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' SUPPLEMENTAL BRIEF

On August 18, 2023, the Court directed the parties to provide supplemental briefing on whether the 2018 Farm Bill creates a private right for Plaintiffs to bring suit, either under 42 U.S.C § 1983 or as an implied cause of action under the 2018 Farm Bill. Plaintiff's Supplemental Brief is submitted pursuant to the Court's Order.

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I. INTRODUCTION

There is no express private cause of action under the 2018 Farm Bill; and the few courts to have directly considered whether claims under § 1983 or the implication doctrine can proceed have yet to till that soil. But this case presents the most fertile ground to recognize Plaintiffs' rights to obtain a narrow, limited remedy under the 2018 Farm Bill, and the Court's equitable powers supply abundant bases to grant them the relief requested. The following explains why.

II. BACKGROUND

The 2018 Farm Bill is a half-trillion-dollar omnibus bill. Agriculture Improvement Act of 2018, Pub. L. No. 115-334 (2018); Keith Hall, Cong. Budget Off., Pub. 54880, Direct Spending and Revenue Effects for the Conference Agreement on H.R. 2, Agriculture Improvement Act of 2018 (Dec. 11, 2018), *available at* https://www.cbo.gov/publication/54880 (estimating spending under the Farm Bill at "$428 billion over the 2019-2023 period and $867 billion over the 2019-2028 period"). The 2018 Farm Bill is the primary mechanism by which the federal government controls agriculture and food policy, *see* Amy E. Mersol-Barg, Note, *Urban Agriculture & the Modern Farm Bill: Cultivating Prosperity in America's Rust Belt*, 24 DUKE ENVTL. L. & POL'Y F. 279, 295-300 (2013), and it has significant impacts on what crops are grown, how, and where, all of which impact local economies, public health, the environment, and food safety. *Id.*

The 2018 Farm Bill included funding for many significant programs, such as rural development, organic agriculture, and African-American land grant institutions of higher education, to help promote the growth and economic sustainability of American farming. Chad G. Marzen, *The 2018 Farm Bill: Legislative Compromise in the Trump Era*, 30

FORDHAM ENVTL. L. REV. 49, 82-83 (2019). As another way to promote the economic health of America's farmers, the 2018 Farm Bill opened the door for farmers to grow a new kind of cash crop: industrial hemp. 2018 Farm Bill, at § 12619 (removing hemp from the Controlled Substances Act and creating federal and state structures to manage and promote industrial hemp growth).

Industrial hemp is used in thousands of products, including construction materials, cosmetics, and pharmaceuticals. RENEE JOHNSON, CONG. RESEARCH SERV., RL32725, HEMP AS AN AGRICULTURAL COMMODITY 2-3; *see also* 164 CONG. REC. S108, 4459-60 (daily ed. June 27, 2018) (statement of Sen. McConnell) (citing the use of hemp in a wide variety of industries). Hemp would allow most farmers to diversify their crops, 164 CONG. REC. S109, 4704 (daily ed. June 28, 2018) (statement of Sen. Leahy), because it would fit in most farmers' existing crop rotations across the country. 164 CONG. REC. S108, 4480 (June 27, 2018) (statement of Sen. Tester).

The most vociferous support of the legalization of hemp in the Senate came from then-Senate majority leader Mitch McConnell. Senator McConnell cited a large demand for hemp among American consumers, but explained that "thanks to heavy-handed regulations" on hemp farming in the United States, consumers had no choice but to import hemp from foreign producers if they wished to have a sufficient quantity for their needs. 164 CONG. REC. S108, 4459-60 (daily ed. June 27, 2018). Given the vast demand for hemp products, Senator McConnell expressed hope that hemp could serve as a cash crop which could reinvigorate the struggling American farm economy. *Id.*

The 2018 Farm Bill was not the first time Congress had addressed hemp. The 2014 Farm Bill included pilot programs for hemp cultivation to encourage research into the feasibility of hemp as an industrial crop. RENEE JOHNSON, CONG. RESEARCH SERV., R44742,

DEFINING HEMP: A FACT SHEET 4 (2019), *available at* https://crsreports.congress.gov/product/pdf/R/R44742; John Hudak, *The Farm Bill, Hemp Legalization, and the status of CBD: An Explainer*, BROOKINGS INST. (Dec. 14, 2018), https://www.brookings.edu/blog/fixgov/2018112114/the-farm-bill-hemp-and-cbd-explainer/. But because hemp was still illegal in many states at that time, it often could not be transported across state lines without running the risk of being seized and destroyed by state police. *See Big Sky Sci. LLC v. Idaho State Police*, 2019 WL 2613882, at *1 (D. Idaho Feb. 19, 2019) (Idaho police seized 13,000 pounds of industrial hemp being transported across Idaho from Oregon to Colorado), *rev'd sub nom. Big Sky Sci. LLC v. Bennetts*, 776 F. App'x 541 (9th Cir. 2019).

To solve this specific problem and further promote hemp farming, Congress included Subtitle G of Title X of the 2018 Farm Bill, now codified as 7 U.S.C. §§ 16390-1369s. That Subtitle did three things. First, Congress modified the definition of hemp, which "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 growing or not, with a delta-9 [THC] concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 1639*o*(1). Congress also removed "hemp" from the definition of marijuana in the Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970). Specifically, "the term 'marihuana' means all parts of the plant Cannabis sativa L . . .. [, but] does not include . . . hemp." 21 U.S.C. § 802(16). The Conference Report for the 2018 Farm Bill makes it clear that Congress intended to preclude states from adopting a more restrictive definition of hemp in an attempt to criminalize it: "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." H.R. Conf. Rep. No. 115-1072, at 738 (2018). The only statutory metric for distinguishing controlled marijuana from legal hemp is the delta-9 THC concentration level. In addition, the definition extends beyond just the plant to "all derivatives, extracts, [and] cannabinoids." 7 U.S.C. § 1639*o*(1).[1]

Second, the 2018 Farm Bill enabled farmers in every state to grow industrial hemp in a federally compliant manner. *See* 7 U.S.C. § 1639p(a)(1) (allowing states to create regulatory plans, subject to approval by the Secretary of Agriculture); 7 U.S.C. § 1639q(a)(1) (requiring the Secretary of Agriculture to create a regulatory scheme for states that do not submit their own for approval). Since the 2018 Farm Bill also removed hemp from the Controlled Substances Act, farmers may now process, market, and sell their hemp and hemp products across the country. JOHNSON, CONG. RESEARCH SERV. R44742, at 5.

Third, Congress recognized that just legalizing hemp was insufficient. Congress also had to ensure that state lawmakers with different priorities would not interfere with hemp producers. Accordingly, Congress made clear that "no State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products . . . through the State or the Territory of the Indian Tribe," as long as the hemp in question was grown in compliance with the other provisions of Subtitle G. 2018 Farm Bill, at § 10114(b).

[1] And to resolve any doubt about its intent, Congress amended the statutory definition of "tetrahydrocannabinols" to exclude "tetrahydrocannabinols in hemp." 21 U.S.C. § 812(c) (Schedule I (c)(17)). The difference between "tetrahydrocannabinols in hemp" and "tetrahydrocannabinols . . . that fall [] within the definition of hemp" is manifest: The phrase "tetrahydrocannabinols in hemp" excludes all tetrahydrocannabinols in hemp, even if those tetrahydrocannabinols considered in isolation would not meet the definition of hemp. The phrase "tetrahydrocannabinols . . . that fall[] within the definition of hemp," by contrast, excludes tetrahydrocannabinols in hemp only if those tetrahydrocannabinols considered in isolation meet the definition of hemp.

Responding in 2019, the USDA issued legal guidance articulating that the provision was intended to preempt any state prohibitions on transportation of hemp. *See* Memorandum from Stephen Alexander Vaden, General Counsel, U.S.D.A. (May 28, 2019), *available at* https://www.ams.usda.gov/sites/default/files/HempExecSumandLegalOpinion.pdf.

Notably, the 2018 Farm Bill was sent to a conference committee upon the passage of differing versions of the Bill in the House and Senate. Subtitle G to the House Bill included two sections that relate specifically to the issue of an express or implied private right of action. First, "[c]onsistent with article I, section 8, clause 3 of the Constitution of the United States," the House Bill expressly prevented state governments from imposing "a standard or condition on the production or manufacture of any agricultural product sold or offered for sale in interstate commerce if—(1) such production or manufacture occurs in another State; and (2) the standard or condition is in addition to the standards and conditions applicable to such production or manufacture pursuant to—(A) Federal law; and (B) the laws of the State and locality in which such production or manufacture occurs." 2018 Farm Bill, at § 11701.

Second, the House Bill expressly adopted a private right of action for any person "affected by a regulation of a State or unit of local government which regulates any aspect of an agricultural product, including any aspect of the method of production, which is sold in interstate commerce, or any means or instrumentality through which such an agriculture product is sold in interstate commerce" to bring an action "to invalidate such a regulation and seek damages for economic loss resulting from such regulation." *Id.* at § 11702. The House Bill included a mechanism through which a plaintiff could obtain a preliminary injunction unless the government could prove by clear and convincing evidence that it was likely to prevail and that an injunction would cause irreparable harm.

Id. The Senate Bill contained no comparable provision, and although the House expressly contemplated the necessity of a private right of action to enforce the 2018 Farm Bill's protections for hemp in interstate commerce, the Conference did not accept the House provision. H.R. Conf. Rep. No. 115-1072, *available at* https://docs.house.gov/billsthisweek/20181210/Joint%20Explanatory%20Statement.pdf.

III. ANALYSIS

"Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England. Louis L. Jaffe & Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. Rev. 345 (1956).

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Shaw v. Delta Air Lines, 463 U.S. 85, 96 n. 14 (1983) (citations omitted). In *Lewis v. Alexander*, the Third Circuit described *Shaw* as "Supreme Court precedent [that] establishes that the Supremacy Clause creates an independent right of action where a party alleges preemption of state law by federal law." 685 F.3d 325, 345-46 (3d Cir. 2012). The Supreme Court has never held or even suggested that, in its application to state officers, that this equitable power rests upon an implied right of action contained in the

Supremacy Clause. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

Equitable preemption actions differ from suits brought by plaintiffs invoking 42 U.S.C. § 1983 or an implied right of action to enforce a federal statute. Suits for "redress designed to halt or prevent the constitutional violation rather than the award of money damages" seek "traditional forms of relief." *United States v. Stanley*, 483 U.S. 669, 683 (1987). By contrast, a plaintiff invoking § 1983 or an implied statutory cause of action may seek a variety of remedies from a potentially broad range of parties. Because an equitable preemption claim does not seek to enforce a statutory right, "[t]he injured party does not need § 1983 to vest in him a right to assert that an attempted exercise of jurisdiction or control violates the proper distribution of powers within the federal system." *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 114 (1989) (Kennedy, J., dissenting). Stated differently, whether a statute is enforceable through § 1983 or otherwise creates an implied right of action is irrelevant to the *Ex parte Young* context.

Indeed, while States are generally immune from suit under the terms of the Eleventh Amendment and the doctrine of sovereign immunity, *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021); *Alden v. Maine*, 527 U.S. 706, 713 (1999), the Supreme Court has long held that common and traditional notions of equity allow certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law. *Ex parte Young*, 209 U.S. 123, 159–160 (1908). For instance, in *Ex parte Young*, Minnesota enacted a law mandating low railroad rates while also imposing high monetary penalties and imprisonment on any involved agent of the railroad. *Id.* at 127. One day before the statute was set to take effect, the carriers filed suit in federal district court and requested an injunction against the

Minnesota Attorney General from enforcing the penalties and remedies of the rate-statute. Because Young's response rested on an assertion that the federal court lacked jurisdiction in the dispute, the federal court held Young in contempt. *Id.* at 142. When the dispute reached the Supreme Court on the jurisdictional issue, the Court held that the sovereign immunity of the State of Minnesota did not prevent a federal suit asking that a relevant state official be enjoined from enforcing a state law which was alleged to violate the U.S. Constitution. Such a suit was not a suit against the state (and, therefore, in violation of the State's sovereign immunity) because an illegal act is by definition not an action of the sovereign state. *Id.* at 167. On this basis, the Court denied the petition requesting it to declare void the federal trial court's attempt to bring Young before the federal court. *Id.*

The essence of the *Ex Parte Young* doctrine is that a federal court may hear a case asking for prospective injunctive relief (even though the party enjoined is effectively a sovereign who has not waived its sovereign immunity) where the case names the relevant government official as the defendant. The Court teaches that "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (internal editing, quotation marks, and citation omitted). Plaintiffs' Amended Complaint alleges an ongoing violation of the 2018 Farm Bill and seeks relief properly characterized as prospective—an injunction.

Even beyond *Ex parte Young*, the Court should find that—as applied to Plaintiffs here—the 2018 Farm Bill creates a private right for Plaintiffs to bring suit under both 42 U.S.C § 1983 as well as under the implication doctrine.

A. Section 1983 is an Appropriate Procedural Vehicle Through Which to Enjoin the Enforcement of an Illegal State Law that Conflicts with Preemptive Federal Law.

Section 1983 provides a federal remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. As the language of the statute plainly indicates, the remedy encompasses violations of federal statutory as well as constitutional rights. The Supreme Court has held that the coverage of the statute must be broadly construed. *See*, *e.g., Felder v. Casey*, 487 U.S. 131, 139 (1988). And as the Supreme Court has recognized, § 1983 can presumptively be used to enforce federal rights unless a private right of action would thwart the enforcement mechanism that the rights-creating statute contains for protection of the rights it has created. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U. S. 246, 253-55 (2009); *Gonzaga Univ. v. Doe*, 536 U. S. 273, 284, & n. 4 (2002).

In *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980), the Court held that § 1983 provides a cause of action for violations of federal statutes as well as the Constitution. There are two exceptions to this rule. A plaintiff alleging a violation of a federal statute will be permitted to sue under § 1983 unless (1) "the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983," or (2) "Congress has foreclosed such enforcement of the statute in the enactment itself." *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423 (1987). This is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute. *See Cort v. Ash*, 422 U.S. 66 (1975) (four factor test to determine whether

"Congress intended to create the private remedy asserted" for the violation of statutory rights). The *Cort* test reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes. *See, e.g., Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring in judgment); *Cannon v. University of Chicago*, 441 U.S. 677, 742-49 (1979) (Powell, J., dissenting). Because § 1983 provides an "alternative source of *express* congressional authorization of private suits," *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981), these separation-of-powers concerns are not present in a § 1983 case. Consistent with this view, § 1983 provides a remedy for violation of unambiguously conferred federal rights unless Congress has affirmatively withdrawn the remedy. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990) (citations omitted).[2]

"Section 1983 speaks in terms of rights, privileges, or immunities, not violations of federal law." *Id.* at 509 (citations and internal quotations omitted). Whether the 2018 Farm Bill creates any "federal rights" enforceable under § 1983 turns on whether "the provision in question was intend[ed] to benefit the putative plaintiff." *Id.* (citations omitted). If so, the provision creates an enforceable right unless it reflects merely a "congressional preference" for a certain kind of conduct rather than a binding obligation on the governmental unit, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 19 (1981), or unless the interest the plaintiff asserts is "too vague and amorphous" such that

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[2] *Wilder* has never been overruled; however, the Eighth Circuit held in *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017) that the Supreme Court in *Gonzaga* functionally repudiated *Wilder*'s holdings that permitted a § 1983 action to proceed in the absence of an unambiguously conferred right. Plaintiffs' discussion of *Wilder* here comports with the Eighth Circuit's reading of *Gonzaga*.

it is "beyond the competence of the judiciary to enforce." *Wilder*, 496 U.S. at 509 (citations omitted).

The availability of administrative mechanisms to protect the plaintiff's interests is not necessarily sufficient to demonstrate that Congress intended to foreclose a § 1983 remedy. *Wright*, 479 U.S. at 425-28. Rather, the statutory framework must be such that "[a]llowing a plaintiff" to bring a § 1983 action "would be inconsistent with Congress' carefully tailored scheme." *Golden State Transit Corp.*, 493 U.S. at 106 (citations omitted). The burden to demonstrate that Congress has expressly withdrawn the remedy is on the defendant. *Id.* at 107. The Court does not "lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." *Id.* at 107 (citations omitted).

Here, nothing in the 2018 Farm Bill expressly forecloses private enforcement under § 1983. In the absence of such an express provision, the Court has found private enforcement foreclosed where the statute itself creates a remedial scheme that is "sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Middlesex County*, 453 U.S. at 20. The 2018 Farm Bill contains no "sufficiently comprehensive" regulatory scheme that could, should, or would displace private enforcement under § 1983.

Instead, the 2018 Farm Bill contemplates a contingent regulatory scheme whereby States that wish to have "primary regulatory authority over the production of hemp in the State . . . shall submit to the [federal] Secretary [of Agriculture] . . . a plan" that includes monitoring land on which hemp is produced, a procedure for testing delta-9 tetrahydrocannabinol concentrations, and procedures for disposal, compliance with enforcement mechanisms, inspections, and information sharing. 7 U.S.C. § 1639p(a)(1).

These plans can be denied by the Secretary of Agriculture, 7 U.S.C. § 1639q(a)(1), and in that case, the default federal plan will apply. But nothing in the 2018 Farm Bill indicates that Congress intended for some contingent administrative framework to replace or limit injunctive remedies available under § 1983, and limited state administrative procedures cannot be considered a "comprehensive" scheme that manifests a congressional intent to foreclose reliance on § 1983. *See Wright*, 479 U.S., at 429 (availability of grievance procedure did not prevent resort to § 1983). While no State is required to regulate hemp production, Congress was clear that any State interested in adopting more stringent production regulations cannot change the definition of hemp, inhibit the interstate commerce of hemp, or "prohibit the transportation of hemp or hemp products . . . through the State[.]" 2018 Farm Bill, at § 10113.

Congress created an unmistakable right for the Plaintiffs here to engage in interstate commerce of "hemp" products. And Plaintiffs represent the interests of the benefitted class that was the unmistakable focus of the 2018 Farm Bill's legalization of hemp. Accordingly, the only question in this case is whether the 2018 Farm Bill imposes a "binding obligation" on the States that gives rise to enforceable rights under § 1983. Congress assuredly did so. States cannot modify the definition of hemp or inhibit interstate commerce by preventing interstate transportation of hemp. Arkansas violated these core, binding obligations, and the Court should hold that § 1983 supplies abundant basis upon which to seek prospective injunctive relief to prevent the State from violating preemptive federal law.

B. The Court Can Also Imply a Private Right of Action to Seek Injunctive Relief for State Violations of the 2018 Farm Bill.

A private right of action is the "right of an individual to bring suit to remedy or prevent an injury that results from another party's actual or threatened violation of a legal requirement." *Landegger v. Cohen*, 5 F. Supp. 3d 1278, 1284 (D. Colo. 2013). Many federal statutes provide a private cause of action through their express terms. Other federal statutes, however, merely define rights and duties, and are silent on the issue of whether an individual may bring suit to enforce them. For statutes in this latter category, courts have held that "implied" private rights of action may exist subject to statutory interpretation. And where "the remedy at hand is an equitable one," courts are "more inclined to perceive in Congress' silence a presumption that an individual may pursue a claim." *First Pac. Bancorp, Inc. v. Helfer*, 224 F.3d 1117, 1125 (9th Cir. 2000).

The doctrine of implied private rights of action rested on the English common law principle that for every legal right there is a remedy. 3 William Blackstone, *Commentaries on the Laws of England* 23 (1783). This meant that if a legal right already existed, then a court had the power to fashion a remedy. This common law principle is the foundation on which Chief Justice John Marshall fashioned the holding in *Marbury v. Madison*, 5 U.S. 137 (1803). In that case, the Secretary of State refused to deliver a judicial commission to William Marbury. Relying on William Blackstone's famous treatise on the common law, Marshall declared, "it is a general and indisputable rule that where there is a legal right, there is also a legal remedy . . .." *Id.* at 163 (citing Blackstone, *Commentaries* at 23). Marbury had a *legal right* to his commission, *id.* at 162, and the Court had the corresponding power to fashion an appropriate remedy.

Even after the proliferation of statutory law, the Supreme Court freely inferred private rights of action for some time. *See, e.g., J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) ("[I]t is the *duty* of the courts to be alert to provide such remedies as are necessary

to *make effective the congressional purpose*.") (emphasis added), *abrogated by Ziglar v. Abbasi*, 582 U.S. 120 (2017). In 1975, the Court in *Cort v. Ash* adopted a four-factor test to determine whether a private action could be implied from a federal statute. 422 U.S. 66 (1975). These factors are: (1) whether the plaintiff is part of a class "for whose special benefit the statute was enacted[;]" (2) whether there is an indication of any legislative intent to deny or create such a remedy; (3) whether the remedy would be consistent with the "underlying purposes" of the legislation; and (4) whether the subject of the cause of action was one "traditionally relegated to state law" so that it would be inappropriate to imply a new action based on federal law. *Id.* at 78. At the same time, "Congress is understood to legislate against a background of common-law adjudicatory principles. Thus, where a common-law principle is well-established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply 'except when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (citing *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)).

Against this background, courts imply private rights of action when statutes create important personal rights but fail to provide sufficient enforcement mechanisms. *See, e.g., Goldman Sachs Group, Inc. v. Arkansas Tchr. Retirement Sys.*, 141 S. Ct. 1951, 1958 (2021) (affirming that a private right of action exists to enforce SEC Rule 10b-5, which prohibits using instrumentalities of interstate commerce to defraud or mislead), *Morse v. Republican Party of Virginia*, 517 U.S. 186, 234-35 (1996) (holding that a private right of action exists to enforce Section 10 of the Voting Rights Act, which prohibited States from imposing illegal poll taxes), *BlackRock Allocation Target Shares: Series S. Portfolio v. Wells Fargo Bank*, 247 F. Supp. 3d 377, 403 (S.D.N.Y. 2017) (holding that a private right

of action exists to enforce the Trust Indenture Act's prohibitions against false or misleading statements).

Prohibitory statutes are more likely to imply a private cause of action. For instance, Title IX prohibits intentional sex discrimination and retaliation. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690-93 (1979)). Though no express cause of action exists under Title IX to sue for retaliation, courts have freely recognized an implied cause of action where the plaintiff alleges injuries that are personal to her and where she is the only effective plaintiff who can bring suit. *See, e.g., Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 251 (5th Cir. 1997). In these prohibitory conduct cases, legislative intent can be inferred from the nature of the prohibition so long as recognizing an implied cause of action would not undermine the legislative scheme.

Admittedly, there have been few opportunities for federal judges to consider the specific question of whether § 1983 or the implication doctrine supply the appropriate procedural vehicle through which to enjoin a State law that violates federal law. In *Serna v. Denver Police Dep't*, 58 F.4th 1167 (10th Cir. 2023), a *pro se* plaintiff sued a local police department that prevented him from transporting hemp plants on a flight from Colorado to Texas under an implication doctrine theory based solely on the interstate commerce provision of the 2018 Farm Bill. The district court expressly held that the 2018 Farm Bill's interstate commerce provisions located at § 10114 "identifies hemp producers licensed under Subtitle G as a protected class." *Serna v. Denver Police Dep't*, 2021 WL 5768993, at *4 (D. Colo. Dec. 6, 2021), *aff'd*, 58 F.4th 1167 (10th Cir. 2023). But the district court did not believe Congress intended to create a private remedy. *Id.* In a single sentence at the close of his objections to the magistrate judge's recommendation, the plaintiff

requested an amendment to add "a § 1983 claim as well as constitutional and common law theories under which [he] may be made whole in addition to seeking equitable relief." *Serna*, 58 F.4th at 1172. While observing that Serna's "fleeting request did not identify with specificity what the basis for those claims would be" and noting that he failed to separately file a proposed amended complaint as required under Rule 15 of the Federal Rules of Civil Procedure, the Court held that adding a § 1983 claim would have been futile in the context of that action. *Id.*

The U.S. District Court for the District of Kansas also considered whether the implication doctrine or § 1983 supplied appropriate basis through which to obtain injunctive and declaratory relief against State actors to prevent them from enforcing Kansas's hemp-regulating statutes that conflicted with the 2018 Farm Bill. *Dines v. Kelly*, 2022 WL 16762903, at *1 (D. Kan. Nov. 8, 2022). There, the plaintiff's retail location was raided by police, who said that the plaintiff's delta-8 products were unlawful; and the lawsuit followed. The plaintiff alleged that the Kansas Hemp Act impermissibly criminalized hemp products in violation of the 2018 Farm Act, the Supremacy Clause, and the Commerce Clause by applying Kansas law in a manner that criminalizes hemp products which are legal under the 2018 Farm Act. *Id.* at *5. Although the district court agreed with *Serna*'s reasoning, *id.* at *7 ("The Court agrees with the Honorable William J. Martinez, who in *Serna* succinctly reasoned . . ."), the *Dines* court did not adopt *Serna*'s recognition that hemp producers are among the protected classes included within the 2018 Farm Bill. *Id.* at *6.

Finally in *Apothio, LLC v. Kern County*, 599 F. Supp. 3d 983, 1001 (E.D. Cal. 2022), the plaintiff cultivated hemp on his property with intent to use it for pharmaceuticals and other purposes. *Id.* The state entered the plaintiff's property with a

warrant and burned the entire hemp crop claiming it was illegal contraband. *Id.* at 997. The state argued that the plaintiff intended to commercialize the crop and there was no lawful way to do so. *Id.* at 1006. Thus, California claimed that its acts, without any notice, were legitimate. *Id.* The plaintiff's complaint asserted the following causes of action: (1) unreasonable search and seizure/destruction in violation of 42 U.S.C. § 1983 and the Fourth Amendment; (2) violations of the right to due process in violation of § 1983 and the Fourteenth Amendment; (3) taking of private property without just compensation in violation of § 1983 and the Fifth Amendment; (4) declaratory judgment under 28 U.S.C. § 2201(a); and (5) various California-based claims. *Id.* at 998. Because the plaintiff could lawfully grow industrial hemp under some circumstances at the time of these events, the court denied the County's motion to dismiss the plaintiffs' Due Process and takings claims, both of which were pursued under § 1983. *Id.* at 1007.

Here, the Court—applying *Cort*'s factors—should hold that an implied private cause of action exists to enjoin State laws that violate the 2018 Farm Bill's prohibitions against inhibiting interstate commerce and transportation of products that are defined to constitute "hemp." As to the first factor, as *Serna* held, hemp producers are unmistakably the protected class with which Congress was concerned. The first *Cort* factor is satisfied.

Second, there is ample evidence that Congress specifically intended to create a private remedy under the 2018 Farm Bill. Indeed, the legislation passed in the House of Representatives expressly adopted a private right of action for any person "affected by a regulation of a State or unit of local government which regulates any aspect of an agricultural product, including any aspect of the method of production, which is sold in interstate commerce, or any means or instrumentality through which such an agriculture product is sold in interstate commerce" to bring an action "to invalidate such a regulation

and seek damages for economic loss resulting from such regulation." *Id.* at § 11702. While that provision was ultimately excluded from the 2018 Farm Bill following the issuance of the conference committee's report, there was also no apparent need to include an express private right of action because federal courts are already invested with authority under *Ex parte Young* and § 1983 to enjoin state laws that violate controlling federal law. In any event, there is *no* indication that Congress intended to *deny* a remedy to Plaintiffs.

To the contrary, every elected official who spoke on the 2018 Farm Bill's hemp provisions voiced support for a national hemp standard. *See* 164 CONG. REC. H10142-03, 164 CONG. REC. H10142-03, H10145 (Rep. James Comer: "This bill benefits all of rural America, our farmers, producers, and consumers. The agreement we have reached on this year's bill includes many important provisions that will help farm country during tough economic times, fully protecting crop insurance and providing certainty to farmers. I am particularly glad to see industrial hemp de-scheduled from the controlled substances list, a key provision I worked with Leader McConnell on to ensure unnecessary government restrictions are lifted from this valuable agricultural commodity."); 164 CONG. REC. H10142-03, 164 CONG. REC. H10142-03, H10150-51 (Rep. Bob Goodlatte: "This Farm Bill provides the stability [farmers and producers of hemp] need to run a successful business and take care of their families. . . . Additionally, while promoting sound agriculture policy this legislation legalizes the production of hemp as an agricultural commodity and removes it from the list of controlled substances. . . . American farmers will now be able to take advantage of this untapped market and begin growing hemp to capitalize on its many commercial uses."); 164 CONG. REC. S7412-01, 164 CONG. REC. S7412-01 (Sen. Michael Bennet: "This bill fully legalizes hemp. The majority leader was out here earlier. I want to congratulate him on his work to do that. In Colorado, our hemp growers have

operated under a cloud of uncertainty for years. Our farmers worry about maintaining access to their water. They couldn't buy crop insurance or transport seeds. Some ran into red tape opening a bank account or even applying for Federal grants. . . . We see hemp as an opportunity to diversify our farmers who manufacture high-margin products for the American people. Now, Coloradans will be able to grow and manufacture hemp without a cloud of uncertainty hanging over them."); and 164 CONG. REC. H9823-01, 164 CONG. REC. H9823-01, H10012-13 ("While states and Indian tribes may limit the production and sale of hemp and hemp products within their borders, the Managers, in Sec. 10112, 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.").

This clear Congressional intent to fully legalize hemp and ensure that States cannot narrow the federal definition of hemp or inhibit transportation of hemp products demonstrates Congress' commitment to a private right of action. Indeed, it would be utterly illogical to conclude that despite Congress' unambiguous intent to legalize hemp, it simultaneously intended to leave parties powerless to challenge states that ignored federal law. The 2018 Farm Bill becomes mere toothless guidance if parties have no private right of action to enjoin states that violate the Supremacy Clause and Commerce Clause—the two provisions that undergird Plaintiffs' challenge to Arkansas' Act 629 and give rise to inalienable constitutional rights. The second *Cort* factor militates in Plaintiffs' favor.

Third, the remedy requested here—declaratory and injunctive relief—is entirely consistent with the underlying purpose of the legislation: creating an interstate hemp marketplace. Part and parcel to a national hemp market is a settled definition of what constitutes "hemp" and how hemp can be transported across the country, and in doing so

intentionally and expressly expanded upon the 2014 Farm Bill's definition of hemp to include extracts, cannabinoids, and derivatives so as to maximize the exploration of the marketplace for hemp and hemp-derived products. Congress spoke plainly in this respect: nothing in the 2018 Farm Bill permits interference with the channels and instrumentalities of hemp in interstate commerce, and no State can limit the transportation of these products within its borders. Enjoining Act 629 is entirely consistent with the specific purpose of the 2018 Farm Bill's hemp provisions. Plaintiffs therefore satisfy the third *Cort* factor.

Finally, the fourth *Cort* factor has no application here because Plaintiffs' causes of action are not traditionally relegated to state law, like issues involving domestic relations or landlord-tenant law. Likewise, Plaintiffs seek equitable remedies only, and their ability to obtain equitable relief under these circumstances is firmly rooted in our nation's common law history. Even England, under a regime of monarchical tyranny, recognized the common law principle that for every legal right there is a remedy.

This Court should too.

IV. CONCLUSION

The 2018 Farm Bill reflects Congress' intent to create a robust hemp market in the United States. Understanding that this overarching policy objective would be subverted if States could seize hemp moving through their borders, Congress explicitly preempted any State law that inhibits the interstate transportation of this specifically defined agricultural commodity. Arkansas's Act 629 plainly changed the definition of hemp and restricts the transportation of hemp through the channels of interstate commerce in violation of federal law. Plaintiffs—who represent the special class of individuals protected by the 2018 Farm Bill's interstate commerce provisions—seek a narrow remedy:

to enjoin Act 629. Federal common law, § 1983, and the implication doctrine, among the other arguments established in Plaintiffs' Motion, Brief, Reply, and Amended Complaint, supply abundant basis upon which to grant Plaintiffs the relief they seek in this lawsuit.

Respectfully submitted,

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