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Pursuant to Article I, Section 2 of the Georgia Constitution and O.C.G.A. §§ 9-4-2 and 9-4-3, Plaintiffs Sass Group, LLC (“Bloom Smoke & Vape”) and Great Vape, LLC (“Great Vape”) bring this verified complaint for declaratory judgment and request for an immediate injunction.

This lawsuit seeks a declaration that commercial products containing cannabinoids derived from hemp, including but not limited to products containing delta-8-tetrahydrocannabinol (“Delta-8-THC”), delta-10-tetrahydrocannabinol (“Delta-10-THC”), Cannabidiol (“CBD”), Cannabinol (“CBN”), and Cannabigerol (“CBG”), are “hemp products” under O.C.G.A. § 2-23-3 and may be lawfully

possessed and sold throughout the state of Georgia. In doing so, this lawsuit seeks to preserve the status quo in place since 2019, and Plaintiffs are requesting an order enjoining the Defendants from initiating or continuing any criminal enforcement actions or civil asset forfeiture proceedings against individuals or businesses based on their possession or sale of these hemp products.

2.

The *Cannabis sativa* plant and its seeds, oils, and extracts have been used and consumed by humans in several forms for thousands of years, including for industrial, medicinal, religious, and recreational purposes. The most well-known forms of the *Cannabis sativa* plant are hemp and marijuana.

3.

The *Cannabis sativa* plant contains over a hundred naturally occurring compounds called “cannabinoids.” Perhaps the best known of these cannabinoids is delta-9-tetrahydrocannabinol (“Delta-9-THC”), a cannabinoid that produces psychoactive effects when consumed by humans. Other cannabinoids have become very popular in recent years as well, including Delta-8-THC and CBD, and are commonly purchased and used to treat pain, anxiety, and other mental and physical conditions. These cannabinoids can be ingested by smoking processed hemp, vaping concentrate, topical oils and balms, and infused food and beverages.

4.

Certain types of *Cannabis sativa* plants are distinguished from each other based on the types and quantities of cannabinoids found in the plant. Specifically, hemp has generally been distinguished from marijuana based on its lower quantity of certain cannabinoids, namely Delta-9-THC.

5.

The relevant cannabinoids in this case, namely CBD, CBN, CBG, Delta-8-THC, and Delta-10-THC, are naturally occurring in both hemp and marijuana and can be extracted from either plant through the process of isomerization.

6.

From around 1970 until 2018, the federal government and most states, including the State of Georgia, prohibited the manufacture, possession, sale, distribution, or trafficking of almost every form of the *Cannabis sativa* plant, including marijuana and hemp.

7.

That changed in 2018, when Congress passed the Agriculture Improvement Act of 2018 (the “Farm Bill”). Among other things, the Farm Bill legalized the cultivation, processing, distribution, and possession of “hemp” and hemp extracts. Because hemp and marijuana are both *Cannabis sativa* plants, the Farm Bill explicitly exempted “hemp” from the definition of marijuana under federal law.

8.

Under 7 U.S.C. § 1639o, federal law defines “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-tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.”

9.

The federal Controlled Substances Act (“CSA”) was amended to exclude “tetrahydrocannabinols in hemp” from the definition of “tetrahydrocannabinol,” a schedule I substance under 21 U.S.C. § 812, and “hemp” from the definition of “marihuana” under 21 U.S.C. § 802.

10.

The Drug Enforcement Administration (“DEA”), for its part, has clarified that Delta-8-THC and other cannabinoids are not illegal controlled substances if they are derived from hemp and meet the threshold limit for Delta-9-THC. In a recent letter to the Alabama Board of Pharmacy, dated September 15, 2021, the DEA responded to a request by the Board regarding the “control status” of Delta-8-THC under the Controlled Substances Act. The DEA has taken the position that “cannabinoids extracted from the cannabis plant that have a delta-9-THC concentration of not more than 0.3 percent on a dry weight basis meet the

definition of ‘hemp’ and thus are not controlled under the CSA.” Accordingly, Delta-8-THC and other cannabinoids that have been extracted from hemp are not controlled substances. (Exhibit 1, Letter to Alabama Board of Pharmacy).

11.

Since passage of the Farm Bill in 2018, most states in the nation have adopted similar definitions of “hemp” to distinguish legal hemp and hemp products from illegal marijuana, including products containing hemp-derived cannabinoids from products containing cannabinoids derived from marijuana, which remains a schedule I controlled substance under federal law.

12.

In 2019, Georgia adopted the federal definition of hemp and exempted hemp and products containing hemp-derived cannabinoids from the state’s criminal laws. Under O.C.G.A. § 2-23-3, “hemp” is defined as “the Cannabis sativa L. plant and any part of such plant, including the seeds thereof **and all derivatives, extracts, cannabinoids, isomers**, acids, salts, and salts of isomers, whether growing or not, with the federally defined THC level for hemp or a lower level.” (Emphasis added). The federally defined THC level for hemp is defined as “a delta-9-THC concentration of not more than 0.3 percent on a dry weight basis, or as defined in 7 U.S.C. Section 16390, whichever is greater.”

13.

In fact, the Georgia legislature went a step farther than Congress, explicitly allowing the manufacture, distribution, and possession of “hemp products,” which includes “all products with the federally defined THC level for hemp **derived from, or made by, processing hemp plants or plant parts** that are prepared in a form available for legal commercial sale.” O.C.G.A. § 2-23-3. (Emphasis added).

14.

O.C.G.A. § 16-13-21, which defines “marijuana” for the purposes of Georgia’s criminal statutes, was amended to exclude “hemp or hemp products as such terms are defined in Code Section 2-23-3.” Similarly, under O.C.G.A. § 16-13-25, which prohibits “tetrahydrocannabinol” (THC) as a schedule I substance, the statute excludes “such substance when found in hemp or hemp products as such terms are defined in Code Section 2-23-3.”

15.

As a result of these changes in the law, and as intended by federal and state legislators, the hemp industry, from farmers to retail shop owners, has seen rapid and expansive growth across the nation and in Georgia over the past four years, especially relating to the manufacture and sale of hemp products such as oils, flower, topical creams, vape concentrates, and infused edible products containing CBD, Delta-8-THC, and other cannabinoids.

16.

In June 2021, for example, the Georgia World Congress Center hosted the USA-CBD Expo. The Atlanta Journal-Constitution reported that over 270 vendors appeared at the event, including CBD and Delta-8 vendors who offered samples of their products to the public.¹ The event was attended by over 7,000 people who use, distribute, or manufacture hemp products, including CBD, Delta-8-THC, and other cannabinoids. Independent Retailer, a leading publication for independent retail store owners, described the event as a “completely sold-out show” where “investors, entrepreneurs, and enthusiasts alike benefited from learning about multiple topics presented by more than 70 expert speakers who shared their insights on current market trends surrounding CBD, hemp, and other high-demand alternative products...”²

17.

Since 2019, products containing CBD, Delta-8-THC, and other cannabinoids have been considered “hemp products” as long as these cannabinoids were derived or extracted from a *Cannabis sativa* plant that met the definition of “hemp” under O.C.G.A. § 2-23-3, in that it has less than 0.3% Delta-9-THC.

¹ Ariel Hart. Hundreds of vendors peddle CBD products at Atlanta convention. Atlanta Journal-Constitution. June 11, 2021. <https://www.ajc.com/news/business/hundreds-of-vendors-peddle-cbd-products-at-atlanta-convention/UHUNV6Q5YJBB7LI2YNDS6KUAUU/>.

² USA CBD Expo a Huge Hit in Atlanta. Independent Retailer. August, 10, 2021. <https://independentretailer.com/usa-cbd-expo-a-huge-hit-in-atlanta/>.

18.

The hemp products involved in this case uniformly contain CBD, Delta-8-THC, Delta-10-THC, and/or other cannabinoids that were extracted, isomerized, processed, or otherwise derived from hemp plants.

19.

Recognizing the significant changes in federal law regarding hemp and products containing hemp-derived cannabinoids, several states have recognized the legal status of CBD, Delta-8-THC, and other cannabinoids derived from hemp.

20.

To date, several states have explicitly recognized the legality of Delta-8-THC and other hemp-derived cannabinoids through legislation, including in states like Ohio³ where recreational marijuana remains illegal. Other states, such as Alabama⁴ and Indiana,⁵ have expressly declined to amend their hemp laws to prohibit Delta-8-THC. The states that have prohibited Delta-8-THC and other cannabinoids have done so explicitly, such as North Dakota, by prohibiting “the

³ Jackie Borchardt. Ohio regulates delta-8 THC in medical marijuana products. Cincinnati Enquirer. June 21, 2021. <https://www.cincinnati.com/story/news/2021/06/21/ohio-regulates-delta-8-thc-medical-marijuana-products/7578880002/>

⁴ Megan Reyna. Delta-8 remains legal in Alabama, but for how long? WAAY31 ABC. February 17, 2022. https://www.waaytv.com/news/delta-8-remains-legal-in-alabama-but-for-how-long/article_acd0f9e2-8f6e-11ec-a6c8-bfce5ff8f1df.html.

⁵ Maddie Alexander. Amended delta 8 bill would grant legal THC product a reprieve—for now. The Statehouse File. February 24, 2022. https://www.thestatehousefile.com/politics/amended-delta-8-bill-would-grant-legal-thc-product-a-reprieve-for-now/article_07f56aec-95b4-11ec-84ad-8b6c825accf0.html.

isomerization of cannabinoids to create isomers of tetrahydrocannabinol, including delta-8, delta-9, and delta-10.”

21.

Litigation in other states has resulted in judicial declarations concluding that Delta-8-THC derived from hemp is not a controlled substance and in injunctions prohibiting law enforcement agencies from initiating criminal or civil enforcement actions against businesses or individuals that possess, sell, or Delta-8 products. One recent example comes from Texas. Like Georgia, Texas adopted the federal definition of “hemp” and excluded hemp and hemp extracts from its list of controlled substances. In November 2021, the Texas Department of State Health Services sought to add Delta-8-THC to the definition of “tetrahydrocannabinols” and “Marijuana extract.” A Texas trial court granted the Plaintiff business owners and consumers’ request for an emergency injunction and enjoined the State of Texas from prohibiting the possession or distribution of Delta-8-THC. The Texas Court of Appeals affirmed the injunction, and the Texas Supreme Court has declined to review that decision. (Exhibit 2, Texas Litigation Orders).

22.

Similarly, on February 28, 2022, the Boone Circuit Court in Kentucky granted a temporary injunction prohibiting the Commissioner of the Kentucky State Police from “instituting or continuing any criminal enforcement action on the

basis of legally compliant Hemp...this includes any products that contain delta-8-tetrahydrocannabinol unless it contains more than 0.3 percent delta-9-tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.” The court rejected the state’s arguments that Delta-8-THC was an illegal, synthetic form of THC and found that the Plaintiffs showed immediate and irreparable injury to their rights based on the “raids and arrests” by state police “relating to the distribution of Delta-8.” (Exhibit 3, Kentucky Injunction).

23.

For the last four years, small businesses in Georgia, including Plaintiffs, have been growing through the sale of products containing CBD, Delta-8-THC, and other hemp-derived cannabinoids. They have done so openly and publicly under the reasonable belief that Georgia has legalized these products as long as the cannabinoids in the products were sourced from hemp. The public has benefited immensely due to the availability of these products, which offer relief for pain and anxiety without pharmaceuticals like prescription opioids.

24.

On January 25, 2022, after almost four years of steady growth in the hemp product industry, Patsy Austin-Gatson, the District Attorney of Gwinnett County, issued a press release stating that her office intended to arrest and prosecute individuals and businesses involved in “possessing, selling or distributing”

products containing Delta-8-THC or Delta-10-THC. The press release states that these individuals will be prosecuted under O.C.G.A. § 16-13-30, which, among other things, criminalizes the manufacture, distribution, and possession of marijuana and other schedule I controlled substances. (Exhibit 4, Press Release).

25.

District Attorney Austin-Gatson has directed raids and arrests of individuals and businesses distributing or otherwise in possession of Delta-8-THC. Upon information and belief, law enforcement has seized millions of dollars in currency, inventory, and other property from individuals and businesses involved in the sale or distribution of Delta-8-THC, Delta-10-THC, and other products containing hemp-derived cannabinoids under her direction.

26.

District Attorney Austin-Gatson appears to have justified this abrupt change in policy based on an incorrect interpretation of the definition of “hemp” and “hemp products” under O.C.G.A. § 2-23-3. Specifically, District Attorney Austin-Gatson reasons that, because “the Georgia code specifically exempts ‘delta-9-THC under certain concentrations, not delta-8-THC,’” then Delta-8-THC and other cannabinoids derived from hemp remain illegal. (Ex. 4). At the same time, the District Attorney has taken the position that CBD products are legal.

27.

Under the Constitution of Georgia and the laws of this State, Plaintiffs come before this Court seeking relief from the *ultra vires* acts of the State of Georgia and the District Attorney, as these acts are outside of the Defendants' lawful authority and otherwise violate the laws and Constitution of this State.

II. THE PARTIES

28.

Plaintiffs are businesses in Gwinnett County that may be subject to arrest, prosecution, and civil asset forfeiture based on the District Attorney's new policy that Delta-8 and Delta-10 products are illegal controlled substances.

29.

Plaintiff Sass Group, LLC ("Bloom Smoke & Vape") is a domestic limited liability company that registered with the Secretary of State in 2014 and has at least one store in Gwinnett County. Bloom Smoke & Vape sells nicotine and tobacco products and accessories, CBD products, and, until recently, Delta-8 and Delta-10 products. As a result of the District Attorney's recent change in policy regarding Delta-8 and Delta-10 products, Bloom Smoke & Vape has ceased selling such products and is losing over 30% of its income.

30.

Plaintiff Great Vape, LLC (“Great Vape”) is a domestic limited liability company that registered with the Secretary of State in 2019 and has two retail stores in Gwinnett County. Great Vape sells nicotine and tobacco products and accessories, CBD products, and, until recently, Delta-8 and Delta-10 products. As a result of the District Attorney’s recent change in policy regarding Delta-8 and Delta-10 products, Great Vape has ceased selling such products and is losing over 60% of its income.

31.

The State of Georgia has been named in this lawsuit as the sole and exclusive Defendant for Plaintiffs’ request for declaratory judgment. The State of Georgia includes any agency, authority, branch, board, bureau, commission, department, office, or public corporation of the state or officer or employee thereof, including the district attorney for each judicial circuit in Georgia pursuant to Article VI, Section 8, Paragraph I of the Georgia Constitution.

32.

Defendant Patsy Austin-Gatson is the elected District Attorney for Gwinnett County, with her office at 75 Langley Drive, Lawrenceville, Georgia, 30046. Defendant Austin-Gatson has publicly taken the position that hemp-derived Delta-8-THC and Delta-10-THC are illegal controlled substances and appears to have

directed her office and cooperating agencies to arrest and prosecute individuals and businesses engaged in the possession or sale of Delta-8 and Delta-10 products, as well as to seize their assets and initiate civil asset forfeiture proceedings against them. Defendant Austin-Gatson is sued in her individual capacity.

III. JURISDICTION AND VENUE

33.

This Court has jurisdiction over this action pursuant to Article I, Section 2, Paragraph V of the Georgia Constitution and O.C.G.A. §§ 9-4-2 and 9-4-3.

34.

As the seat of the state's capitol, Fulton County is the proper venue for this action as this lawsuit includes a claim for declaratory relief against the State of Georgia pursuant to Article I, Section 2, Paragraph V of the Georgia Constitution. Pursuant to O.C.G.A. § 9-4-7(c), the Attorney General shall be served with a copy of this complaint.

IV. CAUSES OF ACTION

FIRST CAUSE OF ACTION: DECLARATORY JUDGMENT AGAINST THE STATE OF GEORGIA

35.

Plaintiffs restate and re-allege Paragraphs 1 through 38 as if fully set forth herein.

36.

The Georgia Constitution was recently amended to provide an avenue for parties to seek declaratory relief from acts of the state or any of its agencies, authorities, departments, offices, or employees when such acts are “outside the scope of lawful authority or in violation of the laws or the Constitution of this state or the Constitution of the United States.” Ga. Const. art. I, § 2, ¶ V.

37.

Specifically, the Georgia Constitution now states:

(b)(1) “Sovereign immunity is hereby waived for actions in the superior court seeking declaratory relief from acts of the state or any agency, authority, branch, board, bureau, commission, department, office, or public corporation of this state or officer or employee thereof or any county, consolidated government, or municipality of this state or officer or employee thereof outside the scope of lawful authority or in violation of the laws or the Constitution of this state or the Constitution of the United States. Sovereign immunity is further waived so that a court awarding declaratory relief pursuant to this Paragraph may, only after awarding declaratory relief, enjoin such acts to enforce its judgment. Such waiver of sovereign immunity under this Paragraph shall apply to past, current, and prospective acts which occur on or after January 1, 2021.

(2) Actions filed pursuant to this Paragraph against this state or any agency, authority, branch, board, bureau, commission, department, office, or public corporation of this state or officer or employee thereof shall be brought exclusively against the state and in the name of the State of Georgia....

38.

Under Article 1, Section 1, Paragraph I of the Georgia Constitution: “No person shall be deprived of life, liberty, or property except by due process of law.”

39.

The State of Georgia, through at least one of its district attorneys, is acting outside the scope of its lawful authority and in violation of the laws and the Constitution of this State by threatening, initiating, and continuing criminal enforcement actions and civil asset forfeiture proceedings against individuals and businesses based on the possession, sale, and distribution of products containing hemp-derived cannabinoids, including Delta-8-THC and Delta-10-THC, that constitute lawful “hemp products” under O.C.G.A. § 2-23-3.

40.

Products containing cannabinoids like Delta-8-THC and Delta-10-THC are legal “hemp products” under the statute as long as 1) they contain the “federally defined THC level for hemp,” which is currently 0.3% of Delta-9-THC, and 2) they are “derived from, or made by, processing hemp plants or plant parts that are prepared in a form available for legal commercial sale...”

41.

The cannabinoids in these commercial products are “derived from, or made by, processing hemp plants or plant parts” as long as they are extracted from a

Cannabis sativa plant, or any of its “derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers,” that contains less than 0.3% Delta-9-THC.

42.

As stated, the products at issue here, that Plaintiffs previously sold legally and in the open for several years, contained only cannabinoids derived from hemp plants and hemp extracts. None of these products were derived from marijuana or marijuana extracts.

43.

The State’s justification for targeting businesses and individuals who sell products containing hemp-derived Delta-8-THC and Delta-10-THC is contrary to the plain language of O.C.G.A. § 2-23-3 and would undermine the legislature’s purpose in legalizing “hemp” and “hemp products.”

44.

Under the District Attorney’s theory, Delta-8-THC is illegal because the statute only exempts “delta-9-THC under certain concentrations,” not Delta-8-THC or other hemp-derived cannabinoids. Under this theory, the sale of CBD would be illegal because the statute does not reference CBD. This is not what the legislature intended when it adopted the broad language of the Farm Bill. In fact, the statute legalized *all* cannabinoids found in hemp and only chose to limit concentrations of Delta-9-THC, not Delta-8-THC, Delta-10-THC, or any other cannabinoids.

45.

Under the proper interpretation of “hemp” and “hemp products,” products containing Delta-8-THC, Delta-10-THC, and other hemp-derived cannabinoids do not constitute “marijuana” or “Tetrahydrocannabinol” under O.C.G.A. §§ 16-13-25, 16-13-21, 16-13-30, 16-13-31, or any other Georgia law.

46.

By publicly announcing that anyone engaged in the possession, purchase, or sale of products containing hemp-derived Delta-8-THC or Delta-10-THC will be prosecuted for felony marijuana offenses, and by arresting individuals and businesses and seizing their property, the State of Georgia has acted outside of its lawful authority, in violation of Georgia law and Plaintiffs’ right to due process under Ga. Const. Art. 1, § 1, ¶ 1, and has caused significant and immediate injury to Plaintiffs, who have lost, and continue to lose, roughly half of their income.

47.

Plaintiffs are entitled to a declaratory judgment against the State of Georgia recognizing that hemp-derived cannabinoids, including but not limited to Delta-8-THC and Delta-10-THC, are “hemp products” under O.C.G.A. § 2-23-3, as well as permanent injunctive relief enjoining the State from initiating or continuing criminal actions or civil asset forfeiture proceedings based on the possession, sale, or distribution of such products.

**SECOND CAUSE OF ACTION:
REQUEST FOR EMERGENCY INJUNCTION AGAINST
PATSY AUSTIN-GATSON IN HER INDIVIDUAL CAPACITY**

48.

Plaintiffs restate and re-alleges Paragraphs 1 through 51 as if fully set forth herein.

49.

Under O.C.G.A. §§ 9-4-2 and 9-4-3, in cases involving a request for declaratory judgment, the court may grant a interlocutory injunction or other interlocutory relief “to maintain the status quo pending the adjudication of the questions or to preserve equitable rights.”

50.

“When deciding whether to issue an interlocutory injunction, a trial court should consider whether:

- (1) there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted;
- (2) the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined;
- (3) there is a substantial likelihood that the moving party will prevail on the merits of [its] claims at trial; and
- (4) granting the interlocutory injunction will not disserve the public interest.”

Wood v. Wade, No. A21A0558, 2022 WL 335449, at *2 (Ga. App. 2022).

51.

“The first factor — substantial threat of irreparable injury if an interlocutory injunction is not entered — is the most important one, given that the main purpose of an interlocutory injunction is to preserve the status quo temporarily to allow the parties and the court time to try the case in an orderly manner.” *Id.*

52.

Here, each of these factors weigh in favor of granting an immediate interlocutory injunction enjoining District Attorney Austin-Gatson, in her individual capacity, from threatening, initiating, or continuing any criminal enforcement actions or civil asset forfeiture proceedings against individuals or businesses based on the possession or distribution of products containing hemp-derived Delta-8-THC and Delta-10-THC.

53.

Regarding the first factor, the threat of irreparable injury if the injunction is not granted, Plaintiffs have already suffered significant injury and continue suffering severe losses and economic harm as a result of the District Attorney’s *ultra vires* actions. As noted above, Plaintiffs have ceased selling Delta-8-THC and Delta-10-THC products and have divested themselves of any remaining inventory at a loss. Plaintiffs will likely never be able to recover those losses and will continue to suffer irreparable economic harm, reputational damage, brand erosion,

loss of customers to stores in other counties, and the risk of having to close their businesses, unless the District Attorney is enjoined from targeting them.

54.

Plaintiffs' injuries are not limited to economic loss. By threatening Plaintiffs with arrest, prosecution, and civil asset forfeiture for engaging in the legitimate business of selling hemp products, the District Attorney is violating Plaintiffs' rights to due process. *See United States v. Goodwin*, 457 U.S. 368, 372 (1982), "To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" (Citation omitted).

55.

Plaintiffs do not need to suffer the extreme and permanent injury of being arrested or having their assets seized, only to later prove the District Attorney's interpretation of the statute is incorrect, to challenge the District Attorney's *ultra vires* acts through this lawsuit. The threat of prosecution and civil asset forfeiture for engaging in a lawful business is an irreparable and unquantifiable injury that is compounded every day the District Attorney is not enjoined from taking enforcement actions against individuals and businesses that sell hemp products.

56.

Regarding the second factor, whether the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being

enjoined, Plaintiffs respectfully contend that the District Attorney cannot show any threat of injury should she be enjoined from pursuing criminal or civil forfeiture actions against individuals and businesses engaged in the business of selling or distributing products containing hemp-derived cannabinoids. An interlocutory injunction would only preserve the status quo from two months ago, and the District Attorney cannot show that going back to that status quo would cause her or the public any injury, loss, or hardship.

57.

Regarding the third factor, whether there is a substantial likelihood that the moving party will prevail on the merits of its claims at trial, Plaintiffs respectfully contend that the plain language of O.C.G.A. § 2-23-3 clearly supports their position. The Plaintiffs only seek to engage in the purchase and sale of products containing cannabinoids derived from hemp, not marijuana, and they have never possessed or sold or intended to possess or sell any other substances referenced in the District Attorney's press release or otherwise prohibited under Georgia law.

58.

Plaintiffs' position on the merits is arguably the same position adopted by the DEA, which has concluded that "cannabinoids extracted from the cannabis plant that have a delta-9-THC concentration of not more than 0.3 percent on a dry weight basis meet the definition of 'hemp'" and thus are not controlled substances.

59.

Plaintiffs' claim has already prevailed on the merits in other states, such as Texas and Kentucky. Not only did courts in these states agree with arguments made by similarly situated plaintiffs in those states, they also recognized the significant and irreparable harm those plaintiffs were facing and enjoined the state from prohibiting Delta-8-THC and initiating enforcement actions. (Ex. 2; Ex. 3).

60.

Even in states that have specifically prohibited Delta-8-THC and other hemp-derived cannabinoids, they have done so explicitly through legislation. In doing so, these state legislatures recognized that the language of the 2018 Farm Bill and related state laws allow the processing, possession, and distribution of Delta-8-THC and other hemp-derived cannabinoids.

61.

Regarding the fourth and final factor, whether granting the interlocutory injunction will not disserve the public interest, Plaintiffs respectfully contend that granting the interlocutory injunction would serve to *further* the public interest. The public deserves clarity in the law, and that clarity must be consistent with the plain language of the statutes passed by the public's representatives in the legislature. The District Attorney's interpretation of the law is not faithful to the text of the law or the legislature's intent in creating a broad market for hemp and hemp products.

It has caused and continues to cause significant and immediate harm to the Plaintiffs and their business community, as well as consumers in Gwinnett County who seek to purchase hemp products, often as alternatives to addictive prescription drugs, to treat or alleviate their pain or anxiety, or other ailments.

62.

Since 2018, the status quo in Georgia prior to the District Attorney's *ultra vires* acts has been that products containing Delta-8-THC, Delta-10-THC, and other hemp-derived cannabinoids are "hemp products" that may be legally bought and sold. Plaintiffs invested money, effort, and years of their lives building their businesses and selling the public safe products that provide relief from a variety of ailments. Now, they have lost roughly half of their source of income, they continue facing severe losses, and they face arrest, prosecution, and asset seizures if they wish to continue selling products that they were able to sell as recently as two months ago, or that they can continue lawfully selling in the next county over.

V. REQUEST FOR RELIEF

Plaintiffs respectfully requests that the Court enter judgment in their favor and against the Defendants as follows:

- a. Grant an immediate interlocutory injunction pursuant to O.C.G.A. §§ 9-4-2 and 9-4-3 enjoining Defendant Patsy Austin-Gatson, in her individual capacity, from directing her office or agents to initiate or continuing any

criminal enforcement action or civil asset forfeiture proceeding based on the possession, sale, or distribution of products containing hemp-derived cannabinoids, including but not limited to Delta-8-THC and Delta-10-THC.

- b. Grant declaratory judgment against Defendant State of Georgia pursuant to Article I, Section 2 of the Constitution of Georgia declaring that commercial products containing hemp-derived cannabinoids, including but not limited to Delta-8-THC and Delta-10-THC, are “hemp products” that may be lawfully possessed and sold under O.C.G.A. § 2-23-3.
- c. Grant declaratory relief pursuant to Article I, Section 2 of the Constitution of Georgia enjoining Defendant State of Georgia from initiating or continuing any criminal enforcement action or civil asset forfeiture proceeding based on the possession, sale, or distribution of products containing hemp-derived cannabinoids, including but not limited to Delta-8-THC and Delta-10-THC.
- d. And award any further relief as this Court may deem just and proper as authorized under Georgia law and the Constitution of Georgia.

This 10th day of March, 2022.

PATE, JOHNSON & CHURCH LLC

Pate, Johnson & Church, LLC
101 Marietta Street, Suite 3300
Atlanta, Georgia 30303
(404) 223-3310

/s/ Thomas D. Church
Thomas D. Church
Georgia Bar No.: 956589

Page A. Pate
Georgia Bar No. 565899

VERIFICATION

Pursuant to O.C.G.A. § 9-10-110, Plaintiff Great Vape, LLC, through its owner and registered agent, Michael Peterson, hereby declares under penalty of perjury that the foregoing Petition and the facts contained within said Petition are true and correct.

Executed on this 9 of March 2022.



Michael Peterson
Owner of Plaintiff Great Vape, LLC

Sworn to and subscribed before me

This 9th day of March 2022.



Notary Public

My commission expires: FEB. 7, 2023



VERIFICATION

Pursuant to O.C.G.A. § 9-10-110, Plaintiff Sass Group, LLC, d/b/a Bloom Smoke & Vape, through its owner, Angad Chahal, hereby declares under penalty of perjury that the foregoing Petition and the facts contained within said Petition are true and correct.


Executed on this 10 of March 2022.



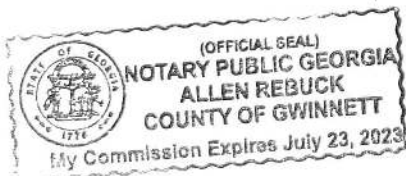
Angad Chahal
Owner of Plaintiff Sass Group, LLC

Sworn to and subscribed before me

This 10 day of March 2022.



Notary Public
My commission expires: 7/23/2023



verified
GOAL
as FD

EXHIBIT 1



U.S. Department of Justice
Drug Enforcement Administration
8701 Morrisette Drive
Springfield, Virginia 22152

www.dea.gov

September 15, 2021

Donna C. Yeatman, R.Ph.
Executive Secretary
Alabama Board of Pharmacy
111 Village Street
Birmingham, Alabama 35242

Dear Dr. Yeatman:

This is in response to your letter dated August 19, 2021, in which you request the control status of delta-8-tetrahydrocannabinol (Δ^8 -THC) under the Controlled Substances Act (CSA). The Drug Enforcement Administration (DEA) reviewed the CSA and its implementing regulations with regard to the control status of this substance.

Δ^8 -THC is a tetrahydrocannabinol substance contained in the plant *Cannabis sativa L.* and also can be produced synthetically from non-cannabis materials. The CSA classifies tetrahydrocannabinols as controlled in schedule I. 21 U.S.C. 812, Schedule I(c)(17); 21 CFR § 1308.11(d)(31). Subject to limited exceptions, for the purposes of the CSA, the term “tetrahydrocannabinols” means those “naturally contained in a plant of the genus *Cannabis* (cannabis plant), as well as synthetic equivalents of the substances contained in the cannabis plant and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity to those substances contained in the plant.” 21 CFR § 1308.11(d)(31). Thus, Δ^8 -THC synthetically produced from non-cannabis materials is controlled under the CSA as a “tetrahydrocannabinol.”

The CSA, however, excludes from control “tetrahydrocannabinols in hemp (as defined under section 1639o of Title 7).” Hemp, in turn, is defined 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 tetrahydrocannabinol [Δ^9 -THC)] concentration of not more than 0.3 percent on a dry weight basis.” 7 U.S.C. 1639o(1).

Accordingly, cannabinoids extracted from the cannabis plant that have a Δ^9 -THC concentration of not more than 0.3 percent on a dry weight basis meet the definition of “hemp” and thus are not controlled under the CSA. Conversely, naturally derived cannabinoids having a Δ^9 -THC concentration more than 0.3 percent on a dry weight basis is controlled in schedule I under the CSA as tetrahydrocannabinols.¹

¹ The Agricultural Improvement Act of 2018 (AIA), Pub. L. 115-334, § 12619, amended the CSA to remove “tetrahydrocannabinols in hemp” from control. See 21 U.S.C. § 812, Schedule I(c)(17). As noted, however, “hemp” is defined to “mean 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-tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.” 7 U.S.C. 1639o (emphasis added). Thus, only tetrahydrocannabinol in or derived from the cannabis plant—not synthetic tetrahydrocannabinol—is subject to being excluded from control as a “tetrahydrocannabinol[] in hemp.”

If you have any further questions, please contact the Drug and Chemical Evaluation Section at DPE@usdoj.gov or (571) 362-3249.

Sincerely,

A handwritten signature in black ink, appearing to read 'Terrence L. Boos'.

Terrence L. Boos, Ph.D., Chief
Drug & Chemical Evaluation Section
Diversion Control Division

cc: Birmingham Office

EXHIBIT 2

CAUSE NO. D-1-GN-21-006174

SKY MARKETING CORP., DBA	§	IN THE DISTRICT COURT
HOMETOWN HERO, CREATE A CIG	§	
TEMPLE, LLC, DARRELL SURIFF, and	§	
DAVID WALDEN	§	
Plaintiffs,	§	
VS.	§	
	§	126TH JUDICIAL DISTRICT
TEXAS DEPARTMENT OF	§	
STATE HEALTH SERVICES, and	§	
JOHN HELLERSTEDT, in his official	§	
capacity as Commissioner of the Texas	§	
DSHS,	§	
Defendants.	§	TRAVIS COUNTY, TEXAS

TEMPORARY INJUNCTION

On November 5, 2021, the Court held a hearing on the Application of Plaintiffs for a Temporary Injunction and Defendants' Plea to the Jurisdiction. Michelle Williamson, official court reporter for the 345th District Court made a record.

After considering the pleadings on file, the admissible evidence, and the arguments of counsel, the Court GRANTS the Plaintiffs' Application for a Temporary Injunction, finding that:

1. Plaintiffs have asserted a valid *ultra vires* claim against Commissioner Hellerstedt for declaratory and injunctive relief for his amendments to the definitions for the terms "tetrahydrocannabinols" and "Marihuana extract" as reflected in the 2021 Department of State Health Services' Schedule of Controlled Substances.

Plaintiffs have asserted a valid cause of action under the Administrative Procedures Act (APA) against DSHS for its changes to DSHS's webpage



wherein DSHS proclaims that Delta-8 in any concentration is considered a Schedule I controlled substance.

3. Plaintiffs have shown a probable right to declaratory and injunctive relief because Commissioner Hellerstedt's action amending the definitions failed to meet the requirements found in § 481.034 of the Texas Health & Safety Code, and DSHS's rule as stated on its website concerning Delta-8 failed to comply with the rule making requirements found in the APA.
4. As a result of Commissioner Hellerstedt's *ultra vires* actions and DSHS's APA violations, Plaintiffs will suffer imminent and irreparable harm such as brand erosion, reputational damage, including loss of customers' goodwill, unsalvageable loss of nationwide customers, loss of market share, loss of marketing techniques, employee force reduction, revenue lost and costs incurred by not being able to manufacture, process, distribute, or sell hemp products that fall within the newly adopted definitions for "tetrahydrocannabinol" and/or "Marihuana extract," having to relocate or shut down part of Plaintiffs' businesses and contributing to the insolvency of Plaintiffs' vendors and customers, and subjecting all of Plaintiffs' employees and similarly situated company employees and individual consumers to potential arrest and other criminal penalties. In addition, Plaintiffs Darrell Suriff and David Walden, along with other similarly situated individual consumers throughout Texas, will have no effective treatment to anxiety, depression, insomnia, migraines, loss of appetite, chronic pain, and nausea. Plaintiffs, along with these other individuals, may be forced to seek other



dangerous alternatives, like opioids or street drugs.

5. Plaintiffs cannot be adequately compensated in damages because the damages are not quantifiable and there is no monetary relief that can be obtained from Defendants. Such injuries would be compounded should Defendants not be immediately restrained from their activities.
6. This Temporary Injunction will preserve the status quo that existed prior to Commissioner Hellerstedt's *ultra vires* conduct and DSHS's APA violations and is in the public's interest. The harm to the Plaintiffs if this Temporary Injunction is not granted outweighs any potential harm to the Defendants by this Temporary Injunction's issuance. Granting injunctive relief will benefit the public interest.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that Plaintiffs' Application for a Temporary Injunction is GRANTED and DSHS and DR. JOHN WILLIAM HELLERSTEDT, in his official capacity as Commissioner of DSHS, his officers, agents, servants, employees, attorneys, and all other persons or entities in active concert or participation with the Defendants who receive actual notice of this Order by personal service or otherwise are enjoined as follows:

1. The Court hereby enjoins the effectiveness going forward of amendments to the terms "'tetrahydrocannabinols" and "Marihuana extract" in the 2021 Department of State Health Services's Schedule of Controlled Substances. More specifically, DSHS shall remove from its currently published Schedule of Controlled Substances the most recent modifications of the definitions to the following terms: "*(31) Tetrahydrocannabinols" and "*(58) Marihuana



extract,” and any subsequent publications of the same (if any) until further order of this Court.

2. The Court hereby enjoins the effectiveness going forward of the rule stated on DSHS’s website that Delta-8 THC in any concentration is considered a Schedule I controlled substance.

This prohibition lasts until the conclusion of the final trial of this case or further notice of the Court.

Actual notice of this Temporary Injunction shall be made by personal service in accordance with the Texas Rules of Civil Procedure.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that a final trial on the merits is set for January 28, 2022.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiffs shall post with the Clerk of this Court a bond in the amount of \$1000.00.

SIGNED on November 8, 2021, at 10:22 a.m.


Ian Soifer, Judge Presiding



TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-21-00571-CV

**Texas Department of State Health Services, and Dr. John Hellerstedt,
in his Official Capacity as Commissioner of DSHS, Appellants**

v.

**Sky Marketing Corp., d/b/a Hometown Hero; Create A Cig Temple, LLC;
Darrell Surif; and David Walden, Appellees**

**FROM THE 126TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-21-006174, THE HONORABLE JAN SOIFER, JUDGE PRESIDING**

ORDER

PER CURIAM

In this interlocutory appeal, appellees have filed an emergency motion for Rule 29.3 temporary relief, asking this Court to reinstate the trial court’s temporary injunction during the pendency of this appeal. *See* Tex. R. App. P. 29.3 (“[T]he appellate court may make any temporary orders necessary to preserve the parties’ rights until disposition of the appeal[.]”). To preserve the status quo and best preserve the parties’ rights during this appeal’s pendency, we grant appellees’ motion and order that the trial court’s temporary injunction is reinstated until the disposition of this appeal. *See id.*; *see also In re Geomet Recycling LLC*, 578 S.W.3d 82, 89–90 (Tex. 2019) (orig. proceeding) (“Rule 29.3 gives an appellate court great flexibility in preserving the status quo based on the unique facts and circumstances presented.”); *Texas Gen. Land Office v. City of Houston*, No. 03-20-00376-CV, 2020 WL 4726695, at *2 (Tex. App.—Austin July 31,

2020, order) (per curiam) (“[A]t this preliminary stage, our task is to determine whether a temporary order will best ‘preserve the parties’ rights until the disposition of the appeal,’ not to determine the merits of the appeal.”).

It is ordered on November 18, 2021

Before Justices Goodwin, Baker, and Smith

RE: Case No. 21-1009

DATE: 12/10/2021

COA #: 03-21-00571-CV

TC#: D-1-GN-21-006174

STYLE: IN RE TEX. DEP'T OF STATE HEALTH SERV.

Today the Supreme Court of Texas denied the petition for writ of mandamus in the above-referenced case. Relators' Emergency Motion for Temporary Relief is dismissed as moot.

MR. D. TODD SMITH
BUTLER SNOW, LLP
1400 LAVACA STREET
SUITE 1000
AUSTIN, TX 78701

* DELIVERED VIA E-MAIL *

RE: Case No. 21-1009

DATE: 12/10/2021

COA #: 03-21-00571-CV

TC#: D-1-GN-21-006174

STYLE: IN RE TEX. DEP'T OF STATE HEALTH SERV.

Today the Supreme Court of Texas denied the petition for writ of mandamus in the above-referenced case. Relators' Emergency Motion for Temporary Relief is dismissed as moot.

DISTRICT CLERK TRAVIS COUNTY
TRAVIS COUNTY COURT
P. O. BOX 679003
AUSTIN, TX 78767
* DELIVERED VIA E-MAIL *

RE: Case No. 21-1009

DATE: 12/10/2021

COA #: 03-21-00571-CV

TC#: D-1-GN-21-006174

STYLE: IN RE TEX. DEP'T OF STATE HEALTH SERV.

Today the Supreme Court of Texas denied the petition for writ of mandamus in the above-referenced case. Relators' Emergency Motion for Temporary Relief is dismissed as moot.

CYNTHIA AKATUGBA
OFFICE OF ATTORNEY GENERAL
300 W 15TH ST FL 11
AUSTIN, TX 78701-1649
* DELIVERED VIA E-MAIL *

RE: Case No. 21-1009

DATE: 12/10/2021

COA #: 03-21-00571-CV

TC#: D-1-GN-21-006174

STYLE: IN RE TEX. DEP'T OF STATE HEALTH SERV.

Today the Supreme Court of Texas denied the petition for writ of mandamus in the above-referenced case. Relators' Emergency Motion for Temporary Relief is dismissed as moot.

MR. JEFFREY D. KYLE
CLERK, THIRD COURT OF APPEALS
209 WEST 14TH ST., ROOM 101
AUSTIN, TX 78701
* DELIVERED VIA E-MAIL *

RE: Case No. 21-1009

DATE: 12/10/2021

COA #: 03-21-00571-CV

TC#: D-1-GN-21-006174

STYLE: IN RE TEX. DEP'T OF STATE HEALTH SERV.

Today the Supreme Court of Texas denied the petition for writ of mandamus in the above-referenced case. Relators' Emergency Motion for Temporary Relief is dismissed as moot.

MS. AMANDA GARRETT TAYLOR
BUTLER SNOW LLP
1400 LAVACA ST., SUITE 1000
AUSTIN, TX 78701
* DELIVERED VIA E-MAIL *

RE: Case No. 21-1009

DATE: 12/10/2021

COA #: 03-21-00571-CV

TC#: D-1-GN-21-006174

STYLE: IN RE TEX. DEP'T OF STATE HEALTH SERV.

Today the Supreme Court of Texas denied the petition for writ of mandamus in the above-referenced case. Relators' Emergency Motion for Temporary Relief is dismissed as moot.

MR. SCOTT K. FIELD

BUTLER SNOW LLP

1400 LAVACA, SUITE 1000

AUSTIN, TX 78701

* DELIVERED VIA E-MAIL *

RE: Case No. 21-1009

DATE: 12/10/2021

COA #: 03-21-00571-CV

TC#: D-1-GN-21-006174

STYLE: IN RE TEX. DEP'T OF STATE HEALTH SERV.

Today the Supreme Court of Texas denied the petition for writ of mandamus in the above-referenced case. Relators' Emergency Motion for Temporary Relief is dismissed as moot.

DAVID GONZALEZ

BUTLER SNOW

1400 LAVACA ST STE 1000

AUSTIN, TX 78701-1764

* DELIVERED VIA E-MAIL *

RE: Case No. 21-1009

DATE: 12/10/2021

COA #: 03-21-00571-CV

TC#: D-1-GN-21-006174

STYLE: IN RE TEX. DEP'T OF STATE HEALTH SERV.

Today the Supreme Court of Texas denied the petition for writ of mandamus in the above-referenced case. Relators' Emergency Motion for Temporary Relief is dismissed as moot.

MR. MARSHALL BOWEN
BUTLER SNOW LLP
1400 LAVACA ST STE 1000
AUSTIN, TX 78701-1764
* DELIVERED VIA E-MAIL *

RE: Case No. 21-1009

DATE: 12/10/2021

COA #: 03-21-00571-CV

TC#: D-1-GN-21-006174

STYLE: IN RE TEX. DEP'T OF STATE HEALTH SERV.

Today the Supreme Court of Texas denied the petition for writ of mandamus in the above-referenced case. Relators' Emergency Motion for Temporary Relief is dismissed as moot.

MS. BETH E. KLUSMANN
ASSISTANT SOLICITOR GENERAL
OFFICE OF THE ATTORNEY GENERAL
P.O. BOX 12548 (MC 059)
AUSTIN, TX 78711-2548
* DELIVERED VIA E-MAIL *

RE: Case No. 21-1009

DATE: 12/10/2021

COA #: 03-21-00571-CV

TC#: D-1-GN-21-006174

STYLE: IN RE TEX. DEP'T OF STATE HEALTH SERV.

Today the Supreme Court of Texas denied the petition for writ of mandamus in the above-referenced case. Relators' Emergency Motion for Temporary Relief is dismissed as moot.

KATHERINE FRANK

SERGI & ASSOCIATES, P.C.

329 S GUADALUPE ST

SAN MARCOS, TX 78666-6309

* DELIVERED VIA E-MAIL *

RE: Case No. 21-1009

DATE: 12/10/2021

COA #: 03-21-00571-CV

TC#: D-1-GN-21-006174

STYLE: IN RE TEX. DEP'T OF STATE HEALTH SERV.

Today the Supreme Court of Texas denied the petition for writ of mandamus in the above-referenced case. Relators' Emergency Motion for Temporary Relief is dismissed as moot.

MR. DAVID KENNETH SERGI
DAVID K. SERGI & ASSOC., P.C.
329 S. GUADALUPE
SAN MARCOS, TX 78666
* DELIVERED VIA E-MAIL *

EXHIBIT 3

**COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
DIVISION I
CASE NO. 21-CI-00836**

KENTUCKY HEMP ASSOCIATION, *et al.*,

PLAINTIFFS

VS.

**RYAN QUARLES, *In His Official Capacity*
As Kentucky Commissioner of Agriculture, et al.,**

DEFENDANTS

ORDER

This matter is before the Court on Plaintiffs' Motion for Temporary Injunction, concerning which the Court conducted an evidentiary hearing on December 16, 2021. Hon. Christopher D. Wiest and Hon. Thomas Bruns appeared for Plaintiffs. Hon. Olivia F. Amlung and Hon. Marc Manley appeared for Kentucky Commissioner of Agriculture Ryan Quarles; and Hon. Lauren Lewis and Hon. Samantha Bevins appeared for Commissioner of the Kentucky State Police, Phillip Burnett, Jr. At the hearing, Plaintiff presented testimony from Mitchell Tate Hall, Vice President and prior President of the Kentucky Hemp Association, Doris Hamilton, the party representative for the Kentucky Department of Agriculture (as if on cross-examination), Rose Seeger, owner of Ky Hemp Girl, LLC, and Dr. Lewis Jackson, Ph.D. Commissioner Quarles presented testimony from Eric Wang, chief executive officer of a company relating to hemp, Dr. Christopher Hudalla, Dr. Peter Akpunonu, Jennifer Padgett, and Sgt. Chris Weber, with the Boone County Sheriff's Department and Northern Kentucky Drug Strike Force.

HISTORICAL BACKGROUND

The history of hemp production is not only a fascinating tale, one that predates the founding of our country, but also one in which Kentucky has played a significant part. Prior to

colonialization, Native Americans raised hemp for many uses, including clothing and food.¹ Settlers at Jamestown grew hemp in the early-1600s, and hemp farming continued throughout the development of the colonies to become a vital commodity for not only North America but England as well.² In addition to other uses, including enduring parchment, nothing compared with the durability of hemp fibers for making sails, cords and rope. Hemp became so integral for Britain's navy that colonial farmers were required to farm it.³ For example, more than 120,000 pounds of hemp was needed to rig the 44-gun USS Constitution, not including that required for canvas and sails.⁴ And, reportedly, Thomas Jefferson wrote the first drafts of the Declaration of Independence on paper made from hemp.⁵

Following the Revolutionary War and until the late 1800s, most of the hemp produced in America was grown by Kentucky farmers.⁶ But as steam ships gained ascendancy on the seas, demand for hemp decreased.⁷ By World War I, Kentucky was the only state raising or producing hemp of any significance, and the nation's primary producer of hemp seed.⁸

Hemp is from the cannabis family of plants as is marijuana.⁹ Variations within the cannabis family of plants have different characteristics, much like there are differences between apple varieties.¹⁰ The stalks of cannabis plants contain fiber valuable for production of a wide

¹ Kenneth Titus and Stephanie Murray, *Industrial Hemp*, Journal of the Kansas Bar Association, 90-APR J. Kan. B.A. 24, 25 (March/April, 2021).

² *Id.*, citing Oscar H. Will III, *The Forgotten History of Hemp Cultivation in America*, FARM COLLECTOR (Nov. 2004), <https://www.farmcollector.com/farm-life/strategic-fibers>.

³ Michelle R.E. Donovan, Jason Canvasser and Danielle M. Hazeltine, *The Evolving CBD and Hemp Market*, Michigan Bar Journal, 100-JUN Mich. B.J. 38, 39 (June, 2021), citing Will, *The Forgotten History of Hemp Cultivation in America*, Farm Collector < <https://www.farmcollector.com/farm-life/strategic-fibers/>>.

⁴ *Id.*

⁵ Vanessa Rogers *The Future of Hemp in Kentucky*, 4 Ky. J. Equine, Agric. & Nat. Resources L. 479, 480 (2012).

⁶ Oscar H. Will, *supra*, note 2.

⁷ *Id.*

⁸ *Id.*

⁹ Donovan, *et al.*, 100-JUN Mich. B.J., at 39.

¹⁰ *Id.*

range of materials, including paper, rope, canvas, building materials and cosmetics.¹¹ The plant also contains flowers, seeds and oil, concerning which many extol as providing health benefits and affording natural relief from adverse medical conditions.¹² Cannabis contains cannabinoids in quantities that vary depending upon the specific variety of cannabis plant. And cannabinoids are comprised of hundreds of natural compounds.¹³ Among these are tetrahydrocannabinol (“THC”), the component having psychoactive properties that can produce feelings of euphoria or a “high,” and cannabidiol (“CBD”), which is popular for treating pain, anxiety and other disorders, including neurological diseases.¹⁴

The federal government began discouraging hemp production beginning with the 1937 Marihuana Tax Act, which taxed the sale of all forms of cannabis. Except for a brief interlude during World War II involving the “Hemp for Victory” campaign, punitive taxation and availability of synthetic fiber stifled the production of hemp. In 1970, Congress passed the Controlled Substances Act, making all cannabis a Schedule I illegal drug—the same designation as narcotics like heroin. Consequently, even hemp production or possession became illegal under federal law.¹⁵ Proponents of hemp have long fought its antagonists to reverse this. That battle still rages.

Proponents of hemp gained ground with the Agricultural Act of 2014 and, later, the Hemp Farming Act of 2018, which removed hemp from the Controlled Substances Act and allows hemp to be farmed agriculturally. Congress did this by codifying an exemption for industrial hemp, under which cannabis plants may not contain more than 0.3 percent of delta-9-THC (“Delta-9”). Kentucky, which had lost significant agriculture following tobacco’s fall from

¹¹ Titus, *et al.*, 90-APR J. Kan. B.A., at 25.

¹² *Id.*

¹³ Donovan, *et al.*, 100-JUN Mich. B.J., at 39.

¹⁴ *Id.*

¹⁵ Titus, *et al.*, 90-APR J. Kan. B.A., at 25.

grace, was at the forefront of this development and the General Assembly enacted statutes tracking the federal exemption for hemp. Following the exemption, various products have been produced from hemp, including CBD oil. Through further processing, a form of THC identified as delta-8 ("Delta-8") can be derived from CBD. According to testimony, products containing Delta-8 are in demand.

On April 19, 2021, the Kentucky Department of Agriculture issued a letter stating Delta-8 is a Schedule I controlled substance, thus illegal, and warned that any manufacturing or distribution of products containing Delta-8 could result in hemp license revocation and criminal prosecution. Plaintiffs point to subsequent criminal enforcement actions by the Kentucky State Police, including raids and arrests, relating to distribution of Delta-8.

ARGUMENTS PRESENTED

Plaintiffs insist that Delta-8 is a derivative of hemp and, therefore, not a controlled substance but exempt. For this premise, Plaintiffs reference the statutory exemption of hemp in 7 U.S.C. § 1639o, and also K.R.S. 260.850. Plaintiffs insist that, because the actions of Defendants are contrary to these statutes, they are acting unlawfully and violating their rights. As to Commissioner Quarles, Plaintiffs argue that he has threatened licensees with revocation of their license and criminal prosecution for engaging in lawful production of Delta-8. Further, at the hearing, they show that police relied upon the April 19, 2021 letter by the Kentucky Department of Agriculture in an affidavit in order to secure a search warrant. And, with regard to the Kentucky State Police, Plaintiffs point to the raids and arrests relating to the same. Plaintiffs argue that, because the production and distribution of Delta-8 by licensees is a lawful activity, Defendants' actions are or will cause irreparable harm and, thus, should be temporarily enjoined pending final decision on the merits.

In response, Defendant Burnett, Commissioner of the Kentucky State Police, argues that Delta-8 is not exempt under the hemp legislation. For this premise, he points to a chart on the Website of the United States Drug Enforcement Agency (“DEA”) where it identifies Delta-8 as being another name for THC, a Schedule I controlled substance. He also references a health advisory published by the Centers for Disease Control warning against the use of products containing Delta-8. Additionally, Commissioner Burnett argues that injunctive relief would be improper on other grounds, namely, because the only harm to Plaintiffs is monetary, that there already has been sufficient delay in Plaintiffs’ case to undermine their claims of immediate or imminent irreparable harm, and that equity supports denying injunctive relief because of the public’s interest that the criminal statutes be enforced.

Defendant Quarles responds that the Kentucky Department of Agriculture neither enforces the criminal laws nor regulates Delta-8, and that the April 19, 2021 letter was merely offered guidance. Consequently, he argues, an injunction would be inappropriate as to either him or his Department. Defendant Quarles initially incorporated¹⁶ arguments from his motion to dismiss, namely, that the harms Plaintiffs alleged to be threatened could be challenged in criminal enforcement proceedings, that hemp license revocation could be challenged through an administrative hearing process, that Plaintiffs failed to allege sufficient injury or controversy and, thus, they lack standing.

Commissioner Quarles also argues that the question is more complicated than the statutory exemption language appears. Defendant Quarles explains that, although the THC in Delta-8 results in a milder high than Delta-9 THC, it is otherwise similar. According to

¹⁶ However, Commissioner Quarles withdrew his motion to dismiss that, prior to that withdrawal, sought incorporation of the arguments therein by reference. In his notice of withdrawal, Commissioner Quarles indicates the intention to litigate the issues to preserve “the integrity and future prospects” of the hemp program from the dangers of “court-sanctioned” Delta-8.

Defendant Quarles, Delta-8 should be considered more of a synthetic creation than a derivative of hemp. Accordingly, he indicates it is otherwise prohibited under K.R.S. Chapter 218A. Further, Quarles contends that because Plaintiffs' loss from complying would be merely monetary, it cannot constitute irreparable harm. Nor, he argues, would an injunction be equitable. As to this he asserts that, "[u]nlike its commonly known counterpart, Delta-8 THC is largely unregulated by federal and Kentucky law," thus, a "court order prospectively blessing the sale of unregulated, untested, and psychoactive drugs to the public, including children, is not in the public interest."¹⁷

In Reply to Commissioner Burnett, Plaintiffs argue that statements on the DEA's Website cannot supersede the law and, in support, point to the DEA's official promulgations in the Federal Register, at 21 CFR 1308.11(31)(ii), that: "(ii) Tetrahydrocannabinols does not include any material, compound, mixture, or preparation that falls within the definition of hemp set forth in 7 U.S.C. 1639o." Contra the argument concerning delay in filing, Plaintiffs explain that they did not file until actual enforcement actions began, such as raids and arrests. Additionally, Plaintiffs assert that Defendant should not be heard to complain that Plaintiffs waited until parties were served and attorneys entered appearances before moving for injunctive relief.

As to Defendants' argument that monetary loss cannot equate to irreparable harm, Plaintiffs point to various federal precedent stating that, because government actors are typically immune from liability for monetary damages, those losses are irreparable. Contra Quarles' arguments, pointing to the April 19, 2021 letter, Plaintiffs point out that the Department has statutory authority to revoke or suspend licenses, and that he has expressly threatened to do so over the very issue in dispute. Further, Plaintiffs point to statutes and precedent to support its

¹⁷ Commissioner Quarles' Resp., pp. 15-16.

position that the controversy here meets standing requirements and, more specifically, grounds for injunctive relief. According to Plaintiffs, the statutory exemption enacted by both the United States Congress, and the Kentucky General Assembly, is clear. Thus, Plaintiffs insist, Delta-8 is exempt and the actions by an agency (or individual officers thereof) to punish licensees for producing it, and raids and arrests of citizens by the Commonwealth's police on those grounds, violates the Kentucky and United States Constitution, thereby constituting irreparable harm.

ANALYSIS

CR 65.04(1) provides the standard the Court is to apply on a Motion for injunctive relief:

A temporary injunction may be granted during the pendency of an action on motion if it is clearly shown by verified complaint, affidavit, or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual.

The purpose of this rule "is to insure that the injunction issues only where absolutely necessary to preserve a party's rights pending the trial of the merits." *Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky. App. 1978). In *Maupin*, the Kentucky Court of Appeals established a three-part test for issuance of a temporary injunction. First, Plaintiff must show that, without the temporary injunction, he will suffer immediate and irreparable injury to his rights pending trial. *Id.* at 699. Second, the Court must weigh any equities that may be involved. *Id.* Third, the Court should determine whether a substantial question on the merits has been shown. *Id.* "If the party requesting relief has shown a probability of irreparable injury, presented a substantial question as to the merits, and the equities are in favor of issuance, the temporary injunction should be awarded." *Id.* If one or more of these criteria are not satisfied, the temporary injunction should be denied. *Sturgeon Min. Co., Inc. v. Whymore Coal Co., Inc.*, 892 S.W.2d 591 (Ky. 1995).

Among Plaintiffs are the Kentucky Hemp Association, whose members are comprised of licensees under Kentucky's hemp program administrated by the Kentucky Department of Agriculture. Plaintiffs also include a hemp producer licensed under that program, and a retailer who is neither a producer nor licensed as such. The evidence entered at the hearing demonstrates—and Defendants do not dispute—that the Kentucky State Police has conducted raids and arrests in Kentucky to prevent distribution of products containing Delta-8. What is in dispute is whether that constitutes irreparable harm. The answer to that question turns, first and foremost, upon whether the raids and arrests are performed according to law. And that answer, in the main, largely centers upon whether Delta-8 is prohibited or exempted under the statutes at issue. If prohibited by law, then no further analysis is needed.

The evidence further demonstrates—concerning which there is also no dispute—that the prohibition of products containing Delta-8 results in economic loss to those who farm, produce and sell it. It is further uncontested that Delta-8 is sold at retail in the states surrounding Kentucky, including Indiana, Tennessee, West Virginia, and Ohio. Plaintiffs also demonstrated at the hearing that law enforcement agents relied upon the April 19, 2021 letter from the Kentucky Department of Agriculture in an affidavit to show the criminality of Delta-8 to obtain search warrant(s).¹⁸ Again, the dispute is whether there are grounds for injunctive relief. And, again, that answer first depends upon the legality of the prohibition. Consequently, in actions where, as here, the central issue is the constitutionality of government action, the third element of the *Maupin* test becomes the threshold question.

¹⁸ Plaintiff's Hearing Exh. No. 7.

A. Substantial Question on Merits

In the Hemp Farming Act, part of the Farm Bill enacted in 2018, Congress exempted hemp from the Controlled Substances Act. In doing so, Congress defined hemp as follows:

The term “hemp” means the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.¹⁹

Kentucky, through its General Assembly, enacted statutes exempting hemp with a definition using nearly identical language. KRS 260.850 provides, in relevant part, as follows:

(5) “Hemp” or “industrial hemp” means the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis;

(6) “Hemp products” or “industrial hemp products” means products derived from, or made by, processing hemp plants or plant parts;

At the hearing, Dr. Lewis Jackson testified as an expert for Plaintiffs. Dr. Jackson holds a B.A. and Ph.D. in Chemistry and has experience in the cannabis industry. Dr. Jackson explained the process involved in producing Delta-8. The process of extraction, he explained, is performed through chemical reactions. He testified that the first step in producing Delta-8 is to extract CBD. This is done by separating the flower, drying it, grinding it and applying an organic solvent (such as oil) to solubilize the cannabinoids for extraction from the plant material. Then, from resulting CBD, whether as a crude extract or isolate, the CBD is solubilized again with what he termed a friendly organic solvent to liquify the material and induce further reactions to derive or extract Delta-8. Dr. Jackson testified that the resulting Delta-8 is a

¹⁹ 7 U.S.C. 1639o(1).

derivative of CBD, which is a derivative of hemp. Dr. Jackson testified that Delta-8 is not Delta-9 and that, in fact, Delta-8 can contain concentrations of Delta-9 THC. The concentrations may be greater or less than 0.3% Delta-9 THC, which is what determines whether it is exempt under the statute.

Defendant Quarles argues that Delta-8 should not be deemed a derivative of hemp but a synthetic creation from chemical processes that is otherwise prohibited under KRS Chapter 218A. The first problem with this argument, however, is that the statutory prohibitions of synthetic marijuana were repealed—perhaps in conjunction with the legalization of hemp.

The next issue with this argument is the text of the hemp statutes itself, which exempts hemp from “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 tetrahydrocannabinol concentration of not more than three-tenths of one percent”²⁰ And, further, KRS 260.858(1) provides that: “*Notwithstanding any other provision of law to the contrary*, it is lawful for a licensee, or his or her agent, to cultivate, handle, or process hemp or hemp products in the Commonwealth.”²¹ Clearly, the definition of hemp includes derivatives, extracts and isomers.

As the evidence shows, the extraction of derivatives, and the isolation of isomers, involve chemical processes. However, the statute exempts “*all* derivatives, extracts, cannabinoids, isomers” so long as it contains less than three percent Delta-9 THC on a dry weight basis.

The Court agrees with Commissioner Quarles that it is not the province of this Court to establish policy, or to make, change or repeal law. That is *solely* the role of the legislative branch. Courts adjudicate based upon the law. Thus, if only natural hemp (unadulterated by any

²⁰ Emphasis added.

²¹ Emphasis added.

chemical) is worthy of exemption, then Congress, and the General Assembly, could have made their statutes say so. They did not. Likewise, if the extraction or production of derivatives using non-hemp solvents should have remained a controlled substance, then the legislators could have, by statute, said so. They did not. Nor did the legislative body choose to limit Delta-8 concentrations as it did with Delta-9. Again, they could have but did not. Courts “cannot question the wisdom or policy of the general assembly” but, rather, “must follow the plain provisions of its enactment” *Boyd v. Land*, 97 Ky. 379, 30 S.W. 1019, 1020 (1895). In applying the law, courts must “look first to the language of the statute, giving the words their plain and ordinary meaning.” *Richardson v. Louisville/Jefferson Cty. Metro Gov’t*, 260 S.W.3d 777, 779 (Ky. 2008). Where intent is suggested that is contrary to the language of the statute, “legislative intent is at best a nebulous will-o’-the-wisp.” *Gateway Const. Co. v. Wallbaum*, 356 S.W.2d 247, 249 (Ky. 1962).

Defendants, however, contend that Delta-8 is nonetheless prohibited as a controlled substance. For this, they point to a chart on the DEA’s Website and to guidance by the CDC. Executive agencies may promulgate regulations but only within the scope of the statute enabling their existence. Otherwise, an agency has no constitutional authority to enact law. Administrative agencies are creatures of statute. Consequently, they may not promulgate rules that contradict statute. As explained by the United States Supreme Court in *Dixon v. United States*:

The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law * * * but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

Dixon v. United States, 381 U.S. 68, 74 (U.S. 1965), internal quotes and citations omitted.

The same was also explained by Kentucky's (formerly) highest court concerning the limits on the authority of government agencies and boards (in a case involving the Kentucky Alcoholic Beverage Control Board):

True, the Legislature . . . vested the Board with certain regulatory and administrative powers, but this does not give the Board authority to adopt regulations extending beyond the scope of the statute which it attempts to administer. . . . [A] public administrative board 'may not, by its rules and regulations, amend, alter, enlarge, or limit the terms of a legislative enactment.'

Roppel v. Shearer, 321 S.W.2d 36, 39 (Ky. 1959), internal citations omitted. *Roppel* has never been overruled.

Moreover, as Plaintiffs point out, the DEA's chart reference to Delta-8 does not coincide with the regulations promulgated and published in the Federal Register at 21 CFR 1308.11(31)(ii). If agencies may not promulgate regulations beyond statutory authority, much less may they do so by explanatory statements or charts on a Website. Plaintiffs have demonstrated a substantial question on the merits.

B. Irreparable Harm

Plaintiffs contend that government actions that are contrary to its duly enacted law constitute irreparable harm. For this, they point primarily to *Boone Creek Props., LLC v. Lexington/Fayette Urban County Bd. of Adjustment*, 442 S.W.3d 36, 40 (Ky. 2014), and quote, in part, the following:

For a representative government that draws its authority from the respect, good will, and consent of the people, rather than by the force of its armed police and military, the ability to promptly eliminate ongoing violations of laws enacted by the people's representatives is essential to the ability to govern and maintain order in the community.

Defendant Quarles, however, challenges the applicability of *Boone Creek* because it involved injunctive relief in favor of a governmental unit. According to Defendant Quarles, the

proper rule is that, “when a *government* seeks to enforce the law, then an injunction against a private citizen is warranted to protect the *government’s* right to enforce its laws”²² The Court disagrees. In fact, this argument defies the very foundational principle on which our law is based: “That . . . Governments are instituted among [the people], deriving their just powers from the consent of the governed.” DECLARATION OF INDEPENDENCE, ¶ 2.

Turning to the arguments concerning delay, Commissioner Burnett contends the timeline alone defeats Plaintiffs’ motion because they cannot show the injury to be “immediate.” A party’s delay may very well undermine their claims of immediacy. By this, it appears Defendant’s criticism is that Plaintiffs did not file suit immediately upon receipt of the Kentucky Department of Agriculture’s April 19, 2021 letter. That would be a curious position, however, given the arguments presented in this case that Plaintiffs have not alleged sufficient threat of injury. Plaintiffs explain that they chose not to bring their challenge unless enforcement action ensued, and that they elected to serve all parties and await appearances of counsel before moving for injunctive relief. For this they cannot be faulted, especially with regard to the latter.

It remains true, however, that the most significant delay in this case is not attributable to the timing of Plaintiffs’ action, but to the briefing deadlines agreed to by the parties and to the

²² Commissioner Quarles’ Resp., p. 13, emphasis original.

scheduling limitations of this Court.²³ The Court does not agree that injunctive relief may be denied on the mere basis of delay. Moreover, here the claims of irreparable harm involve government action. Thus, delay is not as determinative because the alleged harm might be of a continuing nature.

As to Defendants' arguments that Plaintiffs' claims are merely monetary and, therefore, cannot be deemed irreparable, the Court disagrees. First, there is also the foregoing consideration concerning a citizen's ability to obtain redress. Second, as Plaintiffs point out, Defendants are shielded from having to pay Plaintiffs any damages for monetary losses. "[C]omplying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and concurring in the judgment); see, e.g., *Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929) (holding that a company would suffer an irreparable injury

²³ From March 2020 to June 2021, and nearly all months in between, jury trials were prohibited in the courts of Kentucky. When this case was filed in July 2021, this Court had a backlog of cancelled jury trials that had to be reset, many of which involved persons who were being held in custody pending trial. It was during this period the Court attempted to schedule the evidentiary hearing in this matter for September 2021 which, as counsel are aware, the Court had no choice but to cancel. Given matters then pending, the earliest date available on the Court's calendar was for December 16, on which the hearing occurred. And, aside from scheduling issues concerning the hearing date, this matter has been under submission for over sixty days—a circumstance concerning which also invites explanation. In addition, the circumstances of the past two years have caused other bottlenecks aside from the backlog on trials. During the past two years, significant court resources have had to be expended for matters that heretofore were never in issue. Matters that previously required no expense of time became monumental tasks. For example, trying to arrange hearings for persons in custody on warrants in the various detention centers became a monumental task. Frequently, detention centers stated they could not accommodate remote hearings or virtual access. And aside from hearings, often counsel would seek relief from the Court for clients in custody who, due to varying protocols issued by varying persons or agencies, were being denied private meetings with their counsel. Significant Court time had to be spent in trying to alleviate those circumstances by employing various means, including, where all else failed, the issuance of transport orders to accommodate meetings at the Courthouse. There were even instances where detention centers refused to honor a transport order when deputies arrived. Scheduling remote hearings among the various detention centers to coordinate with the calendars of all concerned also required substantial time. And conducting the remote hearings (especially in the first year of the lockdown) proved a great expenditure of time. There were constant problems with bandwidth where the screen would freeze, or audio would drop, and even when the Court's system was functioning, a party or counsel's connection would drop and arrangements then had to be made for telephonic participation, or for rescheduling; or there would be a synchronization problem with the judicial audio-video recording system that threatened the record. It required far more time to do less work. Affording due process became a herculean (if not impossible) task. Thus, the timeline in this case should not be taken as a judgment by the Court that it lacks importance. The Court's submit table has grown heavy with cases, each having issues gravely important to all the parties concerned, and each crying out to be heard.

from paying allegedly unconstitutional tax because state law provided “no remedy whereby restitution of the money so paid may be enforced”). See *Sampson v. Murray*, 415 U.S. 61, 90 (U.S. 1974), explaining that “[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.” The converse reasoning, therefore, would also hold true.

Additionally, non-compliance here entails not mere monetary fines and costs but the prospect of criminal charges. The April 19, 2021 letter has been presented as the grounds for establishing the illegality of Delta-8 in the issuance of search warrants. Indeed, at the hearing Plaintiffs presented evidence showing where persons in Kentucky have been criminally charged for possessing Delta-8.²⁴ “To punish a person because he has done what the law plainly allows him to do is a due process violation ‘of the most basic sort.’” *U. S. v. Goodwin*, 457 U.S. 368, 372 (1982). Irreparable harm is sufficiently demonstrated where it is shown there is potential for the “abrogation of a concrete personal right,” and where such rights are threatened with immediate impairment. *Maupin v. Stansbury*, 575 S.W.2d 695, 698 (Ky. 1978).

Commissioner Quarles’ argument that, because Plaintiffs can challenge Delta-8 enforcement when or if they are charged criminally is likewise without merit. Nor must Plaintiffs be forced to defy the Commissioner in order to challenge his Delta-8 declaration in an administrative hearing following license revocation See *Roppel v. Shearer*, 321 S.W.2d 36, 39 (Ky. 1959).

For all the foregoing reasons, the Court finds that Plaintiffs have made an adequate showing of irreparable harm.

²⁴ See Plaintiffs’ Hearing Exh. 7 and 8.

C. Balance of Equities

As part of balancing the equities between the public interest and the respective parties, courts are to consider “whether the injunction will merely preserve the status quo.” *Rogers v. Lexington-Fayette Urban County Government*, 175 S.W.3d 569, 571 (Ky. 2005). On Plaintiff’s side, the status quo would be to merely recognize the existing statutory definition of hemp, and the corresponding application of the statutory exemption of hemp. On Defendants’ side, the status quo would be to allow criminal enforcement, or license revocation, on the grounds declared in the April 19, 2021 letter by the Kentucky Department of Agriculture despite it being contrary to the statutory exemption.

Defendants both argue the equities weigh against injunctive relief. According to Commissioner Burnett, equity favors denying the injunction because “the public has an interest in the enforcement and application of Kentucky criminal statutes by state law enforcement.”²⁵ And Commissioner Quarles contends that “Delta-8 THC is potentially dangerous to a user’s health, and is not approved for human consumption by the U.S. Food and Drug Administration,” and that, although “Delta-8 THC is largely unregulated by federal and Kentucky law, . . . a court order prospectively blessing the sale of unregulated, untested, and psychoactive drugs to the public, including children, is not in the public interest.”²⁶

At the hearing, Defendants presented a witness who testified to adverse effects she experienced from taking two doses of a product containing Delta-8 within a period of 30 to 45 minutes. Defendants also presented testimony concerning the adverse effects Delta-8 can produce in small children, especially if taken in substantial quantities. Defendants’ further

²⁵ Commissioner Burnett’s Reply (deemed his Response), p. 6, fn. 2.

²⁶ Commissioner Quarles’ Resp., pp. 15-16.

presented evidence of health care practitioners indicating that, despite warnings on packaging, there have been instances where children have obtained products containing Delta-8.

It is clear from the testimony presented that the agents and officers who testified have the best of intentions. But there are many harmful things offered to the public that may injure them physically, mentally, or morally. Regardless of that fact, however, no agency or officer can prohibit possession or distribution without legislative enactment. There is a reason our system does not allow those charged with enforcing the law to also make the law.

In *Roppel v. Shearer*, Kentucky's then highest court considered a very similar argument to the equity arguments presented by Defendants. There, the Kentucky Alcohol Control Board promulgated a regulation declaring it to be illegal for licensed retailers of malt beverages to either take orders for alcoholic beverages over the telephone or to deliver said beverages beyond the premises of the licensee. The underlying statute provided that alcohol sales must be "from the licensed premises only," not "at the license premises only." The Board argued this was sufficient to enable it to impose the regulation. The Board further argued the regulation was necessary to prevent retailers from selling alcohol to minors. The retailer sought a temporary and permanent injunction against the Board. In resolving the issue, Kentucky's then highest court held:

This may be a moral and laudable purpose by the Board, but the statute cannot be construed as limiting sales by a retailer in any such manner. . . . the Board broadened the statutes and included therein matters not written into the statutes by the Legislature. The Board cannot substitute its judgment for that of the Legislature but must accept the law as enacted by that body. It is elementary that the Legislature cannot delegate its functions to others. . . . Whenever the Board adopted regulations which conflicted with the statute, this court has consistently refused to sustain the regulations.

Roppel v. Shearer, 321 S.W.2d 36, 39 (Ky. 1959) (emphasis added; internal citations omitted).

As this Court already stated, it agrees with Defendants that it is not the province of the courts to establish policy. But neither is it the province of governmental agencies to contravene the enactments of the legislative branch. Among the problems with Defendants' reasoning is it would do so, resulting in placing administrative agencies over the legislative branch that created them. And in no circumstance can that be said to serve equity.

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiffs'

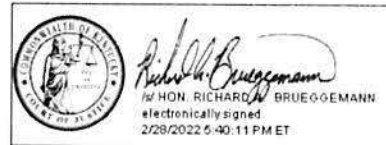
Motion for Temporary Injunction is **GRANTED** as follows:

1. That Defendant, Hon. Ryan Quarles, in his official capacity as Commissioner of the Kentucky Department of Agriculture, as well as its officers and agents are, during the pendency of this case, **ENJOINED** from instituting or continuing any license revocation or other adverse action against licensees on the basis of legally compliant Hemp (the plant *Cannabis sativa* L. with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis), as well as any part of that plant that is compliant (that has a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis), including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, provided none of those materials have a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis; this includes any products that contain delta-8 tetrahydrocannabinol unless it contains more than 0.3 percent delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

That Defendant Colonel Phillip Burnett, Jr., in his official capacity as Commissioner of the Kentucky State Police, as well as its officers, agents, and other persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise are, during the pendency of this case, **ENJOINED** from instituting or continuing any criminal enforcement action on the basis of legally compliant Hemp (the plant *Cannabis sativa* L. with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis), as well as any part of that plant that is compliant (that has a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis), including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, provided none of those materials have a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis; this includes any products that contain delta-8 tetrahydrocannabinol unless it contains more than 0.3 percent delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

IT IS FURTHER HEREBY ORDERED AND ADJUDGED that Pursuant to C.R.
65.05(1), the Court finds it in the public interest to waive the bond requirement.

IT IS SO ORDERED.



JUDGE RICHARD A. BRUEGGEMANN
BOONE CIRCUIT COURT

CC: ALL COUNSEL AND PARTIES OF RECORD.

EXHIBIT 4



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January 25, 2022

Press Release

In the last year the Gwinnett County District Attorney's Office has investigated cases involving the sale of "seemingly" legal substances from convenience stores throughout Gwinnett County. These products may appear to be legitimate; however, they contain controlled substances that in some cases are lethal. The issue is further complicated by the reality that online retailers broadcast that some of these substances are legal and legitimate.

With the emergence of the legalization of hemp and low THC oil there are other products which are being sold which are not legal. Two of those products are Delta-8 THC and Delta-10 THC.

With the passage of the Hemp Farming Bill, Hemp and Hemp related products became legal. O.C.G.A. § 2-23-3(5) & (6) allows for Hemp products with the "federally defined THC levels or lower." O.C.G.A. § 2-23-3(3) defines "federally defined THC levels" as a "delta-9-THC concentration of not more than 0.3 percent."

However, Delta-8-THC is different from Delta-9-THC, [see https://delta8.science/delta-8-vs-delta-9/](https://delta8.science/delta-8-vs-delta-9/). Most notably, the Georgia code specifically exempts "delta-9-THC" under certain concentrations, not delta-8-THC.

O.C.G.A. § 16-13-21(16) defines marijuana and exempts hemp and hemp related products as they are defined in O.C.G.A. § 2-23-3. Additionally, O.C.G.A. § 16-13-25(3)(P) includes THC as a schedule 1 controlled substance but exempts hemp and hemp related products as they are defined in O.C.G.A. § 2-23-3.

Accordingly, Georgia law does not provide an exemption for delta-8-THC and therefore, the possession, sale or distribution (among other things) of Delta-8 THC is a violation of O.C.G.A. § 16-13-30 and is defined as a felony in the State of Georgia. The Gwinnett County District Attorney's Office will pursue the prosecution of individuals and businesses who engage in the possession, sale or distribution of Delta-8 or Delta-10 THC.

There is also evidence that certain convenience stores are stocking and selling products which contain other scheduled substances. Some of the names that these products are being sold under are "Psych," "Solar," "Atom" or "Atomic Drop," "Honey" or "Honey Bee," "Blaze," "Chrome" and "Blue Myst." A chemical analysis of some of these revealed the presence of Schedule I substances (MDMB-4en-PINACA also known as "indazole amide" and MMB-FUBICA also known as "indole carboxamide."

Possession, sale or distribution of schedule 1 controlled substances is a felony punishable under O.C.G.A. § 16-13-30. The Gwinnett County District Attorney's Office will pursue the prosecution of individuals and businesses who engage in the possession, sale or distribution of these and other schedule 1 controlled substances. Those found to be possessing, selling or distributing these substances may be subject to felony punishment and are at risk of having their assets seized and forfeited to the State.

The Gwinnett County District Attorney's Office is committed to protecting the citizens of Gwinnett County and others and has a vested interest in ensuring that illegal and dangerous controlled substances are not being distributed in Gwinnett County and to our citizens.

Patsy Austin-Gatson
District Attorney
Gwinnett Judicial Circuit