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

HW PREMIUM CBD, LLC, *et al.*, *Plaintiffs*, v. KIM REYNOLDS, Governor of Iowa in her official capacity, *et al.*, *Defendants*.	Case No. 4:24-cv-00210-SMR-SBJ

DEFENDANTS' RESISTANCE TO PLAINTIFFS'

MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes

TABLE OF AUTHORITIES (cont'd)

Page(s)

Regulations

Other Authorities

INTRODUCTION

Consumable hemp products are dangerous if left unchecked. This lawsuit is the second challenge to Iowa's Hemp Amendments that impose guardrails and potency limits on those products. As Iowa and other States realized, the federal ceiling on delta-9 THC in consumable hemp products cannot protect their citizens. House File 2605 sets potency limits on consumable hemp products, requires a health warning, and sets an age minimum to buy these intoxicating products. It also bans dangerous and previously unregulated synthetic consumable hemp products. House File 2641 slightly amends regulation of the agricultural side of hemp production.

Though Plaintiffs ask this Court to enjoin enforcement of these Hemp Amendments in their entirety, their arguments target just a few sections. And those challenges fail.

First, Plaintiffs lack standing to bring an express-preemption challenge. They assert that the Amendments purportedly ban transportation of hemp products from one State, through Iowa, and to another State—but they do not allege that they wish to transport these products in this way. Plaintiffs seek to transport hemp products *into* Iowa, but not *through* Iowa. Regardless, Plaintiffs' express-preemption arguments fail because Iowa's Hemp Act has clear exceptions for interstate transportation.

Second, Plaintiffs' conflict-preemption challenge fails because, as this Court has already recognized, "regulating the permissible THC in a consumable hemp product is expressly permitted by the Farm Bill." Order on Pls.' Mot. for Prelim. Inj., *Climbing Kites LLC v. Iowa*, No. 4:24-CV-202 (S.D. Iowa July 2, 2024) ("CK Dkt."), Dkt. 29, at 20.

Third, Plaintiffs argue only two parts of the new laws are unconstitutionally vague. Both fail. "[S]ynthetic consumable hemp product" is a well-known term in the industry and under Iowa law. And Plaintiffs concede that they understand the text of the law giving the Iowa Department of Health and Human Services power to promulgate a required health warning for the label.

Fourth, Plaintiffs' statutory "grace period" argument fails. Whether a statutory grace period gives an adequate opportunity for citizens to become familiar with a new law is a matter which the Court gives the Legislature's judgment its greatest deference.

Fifth, Plaintiffs' Commerce Clause challenge fails because Iowa law does not ban the interstate commerce of hemp through Iowa. Nor, as Plaintiffs admit, are the Hemp Amendments discriminatory or subject to *Pike*'s cost-benefit analysis.

Finally, Plaintiffs' Takings Clause challenge fails because the hemp industry is both highly regulated and volatile, so Plaintiffs cannot have firm investment-based expectations.

This Court should deny Plaintiffs' motion for a preliminary injunction.

BACKGROUND

A. The Controlled Substances Act and the 2018 Farm Bill

In 1970, Congress passed the Controlled Substances Act ("CSA"), 21 U.S.C. § 801, *et seq*. The CSA makes it a federal crime to manufacture, distribute, or possess a controlled substance. 21 U.S.C. § 841(a). Marijuana is a Schedule I drug, which is the most restrictive of the five schedules. *See id.* §§ 841–42. The active psychoactive chemical in marijuana is delta-9 THC. Sher Decl. ¶ 3.

But the CSA does not preempt States' controlled-substances laws. To the contrary, it respects States' traditional role of regulating controlled substances by stating that the CSA shall not "be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State." 21 U.S.C. § 903.

States have thus continued to regulate controlled substances—sometimes more stringently than the CSA, for example by criminalizing the possession or sale of substances the CSA does not. *See, e.g.*, *C. Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541, 548 (7th Cir. 2020) (noting that salvia is not scheduled by the DEA but "some states nonetheless choose to criminalize [it]").

The 2018 Farm Bill amended the CSA to exclude "hemp" from the definition of marijuana. *See* Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 12619 (Dec. 20, 2018); *see also* 7 U.S.C. § 1639*o*(1); 21 U.S.C. § 802(16)(B)(i). It defined "hemp" as "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).

To regulate hemp, the Farm Bill created a cooperative program between the United States Department of Agriculture and participating States. *Id.* §§ 1639p, 1639q. States have "primary regulatory authority over the production of hemp in the State," if they submit a plan to the Secretary of Agriculture that meets basic requirements such as testing. *Id.* § 1639p(a)(1).

To dispel any doubts about States' ability to continue regulating hemp, the Farm Bill included a clause labeled "No preemption" that explained "[n]othing in th[e] subsection" concerning State plans for regulating hemp "preempts or limits the law of any State . . . that—(i) regulates the production of hemp; and (ii) is more stringent than this subchapter." *Id.* § 1639p(a)(3)(A). And even if a State opted to let the Department of Agriculture regulate its hemp, the Farm Bill would not preempt more stringent State regulation. In such a State, hemp production is legal so long as "the production of hemp was not otherwise prohibited by the State." *Id.* § 1639p(f)(2). Further, "it shall be unlawful to produce hemp in [a State without an approved plan] without a license issued by the Secretary." *Id.* § 1639q(c)(1).

Finally, the Farm Bill contains a narrow express preemption provision: "No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (as added by section 10113) through the State." Pub. L. 115-334, § 10114(b) (codified at 7 U.S.C. § 1639*o* note).

B. The Effects of Federal Hemp Legalization

Iowa opted to assume primary regulatory authority over hemp under the 2018 Farm Bill. At first, Iowa law adopted the federal definition of "hemp" and legalized consumable hemp products falling below the federal delta-9 THC limit of 0.3%. CK Dkt. 29 at 4–5.

But, like many other States, *see id.* at 23 (collecting State laws), Iowa found the federal maximum delta-9 THC level was inadequate to protect its citizens. Under the 0.3% standard, a carbonated beverage could contain up to 1,000mg of THC—more than 200 times an adult serving. *See* CK Dkt. 30, at 40:25–41:1 (hearing transcript); Parker Decl. ¶ 7 (noting that researchers use 5mg as a serving size). In the words of Scott Selix, General Counsel of Climbing Kites: that "is a dangerous amount of THC." CK Dkt. 30, at 41:1. Yet because these products were within the federal limits, they flooded into Iowa. Parker Decl. ¶ 8.

Unscrupulous manufacturers then skirted the already dangerously high federal THC limit by creating synthetic THC variants. Parker Decl. ¶ 9. Those variants, including delta-8 and delta-10 THC, are not naturally occurring and are created through chemical processes. Parker Decl. ¶ 9. There are hundreds of synthetic cannabinoids on the market. Ctrs. for Disease Control & Prevention ("CDC"), *About Synthetic Cannabinoids* (Mar. 23, 2021), https://perma.cc/9C3C-XFXC. Because the federal standard regulated only delta-9 THC levels, intoxicating and dangerous products containing synthetically derived THC went unregulated. Parker Decl. ¶ 9.

This lack of regulation caused a public health crisis. Emergency room visits related to THC consumption rose. Sher Decl. ¶ 5. In 2022 alone, 6,799 Iowans visited an emergency room due to substances containing some type of THC. *Id*. Calls to the Iowa Poison Control Center rose as well. *Id*. And what has been happening in Iowa reflects a national trend. In just one six-month span in 2021, 660 adverse reactions to delta-8 THC were reported to national poison control centers; many

of which required hospitalization. CDC, *Increases in Availability of Cannabis Products Containing Delta-8 THC and Reported Cases of Adverse Events* (2021), https://tinyurl.com/cdc-delta-8.

This problem is not limited to adults. Between 2019 and 2023, calls to the Iowa Poison Control Center regarding children exposed to THC products increased by 1,050%. Sher Decl. ¶ 6. One recent study found over 3,000 reported exposures of children under six years old to edible cannabis products in 2021, a nearly fifteen-fold increase from only four years prior, along with a 22.7% hospitalization rate of children aged under six. Marit S. Tweet et al., *Pediatric Edible Cannabis Exposures and Acute Toxicity*, 151 Pediatrics 2 (2023).

When children ingest THC, there are life-threatening side-effects. *See, e.g.*, CDC, *Increases in Availability of Cannabis Products Containing Delta-8 THC*, *supra* (discussing children that ate their parents' delta-8 THC gummies and ended up in an intensive care unit); Mike Snider and Saleen Martin, *Iowa Dad Charged After 4-Year-Old Eats THC Bar is Latest in Edible Emergencies with Children*, USAToday (Dec. 16, 2023), https://perma.cc/F8KX-4QHN. Those effects are exacerbated by some retailers' packaging, which to this point has not been regulated. *See* Sher Decl. at ¶ 6 ("Children cannot distinguish [THC] products from the candy and drinks they normally consume."); Tweet, 151 Pediatrics at 6 ("Products continue to be offered in brightly colored, enticing packaging that is identical in style to . . . candy and snack products.").

C. Iowa's Response: House Files 2605 and 2641

The Iowa Legislature sought to address these issues with two new laws: HF 2605, which took effect July 1, 2024, and HF 2641, which takes effect December 31, 2024.

House File 2605. HF 2605 passed the Legislature on April 2 and was signed into law on May 17. *See* An Act Providing for the Regulation of Hemp and Hemp Products, 2024 Iowa Acts ch. 1176 (to be codified at scattered sections of Iowa Code 4 chs. 123, 204, and 805). Section 2 limits the amount of THC in consumable hemp products. The Potency Provision caps the

"maximum total [THC] concentration" to "less than or equal to the lesser of the following: "[t]here tenths of one percent on a dry weight basis" or "[f]our milligrams per serving and ten milligrams per container on a dry weight basis." HF 2605, § 2 (codified at Iowa Code § 204.2(2)(*c*)(2)).

Section 4 requires that all consumable hemp products comply with packaging and labeling requirements established by the Iowa Department of Health and Human Services. HF 2605, § 4 (codified at Iowa Code § 204.7(8)(*a*)(3)). This Warning Provision specifically requires "a notice advising consumers regarding the risk associated" with using consumable hemp products. *Id.*

To address the proliferation of dangerous synthetics, the Synthetics Prohibition bans Iowa hemp licensees from selling "synthetic consumable hemp products, as defined by rules adopted by the department of health and human services." HF 2605, § 8 (codified at Iowa Code § 204.14A(1B)). The rulemaking authority given to the Iowa Department of Health and Human Services is a response to the fact that manufacturers are constantly creating new THC variants. The Department has issued a proposed definition of synthetic consumable hemp products: "products containing synthetic or semisynthetic cannabinoids. Synthetic and semisynthetic cannabinoids refer to a class of cannabinoids that are created through a chemical process and are structurally similar to naturally occurring cannabinoids or cannabinoids that may occur in very small amounts naturally." Notice of Intended Action, ARC 8064C, 46 Iowa Admin. Bull. 10015, 10077 (June 12, 2024). The proposed rule gives examples of synthetics, such as delta-8 and delta-10 THC. *Id.*

To protect minors, section 12 sets the age limit for purchasing consumable hemp products at 21. HF 2605, § 12 (codified at Iowa Code § 204.14D).

House File 2641. This law passed the Legislature on April 17 and was signed by the Governor a month later. *See* An Act Relating to Agriculture, 2024 Iowa Acts ch. 1177 (to be codified in relevant part in chs. 204, 204A, and 124). The challenged section of HF 2641 modifies

the agricultural side of hemp production in Iowa. It is enforced by the Department of Agriculture and Land Stewardship. HF 2641, § 38 (defining "Department"). The law incorporates and slightly alters testing requirements from the old hemp laws, HF 2641, § 41. It also requires persons transporting hemp seed or harvested hemp "on an intrastate or interstate basis" to carry certain documentation, such as a bill of lading or a certificate of analysis. HF 2541, § 42. That section includes the conditional language, "[e]xcept to the extent otherwise provided in the federal hemp law . . . or by the [USDA] acting under the federal hemp law." *Id.* HF 2641 also codifies its own rule of construction: "Nothing in this chapter shall be construed or applied to be in conflict with applicable federal law and related regulations." HF 2641, § 43.

It is also notable what HF 2605 and HF 2641 did *not* alter: they kept a carve-out for transportation of hemp and hemp products through the State. Section 204.17(3) continues to provide that "[e]xcept as provided in section 204.7, nothing in this chapter shall be construed or applied to prohibit a person from possessing, handling, using, manufacturing, marketing, transporting, delivering, or distributing a hemp product." Section 204.7 prohibits the "manufacture[], s[ale], or consum[ption]" of hemp products, but says nothing about transportation or possession. Iowa Code § 204.7(8)(a). There are additional, similar carve-outs elsewhere in section 204.7. *See* Iowa Code § 204.7(5)(a)–(b), (6) (altered by HF 2641 but not HF 2605). Nor did either law alter section 204.17(2)(a), which says "[n]othing in this chapter shall be construed or applied to be in conflict with . . . [a]pplicable federal law and related regulations."

Finally, in Iowa's Controlled Substances Act, there is an exclusion that allows a person to "produce, possess, use, harvest, handle, manufacture, market, transport, deliver, or distribute" "[h]emp that was produced in another state in accordance with the federal hemp law and other applicable law." Iowa Code § 124.401(6)(b).

D. Procedural History

Plaintiffs are mostly Iowa-based retailers, growers, manufacturers, and distributors of hemp and consumable hemp products. Dkt. 10, at 13 ("Br."). More than two months after HF 2605 and HF 2641 passed the Legislature, but just a few days before HF 2605 would go into effect, Plaintiffs sued seeking a temporary restraining order and a preliminary injunction. Dkt. 1 ("Compl."). Though they ask this Court to enjoin enforcement of the entirety of both laws, Br. 9, their arguments are targeted only at specific parts of the law.

Count I asserts that HF 2605's Potency Provision and Synthetics Prohibition are expressly preempted because, according to Plaintiffs, they prohibit the transportation of hemp through Iowa. Compl. ¶¶ 89–108. Count II asserts that the same provisions are conflict preempted by the Farm Bill. Compl. ¶¶ 109–24. Count III asserts that the Warning Provision and the term "synthetic consumable hemp product" are unconstitutionally vague. Compl. ¶¶ 125–47. Importantly, Plaintiffs do not claim that any other provision of HF 2605 and HF 2641 is void for vagueness. Count IV alleges a due-process violation regarding the timing of the Department's rulemaking. Count V alleges a Commerce Clause violation regarding the Warning Provision, HF 2605, § 8 and HF 2641, § 30. Compl. ¶¶ 172–89. Count VI alleges a Takings Clause violation regarding the entirety of both laws, without specifying which provisions. Compl. ¶¶ 190–217. The Court denied the request for the TRO and set an expedited briefing schedule. Dkt. 8.

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). 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, 485–86 (8th Cir.

1993). When, as here, a plaintiff seeks to "enjoin the implementation of 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, 732–33 (8th Cir. 2008) (en banc). Only after that threshold showing may a court "then proceed to weigh the" other factors. *Id.* at 732. This "more rigorous standard" is intended to ensure that "a state's presumptively reasonable democratic processes" are not thwarted without "an appropriately deferential analysis." *Id.* at 733. 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).

And when reviewing Iowa statutes, certain canons of construction are law. "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.

A. Plaintiffs Lack Standing to Bring Their Express-Preemption Claim.

Plaintiffs contend that the Farm Bill expressly preempts any application of the Hemp Amendments that prohibits transporting hemp products through Iowa. *See* Br. 17 (raising interstate hypothetical). They rely on the Farm Bill's preemption clause, which bars States from "prohibit[ing] the transportation or shipment of hemp or hemp products produced in accordance with [the Farm Bill] . . . through the State." 7 U.S.C. § 1639*o* note.

But to invoke this Court's jurisdiction, Plaintiffs must first establish standing. *See Dig. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 956 (8th Cir. 2015). To do so, Plaintiffs

"must show that [they] h[ave] suffered an injury in fact that is fairly traceable to the challenged conduct of the defendant and will likely be redressed by a favorable decision." *Id*.

Here, Plaintiffs lack standing to bring this express-preemption challenge because their businesses revolve around the transportation of hemp products *into* Iowa, not *through* Iowa. Though they invoke the hypothetical scenario of a Nebraska retailer shipping hemp through Iowa to Illinois, Br. 17, they fail to allege supporting facts. Most of Plaintiffs are retail stores in Iowa. *See* Compl. ¶ 24 (HW Premium CBD, LLC), ¶ 25 (AJ's Health and Wellness, LLC), ¶ 27 (Green Onyx, Inc.), ¶ 28 (Beyond CBD, LLC), ¶ 29 (Campbell's Nutrition Centers, Inc.), ¶ 32 (ICanna, LLC). Plaintiff E. Krieger Land, LLC grows hemp, but it does so exclusively in Iowa. Krieger Decl. ¶ 5. Plaintiff Your CBD Store Franchising, LLC is in Florida and sells products to its franchisee in Iowa—but does not allege that it ships products through Iowa—nor that it is licensed to do so. Compl. ¶ 31. And while Plaintiff TCI Enterprise, Inc., an Iowa corporation with a principal place of business in Cedar Falls, "manufactures its consumable hemp products in Wisconsin," Compl. ¶¶ 30, 85, there are no allegations that it ships products from Wisconsin through Iowa to other States. Nor does it allege that it is currently licensed to do so. And that pleading deficiency is crucial: preemption applies only to "hemp or hemp products produced in accordance with [the Farm Bill]," which requires the producer to be "licensed under an approved state plan or by the federal government itself." *C. Y. Wholesale, Inc. v. Holcomb*, 2021 WL 694217, at *6 (S.D. Ind. Feb. 22, 2021). At bottom, Plaintiffs do not allege facts that mirror their own hypothetical, so they lack standing. *See* Br. 17.

Two courts have already reached this same conclusion. In *Northern Virginia Hemp & Agriculture LLC v. Virginia*, a plaintiff challenging Virginia's hemp restrictions "posit[ed] a scenario" in which its North Carolina-based location would be "forced to detour industrial hemp

shipments around Virginia to its franchise location in Connecticut." 2023 WL 7130853, at *9 (E.D. Va. Oct. 30, 2023). That court held that the interstate hypothetical "does not support their claim for injunctive relief primarily because [plaintiff] has not alleged that any of its shippers have actually had to detour around Virginia or that its shipping costs have increased because of [Virginia's law]." *Id.* And in *C. Y. Wholesale*, the district court on remand held that plaintiffs similarly lacked standing because they failed to show that "the hemp they ship through Indiana [was] produced by an entity licensed under an approved state plan or by the federal government itself." 2021 WL 694217, at *6. So too here. This Court should dismiss Plaintiffs' express-preemption claim because Plaintiffs lack standing.

B. Plaintiffs' Express-Preemption Claim Fails on the Merits.

Even with standing, Plaintiffs' express-preemption claim fails on the merits. "When a federal law contains an express preemption clause, [courts] focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 594 (2011) (quotation marks omitted). Further, "in areas of traditional state regulation," like the regulation of controlled substances, "[t]here is a presumption against preemption." *Wuebker v. Wilbur-Ellis Co.*, 418 F.3d 883, 887 (8th Cir. 2005). The same goes for Iowa law. *See* Iowa Code § 4.4(1) (codifying the interpretative canon that "[c]ompliance with the Constitutions of the state and of the United States is intended").

To begin, Plaintiffs wrongly characterize the Farm Bill's Rule of Construction as a preemption clause. *See* Br. 16–17; 7 U.S.C. § 1639*o* note ("Rule of Construction"). The Rule of Construction states that "nothing in this title"—that is, the Farm Bill—"prohibits the interstate commerce of hemp." 7 U.S.C. § 1639*o* note. It does not prohibit a State stopping hemp or hemp product sales within its own territory. If Plaintiffs' interpretation were correct, then the Farm Bill's express preemption provision, barring States from "prohibit[ing] the transportation or shipment of

hemp" in certain circumstances, would be superfluous. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (discussing the cannon against superfluidity). Worse, Plaintiffs' reading conflicts with the Farm Bill's no-preemption clause, which says the law does not "preempt[] or limit[]" State laws that regulate hemp production "more stringent[ly]" than federal law, 7 U.S.C. § 1639p(a)(3)(A). In short, the Rule of Construction says nothing about state law, thus it cannot expressly preempt it.

The actual express preemption in the Farm Bill is narrow: "No State or Indian Tribe shall prohibit *the transportation or shipment* of hemp or hemp products produced in accordance with . . . the Agricultural Marketing Act of 1946 . . . *through the State*." 7 U.S.C. 1639*o* note (emphases added). "[P]rohibit" means "[t]o forbid by authority," or to ban. American Heritage Dictionary of the English Language (5th ed. 2022), https://perma.cc/Y9RS-QEVA. The term does not bar States from instituting documentation requirements, as Plaintiffs contend. "[T]hrough" means "[i]n one side and out the opposite or another side of." *Id.*, https://perma.cc/M2QL-JC6J. In this context, the Farm Bill's express preemption clause bars Iowa from prohibiting a shipment of hemp or hemp product traveling from another State, through Iowa, and into a third State.

Neither HF 2605 nor HF 2641 prohibits the transportation of hemp or hemp products through Iowa. Iowa Code § 204.17(3), which was not altered by either law, provides that "[e]xcept as provided in section 204.7, nothing in this chapter shall be construed or applied to prohibit a person from possessing, handling, using, manufacturing, marketing, transporting, delivering, or distributing a hemp product." Though Plaintiffs emphasize the cross-reference to section 204.7, Br. 17, that section prohibits only those hemp products "manufactured, sold, or consumed" in Iowa—it does not prohibit shipping through Iowa. Iowa Code § 204.7(8) (quoted language unaltered by HF 2605 or HF 2641). And under HF 2605, there is additional exclusionary language on transportation. *See* Iowa Code § 204.7(5)(a)–(b), (6) (unaltered by HF 2605). Finally, in Iowa's

Controlled Substances Act, there is an exclusion for "[h]emp that was produced in another state in accordance with the federal hemp law and other applicable law." Iowa Code § 124.401(6)(b).

Plaintiffs are wrong that section 42 of HF 2641 creates criminal liability. It says: "[a] criminal offense involving hemp includes but is not limited to production, use, harvest, transportation, delivery, distribution, or sale *of cannabis as a controlled substance* except as otherwise provided in this chapter and chapter 204." HF 2641, § 42 (emphasis added). "Cannabis" means "any form of the plant in which the total delta-9 tetrahydrocannabinol concentration on a dry weight basis has not yet been determined." HF 2641, § 38 (incorporating 7 C.F.R. § 990.1). Given the State's requirement that transporters of hemp carry a certificate of analysis documenting the THC content, Iowa Code § 204.7(5)(a); HF 2641, § 42, it is hard to imagine a situation in which someone could lawfully transport "cannabis" across the State. Nor do Plaintiffs allege they seek to transport cannabis across Iowa without knowing its THC content—in fact, if they did allege that intention, it would mean they seek to transport products while ignorant of whether their products violate the *federal* Controlled Substances Act.

And if none of those sections prohibit the interstate transportation of hemp or hemp products, Iowa's Hemp Act provides rules of statutory construction that—like Iowa Code § 4.4(1)—require interpreting Iowa's laws to avoid conflict with federal law. Section 204.17(2)(a), which is unaltered by either HF 2605 or HF 2641, says "[n]othing in this chapter shall be construed or applied to be in conflict with . . . [a]pplicable federal law and related regulations." *See also* HF 2641, § 43 (same for newly codified Chapter 204A). And "federal law," of course, specifically includes the Farm Bill. *See* Iowa Code § 204.2(8). Because prohibiting shipping hemp and hemp product through the State would conflict with the Farm Bill, no such construction or application

of either HF 2605 or HF 2641 is allowed under Iowa law. These provisions governing construction of Iowa's Hemp Act must be given legal effect and are thus fatal to Plaintiffs' argument.

Lastly, if the Court were to find that Plaintiffs have standing and that section 204.17(2)(a) has no legal effect, the proper remedy would not be to enjoin both laws entirely. *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." (citation omitted)). Iowa's statutes are severable, Iowa Code § 4.12, so a "limited injunction . . . that addresses only transit through the state" would be the most that is appropriate. *C. Y. Wholesale*, 965 F.3d at 547. After all, State statutes are preempted "only to the extent necessary to protect the achievement of the aims of the [federal law]." *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973) (citation omitted).

C. Plaintiffs' Conflict-Preemption Claim Fails Because States May Regulate Hemp Products More Stringently than Federal Law.

Plaintiffs' conflict-preemption argument fares no better. Their argument boils down to this: Congress defined hemp to remove it from the federal schedule of controlled substances, so States cannot regulate hemp more stringently. Br. 18–19. Thus, they assert, HF 2605's Potency Provision and Synthetics Prohibition are preempted. Br. 20.

But that ignores the Farm Bill's plain text. A court "begin[s] [its] analysis with the well-established presumption against imputing to Congress an intention to preempt an area that traditionally has been left to state regulation," such as the regulation of controlled substances. *Swanco Ins. Co.-Arizona v. Hager*, 879 F.2d 353, 356 (8th Cir. 1989). And, as in any obstacle-preemption case, "a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Whiting*, 563 U.S. at 607 (plurality op.). That burden is even higher in a case like this one where the federal statute includes an express preemption clause because "an express definition of the pre-emptive reach of a statute supports a reasonable inference

that Congress did not intend to pre-empt other matters." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (alterations and citation omitted).

The Farm Bill defined its preemptive reach: "[n]o State . . . shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with [the bill] through the State." 7 U.S.C. § 1639*o* note. This "says nothing about whether a state may prohibit possession or sale of industrial hemp," or other hemp products, within the State. *C.Y. Wholesale*, 965 F.3d at 546.

There is more. The Farm Bill contains a no-preemption clause, which provides that it does not "preempt[] or limit[] any law of a State" that "regulates the production of hemp" and is "more stringent" than federal law. 7 U.S.C. § 1639p(a)(3)(A). The Farm Bill also acknowledges that States may ban production of hemp entirely. 7 U.S.C. § 1639p(f)(2).

These sections reflect a congressional intent for States to regulate hemp and hemp products more stringently than federal law, and to ban synthetics. As this Court has recognized, "regulating the permissible THC in a consumable hemp product is expressly permitted by the Farm Bill." CK Dkt. 29, at 20. In other words, the no-preemption clause expressly permits the Potency Provision and Synthetics Prohibition—some of which are *federally* controlled substances because they are not "hemp." *See Implementation of the Agriculture Improvement Act of 2018*, 85 Fed. Reg. 51, 639, 51,641 (Aug. 21, 2020) (DEA explaining that "[a]ll synthetically derived [THCs] remain schedule I controlled substances"); Parker Decl. ¶ 9.

Many courts agree. *See C.Y. Wholesale*, 965 F.3d at 547 (rejecting preemption challenge to Indian's smokeable-hemp ban); *Hemp Quarters 605 LLC v. Noem*, 2024 WL 3250461, at *4 (D.S.D. June 29, 2024) (similar); *AK Indus. Hemp Ass'n, Inc. v. Alaska Dep't of Nat. Res.*, 2023 WL 8935020, at *2, 5 (D. Alaska Dec. 27, 2023) (similar); *N. Virginia Hemp & Agric.*, 2023 WL 7130853, at *8 (similar); *Duke's Invs. LLC v. Char*, 2022 WL 17128976, at *5, 8 (D. Haw. Nov.

22, 2022) (similar); *Free Spirit Organics, NAC v. San Joaquin Cnty. Bd. of Supervisors*, 2022 WL 902834, at *4 (E.D. Cal. Mar. 25, 2022) (similar). Even *Bio Gen, LLC v. Sanders* recognized that "[c]learly, under the 2018 Farm Bill, Arkansas can regulate hemp production and even ban it outright if it is so inclined." 690 F. Supp. 3d 927, 939 (E.D. Ark. 2023) (appeal pending). This Court need not chart a different path here.

One court explained the background principles at play: "[i]f Congress chooses to make a substance . . . legal at the federal level with respect to the Controlled Substances Act, that does not mean that Congress has mandated that the substance must be legal in every state." *N. Virginia Hemp & Agric.*, 2023 WL 7130853, at *6. So, "[a]lthough Congress may have relaxed federal restrictions on low-THC cannabis in order to facilitate a market for hemp, the law indicates that the states were to remain free to regulate industrial hemp production within their own borders." *C.Y. Wholesale*, 965 F.3d at 548.

None of Plaintiffs' arguments show that all these courts somehow erred. They first argue that Congress's use of the word "production" in the no-preemption clause means that it "neither intended nor allowed states to regulate the manufacture, distribution, and sale of hemp." Br. 19 & n.2. This gets preemption doctrine backwards: courts start with the assumption Congress did not preempt State law—especially laws about a State's police power of regulating controlled substances—unless the federal statute shows a "clear and manifest" intent to the contrary. *Swanco Ins.*, 879 F.2d at 356. Further, the Farm Bill itself creates a regulatory structure only for the "production" of hemp, so it is not as if Congress were saving regulation of manufacturing or distribution for itself. 7 U.S.C. §§ 1639*o*, 1639p. At bottom, "Plaintiffs' attempt to narrow the word 'production' in the federal statute so as to not include [Iowa's] regulation of hemp manufacturing,

purchase, and sale within the [State] is not supported by a plain reading of the Farm Act's text." *N. Virginia Hemp & Agric.*, 2023 WL 7130853, at *5.

Unable to find support for their position in Farm Bill's text, Plaintiffs invoke one sentence in a Conference Report. Br. 19. But "only federal laws . . . are entitled to preemptive effect," not "abstract and unenacted legislative desires." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1907 (2019) (plurality). And read in context, the statement suggests that States may not define hemp more broadly than federal law. In full, it says that "states . . . are authorized to put more restrictive parameters on the production of hemp, but are not authorized to alter the definition of hemp or put in place policies that are less restrictive than this title." H.R. Rep. No. 115-1072, at 737 (2018). In other words, States can "put more restrictive parameters on the production of hemp" by regulating it more stringently, *see* 7 U.S.C. § 1639p(a)(3)(A); but States cannot define hemp more broadly than federal law or regulate hemp less restrictively than the Farm Bill allows—because doing so would legalize what federal law calls "marijuana." Regardless, Plaintiffs' reading runs headlong into the statute's text, which allows States to ban hemp products outright. *See* 7 U.S.C. § 1639p(f)(2) (Farm Bill does not prohibit production of hemp in accordance with federal laws "if the production of hemp is not otherwise prohibited by the State"). The Court should dismiss Plaintiffs' conflict-preemption claim.

D. Plaintiffs' Due Process Claims Are Not Likely To Succeed.

1. Neither the Synthetics Prohibition nor the Warning Provision are void for vagueness.

A law is unconstitutionally vague if "it fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). That doctrine does not require "[l]egislatures . . . to define every term in a statute." *Adam & Eve Jonesboro, LLC v. Perrin*, 933 F.3d 951, 958 (8th Cir. 2019).

"[I]ssues of interpretation regarding the meaning of a statute . . . in itself does not give rise to a finding of unconstitutional vagueness." *Farkas v. Miller*, 151 F.3d 900, 905–06 (8th Cir. 1998).

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) (courts look to dictionary definitions, "common usage of statutory language, [and] judicial explanations of its meaning"). That includes analyzing the relevant industry and its terms of art. So when a statute regulating an industry uses a word that has a certain meaning ordinarily known to those in the industry, a court should give the word that meaning. *See, e.g.*, *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."). 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." *United States v. Bronstein*, 849 F.3d 1101, 1111 (D.C. Cir. 2017). Relatedly, 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. 2023).

Plaintiffs argue that two parts of HF 2605 are not capable of any reasonable meaning: "synthetic consumable hemp product" (the Synthetics Prohibition; HF 2605, § 8, codified at Iowa Code § 204.14A(1B)) and a section giving the Department authority to issue packaging and labeling requirements (Warning Provision; HF 2605, § 4, codified at Iowa Code § 204.7(8)(*a*)(3)).

Synthetics Prohibition. The meaning of the term "synthetic consumable hemp products" is "readily ascertainable" by looking to the provision's text, context, and the industry's well-known understanding of the term. *See United States v. Sims*, 849 F.3d 1259, 1260 (9th Cir. 2017) (rejecting a vagueness challenge to the term "synthetic cannabinoid"). A "synthetic consumable hemp

product" is a hemp product designed for human consumption, which contains THC that is chemically produced and not naturally occurring.

Starting with the second part of the challenged term, "consumable hemp product" is already defined within Iowa's hemp laws. Iowa Code § 204.2(2).

As to the first part of the challenged term, the modifier "synthetic" "has a readily discernible meaning." *Sims*, 849 F.3d at 1260. The plain meaning of "synthetic" "refers to man-made (as opposed to naturally occurring) chemical compounds, a concept familiar enough from the distinction between, say, synthetic fibers like polyester and natural fibers like cotton." *Id.* The dictionary similarly defines synthetic as "compounds formed through a chemical process by human agency, as opposed to those of natural origin." Random House Webster's Unabridged Dictionary 1929 (2d ed. 2001).

Iowa's controlled substances laws confirm that plain meaning. Iowa's controlled substance Schedule I differentiates between THC that is "naturally contained in a plant of the genus Cannabis" and THC which is a "synthetic equivalent[] of the substances contained in the Cannabis plant." Iowa Code § 124.204(4)(*u*)(1). Chapter 124 also notes that some hemp products are "naturally occurring" while others are "synthesized." Iowa Code § 124.204(7)(*b*). In other words, in Iowa's controlled substances and hemp laws, "synthetic" means not naturally occurring.

Federal controlled substances law confirms this plain meaning. It defines "synthetic" as "a substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring . . . sources." 7 U.S.C. § 6502(22).

In the context of the hemp industry more broadly, the term "synthetics" carries this same well-known meaning. It refers to chemically produced variants of THC, such as delta-8 and delta-10, which can be made by applying various chemical processes on the hemp plant. *Zini v. City of*

Jerseyville, 2024 WL 1367806, at *7 (S.D. Ill. Mar. 30, 2024) (detailing the industry understanding of "synthetic" THC substances); *see also* Parker Decl. ¶ 9.

Given the plain meaning and the industry understanding of the term "synthetic," Plaintiffs cannot show that the term is 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). Nor can they show that it is vague as applied to them as actors in the hemp industry who are expected to comply with federal controlled substances law. *United States v. Bramer,* 832 F.3d 908, 909 (8th Cir. 2016) (noting that a facial vagueness challenge requires a showing that the statute is vague as applied to the challenger's conduct). Plaintiffs do not allege that they make synthetic consumable hemp products. Indeed, they allege that they make "naturally occurring" CBD products. Br. 11; Wagaman Decl. ¶¶ 6-8; Powell Decl. ¶¶ 7-8.

Nor could Plaintiffs allege that they are selling synthetics because doing so violates federal law. The DEA put it bluntly: "All synthetically derived [THCs] remain schedule I controlled substances." 85 Fed. Reg. at 51,641. That is because "'hemp' is defined to 'mean *the plant* Cannabis sativa L. and *any part of that plant*, [so]. . . only [THC] in or derived from the cannabis plant—not synthetic [THC]—is subject to being excluded from control as a '[THC] in hemp.'" Letter from Terrence L. Boos, Drug & Chem. Evaluation Section Chief, Drug Enf't Admin., to Donna C. Yeatman, Exec. Sec'y, Ala. Bd. of Pharm. at 1 n.2 (Sept. 15, 2021), https://bit.ly/4crZDal (quoting 7 U.S.C. 1639*o*). When synthetic THCs such as delta-8 are "produced from non-cannabis materials," they are not "part of that plant" and thus are "controlled under the CSA." *Id.* at 1.

In sum, "synthetic" carries a plain meaning that is well-known across federal and State controlled-substances laws. Plaintiffs do not allege that they sell products in violation of the federal prohibition on synthetics, so their claim that they do not know whether they sell consumable hemp

products in violation of *Iowa's* ban on these products rings hollow. Plaintiffs thus fail to allege that they sell synthetics that would be prohibited under HF 2605.

Even if this Court determines that "synthetic" is vague, an injunction enjoining enforcement of that provision is inappropriate, unless it is narrow enough to allow the Department to carry out its statutory obligation to promulgate rules that define and give further effect to the Synthetics Prohibition. House File 2605 specifically prohibits the sale of a "synthetic consumable hemp product as defined by the rules adopted by" the Department. Iowa Code § 204.14A(1B). That provision thus requires the Department issue rules defining the term.

Although the rules are not yet final, the proposed rules provide a detailed definition of "synthetic consumable hemp product[s]," tracking the plain meaning that is well-known across the industry. 46 Iowa Admin. Bull. at 10077; *cf. Guedes v. ATF*, 920 F.3d 1, 28 (D.C. Cir. 2019) (concluding that promulgation of rules through notice-and-comment can afford fair notice of prohibited conduct). If Plaintiffs still find the term vague after the Department finalizes the rules, they can bring a due process challenge against the then-final rules. But if this Court enjoins the Department's enforcement of the Synthetics Prohibition altogether, it would deprive the Department of the ability to carry out its statutory obligations.

Warning Provision. The Warning Provision serves to advise consumers about the potential health effects of THC consumption. It says:

> (3) The consumable hemp product complies with packaging and labeling requirements, which shall be established by rules adopted by the department of health and human services by rule. Each container storing a consumable hemp product shall be affixed with a notice advising consumers regarding the risks associated with its use. The department of health and human services shall adopt rules regarding the language of the notice and its display on the container.

Iowa Code § 204.7(8)(*a*)(3). Plaintiffs do not claim that they do not understand what this provision means. Rather, they object that the Department has not yet promulgated a final rule.

But Plaintiffs are not entitled to a preliminary injunction because the Department cannot yet enforce a provision requiring a notice when the Legislature directed the Department to "adopt rules regarding the language of the notice" but those rules are not yet final. CK Dkt. 30, at 15:11-13. Plaintiffs fear of "arbitrary enforcement of civil and criminal penalties," Br. 24, is unfounded.

That the Department has not yet promulgated rules does not make the Warning Provision unconstitutionally vague. Iowa Code § 204.7(8)(*a*)(3) directs the Department to promulgate rules on other subjects, yet those provisions are not vague. Just because Plaintiffs do not know the entire scope of the rules the Department will promulgate does not mean there is a constitutional issue with the statute. *See Guedes*, 920 F.3d at 8 (concluding that the promulgation of rules through the notice-and-comment process can afford fair notice of prohibited conduct). If there were, then the Legislature could never pass a statute delegating rulemaking authority unless the agency implemented all its rules before the law went into effect. Plaintiffs cite no case for that proposition, and this Court should not be the first.

2. Plaintiffs' "grace period" argument fails.

Plaintiffs wrongly allege that the Hemp Amendments provide an inadequate statutory grace period of six weeks. Statutory grace periods receive great deference. *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982). Indeed, "the question whether a statutory grace period provides an adequate opportunity for citizens to become familiar with a new law is a matter on which the Court shows the greatest deference to the judgment of state legislatures." *Id*. That is because a "legislative body is in a far better position than a court to form a correct judgment concerning the number of persons affected by a change in the law, the means by which information concerning the law is disseminated in the community, and the likelihood that innocent persons may be harmed by the failure to receive adequate notice." *Id*.

Here, the Legislature appropriately exercised its judgment by setting a six-week grace period. Plaintiffs say a six-week grace period is insufficient because they complied with the current Iowa law "for years." Br. 24. As Plaintiffs admit, the consumable hemp program has been in place since only 2020. *Id.*; Navin Decl. ¶ 8. And since then, many health and safety concerns have risen. Sher Decl. ¶¶ 5–8. It makes sense for the Legislature to amend the program in response to concerns that have arisen in the few years following its inception.

Changes in the consumable hemp program were not illegally unpredictable, because it is a volatile industry. And acting in such a highly regulated field "greatly reduce[s] the reasonableness of expectations and reliance on regulatory provisions." *Conti v. United States*, 48 Fed. Cl. 532, 538 (Fed. Cl. 2001). Indeed, there are many regulatory developments "amidst an American hemp economy witnessing rapid and substantial growth." *Hemp Indus. Ass'n v. United States Drug Enf't Admin.*, 539 F. Supp. 3d 120, 124 (D.D.C. 2021).

Further, the six-week grace period was no surprise. Iowa Code requires that "[a]ll acts and resolutions of a public nature passed at regular session of the general assembly shall take effect on the first day of July." Iowa Code § 3.7(1). This has long been the practice in Iowa. In any event, Plaintiffs have been aware of the impending changes to Iowa's consumable hemp program since HF2605 was introduced in the Iowa House in February and passed the Legislature on April 2. That is nearly three months of preparation time. For these reasons, Plaintiffs' due process claims fail.

E. Plaintiffs Are Not Likely To Succeed On Their Commerce Clause Claim.

Plaintiffs fail to show a likelihood of success on their Dormant Commerce Clause claim because the laws do not discriminate against out-of-state business and do not impose substantial burdens on interstate commerce compared to their local benefits.

The "core" of the Dormant Commerce Clause is an "antidiscrimination principle" that "prohibits the enforcement of state laws driven by economic protectionism—that is, regulatory

measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023) (Gorsuch, J.) (cleaned up). "If there is no discrimination, a court will consider . . . whether the state laws unjustifiably . . . burden the interstate flow of articles of commerce." *Brown v. Hovatter*, 561 F.3d 357, 363 (4th Cir. 2009) (quotation marks omitted).

Here, Plaintiffs concede that the Hemp Amendments are not discriminatory. Br. 51 n.9. So they must show that the Hemp Amendments unjustifiably burden the interstate flow of articles of commerce. Plaintiffs cannot meet this burden.

Plaintiffs first argue that the Hemp Amendments restrict the "possession, manufacture, sale, and transportation, of non-conforming hemp and hemp products within Iowa" in violation of the Dormant Commerce Clause. Br. 27. This contention fails for two reasons.

First, "this is an attempt by plaintiffs to challenge [Iowa's] decision to control the production of industrial hemp within its borders, which the Farm [Bill] has expressly said [Iowa] may do." *N. Virginia Hemp & Agric.*, 2023 WL 7130853, at *10. Indeed, the Farm Bill allows Iowa to "regulate[] the production of hemp . . . more stringent[ly]" than federal standards. 7 U.S.C. § 1639p(a)(3)(A). So any argument that the Hemp Amendments violate the Dormant Commerce Clause by restricting possessing, manufacturing, or selling hemp products in Iowa cannot stand.

Second, the Hemp Amendments do not ban shipping hemp through Iowa. "[A] person may transport hemp product within and through this state and may export a hemp product to any foreign nation, in accordance with the applicable federal law and the law of the foreign nation." Iowa Code § 204.7(7)(*b*). A law restricting transportation through Iowa would conflict with federal law. 7 U.S.C. § 1639*o* note. And Iowa's hemp laws explain that "nothing in this chapter shall be construed

or applied to be in conflict with federal law and related regulations." Iowa Code § 204.17(2); *see supra* Part I.B.

Plaintiffs next ask this Court to engage in the cost-benefit balancing test from *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 140 (1970). They ask this Court to conclude that the State's interest in the safety of minors does not outweigh the economic harm to Iowa's hemp industry. Br. 21. But applying *Pike* balancing "does not help plaintiffs because, as the Supreme Court in *National Pork Producers Council* observed, there is 'no clear line' separating the *Pike* line of cases from the Court's antidiscrimination precedents," and "plaintiffs have already failed to allege a challenge rooted in antidiscrimination principles." *N. Virginia Hemp & Agric.*, 2023 WL 7130853, at *11 (quoting *Nat'l Pork Producers Council*, 598 U.S. at 380).

Indeed, "the Commerce Clause does not authorize judges to undertake" the cost-benefit analysis because judges are "not institutionally suited to draw reliable conclusions of the kind that would be necessary." *Nat'l Pork Producers Council*, 598 U.S. at 380. That is because "[j]udges cannot displace the cost-benefit analyses embodied in democratically adopted legislation guided by nothing more than their own faith in" the record before them. *Id*.

Plaintiffs Commerce Clause claims fail.

F. Plaintiffs' Takings Claim Fails Because Health And Safety Regulations Are Not Takings, Even If They Devalue Personal Property.

Product bans are not takings. The Supreme Court has long held that "prohibition for purposes that are declared, by valid legislation, to be injurious to health morals, or safety of the community cannot, in any just sense be deemed a taking or an appropriation of property for the public benefit." *Mugler v. Kansas*, 123 U.S. 623, 668–669 (1887). Today, this is even truer "in the case of a highly regulated and contentious activity" like brewing intoxicating THC beverages. *Holliday Amusement Co. of Charleston v. South Carolina*, 493 F.3d 404, 411 (4th Cir. 2007).

Plaintiffs argue that the prohibition on certain hemp products and serving size restrictions render their inventories valueless and thus constitute a taking. Compl., ¶¶ 195–98 (citing Iowa Code § 124.204). They also claim that alleged restrictions on transportation devalue their inventory. Br. 24; *but see supra* Part I.B (addressing the transportation argument). To support their takings claim, Plaintiffs allege that they had reasonable investment-backed expectations in the continuing legality of their products because the federal government is maybe in the process of rescheduling marijuana. Br 24. Plaintiffs' argument fails.

1. Plaintiffs misstate the standard for regulatory takings of personal property.

Plaintiffs' argument is premised on a misstatement of takings law. *Lucas v. South Carolina Coastal Council* found a regulatory taking had occurred where regulations banning a landowner from developing his property amounted to a "total deprivation" of all economic use. 505 U.S. 1003, 1017 (1992). Plaintiffs contend that *Lucas* created a categorical rule that all such deprivations are regulatory takings. Br. 30. But that argument runs into a wall of precedent holding that *Lucas* does not apply to personal property.

The Eighth Circuit has limited "*Lucas* [to] real property only." *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 430 (8th Cir. 2007). That is because, read correctly, *Lucas* "requires compensation when a regulation deprives on owner of all economically beneficial uses of his land." *Id.* at 441 (cleaned up); *accord Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 674 (3d Cir. 1999) ("The categorical approach has only been used in real property cases."). That is why every case Plaintiffs cite regarding the *Lucas* rule involves a dispute over land–not personal property. Br. 30; *see, e.g.*, *Lucas,* 505 U.S. at 1019 (zoning dispute); *Outdoor Graphics, Inc. v. City of Burlington, Iowa*, 103 F.3d 690, 695 (8th Cir. 1996) (same); *Cedar Point Nursery v. Hassid*, 594

U.S. 139, 149 (2021) (access to a farm). In sum, because this is a case about personal property, Plaintiffs cannot succeed in regulatory takings claim under *Lucas*.

2. *Penn Central* applies, and decisively declares no taking.

Because the categorical *Lucas* approach does not apply, takings claims are often evaluated under *Penn Central*. *See, e.g.*, *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979) (applying *Penn Central*); *Maryland Shall Issue, Inc. v. Hogan*, 963 F.3d 356, 372 (4th Cir. 2020) (applying *Penn Central*), *cert. denied,* 141 S. Ct. 2595 (2021). *Penn Central* requires "essentially ad hoc, factual inquiries" but focuses "particularly [on] the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Other factors include the "economic impact of the regulation on the claimant" and, less importantly, the "character of the government regulation." *Lingle v. Chevron U.S.A.*, *Inc.*, 544 U.S. 528, 538–39 (2005) (cleaned up).

1. Beginning with the investment-backed-expectations factor, Plaintiffs cannot show such expectations in a volatile industry–like Iowa's consumable hemp industry. Parker Decl. ¶ 5 (discussing the volatility of the industry). Operating at the intersection of three highly regulated industries—food, drugs, and agriculture—regulatory change is sufficiently foreseeable as to not constitute a taking. That Plaintiffs hope "the Legislature would not stringently regulate or abolish" the legality of a product before they have "recouped [their] investment" is not enough to satisfy this element because a "'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Hawkeye*, 486 F.3d at 442 (quoting *Ruckelshaus v. Monsanto Co*., 467 U.S. 986, 1005 (1984)).

This lack of investment-backed expectations defeats Plaintiffs' takings claim even if the regulation significantly devalues their personal property. Alleged regulatory takings of personal property are subject to a different analysis than those involving land. *Lucas* warned, "in the case

of personal property, by reason of State's traditionally high degree of control over commercial dealings, [a plaintiff] ought to be aware of the possibility that new regulation might even render his property economically worthless." 505 U.S. at 1027.

Acting in such a field "greatly reduce[s] the reasonableness of expectations and reliance on regulatory provisions." *Conti*, 48 Fed. Cl. at 538 (holding that regulation barring certain fishing nets was not a taking). This is why another district court in this Circuit already denied a similar challenge to a regulation restricting hemp. *See Hemp Quarters 605*, 2024 WL 3250461, at *1; *see also AK Indus. Hemp Ass'n*, 2023 WL 8935020, at *6 (finding Plaintiffs had not shown a likelihood of success on the merits of their regulatory takings claim).

2. Given the lack of investment-backed expectations, the economic impact of these regulations does not make them a taking under *Penn Central*. That is why courts refuse to apply *Lucas*'s categorical rule to takings of personal property. Regulating personal property is not necessarily a taking even when it "render[s] [Plaintiffs'] property economically worthless." *Lucas*, 505 U.S. at 1027; *see also Andrus*, 444 U.S. at 66–67. And this case is made even easier by the fact Plaintiffs have not suffered such a total deprivation. Courts have held that no taking occurs where a regulated party can sell their goods in a different market. *See Hawkeye*, 486 F.3d at 442 (*Penn Central*'s economic impact factor did not point towards a regulatory taking because Plaintiff "may take [their product] to another state (or nation) that allows" the regulated conduct). The same is true here: Plaintiffs cannot succeed on the merits where they are unable to "detail why they cannot sell their products to consumers in the many other states that currently permit the sale of such [hemp] products." *AK Indus. Hemp Ass'n*, 2023 WL 8935020, at *6.

3. Moving to *Penn Central*'s last element, the character of these regulations is wholly distinct from regulations which courts have found constitute a regulatory taking. *Compare*

Hawkeye, 486 F.3d at 442 (ban on lottery game not a taking), *with Hodel v. Irving*, 481 U.S. 704, 716 (1987) (statute abrogating inheritance principle present in "the Anglo-American legal system since feudal times" showed a *Penn Central* taking). Generally, there is no taking where "interference [with Plaintiffs' property interest] arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Lingle*, 544 U.S. at 538–39.

Put differently, in evaluating the character of the regulation, courts consider "the extent to which a regulation was enacted solely for the benefit of private parties as opposed to a legislative desire to serve important public interests." *Cmty. Hous. Improvement Program v. City of New York*, 59 F.4th 540, 555 (2d Cir.) (quotation marks omitted), *cert. denied*, 144 S. Ct. 264 (2023). When the law serves important public interests, courts decline to find a taking and instead defer to the legislative judgment, because "courts are not in the business of second-guessing legislative determinations." *Id.*; *see also Zeman v. City of Minneapolis*, 552 N.W.2d 548, 554 (Minn. 1996) ("A harm-prevention regulation . . . is a powerful rationale militating against finding a taking.").

And that's what Iowa is doing. Iowa enacted HF2605 and HF2641 to serve the important public interest of protecting its citizens from harm posed by extremely potent, psychoactive substances. Indeed, because of the availability and potency of consumable hemp products, Iowa has seen drastic uptick in calls to its Poison Control Center regarding child THC exposure, and in visits to the emergency room relating to THC consumption. Sher Decl. ¶¶ 5, 6. Iowa's Hemp Amendments thus serve important public health interests; and there is no suggestion that it benefits anyone other than the public. It does not amount to a taking. *See Mugler*, 123 U.S. at 668–69 (prohibition serving to protect public health and safety not a taking); *cf. Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (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."). There is no taking here.

II. THE OTHER FACTORS WEIGH AGAINST A PRELIMINARY INJUNCTION.

Plaintiffs are unlikely to succeed on the merits, so the Court need not proceed to the other 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). Uncertainty stemming from a new regulation, even paired with new compliance costs, is "typically insufficient to constitute irreparable harm." *Morehouse Enterprises, LLC v. ATF*, 2022 WL 3597299, at *12 (D.N.D. Aug. 23, 2022), *aff'd,* 78 F.4th 1011 (8th Cir. 2023). So too the threat of criminal prosecution. Indeed, the Eighth Circuit has rejected claims that a risk of prosecution, without more, is an irreparable harm. *See, e.g.*, *Munson v. Gilliam*, 543 F.2d 48, 54 (8th Cir. 1976); *Bacon v. Neer*, 631 F.3d 875, 879 (8th Cir. 2011).

Plaintiffs' delay in bringing this suit underscores their inability to show imminent harm. HF 2605 was signed into law on May 17. But Plaintiffs waited to sue until five days before the law took effect, then took another two days to serve Defendants. 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); *see Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) ("[D]elay in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm.").

What is more, because of Plaintiffs' delay, HF 2605 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). And as for HF 2641, the challenged provisions go into effect December 31, 2024, HF 2641, § 55—there is therefore no need for an injunction to

preserve the status quo to allow the merits to be determined (especially on an expedited briefing schedule), because the merits here can well be determined before HF 2641's effective date.

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). Indeed, it is black letter Iowa law that Iowa's statutes are to be presumed in compliance with the federal Constitution. *See* Iowa Code § 4.4(1).

There is a strong public interest in protecting Iowans, especially Iowa's youth, from these increased risks. Iowa thus has valid reasons for regulating drugs and psychoactive substances as a proper exercise of its police powers. *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (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."). And Iowa's "interest in the enforcement of its criminal laws" is among the most important State interests. *Juidice v. Vail*, 430 U.S. 327, 335 (1977).

An injunction risks exposing Iowans to severe health risks. Under Iowa's pre-July 2024 consumable hemp laws, Iowa saw a drastic increase in hospital visits for THC consumption. Sher Decl. ¶ 5. Worse, an injunction puts Iowa's children at increased risk. Sher Decl. ¶ 6. THC comes in many deceptive forms, including candy and sparkling beverages, which attract children. Since the dawn of Iowa's consumable hemp market, calls to the Iowa Poison Control Center regarding children exposed to THC increased by 1,050%. *Id*. The balance of Plaintiffs' alleged harm compared to exposing Iowans—without warning—to health risks weighs against an injunction.

CONCLUSION

For these reasons, the Court should deny the preliminary injunction.

July 5, 2024

Respectfully submitted,

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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
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ CM/ECF
- ☐ FAX
- ☐ Overnight Courier
- ☐ Other

Signature: */s/Patrick C. Valencia*