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

HW PREMIUM CBD, LLC, AJ's HEALTH AND WELLNESS d/b/a AMERICAN SHAMAN, E. KRIEGER LAND, LLC d/b/a GREENE GOODS MARKET & GREENHOUSES, GREEN ONYX INC. d/b/a YOUR CBD STORE, BEYOND CBD, LLC dba BEYOND CBD, CAMPBELL'S NUTRITION CENTERS, INC., TCI ENTERPRISE, INC. d/b/a SKY HIGH, ICANNA, LLC, YOUR CBD STORES FRANCHISING, LLC,

Plaintiffs,

v.

GOVERNOR KIM REYNOLDS in her official capacity, DIRECTOR OF IOWA DEPARTMENT OF HEALTH AND HUMAN SERVICES KELLY GARCIA in her official capacity, COMMISSIONER OF IOWA DEPARTMENT OF PUBLIC SAFETY STEPHAN BAYES in his official capacity, and IOWA SECRETARY OF AGRICULTURE MIKE NAIG in his official capacity,

Defendants.

Case No. 4:24-cv-00210-SHL-HCA

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**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**
**(REQUEST FOR EXPEDITED RELIEF AND ORAL ARGUMENT)**

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## INTRODUCTION

House File 2605 and House File 2641 (the "Hemp Amendments") are unconstitutional. A preliminary injunction should issue until this matter may be heard on the merits.[1]

## ARGUMENT

### I. Plaintiffs are Likely to Prevail on the Merits of Their Claims.

A. Plaintiffs are likely to prevail on their preemption claims.

*i. Plaintiffs have standing to bring their express preemption claim.*[2]

Standing requires: (1) an injury in fact; (2) the injury must be traceable to the challenged action; and (3) it must be "likely" rather than "speculative" that a favorable decision will redress the injury. *S. Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 591 (8th Cir. 2003).

Contrary to Defendants' assertions, Plaintiffs regularly conduct business via interstate commerce through 1) the sourcing of their products they sell in Iowa; and 2) shipping products out of Iowa as retailers and manufacturers of products. For example, Plaintiff TCI Enterprise ("Sky High") manufactures its consumable hemp products in Wisconsin and distributes its products primarily to Iowa. *See* ECF No. 1, ¶ 85; *see also* Exhibit A, Declaration of Corey Coleman ("Coleman Decl."), ¶ 7. Further, now that the Hemp Amendments are in effect, Sky High will be forced to transport, store, and sell its product outside of Iowa and will be prohibited from *even transporting its manufactured consumable hemp products through Iowa*. ECF No. 1, ¶ 85; Ex. A,

[1] This Court has confirmed that while "no individual factor is dispositive, the Eighth Circuit has held that probability of success 'is the most significant'" factor for purposes of evaluating a request for preliminary injunction. *See Climbing Kites LLC et al v. State of Iowa et al*, 4:24-cv-00202, ECF No. 29, p. 10 (*citing Sleep Number Corp. v. Young*, 33 F.4th 1012, 1016 (8th Cir. 2022)). Plaintiffs recognize that they must show they are "likely to prevail on the merits" of their claims. Plaintiffs have shown that they are likely to prevail on all claims asserted. However, Plaintiffs only need to meet this standard on any one of its claims. *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs, 826 F.3d 1030, 1040 (8th Cir. 2016)*.

[2] Defendants narrowly define "transport" and claim that because Plaintiffs' business practices "revolve around the transportation of hemp products *into* Iowa, not *through* Iowa" there is no standing. ECF No. 25-1, p. 10. Plaintiffs disagree with this interpretation of the express preemption clause and assert that "transport through a State" includes goods that are transported interstate, whether originating from Iowa or another state. *See infra*, Section I(A)(iii).

Coleman Decl., ¶ 17–18. The majority of Plaintiffs also ship product out of Iowa. Ex. A, Coleman Decl., ¶ 9; *see also* Exhibit B, Supplement Declaration of Ashley Powell ("Powell Supp. Decl."), ¶ 19. Approximately 80% of the products Plaintiffs offer for sale within Iowa will be made illegal based on guidance from DHHS. These Plaintiffs have physical businesses in Iowa and cannot ship their products *out* of state (or through Iowa) even as a 100% online retailer. Ex. A, Coleman Decl., ¶ 24; *see also* ECF No. 3-1, Ex. 1, Wagaman Decl., ¶ 18, Ex. 3, Krieger Decl., ¶ 11; Ex. 6, Miller Decl., ¶ 7; and Ex. 8, Glenn Decl., ¶ 9. Plaintiffs have established that they have standing to bring their express preemption claim. *Arkansas United v. Thurston*, 517 F. Supp. 3d 777, 792 (W.D. Ark. 2021) ("In a multi-plaintiff suit, only one plaintiff need satisfy the constitutional standing requirements.") (*citing Horne v. Flores*, 557 U.S. 433, 446–47 (2009)).

*ii. The presumption against preemption does not apply here.*

The canon of construction often called the "presumption against preemption" instructs that federal law should not be read to preempt state law "unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947). But the Supreme Court has determined that where, as here, the federal statute contains an express preemption clause, the Court is not to invoke the presumption against preemption. *See Commonwealth of Puerto Rico v. Franklin California Tax-free Tr*., 579 U.S. 115, 125 (2016). The 2018 Farm Bill contains an express preemption provision (*see infra*). Thus, the presumption does not apply.

*iii. Plaintiffs are likely to prevail on their express and conflict preemption claims.*

**a. The 2018 Farm Bill expressly preempts the Hemp Amendments.**

In analyzing an express preemption claim, the Court will "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Commonwealth of Puerto Rico*, 579 U.S. at 125. The 2018 Farm Bill's express preemption provision states that "[n]o State… 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[.]" (codified as 7 U.S.C.A. § 1639o.). The Hemp Amendments do exactly what is prohibited: hinder interstate transportation and shipment of hemp.

Defendants allege the 2018 Farm Bill's express preemption clause's use of the word "through" to mean "traveling from another State, through Iowa, and into a third State." ECF No. 25-1, p. 12. However, Defendants cite no cases that support such interpretation and neglect a secondary definition to "through" within their own cited authority.[3] Moreover, *Bio Gen, LLC v. Sanders* provides that the scope of the 2018 Farm Bill's express preemption clause "clearly provides that states may not pass laws that *interfere with the right to transport hemp in interstate commerce* . . . that have been lawfully produced under a state or Tribal plan or under a license issued under the USDA plan." 690 F. Supp. 3d 927, 940 (E.D. Ark. 2023) (emphasis added). There is no indication that "through" is limited as Defendants suggest and this Court can similarly interpret the scope of the clause and grant a preliminary injunction, as *Bio Gen* did.[4]

Even if the Court interpreted the express preemption clause as Defendants suggest, the Hemp Amendments specifically prohibit the transportation of hemp products that do not meet the requirements set forth therein (e.g. the Potency,[5] Synthetic[6] and Warning Label[7] requirements).

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[3] While Defendants cite to the American Heritage Dictionary for the assertion that "through" means "In one side and out the opposite or another side of," that is not the *only* definition of "through." Using Defendants' same source, "through" may also mean "among or between; in the midst of." *See* https://perma.cc/M2QL-JC6J. One could supplant the word "through" with "among the state" and to find that the express preemption clause has been violated.

[4] In *Bio Gen*, the Court found that the Arkansas law was preempted, even with an exception for transportation ("continuous" transportation through the state was not an "effective exemption for interstate commerce.").

[5] I.C.A. § 204.1(2)(c) ("A hemp product is deemed to be a consumable hemp product if. . . (2) Its maximum total tetrahydrocannabinol concentration is less than or equal to the lesser of the following: (a) Three-tenths of one percent on a dry weight basis. (b) Four milligrams per serving and ten milligrams per container on a dry weight basis.") ("Potency Provision").

[6] I.C.A. § 204.14A(1B) ("A person required to be registered to manufacture or sell a consumable hemp product under section 204.7 shall not manufacture, produce, distribute, market, or sell a synthetic consumable hemp product, as defined by rules adopted by the department of health and human services.") ("Synthetic Provision").

[7] I.C.A. § 204.7(8) ("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

Specifically, I.C.A. § 204.17(3), makes clear that *only* hemp products that meet the requirements contained in section 204.7 may be transported in Iowa. ECF No. 10, p. 10. Any hemp products that fall outside of the Potency, Synthetic and Warning provisions are deemed controlled substances. Compl. ¶¶ 68-72; H.F. 2605 § 8; H.F. 2641 § 40.

Defendants argue H.F. 2641, Section 42 does not provide criminal penalties pertaining to transportation of hemp, but for cannabis only. But Section 42 provides that "[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.") (emphasis added). The criminal offense "involving hemp" refers to non-conforming products (making them "cannabis") under the Hemp Amendments. ECF No. 1, ¶72. Further, the FAQs published on HR 2605 state that "[s]elling non-conforming or illegal products in Iowa may result in civil and criminal penalties." Products which contain THC and do not conform with Iowa's Consumable Hemp law are "controlled substances" pursuant to Iowa Code sections 124.101(20), 124.202, and 124.204(4)(m). *Id.* Consequently, the criminalization of even the possession of these products necessarily means that the *transportation* of the products is prohibited, even if Plaintiffs converted to 100% online retailers shipping out-of-state.[8]

Defendants assert that the 2018 Farm Bill's "no-preemption" clause sinks Plaintiffs' claims, but this argument fails for several reasons. First, the argument is nonsensical, as it would require the Court to find "production" equivalent to transportation, storage, processing, distribution, etc., but the 2018 Farm Bill uses such terms discretely. *E.g.,* 7 U.S.C. § 9071(c)(1)(A)

use. The department of health and human services shall adopt rules regarding the language of the notice and its display on the container.") ("Warning Label Provision").

[8] HF 2641 enacts Chapter 204A. This new section, specifically, 204A.2 incorporates 7 CFR 990.1's definition of cannabis. Cannabis, itself, is not prohibited, only cannabis products that contain more than 0.3% of delta-9 THC concentration are illegal and are considered "marijuana." New Chapter 204A.4 makes cannabis a controlled substance except as otherwise allowed by chapters 204A and 204.

("…the process that the eligible partnership will use for the donation, processing, transportation, temporary storage, and distribution…."). Second, it would render the express preemption clause superfluous. Third, it requires reading the express preemption clause narrowly, while concurrently reading the "no-preemption" clause broadly. Plaintiffs recognize that the 2018 Farm Bills permits State laws that regulate hemp *production* "more stringent[ly]" than federal law, 7 U.S.C. § 1639p(a)(3)(A). "Production" is the sole term tied to hemp in the "no preemption" clause, but this is merely another word for *growing* hemp. But the Hemp Amendments do not stop at "production." They impact interstate transportation of hemp, which is not permitted by the 2018 Farm Bill.[9] *See* Exhibit C, Memorandum of Executive Summary of New Hemp Authorities, United States Department of Agriculture, p. 2 (May 28, 2019) ("It is important for the public to recognize that the 2018 Farm Bill preserves the authority of States and Indian tribes to enact and enforce laws regulating the *production* of hemp that are more stringent than Federal law. Thus, while a State or an Indian tribe cannot block the shipment of hemp through that State or Tribal territory, it may continue to enforce State or Tribal laws prohibiting the *growing* of hemp in that State or Tribal territory.") (emphasis added).

**b. The Hemp Amendments are similarly preempted under a conflict preemption theory.[10]**

[9] Again, ICA § 204.17(3) makes clear that only hemp products that meet the requirements contained in section 204.7, including the transportation of the products, are permitted. Section 42 of H.F. 2641 further provides that "[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.") (emphasis added). And hemp that does not meet the Potency, Synthetic or Warning provision requirements is deemed a controlled substance in Iowa. 124.101(20), 124.202, and 124.204(4)(m). "Those possessing, manufacturing, or distributing controlled substances in Iowa may be criminally prosecuted." Compl. ¶ 206, Ex. D H.F. 2605 FAQs at p. 6.

[10] For similar reasons as those contained in the express preemption section above, the Hemp Amendments' criminalization of possession, therefore, transportation of non-compliant hemp products also run into conflict preemption issues. Products containing THC and that do not conform with the Hemp Amendments will now be considered "controlled substances," and those possessing, manufacturing, selling or distributing controlled substances may be criminally prosecuted. Compl. ¶¶ 68-72; H.F. 2605 § 8; H.F. 2641 § 40. Because states may not enact laws that prohibit the transportation of hemp in interstate commerce, the Hemp Amendments conflict with federal law.

Similarly, Plaintiffs demonstrate that the Hemp Amendments' Potency Provision and Synthetics Prohibition are preempted through conflict preemption. The Hemp Amendments alter the definition of hemp by limiting the potency, running afoul of the 2018 Farm Bill's definition and Iowa's USDA-approved Hemp Plan, and without seeking approval of the USDA. The Potency Provision *changes* what the acceptable THC concentration that is contained in a particular serving or container in a paternalistic manner that should be reserved to the Federal Government, who has already set limits of THC in the definition of hemp itself. ECF No. 1, ¶43. The Hemp Amendments' redefining "hemp" results in an obstacle in complying with federal law. *See e.g*., *Bio Gen,* 690 F. Supp. 3d at 939 (holding that "changing definitions in a federal program, which [the state] has already fully joined," like that of "hemp," "is not a constitutionally valid way to do it.").

The issue is the same for "synthetic" hemp products or those that are designed for certain methods of consumption, *i.e.*, inhalation.[11] Specifically, the Hemp Amendments prohibit the sale of "synthetic consumable hemp products" and raw or dried flower for purposes of inhalation. Compl. ¶¶ 55, 56. The Farm Bill's definition of "hemp" does not distinguish between synthetic and non-synthetic hemp. *See* 7 U.S.C. § 1639o(1). If a governmental entity is inclined to do so, it should come from the Federal Government.[12] *See* Proposed Amendment No. 35 to 2024 Farm Bill by Rep. Mary Miller.[13] Doing otherwise will bring the hemp industry to a grinding halt.

B. Plaintiffs are likely to prevail on their due process claims.

[11]ICA § 204.14A ("A person shall not possess, use, manufacture, market, transport, deliver, or distribute harvested hemp or a hemp product if the intended use of the harvested hemp or hemp product is introduction into the body of a human by any method of inhalation[.]").

[12] Notably, Defendants do not respond to Plaintiffs' argument that the Potency Provision and Synthetic Prohibition are altering the definition of hemp, but do acknowledge that the Farm Bill states 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." ECF 25-1, P. 18 (citing H.R. Rep. No. 115-1072, at 737 (2018)(emphasis added).

[13] https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=117371.

*i. The lack of definitions surrounding key, material terms make the Hemp Amendments vague and in violation of the Due Process Clause.*

Defendants concede a law is unconstitutionally vague if it fails to give ordinary people fair notice of what conduct it punishes or if it invites arbitrary enforcement. ECF No. 25-1, p. 18. Both the term "synthetic consumable hemp product" and the new warning label requirement for products are subject to "rules" *yet to be adopted* by the Iowa Department of Health and Human Services ("DHHS").[14] These provisions are not readily ascertainable because they are subject to definitions within rules that *will* be adopted by DHHS in the future, likely not until the end of August once effective. *See generally* Iowa Code Ann. § 17A.4. For example, HF 2605 has a draft definition for "synthetic consumable hemp product" that is entirely different than what is asserted by Defendants here ("'synthetic' means not naturally occurring"). ECF No. 25-1, p. 19. And that's the issue. Neither Plaintiffs, nor anyone else charged with enforcing the Hemp Amendments *now*, know what the definition will be. It is the same with the Warning Provision and the lack of "rules regarding the language of the notice and its display on the container." *See* HR 2605.[15]

Defendants cite *Guedes v. ATF,* for the assertion that "the promulgation of rules through the notice-and-comment process can afford fair notice of prohibited conduct." ECF No, 25-1, p. 22 (920 F.3d 1, 28 (D.C. Cir. 2019)). However, in *Guedes*, the rules surrounding the new laws for bump-stocks for automatic weapons were promulgated *before* the law went into effect, thus, giving citizens time to understand and comply with the law. *Guedes*, 920 F.3d 28. ("The Bureau further assured that individuals would be subject to 'criminal liability only for possessing bump-stock-type devices after the effective date of regulation, not for possession before that date.'"). Here,

[14] *See supra*, n. 6, 7.
[15] *See supra*, n. 7.

Defendants intend to enforce the Hemp Amendments *now*. *Climbing Kites LLC et al v. State of Iowa et al*, 4:24-cv-00202, ECF No. 30, Transcript at 44:7-9.[16]

However, that is not all. Defendants are wrong in their assertion that Plaintiffs assert "synthetic consumable hemp product" and lack of a warning label vague as the only basis for Plaintiffs' due process challenge. Plaintiffs alleged that the Hemp Amendments are vague on their face and there are several other provisions within the Hemp Amendments that violate the Due Process Clause. ECF No. 1, ¶ 18 ("critical phrases are not defined[.]"); ¶ 77 (describing the issues with serving size on different products and stating "[b]ased on the language of H.F. 2605 and guidance issued by DHHS, retailer Plaintiffs believe that the full spectrum CBD products they sell in Iowa will not comply with the serving and container limitations."); ¶ 128 (asserting that the Hemp Amendments are unconstitutionally vague on their face); ¶ 138-139 (asserting failure to define "material words" and "specifications of the required notice" renders the Hemp Amendments vague on their face); ECF No. 21, Amended and Supplemental Declaration of Lacie Navin ¶ 22 ("The phrases 'per serving' and 'per container' are vague as there has been no definition or regulation issued that defines what 'serving' or 'container' means in this context, as my store sells a variety of products that are both liquid and solid with a variety of different serving sizes."); Ex. B, Powell Supp. Decl., ¶¶ 20–24.

Further, this Court has already characterized the Hemp Amendments' terms "serving size" and the "container" as being a potential vagueness issue. *See Climbing Kites*, ECF No. 30,

[16] This Court questioned how and why the State would enforce a law that still needs its parameters decided. *See Climbing Kites LLC et al v. State of Iowa et al*, 4:24-cv-00202, ECF No. 30, Transcript at 50:4-14 ("So why not hold off enforcing the law until you have the rules in place? How are you going to stop every local sheriff and police officer with authority to arrest people from enforcing this law on Monday when you haven't given them the guidance they need to do so?").

Transcript at 34:10-18; 36:7-10.[17] ("well, more exactly, it doesn't set serving sizes. So how is it enforceable when you didn't define serving size? . . . That's a huge problem for the State, in my view."); *Id.* at 61:16-23 ("…I do have concerns about the vagueness of this statute.").[18] *See generally* Ex. B, Powell Supp. Decl., ¶¶ 20–24. And the uncertainty and risk for arbitrary enforcement is imminent. For example, Plaintiff AJ's Health and Wellness, LLC d/b/a American Shaman sells products that come in various forms, like liquids, powders, topicals, and gummies. *Id*. Without official guidance on what "serving size" means for these products, or whether the products that contain CBD only are subject to the Hemp Amendments but could be construed as a "consumable hemp product" if trace 0.00001% THC appears, Plaintiffs are unsure what products are legal. *Id.*, at ¶ 32.

*ii. Six weeks to comply with no sell-through period violates due process.*

Six weeks is not enough time to come into compliance with a law where Plaintiffs' previous conduct has been legal since 2020. "Volatile industry" (as referenced in Defendants' argument on page 23) or not, citizens must be given adequate time to become familiar with the law. The six weeks' notice is not enough and because there is/was not time to come into compliance, Plaintiffs have suffered devasting consequences, like closing their doors and laying off employees while disposing of product on their shelves legally as of July 1 but not allowed to be sold until gone. *See* ECF No. 3-1, Ex. 2, ¶ 19, 23–24. This is a lack of adequate notice, and violates due process.

C. Plaintiffs are likely to prevail on their dormant commerce clause claim.

Defendants misconstrue Plaintiffs' arguments and fail to complete *Pike v. Bruce Church*

[17] In discussing the phrase "serving size," the Court stated: "[b]ut it's a problem when the State comes in and says this law stands by itself, it's enforceable by itself, when, no, it's not. It's an island floating without the necessary definitions to be enforceable."

[18] If deemed necessary by the Court, Plaintiffs intend to exercise their right to amend their Complaint to more fully and completely identify the vagueness issues surrounding HF 2605's "serving size" and "container" requirements, but do not concede that these allegations are absent from Plaintiffs' Complaint.

balancing associated with the burdens imposed on interstate commerce compared to any legitimate local benefit. The Hemp Amendments regulate beyond purely the "production" of hemp within Iowa's borders.[19] The Hemp Amendments' provision making it illegal to *possess* any non-compliant consumable hemp product prohibits hemp or consumable hemp products produced or manufactured lawfully under the 2018 Farm Bill. *See* HF 2605.[20] Defendants argue that Iowa Code § 204.7(7)(b) permits the transportation of hemp through Iowa and concede that any law restricting such transportation would conflict with federal law. *See* ECF No. 25-1, p. 24 (citing U.S.C. § 1639*o* note). However, restricting the transportation of hemp is exactly what the Hemp Amendments do. *See supra*, I(A)(iii); ECF No. 1, ¶ 98.

Additionally, Defendants fail to address Plaintiffs' *Pike* claim on its merits. This Court may still engage in a *Pike* analysis even if the Hemp Amendments regulate even-handedly because they place excessive burdens on interstate commerce compared to the local benefits. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 395–96 (2023) (Roberts, C.J. concurring and dissenting in part) ("As a majority of the Court acknowledges, 'we generally leave the courtroom door open to plaintiffs invoking the rule in *Pike*, that even nondiscriminatory burdens on commerce may be

[19] Defendants cite *N. Virginia Hemp & Agric. LLC v. Virginia* to support their assertion that Hemp Amendments do not violate the dormant commerce clause because the Farm Bill permits states to control the production of hemp within its borders. ECF No. 25-1, p. 24. However, the analysis and law in that case involved a "sales restriction," not a restriction on transportation. 2023 WL 7130853, at *10 (E.D. Va. Oct. 30, 2023). Specifically, the law there prohibited hemp processors from selling hemp to a person if the processor knew or had reason to know that the person intended to use the hemp in a substance that exceeded the "total THC" standard under the state law. *Id*., *3. The Court found that the sales restriction was proper under 7 U.S.C. § 1639p, which allows states to have the regulatory authority over the *production* of hemp by submitting to the Secretary of Agriculture a plan to monitor and regulate that production. This is not same issue as before this Court. The Hemp Amendments prohibit the possession, and consequently, the *transportation* of non-compliant hemp, which is prohibited under the Farm Bill (*see* at 7 U.S.C. § 1639o note). Again, the Hemp Amendments go much farther than "production." *See C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541, 547 (7th Cir. 2020) (finding injunction of the state law that "addresses only transit through the state, along with ancillary restrictions on the possession and delivery of smokable hemp to the extent that those provisions interfere with that transit, is the most that would have been warranted on express preemption grounds.").

[20] *See* ICA § 204.17(3) ("*Except 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."). HF 2605's new section 204.7 states that "a consumable hemp product shall not be manufactured, sold, or consumed in this state unless all of the following conditions are met" and listing the new and Iowa-specific requirements for legal and compliant consumable hemp products.

struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice.'"). However, Defendants assert that *Ross* foreclosed such cases and there is no way a *Pike* theory can succeed if it is facially non-discriminatory. That is simply not the case. *See Ross*, 598 U.S. at 395–96 (Roberts, C.J.) ("even nondiscriminatory burdens on commerce may be struck down on a showing that those burdens clearly outweigh the benefits of a state or local practice."). Defendants did not respond to Plaintiffs' contentions that the Hemp Amendments place an incredible burden on interstate commerce that can be solved by less burdensome means. *See* ECF No. 25-1, p. 25. Accordingly, this should be conceded to for purposes of Plaintiffs' request for a preliminary injunction. *See generally Noem v. Haaland,* 542 F. Supp. 3d 898, 916 (D.S.D. 2021) ("A party's failure to make an argument in its brief may constitute waiver of that argument.").

D. Plaintiffs are likely to succeed on their regulatory takings claim.

Plaintiffs analyze whether a taking has occurred under the Penn Central factors. *See* ECF No. 3-1, p. 22-26.[21] Plaintiffs had approximately six weeks' notice that their products would not only become unsellable, but also illegal to possess and subject to criminal prosecution. ECF No. 1, ¶ 2, 206. Defendants cite *Hawkeye Commodity Promotions, Inc. v. Vilsack* for the assertion that "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." ECF No. 25-1, p. 28 (citing 486 F.3d 430, 442 (8th Cir. 2007)). But how can Plaintiffs sell their products to another market when even *possessing* them in Iowa is illegal and Plaintiffs are only licensed as hemp retailers in Iowa? *See*

[21] Defendants state that Plaintiffs "misstate the standard for regulatory takings of personal property" by citing to *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). ECF No. 25-1, p. 26. However, Plaintiffs only cite to *Lucas* for the general assertion that where the government enacts regulations that deprive an owner of all economically beneficial use of the property, it is considered a taking. Plaintiffs go on to examine their regulatory taking under the *Penn Central* factors, which are (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct, investment-backed expectations; and (3) the character of the government regulation. The first two factors are "primary"; the third "may be relevant in determining whether a taking has occurred." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

ECF No. 1, ¶¶ 68-72; H.F. 2605 § 8; H.F. 2641 § 40. That is why the Hemp Amendments are different. *See* ECF No. 3-1, p. 22-26.

## II. The Other Preliminary Injunction Factors Favor Injunctive Relief.

Plaintiffs demonstrated that the irreparable harm that Plaintiffs are facing is not speculative or based on conjecture. It is estimated that 75-90% of Plaintiffs' products may no longer be sold within Iowa. Plaintiffs risk criminal prosecution by merely possessing non-compliant goods – goods which they aren't even certain are prohibited due to the underlying vagueness on the face of the Hemp Amendments. As to any argument that Plaintiffs' claims were "delayed," thereby mitigating the need for a preliminary injunction, Plaintiffs brought their claims and motion just over a *month* after the law was signed by Governor Reynolds and just a little over two weeks after the draft regulations were published. This is not a substantial delay to justify not entering a preliminary injunction.

It is within the public's interest to prevent the enforcement of unconstitutional laws that do not provide notice of what conduct is prohibited. Finally, the balance of the harms weighs favorably in Plaintiffs' direction. There are current safeguards and business practices in place, like Plaintiffs' decision not to sell to anyone under the age of 21 (*see* ECF No. 3-1, p. 21-22), to protect minors, the Hemp Amendments' purported goals. This Court may tailor the preliminary injunction to protect Plaintiffs' constitutional rights, while still permitting certain, constitutional provisions to move forward, like the age restriction provision in I.C.A. § 204.14D.

## CONCLUSION

Given the emergency presented, Plaintiffs respectfully request that this Court grant its Motion for Preliminary Injunction and enjoin enforcement of the Hemp Amendments.

Dated this 8th day of July 2024.

HW PREMIUM CBD, LLC, AJ's HEALTH AND WELLNESS d/b/a AMERICAN SHAMAN, E. KRIEGER LAND, LLC d/b/a GREENE GOODS MARKET & GREENHOUSES, GREEN ONYX INC. d/b/a YOUR CBD STORE, BEYOND CBD, LLC dba BEYOND CBD, CAMPBELL'S NUTRITION CENTERS, INC., TCI ENTERPRISE, INC. d/b/a SKY HIGH, ICANNA, LLC, YOUR CBD STORES FRANCHISING LLC, Plaintiffs,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 8th day of July 2024, the foregoing was electronically served by the court via EDMS on all counsel of record.

/s/ *Ryann A. Glenn*