In the
United States Court of Appeals
For the Seventh Circuit

No. 19-3034

C.Y. WHOLESALE, INC., et al.,

Plaintiffs-Appellees,

v.

ERIC HOLCOMB, et al.,

Defendants-Appellants.

Appeal from the United States District Court,
Southern District of Indiana, Indianapolis Division
The Honorable Sarah Evans Barker, Judge
Civil Action No 1:19-cv-02659-SEB-TAB

PLAINTIFFS-APPELLEES' PETITION FOR REHEARING

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-3034

Short Caption: C.Y.Wholesale, Inc., et al v. Eric Holcomb, et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The CBD Store of Fort Wayne, LLC, Indiana CBD Wellness Inc., C.Y. Wholesale Inc.,
Indy E Cigs LLC, 5 Star Medical Products, LLP, Dreem Nutrition, Inc., Midwest Hemp Council, Inc.,
and El Anar, LLC

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Bose McKinney & Evans, LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: s/ Paul D. Vink Date: October 31, 2019

Attorney's Printed Name: Paul D. Vink

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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None

Attorney's Signature: s/ Tyler J. Moorhead Date: November 6, 2019

Attorney's Printed Name: Tyler J. Moorhead

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None

Attorney's Signature: s/ Justin E. Swanson Date: November 18, 2019

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

Rules

Plaintiffs-Appellees ("Plaintiffs"), by counsel, pursuant to Federal Rule of Appellate Procedure 40, respectfully petition this Court to grant a penal rehearing on the July 8, 2020 Opinion (the "Opinion") ruling in favor of Defendants-Appellants, Governor Eric Holcomb and The State of Indiana (collectively, "the State"). This Court's Opinion overlooked and did not address two of Plaintiffs' central arguments: (1) conflict preemption compels Indiana's Senate Enrolled Act No. 516 ("SEA 516") to be enjoined because narrowing the definition of hemp, an agricultural commodity, by carving out and criminalizing smokable hemp, violates Congressional intent in the Agriculture Improvement Act of 2018 ("2018 Farm Bill") that individual states are not permitted to modify the federal definition of industrial hemp; and (2) the State waived its argument that the injunction was too broad because it failed to raise that argument before the district court.

STATEMENT OF ISSUES

I. Whether conflict preemption compels SEA 516 to be enjoined because narrowing the definition of hemp by carving out and criminalizing smokable hemp violates Congressional intent in the 2018 Farm Bill; and

II. Whether the State waived its ability to challenge the breadth of the injunction by failing to raise that argument before the district court.

ARGUMENT

I. This Court overlooked Plaintiffs' argument that conflict preemption compels SEA 516 to be enjoined because narrowing the definition of hemp by carving out smokable hemp violates Congressional intent in the 2018 Farm Bill.

From the outset of this litigation, Plaintiffs have consistently argued that conflict preemption requires SEA 516 to be enjoined because narrowing the definition of hemp by criminalizing smokable hemp violates Congressional intent in the 2018 Farm Bill. This was Plaintiffs' principal conflict preemption argument advanced before the district court and in the conflict preemption section of their Brief of Plaintiffs-Appellees. (*See* Complaint, (D. 1); Memorandum in Support of Motion for Preliminary Injunction (D. 4, Section I(A)); Reply Brief in Support of Motion for Preliminary Injunction (D. 27, Section I(B)); Brief of Plaintiffs-Appellees, Section I(B) at 19-21.)) Indeed, Plaintiffs devoted five pages to this argument in briefing before this Court and pointed out that the State failed to address it at all in its Brief of Defendants-Appellants. (*See* Brief of Plaintiffs-Appellees at 19-23.)

Despite the centrality of the argument, this Court's Opinion did not address it. Instead, it only addressed Plaintiffs' secondary conflict preemption argument—that criminalizing smokable hemp conflicts with Congressional intent to treat hemp like an agricultural commodity and not a controlled substance. (*See* Brief of Plaintiffs-Appellees at 21-24.) Panel rehearing is warranted for this Court to address Plaintiffs' main conflict preemption argument omitted entirely from the Opinion.

To determine whether conflict preemption exists, a court should ask whether "the challenged state law stands as an obstacle to the accomplishment and

execution of the full purposes and objections of Congress." *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quotation and citation omitted). In so doing, a court should look to "the federal statute as a whole and identify its purpose and intended effects." *Id.* "Congressional intent may be construed from the language of the statute and legislative history . . . ." *Levin v. Madigan*, 692 F.3d 607, 615 (7th Cir. 2012).

Here, the Court need not look any further than the plain language of the 2018 Farm Bill to determine that Congress intended for smokable hemp to remain within the definition of hemp. *O'Kane v. Apfel*, 224 F.3d 686, 688 (7th Cir. 2000) ("When interpreting congressional statutes, we first look at the plain language of the statute because that is the best way to determine congressional intent.") The 2018 Farm Bill expanded upon the Agriculture Improvement Act of 2014's (the "2014 Farm Bill") definition of hemp to include the "plant Cannabis sativa L. and any part of that plant, including the seeds thereof ***and all derivatives [and] extracts*** . . . 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).

While Indiana's SEA 516 begins with this broad definition, it later substantially narrows it by excluding two of the "derivatives" and "extracts"—hemp bud and hemp flower. Specifically, Ind. Code § 35-48-1-26.6(a) criminalizes the possession, delivery, manufacture, or financing of smokable hemp, which is broadly defined as any "form that allows THC to be introduced into the human body by inhalation of smoke. The term includes: (1) hemp bud; and (2) hemp flower." The State has never

disputed that hemp bud and hemp flower are "derivatives [and] extracts" of hemp that were purposefully included within the federal definition. 7 U.S.C.A. § 1639o(1); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) (The Supreme Court "ha[s] stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (Quotation omitted). Thus, the plain language of the 2018 Farm Bill's expanded definition of hemp demonstrates Congress's intent that smokable hemp (specifically hemp bud and hemp flower) is included in the definition of hemp.

This Congressional intent is further evidenced in the legislative history of the 2018 Farm Bill. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874 (2000) (looking to comments of the federal act in question and its legislative history to determine the purpose and intent of the act). For example, the Conference Report for the 2018 Farm Bill provides that:

> In Sec. 297B, the Managers intend to authorize states and tribal governments to submit a state plan to the Secretary for approval to have primary regulatory authority over the growing and production of hemp. The Managers do not intend to limit what states and tribal governments include in their state or tribal plan, as long as it is consistent with this subtitle. For example, states 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 than this title.

(Conference Report for Agricultural Improvement Act of 2018, p. 738, D. 1-3 at 2) (emphasis added). Thus, the 2018 Farm Bill includes all "derivatives" and "extracts" like hemp bud and hemp flower in the expanded definition of hemp, and its

legislative history unambiguously declares that states "are not authorized to alter the definition of hemp." *Id.*

Importantly, the improper narrowing of the definition of hemp in SEA 516 renders the entire section devoted to smokable hemp invalid, not just the section limiting transportation of smokable hemp. Thus, while the Court's Opinion correctly suggests that SEA 516 likely encroaches on the interstate transportation of hemp, the problem is much broader. The federal government in the 2018 Farm Bill clearly stated that all "derivatives" and "extracts" of low-THC hemp fit within the definition of legalized hemp, and provided legislative history advising individual states that they may not modify that definition. Yet Indiana did exactly that by carving out two extracts—hemp bud and hemp flower—and declaring them illegal. That is precisely why the district court enjoined all aspects of SEA 516 as it relates to smokable hemp, not just transportation.

In its preliminary injunction order, the district court analyzed this conflict preemption argument in detail, agreeing with Plaintiffs that SEA 516 conflicted with the federal definition:

> Here, the plain language of the 2018 Farm Bill … reflect Congress's intent to destigmatize and legalize all low-THC hemp, including its derivatives and extracts …. [T]he 2018 Farm Bill expands the federal definition of hemp beyond that set forth in the 2014 Farm Bill to specifically include hemp derivatives and extracts, such as hemp bud and hemp flower, and removes low-THC hemp from federal controlled substance schedules. Plaintiffs have shown at least some likelihood of establishing that the challenged provisions of SEA 516, which criminalize the manufacture, finance, delivery, and possession of hemp bud and hemp flower—hemp derivatives of the kind specifically legalized under the 2018 Farm Bill—frustrates these congressional purposes and objectives. (D. 31 at 17.)

This conclusion of the district court played a key role in the court's determination that federal law preempted SEA 516.

This Court concluded that the district court's injunction was overbroad because it extended beyond the transportation of hemp:

> [The district court] broadly enjoined the portions of Act 516 that criminalize much more than transportation, including the manufacture, financing, delivery, or possession of smokable hemp. It did so without any explanation of why that breadth was necessary. It seems to us that there is a missing step in the district court's reasoning.

(Opinion at 5.) With all due respect, the district court ***did*** explain why all provisions relating to smokable hemp must be struck down. In fact, the district court devoted several pages to explaining why SEA 516 should be enjoined due to conflict preemption and the State's improper modification of the federal definition. SEA 516 changed the federal definition of hemp by carving out smokable hemp, despite Congress explicitly stating in legislative history that states were not permitted to do so. The district court's injunction applied to more than just transportation because the entire concept of criminalizing hemp bud and hemp flower directly conflicted with the federal definition. Read in its entirety, there was no missing step in the district court's analysis.

In sum, the plain language of the 2018 Farm Bill and its legislative history establish that it was Congress's intent to expand the 2014 Farm Bill's definition of hemp to include all derivatives and extracts of the plant, which include the hemp bud and flower, and that individual states are prohibited from altering that

definition. As such, the entire portion of SEA 516 relating to smokable hemp is preempted by federal law and the district court's injunction was not overbroad.[1] Panel rehearing should be granted to address this argument, which was central to the district court's decision and prominently argued in briefing before this Court.

II. This Court also did not address that the State waived its ability to challenge the breadth of the requested injunction by failing to raise that argument before the district court.

In its Brief of Defendants-Appellants, the State argued that even if the district court's conclusion that SEA 516 is unconstitutional was correct, the preliminary injunction was too broad because it applied to the manufacture, finance, delivery, and possession of smokable hemp, rather than solely to interstate transportation. (Brief of Defendants-Appellants at 24-26.) As Plaintiffs argued in both the express preemption and conflict preemption sections of their Brief of Plaintiffs-Appellees, the State waived this argument by failing to raise it before the district court. (Brief of Plaintiffs-Appellees at 17-18, 25.) This Court's Opinion, however, did not address this waiver argument, presenting another, independently sufficient, basis to grant panel rehearing.

From the moment this matter was commenced, Plaintiffs made no secret that they sought to enjoin the section of SEA 516 dedicated to smokable hemp in its entirety. (*See* Complaint, D. 1 at 11 ("Plaintiffs respectfully request that the Court: .

[1] Because the narrowed definition of hemp in SEA 516 cuts across the entire section relating to smokable hemp, the State's adoption of Senate Enrolled Act 335 does not fix the problem. SEA 335 was drafted to permit the interstate transportation of hemp under certain conditions, but does nothing to address the more fundamental problem—that Indiana is "not authorized to alter the definition of hemp." (Conference Report for Agricultural Improvement Act of 2018, p. 738, D. 1-3 at 2.)

. . Issue a preliminary injunction, later to be made permanent, enjoining Indiana from enforcing portions of SEA 516 that criminalize the manufacture, financing, delivery, or possession of smokable hemp.")) The parties then extensively briefed the motion for preliminary injunction and participated in oral argument before the district court. (D. Nos. 4, 23, 27-28). At no time before the district court did the State argue or claim that the requested relief was too broad or that any such injunction should be narrowly tailored solely to interstate transportation alone. (*See generally*, *id.*)

The State made that argument for the first time on appeal in support of its express preemption and conflict preemptions arguments. (Brief of Defendants-Appellants at 24-26, 30-31.) But it is black letter law that arguments raised for the first time on appeal are waived. *See United States v. Ritz*, 721 F.3d 825, 827–28 (7th Cir. 2013) ("Because the specific theory [the appellant] now urges was never actually presented to the district court, we find it waived for purposes of this appeal."); *Williams v. Dieball*, 724 F.3d 957, 961 (7th Cir. 2013) (The Seventh Circuit has "repeatedly stated that a party may not raise an issue for the first time on appeal. Consequently, a party who fails to adequately present an issue to the district court has waived the issue for purposes of appeal.") (Quotation omitted). Consistent with long-standing precedent from this Court, the State should have been precluded from arguing on appeal that the injunction is overbroad given that it never raised that argument in the district court. Panel rehearing should be granted to address this argument, which also was omitted from the Court's Opinion.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant panel rehearing and determine that the district court's order granting Plaintiffs' Motion for Preliminary Injunction should be affirmed.

Respectfully submitted,

/s/ Paul D. Vink
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WORD COUNT CERTIFICATE

The undersigned furnishes the following in compliance with Federal Rule of Appellate Procedure 32(a)(7):

I hereby certify that this Brief conforms to the rules contained in Federal Rule of Appellate Procedure 32(a)(7) and Circuit Rule 32 for a brief produced with a Century style proportionally-spaced font in 12 point type. The length of this Brief is 2,219 words. This word count was calculated by Microsoft® Office Word 2010 and according to Rule 32(a)(7) does not include the Cover, Disclosure Statement, Table of Contents, Table of Authorities, Signature Block, Certificate of Service, and this Word Count Certificate. This word count does include headings, footings, and quotations but does not include embedded images.

I affirm under the penalties for perjury that the foregoing statements are true and correct as calculated by the word count of the word processor used to prepare this brief.

Respectfully submitted,

/s/ Paul D. Vink

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Attorneys for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25, I certify that on July 22, 2020, a copy of the "Plaintiffs-Appellees' Petition for Rehearing" was electronically filed and was served electronically on all registered counsel through the Court's EM/ECF system.

/s/ Paul D. Vink
Paul D. Vink

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