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

CLIMBING KITES LLC and FIELD DAY BREWING COMPANY LLC, Plaintiffs, v. THE STATE OF IOWA; KELLY GARCIA, in her official capacity as Director of the Iowa Department of Health and Human Services; and THE IOWA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.	CASE NO. 4:24-CV-202 **PLAINTIFFS' REPLY TO DEFENDANTS' RESISTANCE TO RENEWED MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR RENEWED MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs Climbing Kites LLC and Field Day Brewing Company LLC, by and through the undersigned counsel, submit this Reply to Defendants' Resistance to Plaintiffs' Renewed Motion for a Preliminary Injunction.

INTRODUCTORY STATEMENT

It is important to establish who did (and did not) do what. The legislature passed HF2605 creating certain limitations on a "serving" of THC in a consumable hemp product. The legislature—according to the Attorney General, and as recognized by this Court—did not define "serving." Transcript of June 28, 2024 Hearing at 34:10–35:8 (hereinafter "Tr."). The Department then took that law, inserted its own definition of "serving," and told the world 90% of Plaintiffs' products are criminal and that Plaintiffs would be prosecuted for selling them.

The Department assures this Court it has taken *no action*: its regulations implementing HF2605 are not yet final, and it is not even Director Garcia who will implement or enforce the statute. Defs.' Opposition to Renewed Preliminary Injunction at 6 & 17 (hereinafter "Defendants' Br."). If that's true, that makes the Department's own claims wholly inexplicable: "**[P]enalties**

for non-compliance implemented by HF 2605 are severe and HHS intends to enforce these new regulations when they become effective on July 1." Department's Guidance p. 6 (emphasis added). HHS tells the world penalties will apply and *the Department* will enforce these new regulations, yet tells the Court otherwise. Moreover, with no apparent legal basis to do so, the Department has now determined that 100% of Plaintiffs' products are illegal and they no longer can sell *any* of their products in Iowa without facing the threat of criminal prosecution—even those that contain less than 4 milligrams of THC in an entire can and thus fall safely within the Department's "not yet final" rules. HHS cannot tell all wholesalers, retailers, and consumers one thing and then credibly claim something else to this Court.

ADDITIONAL FACTUAL BACKGROUND

The Department previously represented to the Court that its "clarifying guidance," which defines "serving," does not go into effect on July 1. Tr. 35:14–16; *see also* Tr. 43:21–22 ("The guidance from the Department of Health and Human Services does not go into effect July 1st.").

Yet on or about July 1, 2024, the Department removed *all* of Plaintiffs' products from the Department's register of approved products—including those that contain less than 4 milligrams per container (and, under any party's interpretation, remain legal under HF2605). Declaration of Scott Selix in Support of Renewed Motion ¶ 13 (hereinafter "Selix Decl."); Declaration of Dan Caraher in Support of Renewed Motion ¶ 13 (hereinafter "Caraher Decl."). The Department provided no advance notice of its action and did not inform Plaintiffs once it had been done. *Id.* The only reason Plaintiffs became aware that the Department had removed *all* their products was when Plaintiffs consulted the online register. At this point, it appears the Department has made it illegal for Plaintiffs to sell *all* consumable hemp products, regardless of the amount of THC in a

"serving." The Department continues to insist it is not enforcing HF2605 and Plaintiffs have no ability or right to sue.

ARGUMENT

I. PLAINTIFFS SUED THE PROPER PARTIES.

Plaintiffs amended their complaint, but request the same relief: injunctive relief preventing state officials—here Director Kelly Garcia—from implementing or enforcing state law in violation of federal law. *See Ex parte Young*, 209 U.S. 123 (1908). The fact the Department's evolving interpretation of HF2605 has criminal implications—in addition to significant economic consequences—does not mean Plaintiffs sued the wrong parties. Would an injunction against the Commissioner of the Department of Public Safety prevent an elected county sheriff from relying upon the Department's interpretation of "serving"? Would naming the Iowa Attorney General stop an elected county attorney from ordering the confiscation or destruction of "non-compliant" products from Plaintiffs' warehouses or their retailers' shelves? It would not. Should Plaintiffs sue every police chief in the state of Iowa, or the agency charged with administering the program and who has assumed the power to define what is illegal? The answer is plain. Plaintiffs sued the Department after it defined "serving" without statutory authority to do so, removed *all* of Plaintiffs' products as approved products (including those containing less than four milligrams in an entire container), then threatened criminal charges starting July 1. Plaintiffs agree with the State: "the Department of Health and Human Services does have a sufficient enforcement role so that under *Ex parte Young*, Ms. Garcia is a proper party." Tr. at 32:4–6.

II. THE STATUTE'S PER-SERVING POTENCY LIMIT IS FATALLY VAGUE.

It is a *criminal act* to manufacture or sell a consumable hemp product in Iowa if its total THC concentration exceeds "four milligrams per serving and ten milligrams per container." But what is a "serving?" The legislature provided no clues to the public, the executive branch, or local

law enforcement. Until it does, this Court must enjoin the statute's unintelligible per-serving potency limitation to prevent arbitrary or discriminatory enforcement of the law.

This Court is already aware of the serious questions regarding the constitutionality of the per-serving potency limitation. ECF 29 p. 9. The Court succinctly characterized such limits as "an island floating without the necessary definitions to be enforceable." Tr. 36:9–10. Plaintiffs agree. And the Department's amorphous interpretation(s) fare no better. Since February, the Department has taken the following positions:

- In its initial guidance, the Department stated that a "serving" of a consumable hemp beverage was the entire container, regardless of the size of the container. ECF 2-1, ¶ 13; ECF 2-2, ¶ 13.
- In its current guidance, the Department stated a "serving" of a consumable hemp beverage must be twelve ounces, regardless of the size of the container or type of beverage therein. Department Guidance pp. 1–2.
- At the June 28 hearing, the Department changed course again, conceding that a twelve-ounce beverage container may contain two servings. Tr. 47:9–18 ("It would be legal, Your Honor.").
- The Department has approved and allowed the sale of beverage products from Plaintiffs with <u>one</u>, <u>two</u>, <u>two-and-a-half</u>, and <u>four</u> servings in a twelve-ounce container. Selix Dec. ¶ 7; Caraher Decl. ¶ 7.

If a "serving" of THC has such a "settled legal meaning," Defendants' Br. p. 12, why has the Department taken so many inconsistent positions? Moreover, the Department has now claimed *twice* that a manufacturer should use Google to determine whether it is violating the law. Tr. 36:11–20; Defendants' Br. p. 16. It is hard to imagine Plaintiffs should operate their business—or must avoid arrest and prosecution—by relying on a Google search.

Plaintiffs have no obligation to offer some "plausible interpretation of serving." Defendants' Br. p. 17. In fact, this Court has no obligation to make legal sense of the per-serving limitation if its meaning is vague and the Department's application is "garbled beyond comprehension." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts*

138 (2012). Rather, the Court must enjoin the per-serving potency limit as void for vagueness if the statute fails to give adequate notice to Plaintiffs of conduct *criminalized* by the legislature, and upon a showing that the statute may be enforced arbitrarily among Iowa's state, county, and local law enforcement agencies. *United States v. Barraza*, 576 F.3d 798, 806 (8th Cir. 2009); *United States v. Articles of Drug*, 825 F.2d1238, 1243–44 (8th Cir. 1987). "A statutory offense can not be established by implication and there can be no constructive offense. Before an accused can be punished, his act must plainly be within the statute." *Arnold v. United States*, 115 F.2d 523, 526 (8th Cir. 1940). "The legislature has no power to create offenses by implication. There can be no constructive offenses." *State v. Brighi*, 7 N.W.2d 9, 11 (Iowa 1942).

If the *Department* has approved varying applications of "serving" sizes—as the agency charged with administering Iowa's consumable hemp program—it is almost certain the term "serving" does not give notice to non-lawyer citizens of ordinary intelligence. *D.C. & M.S. v. City of St. Louis*, 795 F.2d 652, 653 (8th Cir. 1986) ("Vague laws may trap the innocent by not providing fair warning."). And nothing in the statute suggests the legislature intended the term "serving" in chapter 204 should mean what the Federal Food, Drug, and Cosmetic Act says it means. Despite including the FDCA and the 2018 Farm Bill as defined terms in chapter 204, *see* Iowa Code § 204.2(7)–(8), the legislature did not tie the meaning of "serving" to the FDCA or its immense technical framework. Thus, the tables and charts cited by the Department are of no help.

Nor did the legislature specify how many servings of total THC can be contained within a 12-ounce beverage. The Minnesota legislature, for example, limited a consumable product to "five milligrams of [THC] in a single serving." Minn. Rev. Stat. 151.72(5a)(f). The statute goes on, however, to clarify that "[a]n edible cannabinoid product that is intended to be consumed as a beverage may not contain more than two servings per container." *Id.* Iowa's legislature could

have included such a limitation. It did not. *State v. Robbins*, 257 N.W.2d 63, 67 (Iowa 1977) ("In defining crimes, as in all other legislation, the legislature is its own lexicographer."). Plaintiffs are forced to guess at the meaning of a "serving" of THC and risk arrest or destruction of thousands of dollars of property if their guess does not match the State's. *See Planned Parenthood v. Miller*, 30 F. Supp. 2d 1157, 1164 (S.D. Iowa 1998). The Department's reliance on *G & G Fremont, LLC v. City of Las Vegas*, 202 F. Supp. 3d 1175 (D. Nev. 2016) is similarly misplaced for at least two reasons. There, the city ordinance prohibited the sale of "single serving" beverages, but the amount of alcohol in any "single serving" of the beverage was never in question. *Id.* at 1181. And even if Iowa's law limited sales to "single" servings (which it does not), the Department's own actions demonstrate a 12-ounce beverage may contain multiple servings. Selix Decl. ¶ 7; Caraher Decl. ¶ 7.

Because the term "serving" does not have some technical or intuitive meaning under the statute, its ordinary meaning must apply. *Nahas v. Polk County*, 991 N.W.2d 770, 781 (Iowa 2023); *see GLBT Youth in Iowa Schools Task Force v. Reynolds*, No. 4:23-cv-474, 2023 WL 9052113, at *22 (S.D. Iowa Dec. 29, 2023) (using dictionary definitions to assess a void-for-vagueness challenge); *Fort Des Moines Church of Christ v. Jackson*, 215 F. Supp. 3d 776, 798 (S.D. Iowa 2016) (same). Multiple dictionaries define "serving" as "a ***helping*** of food or drink." *Serving*, *Webster's Third New Int'l Dictionary* 2076 (1976) (emphasis added); *Serving*, *Webster's New Collegiate Dictionary* 1060 (1973) (same). Impermissibly vague. Suppose a manufacturer "Googles" the term, as the Department recommends. Tr. 36:11–20; Defendants' Br. p. 16. There, "serving" means "a ***quantity*** of food suitable for or served to one person." *Serving*, *Oxford Languages*, *available through* www.google.com ("Google's English dictionary is provided by Oxford Languages.") (emphasis added).

When the legislature criminalizes based on amount, the Fourteenth Amendment requires enough detail for an ordinary person to differentiate between lawful business and criminal activity. Plaintiffs have heard three separate interpretations of "serving" from *the Department* over the past several months.[1] But now imagine that ad hoc, subjective determination delegated to each of Iowa's policemen, judges, or juries. *See Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972); *see also Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983). Whether a product violates state law based on its "servings" will lead to arbitrary enforcement. *See, e.g.*, *Parents Defending Educ. v. Linn Mar Comm. Sch. Dist.*, 83 F.4th 658, 669 (8th Cir. 2023) (striking down school disciplinary rules based on a student's failure to "respect" other students). Do all state and local elected officials share the same philosophical, political, or legal views of THC consumables? Can Iowans agree on the appropriate or reasonable "helping" or "quantity" of a beverage consumed in a day? Due process requires greater clarity.[2]

III. THE PER-SERVING POTENCY LIMIT CANNOT BE ENFORCED UNTIL THE LEGISLATURE PROVIDES GREATER CLARITY.

Should this Court enjoin the statute's per-serving limit, the Court should grant relief until the *legislature* clarifies the statute—not until the *Department* issues administrative rules. The Department broadly asserts it has rulemaking authority to define "serving," but the statute offers no support for that claim. ECF 17-1 pp. 24–25. The law's text, legislative history, and floor statements from key legislators make clear the statute does *not* vest interpretative authority with

[1] Now, in this litigation, the Department insists that federal law provides "the only definition of serving sizes." Defendants' Br. p. 19. Other states have codified at least two different meanings of a "serving" of THC in beverages. *See* Minn. Rev. Stat. § 151.72(5a)(f) (defining a "serving" as 5 milligrams of THC without reference to the vehicle carrying that THC); La. Rev. Stat. § 3:1481(11) (defining a "serving" of THC as the "amount of individual units or amount of liquid of a product recommended by the manufacturer to be consumed at a single time").

[2] The Department's recent decision to remove its approval for *all* of Plaintiffs' products—some in complete compliance with the Department's non-final guidance and with no notice provided—presents similar Due Process concerns and certainly fails to give adequate notice of conduct the Department apparently believes the legislature prohibited. *See Barraza*, 576 F.3d at 806–07 (focusing on the risk of "arbitrary enforcement" of penal statutes).

the agency.[3] Amendment H-8193 to Amendment H-8134 to H.F. 2605, 90th G.A., 2d Sess. (Iowa 2024); *see Abbas v. Iowa Ins. Div.*, 893 N.W.2d 879, 889–890 (Iowa 2017) (using prior bill versions and legislative amendments to determine legislative intent). The Department gets no "benefit of the doubt" on its interpretation of an ambiguous statute, especially when its authority to do so is in serious question. *Cf. Loper Bright Enters. v. Raimondo*, __ S. Ct. __, 2024 WL 3208360, at *16 (2024) (rejecting agency deference "when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is *least* appropriate").

The Department has no subject matter expertise to define "serving," a fact plainly evident based on its inconsistent iterations of how a serving applies to a 12-ounce can. *See Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 257 (Iowa 2012) (recognizing agencies have no authority to interpret a statute "when a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency" (quoting *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 14 (Iowa 2010) (cleaned up))). And just because the agency is granted rulemaking authority over *some* areas of the Iowa Hemp Act does not establish authority over *other* areas, such as defining "serving." *See Banilla Games, Inc. v. Iowa Dep't of Inspections & Appeals*, 919 N.W.2d 6, 13 (Iowa 2018) ("[T]he fact that the legislature granted an agency rulemaking authority does not give the agency 'authority to interpret *all* statutory language.'" (quoting *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 343 (Iowa 2013))). Absent some specific showing that the legislature granted the agency the right to define potency limits per serving, an injunction

[3] Statements from individual legislators confirm the Department's authority to define potency limits was removed from the final bill to keep the legislature "in the driver's seat on setting limits, instead of faceless bureaucrats." *House Video HF2605: H-8193 to H-8134 by Sorenson of Adair*, Iowa Legislature, at 4:53:15 to 4:53:23 PM (March 12, 2024).

extending only until the Department defines "serving" will lead the parties back into the courtroom in mere months—all while the industry continues to be damaged.[4]

Yet there is a more fundamental reason why this Court must extend relief until the statute is amended: separation of powers requires it. Even if the Department claims to have rulemaking authority to define "serving" in this context, that authority is an unconstitutional delegation of power because it creates crimes and imposes punishment on Iowa citizens. "*Only the legislature has the power to create and define crime*." *State v. Watts*, 186 N.W.2d 611, 614 (Iowa 1971) (emphasis added). Administrative agencies cannot swoop in to clean up, modify, or clarify an unconstitutionally vague criminal statute—especially when the stated rationale is, "well, *someone* has to clarify the law." *See* ECF 17-1 p. 25. An agency only enjoys authority granted by the legislature, as constrained by the Iowa constitution. *See Brakke v. Iowa Dep't of Nat. Res.*, 897 N.W.2d 522, 533–34 (Iowa 2017); *see* Iowa Const. art. III, § 1. This Court should not accept the Department's claim that it can define state-law crimes how it pleases. Until the legislature revisits serving-size limitations on THC consumables, the statute's per-serving requirement cannot be enforced.

CONCLUSION

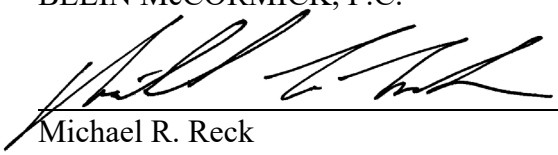
Plaintiffs continue to have no idea which of its products are legal. And at this moment, the Department appears to have criminalized *all* of Plaintiffs products, regardless of the amount of THC in a serving. Due process requires more clarity. This Court should enjoin HF2605's limitation that a consumable hemp product contain no more than "four milligrams per serving" until the legislature provides clarity on what, exactly, that means.

[4] The earliest the Department could implement its definition of "serving" and "container" through rulemaking—i.e., when its rules could *take effect* (and not merely be "adopted")—is September 11, 2024. *See* Administrative Rules 2024 Schedule for Rulemaking (for rules noticed on or before June 12, 2024), *available at* https://www.legis.iowa.gov/docs/publications/ACOD/1386483.pdf.

Dated this 8th day of July, 2024.

Respectfully submitted,

BELIN McCORMICK, P.C.



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