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

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

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

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

PLAINTIFFS' REPLY[1] IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER OR ALTERNATIVE MOTION FOR PRELIMINARY INJUNCTION

[1] On August 8, 2023, Defendants filed a document styled as a "Motion to Dismiss and Response in Opposition to Plaintiffs' Motion for Temporary Restraining Order or Alternative Motion for Preliminary Injunction." ECF 38. This Reply focuses exclusively on the substantive issues before the Court. Plaintiffs separately filed an Amended Complaint and Response to Defendants' Motion to Dismiss.

Despite Defendants' allegations contained in their response, Act 629, with or without the apparent changes made by the Arkansas Code Revision Committee, directly conflicts in several different aspects with the 2018 Farm Bill. First, Defendants disingenuously claim that the definition of "hemp" in the Act comports with the federal definition. This is false. The Act clearly alters the definition of "hemp," which the 2018 Farm Bill specifically prohibits states from doing.

Additionally, Defendants allege that the Act's protection of interstate commerce mirrors the language from the 2018 Farm Bill, which expressly prohibits states from interfering with the interstate transportation of hemp and hemp products. However, the Act includes an additional burden to interstate transportation of hemp and hemp products by requiring them to be in "continuous transportation" through Arkansas, a standard that appears nowhere in the 2018 Farm Bill. Moreover, the Act attempts to criminalize certain THCs, chemically converted products, and "psychoactive substances" as Schedule VI "synthetic substances," impermissibly creating a distinction based on method of manufacture in further conflict with the 2018 Farm Bill's definition of hemp, which removed all hemp derived THCs from federal controlled status. Finally, throughout their Response, Defendants erroneously conflate hemp-derived cannabinoids with synthetic cannabinoids based on an invented two prong standard, which, again, directly conflicts with the 2018 Farm Bill that relegalized all extracts and derivatives of hemp.

Defendants further allege that, due to certain substantive revisions made by the Arkansas Code Revision Commission ("Commission") to Sections 16 and 17 of Act 629, the Act does not unconstitutionally interfere with interstate commerce nor is it unconstitutionally vague. However, in making these revisions, the Commission manifestly altered the meaning and substance of the Act by changing which sections of

the Act become effective upon the enjoining of certain sections of the Act. These changes were substantive, and in revising Act 629, the Commission exceeded its powers. As a result, the original wording of Act 629 controls. Therefore, Sections 7 and 10 of Act 629, which attempt, but fail, to cure the Act's impermissible interference with the interstate transportation and shipment of hemp and hemp products, are not currently effective until Sections 2-5 are enjoined as originally contemplated in Section 17.

Moreover, Act 629 is unconstitutionally vague due to those various inconsistencies and for failing to provide notice as to what contemplated conduct is forbidden and what is permitted with regard to production, possession, transportation, and shipment of hemp and hemp products it seeks to ban.

Finally, Act 629's threat of irreparable harm has become a reality for Plaintiffs as Arkansas Tobacco Control officers have directed Plaintiffs' employees to remove delta-9 THC products, regardless of whether those products were naturally extracted or produced as a result of a synthetic chemical process in apparent conflict with Defendants' interpretation of the Act. The Court should grant Plaintiffs' requested temporary restraining order for each of these reasons.

I. THE ACT CONFLICTS WITH THE PLAIN LANGUAGE OF THE 2018 FARM BILL

A. Section 2's definitional change conflicts with the federal definition of hemp.

Section 2 of the Act narrows the definition of "industrial hemp" for purposes of Arkansas's Industrial Hemp Production Act. The Industrial Hemp Production Act establishes a 2018 Farm Bill-authorized plan by which hemp may be legally grown and cultivated in Arkansas. The Industrial Hemp Production Act is, therefore, subject to the

2018 Farm Bill's parameters. *See* 7 U.S.C. § 1639p (requiring a state to submit its 2018 Farm Bill hemp plan to USDA for approval).

Defendants' baseless assertion that the Act's narrowed definition of "industrial hemp" is "coherent" with the 2018 Farm Bill's expanded definition of "hemp" falls woefully short of the two definitions being one in the same—in both a literal and a practical sense. Make no mistake about it: with its definition of "hemp" in the 2018 Farm Bill, Congress deliberately broadened the 2014 Farm Bill's definition of "industrial hemp" to additionally protect "all derivatives, extracts, cannabinoids, isomers"—individual parts of the hemp plant which were not explicitly included in the 2014 Farm Bill's definition. *See United States v. Mallory*, 372 F. Supp. 3d 377, 379, n.1 (S.D.W. Va. 2019) ("Hemp is now defined in [the 2018 Farm Bill] as . . ."). The 2018 Farm Bill did not, however, change the delta-9 THC dry weight standard by which hemp is federally measured. So long as a product contains 0.3% delta-9 THC or less on a dry weight basis, the product constitutes hemp under the 2018 Farm Bill. *See AK Futures LLC v. Boyd St. Distro, LLC*, 35 F.4th 682, 690 (9th Cir. 2022) ("A straightforward reading of [the 2018 Farm Bill] yields a definition of hemp applicable to all products that are sourced from the cannabis plant, contain no more than 0.3 percent delta-9 THC, and can be called a derivative, extract, cannabinoid, or one of the other enumerated terms.").

Arkansas's modified definition of "industrial hemp" in Section 2 of the Act narrows the term to exclude products that the 2018 Farm Bill's definition of "hemp" was expressly intended to protect. As opposed to any product that is sourced from the hemp plant and that contains no more than 0.3% delta-9 THC on a dry weight basis, a product must instead have a delta-9 THC concentration "of no more than three-tenths of one percent (0.3%) of the hemp-derived cannabidiol" to meet the Act's new definition of "industrial

hemp." In addition to being confusing and nearly unintelligible, the Act's new definition conflicts with the definition of "hemp" in the 2018 Farm Bill.[2] Indeed, Defendants' own side-by-side comparison unambiguously depicts the direct conflict between the two definitions.

Act 629	Arkansas Law	Federal Law
Section 2 Definition of Hemp Arkansas Industrial Hemp Production Act	A.C.A. § 2-15-503(5) "Industrial hemp" means the plant Cannabis sativa and any part of the plant, including the seeds of the plant and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a total delta-9 tetrahydrocannabinol concentration of no more than three-tenths of one percent (0.3%) of the hemp-derived cannabidiol on a dry weight basis, unless specifically controlled under the Uniform Controlled Substances Act, § 5-64-101 et seq.	7 U.S.C. 16390(1) The term "hemp" means 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 grow-ing or not, with a delta-9 tetrahydro-cannabinol concentration of not more than 0.3 percent on a dry weight basis.

As one can plainly read, the above highlighted language in the Act's definition of "industrial hemp" is nowhere to be seen in the federal definition of hemp. The Act's definition limits hemp to something with a delta-9 THC concentration that is a percentage concentration of a wholly different cannabinoid, cannabidiol ("CBD")—when the 2018 Farm Bill does not. Defendants nonetheless expect this Court to believe the two

[2] It is telling that Section 7 of the Act preserves the federal definition of hemp. As discussed below, Section 7, which restricts transportation in interstate commerce, incorporates the 2018 Farm Bill's definition of hemp word for word ("the plant Cannabis sativa L., and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than three-tenths percent (0.3%) on a dry weight basis"). This was perhaps an acknowledgement by the General Assembly that the State cannot narrow its definition of hemp as it chooses. These competing definitions further illustrate the Commission's error in changing the Act's trigger clause provisions.

definitions are the same. As a result of its new definition, the Act recriminalizes certain parts of the hemp plant despite Congress' clear intention to redevelop a domestic supply chain of hemp and hemp products that flow freely in the stream of interstate commerce.

To be clear, Arkansas's definition of hemp is unlike any in the country at the state or federal level. Most states, in fact, match the 2018 Farm Bill's definition verbatim. Arkansas's extremely narrow and unworkable definition puts Arkansas farmers, small businesses, and consumers in jeopardy. First, it turns them into criminals overnight by reclassifying certain hemp-derived cannabinoids (and others that may be chosen in the future) as Controlled Substances. Second, requiring a farmer's hemp to be ". . . no more than three-tenths of one percent (0.3%) of the hemp-derived cannabidiol" creates an insurmountable obstacle to harvest and will eliminate all legal hemp production in Arkansas. This is because the new definition of hemp requires the total delta-9 THC concentration to be limited to—and calculated on account of—the plant's CBD concentration. According to this novel definition of hemp, the hemp plant cannot have a total delta-9 THC concentration that exceeds 0.3% of the CBD. In contrast, the federal definition focuses on the concentration of delta-9 THC, not the CBD concentration. Although Defendants want this Court to believe it to be an "absurd" claim, it is a fundamental reality that this narrower definition of hemp is unworkable for Arkansas farmers, and it is absurd to suggest that the federal and Arkansas definitions of hemp are the same. They are not.

Defendants correctly point out that the 2018 Farm Bill does not "preempt[] or limit[] any law of a State or Indiana tribe that – (i) regulates the production of hemp; and (ii) is more stringent than this subchapter." 7 U.S.C. § 1639p(a)(3). However, in standing by Section 2's narrowed definition of "industrial hemp," Defendants are asking this Court

to ignore the plain meaning of the term "production" in an agricultural sense and interpret this language to allow individual states to criminalize certain parts of the hemp plant on a whim. In fact, Defendants assert that this means "[s]tates are permitted to ban the production of hemp all together" as justification for the Act. ECF No. 38 at 3. This is an unequivocally inaccurate interpretation of the law. While a state may very well choose to not invest in developing a hemp production regulatory program for their farmers, farmers in that state could still apply for a license to grow hemp through USDA's program and that state is still required to permit the interstate transportation of hemp and products. Evidently, Congress anticipated states dragging their feet on relegalizing the domestic production of hemp and codified safeguards to prevent states from doing exactly what the General Assembly did here.

B. Section 7 conflicts with interstate commerce protections.

As Defendants identified in their side-by-side comparison, the 2018 Farm Bill expressly prohibits states from interfering with the interstate transportation of hemp and hemp products. However, yet again, Defendants' own comparison illustrates the conflict between Arkansas law and federal law. While the definition of hemp in Section 7 matches the 2018 definition, an additional burden has been added to interstate transportation of hemp and hemp products.

Act 629	Arkansas Law	Federal Law
Section 7 Uniform Controlled Substances Act – Substances in Schedule VI regarding Transportation and Shipment	A.C.A. § 5-64-215(d) (d) This section does not prohibit the continuous transportation through Arkansas of the plant Cannabis sativa L., and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a	7 U.S.C. 16390 Statutory Notes and Related Subsidiaries – Interstate Commerce Pub. L. 115–334, title X, §10114, Dec. 20, 2018, 132 Stat. 4914 "(a) RULE OF CONSTRUCTION.—

	delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis, produced in accordance with 7 U.S.C. § 16390 et seq.	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 [7 U.S.C. 16390] (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 [7 U.S.C. 16390 et seq.] (as added by section 10113) through the State or the territory of the Indian Tribe, as applicable."

As one can plainly read, the above highlighted language is nowhere to be seen in the 2018 Farm Bill. As confirmed by its rules of construction, the 2018 Farm Bill preempts and forbids Arkansas from "prohibit[ing] the transportation or shipment of hemp or hemp products produced in accordance with [the 2018 Farm Bill]"—full stop. *See* 7 U.S.C. § 16390 (Pub. L. 115-334, Title X, § 10114). The Act's attempt to criminalize hemp as a controlled substance when it is not in "continuous transportation" defies Congressional intent as a prohibition against hemp and hemp products in transportation or shipment.

As a practical consequence, Section 7 effectuates a significant burden to the interstate transportation or shipment of hemp and products by requiring them to be in "continuous transportation" through Arkansas. Under Act 629, those who transport and

ship hemp or hemp products may face criminal liability if they fail to demonstrate the products were "in continuous transportation." *See* Ark. Code Ann. § 20-56-412. As a direct result, farmers and other small businesses will be forced to route their products around Arkansas. Consumers will be denied hemp products intended to reach Arkansas. Arkansas, on the other hand—if Section 7 is allowed to take effect—will have been allowed to avoid express preemption by Congress.

Section 7 criminalizes certain hemp products that are not "in continuous transportation," which is not defined in statute, as controlled substances. Would an employee from a state like Tennessee that regulates and taxes hemp products like delta-8 THC be subject to criminal liability when stopping for gas or staying overnight before reaching the final destination outside of Arkansas? By criminalizing such products, the Act attempts to involve law enforcement agencies like the Drug Enforcement Administration ("DEA"). This ignores the fact that the 2018 Farm Bill completely removed any jurisdiction from the DEA over hemp and hemp products. While it is true that USDA and states must consult with the Department of Justice and DEA, the 2018 Farm Bill's plain language limited this interaction to only those situations where a mental state greater than negligence is suspected (like intentionally growing marijuana under a hemp license). In fact, the 2018 Farm Bill explicitly protects farmers who unintentionally grow hemp above 0.3% delta-9 THC from local, ***state***, and federal criminal prosecution. *See* 7 U.S.C. § 1639p(e) (emphasis added).

USDA's Final Rule implementing the 2018 Farm Bill even goes as far as to ***require*** state hemp plans to include remediation options for farmers who produce hemp above 0.3% delta-9 THC. This means that so long as the noncompliant crop is properly

remediated, farmers are still able to get their hemp and hemp products into the stream of commerce despite state and federal marijuana laws. *See* 7 U.S.C. § 990.3(6).

Clearly, Congress did not see a role for the DEA in the redevelopment of a domestic supply chain of hemp and hemp products. And for good reason. The DEA has been attempting to frustrate the development of a domestic hemp production program since its inception in the 2014 Farm Bill. For example, the DEA seized hemp seeds destined for the Kentucky Department Agriculture ("KDA"). KDA was forced to spend time and resources suing the DEA in federal court to gain possession of their legally purchased hemp seeds that the DEA had decided to seize. See *Kentucky Dep't of Ag. v. U.S. Drug Enf. Admin. et al.*, No. 3:14-cv-372-JGH, 2014 WL 2601244 (W.D. Ky. May 14, 2014).

The interstate commerce of hemp and hemp products are unduly burdened as employees would have to route around Arkansas due to the ever-present risk of arrest for transporting the hemp or hemp products through the State. Therefore, Act 629 is unconstitutional under the Commerce Clause of the United States Constitution.

C. Defendants offer no explanation for Section 6's conflicting additions to Arkansas' Uniform Controlled Substances.

Defendants attempt to justify Section 6's addition of certain THCs and "synthetic" or "psychoactive" substances to Arkansas's Uniform Controlled Substances by arguing that "[t]he federal government does not have a Schedule VI under the Controlled Substances Act." ECF No. 38 at 15. Defendants are technically correct—the federal Controlled Substances Act does not have a Schedule VI—but that argument is unhelpful to Defendants' position. Defendants have conveniently omitted the fact that the 2018 Farm Bill removes all hemp derived THCs from federal controlled status. *See* 21 U.S.C. § 812(c)(17).

Act 629	Arkansas Law	Federal Law
Section 6 Uniform Controlled Substances Act – Substances in Schedule VI	A.C.A. § 5-64-215(a) (5) Synthetic substances, derivatives, or their isomers in the chemical structural classes described below in subdivisions (a)(5)(A)-(J) of this section and also specific unclassified substances in subdivision (a)(5)(K) of this section. Compounds of the structures described in this subdivision (a)(5), regardless of numerical designation of atomic positions, are included in this subdivision (a)(5). The synthetic substances, derivatives, or their isomers included in this subdivision (a)(5) are: (A) (i) Tetrahydrocannabinols, including without limitation the following: (a) Delta-1 cis or trans tetrahydrocannabinol, otherwise known as a delta-9 cis or trans tetrahydrocannabinol, and its optical isomers; (b) Delta-6 cis or trans tetrahydrocannabinol, otherwise known as a delta-8 cis or trans tetrahydrocannabinol, and its optical isomers; (c) Delta-3,4 cis or trans tetrahydrocannabinol, otherwise known as a delta-6a,10a cis or trans tetrahydrocannabinol, and its optical isomers; (d) Delta-10 cis or trans tetrahydrocannabinol, and its optical isomers; (e) Delta-8 tetrahydrocannabinol acetate ester; (f) Delta-9 tetrahydrocannabinol acetate ester; (g) Delta-6a,10a tetrahydrocannabinol acetate ester; (h) Delta-10 tetrahydrocannabinol acetate ester; (i) A product derived from industrial hemp that was produced as a result of a synthetic chemical process that converted the industrial hemp or a substance contained in the industrial hemp into delta-8, delta-9, delta-6a,10a, or delta-10 tetrahydrocannabinol including their respective acetate esters; and (j) Any other psychoactive substance derived therein.	The federal government does not have a Schedule VI under the Controlled Substances Act. 21 U.S.C. § 812.

As is clear from the highlighted language above, Section 6 attempts to criminalize THCs "without limitation" in hemp—and other products protected as hemp—in conflict with the 2018 Farm Bill. The 2018 Farm Bill "is unambiguous." *AK Futures LLC*, 35 F.4th

at 692. Its definition of hemp, for purposes of the exclusion of THCs in hemp from federal controlled status, "does not limit its application according to the manner by which [the THCs, as derivatives, extracts, or cannabinoids] are produced." *See id*. "Rather, [the definition] expressly applies to 'all' such downstream products so long as they do not cross the 0.3 percent delta-9 THC threshold." *Id.* (citing 7 U.S.C. § 1639*o*(1)). In other words, there is no "distinction based on manufacturing method." *Id*. It is "the source of the product—not the method of manufacture—[that] is the dispositive factor . . ." *Id*.

Section 6's criminalization of certain THCs, chemically converted products, and "psychoactive substances" as Schedule VI "synthetic substances" creates a distinction based on method of manufacture that the Ninth Circuit rejected in *AK Futures*, Section 6 conflicts with not only the plain language of the 2018 Farm Bill, but the plain language of Arkansas's own Industrial Hemp Production Act as well, which expressly states it does ***not*** regulate hemp processing practices or methodologies and is very clear that if ***any*** of its provisions conflict with federal law relating to hemp, the federal provisions control. *See* Ark. Code Ann. §§ 2-15-502(b) (Department of Agriculture lacks "authority to regulate hemp processing practices or methodologies") and 2-15-506 (federal law controls in the event of conflict with Arkansas law).

D. Defendants erroneously conflate hemp-derived cannabinoids with synthetic cannabinoids.

Despite the plain and unambiguous reading of the 2018 Farm Bill that removed all tetrahydrocannabinols in hemp from the Controlled Substances Act, Defendants assert that popular hemp-derived cannabinoids are the equivalent of "synthetic cannabinoids" based on an invented two prong standard. This invented standard relies on whether or not a compound occurs naturally in the plant and the type of manufacturing process (like

a chemical reaction) used. This invented standard ignores the plain reading of the 2018 Farm Bill that relegalized all extracts and derivatives of hemp.

For the first prong of the invented standard, Defendants state as a matter of fact without evidence that delta-9 THCO[3] and delta-8 THCO do not occur naturally in the plant. The science of testing hemp is still catching up to the market, and scientists do not even know how many cannabinoids are found in the plant. For an example, a recent abstract of a thesis exploring testing methods to properly identify unknown cannabinoids and isomers of cannabinoids discovered a structural isomer of delta-9 THCO in flower material. Mojisola Adisa, *Development of a Validated Method for High Throughput Quantification of up to Twenty Cannabinoids in Cannabis Cigarettes Using Liquid Chromatography Diode Array Detector with Optional Electrospray Ionization Time-of-Flight Mass Spectrometry*, DEP'T OF CHEMISTRY - WESTERN ILLINOIS UNIVERSITY (December 2022), courtesy copy attached as **Exhibit 1**.

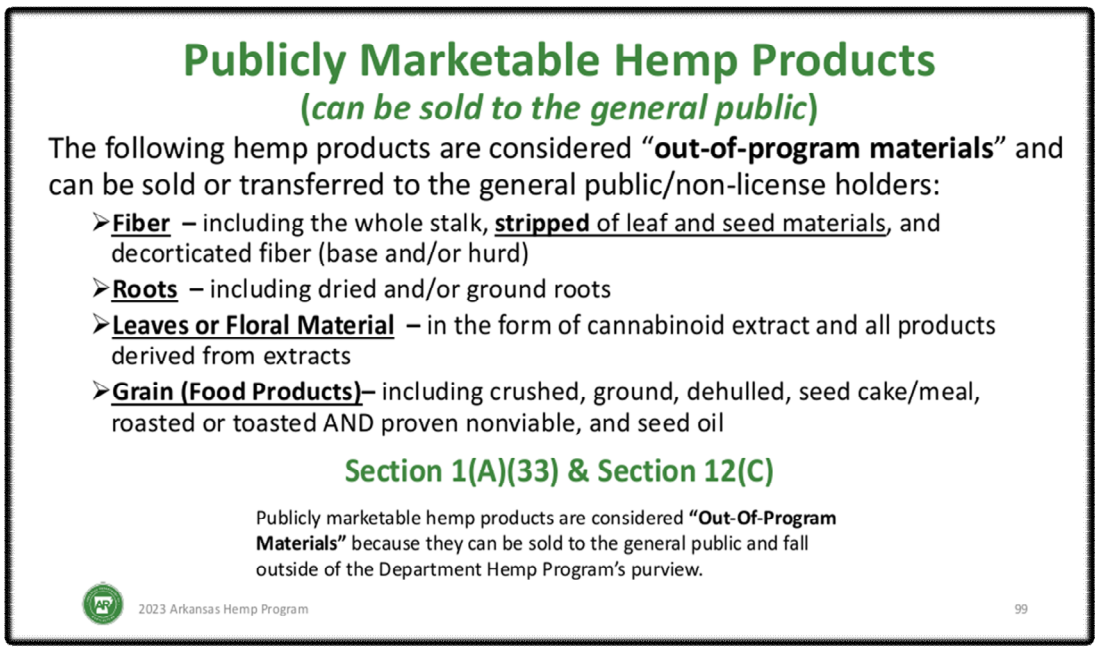
For the second prong of the invented standard, Defendants rely on DEA correspondence (Exhibit B to the Response) that states delta-8 THC ". . . produced from non-cannabis materials is controlled under the CSA as 'tetrahydrocannabinol.'" This private email exchange is dated August 12 and 13, 2021 and is in direct conflict with more publicly available guidance issued a month later to the Alabama Board of Pharmacy indicating delta-8 THC is in fact considered hemp so long as it is 0.3% or less delta-9 THC. *See* ECF No. 1-5. Defendants would have the Court believe that hemp-derived cannabinoids are the same as "synthetic cannabinoids," but these two substances are worlds apart. Plaintiffs agree that true synthetic cannabinoids—man-made products that

[3] To be clear, this case has nothing to do with Delta-8 THCO or any other synthetic product like "spice" or K2.

do not occur naturally—are dangerous and need to be controlled, and in fact they already are. Defendants conflate these two concepts, claiming on one hand that delta-8 THC occurs naturally in the cannabis plant in trace amounts and is 50-75% less potent than delta-9 THC, and simultaneously claiming synthetic cannabinoids are not naturally produced by the cannabis plant and are 100-800 times more potent than the THCs found naturally in the plant. Defendants cannot have it both ways. And despite several subsequent public statements from the DEA that indicate delta-8 THC derived from cannabis is not controlled so long as the delta-9 THC levels do not exceed 0.3%, Defendants instead rely on one sentence in an earlier-dated obscure private email from a DEA staff person to make their case.

To be clear, prior to Act 629, floral material, including cannabinoid extract and all products derived from extracts, were considered "out of program materials" and were allowed to be sold to the general public. In fact, as the below chart from Defendants' Exhibit A demonstrates, the hemp program rules currently in effect specifically permit the sale or transfer of consumable hemp products to the general public, both within and outside the state, without any special license or permit required, deeming them "publicly marketable hemp products."[4] The only compliance metric used for these out of program materials is the delta-9 THC concentration on a dry weight basis—just like the 2018 Farm Bill.

[4] The same information is currently available on the State of Arkansas's hemp program website at https://www.agriculture.arkansas.gov/plant-industries/feed-and-fertilizer-section/hemp-home/restrictions-on-sale-or-transfer/ (last visited Aug. 14, 2023).



Again, the Arkansas Industrial Hemp Act expressly states that if ***any*** of its provisions conflict with federal law relating to hemp, the federal provisions control. *See* Ark. Code Ann. § 2-15-506. Yet, Defendants have adopted the position that compliance with the 2018 Farm Bill now relies on an invented standard that is equal parts incoherent and unverifiable. Finally, this invented standard ignores the fact that the 2018 Farm Bill provided a path to market for all extracts and derivatives of hemp (going so far as to protect them in interstate commerce from individual states), and such an interpretation is in direct conflict with the plain reading of the 2018 Farm Bill.

II. THE CHANGES MADE BY THE ARKANSAS CODE REVISION COMMISSION MANIFESTLY CHANGED THE SUBSTANCE AND MEANING OF ACT 629, AND THEREFORE THE ORIGINAL WORDING OF THE ACT CONTROLS.

Defendants further allege that Act 629 does not unconstitutionally interfere with interstate commerce nor is it unconstitutionally vague due to certain revisions made by the Arkansas Code Revision Commission on June 13, 2023. *See* ECF No. 38 at 3. As originally enacted, Section 17 of Act 629 stated:

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

This provision is a trigger clause, and by altering the numerical section designations, the Commission altered the substance of the Act. Indeed, the Commission presumed that the General Assembly intended Sections 8-15, not 6-14, of the Act to become effective upon enjoining the enforcement of Sections 2-7, not 2-5, of the Act. *See* ECF No. 43-3. Because of this, the Commission altered the sections referenced in this trigger clause along with Section 16, indicating that such references constituted "manifest reference errors." *See id*.

While the Commission, in the process of codifying an Act, is permitted to make certain corrections to spelling, grammar, and clerical errors, "the commission shall not authorize any change in the substance or meaning of any provision of the Arkansas Code or any act of the General Assembly. The bureau [of legislative research] shall not change the substance or meaning of any provision of the Arkansas Code or any act of the General Assembly." Ark. Code Ann. § 1-2-303(d)(1) (emphasis added). Further, except for the clerical-type changes specifically listed in subsection (d)(1), "the wording, punctuation, and format of sections of acts shall appear in the Arkansas Code *exactly as enacted* by the General Assembly." Ark. Code Ann. § 1-2-303(d)(2) (emphasis added); *see also* Norman Singer & Shambie Singer, 2 SUTHERLAND STATUTORY CONSTRUCTION § 36A:1 (7th ed.) (Nov. 2018 update) ("The only truly authentic text of a statute is the exact wording of the act in the form in which it passed both houses of the legislature and was either approved by executive or passed over h[er] veto.").

Arkansas courts have consistently invalidated the Commission's amendments that change the substance and meaning of any provision of the Arkansas Code or any act of

the General Assembly. *See e.g.*, *Harrell v. State,* 2012 Ark. 421, at 4-5, 2012 WL 5462868 ("In reviewing the General Assembly's language and the codified version, it is apparent that the language of the General Assembly was substantially altered by the Arkansas Code Revision Commission."); *Falcon Cable Media LP v. Arkansas Pub. Serv. Comm'n*, 2012 Ark. 463, 11, 425 S.W.3d 704, 710–11 (holding that the Commission's substitution of the word "subchapter" for the word "act" "ha[d] the effect of altering the meaning of the statute, [and] the Code Revision Commission is not authorized to change the substance or meaning of any provision of the Arkansas Code or any act of the General Assembly"); *Porter v. Ark. Dep't of Health & Human Servs.*, 374 Ark. 177, 182, 286 S.W.3d 686, 691 (2008) ("The [Commission] lacked the authority to amend Act 441 in its codification—which became § 9-11-102(b)—in a manner that changed the meaning and substance of Act 441."); *Cox v. City of Caddo Valley,* 305 Ark. 155, 806 S.W.2d 6 (1991) (holding that, although the language of the statute was clear and unambiguous, the language of the act was controlling where the Code Revision Commission omitted a word that changed the meaning of the statute). Where the Commission exceeds its powers in amending an act, the original wording of the act controls. *Porter*, 374 Ark. at 183, 286 S.W.3d at 692.

The Commission lacked the authority to amend Act 629 in a manner that changed the meaning and substance of the Act. While the Commission has the authority to correct reference errors, its revision cannot "manifestly change[] the substance and meaning" of the Act. *Id.*, 286 S.W.3d at 691. Here, the Commission did exactly that by unilaterally amending Section 17 of Act 629 to change the sections of the Act that were to become effective upon the occurrence of a certain triggering event. Such a change goes beyond merely amending reference errors to completely altering the substance of the Act.

This is particularly true in context of Act 629. Act 629 contains a trigger clause, and altering the section references of a trigger clause directly alters its substance. In fact, Plaintiffs have been unable to locate *any* legislation containing a trigger clause that the Commission attempted to amend. The Commission, in revising Act 629 exceeded its powers, and, as a result, the original wording of Act 629 controls. And if not, the Commission's revisions only serve to render Act 629 all the more vague.

A. The interstate commerce provisions from Sections 7 and 10 of Act 629 are not in effect until Section 2-5 of the Act are enjoined.

Given that the language of Act 629 as originally passed by the General Assembly controls, Sections 7 and 10 of Act 629, which attempt, but fail, to cure the Act's impermissible interference with the interstate transportation and shipment of hemp and hemp products, are not currently effective until Sections 2-5 are enjoined as contemplated in Section 17. As a result, no such attempted protection of the transportation of hemp and hemp products is currently in effect, and, thus, Act 629 additionally interferes with the interstate transportation and shipment of hemp and hemp products in direct violation of the express language of the 2018 Farm Bill.

Moreover, even the Code referenced in Defendants' exhibit indicates that the language from Section 7 of the Act is not currently in effect and is only effective if the contingency in Section 17 of Act 629 is met. *See* ECF No. 43-5 at 57; *see also* Ark. Code Ann. § 20-56-412. As discussed above, because the 2018 Farm Bill expressly preempts any prohibition on the interstate transport of hemp and hemp products, Act 629 is unconstitutional under the Supremacy Clause of the United States Constitution.

B. Act 629 remains unconstitutionally vague and constitutes a regulatory taking.

Additionally, given that the language of Act 629 as originally passed by the General Assembly controls, the Act is unconstitutionally vague as those internal inconsistencies remain which prevent a person of average intelligence from knowing whether the possession, transportation, or shipment of hemp or hemp-derived products is subject to criminal punishment. Moreover, besides those internal inconsistencies, Act 629 is unconstitutionally vague for various other reasons as previously outlined in Plaintiffs' Motion for Temporary Restraining Order or Alternative Motion for Preliminary Injunction.

Additionally, as fully explained above, Act 629 does in fact change the definition of hemp from that of the 2018 Farm Bill. But Act 629 does not define "psychoactive substance," and Defendants' attempt to rely on the DEA's interpretations is misplaced. *See* ECF No. 38 at 30. The DEA fact sheet that Defendants cite does not define "psychoactive substance." Instead, it defines "marijuana" as "a mind-altering (psychoactive) drug, produced by the Cannabis sativa plant."[5] A psychoactive substance is commonly defined as "any substance that interacts with the central nervous system," which includes nicotine, alcohol, and caffeine.[6] Hemp products containing 0.3% or less THC and even CBD isolate with no THC could therefore be considered "psychoactive substances," which are banned by Act 629.[7]

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[5] Marijuana/Cannabis, DOJ/DEA Drug Fact Sheet, https://www.dea.gov/sites/default/files/2020-06/Marijuana-Cannabis-2020_0.pdf (last visited Aug. 13, 2023).

[6] https://www.medicalnewstoday.com/articles/types-of-psychoactive-drugs#risks (last visited Aug. 13, 2023).

In response to Plaintiffs' allegation that Act 629 constitutes a regulatory taking, Defendants direct the Court to review Section 10 which states that a hemp-derived product "shall not be combined with or contain any of the following: . . . Any amount of tetrahydrocannabinol as to create a danger of misuse, overdose, accidental overconsumption, inaccurate dosage, or other risk to the public." However, it is unclear what amount of tetrahydrocannabinol Defendants believe constitutes a "danger of misuse" or a "risk to the public." This metric is also vague. This prohibition could potentially include hemp-derived products that contain 0.3% or less of delta-9 tetrahydrocannabinol as encompassed by the broad definition of hemp under the 2018 Farm Bill. 7 U.S.C. § 16390(1).

Act 629's threat of irreparable harm has become a reality for Plaintiffs. Specifically, one of the retail stores of Plaintiff Drippers Vape Shop was inspected by an Arkansas Tobacco Control officer on August 7, 2023. *See* **Exhibit 2**, *Declaration of Scout Stubbs* (Drippers Vape Shop, LLC). The officer directed the company's employees to remove a hemp product containing 0.3% or less of delta-9 THC, regardless of whether that product was naturally extracted or produced as a result of routine chemical processes. *Id*. This enforcement action shows that the Act not only recriminalizes all hemp products "produced as a result of a synthetic chemical process" but also "[a]ny other psychoactive substance derived [from hemp]," including those hemp products purportedly permitted under the Act, naturally derived hemp products containing 0.3%

[7] Ian Stewart, *It's Time to Set the Record Straight – CBD Is Psychoactive*, https://www.mondaq.com/unitedstates/food-and-drugs-law/809252/its-time-to-set-the-record-straight--cbd-is-psychoactive (last visited Aug. 13, 2023); *see also* https://www.goodrx.com/classes/cannabinoids/does-cbd-get-you-high (last visited Aug. 13, 2023).

or less of delta-9 THC, and even CBD isolate. Therefore, Act 629 constitutes a regulatory taking as it impermissibly deprives Plaintiffs of all, or substantially all, beneficial economic use of their businesses without just compensation.

Inconsistent with a plain reading of Act 629, Defendants state in their Response that "assuming Plaintiffs were already compliant with Arkansas law in their cultivation and sale of help products, there should be no change in their business. If instead their inventory contains synthetic cannabinoids that exceeds the required concentration of delta-9 THC, it is already illegal under both Arkansas and federal law." ECF No. 38 at 31. Plaintiffs cannot take the word of Defendants in their Response as to how to interpret Act 629. The Act appears on its face to recriminalize all hemp products "produced as a result of a synthetic chemical process" – including delta-8, along with "[a]ny other psychoactive substance derived [from hemp]." Demonstrating the public confusion involving Act 629, even Arkansas Tobacco Control officers appear to be inconsistently enforcing the Act. On its face, Act 629 contains numerous internal inconsistencies and fails to provide notice as to what contemplated conduct is forbidden and what is permitted with regard to production, possession, transportation, and shipment of hemp and hemp products it seeks to ban. Therefore, Act 629 is unconstitutional, and the Act should be enjoined.

CONCLUSION

As set forth in Plaintiffs' Motion, Brief, and this Reply, Act 629 is unconstitutional because it is (1) preempted by the 2018 Farm Bill, which solidifies the broad definition of hemp and declares hemp and all derivatives and isomers thereof legal; (2) is preempted by the 2018 Farm Bill by precluding the interstate commerce of hemp; (3) impermissibly restricts the interstate commerce of hemp in violation of the Commerce Clause; (4) its regulatory scheme results in an impermissible regulatory taking, effectively creating a

total ban of hemp containing any amount of tetrahydrocannabinol and thus infringing upon Plaintiffs' businesses; and (5) is void for vagueness due to its failure to provide clarity and fair warning to persons of ordinary intelligence as to its requirements. Moreover, Plaintiffs will be irreparably harmed unless Act 629 is enjoined, and the balance of equities favors entry of an injunction enjoining the Act. Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for a Temporary Restraining Order, or in the alternative, Preliminary Injunction, and for all other just and equitable relief.

Respectfully submitted,

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