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

THE CBD STORE OF FORT WAYNE, L.L.C., INDIANA CBD WELLNESS INC., C. Y. WHOLESALE INC., INDY E CIGS LLC, 5 STAR MEDICINAL PRODUCTS, LLP, DREEM NUTRITION, INC. MIDWEST HEMP COUNCIL, INC., and EL ANAR, LLC, Plaintiffs, vs. GOVERNOR ERIC HOLCOMB, in his official capacity, and THE STATE OF INDIANA, Defendants.	) CASE NO. 1:19-cv-2659-SEB-TAB

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR A PRELIMINARY INJUNCTION

Date: June 28, 2019

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INTRODUCTION

Plaintiffs bring this motion for a preliminary injunction to challenge the constitutionality of a recent state statute that impermissibly narrows the federal definition of hemp and criminalizes the transport of smokable hemp, despite federal laws declaring all hemp derivatives to be legal and transportable.

On May 2, 2019, Governor Eric Holcomb ("Governor Holcomb") signed into law Senate-Enrolled Act 516 ("SEA 516"), which becomes effective on July 1, 2019. SEA 516, in part, exempts "smokable hemp" (which includes the derivatives hemp bud and hemp flower) from the definition of "hemp" supplied by federal law, and renders it a crime to possess or transport smokable hemp. Defendants' attempt via SEA 516 to change the definition of hemp and preclude the transportation of smokable hemp is expressly preempted by federal law. Indeed, the Agriculture Improvement Act of 2018, Pub. L. 115-334 (the "2018 Farm Bill") precludes states from altering the definition of hemp, and precludes states from restricting "the transportation or shipment of hemp or hemp products . . . ." (2018 Farm Bill § 10114(b)). Thus, portions of SEA 516 relating to smokable hemp are unconstitutional pursuant to the Supremacy Clause and Commerce Clause, and are preempted by federal law.[1] Because Plaintiffs satisfy all of the elements for a preliminary injunction, their Motion should be granted.

FACTUAL BACKGROUND

Plaintiffs are primarily Indiana businesses that are wholesalers or retailers of hemp products. (Complaint for Declaratory and Injunctive Relief Challenging the Constitutionality of State Statute (ECF No. 1 ¶¶ 8-15.)) Additionally, Plaintiff Midwest Hemp Council, Inc. is an

[1] To be clear, the majority of SEA 516 is permissible and consistent with the 2018 Farm Bill. Plaintiffs only challenge the sections of SEA 516 that criminalize smokable hemp.

Indiana non-profit corporation dedicated to providing information and advocacy for the hemp industry in Indiana and surrounding states on behalf of its members. (*Id*. ¶ 16.)

On February 7, 2014, President Barack Obama signed into law the Agricultural Act of 2014, Pub. L. No. 113-79 (the "2014 Farm Bill"), which permitted states to grow industrial hemp under certain conditions. (*Id*. ¶ 20.) A month and a half later, on March 26, 2014, then-Governor Mike Pence signed into law Senate-Enrolled Act 357, P.L. 165-2014 ("SEA 357"), authorizing the production, possession, scientific study, and commerce of industrial hemp in Indiana pursuant to Indiana Code § 15-15-13. SEA 357 also removed industrial hemp from the state's definition of "marijuana" in recognition that it is a regulated agricultural commodity and the low THC concentration is non-psychoactive. Ind. Code § 35-48-1-19; (*Id*. ¶¶ 22-23.)

On December 20, 2018, President Donald Trump signed into law the 2018 Farm Bill, which explicitly removes hemp from the Controlled Substances Act and requires the United States Department of Agriculture to be the sole federal regulator of hemp production. (*Id*. ¶¶ 27, 29).[2] The 2018 Farm Bill broadly defines hemp as the "plant Cannabis sativa L. and any part of that plant, including the seeds thereof and ***all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not***, with a delta-9 tetrahydrocannabinol [THC] concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C.A. § 1639o(1) (emphasis added); (*Id*. ¶ 30). The Conference Report for the 2018 Farm Bill establishes Congressional intent to preclude states from altering the definition of hemp: "state and Tribal governments are authorized to put more restrictive parameters on the production of hemp, but are not authorized to alter the definition of hemp or put in place policies that are less restrictive." Conference Report for Agricultural Improvement Act of 2018, p. 738; (*Id*. ¶ 31).[3]

[2] The 2018 Farm Bill is attached to the Complaint as ***Exhibit 1***.
[3] The Conference Report is attached to the Complaint as ***Exhibit 2***.

The 2018 Farm Bill explicitly states that "no State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products . . . ." (2018 Farm Bill 10114(b); (*Id*. ¶ 33.) The Conference Report for the 2018 Farm Bill reiterates this prohibition: "While states and Indian tribes may limit the production and sale of hemp and hemp products within their borders, the Managers, in Section 10122, agreed to not allow such states and Indian tribes to limit the transportation or shipment of hemp or hemp products through the state or Indian territory." Conference Report for Agricultural Improvement Act of 2018, p. 739; (*Id*. ¶ 34.)

On May 2, 2019, in direct response to the 2018 Farm Bill, Governor Eric Holcomb signed into law SEA 516. (*Id*. ¶ 37).[4] While SEA 516 defines "hemp" in the same way as the 2018 Farm Bill, SEA 516 later narrows that definition by carving out "smokable hemp" and criminalizing its manufacture, finance, delivery, and possession. Ind. Code § 35–48–4–10.1 (effective July 1, 2019). Smokable hemp is defined as "a product containing not more than three-tenths percent (0.3%) delta-9-tehtrahydrocannabinol (THC), including precursors and derivatives of THC, in a form that allows THC to be introduced into the human body by inhalation of smoke" and includes derivatives "hemp bud" and "hemp flower." Ind. Code § 35-48-1-26.6 (effective July 1, 2019); (*Id*. 38.) By criminalizing smokable hemp, SEA 516 effectively precludes transportation of the same in or through Indiana, in direct contravention of Section 10114(b) of the 2018 Farm Bill.

ARGUMENT

To obtain a preliminary injunction, Plaintiffs must establish that: (1) they are likely to succeed on the merits of their claim; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities favors Plaintiffs; and (4) an injunction would serve the public interest. *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 20 (2008). The

[4] A copy of SEA 516 is attached to the Complaint as ***Exhibit 3***.

Seventh Circuit does not consider the independent strength of each of these factors, but rather evaluates them on a sliding scale, such that a powerful claim on the merits requires a lesser showing that the equities tilt in favor of the plaintiffs, and vice versa. *See Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015). Here, Plaintiffs satisfy all four factors. Relief is warranted to prevent Defendants from enforcing an unconstitutional state statute and to prevent irreparable harm to Plaintiffs and the public alike.

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

Plaintiffs are likely to succeed on their claim that SEA 516 is unconstitutional because it is preempted by the 2018 Farm Bill and is an impermissible restriction on interstate commerce. "The threshold for establishing likelihood of success is low." *Michigan v. United States Army Corps of Eng'rs*, 667 F.3d 765, 782 (7th Cir. 2011). The Seventh Circuit has said that a plaintiff must show only "that it has a better than negligible chance of success on the merits of at least one of its claims." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1096 (7th Cir. 2008) (quotations omitted). Plaintiffs' likelihood of success far exceeds that low hurdle.

A. The 2018 Farm Bill preempts Indiana's attempt to narrow the definition of hemp by excluding smokable hemp, making SEA 516 unconstitutional under the Supremacy Clause of the United States Constitution.

Plaintiffs are likely to prevail on their claim that Indiana's attempt to narrow the definition of hemp is preempted by the federal 2018 Farm Bill. Such preemption makes SEA 516 unconstitutional under the Supremacy Clause of the United States Constitution, and it is therefore unlawful and should be enjoined.

The Supremacy Clause of the United States Constitution gives Congress power to preempt state law. *See generally Arizona v. United States*, 567 U.S. 387 (2012); *Crosby v. Nat'l*

Foreign Trade Council, 530 U.S. 363 (2000). Preemption is typically applied in three forms: (1) express preemption, where a statute contains a provision precluding state conduct; (2) field preemption, where Congress has determined an area is under its exclusive federal governance; or (3) conflict preemption, where "state laws are preempted when they conflict with federal law, including when they stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 567 U.S. at 387 (2012).

Here, Indiana's attempt in SEA 516 to amend – and narrow – the definition of hemp falls squarely under conflict preemption. The federal 2018 Farm Bill purposefully defines "hemp" as "plant Cannabis sativa L. and any part of that plant, including the seeds thereof and ***all derivatives, extracts***, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol [THC] concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C.A. § 1639o(1) (emphasis added). SEA 516 directly conflicts with the 2018 Farm Bill's definition by excluding "smokable hemp," which is defined as any "product containing not more than three-tenths percent (0.3%) delta-9-tehtrahydrocannabinol (THC), including precursors and derivatives of THC, in a form that allows THC to be introduced into the human body by inhalation of smoke," including derivatives "hemp bud" and "hemp flower." Ind. Code § 35-48-1-26.6 (effective July 1, 2019). The same "derivatives" and "extracts" of hemp that the 2018 Farm Bill purposefully included within its definition are removed by the prohibition of smokable hemp in SEA 516. Thus, there is an undeniable conflict between state and federal law.

In determining whether conflict preemption exists, the Supreme Court of the United States asks whether "the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objections of Congress" and that to conclude as such the Court

should look to "the federal statute as a whole and identify[] its purpose and intended effects." *Arizona*, 567 U.S. at 387 (2012) (quotation omitted); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874 (2000). Here, the intent of the 2018 Farm Bill to preclude states from amending the definition of hemp is clearly stated in the legislative history for the bill. The Conference Report for the 2018 Farm Bill provides that states "***are not authorized to alter the definition of hemp*** or put in place policies that are less restrictive." Conference Report for Agricultural Improvement Act of 2018, p. 738 (emphasis added). *See Geier*, 529 U.S. at 874 (looking to comments of the federal act in question and its legislative history to determine the purpose and intent of the act). Because it was Congress's intent to prohibit states from altering the definition of hemp – and because SEA 516 narrows the definition of hemp by carving out smokable hemp – the portions of SEA 516 relating to smokable hemp are preempted by federal law and are unconstitutional under the Supremacy Clause of the United States Constitution.

Moreover, Indiana's attempt to criminalize smokable hemp conflicts with Congressional intent to treat hemp like a regulated agricultural commodity. Congress saw fit to remove low-THC hemp from a list of controlled substances so that farmers could utilize it as a crop, and Congress empowered the USDA to be the sole federal regulator of hemp production (the FDA retains jurisdiction over ingestible and topical hemp products). In short, the federal government's intent in the 2018 Farm Bill was to legalize low-THC hemp (including all derivatives); Indiana's attempt to criminalize one of those derivatives – smokable hemp – conflicts with Congress's purpose. The smokable hemp restrictions in SEA 516 stand in direct conflict with the 2018 Farm Bill and are preempted by federal law. Plaintiffs' Motion should be granted for this reason alone.

B. Criminalizing the transportation of smokable hemp directly conflicts with the 2018 Farm Bill, and thus SEA 516 is preempted and unconstitutional.

A second, independently sufficient reason to grant Plaintiffs' Motion is that federal law expressly preempts Indiana's attempt in SEA 516 to preclude the transportation of smokable hemp. Such preemption makes SEA 516 unconstitutional under the Supremacy Clause of the United States Constitution, and it is therefore unlawful and should be enjoined.

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

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

(emphasis added) (*see also* 7 U.S.C.A. § 1639o(1) (defining hemp broadly to include all hemp derivatives or extracts).

Despite this express prohibition, SEA 516 attempts to preclude the transportation of hemp derivatives and extracts in the form of smokable hemp by criminalizing it:

> (a) A person who:
> (1) knowingly or intentionally:
> (A) manufactures;

(B) finances the manufacture of;
(C) delivers;
(D) finances the delivery of; or
(E) possesses;
smokable hemp; or
(2) possesses smokable hemp with intent to:
(A) manufacture;
(B) finance the manufacture of;
(C) deliver; or
(D) finance the delivery of;
smokable hemp;
commits dealing in smokable hemp, a Class A misdemeanor.

Ind. Code § 35–48–4–10.1 (effective July 1, 2019). By criminalizing the "possession" or "delivery" of smokable hemp, SEA 516 precludes the transportation of a hemp derivative in or through Indiana by forcing those who transport hemp to face prosecution. This, despite the fact that the 2018 Farm Bill unequivocally prohibits states from doing so. (2018 Farm Bill Sec. 10114.) General Counsel for the USDA has authored a memorandum on this exact issue, concluding that the 2018 Farm Bill "preempts State law to the extent such State law prohibits the interstate transportation or shipment of hemp. . . ." (Memorandum Sec. II(B);[5] (*Id.* ¶ 41.) Because the 2018 Farm Bill expressly preempts Indiana's prohibition on the transportation of smokable hemp, SEA 516 is unconstitutional under the Supremacy Clause of the United States Constitution.

C. Indiana's attempt to preclude the transportation of smokable hemp is unconstitutional because it violates the Commerce Clause.

Finally, Indiana's attempt in SEA 516 to preclude the transportation of smokable hemp impermissibly restricts interstate commerce. A truck driver delivering smokable hemp products to Illinois from a farm in Ohio faces criminal sanction were his truck to be stopped by law enforcement in Indiana. Such a restriction on interstate commerce of a product declared legal by

[5] A copy of the USDA Memorandum is attached to the Complaint as ***Exhibit 4***.

the federal government renders SEA 516 unconstitutional under the Commerce Clause of the United States Constitution.

The Commerce Clause grants Congress the power to regulate commerce among the States. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978). The Supreme Court of the United States recognizes that "the 'negative' or 'dormant' aspect of the Commerce Clause prohibits States from advancing their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state." *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat. Res.*, 504 U.S. 353, 359 (1992) (quotations omitted). Despite this clear principle, SEA 516 seeks to "curtail[] the movement of [smokable hemp] either into or out of the state" of Indiana. *Id*. Because SEA 516 attempts to preclude the interstate transport of smokable hemp – a product declared legal and authorized for interstate trade among the states by the 2018 Farm Bill – SEA 516 is unconstitutional under the Commerce Clause of the United States Constitution.

* * *

In conclusion, SEA 516 should be enjoined because (1) it's differing definition of hemp (by carving out smokable hemp) conflicts with, and is preempted by, the 2018 Farm Bill; (2) criminalizing the transport of smokable hemp is expressly prohibited by federal law; and (3) prohibiting the transport of smokable hemp through threat of criminal sanction violates the Commerce Clause. Plaintiffs have a strong – and certainly "better than negligible" – likelihood of success on the merits of their claim. *See Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1096.

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

Without a preliminary injunction, Plaintiffs have no adequate remedy at law. To preclude a grant of equitable relief, "an available remedy at law must be plain, clear and certain, prompt or speedy, sufficient, full and complete, practical, efficient to the attainment of the ends of justice, and final." *Interstate Cigar Co. v. United States*, 928 F.2d 221, 223 (7th Cir. 1991) (quotations and citations omitted). Plaintiffs have no such adequate legal remedy because monetary losses are unknowable, and potential criminal sanctions constitute irreparable harm. In fact, a misdemeanor drug conviction for smokable hemp would prevent any Plaintiff from obtaining a license to grow or handle legal hemp in Indiana. Ind. Code 15-15-13-7(c)(5)). SEA 516 and/or the 2018 Farm Bill do not provide for a specific remedy when a state statute is challenged as unconstitutional. An injunction is the proper remedy when challenging the constitutionality of a state statute. *See i.e. Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r, Indiana State Dep't of Health in his official capacity*, No. 1:13-CV-01335-JMS, 2015 WL 4065441, at *1 (S.D. Ind. July 2, 2015) (seeking declaratory and injunctive relief when challenging state statutes as unconstitutional).

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

"In balancing the harms, the court must weigh the error of denying a preliminary injunction to the party who would win the case on the merits against the error of granting an injunction to the party who would lose." *Foodcomm Int'l v. Barry*, 328 F.3d 300, 305 (7th Cir. 2003). The Court can also consider the potential harm to interested third parties. *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994). But if Plaintiffs establish a likelihood of success on the merits – which they have – then the court balances any potential harm to Defendants and the public on a "sliding scale" against Plaintiffs' likelihood of success; the more

likely Plaintiffs are to win, the less the balance of harms must weigh in Plaintiffs' favor. *Turnell v. Centimark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015) (internal citations omitted).

Here, the balance of harms favors Plaintiffs. If the Court does not award the injunction, then Plaintiffs businesses will suffer financial harm or the risk of criminal prosecution. Their businesses will be precluded from selling, financing, or shipping what SEA 516 defines as "smokable hemp" – a low THC derivative of hemp that the federal government has declared legal. By contrast, if the Court enjoins SEA 516, it will cause Defendants no harm in that it is merely prohibiting conduct that violates the 2018 Farm Bill and the United States Constitution.

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

The public's interest supports preventing Indiana from violating federal law and the United States Constitution. Protecting Indiana citizens from unconstitutional restrictions is a *per se* public interest. "[U]nder Seventh Circuit precedent "there can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute because 'it is always in the public interest to protect [Constitutional] liberties.'" *Annex Books, Inc. v. City of Indianapolis*, 673 F. Supp. 2d 750, 757 (S.D. Ind. 2009), aff'd sub nom. *Annex Books, Inc. v. City of Indianapolis*, Ind., 624 F.3d 368 (7th Cir. 2010) (quoting *Joelner v. Village of Washington Park*, 378 F.3d 613, 620 (7th Cir.2004)).

Moreover, the purpose of the 2018 Farm Bill was to expand the availability of low THC hemp as a crop for farmers by removing it from a list of illegal substances, and to open up new applications for it use. By criminalizing the manufacture, financing, delivery, and possession of smokable hemp, SEA 516 undermines the 2018 Farm Bill and harms the legal hemp industry in Indiana. The public's interest is served by Plaintiffs' Motion, because without it, Indiana

citizens would be impermissibly prevented from purchasing, transporting, or selling hemp products that federal law gives them the right to access.

V. Plaintiffs do not need to provide security.

Plaintiffs need not provide security in this case under Federal Rule of Civil Procedure 65(c) because there is no danger that Defendants will incur costs or monetary damages from the issuance of a preliminary injunction. SEA 516 has not yet become effective. Enjoining the unconstitutional provisions aimed at smokable hemp will not alter the status quo nor prevent the implementation of the constitutional portions of SEA 516. As such, "a district court may 'waive the requirement of an injunction bond' when 'the court is satisfied that there's no danger that the opposing party will incur any damages from the injunction.'" *Hope v. Comm'r of Ind. Dep 7 of Correction*, No. 1:16-cv-02865-RLY-TAB, 2017 WL 1301569, at *8-9 (S.D. Ind. Apr. 6, 2017) (quoting *Habitat Educ. Ctr. v. United States Forest Serv.*, 607 F.3d 453, 458 (7th Cir. 2010)) (waiving bond requirement because based on finding that "Defendants will not suffer any damages if an injunction is ordered"). This case presents a challenge to the constitutionality of a statute, not a case where Defendants will incur damages. Plaintiffs should not be required to provide security.

CONCLUSION

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

Respectfully submitted,

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