new conduct), *with id*. at 27 ("there has been no change in state . . . law whatsoever"). In reality, the Attorney General can neither initiate criminal proceedings against Plaintiffs nor criminalize their conduct. Only local prosecuting attorneys can charge controlled substance violations. *See* Ind. Code §§ 33-39-1-5, 35-48-2-4, 35-48-4-2; *see also Doe*, 883 F.3d at 977 (applying Indiana law) ("the general rule in Indiana is that the Attorney General cannot initiate prosecutions; instead, he may only join them when he sees fit"). And the "authority to define crimes and establish penalties belongs to the legislature." *State v. Downey*, 476 N.E.2d 121, 123 (Ind. 1985); *see* Ind. Const. art. IV, § 1 ("the Legislative authority of the State shall be vested in a General Assembly"). All the Attorney General has done is issue an opinion.

That the Attorney General has not harmed Plaintiffs is true for an even simpler reason: Official Opinion 2023-1 is not law. Plaintiffs have acknowledged this throughout the litigation. *See* ECF No. 6 at 14 ("Official Opinions from the attorney general are not law"); ECF No. 113 at 25 ("the Official Opinion . . . is not binding law"). And Indiana authorities, *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), confirm this. The Indiana Supreme Court first held that attorney general advisory opinions do not have the force of law in *Dodd v. State*, 18 Ind. 56 (1862). The court noted that advisory opinions are not binding; they are merely "for the information" of the

requestor, and "[h]e can follow it or not." *Id*. at 67. This is because, of course, only the legislature may make binding law. *Id*. at 66. Courts since *Dodd* have agreed. *See McPeek v. McCardle*, 888 N.E.2d 171, 177 n.4 (Ind. 2008); *Miller Brewing Co. v. Bartholemew Cnty. Beverage Co*., 674 N.E.2d 193, 203 (Ind. Ct. App. 1996). And the Attorney General's advisory opinions regularly acknowledge this. *See* 2003 Op. Att'y Gen. No. 5, at 61 (June 17, 2003) ("this opinion is not binding on a court"); 1961 Op. Att'y Gen. No. 8, at 44 (Mar. 17, 1961) (similar).

Accordingly, Official Opinion 2023-1 has as much force at law as an informal chat between the Attorney General and one of Plaintiff 3Chi's employees. *See* ECF No. 113 at 5. Plaintiffs have admitted as much throughout the litigation. *See* ECF No. 6 at 14 ("Official Opinions from the attorney general are not law and are not binding on courts") (citing *McPeek*); ECF No. 33 at 16–17 ("Official Opinions from the attorney general cannot trump enacted state law") (citing *McPeek*); ECF No. 87 at 8 ("To be clear, Plaintiffs agree that the Official Opinion is not binding law on this Court."); ECF No. 113 at 25 ("the Official Opinion . . . is not binding law"). And because Official Opinion 2023-1 does not represent any kind of criminalization or prosecution—or anything else with force of law—Plaintiffs cannot make the requisite showing that their asserted injuries "would likely be redressed by the requested judicial relief" against the Attorney General. *Thole v. U.S. Bank, N.A.*, 140 S. Ct. 1615, 1618 (2020). Consequently, Plaintiffs have not demonstrated any injury traceable to the Attorney General because of the Official Opinion.

As for the Prosecutors, any injury Plaintiffs might allege they have caused has nothing to do with Official Opinion 2023-1 and is not redressable by this lawsuit. A prosecutor "can follow" the Official Opinion "or not," just like the state official in *Dodd*. 18 Ind. at 67. A judgment about the validity of the opinion would not prevent prosecutors from enforcing Indiana's criminal laws. And while local prosecutors (unlike the Attorney General) do have power to initiate criminal

proceedings, that power naturally is limited to violations of controlled substance *statutes*. Plaintiffs do not challenge any statute or allege that any prosecutor has exercised that power. Instead, Plaintiffs baldly assert that Prosecutors have threatened criminal proceedings "[a]s a result of" or in "reli[ance] upon" the "Official Opinion." ECF No. 113 at 2, 6, 22, 24. That is incorrect. Again, Official Opinion 2023-1 is nonbinding; no prosecutor can institute criminal proceedings under it. And prosecutors are well aware of this reality. For instance, in the cease-and-desist letters that Plaintiffs submitted into evidence, *see* ECF Nos. 31-6, 31-8, the prosecutors state that any criminal proceeding would be under the controlled substance provisions of the Indiana Code, not Official Opinion 2023-1. So Plaintiffs cannot demonstrate that succeeding on their claims challenging Official Opinion 2023-1 would prevent prosecution under unchallenged Indiana statutes. Because the relief Plaintiffs seek will not resolve their alleged injury, the Plaintiffs have not established standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412 (2013); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson*, 674 F.2d 1195, 1199 (7th Cir. 1982).

Moreover, whatever the validity of Official Opinion 2023-1, selling a product containing no more than .3% Delta-9 THC is illegal if the product contains other controlled substances. Those substances include "synthetic equivalents" of Schedule I substances. Ind. Code § 35-48-2-4(d)(32). And there is evidence that products made and distributed by 3Chi, and products sold by Wall's Organics, contain "non-naturally occurring isomers, like delta-10-THC and/or delta-6a10a-THC," which remain illegal under Indiana law. ECF No. **129-1** at 8–9, 15 (Hudalla Decl. ¶¶ 21, 47–49); *see* ECF No. 130-1, 130-2, 130-3 (identifying products for sale at Wall's Organics during the relevant time period). So Plaintiffs cannot demonstrate that any future injuries resulting from prosecution for selling products containing synthetic equivalents of Schedule I controlled

substances (or other prohibited substances) are traceable to Official Opinion 2023-1 or redressable through this lawsuit. Prosecutors would still be entitled to prosecute offenses based on unchallenged provisions of Indiana law.

Nor is the Huntington County Prosecuting Attorney a proper defendant. None of the Plaintiffs alleges that the Huntington County Prosecuting Attorney has directed conduct at them or that they have suffered injury traceable to him. The Amended Complaint alleges conduct related to Front Row, LLC and Sky Vape Shop Inc., ECF No. 31 at 12–13, but neither business entity is a party to this lawsuit or a member of the Midwest Hemp Council. See ECF No. 70-2 at 1; *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (a plaintiff "generally must assert his own legal rights and interests"). Wall's Organics has no presence in Huntington County, ECF No. 70-1, and makes no allegations related to the Huntington County Prosecuting Attorney, see ECF No. 31 at 11–12. 3Chi likewise does not allege the Huntington County Prosecuting Attorney has taken any action against it or will imminently do so. *See id.* Indeed, it does not allege that any 3Chi products were seized by law enforcement at the Huntington County prosecutor's direction. Plaintiffs thus fail to show injury in fact traceable to the Huntington County Prosecuting Attorney, making an injunction against him improper. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

Plaintiffs offer other arguments in passing to demonstrate injury from Official Opinion 2023-1. None has merit. Plaintiffs speculate that the Official Opinion could be the "catalyst" for future harm, ECF No. 113 at 25, and then assert they need not "wait to be arrested" under controlled substance laws to demonstrate sufficient injury, *id*. at 26. This argument misunderstands standing. Official Opinion 2023-1 is legally inert. It did not (and cannot) alter any preexisting scheme of rights and correlative duties or prescribe, permit, or proscribe any act of any state official. It is not law. And because Official Opinion 2023-1 is not law, it cannot cause any future prosecution. In the

cases applying that doctrine—including a case Plaintiffs cite, *see id*. at 26—the plaintiff challenged the *statute* the state defendant threatened to enforce. *See Kucharek*, 902 F.2d at 515 (state obscenity statute); *see also Steffel*, 415 U.S. at 454–55 (state leafleting statute); *Mueller*, 740 F.3d at 1130 (state sex offender registration statute).[2] The facts here are more like those in *Brackeen*, *Doe*, and *Shell Oil*; those cases were dismissed for want of standing because the government defendants "had no connection with the enforcement" of the challenged state laws. *See Shell Oil*, 608 F.2d at 210, 213. Here, no State Defendant can "enforce" the Official Opinion.

Plaintiffs also claim injury because their investors allegedly have gotten cold feet. *See* ECF No. 113 at 6–7. But any injury must be traceable to the *defendant's* conduct and not caused by a nonparty to the suit. *See Simon*, 426 U.S. at 41–42. Courts have routinely held that where a plaintiff claims injury from a nonparty's voluntary conduct, the plaintiff cannot then establish standing against the government merely because a government official did something, however tangentially related to the subject matter of the case. For instance, where a gun dealer chooses not to sell the plaintiff a gun, the plaintiff cannot sue the FBI merely because an FBI agent remarked to the gun dealer that the plaintiff kept bad company. *See Turaani v. Wray*, 988 F.3d 313 (6th Cir. 2021). And where animal rights organizations prophesy that a state environmental agency will cull more wolves to prevent them from killing grazing livestock, the organizations cannot sue the U.S. Forest Service merely because the Forest Service changed a regulation involving livestock grazing. *See WildEarth Guardians v. U.S. Forest Serv.*, 70 F.4th 1212 (9th Cir. 2023). The same is true here.

[2] Plaintiffs also cite *MedImmune, Inc. v. Genentech, Inc*., for the proposition that "where threatened government action is concerned," a plaintiff is "not required to expose himself to liability before bringing the suit to challenge the basis for the threat." 549 U.S. 118, 128–29 (2007) (emphasis omitted); *see* ECF No. 113 at 26 (citing *MedImmune*, 549 U.S. at 118–19). That proposition is dicta; *MedImmune* was a patent dispute involving "threatened enforcement action of *a private party* rather than the government." 549 U.S. at 130 (emphasis in original). In any event, the problem remains that plaintiffs are challenging something that cannot be enforced.

Where financial investors express concerns about funding hemp outfits, the outfits cannot sue state officials merely because the Attorney General issued an opinion to advise state officials.

Lastly, inasmuch as Plaintiffs claim financial loss from their *own* choice to remove products from their shelves, *see* ECF No. 113 at 8, a self-inflicted injury does not bootstrap a plaintiff into federal court. *See Baysal v. Midvale Indem. Co.*, 78 F.4th 976, 977–78 (7th Cir. 2023) (no standing where automobile drivers chose to buy credit-monitoring services then claimed injury from that purchase); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (no standing where state chose to give citizens who pay out-of-state taxes a tax credit, then claimed injury from lost tax revenues). Simply put, "no unlawful Government action 'fairly traceable' to [the Official Opinion] caused the plaintiffs' pocketbook harm. Here, there is no action—actual or threatened—whatsoever. There is only the [Official Opinion's] unenforceable language." *California v. Texas*, 593 U.S. 659, 671 (2021). Ultimately, Plaintiffs have not shown evidence of any injury at law fairly traceable to the conduct of State Defendants.

2. Even if Plaintiffs had identified an injury, the relief Plaintiffs seek amounts to an advisory opinion which redresses nothing

Even if a plaintiff shows that an injury exists, standing also requires the plaintiff to demonstrate that the injury is "likely to be redressed by the lawsuit." *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023) (citing *Lujan*, 504 U.S. at 560–61). The essence of redressability is an adjustment of the legal relations between the parties to a suit, as remedies "operate with respect to specific parties" and "not . . . 'on legal rules in the abstract.'" *California*, 593 U.S. at 672; *see also Muskrat v. United States*, 219 U.S. 346, 356 (1911) ("Judicial power . . . is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals."). Put differently, "no court

may lawfully enjoin the world at large" or purport to enjoin "laws themselves." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 44 (2021) (cleaned up). Thus, declaratory relief affords no redress absent the separate ability to issue an injunction that would provide relief. *See California*, 593 U.S. at 672–73. Otherwise, "a declaratory judgment is little more than an advisory opinion." *Haaland v. Brackeen*, 599 U.S. 255, 293 (2023); *see California*, 593 U.S. at 672–73. "[F]ederal courts do not issue advisory opinions," *TransUnion*, 594 U.S. at 424, and do not "possess a roving commission to publicly opine on every legal question," *id.* at 423.

Even if Plaintiffs had demonstrated an injury here, no answer from this Court to the question whether the Official Opinion "is right or wrong," ECF No. 75 at 4, would adjust any legal relationship between Plaintiffs and State Defendants. An injunction forbidding Prosecutors to enforce Official Opinion 2023-1, *see* ECF No. 31 at 20 (Am. Compl. ¶ 113), would be useless; the Official Opinion is already "unenforceable. There is no one, and nothing, to enjoin." *California*, 593 U.S. at 673. And even if it were independently enforceable, Official Opinion 2023-1 itself could not be enjoined, as courts do not "enjoin challenged 'laws themselves.'" *Whole Woman's Health*, 595 U.S. at 44. Injunctive relief in these circumstances would "amount to no more than a . . . declaratory judgment" that Official Opinion 2023-1 is wrong, *California*, 593 U.S. at 673, which Plaintiffs also request, *see* ECF No. 31 at 15 (Am. Compl. ¶ 81), *id*. at 18 (Am. Compl. ¶ 95). But a declaratory judgment "is the very kind of relief that cannot alone supply jurisdiction otherwise absent." *California*, 593 U.S. at 673. Since no order would entitle Plaintiffs to any relief in a future prosecution under a state controlled-substance law or any other statute governing sales of consumer products—which Plaintiffs do not challenge—the Court cannot provide redress. *See Brackeen*, 599 U.S. at 293 ("[w]hat saves proper declaratory judgments from a redressability problem—but is lacking here—is that they have preclusive effect on a traditional lawsuit that is

imminent"). Plaintiffs would still be left "speculat[ing] as to how [Prosecutors] will exercise their discretion" in enforcing state law, and that is fatal to standing. *Clapper*, 568 U.S. at 412.

The Attorney General, as a general matter, does not initiate criminal proceedings or direct prosecutors to do so. *Doe*, 883 F.3d at 977; *see* Ind. Code § 4-6-2-1.1 (listing limited circumstances in which the Attorney General has concurrent jurisdiction with prosecuting attorneys). Nor can he "enforce" Official Opinion 2023-1. Thus, injunctive relief against the Attorney General would not restrain anyone from doing anything against Plaintiffs. Nor would declaratory relief change legal relations between Plaintiffs and the Attorney General. To illustrate, if the Court declares that Official Opinion 2023-1 is "wrong," ECF No. 75 at 4, 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*. Yet at no part of this recursive farce would any legal relationship change. No court order could alter the status quo precisely because Official Opinion 2023-1 itself did not alter the status quo. Frolics in judicial futility do not fix anything.

Nor can the Court grant Plaintiffs' most ambitious request: to "[d]eclare all low THC hemp extracts as legal" and enjoin State Defendants to act accordingly. ECF No. 31 at 20 (Am. Compl. at 20). Plaintiffs do not explain how a federal court could grant such a request. To the extent that such a declaration would merely state the law as it stands, again, a declaratory judgment will lie only if there is another independent basis for injunctive relief, *see California*, 593 U.S. at 672–73, and there is no basis for an injunction here. Justice Holmes declared long ago that a federal court cannot issue a "sweeping injunction to obey the law." *Swift & Co. v. United States*, 196 U.S. 375, 401 (1905). Besides, Plaintiffs do not attack any controlled substance *statute*; as the Indiana Supreme Court held, the "question of the validity of [a statute] can be raised by a legal

proceeding . . . but it cannot be raised in this proceeding, and neither can [this Court] decide whether the [Official Opinion] answered the question . . . correctly." *State ex rel. Lynch Coal Operators' Reciprocal Ass'n v. McMahan*, 142 N.E. 213, 214 (1924). If, on the other hand, Plaintiffs seek a declaration to *change* the law of controlled substances in Indiana, they must obtain it elsewhere. Plaintiffs may well interpret controlled substance law differently from the Attorney General and want the law to reflect their interpretation, but Article III is not a vehicle for citizens "to press general complaints about the way in which government goes about its business." *Allen v. Wright*, 468 U.S. 737, 760 (1984) (internal quotation marks omitted). Those issues must be debated in legislative chambers, not the courthouse.

Ultimately, Plaintiffs seek an advisory opinion of their own. Indeed, "[t]o 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*, 593 U.S. at 673 (cleaned up); *accord Brackeen*, 599 U.S. at 293 ("Without preclusive effect, a declaratory judgment is little more than an advisory opinion."). But "federal courts . . . do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). There is no debate that Article III prohibits mere advisory opinions. *See, e.g.*, *Carney v. Adams*, 592 U.S. 53, 58–59 (2020); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 48–52 (1851); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.† (1792).

Plaintiffs' protestations to the contrary say little. Plaintiffs cite *Fendon v. Bank of America, N.A.*, which defines an "advisory opinion" as "a legal declaration that could not affect anyone's rights." 877 F.3d 714, 716 (7th Cir. 2017); *see* ECF No. 113 at 23. This definition cuts against Plaintiffs' position. Plaintiffs argue that a court order here *would* affect their rights because "it

would permit [Plaintiffs] to again" produce, distribute, and promote hemp products. ECF No. 113 at 23. But this argument just begs the question; it *assumes* that Official Opinion 2023-1 removed Plaintiffs' ability to carry on their business activities to prove that it *did* remove the ability. In reality, the Official Opinion did not change the extent to which Plaintiffs legally could produce, distribute, or promote hemp products.

Plaintiffs also cite *Wisconsin's Environmental Decade, Inc. v. State Bar of Wisconsin*, purporting to apply its multifactor test to determine whether a court order amounts to an advisory opinion. 747 F.2d 407 (7th Cir. 1984); *see* ECF No. 113 at 24–25. But *Wisconsin's Environmental Decade* does not apply here; it addresses situations where the plaintiff has "ask[ed] for a declaration that the *law of a state* violates the federal Constitution." 747 F.2d at 411 (emphasis added). Applying the case's test to a non-law is an exercise in absurdity. To illustrate, one factor of the test is the "magnitude of the threat that the challenged law will actually be enforced against the plaintiff." *Id*. The magnitude here is nonexistent, for Plaintiffs have not challenged a law, and what they *have* challenged cannot be enforced against them. Another factor is "the nature of the consequences risked by the plaintiff if the challenged law should be enforced against him." *Id*. But existence precedes essence; the consequences here have no "nature" because there *are no* consequences, for (again) what Plaintiffs have challenged cannot be enforced against them. A related question under the test is "whether the plaintiff has actually been forced to alter his conduct as a result of the law under attack." *Id.* The answer is no; Plaintiffs attack no law at all. Thus, the relief Plaintiffs seek would not change any legal relation between them and State Defendants.

Redressability needs more than a "mere declaration in the air." *Giles v. Harris*, 189 U.S. 475, 486 (1903).[3]

* * *

At bottom, Plaintiffs have not shown that Article III allows them to be in federal court. They seek a double dose of conjecture: an advisory opinion from this Court musing on whether the Attorney General's own advisory opinion "is right or wrong." ECF No. 75 at 4. Article III does not empower a federal court to conjecture. *See Sweeney v. Raoul*, 990 F.3d 555, 561 (7th Cir. 2021) ("federal courts do not deal in advice"). Article III does, however, empower a federal court to dismiss for lack of standing—indeed requires it to do so. The Court should do so here.

B. Sovereign immunity independently bars Plaintiffs' claims

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Amendment's text reflects the nation's response to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). The Amendment's "greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Article III." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984); *accord Missouri v. Fiske*, 290 U.S. 18, 25 (1933) ("The Eleventh Amendment is an explicit limitation on the judicial power of the United States."); *see also Alden v. Maine*, 527 U.S. 706, 715–27 (1999) (setting out a

[3] Plaintiffs in passing cite *Pueblo of Taos v. Andrus*, 475 F. Supp. 359 (D.D.C. 1979), for the proposition that their challenge to a nonbinding advisory opinion "is not a novel concept." ECF No. 113 at 25. But *Pueblo of Taos* does not help Plaintiffs' position. *Pueblo of Taos* was focused on a federal determination of a land boundary, 475 F. Supp at 362–63—not a constitutional challenge to a state attorney general opinion. And whatever another district court may have said in 1979 about the effect of a *United States* Attorney General advisory opinion, Indiana law governs this matter, and Indiana law has been clear since 1862 that advisory opinions of Indiana Attorneys General are not law. *See* pp. 14–15, *supra*.

historical construction of the amendment). Thus, "the judicial power does not extend to [a suit] if the suit is sought to be prosecuted against a State, without her consent, by one of her own citizens." *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934); *see In re New York*, 256 U.S. 490, 497 (1921).

Sovereign immunity applies to state law claims. *See Pennhurst*, 465 U.S. at 106, 121. It also applies to federal claims. *See Hans v. Louisiana*, 134 U.S. 1 (1890). Absent consent or abrogation, a plaintiff's federal claims can overcome immunity only if the plaintiff shows that the state is "about to commence suits which have for their object the enforcement of an act which violates" federal law. *Ex parte Young*, 209 U.S. 123, 167 (1908). Finally, "[a] federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Pennhurst*, 465 U.S. at 121.

Here, sovereign immunity disqualifies each of Plaintiffs' claims. Plaintiffs' state law claim runs headlong into *Pennhurst*. And because Plaintiffs base their complaint on Official Opinion 2023-1, their federal claims are barred too, for they have not demonstrated that any state official has "enforced [or] threatened to enforce [an] 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)).

1. *Pennhurst* bars Plaintiffs' state law claim

Plaintiffs cannot seek relief in federal court against their own state or its officials for a violation of state law. *See Pennhurst*, 465 U.S. at 106; *accord Svendsen v. Pritzker*, 91 F.4th 876, 877 (7th Cir. 2024). There is no exception for state law claims ported into federal court under pendent jurisdiction. *See Pennhurst*, 465 U.S. at 121. The Seventh Circuit has applied these principles without deviation in case after case. *See Svendsen*, 91 F.4th at 877; *Lukaszczyk v. Cook Cnty.*, 47 F.4th 587, 603–04 (7th Cir. 2022); *EOR Energy LLC v. IEPA*, 913 F.3d 660, 664–65 (7th

Cir. 2019); *Katz-Crank v. Haskett*, 843 F.3d 641, 650 (7th Cir. 2016); *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993); *Lett v. Magnant*, 965 F.2d 251, 255–56 (7th Cir. 1992); *Ill. Psych. Ass'n v. Falk*, 818 F.2d 1337, 1340 (7th Cir. 1987).

This case is yet another example. Plaintiffs seek relief against State Defendants for a purported "violat[ion] [of] Indiana law," ECF No. 113 at 21. Plaintiffs nowhere dispute that State Defendants are immune on this front. The claim is barred.

2. Sovereign immunity bars Plaintiffs' federal claims too

Sovereign immunity generally prohibits a plaintiff from suing a state in federal court merely "upon the ground that the controversy arises under the Constitution or laws of the United States." *Fiske*, 290 U.S. at 26. Absent Congress' abrogation of immunity or the state's consent, *see PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 500 (2021)—neither of which exists here—a plaintiff may evade immunity only by showing that a state official "threaten[s] and [is] about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act." *Ex parte Young*, 209 U.S. at 156. Plaintiffs here present no evidence that any State Defendant seeks to enforce an unconstitutional act. Sovereign immunity therefore bars Plaintiffs' federal claims.

Sovereign immunity from Plaintiffs' federal claims applies both to the Attorney General and the Prosecutors. As established in *Hans v. Louisiana*, the Eleventh Amendment bars haling a state into federal court under federal question jurisdiction. 134 U.S. 1 (1890); *see Meadows v. Indiana*, 854 F.2d 1068, 1069 (7th Cir. 1988). This principle also shields certain state employees who act in their official capacities, because a suit against them functions as a suit "against the official's office" and "[a]s such . . . is no different from a suit against the State itself." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Relevant here, the Seventh Circuit has held that the

Indiana Attorney General functions as the State for immunity purposes when the challenged conduct relates to the Attorney General's general duty to support the constitutionality of state laws. *See Doe*, 883 F.3d at 976. And the same is true for Indiana prosecuting attorneys when the challenged conduct relates to the prosecutor's authority to initiate criminal proceedings. *See Jones v. Cummings*, 998 F.3d 782, 786–87 (7th Cir. 2021).

Both the Attorney General and the Prosecutors are operating as the State here. Plaintiffs sued the Attorney General "in his official capacity due to the publication of the Official Opinion," ECF No. 31 at 4 (Am. Compl. ¶ 18), a statutory duty of the attorney general's role. Plaintiffs also bring an official capacity claim against Prosecutor Nix "due to his involvement with the arrests in Huntington County . . . and his ability to prosecute those arrested." *Id.* at 5 (Am. Compl. ¶ 21); *see id.* (Am. Compl. ¶ 24) (same for prosecutor Moers). These activities are within the prosecuting attorneys' statutorily authorized roles. So Plaintiffs sued each State Defendant for taking an action—or, rather, *as if* they had taken an action—"as an officer of the state," *Jones*, 998 F.3d at 787. That, under the Eleventh Amendment, "is the end of it." *Id.*

Ex parte Young carves out a narrow exception to sovereign immunity when a plaintiff seeks prospective relief against a state official acting under color of state law for an alleged violation of federal law. 209 U.S. 123 (1908). Courts have recognized that if *Ex parte Young* is to apply at all, a plaintiff must demonstrate several elements. Chief among them is that the official must have a duty to "enforc[e] . . . the complained-of statute." *Doe*, 883 F.3d at 977; *accord Ex parte Young*, 209 U.S. at 157 ("such officer must have some connection with the enforcement of the act").

In *Doe*, the plaintiff alleged that an Indiana name-change statute was unconstitutional and attempted to sue the Indiana Attorney General, arguing that *Ex parte Young* applied because the Attorney General has broad authority to enforce criminal laws. 883 F.3d at 975–77. "To the

contrary," observed the Seventh Circuit, "the general rule in Indiana is that the Attorney General cannot initiate prosecutions." *Id*. at 977. Moreover, "there [were] no criminal penalties for violating" the name-change statute. *Id*. All the Attorney General could do was *join* a perjury prosecution (not initiate one, since that power belonged to the local prosecutor) if the individual seeking a name change lied on the application. *See id*. But even that "connection" with the Attorney General's duty to enforce the law was "too attenuated," concluded the Seventh Circuit, and *Ex parte Young* did not apply. *Id*.

An obvious prerequisite to the duty-to-enforce requirement is that there is a law to be enforced. Yet Plaintiffs stumble over this most rudimentary hurdle. They have not pleaded that anything enforceable by anyone is unconstitutional. Instead, they challenge Official Opinion 2023-1, *see* ECF No. 31 at 2 (Am. Compl. ¶ 1), *id*. at 14–17 (¶¶ 74–93), which does not have independent force of law, *see* pp. 14–15, *supra*. As in *Doe*, "there are no criminal penalties for violating" the Official Opinion. 883 F.3d at 977. It follows that Prosecutors cannot have a duty to enforce it. Once again, Prosecutors know this; in a cease and desist letter they only list controlled substance provisions of the Indiana Code as potential bases for prosecution. *See* ECF No. 31-6 at 1 (citing Ind. Code §§ 35-48-4-2, 35-48-4-10.1, 35-48-4-10(d)(3)).

So too with the Attorney General. He cannot enforce Official Opinion 2023-1 and cannot even initiate criminal prosecutions for drug offenses. Indeed, the Official Opinion explicitly says that the Attorney General "cannot opine on the charging or prosecution of individual cases and defers to the prosecuting attorneys and law enforcement officers for those decisions." ECF No. 31-5, at 2, 14.

The State Defendants "ha[ve] not threatened to do anything, and cannot do anything, to prosecute a violation" of Official Opinion 2023-1 itself. *Doe*, 883 F.3d at 977. As to the Attorney

General specifically, Plaintiffs "do not direct this Court to any enforcement authority [he] possesses in connection with [a challenged statute] that a federal court might enjoin him from exercising." *Whole Woman's Health*, 595 U.S. at 43. And as to State Defendants generally, Plaintiffs have not alleged that any State Defendant seeks to enforce an unconstitutional state statute. Thus, to allow Plaintiffs' federal claims to proceed would "extend *Ex parte Young* past its limits." *Doe*, 883 F.3d at 977.

For these reasons, Plaintiffs lack standing and are barred by sovereign immunity from asserting their claims against State Defendants. Since Plaintiffs have not raised any justiciable claim, this Court should grant summary judgment for State Defendants on jurisdictional grounds alone.

II. Even If Plaintiffs' Claims Were Justiciable, Plaintiffs Have Not Shown That Any State Law Is Preempted or Unconstitutional

"[I]f it is not necessary to decide more, it is necessary not to decide more." *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and in judgment). Plaintiffs cannot demonstrate standing or overcome sovereign immunity, which alone warrants summary judgment for State Defendants. But even if the Court must decide more, Plaintiffs' claims on the merits fail too. Plaintiffs invoke preemption doctrines and the dormant Commerce Clause against Official Opinion 2023-1. *See* ECF No. 31 at 15, 17–18 (Am. Compl. ¶¶ 81, 91, 95). But the Official Opinion is not law, and since Plaintiffs nowhere allege that any state *law* violates federal law, there is nothing to preempt or declare unconstitutional. Moreover, *C.Y. Wholesale v. Holcomb*, 965 F.3d 541 (7th Cir. 2020), forecloses Plaintiffs' preemption and Commerce Clause claims. The State Defendants are therefore entitled to summary judgment on the merits.

A. Plaintiffs do not allege that any state law conflicts with federal law or the Constitution

The elementary principles of Article III and the Supremacy Clause are long settled. "If two laws conflict with each other, the courts must decide on the operation of each." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Where "acts of the State Legislatures . . . interfere with, or are contrary to the laws of Congress," the latter "is supreme; and the law of the State . . . must yield to it." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). And "a law repugnant to the constitution is void." *Marbury*, 5 U.S. (1 Cranch) at 180. Given contrary laws, the "very essence of the judicial duty" is to "determine which of these conflicting rules governs the case." *Id*. at 178.

Here the judicial duty is made easy, because there is no conflict. Plaintiffs do not argue that any state law conflicts with federal law or the Constitution. Instead, Plaintiffs "challeng[e] . . . Official Opinion 2023-1." ECF No. 113 at 1. But the Official Opinion (once again) is not law, *see* pp. 14–15, *supra*, and as Plaintiffs remind us, it "cannot trump . . . state law," ECF No. 33 at 16; *see* ECF No. 113 at 25. It follows that the Official Opinion cannot be preempted or declared unconstitutional as conflicting with a higher law, for there is nothing to create such a conflict.

The doctrines of preemption and the dormant Commerce Clause already recognize this reality. Conflict preemption requires a showing that a "state *law* . . . stand[s] 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1049 (7th Cir. 2013) (emphasis added) (quoting *Hillman v. Maretta*, 569 U.S. 483, 490 (2013)). 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) (emphasis added); *accord English v. Gen. Elec. Co*., 496 U.S. 72, 78 (1990) (express preemption applies when Congress "define[s] explicitly the extent to which its enactments pre-

empt state *law*") (emphasis added). And the dormant 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) (emphasis added) (quoting *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res.*, 504 U.S. 353, 359 (1992)). Each of these doctrines depends on competing sources of *binding law*, necessitating a decision on the "operation of each." *Marbury*, 5 U.S. (1 Cranch) at 177. But Plaintiffs admit that the "Official Opinion . . . is not binding law." ECF No. 113 at 25. There is thus no need for the Court to weigh the operation of Official Opinion 2023-1 against a federal counterpart, for the Official Opinion can have no operation.

Plaintiffs devote the balance of their brief to a detailed examination of each of these doctrines. *See* ECF No. 113 at 9–21. In doing so, Plaintiffs utterly disregard the lack of a legal conflict—a necessary condition of any application of those doctrines. Plaintiffs illustrate this disregard in their citations. Although they adduce several cases to show that (other) courts have construed (other states') controlled substance laws favorably to Plaintiffs' desired interpretation of Indiana controlled substance law, Plaintiffs overlook that each of those cases naturally involves a challenged *statute*. *See id*. at 13–18. Plaintiffs' position here would produce absurd results. Under their position, someone could presumably sue a state official under a preemption theory any time such an official speaks (or misspeaks) about the proper application of federal law at a press conference or in a legal journal article. When a state official issues a non-binding opinion interpreting federal law—an activity undertaken neither in a legislative nor in an enforcement capacity—it does not operate to preempt federal law.

And in seeking a pronouncement that Official Opinion 2023-1 is "unconstitutional," *id*. at 9, 20, 21, Plaintiffs ask the Court to toss overboard "cardinal principles of free government": that

the "judicial power is carefully and effectually separated from the executive and legislative departments" and that the "Court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution." *Gordon v. United States*, 117 U.S. 697, 706 (1864). The judicial power does not encompass "giv[ing] advisory opinions." *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345–46 (1936) (Brandeis, J., concurring); *see* pp. 19–24, *supra*. To "revise or review [the Official Opinion], which has only the force of a recommendation," would be to "render an advisory opinion in its most obnoxious form." *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). The judicial power does not sanction dueling advisory opinions.

B. Even if Plaintiffs had shown that a state law is in conflict, the Seventh Circuit has already rejected Plaintiffs' federal claims

Even setting aside the lack of a legal conflict, precedent forecloses Plaintiffs' preemption and dormant Commerce Clause claims. What Plaintiffs really want is a declaration that existing Indiana controlled substance laws do not prohibit their products. *See* ECF No. 31 at 2 (Am. Compl. ¶ 1) (challenging "[t]he Official Opinion['s] attempt[] to unilaterally reclassify low THC hemp extracts as Schedule I substances in direct conflict with well-established state and federal laws encouraging the redevelopment of a domestic supply chain of hemp and hemp products in Indiana and across the country"); *id*. at 20 (seeking "declar[ation that] all low THC hemp extracts [are] legal products under state and federal law"). Even if the Court could give a pronouncement so legislative in character, precedent bars those claims.

In *C.Y. Wholesale v. Holcomb*, 965 F.3d 541 (7th Cir. 2020), the Seventh Circuit rejected materially identical preemption and Commerce Clause claims targeting Indiana's regulation of hemp. The plaintiffs sought an injunction of an Indiana statute—not an advisory opinion—that

prohibited "the manufacture, delivery, or possession of smokable hemp." *Id.* at 543 (citing Ind. Code § 35-48-3-10.1).

Just like Plaintiffs here, *see* ECF No. 113 at 19–20, 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. No. 115-334, § 10114 (codified at 7 U.S.C. § 1639*o*); *C.Y. Wholesale*, 965 F.3d at 546. The Seventh Circuit rejected that claim, pointing to 7 U.S.C. § 1639p(a)(3)(A). *Id.* at 546–47. That provision, titled "No preemption," states that "[n]othing in this subsection preempts or limits any law of a State . . . that regulates the production of hemp; and is more stringent than this subchapter." 7 U.S.C. § 1639p(a)(3)(A). Thus, as *C.Y. Wholesale* observed, Congress has expressly left States free "to continue to regulate the production of hemp, and [the Farm Bill's] express preemption clause places no limitations on a state's right to prohibit the cultivation or production of industrial hemp." 965 F.3d at 547.

C.Y. Wholesale also considered and rejected the same conflict-preemption claim, *see* ECF No. 113 at 9–13, explaining that the Farm Bill clearly allows States to regulate hemp within their own borders. *See* 965 F.3d at 548. In "areas of traditional state regulation," Congress' intent to preempt state law must be "clear and manifest." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). The Seventh Circuit 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." *C.Y. Wholesale*, 865 F.3d at 548. "Although Congress may have relaxed federal restrictions on low-THC cannabis in order to facilitate a market for hemp," explained the court, "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. 1:19-cv-02659, 2021 WL 694217, at *7 (S.D. Ind. Feb. 22, 2021). Plaintiffs cannot succeed on their preemption theories.

C.Y. Wholesale requires rejection of Plaintiffs' dormant Commerce Clause claim too. Plaintiffs assert that "[b]ecause the Official Opinion precludes the interstate transport of hemp extracts—a product declared legal and authorized for interstate trade among the states by the 2018 Farm Bill—the Official Opinion is unconstitutional under the Commerce Clause of the United States Constitution." ECF No. 33 at 16; *see* ECF No. 113 at 20–21. The Seventh Circuit squarely rejected that argument. *See C.Y. Wholesale*, 965 F.3d at 548. Plaintiffs' attempt to refashion the *C.Y. Wholesale* argument must go the same way; the argument that Official Opinion 2023-1 "burdens interstate commerce . . . by precluding a major industry from shipping its goods 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 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 were binding Indiana law—and it is not, *see* pp. 14–15, *supra*—it would withstand judicial review against Plaintiffs' federal preemption and dormant Commerce Clause claims.

C. In any event, Plaintiffs lack a cause of action on their state law claim

Finally, Plaintiffs argue that "[t]he Official Opinion violates Indiana law" and assert this claim as an additional basis for relief. ECF No. 113 at 21; *see* ECF No. 31 at 17–19 (Am. Compl.

¶¶ 94–106). Again, *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 121 (1984), bars these claims against the State Defendants. *See* pp. 25–26, *supra*. Even setting that aside, it is unclear on what basis Plaintiffs think they can bring a claim that the Attorney General's advisory opinion has incorrectly interpreted state statutory law. Here, the relevant state statute, S.E.A. 52 (codified at Indiana Code § 35-48-1-17.5), defines "low THC hemp extract" the same as does the Farm Bill: a substance containing no more than 0.3% delta-9 THC. *See* 7 U.S.C. § 1639*o*(1). Plaintiffs contend that the Official Opinion's conclusions about delta-8 do not align with that definition. *See* ECF No. 113 at 21–22. But they cite no cause of action and assert no theory providing legal grounds for adjudicating the correctness of the Official Opinion. Nor do they adduce any precedent for a court to "enjoin" a nonbinding advisory opinion simply on the theory that it conflicts with state law. Plaintiffs' state law claim fails.

In any event, Official Opinion 2023-1 is correct. As the Official Opinion states, synthetic THC of all isomers remains a Schedule I controlled substance, and "[i]t is clear from the plant biology that delta-8 THC products are by default mostly synthetic even if they have some natural component to them, and some delta-8 THC products are completely synthetic." ECF No. 31-5 at 11. Furthermore, as the Official Opinion 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)(32) 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.

III. Plaintiffs Are Not Entitled to a Permanent Injunction

In addition to declaratory relief under Counts I and II, ECF No. 111 at 1; *see* ECF No. 31 at 14–19 (Am. Compl. ¶¶ 74–106), plaintiffs also seek "a preliminary injunction, later to be made

permanent, with respect to the Official Opinion," ECF No. 31 at 20 (Am. Compl. ¶ 113). Specifically, Plaintiffs ask the Court to "enjoin[] Defendants . . . from taking any steps to criminalize or prosecute the sale, possession, manufacture, financing, or distribution of low THC hemp extracts that are not more than .3% Delta-9 THC on a dry weight basis." *Id.* at 20. Plaintiffs are not entitled to an injunction as a matter of law because they "have not established that they will suffer irreparable harm in the absence of an injunction." ECF No. 107 at 2.

For a permanent injunction to issue, a plaintiff must establish (among other factors) "that it has suffered an irreparable injury." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *Liebhart v. SPX Corp.*, 998 F.3d 772, 779 (7th Cir. 2021). Harm is irreparable if damages are inadequate to redress the plaintiff's injury. *Life Spine, Inc. v. Aegis Spine, Inc.*, 8 F.4th 531, 545 (7th Cir. 2021); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984). At the outset, it is unclear if Plaintiffs can establish harm at all. Plaintiffs largely rely on the experiences of nonparties to argue they will suffer irreparable harm from law enforcement action, *see* ECF No. 31 at 14 (Am. Compl. ¶¶ 73, 77–79), and they cite no evidence for these claims on summary judgment. Wall's Organics is the only plaintiff to offer evidence related to a defendant, and Wall's Organics continues to report sales of "low THC hemp extract" products even after they were originally removed from shelves. ECF Nos. 130-1, 130-2, 130-3; *see* ECF No. 112-4 at 2 (Wall Decl. ¶ 11); ECF No. 113 at 7–8.

Plaintiffs also ask for an injunction against laws they have not challenged. So even if this Court "enjoined" Official Opinion 2023-1 (whatever that would mean), Plaintiffs would still face statutory provisions governing their products. As Plaintiffs admit, Official Opinion 2023-1 does not "trump . . . state law," ECF No. 33 at 16, and so it does not change the "potential criminal sanctions" Plaintiffs face by producing, selling, and possessing products barred by Indiana law, *id.*

at 17. And, in any event, many of the plaintiffs' products contain "non-naturally occurring isomers, like delta-10-THC and/or delta-6a10a-THC," which would be illegal under any construction of Indiana law, or whose composition is "inconsistent with label claims" or poses "significant safety concern[s]." ECF No. 129-1 at 8–9, 15–16 (Hudalla Decl. ¶¶ 21, 47–49). Any potential criminal sanctions Plaintiffs face today, they faced before Official Opinion 2023-1 was issued and will continue to face even if the court enters an injunction "with respect to the Official Opinion." *See* ECF No. 31 at 20 (Am. Compl. ¶ 113). Moreover, Plaintiffs present "no evidence tending to show that prosecution is imminent." ECF No. 107 at 9. And "[o]utside of the First Amendment context, a preliminary injunction is not appropriate for mere threats of [criminal] sanctions." *Id.*

Plaintiffs also assert that "the loss of bank financing [] and inability to transport hemp results in unknowable financial harm that threatens the viability of those engaged in the production, manufacture, wholesale, or retail of Delta 8 products." ECF No. 33 at 18. Plaintiffs "do not point to any evidence to support this contention that the losses are unknowable." ECF No. 107 at 7. Nor have they "directed the Court to any evidence showing the loss of goodwill or damage to reputation that they allege." *Id.* at 8–9. Any loss of bank financing, moreover, comes from banks' evaluations of the hemp industry's risk profile, not as a directive from the Attorney General, county prosecutors, or any other public official. In any event, 3Chi "found a partner in Indiana willing to explore working with [it]," and now "ha[s] banking secured" to a large extent, so it is not suffering irreparable harm on the banking front. Journay Dep. Tr. 55:5–14, ECF No. 78-2 at 57. Plaintiffs have not demonstrated they face irreparable harm warranting the "extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

The equities and public interest weigh against injunctive relief as well. *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 *Romero-Barcelo*, 456 U.S. at 312)); *see also Liebhart*, 998 F.3d at 779 ("[o]rdinarily, a court is obligated to conduct an equitable balancing of harms before awarding injunctive relief" (quotation omitted)). Plaintiffs, again, will be in no better position vis-à-vis Indiana criminal statutes and financial services even if granted an injunction here.

In contrast, an injunction would irreparably harm vital state interests. In asking this Court to enjoin any steps that would "criminalize" low THC hemp extract products, ECF No. 32 at 3, Plaintiffs appear to seek relief that would interfere with the Attorney General's discharge of his statutory duty to give advice to state officials, *see* Ind. Code § 4-6-2-5. The Court should be particularly wary of entering relief that constrains state officials from seeking counsel and that prevents state officials from expressing their views on the appropriate interpretation of state statutes, policies, and procedures. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (recognizing a "government entity has the right to 'speak for itself'"); *cf. Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("prior restraints" are disfavored).

The State, moreover, has strong interests in enforcing its criminal laws, including its drug laws, to "promote the health, safety, . . . and welfare of the public." *See Price v. State*, 622 N.E.2d 954, 959 (Ind. 1993). And enjoining the State from "effectuating statutes enacted by representatives of its people" would "irreparabl[y] injur[e]" it. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *see Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935) (federal equity courts must have "proper regard for the rightful independence of state governments in carrying out their domestic policy"). 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." Journay Dep. Tr. 51:6–23, 52:14–24, 53:19–21, ECF No. 78-2 at 53–55. 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.

Additionally, some of these products may contain controlled substances, so an injunction broadly prohibiting enforcement against products that contain "no more than .3% Delta-9 THC" would cause harm to people and society. ProVerde Labs analyzed samples of 3Chi's vape products and found "evidence . . . [of] non-naturally occurring isomers, like delta-10-THC and/or delta6a10a-THC," ECF No. 129-1 at 15–16, 21 (Hudalla Decl. ¶¶ 47–50, 68). Thus, products that comply with the .3% delta-9 THC limit may nevertheless constitute controlled substances because they contain these "synthetic equivalents." Ind. Code § 35-48-2-4(d)(32). ProVerde Labs further identified evidence that the contents of products sold by Wall's Organics are "inconsistent with label claims" and potentially "carcinogenic," ECF No. 129-1 at 9 (¶ 21). A broad injunction like the one Plaintiffs request would be "prejudicial to the public interest." *Williams*, 294 U.S. at 185.

CONCLUSION

In sum, State Defendants are entitled to judgment as a matter of law. Plaintiffs challenge the Attorney General's Official Opinion 2023-1; they have not challenged any state law, and they do not allege that any Indiana statute violates federal law or the Constitution. On the merits, then, Plaintiffs' preemption and dormant Commerce Clause claims are in vain, for there is nothing to preempt or declare unconstitutional. And even if Plaintiffs could succeed on the merits, the injunctive relief they request is improper. Still, it is unnecessary for the Court to reach the merits. Plaintiffs' challenge to Official Opinion 2023-1 is self-defeating in that it deprives Plaintiffs of

standing to bring this action or ability to overcome sovereign immunity. A suit against an attorney general's advisory opinion cannot hope to obtain anything more than a judicial advisory opinion in response. And the power of judicial review does not sanction dueling advisory opinions; it does not extend to that which is not law.

The Court should grant State Defendants' cross-motion for summary judgment and deny Plaintiffs' motion for partial summary judgment.

Respectfully submitted,

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