

**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**

**DEFENDANTS' BRIEF ON THE EXISTENCE OF A PRIVATE RIGHT OF ACTION**

On August 18, 2023, the Court directed the parties to brief “whether the 2018 Farm Act creates a private right for Plaintiffs to possess and sell hemp and hemp products, either under Section 1983 or as an implied cause of action under the 2018 Farm Act itself.”

The Agriculture Improvement Act of 2018 (“Farm Bill”) does not create a private right of action for Plaintiffs to possess and sell hemp and hemp-derived products. Congress did not use

rights-creating language in the law, nor did it provide for a private remedy. Both are necessary before a private party can enforce a federal statute. *Alexander v. Sandoval*, 532 U.S. 275 (2001). Accordingly, the Court lacks subject matter jurisdiction over this matter. And further, Plaintiffs cannot meet their burden of establishing success on the merits to show entitlement to a temporary restraining order or preliminary injunction.

#### **BACKGROUND**

Plaintiffs challenge Act 629 by alleging it violates the Farm Bill, which authorizes states and Indian tribes to legalize hemp and regulate its production within their borders but generally precludes states from interfering with the interstate transportation of hemp. *See* 7 U.S.C. §§ 1639o-1639s. On July 31, 2023, Plaintiffs moved for a temporary restraining order (TRO) and preliminary injunction seeking to prevent the enforcement of Act 629 in its entirety, i.e., Sections 2-7 that became effective on August 1, 2023, and Sections 8-16, which become effective only upon the contingency being met as stated in Section 17. Plaintiffs claim they are entitled to a TRO and preliminary injunction because Act 629 conflicts with the Farm Bill and the Supremacy and Commerce Clauses of the Constitution of the United States, constitutes an impermissible regulatory taking, and is void for vagueness in violation of the Due Process Clause of the Fifth and Fourteenth Amendments. *See* Amend. Compl. 30 ¶ 126 (Doc. 51). They also contend this action is brought pursuant to 42 U.S.C. § 1983. *Id.* at 5 ¶ 11.

Plaintiffs, among other things, must demonstrate a likelihood of success on the merits to prove entitlement to a TRO and preliminary injunction. As a threshold matter bearing on this issue is whether Plaintiffs have a judicially enforceable right under the Farm Bill. *See generally Does v. Gillespie*, 867 F.3d 1034, 1039 (8th Cir. 2017). If the Farm Bill does not create an enforceable

federal right, then Plaintiffs cannot sue under § 1983 and there is no likelihood of success on the merits. *Id.*

#### ARGUMENT

For a federal district court to hear and decide a lawsuit, it must have subject-matter jurisdiction over the suit. This jurisdiction is conferred on the court by statute. *Patchak v. Zinke*, 138 S. Ct. 897, 907 (2018) (“[W]ith limited exceptions, a congressional grant of jurisdiction is a prerequisite to the exercise of judicial power.”); *see also Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (noting that a court acting “beyond the bounds of authorized judicial action . . . offends fundamental principles of separation of powers”).

Plaintiffs allege jurisdiction under 28 U.S.C. § 1331, which grants jurisdiction to federal district courts over all civil actions arising under federal law. “A claim arises under federal law ‘when federal law creates a private right of action and furnishes the substantive rules of decision.’” *Cross v. Fox*, 23 F.4th 797, 800 (8th Cir. 2022) (quoting *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 378 (2012)). “If the plaintiff brings a claim under a federal statute that does not authorize a private right of action, the statute will not support jurisdiction under § 1331.” *Cross*, 23 F.4th at 800 (citing *Anthony v. Cattle Nat’l Bank & Tr. Co.*, 684 F.3d 738, 739 (8th Cir. 2012) (affirming a ruling that “federal-question jurisdiction did not exist” because 12 U.S.C. § 1831n “does not create a private right of action”); *Lakes & Parks All. of Minneapolis v. Fed. Transit Admin.*, 928 F.3d 759, 761-63 (8th Cir. 2019) (treating absence of a private right of action as fatal to jurisdiction); *Dillon v. Combs*, 895 F.2d 1175, 1177 (7th Cir. 1990) (“A federal rule of decision is necessary but not sufficient for federal jurisdiction. There must also be a right of action to enforce that rule.”). Further, “[a] court does not obtain subject-matter jurisdiction just because a plaintiff raises a federal question in his or her complaint. If the asserted basis of federal jurisdiction is

patently meritless, then dismissal for lack of jurisdiction is appropriate.” *Cross*, 23 F.4th at 800 (quoting *Biscanin v. Merrill Lynch & Co.*, 407 F.3d 905, 907 (8th Cir. 2005) (citations omitted)). Finding that the federal statute at issue did not contain a private right of action to seek injunctive or declaratory relief in federal court, the Eighth Circuit held the district court lacked subject matter jurisdiction under 28 U.S.C. § 1331, affirming dismissal. *Cross*, 23 F.4th at 800.

**I. The 2018 Farm Bill does not create an express private right of action for Plaintiffs to possess and sell hemp and hemp-derived products.**

Plaintiffs allege subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. Jurisdictional statutes do not create private rights of action. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 (1979) (“The source of plaintiffs’ rights must be found, if at all, in the substantive provisions of the [statute] which they seek to enforce, not in the jurisdictional provision.”); *see also Ohlendorf v. United Food & Com. Workers Int’l Union*, 883 F.3d 636, 642 (6th Cir. 2018) (citing *Touche Ross & Co.*, 442 U.S. at 577).

Congress neither created an express private right of action in the 2018 Farm Bill nor furnished the substantive rules of decision. *Serna v. Denver Police Department*, 58 F.4th 1167, 1168-69 (10th Cir. 2023). As a result, Plaintiffs’ claims do not arise under federal law, and none of the jurisdictional statutes identified by Plaintiffs confer jurisdiction on this Court. *Touche Ross & Co.*, 442 U.S. at 577.

**II. The 2018 Farm Bill does not create an implied private right of action for Plaintiffs to possess and sell hemp and hemp-derived products.**

The court should not imply a private right of action to enforce the 2018 Farm Bill where Congress has not expressly provided one. The Supreme Court has made clear that judicially implied private rights of action are extremely disfavored. *See Alexander v. Sandoval*, 532 U.S. 275 (2001); *see also Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Stoneridge Inv. Partners, LLC v.*

*Scientific-Atlanta*, 552 U.S. 148 (2008); *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). To establish an implied cause of action, Plaintiffs must show that Congress intended such authorization. *Sandoval*, 532 U.S. at 286–87. *Sandoval* outlines the strict requirements for when a court may imply a private right of action to enforce a statutory provision. *Sandoval*, 532 U.S. at 286–88. Specifically, Plaintiffs must show the 2018 Farm Bill “displays an intent to create not just a private right but also a private remedy.” *Serna*, 58 F.4th at 1170 (quoting *Sandoval*, 532 U.S. at 286). “Unless the statute expresses an intent to create both a private right and a private remedy, ‘a cause of action does not exist and [the Court] may not create one, no matter how desirable that might be as a policy matter.’” *Serna*, 58 F.4th at 1170 (quoting *Sandoval*, 532 U.S. at 286-87).

Applying these principles, the Tenth Circuit affirmed in January 2023 that the 2018 Farm Bill, including § 10114(b) regarding interstate commerce, does not create a private cause of action. *Serna*, 58 F.4th at 1170. The analysis began with the express language of the text, noting that “[t]o express such an intent, Congress must use ‘rights-creating’ language,’ which is language that ‘explicitly confers a right directly on a class of persons that includes [Plaintiffs].’” *Serna*, 58 F.4th at 1170-71 (quoting *Sandoval*, 532 U.S. at 288; and quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690 n.13 (1979)). Stated differently, the language of the 2018 Farm Bill must “create a federal right in [Plaintiffs] favor.” *Serna*, 58 F.4th at 1171 (citing *Cannon*, 441 U.S. at 688, quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

Explaining its findings in *Serna*, the Tenth Circuit stated:

[Plaintiff] asserts that § 10114(b) “creates a private right for licensed farmers to be free from state and tribal interference with the interstate transportation of their industrial hemp.” But § 10114(b) makes no mention of this purported class of “licensed hemp farmers.” It does not say, for example, that “licensed hemp farmers may transport hemp interstate,” or that “no person shall prevent licensed hemp farmers from transporting hemp interstate.” Instead, it says that “no *state or Indian tribe* shall prohibit the transportation

or shipment of hemp” through their territory. § 10114(b). *Sandoval* makes clear that such language, which “focuses on the person regulated rather than the individuals protected,” does not imply “‘an intent to confer rights on a particular class of persons.’” 532 U.S. at 289 (quoting *California v. Sierra Club*, 451 U.S. 287, 294 (1981)); see also *Sierra Club*, 451 U.S. at 294 (finding no intent to create private cause of action in statute that provided “a general proscription of certain activities,” with no “focus on any particular class of beneficiaries whose welfare Congress intended to further”).

*Serna*, 58 F.4th at 1171 (internal citations to briefing omitted) (emphasis in original). The Tenth Circuit held the text of the 2018 Farm Bill did not create an express or implied private right of action.

### **III. Plaintiffs cannot sustain a cause of action under Section 1983.**

For the same reasons, the 2018 Farm Bill does not create a federal right for Plaintiffs that can be enforced under 42 U.S.C. § 1983. “Section 1983 provides a cause of action against any person who, under color of law, subjects a citizen to the deprivation of any rights secured by the laws of the United States.” *Does v. Gillespie*, 867 F.3d 1034, 1039 (8th Cir. 2017). Section 1983 generally provides a remedy for violations of rights arising from federal statutes. *Id.* (citing *Maine v. Thiboutot*, 448 U.S. 1, 4–8 (1980)). A plaintiff relying on federal law must show Congress created an enforceable federal right in order to bring an action under § 1983. *Gillespie*, 867 F.3d at 1039 (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002)).

Here, Plaintiffs contend that the Farm Bill creates an enforceable federal right. As demonstrated above, Plaintiffs must show Congress used rights-creating language in the Farm Bill and Congress provided for a private remedy. *Sandoval*, 532 U.S. at 286-88. The Farm Bill does not provide for a private remedy. Assuming arguendo that § 1983 creates a private remedy, the Farm Bill does not contain any rights-creating language.

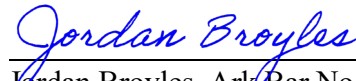
**CONCLUSION**

In light of the foregoing arguments and authorities, the Court should find that there exists no express or implied private right of action for Plaintiffs under the 2018 Farm Bill. Therefore, the Court is without jurisdiction to hear and decide this matter.

Consequently, for these reasons as well as those articulated in Defendants' Motion to Dismiss and Response in Opposition to Plaintiffs' Motion for Temporary Restraining Order and alternative Motion for Preliminary Injunction, Plaintiffs do not have a likelihood of success on the merits of their claims.

Respectfully submitted,

TIM GRIFFIN  
Attorney General



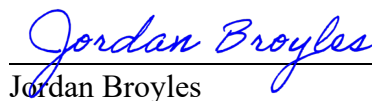
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**CERTIFICATE OF SERVICE**

I, Jordan Broyles, hereby certify that on August 22, 2023, I electronically filed the foregoing pleading on behalf of all Defendants using the CM/ECF system, which will send notifications to all attorneys of record.

  
Jordan Broyles