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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

BIG SKY SCIENTIFIC LLC, Plaintiff, vs. IDAHO STATE POLICE, ADA COUNTY, JAN M. BENNETTS, in her official capacity as Ada County Prosecuting Attorney, Defendants.	**Case No. 1:19-cv-00040-REB** **MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Defendants Ada County and Jan M. Bennetts, in her official capacity as Ada County Prosecuting Attorney (collectively "County Defendants") [1], submit this memorandum in opposition to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction. [Dkt. 2]

[1] Ada County is not a proper defendant in this action because it has no authority over the contraband as the contraband is evidence in a criminal proceeding. Ada County and the Ada County Prosecuting Attorney intend to file a motion to dismiss in the near future, which will expand on such arguments. For ease of reference only, these parties will be collectively referred to as "County Defendants." County Defendants do not thereby concede that Ada County has any involvement in this case whatsoever.

I. INTRODUCTION

Plaintiff's contraband was lawfully seized under Idaho state law and remains detained as evidence in a pending state criminal action. Plaintiff seeks to enjoin County Defendants from enforcing Idaho state laws regarding the transportation of this contraband through the state and to return its contraband. [Dkt. 2-1, p. 1] However, the Court should abstain from exercising jurisdiction in this matter and deny Plaintiff's request for equitable relief consistent with the *Younger* abstention doctrine. Even if the Court exercises jurisdiction in this matter, this Court should deny Plaintiff's request for relief because Plaintiff has failed to establish under any state or federal law that it is entitled to the extraordinary relief sought.

II. FACTUAL BACKGROUND

On January 24, 2019, Specialist Jason Law of the Idaho State Police stopped a tractor-trailer at the eastbound Boise Port of Entry in Ada County, Idaho. Decl. of J.D. Law, ¶ 2.[2] The tractor-trailer was driven by Denis Vladimirovich Palamarchuk of Oregon. *Id.* at ¶ 8. The bill of lading for the shipment listed the cargo as approximately 7,000 pounds of "hemp." *Id.* at ¶ 10. Specialist Law could smell the strong odor of marijuana emanating from the trailer. *Id.* at ¶ 11. Mr. Palamarchuk opened the trailer and Specialist Law observed that it was full of thirty-one (31) large white bags that contained a green leafy substance that from his training and experience appeared and smelled like marijuana. *Id.* at ¶¶ 13, 28. Specialist Law then tested a sample of the green leafy substance with his Narcotic Identification Kit, and the substance tested presumptive positive for marijuana. *Id.* at ¶ 14. Corporal C. Cottrell arrived on scene to assist and deployed his drug sniffing canine. *Id.* at ¶ 15. Corporal Cottrell informed Specialist Law that the dog demonstrated a positive alert on the rear of the trailer. *Id.* at ¶ 16. Based on the foregoing, Idaho State Police seized the approximately

[2] The Declaration of J.D. Law was filed in support of Defendant Idaho State Police's Opposition to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction. County Defendants hereby also rely on the Declaration of J.D. Law and the attachments thereto in support of this memorandum.

6,701.4 pounds of contraband and arrested Mr. Palamarchuk. *Id.* at ¶¶ 26, 29. Mr. Palamarchuk was subsequently charged with felony trafficking in marijuana pursuant to I.C. 37-2732B(1)(C) in the Idaho Fourth Judicial District Court on January 25, 2019 as case number CR01-19-03634. That case is currently pending before the state criminal court for preliminary hearing on February 7, 2019.

III. LEGAL STANDARD

Plaintiff's motion for a temporary restraining order and a preliminary injunction is governed by Rule 65 of the Federal Rules of Civil Procedure. The legal standard for either request for relief is the same. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). To the extent Plaintiff seeks an order requiring the County Defendants to take action, such as to return its contraband, its motion is properly categorized as a request for a mandatory injunction as opposed to a prohibitory injunction. *See Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th. Cir. 2015). Mandatory injunctions are "particularly disfavored" by the court and "[t]he district court should deny such relief unless the facts and law clearly favor the moving party." *Id.* (internal quotations omitted). "In plain terms, mandatory injunctions should not issue in 'doubtful cases.'" *Id.*

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). The United States Supreme Court counseled:

> A preliminary injunction is an extraordinary remedy never awarded as of right. . . . In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.

Id. at 24 (internal citations and quotations omitted).

Significantly, the first *Winter* factor, "likely success on the merits," is the most important. *Garcia*, 786 F.3d at 740 (9th. Cir. 2015). The issue of whether a plaintiff will likely succeed on the

merits is a threshold inquiry, and if a plaintiff fails to show likelihood of success on the merits, the court need not consider the remaining three *Winter* factors. *Id.* To the extent Plaintiff seeks a mandatory injunction, it "must establish that the law and facts *clearly favor* [its] position, not simply that [it] is likely to succeed." *Id.* (emphasis in original).

Further, the Ninth Circuit has held that the trial court may utilize a "sliding scale" in weighing the *Winter* factors, such that "a preliminary injunction could issue where the likelihood of success is such that 'serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor.'" *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). However, the other two elements of the *Winter* test must still be met. *Id.* at 1132.

IV. ARGUMENT

A. The Court should abstain from exercising jurisdiction over Plaintiff's request for equitable relief consistent with the *Younger* abstention doctrine.

Plaintiff contends this Court should enjoin County Defendants from enforcing Idaho state laws regarding the transportation of this contraband through the state and to return its contraband. [Dkt. 2-1, p. 1] In *Younger v. Harris*, 401 U.S. 37, 41 (1971), the Supreme Court held that federal courts should abstain from granting equitable relief as to the validity of state criminal statutes when parallel criminal proceedings are ongoing in state court. To do otherwise, the Court concluded, would be "a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." *Id.* "[T]he possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." *Id.* at 54. Indeed, "a polity's ability to protect its citizens from violence and other breaches of the peace through enforcement of criminal laws is the centermost pillar of sovereignty." *People of State of Cal. v. Mesa*, 813 F.2d 960, 966 (9th Cir. 1987).

Later reiterating the principles contained in *Younger*, the Supreme Court concluded:

> [A] federal court should not enjoin a pending state criminal proceeding except in the very unusual situation that an injunction is necessary to prevent great and immediate irreparable injury. [In *Younger*] [w]e justified our decision both on equitable principles and on the 'more vital consideration' of the proper respect for the fundamental role of States in our federal system. Because of our concerns for comity and federalism, we thought that it was 'perfectly natural for our cases to repeat time and time again that the *normal* thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions.'

Ohio Civil Rights Com'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 626 (1986) (internal quotations and citations omitted).

Further, "a plaintiff's failure to raise its federal claims in the state proceedings favors *Younger* abstention." *Communications Telesystems Intern. v. California Public Utility* Com'n, 196 F.3d 1011, 1019 (9th Cir. 1999); *see also Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987) ("[W]hen a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.").

In this case, the Court should abstain from exercising jurisdiction because the nature of the relief sought would necessarily enjoin County Defendant's ability to enforce Idaho's controlled substance laws as more fully set forth under Section IV(B) below, and would enjoin the ongoing state-initiated criminal case against Mr. Palamarchuk for violation of those laws. Further, County Defendants must protect the integrity of the contraband as evidence in an ongoing criminal investigation and active pending criminal case, both to support the prosecution of the case against Mr. Palamarchuk, and to protect Mr. Palamarchuk's rights as a criminal defendant to discovery and a fair trial. Indeed, the Idaho Criminal Rules impose upon the Ada County Prosecuting Attorney's Office a duty to permit Mr. Palamarchuk to inspect, copy, or photograph tangible objects that are material to the defense or intended for use by the prosecutor as evidence at trial. I.C.R. 16(b)(4)(E).

Also, Plaintiff has an adequate, full, and fair opportunity to raise its federal claims in the state proceeding. Because of the significant interests that may be involved with a person's property that is being held in a criminal action, the Idaho Criminal Rules provide a mechanism for when and how such property may be returned. Specifically, "[a]t any time after a criminal action begins, any interested party or person may apply to the trial court for an order permitting the party or person to reclaim . . . any property in the possession of any department, agency or official who is holding the property in connection with the trial of the criminal action." I.C.R. 41.1(a)(3). If the court grants such a motion, it has authority to order specific conditions or protections regarding the property, including (1) substituting in place of the original a copy, photograph, drawing, facsimile, or other reproduction, or (2) require the posting of a bond that the property will be returned to the court if it later orders the return of the property in connection with the criminal action. I.C.R. 41.1(b)(1)–(2). Indeed, the state criminal court is the best and only venue in which all parties relevant to the criminal action, including the prosecutor, the defendant, and the defense attorney can be heard as to the consequences of retaining and/or returning the contraband. Plaintiff should not be permitted to circumvent the prescribed procedure for the return of evidence in the ongoing criminal case through this action.

Based on the foregoing, the Court should abstain from exercising jurisdiction in this matter and deny Plaintiff's request for equitable relief.

B. The Court should deny Plaintiff the extraordinary remedy of a preliminary injunction.

To obtain the extraordinary remedy of a preliminary injunction, Plaintiff must establish that it is likely to succeed on the merits (or in the case of a mandatory injunction, the law and facts clearly favor its position), it is likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips in its favor, and an injunction is in the public interest. *See Winter*, 555

U.S. at 20; *Garcia*, 786 F.3d at 740. Plaintiff has failed to establish each of these four factors as set forth below.

1. Plaintiff has failed to establish that it is likely to succeed on the merits or that the law and facts clearly favor its position.

The contraband was lawfully seized, and remains lawfully detained, under Idaho state law. Plaintiff does not contend that it is entitled to the return of the contraband under Idaho state law. Instead, Plaintiff cites two federal legal bases: (1) pursuant to the Agriculture Improvement Act of 2018 (the "2018 Farm Bill"), the contraband is considered legal hemp with a THC concentration of 0.3 percent or less, and that Idaho is precluded from prohibiting the transportation of that hemp through the state [Dkt. 2-1, pp. 12 – 15]; and (2), pursuant to the Commerce Clause of the United States Constitution, County Defendants cannot interfere with the shipment of goods between states. [Dkt. 2-1, pp. 15 – 17] Plaintiff contends that the 2018 Farm Bill and the Commerce Clause preempt Idaho state law to the extent the laws conflict, the contraband was unlawfully seized, and it is entitled to the return of its contraband. [Dkt. 2-1, pp. 12 – 17]

As set forth below, Plaintiff has failed to establish under either argument that it is likely to succeed on the merits or that the law and facts clearly favor its position.

a. The contraband was lawfully seized, and remains lawfully detained, under Idaho state law.

The Idaho Uniform Controlled Substances Act ("IUCSA") does not distinguish between hemp with any amount of THC concentration and marijuana. "Any material, compound, mixture or preparation which contains any quantity of . . . Marihuana . . . [or] Tetrahydrocannabinols" is considered an unlawful controlled substance. I.C. 37-2705(d)(19),(27). IUCSA defines marijuana to include "all parts of the plant of the genus Cannabis, regardless of species, and whether growing or not. . . and every compound, manufacture, salt, derivative, mixture, or preparation of such plant. . .

." I.C. 37-2701(t). Significantly, IUCSA states that "[e]vidence that any plant material or the resin or any derivative thereof, regardless of form, contains any of the chemical substances classified as tetrahydrocannabinols shall create a presumption that such material is 'marijuana' as defined and prohibited herein." *Id.* Any person who knowingly brings into this state or is knowingly in actual or constructive possession of twenty-five (25) pounds or more of marijuana as that term is defined under I.C. 37-2701(t) (which includes any plant material that contains any level of tetrahydrocannabinols) is guilty of felony trafficking in marijuana pursuant to I.C. 37-2732B(1)(C).

Based on Specialist Law's investigation as set forth in Section II, above, the Idaho State Police had probable cause to seize this particular contraband and arrest Mr. Palamarchuk. Plaintiff's own documents, to the extent they actually relate to the shipment of contraband, establish that the contraband contains THC. *See* Declr. of Elijah Watkins, ¶¶ 4–5, Exs. B–C [Dkt. 2-2]. Samples of the contraband sent to an Idaho State Police Forensics Laboratory contained marijuana or the resins thereof. Decl. of J.D. Law, ¶¶ 30–31, Ex. B. Thus, the contraband is classified by the IUCSA as marijuana, and its transportation is unlawful in the state of Idaho. I.C. §§ I.C. 37-2705(d)(19),(27); 37-2701(t); I.C. 37-2732B(1)(C).

Based on the foregoing, the contraband was lawfully seized, and remains lawfully detained, by the Idaho State Police as evidence in the active criminal case against Mr. Palamarchuk.

b. The 2018 Farm Bill does not prohibit the Idaho State Police from seizing and detaining Plaintiff's contraband.

Even though Plaintiff's contraband is an unlawful controlled substance under Idaho state law, Plaintiff contends that pursuant to the 2018 Farm Bill, the contraband is considered "legal hemp" with a THC concentration of 0.3 percent or less, and that Idaho is precluded from prohibiting the transportation of that hemp through the state. [Dkt. 2-1, pp. 12 – 15] For the purposes of this motion only, County Defendants assume solely for the sake of argument that the 2018 Farm Bill is a

lawful exercise of federal legislative authority and applies to this case. However, County Defendants do not ultimately concede these points and reserve the right to present future argument on the matter in later briefings.

Plaintiff's contention relies primarily on its interpretation of the following two subsections of section 10114 of the 2018 Farm Bill:

> (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.

When interpreting statutes, courts "first determine whether the statutory text is plain and unambiguous." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). "If it is, [the court] must apply the statute according to its terms." *Id.* "Only when statutes are ambiguous may courts look to legislative history." *In re Del Biaggio*, 834 F.3d 1003, 1010 (9th Cir. 2016). "A statute is ambiguous if it gives rise to more than one reasonable interpretation." *Woods v. Carey*, 722 F.3d 1177, 1181 (9th Cir. 2013) (internal quotations omitted). The Court "must analyze the statutory provision in question in the context of the governing statute as a whole, presuming congressional intent to create a coherent regulatory scheme." *Padash v. I.N.S.*, 358 F.3d 1161, 1170 (9th Cir. 2004). "In this regard, [the court] must mak[e] every effort not to interpret [the] provision [at issue] in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Id.* at 1170–1171. The provisions at issue in this case are plain and unambiguous and the Court must apply them according to their terms without reference to or reliance on legislative history.

Section 10114(a) simply acknowledges that nothing in the cited federal laws prohibits the interstate commerce of hemp or hemp products. The provision does not purport to further regulate the production, transportation, or shipment of hemp or hemp products by states or otherwise. Nor does it imply that state laws cannot prohibit such conduct. When viewed in context with section 10114(b), as more fully discussed below, it is apparent that subsection (a) just creates a foundation upon which Congress may build the remainder of the legal framework for producing and regulating hemp.

Section 10114(b) precludes states from prohibiting the transportation or shipment of hemp only if that hemp is "produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (as added by section 10113)." Pursuant to subtitle G, states that wish to have primary regulatory authority over the production of hemp in their state must "submit to the Secretary, through the State department of agriculture (in consultation with the Governor and chief law enforcement officer of the State) . . . a plan under which the State . . . monitors and regulates that production . . ." 7 U.S.C.A. § 1639p(a)(1).

The state plan must include: (i) "a practice to maintain relevant information regarding land on which hemp is produced in the State"; (ii) "a procedure for testing . . . delta-9 tetrahydrocannabinol concentration levels of hemp produced in the State . . ."; (iii) "a procedure for the effective disposal of . . . plants, whether growing or not, that are produced in violation of this subtitle . . . and products derived from those plants"; (iv) "a procedure to comply with enforcement procedures . . ."; (v) "a procedure for conducting annual inspections of, at a minimum, a random sample of hemp producers to verify that hemp is not produced in violation of this subtitle"; (vi) a procedure for submitting specific statutorily required information to the Secretary not more than 30 days after the date on which the information is received; and (vii) "a certification that the State . . .

has the resources and personnel to carry out the practices and procedures described in clauses (i) through (vi) . . .” 7 U.S.C.A. § 1639p(a)(2)(A)(i)–(vii).

Further, Subtitle G requires states to obtain federal approval of the above plan (*see* 7 USCA § 1639p(b)), establishes a procedure under which the Secretary may audit the state’s compliance and correct its noncompliance with its plan (*see* 7 USCA § 1639p(c)), establishes a corrective action plan and punishments for negligent and repeat violations of the state plan by hemp producers (*see* 7 U.S.C.A. § 1639p(e)(2)), establishes requirements to report hemp producers who violate state plans with a culpable mental state greater than negligence to the appropriate state authorities (*See* 7 U.S.C.A. § 1639p(e)(3)(A)), and prohibits certain persons guilty of felonies relating to a controlled substance from participating in the state program or to produce hemp under any other regulations or guidelines issued pursuant to the Secretary’s authority to promulgate regulations under the subtitle (*see* 7 U.S.C.A. § 1639p(e)(3)(B)).

In the case of a state that does not have an approved plan, “the production of hemp in that State . . . shall be subject to a plan established by the Secretary to monitor and regulate that production . . .” 7 U.S.C.A. § 1639q(a)(1). The federal plan must include the same contents as set forth above regarding the state plan in 7 U.S.C.A. §§ 1639p(a)(2)(A)(i)–(vi). 7 U.S.C.A. § 1639q(a)(2). Subtitle G also requires the Secretary to establish a procedure to issue licenses to hemp producers in accordance with its plan (*see* 7 U.S.C.A. § 1639q(b)), establishes a corrective action plan and punishments for negligent and repeat violations of the federal plan by hemp producers (*see* 7 U.S.C.A. § 1639q(c)(2)), and establishes procedures for information collection and sharing with law enforcement (*see* 7 U.S.C.A. § 1639q(d)). Most significantly, in the case of a state that does not have an approved plan, “it shall be unlawful to produce hemp in that State . . . without a license issued by the Secretary” pursuant to its federal plan. 7 U.S.C.A. § 1639q(c)(1)).

The above summary of subtitle G creates a coherent regulatory scheme under which hemp must be produced before it may be lawfully transported under section 10114(b). Plaintiff has not argued, nor has it established, that its contraband was produced "in accordance with subtitle G" as set forth above. This is likely because Oregon, the state in which this contraband was produced, does not have a federally approved plan and the Secretary of the United States Department of Agriculture has yet to establish its own plan.[3]

Despite these clear requirements of subtitle G, Plaintiff virtually ignores them and argues instead that the legislative history of the bill indicates it was the clear intent of Congress that states cannot prohibit the transportation or shipment of any hemp through their state, whether or not that hemp was produced in accordance with subtitle G. [Dkt. 2-1, pp. 5–6, 14–15] Plaintiff's interpretation contradicts the plain language of section 10114(b) and renders the requirements of subtitle G and the language requiring hemp to be "produced in accordance with subtitle G" inconsistent and meaningless. If Congress had intended for section 10114(b) to apply to the transportation or shipment of *all hemp* as that term is defined, regardless of the circumstances under which it was produced, it could have easily so indicated.[4]

In summary, assuming for the sake of argument that the 2018 Farm Bill even applies, its plain language precludes states from prohibiting the transportation or shipment of hemp through the state *only if* that hemp is "produced in accordance with subtitle G." Subtitle G contains an extensive legal framework for the production and regulation of hemp. Plaintiff has not established and it cannot establish that its contraband was "produced in accordance with subtitle G." Thus, even under

[3] As Plaintiff acknowledges, a lapse in congressional funding due to the federal government shutdown from December 22, 2018 through January 25, 2019 made it difficult if not impossible for states to obtain approval for plans under subtitle G from the Secretary of Agriculture. [Dkt. 2-1, p. 5, n. 3]

[4] For example, in the same 2018 Farm Bill, Congress de-scheduled hemp from the federal Controlled Substances Act by referring to it as "hemp . . . as defined in section 297A of the Agricultural Marketing Act of 1946," instead of "hemp . . . produced in accordance with subtitle G." *See* 21 U.S.C.A. § 802(16)(B)(i); 812(c)(17).

section 10114(b), Idaho is free to prohibit the transportation or shipment of Plaintiff's contraband through the state.

c. The Commerce Clause does not preempt Idaho's controlled substances laws.

Plaintiff contends that even in the absence of the 2018 Farm Bill, County Defendants cannot interfere with Plaintiff's shipment "because Congress has preempted virtually all of interstate commerce." [Dkt. 2-1 at 15]. Plaintiff is mistaken. To the contrary, courts are required to "start with the assumption that the historic police powers of the States" are not displaced by federal action "unless that was the clear and manifest purpose of Congress." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 145, 83 S.Ct. 1210, 1219 (1963), *see also Freeman v. Hewit*, 329 U.S. 249, 67 S.Ct. 274 (1946) ("A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State."). Despite Plaintiff's conclusory contention, federal preemption only occurs in a narrow set of circumstances—circumstances which are not present here.

Federal law only preempts state law in the following three ways: (1) If Congress has enacted an express preemption provision; (2) If "Congress, acting within its proper authority, has determined [that certain conduct] must be regulated by its exclusive governance"; or (3) If federal and state laws conflict such that "compliance with both federal and state regulations is a physical impossibility," or if the "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Nat'l Fed. Of the Blind v. United Airlines*, 813 F.3d 718, 724 (9th Cir. 2016). In ruling on such matters, the Ninth Circuit has remained "mindful of the adage that Congress does not cavalierly preempt state law causes of action." *Id*. (quoting *Montalvo v. Spirit Airlines*, 508 F.3d 464, 471 (9th Cir. 2007) (citation omitted).

The Constitution's Commerce Clause delegates the power to Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. Plaintiff claims that pursuant to this authority, Congress has long "exercised *complete* preemption over interstate shipment of goods. . ." [Dkt. 2-1 at 16] (emphasis added). However, while Congress's latitude to regulate interstate commerce is expansive, it has not enacted any sort of sweeping, "complete" preemption over interstate shipment of all goods. Instead, Congress has applied preemption utilizing the three methods noted above.

Plaintiff cites five cases in support of its claim that Congress exercises "complete" preemption over interstate shipment of goods. Importantly, not one of the five cases stands for the cited proposition. In two of the cases referenced by Plaintiff, the United States Supreme Court interpreted what constitutes "interstate" versus "intrastate" commerce—an issue that is not at play here. *See Swift & Co. v. United States*, 196 U.S. 375 (1905), *Baltimore & O. S. W. R. Co. v. Settle*, 260 U.S. 166 (1922). Moreover, neither case even addresses federal preemption. *Id*.

The other three cases Plaintiff cites all involve situations where Congress either explicitly carved out their exclusive authority in an area or explicitly preempted state law. *BNSF Ry. Co. v. Cal. Dep't of Tax & Fee Admin.*, 904 F.3d 755 (9th Cir. 2018) (state law regarding railroad rates preempted by federal law granting exclusive power to regulate railroad rates to an arm of the federal government), *Hawai'i Papaya Indust. Ass'n v. Cty. of Hawaii*, 666 F.Appx. 631 (9th Cir. 2016) (federal law stating that "no State or political subdivision of a State may regulate the movement in interstate commerce of any. . . plant, . . . plant pest, noxious weed, or plant product. . ." preempted a county ordinance attempting to regulate dissemination of plants and seeds from fields), *Man Hing Ivory & Imports, Inc. v. Deukmejian*, 702 F.2d 760 (9th Cir. 1983) (state law prohibiting trade of elephant parts preempted by federal law allowing trade in such products because appellee complied

with the federal statutes and permitting requirements). In each of the three cases, the Ninth Circuit determined that the exact words of the preemption or exclusivity statute dictated the limits of the preemption. *See id*.

For example, in *Man Hing Ivory*, the court weighed a state law outlawing the exchange of endangered species against a federal law allowing such trade pursuant to a federal permit. 702 F.2d 760. Because the federal law explicitly stated that states could not interfere with such trade if done pursuant to a federal permit, and because the appellee in that case had obtained a federal permit, the court determined that the preemption applied. *Id*. at 762-64. It was the terms of the preemptory clause itself that defined the limits of the preemption. United States Supreme Court precedent also supports this contention; the Court has ruled that Congress's "enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517, 112 S.Ct. 2608, 2618 (1992). Congress's intent with regard to the scope of a preemption need not be inferred where it is stated clearly.

Here, Plaintiff requests that this Court ignore the plain words of section 10114(b) of the 2018 Farm Bill. To the extent section 10114(b) even preempts state law, which County Defendants do not concede, it is the specific words of that section that would dictate the scope of preemption. Section 10114(b) forbids states from "prohibit[ing] the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946. . ." As discussed previously, Plaintiff did not produce the contraband pursuant to subtitle G of the Agricultural Marketing Act of 1946. Again, Plaintiff has not even alleged that the contraband was produced in accordance with subtitle G. Thus, by Congress's own words, any preemption created by the 2018 Farm Bill cannot apply to the matter at hand. Nothing in the 2018 Farm Bill indicates that Congress had a clear and manifest purpose to displace state laws prohibiting the transportation of

hemp that was *not* produced in accordance with subtitle G. Idaho is therefore free to prohibit the transportation or shipment of Plaintiff's contraband through the state.

d. Summary Conclusion

Based on the foregoing, Plaintiff has failed to establish that it is likely to succeed on the merits or that the law and facts clearly favor its position. As Plaintiff has failed to meet even the first and most important *Winter* factor, the Court need not consider the remaining three *Winter* factors and should deny Plaintiff's motion. *See Garcia*, 786 F.3d at 740. To the extent the Court considers the remaining three *Winter* factors, Plaintiff fails to establish each of them as explained below.

2. Plaintiff has failed to establish that it will suffer irreparable harm in the absence of preliminary relief.

Plaintiff contends it will suffer irreparable harm in the absence of preliminary relief because: (1) the contraband will spoil; (2) it will lose out on business opportunities and market share; and (3) its future shipments of contraband will have to be transported around Idaho. [Dkt. 2-1, pp. 17–19] "Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages." *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1068 (9th. Cir. 2014).

Significantly, Plaintiff's contentions are necessarily based on the flawed premise that transporting its contraband through Idaho is legal. As explained at length in Section IV(B)(1), above, the seized contraband is unlawful to transport in Idaho, the 2018 Farm Bill does not prohibit Idaho from seizing this contraband, and the Commerce Clause on its own does not preempt Idaho's laws regarding controlled substances. As Plaintiff itself noted in its memorandum, a party "cannot be harmed by being blocked from doing that which they were never allowed to do in the first place." [Dkt. 2-1, p. 19] Indeed, as with any other controlled substance defined under the Idaho Uniform Controlled Substances Act, the contraband is summarily forfeited to the state. *See* I.C. §

37-2744(a)(1),(d)(1). Plaintiff simply cannot be harmed, irreparably or otherwise, by the seizure of an unlawful controlled substance that is summarily forfeited to the state.

Further, Plaintiff is not without a remedy in the absence of preliminary relief. As more fully explained in Section IV(A), above, Plaintiff may file a motion with the state criminal court that presides over the criminal action against Mr. Palamarchuk to request the release of the contraband pursuant to Idaho Criminal Rule 41.1.[5]

Based on the foregoing, Plaintiff has failed to establish that it will suffer irreparable harm in the absence of preliminary relief.

3. Plaintiff has failed to establish that the balance of equities weighs in its favor or that the injunction is in the public interest.

Plaintiff contends the balance of the equities weighs in its favor because County Defendants "cannot be harmed by being blocked from doing that which they were never allowed to do in the first place" and that County Defendants do not need the contraband as evidence against Mr. Palamarchuk. [Dkt. 2-1, p. 19] Plaintiff also contends that releasing the contraband is not contrary to the public interest because the Court would simply be requiring County Defendants to comply with federal law. [Dkt. 2-1, p. 20]

While these two factors, balance of the equities and the public interest, generally deserve separate attention, "[w]hen the government is a party these last two factors merge." *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014) (internal quotations omitted). To balance the equities, the Court "explore[s] the relative harms to applicant and respondent." *Trump v. International Refugee Assistance Project*, 137 S.Ct. 2080, 2087 (2017) (internal quotations omitted). "The public interest inquiry primarily addresses impact on non-parties rather than parties." *Id.*

[5] Although County Defendants would oppose such a motion and oppose the return of the contraband, Plaintiff nevertheless can seek relief and the judge in the state court can make the determination.

Significantly, throughout the history of the United States, "the several States have exercised their police powers to protect the health and safety of their citizens." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996). "Because these are 'primarily, and historically, . . . matter[s] of local concern,' the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the believes, limbs, health, comfort, and quiet of all persons." *Id.* (internal citations and quotations omitted).

In this case, as established above, Plaintiff's contraband was legally seized, and remains legally detained, under Idaho state laws that were created and are enforced to protect the health and safety of the citizens of Idaho. Even if the 2018 Farm Bill applies, County Defendants are not blocked from prohibiting this contraband from being transported through Idaho because the contraband was not produced in accordance with subtitle G. As evidence in an ongoing criminal investigation and active pending criminal case, County Defendants must protect the integrity of the contraband as more fully set forth under Section IV(A), above. Further, the contraband was seized as an unlawful controlled substance in the state of Idaho. Returning this contraband would be no different under Idaho state law than returning any other controlled substance. As noted above, the contraband is summarily forfeited to the state just like any other controlled substance defined under the Idaho Uniform Controlled Substances Act. *See* I.C. § 37-2744(a)(1),(d)(1).

In balancing the equities in this case and in considering the interests of the public, it must be emphasized that a preliminary injunction would have broader implications for County Defendants than just this shipment of contraband and this active criminal case against Mr. Palamarchuk. Indeed, a ruling in Plaintiff's favor would enjoin County Defendants from enforcing Idaho state laws regarding the transportation of this contraband through the state – laws that were created and are enforced to protect the health and safety of the citizens of Idaho.

Further, a ruling in Plaintiff's favor would require County Defendants to conduct quantitative THC testing on all marijuana seized in County Defendants' jurisdiction on its passage through the state to ensure that it is not "hemp" as that term is defined under the 2018 Farm Bill. The state of Idaho does not have the capability to conduct quantitative THC testing within the state. Thus, all quantitative THC testing would need to be done at an out-of-state laboratory. While awaiting test results, the marijuana would remain detained and criminal charges would again be pending under Idaho state law against the transporter of the marijuana until test results are returned weeks later. In the case against Mr. Palamarchuk, thirty one samples (one from each bag of contraband seized) were sent to a lab in Kentucky for quantitative THC testing. Once the lab receives the samples, it will take three to four weeks to receive test results, at a cost of $60.00 per sample plus the cost of shipping both ways. This would make it difficult, if not impossible, for County Defendants to effectively enforce Idaho state laws regarding trafficking in marijuana, which laws are designed to protect the citizens of Idaho.

Based on the foregoing, a ruling in Plaintiff's favor removes evidence from a criminal case, returns to Plaintiff contraband that is summarily forfeited to the state, violates Idaho's police power to legislate for the protection of its citizens, and significantly hampers law enforcement's ability to enforce Idaho state law. In contrast, a ruling *against* Plaintiff upholds Idaho state law, preserves County Defendants' ability to enforce the law and protect the citizens of Idaho, prevents the release of contraband back onto the streets of Idaho, preserves evidence in the active criminal case against Mr. Palamarchuk, and acknowledges that the 2018 Farm Bill does not protect this contraband in any way because it was not produced in accordance with subtitle G. Thus, the balance of the equities and the interests of the public weigh strongly against a preliminary injunction in this case.

V. CONCLUSION

County Defendants respectfully request that the Court abstain from exercising jurisdiction over Plaintiff's request for equitable relief consistent with the *Younger* abstention doctrine, or deny Plaintiff's request for a temporary restraining order or preliminary injunction based on Plaintiff's failure to establish that it is likely to succeed on the merits (or the law and facts clearly favor its position), that it is likely to suffer irreparable harm, that the balance of equities tips in its favor, and that the injunction is in the public interest.

DATED this 6th day of February, 2019.

JAN M. BENNETTS
Ada County Prosecuting Attorney

By: /s/ David A. Roscheck
David A. Roscheck
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of February, 2019, I served a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION on the following non-CM/ECF Registered Participant in the manner indicated as follows:

Elijah M. Watkins Stoel Rives LLP 101 S. Capitol Blvd., Ste 1900 Boise, Idaho 83702 elijah.watkins@stoel.com	_____ Hand Delivery _____ U.S. Mail ___x_ Electronic Mail _____ Facsimile
Merritt L. Dublin Deputy Attorney General Criminal Law Division/Idaho State Police 700 S. Stratford Dr. Meridian, ID 83642 Merritt.dublin@isp.idaho.gov	_____ Hand Delivery _____ U.S. Mail ___x_ Electronic Mail _____ Facsimile

/s/ Candace McCall
Candace McCall, Legal Assistant