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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

BIG SKY SCIENTIFIC LLC,

Plaintiff,

v.

IDAHO STATE POLICE, ADA  
COUNTY, JAN M. BENNETTS, in her  
official capacity as Ada County  
Prosecuting Attorney,

Defendants.

Case No.

**MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S EMERGENCY MOTION FOR  
TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

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Pursuant to Federal Rule of Civil Procedure 65, Plaintiff Big Sky Scientific LLC (“Big Sky”) moves the Court for a temporary restraining order (“TRO”) and to preliminarily enjoin Defendants Idaho State Police (“ISP”), Ada County (the “County”), and Jan M. Bennetts in her official capacity as Ada County Prosecuting Attorney (“Bennetts”) (collectively, “Defendants”) from violating the clear commands of the Agriculture Improvement Act of 2018, Pub. L. No. 115-334 (the “2018 Farm Bill”) and the Commerce Clause, and to order Defendants to immediately return Big Sky’s property. Alternatively, Big Sky requests the Court appoint an emergency receiver to safeguard Big Sky’s valuable, federally-protected property, pending final resolution of the matter. As explained herein, such relief is necessary to prevent Big Sky from suffering immediate, irreparable harm as a result of Defendants’ unlawful conduct.

### **INTRODUCTION**

Industrial hemp is not marijuana. It is an agricultural crop. It causes no “high.” Products containing industrial hemp isolates, such as hand cream, shampoo, lip balm, pet products, sports drinks, and dietary supplements, can be found in national chains and local grocery stores throughout the Treasure Valley. Industrial hemp is not illegal.

On December 20, 2018, Congress enacted the 2018 Farm Bill. Among other things, the 2018 Farm Bill distinguished industrialized hemp from marijuana and removed it from the Controlled Substances Act. Most critically for this case, the 2018 Farm Bill provides that no state, regardless of that state’s marijuana laws, may prohibit the shipment of industrial hemp or hemp products through the state or territory. Blocking such shipments puts an impermissible burden on interstate commerce.

Despite the clear language of the 2018 Farm Bill and the Commerce Clause, on or around January 24, 2019, ISP prohibited one of Big Sky’s industrial hemp shipments from passing through the state, headed from Oregon to Colorado. Instead, ISP arrested the driver, seized the

shipment, and reported to media outlets that it had just made the “largest marijuana bust” in the agency’s history. Industrial hemp is not marijuana.

Big Sky was quick to respond. Through counsel, it spoke to the County’s Chief Deputy Criminal Prosecutor, emailed and sent hand-delivered letters to Bennetts and her Chief Deputy in charge of civil matters, and left voice messages, sent a letter, and emailed the Deputy Attorney General assigned to ISP. Big Sky provided Defendants with documentation from multiple state-accredited laboratories certifying the shipment as industrial hemp, not marijuana. It explained that the shipment was very expensive and very perishable. If proper climate and airflow are not maintained, the product will mold. If that happens, the product will be worthless and Big Sky will have lost not only the estimated \$1.3 million value of its industrial hemp shipment’s isolates, but also the opportunity of being among the first entrants into the new Congressionally-created industrial hemp market. Defendants think the 2018 Farm Bill does not apply.

Big Sky files this action and emergency motion to safeguard its perishable, federally-protected property, and to ensure that it can continue its lawful business as Congress intended.

### **THE LEGAL BACKGROUND OF INDUSTRIAL HEMP**

#### ***A. The 2014 Farm Bill***

On February 7, 2014, President Barack Obama signed the Agricultural Act of 2014, Pub. L. No. 113-79 (the “2014 Farm Bill”), into law. The 2014 Farm Bill provided that “[n]otwithstanding the Controlled Substances Act . . . or any other Federal law, an institution of higher education . . . or a State department of agriculture may grow or cultivate industrial hemp,” provided it is done “for purposes of research conducted under an agricultural pilot program or other agricultural or academic research” and those activities are allowed under the relevant state’s laws. 7 U.S.C. § 5940(a). The 2014 Farm Bill narrowly defined “industrial hemp” as the plant *Cannabis sativa L.*, or any part of such plant, “with a delta-9 tetrahydrocannabinol



concentration of not more than 0.3 percent on a dry weight basis.” *Id.* § 5940(b).<sup>1</sup>

Despite opening pathways for state-sponsored research into industrial hemp, the 2014 Farm Bill did not remove industrial hemp from the federal controlled substances list. *Hemp Indus. Ass’n v. U.S. Drug Enf’t Admin.*, 720 F. App’x 886, 887 (9th Cir. April 30, 2018) (affirming DEA interpretation of industrial hemp isolates as a Schedule I controlled substance, but holding that such interpretation did not interfere with state-sponsored research).

Following the passage of the 2014 Farm Bill, the Oregon legislature passed HB 4060 in order to establish an industrial hemp program in line with the registration and research requirements of the 2014 Farm Bill. The Oregon law requires industrial hemp growers to be registered and certified with the state. Consistent with the research aims of the 2014 Farm Bill, Oregon’s law established a framework “for the purpose of developing standards for investigating and testing ... industrial hemp crop[s].” Or. Rev. Stat. § 571.333.

### ***B. The 2018 Farm Bill***

For four years, multiple states and academic institutions across the country, including Oregon, tested the viability of industrial hemp as an agricultural crop, as part of the pilot programs contemplated by the 2014 Farm Bill. Following this four-year research period, on December 20, 2018, President Donald Trump signed the 2018 Farm Bill into law.

The 2018 Farm Bill amends the Agricultural Marketing Act of 1946, 7 U.S.C. § 1621, *et seq.*, by expanding the definition of “industrial hemp” beyond the 2014 Farm Bill to include not only “the plant *Cannabis sativa* L. and any part of that plant,” but also “the seeds thereof and all

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<sup>1</sup> Delta-9 tetrahydrocannabinol (“ $\Delta$ -9 THC”) is the principal psychoactive constituent of cannabis. Declaration of Ryan Shore in Support of Big Sky Scientific LLC’s Emergency Motion for Temporary Restraining Order and Preliminary Injunction (“Shore Decl.”) at ¶ 3. The greater the amount of  $\Delta$ -9 THC, the larger the “high” experienced by a recreational marijuana user. *Id.* Industrial hemp, with a  $\Delta$ -9 THC level of 0.3 percent or less on a dry weight basis, has virtually no psychotropic effect and is therefore not used for recreational purposes. *Id.*

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.” *Compare* 2018 Farm Bill § 10113 *with* 2014 Farm Bill § 7606.

With its expanded definition, the 2018 Farm Bill distinguishes industrial hemp from “marihuana” as defined in the Controlled Substances Act (“CSA”), 21 U.S.C. § 802(16), and, unlike the 2014 Farm Bill, explicitly removes industrial hemp from the CSA. 2018 Farm Bill § 12619(b) (“TETRAHYDROCANNABINOL.—Schedule I, as set forth in section 202(c) of the Controlled Substances Act (21 U.S.C. § 812(c)), is amended in subsection (c)(17) by inserting after ‘Tetrahydrocannabinols’ the following: ‘, except for tetrahydrocannabinols in hemp (as defined under section 297A of the Agricultural Marketing Act of 1946)’”).

In removing industrial hemp from the CSA, Senate Majority Leader Mitch McConnell of Kentucky, a member of the Senate Agriculture Committee, stated: “I think it’s time we took this step.... I think everybody has figured it out that this isn’t the other plant.” Jeff Daniels, CNBC, Senate Agriculture Panel Passes Farm Bill with Hemp Legalization (June 13, 2018; updated June 14, 2018), <https://www.cnbc.com/2018/06/13/senate-agriculture-panel-passes-farm-bill-with-hemp-legalization.html>. Leader McConnell went on to explain that industrial hemp is an agricultural crop, not a narcotic: “I know there are farming communities all over the country who are interested in this,” as a “cash crop.... I think it’s an important new development in American agriculture. There’s plenty of hemp around; it’s just coming from other countries. Why in the world would we want a lot of it to not come from here?” *Id.*

Senate Minority Leader Chuck Schumer of New York holds a similar viewpoint. Referring to then federal law, he stated: “It’s a crock.... It makes no sense that the DEA is the primary regulator, and that they stop farmers and investors from growing hemp. Why are we

buying hemp from other countries, when we have hundreds of acres that could be grown right here in our backyard?” Tom Angell, Forbes, Legalizing Hemp Brings Schumer and McConnell Together (May 5, 2018), <https://www.forbes.com/sites/tomangell/2018/05/05/legalizing-hemp-brings-schumer-and-mcconnell-together/#188159e9222d>. Idaho’s entire congressional delegation that voted, voted in favor of the legalization of industrial hemp. Agriculture Improvement Act, Cong. Rec. 164:196 (Dec. 12, 2018) p. H10151-H10152; 164:195, p. S7405.<sup>2</sup>

In addition to making industrial hemp a legal agricultural crop, Congress also prohibited state interference with the transportation of industrialized hemp through interstate commerce, regardless of a state’s marijuana laws. The 2018 Farm Bill provides in relevant part:

SEC. 10114. INTERSTATE COMMERCE.

(a) RULE OF CONSTRUCTION.—**Nothing in this title** or an amendment made by this title **prohibits the interstate commerce of hemp** (as defined in section 297A of the Agricultural Marketing Act of 1946 (as added by section 10113)) or hemp products.

(b) TRANSPORTATION OF HEMP AND HEMP PRODUCTS.—**No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (as added by section 10113) through the State or the territory of the Indian Tribe, as applicable.**

(Emphasis added.) The Conference Report clarifies that despite section 10114(b)’s reference to “subtitle G,”<sup>3</sup> **“nothing** in this title authorizes interference with the interstate commerce of

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<sup>2</sup> On the day of the 2018 Farm Bill’s passage, FDA Commissioner Scott Gottlieb stated that the changes made remove hemp “from the Controlled Substances Act, which means that it will no longer be an illegal substance under federal law.” U.S. FDA, Statement from FDA Commissioner Scott Gottlieb, M.D., on signing of the Agriculture Improvement Act and the agency’s regulation of products containing cannabis and cannabis-derived compounds (Dec. 20, 2018), <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm628988.htm>.

<sup>3</sup> A lapse in congressional appropriations funding the federal government made it difficult if not impossible for states to submit “subtitle G” information to the Secretary of Agriculture from December 22, 2018 (two days after the 2018 Farm Bill was enacted) through January 25, 2019.

hemp.” H. Rep. No. 115-1072, at 436 (2018) (emphasis added). “While states and Indian tribes may limit the production and sale of hemp and hemp products within their borders, the Managers, in Sec. 10112, agreed to **not allow such states and Indian tribes to limit the transportation or shipment of hemp or hemp products through the state or Indian territory.**” *Id.* at 438 (emphasis added).

### **FACTUAL BACKGROUND**

#### ***A. Big Sky and the Industrial Hemp Market***

Big Sky was incorporated on December 17, 2018, three days before the 2018 Farm Bill was signed into law, specifically so it could be among the first companies to market in the new industrial hemp industry. Shore Decl. at ¶ 4. Big Sky promptly set up operations in Aurora, Colorado, where it could receive and process shipments of industrial hemp. *Id.* at ¶ 5. Big Sky’s business model is to purchase industrial hemp from licensed growers; process it to remove the “extracts, cannabinoids, isomers, acids, salts, and salts of isomers,” typically an odorless and flavorless cannabidiol (“CBD”) powder; and then sell the CBD to consumer products manufacturers for a profit. *Id.* at ¶ 6.

The public’s desire for CBD-infused products is vast. *Id.* at ¶ 7. Products run the gamut from skin cream to pet products to nutritional supplements. *Id.* Consumers are willing to pay a premium for CBD products. *Id.* While Big Sky does not produce any end-user CBD products or make any claims as to the efficacy of them, CBD-infused products are used by some consumer products manufacturers to treat medical problems, including epileptic seizures, inflammation, and anxiety, particularly in children. *Id.*

While consumer products manufacturers may sell items that contain CBD, not all of these manufacturers are equipped to extract and process the CBD isolates from the industrial hemp. *Id.* at ¶ 8. By marketing CBD to products manufacturers, Big Sky hopes to position itself as a

market leader in meeting the public's increasing demand for CBD-infused products. *Id.*

***B. Big Sky Purchases a Large Shipment of Industrial Hemp***

Boones Ferry Berry Farms ("Boones Ferry") is a registered industrial hemp grower, licensed with the Oregon Department of Agriculture ("ODA"), License No. AG-R1050510IHG. Declaration of Elijah M. Watkins in Support of Big Sky Scientific LLC's Emergency Motion for Temporary Restraining Order and Preliminary Injunction ("Watkins Decl.") at Ex. A. ODA performed  $\Delta$ -9 THC testing on Boones Ferry's industrial hemp crops during its growing cycle, as required under Oregon's state-regulated industrial hemp program, to ensure the crops were cultivated to have a  $\Delta$ -9 THC concentration level of 0.3 percent or less. Shore Decl. at ¶ 9.

Big Sky implements strict buying controls to ensure that the products it purchases meet the 2018 Farm Bill definition of industrial hemp. *Id.* at ¶ 10. Boones Ferry's crop was tested by two different state-accredited laboratories prior to Big Sky's purchase. Watkins Decl. at Exs. B and C. On October 26, 2018, Chemhistory, an Oregon accredited laboratory, provided a certificate of analysis for industrial hemp, certifying that the Boones Ferry crop Big Sky was contemplating purchasing contained a dry weight  $\Delta$ -9 THC level of 0.03 percent, far less than the 0.3 percent industrial hemp ceiling established by the 2018 Farm Bill. *Id.* at Ex. B. On January 17, 2019, the Good Lab, a Colorado accredited laboratory, provided  $\Delta$ -9 THC/CBD potency test results showing the average  $\Delta$ -9 THC percentage between 19 different samples from the Boones Ferry crop was 0.043 percent. *Id.* at Ex. C.

Based on the multiple independent state-accredited testing results certifying the crop as industrial hemp, Big Sky purchased approximately 13,000 pounds of industrial hemp from Boones Ferry. Shore Decl. at ¶ 11. Big Sky intended to have the industrial hemp shipped from Hubbard, Oregon to Big Sky's processor in Aurora, Colorado. *Id.* at ¶ 11. Big Sky had and still

has no intention of selling, marketing, or distributing industrial hemp at all in Idaho. *Id.* at ¶ 12.

**C. *Big Sky's Shipment Is Seized in Violation of the 2018 Farm Bill***

Big Sky contracted with a third-party logistics company that arranged for Big Sky's industrial hemp to be shipped with VIP Transporter LLC ("VIP") from Oregon to Colorado. *Id.* at ¶ 13. Given the quantity of industrial hemp, the shipment had to be split into multiple truck loads. *Id.* On January 24, 2019, one of the trucks transporting Big Sky's industrial hemp stopped at the East Boise Port of Entry in compliance with commercial trucking laws and standards to have the shipment weighed and/or inspected. *Id.* at ¶ 14. The truck was headed eastbound on I-84 as one would be traveling if driving to Colorado. *Id.*

The VIP driver presented the officer with a copy of the bill of lading, indicating the shipment was industrial hemp bound for Colorado. Watkins Decl. at Ex. D. The industrial hemp was not hidden away in tires or wall panels as one would expect an illegal product to be shipped, but was instead stored in large shipping bags in plain sight, as one might expect any other agricultural crop to be transported. Shore Decl. at ¶ 14. The driver was arrested and charged with marijuana trafficking, a felony offense that carries a mandatory minimum five-year term of imprisonment. Watkins Decl. at ¶ 7. Big Sky's industrial hemp shipment was seized. Shore Decl. at ¶ 15. Although Defendant ISP had only "field-tested" the industrial hemp, a process that does not measure  $\Delta$ -9 THC percentage, ISP began reporting to media outlets that it had achieved the "largest marijuana bust" in the agency's history. *Id.* The market value of Big Sky's seized property is approximately \$1.3 million. *Id.* at ¶ 16.

**D. *Big Sky Contacts Defendants in Hopes of Resolving the Issue, but to No Avail***

Like most agricultural crops, industrial hemp is perishable. *Id.* at ¶ 17. It must be stored in a climate-controlled setting, unbundled, with space between the product to allow air flow so the product can "breathe." *Id.* If stored improperly, it can mold. *Id.* If any portion of a bail of

industrial hemp molds, the entire bail becomes useless, loses all commercial value, and must be discarded. *Id.* Even without spoiling, the longer industrial hemp sits, the more the CBD trapped inside dissipates, thus lowering the value of the product. *Id.*

On January 28, 2019, counsel for Big Sky called Shawna Dunn, Chief Deputy Criminal Prosecutor for the County. Watkins Decl. at ¶ 8. Counsel explained that the shipment was industrial hemp, not marijuana; that the 2018 Farm Bill's provision regarding interstate transportation supersedes Idaho's state marijuana laws; the value and perishable nature of the industrial hemp; and the need for the County and/or ISP to release the hemp or properly store it. *Id.* Counsel explained his intention to resolve the issue quickly and amicably, without having to litigate. *Id.* Dunn explained that she would not allow the shipment to be released, that it was outside her purview to direct the manner in which the shipment was stored, that industrial hemp is illegal under Idaho law regardless of what the 2018 Farm Bill says, and that if she were to release the shipment to counsel, she herself would be guilty of a felony. *Id.* at ¶ 9.

On January 29, 2019, counsel emailed and hand-delivered a letter to Defendant Bennetts and her Deputy Chief Civil Prosecutor, and emailed a variant of the same letter to ISP's assigned Deputy Attorney General, Merritt Dublin, setting forth Big Sky's position. *Id.* at Exs. E and F. The letters attached the Δ-9 THC reports from two different state-accredited laboratories and Boones Ferry's industrial hemp license issued by ODA. *Id.* Counsel outlined the changes made by the 2018 Farm Bill, explained that the seizure violated the 2018 Farm Bill's Interstate Commerce section and the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl. 2), and asked that Defendants' counsel contact him "at your first available moment," as "[t]ime is of the essence" given the perishability of Big Sky's industrial hemp. *Id.* Big Sky's counsel explained that the matter needed to be resolved by Friday in order to avoid litigation. *Id.*

On Thursday, Defendants responded that the 2018 Farm Bill did not apply, claiming that “section G” in section 10114 gave them a safe harbor to prohibit the interstate shipment of what has been declared a legal good under federal law. *Id.* at Exs. G and H.

***E. Defendants Openly Oppose Federal Law***

While slow to respond to Big Sky, Defendants were quick to speak to the press, declaring “business as usual” despite the 2018 Farm Bill. According to Scott Bandy, Chief Criminal Deputy Prosecutor for the County, “As far as we’re concerned, it [industrial hemp] is and always has been illegal under Idaho law as it’s currently written, and nothing has changed,” the 2018 Farm Bill notwithstanding. Emily Lowe & Xavier Ward, Idaho Press, Does the new federal law protect people from transporting hemp plants in Idaho? (Jan. 30, 2019), [https://www.idahopress.com/news/local/does-the-new-federal-law-protect-people-from-transporting-hemp/article\\_d5a71a18-e3e8-5e83-ad66-a802e99ecbaf.html](https://www.idahopress.com/news/local/does-the-new-federal-law-protect-people-from-transporting-hemp/article_d5a71a18-e3e8-5e83-ad66-a802e99ecbaf.html)8. “If there is any quantity of THC, then it meets the definition of marijuana.” Katy Moeller, Idaho Statesman, Hemp or marijuana? ISP stops truck driver with 6,701 pounds of ‘green, leafy substance,’ (Jan. 29, 2019), <https://www.idahostatesman.com/news/northwest/idaho/article225242275.html>. “We don’t believe [the 2018 Farm Bill] affects Idaho law.... It does not preempt state law,” and anyone transporting industrial hemp in interstate commerce “across the state” will be treated by Defendants as “a drug smuggler.” Katie Terhnune, KTVB.com, ‘It is up to them to understand the law:’ Idaho prosecutors charge hemp under drug statutes (Jan. 30, 2019; updated Jan. 31, 2019), <https://www.ktvb.com/article/news/it-is-up-to-them-to-understand-the-law-idaho-prosecutors-charge-hemp-under-drug-statutes/277-0aa8ca83-5404-4557-aa90-4a2a17b8c275>.

Big Sky now files this emergency motion to safeguard its federally-protected property, its position in the marketplace, and its future viability as a legitimate and lawful business.



### LEGAL STANDARD

Under Federal Rule of Civil Procedure 65, a court may issue preliminary injunctive relief if the plaintiff shows (1) a likelihood of success on the merits; (2) that irreparable harm will result in the absence of injunctive relief; (3) that the balance of relative hardships tips in plaintiff's favor; and (4) that an injunction is not contrary to the public's interest. *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 970 (9th Cir. 2015); *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (per curiam) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Although all four parts must be satisfied, the first factor—likelihood of success on the merits—is the “most important.” *Disney Enters., Inc. v. VidAngel, Inc.*, No. 16-56843, 2017 WL 3623286, at \*4 (9th Cir. Aug. 24, 2017) (quoting *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015)). “The standard for issuing a temporary restraining order is identical to the standard for a preliminary injunction.” *Idaho State Univ. Faculty Ass’n for the Pres. of the First Amendment v. Idaho State Univ.*, 857 F. Supp. 2d 1055, 1060 (D. Idaho 2012).

In addition to this traditional test, the Ninth Circuit has applied an alternative “sliding-scale” approach under which a TRO and/or preliminary injunction may be granted where the plaintiff “demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.” *Greater Yellowstone Coal. v. Timchak*, 323 F. App’x 512, 513–14 (9th Cir. 2009) (emphasis omitted) (quoting *Save Our Sonoran, Inc., v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005)); see *Pimentel*, 670 F.3d at 1105 (“Under the ‘sliding scale’ approach to preliminary injunctions observed in this circuit, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another.” (citation omitted)). Where Big Sky’s probability of success is so great, resorting to the sliding scale is not necessary, but under either standard, emergency injunctive relief is warranted.

Alternatively, the Court should appoint a receiver pursuant to Fed. R. Civ. P. 66 to store and keep the industrial hemp during the duration of the dispute.

## ARGUMENT

### A. *THE COURT SHOULD ENTER AN EMERGENCY INJUNCTION*

#### 1. Big Sky Is Likely to Succeed on the Merits of Its Declaratory Judgment Claims.

Congress has clearly spoken on the issue of industrial hemp. Big Sky's shipment is industrial hemp. Without question, industrial hemp is legal at the federal level and considered to be an agricultural crop. While it remains the prerogative of each state to enact its own drug laws, those state laws cannot be enforced in a manner that conflicts with federal statutes. Congress has entirely preempted the area of interstate transportation of industrial hemp, so any state law that conflicts with that complete preemption must give way under the Supremacy Clause. Big Sky is likely to succeed on the merits of its declaratory judgment claims.

##### *a. The Shipment Is Industrial Hemp.*

Under the 2018 Farm Bill, industrial hemp 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 concentration of not more than 0.3 percent on a dry weight basis.**” 2018 Farm Bill § 10113 (emphasis added). The shipment transported by VIP was certified by two different state-accredited laboratories as falling well below the 0.3 percent  $\Delta$ -9 THC limit. Watkins Decl. at Exs. B and C. ODA monitored the crop during its growing process to ensure that it was cultivated in such a way so as to fall below the  $\Delta$ -9 THC limit. Shore Decl. at ¶ 9.

At the time of the seizure, Defendants possessed no meaningful evidence to suggest that the shipment was anything but what the VIP driver and the bill of lading said it was: industrial

hemp bound for Colorado, not Idaho. The ISP officer's field test was incapable of measuring the percentage amount of  $\Delta$ -9 THC because the test just indicates the presence of "THC" in general, without regard to amount—the main distinguishing characteristic of industrial hemp compared to marijuana. *Id.* at ¶ 15. Nor was it possible for the K-9 officer to smell the percentage amount of  $\Delta$ -9 THC since K-9's don't smell "THC", but terpenes, which are present in several plants, including industrial hemp. *Id.* That is why ISP has sent samples of the seized industrial hemp to laboratories for further testing. Terhnune, *supra*, <https://www.ktvb.com/article/news/it-is-up-to-them-to-understand-the-law-idaho-prosecutors-charge-hemp-under-drug-statutes/277-0aa8ca83-5404-4557-aa90-4a2a17b8c275>.<sup>4</sup>

Nor did the circumstances surrounding the stop alert ISP to the shipment being anything but industrial hemp. The VIP driver voluntarily stopped at a port of entry, just as any other law-abiding commercial driver would have done. The industrial hemp was not hidden in secret compartments, but was out in the open, being shipped like any other legal good. When asked what he was hauling, the VIP driver told the truth and said "industrial hemp." While ISP has claimed to news outlets that the amount seized is greater than the total amount of marijuana seized by ISP in the past five years combined, by a significant margin, Moeller, *supra*, <https://www.idahostatesman.com/news/northwest/idaho/article225242275.html>, there is good reason for that. The shipment was not an illegal load of marijuana, but a commercial-sized load of industrial hemp being legally shipped on federally-funded interstate highways to Colorado.

Every piece of direct and circumstantial evidence points to the shipment being what Big Sky claims it to be: industrial hemp.

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<sup>4</sup> Big Sky reserves the right to amend its Complaint to seek damages for lost amounts of its industrial hemp, including lost amounts resulting from destructive testing performed by or at the direction of Defendants.

***b. Industrial Hemp Is Legal on a Federal Level***

The 2018 Farm Bill makes industrial hemp legal at the federal level. It is no longer a controlled substance under the CSA. 2018 Farm Bill § 12619(b). That includes not only the plant itself, but all isolates derived from it, like CBD. *Id.* § 10113. It was the clear intent of Congress to treat industrial hemp as an agricultural crop (akin to potatoes, onions, cotton, and the like), and not a narcotic. Daniels, *supra*, <https://www.cnn.com/2018/06/13/senate-agriculture-panel-passes-farm-bill-with-hemp-legalization.html>.

***c. Congress Has Completely Preempted State Control over the Interstate Shipment of Industrial Hemp, so Defendants Must Allow Big Sky's Shipment of Industrial Hemp to Proceed to Its Final Destination in Colorado.***

***i. 2018 Farm Bill Preemption***

Under the 2018 Farm Bill, states remain free to continue to categorize any plant with trace amounts of  $\Delta$ -9 THC as an illegal substance. While at least “41 states have legalized [industrial hemp],” including “[a]ll of Idaho’s neighboring states,” Idaho remains free to prohibit the production, marketing, and sale of all  $\Delta$ -9 THC plants within its borders. Lowe & Ward, *supra*, [https://www.idahopress.com/news/local/does-the-new-federal-law-protect-people-from-transporting-hemp/article\\_d5a71a18-e3e8-5e83-ad66-a802e99ecbaf.html](https://www.idahopress.com/news/local/does-the-new-federal-law-protect-people-from-transporting-hemp/article_d5a71a18-e3e8-5e83-ad66-a802e99ecbaf.html).

However, under the 2018 Farm Bill, Idaho cannot legally prohibit the transportation across its state of what is a lawful agricultural crop under federal law, as the crop is bound for a neighboring state where it will be sold. 2018 Farm Bill § 10114. This was the clear intent of Congress. Conf. Rep. at 436-438 (emphasis added) (“**nothing** in this title authorizes interference with the interstate commerce of hemp,” Congress will “**not allow such states...to limit the transportation or shipment of hemp or hemp products through the state....**”)

Congress is presumed to be aware of the conflicting laws of the several states, and yet

still chose to forbid states, like Idaho, from prohibiting the interstate travel of industrial hemp. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696–97 (1979) (“It is always appropriate to assume that our elected representatives, like other citizens, know the law....”). Congress has completely preempted the area of interstate commerce of industrial hemp shipments by the 2018 Farm Bill.

*ii. Preemption and Interstate Commerce*

Even if the 2018 Farm Bill did not apply (and it does), Defendants still cannot interfere with the shipment of goods between states, because Congress has preempted virtually all of interstate commerce. “States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.” *Nat’l Fed’n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 724 (9th Cir. 2016) (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2495 (2012)). Moreover, state laws are preempted when they conflict with federal law,” such that “compliance with both federal and state regulations is a physical impossibility, ... [or] the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* (internal quotation marks and citation omitted). The Supremacy Clause mandates that conflicting, preempted state laws must give way to federal law. U.S. Const. art. VI, cl. 2.

The Commerce Clause affords Congress near limitless authority to regulate the free shipment of goods between the several states, local laws notwithstanding.

Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force **created an area of trade free from interference by the States**. In short, the Commerce Clause **even without implementing legislation by Congress** is a limitation upon the power of the States.

*Freeman v. Hewit*, 329 U.S. 249, 252 (1946) (emphasis added); *S. Pac. Co. v. Arizona*, 325 U.S. 761 (1945); *Morgan v. Virginia*, 328 U.S. 373 (1946).

Long has Congress exercised complete preemption over interstate shipment of goods, and federal courts have chided states and localities for just as long when they have attempted to interfere with the free interstate shipment of legal goods. *Swift & Co. v. United States*, 196 U.S. 375 (1905) (cattle for slaughter); *Baltimore & O. S. W. R. Co. v. Settle*, 260 U.S. 166, 174 (1922) (rail cars of lumber); *Hawai'i Papaya Indus. Ass'n v. Cty. of Hawaii*, 666 F. App'x 631, 634 (9th Cir. 2016) (county ordinance banning certain fruits and seeds preempted because it burdened the interstate movement of plant products); *BNSF Ry. Co. v. Cal. Dep't of Tax & Fee Admin.*, 904 F.3d 755, 771 (9th Cir. 2018) (affirming injunction of state fees on interstate waste shipments).

Importantly, federal preemption over the interstate shipment of goods applies even where a state totally bans the possession of a given product in that state. In *Man Hing Ivory & Imports, Inc. v. Deukmejian*, California banned the possession of African elephant parts within its borders, while federal law allowed the practice. 702 F.2d 760, 761-62 (9th Cir. 1983). In quoting from and affirming the district court, the Ninth Circuit found that to allow the state to prohibit possession of an item that it believed was objectionable, but that was allowed under federal law, “would open the way for states to impose regulation to supersede federal regulation of trade in...interstate commerce, **a form of state preemption clearly contrary to the intent of Congress...**” *Id.* at 765. Like California in *Man Hing Ivory*, Idaho can prohibit the sale and marketing of industrial hemp within its borders, but it cannot enforce its local laws so stringently as to cut off interstate commerce of what is considered lawful at the federal level. *Id.*

In this case, the 2018 Farm Bill is clear that “[n]o State...shall prohibit the transportation or shipment of hemp or hemp products...through the State....” 2018 Farm Bill § 10114. Defendants’ belief that “nothing has changed” is just plain wrong. *Lowe & Ward, supra*, <https://www.idahopress.com/news/local/does-the-new-federal-law-protect-people-from->

transporting-hemp/article\_d5a71a18-e3e8-5e83-ad66-a802e99ecbaf.html. While Idaho law may have remained the same, federal law as it concerns the interstate shipment of industrial hemp has drastically changed. Defendants are prohibited from shutting down the interstate commerce of industrial hemp under the explicit language of the 2018 Farm Bill as well as under Congress's preemption over the interstate travel of lawful goods. Defendants' seizure of Big Sky's lawful property, and the untenable alternative of needing to drive hundreds of miles around Idaho to avoid such seizures in the future, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 132 S. Ct. at 2501 (citation omitted). Preemption and the Supremacy Clause mandate that Defendants must release Big Sky's shipment and allow it to be transported through the state.

Because Big Sky's seized shipment qualifies as legal industrial hemp under the 2018 Farm Bill, and because the interstate shipment of industrial hemp has been completely preempted by Congress, Big Sky is likely to succeed on the merits. *United States v. Mallory*, No. CV 3:18-1289, 2019 WL 252530, at \*3 (S.D.W. Va. Jan. 17, 2019) (lifting injunction that prohibited defendant from transporting industrial hemp across West Virginia, and noting that after enactment of the 2018 Farm Bill "the Court has become increasingly doubtful of the Government's case on the merits"). This factor strongly favors entry of an injunction.

**2. Big Sky Will Suffer Irreparable Harm if Defendants Are Not Enjoined.**

"Harm is irreparable when, as name suggests, the harm cannot be undone by an award of compensatory damages." *Battelle Energy All., LLC v. Southfork Sec., Inc.*, 980 F. Supp. 2d 1211, 1220 (D. Idaho 2013). "The threat of loss of prospective customers, goodwill, or reputation may support a finding of irreparable harm, so long as it is not too speculative." *Id.* "Additionally, irreparable harm may arise when a company loses prospective goodwill due to the lost ability to market a unique product." *Id.* The irreparable harm prong also is satisfied where a perishable

good may be destroyed or harmed prior to the resolution of a case. *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 974 (9th Cir. 2002).

In this case, Big Sky's industrial hemp shipment will spoil if not properly stored. Shore Decl. ¶ 17. This is not mere speculation, but a fact of nature. *Id.* If that occurs, Big Sky, a newly formed company, will lose its approximately \$1.3 million shipment at the precise moment when it needs such capital to grow and stay viable.

More troubling, if the shipment does not arrive soon, Big Sky will lose out on business opportunities and market share. According to the bill of lading, the industrial hemp shipment was supposed to arrive in Colorado on January 29, where it would have been immediately processed to have the isolates removed. Watkins Decl. at Ex. D. Big Sky has reserved time with its processor's lab for this very reason. Shore Decl. at ¶ 18. If the shipment does not arrive soon, the processor will take Big Sky off its schedule and begin to process the industrial hemp of Big Sky's competitors. *Id.* Big Sky will be placed at the back of the queue or will have to find a new processor, at a time when processors are busy and booked due to the 2018 Farm Bill. *Id.*

Additionally, Big Sky is already under contract for the isolates from this shipment. One large customer wants at least \$650,000 of the CBD from this shipment, and plans on placing similarly sized orders each month going forward. *Id.* at ¶ 19. If Big Sky cannot timely deliver, it will lose this ongoing customer, and the annual \$7.8 million this customer's business represents. *Id.* This loss of capital will occur precisely when Big Sky needs infusions of cash to grow during its first year of business. *Id.* at ¶ 20. Two other customers—one with \$1.2 million in monthly CBD needs, and the other with \$580,000 in monthly CBD needs—want to purchase from Big Sky once Big Sky can demonstrate a steady industrial hemp supply stream, rich in CBD. *Id.* at ¶ 21. If Big Sky fails in demonstrating the reliability of its supply, these customers will go to Big



Sky's competitors, who are already courting Big Sky's customers and potential customers. *Id.*

Going forward, Defendants' conduct irreparably harms Big Sky, as it cuts off the most direct trade route for Big Sky's operations. Rather than a shipping truck traveling the approximately 1,200 miles between Hubbard, Oregon and Aurora, Colorado on I-84, Defendants' interference with interstate commerce means that Defendants must bypass Idaho by traveling down the California coast to Sacramento on I-5 and then cut over through Reno via I-80, a 500-mile detour made treacherous and unreliable because of the Sierra Nevada mountains. *Id.* at ¶ 22. This also will greatly increase Big Sky's costs and impact its profitability. *Id.* The irreparable harm element strongly favors emergency relief for Big Sky.

### **3. The Balance of Equities Weighs in Favor of Big Sky.**

In considering an injunction, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Disney Enters.*, 2017 WL 3623286, at \*14 (quoting *Winter*, 555 U.S. at 24). Here, as discussed, releasing the shipment to continue on to Colorado complies with the 2018 Farm Bill, which preempts Idaho's laws as they apply to the interstate transportation of industrial hemp. Defendants will suffer no real harm by being required to respect Congress's constitutional authority to regulate interstate commerce because Defendants **never** had the ability to regulate interstate commerce. *Freeman*, 329 U.S. at 252 (the Commerce Clause "by its own force created an area of trade free from interference by the States," and "even without implementing legislation by Congress is a limitation upon the power of the States"). Defendants cannot be harmed by being blocked from doing that which they were never allowed to do in the first place.

Nor do Defendants need the industrial hemp to prosecute their case against the VIP driver because a semi-truck load of industrial hemp will not fit into a County courtroom. Defendants can take pictures and video of the shipment to present to any future jury. There is no need for the

shipment to be kept in Idaho once Defendants have photographic evidence of it (which they do).

By awarding injunctive relief, Defendants remain free to enforce local drug laws among persons in Idaho. Injunctive relief would impact only Defendants' ability to prohibit interstate commerce of industrial hemp traveling across, but not being distributed in, Idaho. The equities heavily favor emergency injunctive relief.

**4. Enforcing the 2018 Farm Bill and Releasing the Shipment Would Not Be Contrary to the Public Interest.**

The public has a clear interest in states not acting in conflict with federal law. *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (“[I]t is clear that it would not be equitable or in the public’s interest to allow the state ... to violate the requirements of federal law....” (quoting *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013))). This is especially true where a state tries to ignore the Supremacy Clause. *Am. Trucking Ass’n v. City of Los Angeles*, 559 F.3d 1046, 1059–60 (9th Cir. 2009) (the public’s interest is met by recognizing “the Constitution’s declaration that federal law is to be supreme”). “Essentially, it is in the public interest to avoid constitutional violation. It is also in the public interest to uphold the decisions of Congress.” *Compass Airlines, LLC v. Mont. Human Rights Bureau of the Dep’t of Labor & Indus.*, No. CV 12-105-H-CCL, 2012 WL 6477267, at \*5 (D. Mont. Dec. 13, 2012). The public interest prong strongly favors emergency injunctive relief in Big Sky’s favor.

Because each of the four TRO/preliminary injunction factors weighs heavily in favor of Big Sky, the Court should enter an order requiring the release of Big Sky’s shipment so that it may be allowed to continue on to its final destination in Colorado.

**B. *ALTERNATIVELY, THE COURT SHOULD APPOINT A RECEIVER***

A TRO and preliminary injunction are necessary in this instance to protect Big Sky’s federally-protected rights. However, if such relief is denied, the Court should at least appoint a

receiver who can safeguard the perishable industrial hemp in a commercially reasonable manner so that spoiling can be reduced (but not eliminated) during the litigation. Fed. R. Civ. P. 66.

**CONCLUSION**

Big Sky respectfully requests that the Court enter a TRO and preliminary injunction in the form set forth in Exhibit A to Big Sky's Motion.

DATED: February \_\_, 2019

STOEL RIVES LLP

By: /s/  
Elijah M. Watkins

**CERTIFICATE OF SERVICE**

I hereby certify that on February 1, 2019, I served a copy of the foregoing

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF ITS EMERGENCY MOTION FOR  
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** on

CM/ECF Registered Participants as reflected on the Notice of Electronic Filing as follows:

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