IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CLIMBING KITES LLC, *et al.*, *Plaintiffs*, v. STATE OF IOWA, *et al.*, *Defendants.*	Case No. 4:24-cv-202-SMR-SBJ

DEFENDANTS' OPPOSITION TO PLAINTIFFS'

RENEWED MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs, two manufacturers of THC-infused drinks, sued to enjoin enforcement of House File 2605, which sets limits on the amount of THC permissible in consumable hemp products and requires a health warning be placed on the product's label. Plaintiffs originally brought only two substantive claims—they argued HF2605 was preempted by federal law, and they sought judicial review of an agency's FAQ Guidance. This Court held a hearing on Plaintiffs' first motion for preliminary injunction and denied the motion. The law took effect on July 1.

After the hearing on Plaintiffs' first motion for preliminary injunction, Plaintiffs knew they had a problem: they would not receive their desired injunctive relief and the law was set to take effect in just one business day. So one hour after the hearing, Plaintiffs amended their complaint to include a vagueness claim. The law limits the THC allowed in a consumable hemp product to "four milligrams per serving." Plaintiffs' amended claim asserts, for the first time, that the "per serving" limit is "vague beyond comprehension." Dkt. 26-1 at 2.

A law is only found to be unconstitutionally vague when no ordinary person could understand what conduct is prohibited. But "serving" has a well-understood meaning in the food industry. "Serving" is a term defined by federal law, which requires a product's serving size and quantity be listed on a product's label. So every can of Plaintiffs' product identifies its serving size and quantity. Iowa cannot impose its own measure of what constitutes a serving. Not only would that strike confusion across a product's label, but it would be outside the State's role. Plaintiffs' claim requires an unnatural reading of the statute, stripped of any of the standard tools in the interpretive toolbox. And that is not how statutory interpretation—or vagueness review—works.

But even before getting to the merits, Plaintiffs' amended claim suffers serious justiciability flaws. *First*, Plaintiffs failed to plead a cause of action against any Defendants. They assert a direct claim under the Fourteenth Amendment's Due Process Clause, but that does not provide a cause

of action. *Second*, their claims against the State and state agency run headlong into Iowa's sovereign immunity, which means—at most—only their claim against Kelly Garcia, Director of the Iowa Department of Health and Human Services, may proceed. *Finally*, Plaintiffs allege irreparable harm because they claim they do not know what conduct is legal and what conduct could result in criminal penalties. Yet they fail to seek injunctive relief against anyone with criminal enforcement authority. Director Garcia, the only official sued, cannot enforce the criminal penalties against Plaintiffs. So an injunction against her would not redress Plaintiffs' alleged harms.

Plaintiffs lack a cause of action. They lack standing. And they are not likely to succeed on the merits of their last-minute vagueness claim. The Court should again deny Plaintiffs' motion for preliminary injunction.

BACKGROUND

This Court is well familiar with the facts here. Dkt. 29, Op. at 2–9 (recounting factual and procedural background of this case). House File 2605's Potency Provision sets the maximum THC limit of a consumable hemp product at either 0.3% on a dry weight basis or "four milligrams per serving and ten milligrams per container on a dry weight basis"—whichever is lesser. HF2605, § 2. The text of this provision has remained unchanged since at least April 2.

Plaintiffs—THC beverage manufacturers that disagree with the State of Iowa's public-safety decision to lower the amount of THC in consumable hemp products—seek to enjoin enforcement of the Potency Provision. But in their lawsuit as originally pleaded, they did not claim the Potency Provision was vague. Nor do the plaintiffs in the companion case challenging HF2605. Complaint, *HW Premium CBD v. Reynolds*, S.D. Iowa No. 4:24-cv-210 (S.D. Iowa June 25, 2024), Dkt. 1 ("*HW* Dkt."). In short, despite dozens of lawyers, producers, manufacturers, lobbyists, retailers, consumers, and trade representatives pouring over the text of HF2605 since at least April 2024, nobody thought HF2605's use of "serving" was unconstitutionally vague.

At the hearing on Plaintiffs' preliminary-injunction motion, the Court raised "concerns about the vagueness" of the Potency Provision. Dkt. 30, Hrg. Tr. at 61:19; Dkt. 29, Op. at 9 ("Serious questions about the clarity and constitutionality of HF2605 came to light at the hearing."). An hour after the hearing, realizing they had not brought this claim, Plaintiffs amended their complaint to allege the Potency Provision was unconstitutionally vague. Dkt. 24, at 11–12. Aside from the new claim, Plaintiffs' amended complaint "is identical to the initial Complaint" in "all other material respects." Dkt. 26-1 at 1. Plaintiffs did not add or remove any Defendant.

Soon after, this Court denied Plaintiffs relief on all claims pleaded in their initial complaint. Dkts. 25, 29 (Order and Opinion denying injunctive relief). Plaintiffs then "renewed" their motion for preliminary injunction. Dkt. 26. They also sought a temporary restraining order, which this Court denied that same day. Dkt. 27. Plaintiffs now allege the Potency Provision is unconstitutionally vague because it "does not define, explain, or otherwise shed any light on what constitutes a 'serving.'" Dkt. 24 at ¶ 63. Plaintiffs' short form brief argues, "[f]or the reasons demonstrated at the hearing . . . the Potency Limits within HF2605," as applied to Plaintiffs and "as interpreted by the Department," are "vague beyond comprehension and provide no fair notice of criminal offenses. Plaintiffs continue to have no understanding what constitutes lawful business and what constitutes criminal conduct as of Monday, July 1, 2024." Dkt. 26-1 at 2.

Though their renewed motion sweeps broadly, their argument relates only to the per-serving limitation. After all, Plaintiffs have said that the "per container" limit of the Potency Provision is not vague because "container . . . is an unambiguous term." Dkt. 11 at 27. And as it relates to the per-serving limitation, the harm Plaintiffs seek relief from is the criminal penalties: Plaintiffs assert "irreparable injury, loss, or damage as a result of the vagueness of the criminal statute," as detailed in their prior motion. Dkt. 26-1 at 2.

Because Plaintiffs allege nothing new as to the claims re-pleaded in the amended complaint, those claims do not require consideration anew by this Court on this motion. Rather, this Court's opinion and order denying Plaintiffs' initial motion applies similarly to the extent those earlier claims are renewed here. Dkt. 29, Op. at 13–28. If the Court were to entertain those earlier claims, Defendants incorporate the arguments made in their initial Resistance, Dkt. 19, and the reasoning of this Court's opinion denying those claims, Dkt. 29.

In short, it appears Plaintiffs ask this Court to enjoin Defendants' enforcement of the Potency Provision's "per serving" limit as unconstitutionally vague.

LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). A plaintiff seeking a preliminary injunction bears the burden of showing "that it will be irreparably harmed absent the issuance of the requested relief." *Mediacom Comms. Corp. v. Sinclair Broad. Group, Inc.*, 460 F. Supp. 2d 1012, 1017 (S.D. Iowa 2006); *H&R Block, Inc. v. Block, Inc.*, 58 F.4th 939, 946 (8th Cir. 2023).

When determining whether to grant a preliminary injunction, courts consider: (1) the likelihood of success on the merits; (2) the threat of irreparable harm; (3) the balance of equities; and (4) whether the injunction is in the public interest. *Sanborn Mfg. Co., v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 485–486 (8th Cir. 1993).

When a plaintiff seeks to enjoin "a duly enacted state statute," a district court must "make a threshold finding that a party is likely to prevail on the merits." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732–733 (8th Cir. 2008) (en banc); *see id.* at 732 (courts apply "the familiar 'fair chance of prevailing' test where a preliminary injunction is sought to enjoin something *other* than government action based on presumptively reasoned democratic processes" (emphasis added)). Only after that threshold finding may a court "proceed to weigh the" other

factors. *Id.* at 732. This "more rigorous standard" ensures "a state's presumptively reasonable democratic processes" aren't thwarted without "an appropriately deferential analysis." *Id.* at 733.

Lack of irreparable harm is an "independently sufficient" reason "to deny a preliminary injunction." *Sessler v. City of Davenport*, 990 F.3d 1150, 1156 (8th Cir. 2021) (citation omitted).

When reviewing Iowa statutes, certain canons of construction are black letter law. The Legislature adopted Chapter 4 to provide rules for the construction of Iowa statutes. "In enacting a statute, it is presumed that [c]ompliance with the Constitutions of the state and of the United States is intended." Iowa Code § 4.4(1). "It is presumed that . . . [a] just and reasonable result is intended." *Id.* § 4.4(3). And the "[p]ublic interest is favored over any private interest." *Id*. § 4.4(5). Iowa's laws are also presumed severable. *Id.* § 4.12.

ARGUMENT

I. Plaintiffs Are Not Likely to Succeed on the Merits.

To succeed on a facial challenge, plaintiffs must show there is no "circumstance" in which a statute can be constitutionally applied. *Furlow v. Belmar*, 52 F.4th 393, 400 (8th Cir. 2022); *see United States v. Salerno*, 481 U.S. 739, 745 (1987). Because facial vagueness challenges are generally disfavored, courts first determine whether the law is constitutional as applied to plaintiffs; if it is, then the facial challenge fails too. *See Musser v. Mapes*, 718 F.3d 996, 1000 (8th Cir. 2013); *Nygard v. City of Orono*, 39 F.4th 514, 519 (8th Cir. 2022).

A. Plaintiffs' vagueness claim is not justiciable.

"Federal courts are courts of limited jurisdiction possessing only that power authorized by Constitution and statute." *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quotation marks omitted). "[T]he separation of powers generally vests the power to create new causes of action in Congress, not [the courts]." *Ahmed v. Weyker*, 984 F.3d 564, 567 (8th Cir. 2020). Even if there is a cause of action, federal courts must determine whether a plaintiff has Article III standing before reaching

the merits. *See Dept. of Educ. v. Brown*, 600 U.S. 551, 560 (2023). And standing requires a plaintiff establish three threshold elements: Plaintiff "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

Plaintiffs' vagueness claim is not justiciable because they do not have a cause of action against any named Defendant. At most, under a liberal construction, Plaintiffs may have an equitable action against the Director of the Iowa Department of Health and Human Services, Kelly Garcia. But their vagueness claim is rooted in uncertainty about the law's criminal consequences. Because Director Garcia does not enforce any criminal laws, Plaintiffs fail to plead an injury in fact that would be redressed by an injunction prohibiting Director Garcia from enforcing HF2605.

1. Plaintiffs lack a cause of action under the Due Process Clause.

Plaintiffs assert a claim under "the Due Process Clause of the Fourteenth Amendment," Dkt. 24 at 11–12, without invoking any statutory or equitable cause of action—just the Constitution. But the Due Process Clause of the Fourteenth Amendment does not give Plaintiffs a cause of action against any Defendant. *See Wax'n Works v. City of St. Paul*, 213 F.3d 1016, 1019 (8th Cir. 2000) (A due process claim "may not be brought directly under the fourteenth amendment"). Indeed, a Fourteenth Amendment claim may not be brought directly; it can be asserted only by invoking 42 U.S.C. § 1983. *Clark v. Iowa State Univ.*, 2010 WL 11531381, at *9 (S.D. Iowa June 2, 2010), *aff'd in relevant part, rev'd in part on other grounds*, 643 F.3d 643 (8th Cir. 2011) (dismissing "freestanding" due process Fourteenth Amendment claim because such claim "may, in fact, *only* be asserted under the auspices of § 1983").

Because the Fourteenth Amendment does not confer a freestanding cause of action, claims brought directly under it must be dismissed. *See id.* (collecting cases); *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (stating that § 1983 "provides a method for vindicating federal rights elsewhere

conferred" (quotation marks omitted)); *Azul–Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) ("Plaintiff has no cause of action directly under the United States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983."). The Court should deny Plaintiffs' new request for injunctive relief against all Defendants because Plaintiffs fail to plead a cause of action authorizing their vagueness claim. *See, e.g.*, *Clark*, 2010 WL 11531381, at *9.

2. Plaintiffs lack a cause of action against the State and the Department.

As this Court has already recognized, the State of Iowa and the Iowa Department of Health and Human Services are entitled to sovereign immunity. Dkt. 29, Op. at 13.

Courts enjoin individuals, not States or Departments. So even if this Court were to construe Plaintiffs' amended complaint as asserting a claim under Section 1983, Plaintiffs still lack a cause of action against the State and the Department because those Defendants are not "persons" that can be sued under § 1983. Section 1983 creates a cause of action against a "person" acting "under color of any statute . . . of any State" who deprives another of a federal right. *See, e.g.*, *Mungai v. Univ. of Minn.*, 2024 WL 1216474, at *9 (D. Minn. Mar. 21, 2024). And the State and the Department are not such "persons." *See Nix v. Norman*, 879 F.2d 429, 432–433 (8th Cir. 1989) (dismissing action against State and agency because plaintiff "may not bring an action solely against either the state or one of its agencies" and instead may sue official "in his official capacity if the plaintiff merely seeks injunction or prospective relief"). Plaintiffs thus cannot salvage their Due Process claim against the State and the Department by invoking § 1983.

For similar reasons, *Ex parte Young* does not give Plaintiffs an equitable action against the State or the Department. 209 U.S. 123 (1908). That decision said "federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). But injunctions run against individuals, and *Ex parte Young*

provides an equitable action against state officials in their official capacities and not against the State or its agencies. *See id.*; *Digit. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015); *McDaniel v. Precythe*, 897 F.3d 946, 951–952 (8th Cir. 2018); Dkt. 29, Op. at 13–14. And that makes sense. Allowing claims to proceed against the State and the Department would violate the State's sovereign immunity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) ("It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment."). Plaintiffs have no authorization to sue the State or the Department.

Plaintiffs admitted so at the hearing on their initial motion for preliminary injunction. Dkt. 29, Op. at 13–14. And this Court already determined that the State and Department were not proper defendants because they are entitled to sovereign immunity. *Id.* That reasoning remains true here.

3. Plaintiffs lack a cause of action and standing to enjoin HF2605's criminal penalties.

If the Court gives Plaintiffs a third bite at the apple by allowing their void-for-vagueness claim to proceed despite no cause of action, that claim for injunctive relief could be against only Director Garcia, and only as to her role in enforcing the challenged provisions. Director Garcia is the Director of the Iowa Department of Health and Human Services, and she holds only civil enforcement and regulatory authority. She lacks criminal enforcement authority.

This poses a problem for Plaintiffs, who seek relief mainly from the criminal penalties imposed by HF2605. Dkt. 24 ¶¶ 62, 67, 68; Dkt. 26-1 at 2 ("Potency Limits . . . provide no fair notice of criminal offenses. Plaintiffs continue to have no understanding what constitutes lawful business and what constitutes criminal conduct."). Indeed, Plaintiffs focus their asserted "irreparable injury, loss, or damage" on the law being criminal, and violations leading to criminal consequences. Dkt. 26-1 at 2–3. Aside from passing references to civil penalties made in their

initial preliminary injunction brief, Dkt. 11 at 29, and reply brief, Dkt. 22 at 11, Plaintiffs' evidence of irreparable harm is limited to discussing the law's criminal penalties. *See, e.g.*, Dkt. 2-1 at ¶ 17; Dkt. 2-2 at ¶ 17.

Whether Plaintiffs' never-pleaded cause of action is under *Ex parte Young* or § 1983, Director Garcia "must have a sufficiently close relationship to the enforcement of the challenged law" in order for any injunctive relief to be appropriate. Dkt. 29, Op. at 14 (citing *Ex parte Young*, 209 U.S. at 157 (named state official "must have some connection with the enforcement" of the challenged law, or else the lawsuit is an impermissible "attempt[] to make the state a party")); *see also Mahn v. Jefferson Cnty.*, 891 F.3d 1093, 1099 (8th Cir. 2018) ("In a claim under § 1983, there must be evidence of a causal connection between the misconduct complained of and the official sued.").

Here, Director Garcia lacks that connection because she does not have criminal enforcement authority. Accordingly, because Plaintiffs seek injunctive relief against HF2605's criminal consequences, their claim is not justiciable, for two reasons.

First, Plaintiffs lack a cause of action to seek their desired relief against Director Garcia. Though they seek to enjoin criminal enforcement, they have not sued anyone who enforces the law's criminal penalties. *See* Dkt. 29, Op. at 14; *McDaniel*, 897 F.3d at 951–952 ("*Ex parte Young* provides that a suit seeking to enjoin enforcement of a state statute may proceed against a state officer only where the officer has "some connection with the enforcement of the act."). Director Garcia cannot criminally charge Plaintiffs, so neither *Ex parte Young* nor § 1983 provides Plaintiffs a cause of action to sue her to enjoin enforcement of the law's criminal penalties. At most, a cause of action against Director Garcia could result in an injunction against Director Garcia's enforcement of civil and regulatory penalties that stem from the per-serving limitation on THC.

But the injunction Plaintiffs want—enjoining the law's criminal penalties—could not issue against Director Garcia. After all, "federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves." *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021); *see Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1255 (11th Cir. 2020) ("[F]ederal courts have no authority to erase a duly enacted law from the statute books." (quoting Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 936 (2018))).

Second, Plaintiffs lack standing to enjoin the law's criminal penalties, because their alleged harms would not be redressed by an injunction against Director Garcia's enforcement of the law. Traceability and redressability issues "often travel together," because unless a plaintiff's claimed injury is caused by the alleged violative conduct, it is unlikely that a favorable decision enjoining said conduct would redress the claimed injury. *Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1201 (11th Cir. 2021). Plaintiffs must tie their alleged harm to Defendants' enforcement of the law. But they cannot do so: Director Garcia does not have criminal enforcement authority, so if she is enjoined from enforcing the per-serving limitation of HF2605, other state officials may still enforce the criminal consequences of the per-serving limitation against Plaintiffs.

Plaintiffs therefore cannot establish an equitable or statutory cause of action to enjoin the law's criminal penalties—nor could they establish standing to support such cause of action.

B. The Potency Provision's "per serving" limit sets a readily ascertainable standard and is not unconstitutionally vague.

Because the per-serving limit can be constitutionally applied to Plaintiffs, the as-applied challenge, and so too the facial challenge, fails. *See Nygard*, 39 F.4th at 519 (facial vagueness challenges are disfavored; plaintiff must first establish an as-applied vagueness challenge).

To establish that a law is unconstitutionally vague, Plaintiffs must show the law "either forbids or requires the doing of an act in terms so vague that men of common intelligence must

necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926); *Farkas v. Miller*, 151 F.3d 900, 905 (8th Cir. 1998). A law is not impermissibly vague if "ordinary people" can "understand what conduct is prohibited." *Gonzales v. Carhart*, 550 U.S. 124, 148–149 (2007). If the law "provides . . . reasonable opportunity to know what is prohibited," then the void-for-vagueness challenge fails. *Id.* at 149 (cleaned up); *see also Musser*, 718 F.3d at 1000 ("Under the void-for-vagueness doctrine, a law is unconstitutional if it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'").

"Mathematical precision is not required in legislation. Although there may be issues of interpretation regarding the meaning of a statute, that in itself does not give rise to a finding of unconstitutional vagueness." *Farkas*, 151 F.3d at 905–906 (citations omitted); *see also Sanimax USA, LLC v. City of S. St. Paul*, 95 F.4th 551, 569 (8th Cir. 2024) ("We are mindful, of course, that the Due Process Clause does not require perfect clarity and precise guidance.").

Courts instead use all tools in their toolbox to determine whether a statute has a readily ascertainable meaning. *See Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1309 (8th Cir. 1997) (when assessing vagueness claim, courts look to dictionary definitions, "common usage of statutory language, judicial explanations of its meaning, and previous applications of the statute to the same or similar conduct"); *United States v. Bronstein*, 849 F.3d 1101, 1111 (D.C. Cir. 2017) (looking to "statute's text, context, and history" when evaluating whether it was void for vagueness). This includes analyzing the relevant industry and its terms of art.

Indeed, when a word with many meanings carries with it a certain meaning that is ordinarily known to those in the trade or industry, and the statute regulates that trade or industry, then a court should not deem the word to be unconstitutionally vague. *See, e.g.*, *Omaechevarria v. State of*

Idaho, 246 U.S. 343, 348 (1918) (holding that criminal statute referring to the "usual" use of a cattle "range" was not unconstitutionally vague because of its common industry usage); *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 502 (1925) ("[T]he term 'kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it, at least as a general thing."); *Bronstein*, 849 F.3d at 1108–09 ("it ma[de] sense for Congress to deploy both 'harangue' and 'oration' within a statutory phrase targeting all public speeches that tend to disrupt the Court's operations."). In short, "[w]hen a statute's text, context, and history all converge on certain terms possessing a settled legal meaning, the Court should effectuate it." *Bronstein*, 849 F.3d at 1111.

Courts can avoid holding a law void for vagueness by reading a law to "conform[] to state and federal requirements and standards." 1A Sutherland Statutory Construction § 21:16 (7th ed. Nov. 2023 update). And that's exactly what Iowa's Hemp Act requires. Iowa Code § 204.17(2)(a) ("Nothing in this chapter shall be construed or applied to be in conflict with . . . [a]pplicable federal law and related regulations.").

The Potency Provision explains that a "hemp product is deemed to be a consumable hemp product if . . . its maximum [THC] concentration is less than or equal to the lesser of" either 0.3% on a dry weight basis or "four milligrams per serving and ten milligrams per container on a dry weight basis." HF2605, § 2. The most natural reading of this "four milligrams per serving" limit is that it limits the amount of THC in each serving of Plaintiffs' carbonated beverages to four milligrams. In other words, the limit is "four milligrams [of THC] per serving [of whatever the THC is added to]." That means Plaintiffs' THC carbonated beverages must not include more than four milligrams of THC per serving of the carbonated beverage.

But what is a serving? The common usage of "serving" in the food industry is defined through federal law. Iowa does not promulgate serving-size regulations for carbonated beverages,

nor does it appear that any other States does. The reason is that federal law requires Plaintiffs to list a serving size on each of their beverages and preempts any State law seeking to require manufactures to calculate the serving size listed on the Nutrition Facts label any differently. *See* 21 U.S.C. § 343–1(a)(4); *id.* § 343(q)(1)(A)–(B).

Given that federal law requires Plaintiffs to list the number of servings in each of their cans, to know how many servings are in their products Plaintiffs need only look to the side of their cans. Once they see the number of servings that they are federally required to list, they can compare it with the amount of THC in the beverages. Plaintiffs know how to do this; they are required to make these types of calculations with, for example, the nutrients in their products. *See* 21 C.F.R. § 101.9 (requiring that "all nutrient and food component quantities shall be declared in relation to a serving as defined in this section"). If the quantity of THC in relation to one serving of their carbonated beverage is less than or equal to four milligrams per serving, then Plaintiffs are not violating the Potency Provision's "per serving" limit.

At least one court has rejected an argument similar to Plaintiffs'. In *G & G Fremont, LLC v. City of Las Vegas*, retailers argued that an ordinance that "prohibited the sale of 'single serving products containing alcohol for immediate consumption'" was unconstitutionally vague. 202 F. Supp. 3d 1175, 1179 (D. Nev. 2016). The court rejected the argument, holding that "a person of ordinary intelligence would not be perplexed by the phrase 'single serving product.'" *Id.* at 1181. The operative word in that case—serving—is the same here.

The meaning of serving is thus especially ascertainable when the word is understood from the context in which the word is used—the food industry. No person of ordinary intelligence—particularly like Plaintiffs who operate in the industry—could fail to understand what serving

means when used in this context. There are at least five reasons why the common usage and context of "serving" here shine light on its meaning here.

1. Federal law provides the only definition of serving sizes.

The meaning of "serving," when used in a food regulation, is readily ascertainable by looking to federal law, which requires the serving size be listed on a food product's label, and which defines serving. The FDCA requires that a label must reflect "the serving size" and "the number of servings or other units of measure per container." 21 U.S.C. §§ 343(q)(1)(A)(i), (1)(B). It defines "serving" as "an amount customarily consumer and which is expressed in a common household measure that is appropriate to the food." *Id.* And it prescribes serving sizes for standard types of food consumed; for carbonated and non-carbonated beverages, federal law says the standard "serving" size is 12 ounces. *See* 21 C.F.R. § 101.12, Table 2.

Federal law thus requires manufacturers like Plaintiffs to determine the appropriate serving size of their product, how many servings their product includes, and then to list the size and number of servings on the product's label. Iowa cannot require Plaintiffs to use a different formula for determining the "serving" size on the nutrition label, because federal law provides the nutrition labeling standard. *See* 21 U.S.C. § 343–1(a)(4) (preempting state laws requiring different Nutrition Facts labels); *id.* § 343(q)(1)(A)–(B) (requiring serving and serving size on the Nutrition Facts label).

True, Iowa law did not expressly incorporate the federal definition of serving in HF2605. But it did not need to do so. Iowa legislates against the backdrop of federal food laws (like the FDCA). 21 U.S.C. § 343(q)(1)(A)–(B). And Section 343(q) is a well-known requirement that servings and serving sizes must appear on a product's label. *See generally* Dkt. 11, at 12–13 (Plaintiffs discussing the FDCA's requirements). It would not make sense for Iowa to quietly require the serving size of carbonated beverages to which THC is added to be measured and

reported in relation to one unidentified and not-previously existing "serving" formula, while other nutritional facts like sodium and protein be measured and reported in relation to the present federal "serving" formula, and then expect the two understandings of "servings" to be reported on the product's label. The Iowa Legislature, like Congress, "does not hide elephants in mouseholes." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 583 U.S. 416, 431 (2018) (quotation marks omitted).

More, HF2605 is not to be "applied to be in conflict with . . . [a]pplicable federal law and related regulations." Iowa Code § 204.17(2)(a). And not only are Iowa's laws are presumed to comply with the federal Constitution—*i.e.*, to not be unconstitutionally vague—but it is also presumed that a "reasonable result is intended." Iowa Code §§ 4.4(1), (3). Construing "serving" to mean the same thing under Iowa and federal law, and across a product's label, accomplishes each of these goals.

2. Plaintiffs understand the meaning of "serving."

If you pick up one of their cans, Plaintiffs, in accordance with federal law, list the serving size and number of servings on the side of their can. *See* 21 U.S.C. §§ 343(q)(1)(A)(i), (1)(B). Plaintiffs' beverages primarily consist of carbonated water. Dkt. 2-1, Selix Decl. ¶ 6; Dkt. 2-2, Caraher Decl. ¶ 6. So as they conceded at the initial preliminary injunction hearing, they "have currently set a 12-ounce serving size for their products." Dkt. 29, Op. at 21. That is not a discretionary requirement that Plaintiffs can pick and choose; it is required to be on their nutrition label. Nor are they able to deviate from the serving-size calculation for a carbonated beverage.

Plaintiffs also fully understand that serving is a common industry term of art, governed by federal law, when it comes to food regulations. At the hearing, Plaintiffs asserted that "per serving . . . is clearly governed by federal law." Dkt. 30, Hrg. Tr. at 9:1; *see id.* at 13:13 ("serving size . . . is for the FDA"); *id.* at 14:3–4 ("FDA has to set the serving size"). And in support of their

initial preliminary injunction, they attached a "certified lab report" for their THC products, which included a column reporting the "per serving" amount of THC in their product. Dkt. 2-1 at 6.

But now, in their amended complaint, Plaintiffs allege "per serving" is "vague beyond comprehension" so they have "no understanding" what would violate the Potency Provision's per-serving limit. The Court should take Plaintiffs at their initial word.

3. Others in the industry understand the meaning of the term "serving."

Even other manufacturers and retailers in Iowa's hemp consumables industry understand the plain meaning of the term serving, because it is so commonly used in the industry. To credit Plaintiffs' vagueness claim, then, the Court would need to determine that plaintiffs in the related case challenging HF2605 on other grounds are persons of extraordinary intelligence, because those plaintiffs know what serving means. Their allegations and declarations consistently talk about THC content in terms of "per serving." *E.g., HW* Dkts. 10-5 at ¶ 14; 10-6 at ¶ 11. And they detail how certain plaintiffs have closed stores or will have to reduce their inventory to "comply with the serving and container size requirements in HF2605." Declarations, *HW* Dkts. 10-2 at ¶19; 10-4 at ¶ 8; 10-5 at ¶ 21; 10-6 at ¶ 8; 10-8 at ¶ 9; see also *HW* Dkt. 1 at ¶¶ 81–86. Notably, those plaintiffs do not assert a vagueness claim against the "per serving" limit. The industry—which comprises many persons of ordinary intelligence—thus well understands what HF2605 meant when it set a limit of THC content "per serving" of consumable product.

Finally, if there was any question, consider that the very first Google search result (and many of the results thereafter) for the query "serving size carbonated beverage" explains that "serving" means 12 ounces.

4. Plaintiffs' asserted confusion relies on an unnatural reading of the text.

Plaintiffs appear to interpret the phrase "four milligrams per serving" as somehow referencing four milligrams of THC per serving of THC. For example, in their complaint, Plaintiffs

refer to "a 'serving' of total THC in a consumable hemp product." Dkt. 24 ¶ 63. This reading makes no sense. The phrase "four milligrams per serving" refers to "four milligrams [of THC] per serving [of whatever the THC is added to]"—not "four milligrams [of THC] per serving [of THC]."

Much of Plaintiffs' confusion over "serving" appears to instead stem from the minimum size packaging requirements in the non-final guidance the Department issued. *E.g.*, Dkt. 11 at 9. But this Court has already determined that Plaintiffs cannot obtain injunctive relief here based on alleged infirmities in the Department's non-final guidance. Dkt. 29, Op. at 21.

Tellingly, Plaintiffs do not point to a different way to measure servings. They do not argue that they are confused about whether the federal measurement of a serving applies rather than some other measure. In fact, Plaintiffs offer no other plausible interpretation of serving. And for good reason—Iowa law contains no other measure of serving size. There is no reason to believe that by instituting a per-serving limit on THC, Iowa meant to adopt some alternate measurement for the serving size of a carbonated beverage—a measurement that is nowhere defined or utilized in Iowa law. *See Cyan, Inc.*, 583 U.S. at 431 (legislatures do not "hide elephants in mouseholes.").

Because HF2605 regulates within that industry, and because Iowa cannot require Plaintiffs to use a serving size different than federal law's labeling requirements, "ordinary people" can "understand what conduct is prohibited" under HF2605's per-serving limit. *Gonzales v. Carhart*, 550 U.S. at 148–149. Vague does not mean capable of multiple meanings. It means that "men of common intelligence must necessarily guess at its meaning." *Connally*, 269 U.S. at 391. Ordinary people purchasing food products off store shelves every day understand what "serving" means. So too should Plaintiffs.

5. Plaintiffs know how to interpret other undefined terms in HF2605.

The same tools Plaintiffs use to understand other undefined terms should be used to understand the per-serving limit.

Plaintiffs readily understand the per-container limit. They have read the section, which says a "hemp product is deemed to be a consumable hemp product if . . . its maximum [THC] concentration is less than or equal to . . . ten milligrams per container," HF2605, § 2, and they admittedly understand this sets a maximum THC concentration of "ten milligrams per container" of consumable hemp product. *See, e.g.*, Dkt. 11 at 9, 20, 21, 27, 28 (showing this understanding). Even though the per-container limit is phrased the same as the per-serving limit, Plaintiffs assert it is unclear whether the per-serving limit refers to serving of THC or serving of consumable hemp product. But interpreting the per-serving limit the same way Plaintiffs interpret the per-container limit, a plain and consistent reading says that HF2605 sets a maximum THC concentration of "four milligrams per serving" of consumable hemp product. That is, four milligrams of THC per serving of carbonated beverage.

Next, HF2605 refers to a product's "label" or "labeling," but does not define "label." HF2605, §§ 2, 4. No one challenges that term as void for vagueness. And that makes sense, because the term "label," when used in a food regulation as here, carries with it an understood meaning. An ordinary person would understand the term, and would need look no further than federal food laws and regulations for the definitional backdrop which Iowa's Legislature is presumed to understand and legislate against. *E.g.*, 21 U.S.C. § 321 (k) (defining "label"); 21 C.F.R. § 1.3 (defining "labeling" and "label").

* * *

If the Court finds the per-serving limit is unconstitutionally vague, it should not enjoin Director Garcia's enforcement of the entire Potency Provision. *Cf. Jacobson*, 974 F.3d at 1255 (discussing writ-of-erasure fallacy). Iowa's laws are presumed severable. Iowa Code § 4.12. And Plaintiffs do not raise a vagueness challenge to any part of the Potency Provision other than the "serving" limit. They concede the "per container" limit "is an unambiguous term." Dkt. 11 at 27.

It would not "substantially impair the legislative purpose" to enjoin Director Garcia's enforcement of only the per-serving limit, because the per-container limit is discrete and separately enforceable and it "can be given effect without the invalid provision." *Am. Dog Owners Ass'n, Inc. v. City of Des Moines*, 469 N.W.2d 416, 418 (Iowa 1991). The per-container limit should not be enjoined.

II. The Other Factors Weigh Against Plaintiffs' Requested Relief.

Plaintiffs are not likely to succeed on the merits, so the Court need not proceed to the other injunction factors. *See Rounds*, 530 F.3d at 732. But those factors also weigh against an injunction.

Plaintiffs have not shown harm that "is certain and great and of such imminence that there is a clear and present need for equitable relief." *Powell v. Noble*, 798 F.3d 690, 702 (8th Cir. 2015). Their delay in suing—and the even longer delay in bringing the vagueness claim—underscores this failure. The Legislature passed HF2605 on April 2, and the Governor signed it on May 17. But Plaintiffs did not raise their vagueness claim until 2 days before the law took effect. Such a delay "vitiates much of the force of" any "allegations of irreparable harm." *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 895 (8th Cir. 2013). And because of their delay in asserting a vagueness claim, the law has already taken effect. Issuing a preliminary injunction now would run counter to the purpose of a preliminary injunction, which is "to preserve the status quo until the merits are determined." *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113 n.5 (8th Cir. 1981) (en banc).

Nor have Plaintiffs shown why an injunction is necessary to address their asserted irreparable harm. Much of that asserted irreparable harm relates to HF2605's criminal consequences. But even if Plaintiffs are likely to succeed on their vagueness claim, an injunction would not grant them relief from those criminal consequences, because an injunction against Director Garcia would enjoin enforcement only some of the law's civil and regulatory aspects.

To the extent irreparable harm does exist, it is borne by the State. "[A]ny time a State is enjoined by a court from effectuating statutes . . . it suffers a form of irreparable injury." *New*

Motor Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). And statutes are supposed to be "presumed constitutional and all doubts are resolved in favor of constitutionality." *Arkansas Times LP v. Waldrip as Tr. Of Univ. of Ark. Bd. of Trustees*, 37 F.4th 1386, 1393 (8th Cir. 2022). That is black letter Iowa law. *See* Iowa Code § 4.4.

Iowa has valid reasons for regulating drugs and psychoactive substances, *e.g.*, Parker Decl. ¶¶ 9–12, and to do so is a proper exercise of the State's police powers. *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (holding that States have "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."). Iowa's "interest in the enforcement of its criminal laws" is, in fact, among the most important State interests. *Juidice v. Vail*, 430 U.S. 327, 335 (1977).

Restricting Iowa from exercising these police powers would harm its citizens. It would risk exposing Iowans to health risks, especially children who have already suffered from a severe uptick in hospital visits relating to TCH edible poisoning. Sher Decl. ¶¶ 5–7; Parker Decl. ¶¶ 9–10. Since the onset of Iowa's consumable hemp market, Iowa has seen a 1,050% uptick in calls to the Iowa Poison Control Center regarding children exposed to THC. Sher Decl. ¶ 6. In the last several years, because of the availability and potency of the available consumable hemp products, Iowa's hospitals have seen a drastic increase in emergency visits relating to THC consumption. *Id.* ¶ 5. "[W]eed drinks might induce more psychoactive effects than cannabis products that you smoke," and a user "can go from a pleasant experience to a really unpleasant, dysphoric experience really quickly." Dani Blum, *Weed Drinks Are a Buzzy Alcohol Substitute. But Are They Safe?*, N.Y. Times (Aug. 19, 2022), https://perma.cc/AZ2T-3UV8. There is therefore a strong public interest in protecting Iowans, especially the vulnerable population like children, from these increased risks.

CONCLUSION

For these reasons, the Court should deny the motion.

July 5, 2024

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa

/s/ *Eric Wessan*
ERIC WESSAN
Solicitor General

/s/ *Patrick C. Valencia*
PATRICK C. VALENCIA
Deputy Solicitor General

/s/ William C. Admussen
WILLIAM C. ADMUSSEN*
Assistant Solicitor General
*Admitted *Pro Hac Vice*

/s/ Alexa S. Den Herder
ALEXA S. DEN HERDER
Assistant Solicitor General

Iowa Department of Justice
Hoover State Office Building
Des Moines, Iowa 50319
(515) 823-9117 / (515) 281-5191
eric.wessan@ag.iowa.gov
patrick.valencia@ag.iowa.gov
william.admussen@ag.iowa.gov
alexa.denherder@ag.iowa.gov

ATTORNEYS FOR DEFENDANTS

Original filed electronically.
Copy electronically served on all parties of record.

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served on counsel for all parties of record by delivery in the following manner on July 5, 2024:

☐ U.S. Mail	☐ FAX
☐ Hand Delivery	☐ Overnight Courier
☐ Federal Express	☐ Other
☒ CM/ECF	

Signature: */s/ Patrick C. Valencia*