STATE OF INDIANA	)	IN THE MARION CIRCUIT COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49C01-1507-MI-022522

THE FIRST CHURCH OF CANNABIS, INC., *et al.*,

Plaintiffs,

v.

STATE OF INDIANA, *et al.*,

Defendants.

FILED

JUL 06 2018 (223)

Myla A. Eldridge

CLERK OF THE MARION CIRCUIT COURT

ORDER ON DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter having come before this Court on Plaintiffs' Motion for Partial Summary Judgment, filed by Plaintiffs The First Church of Cannabis, Inc. ("FCOC"), Bill Levin ("Levin"), Herbert Neal Smith ("Smith"), and Bobbi Jo Young ("Young") (collectively "Plaintiffs"), on March 22, 2016, and on Defendants' Joint Motion for Summary Judgment, filed by Defendants State of Indiana, Governor Mike Pence ("Pence"), Attorney General Gregory F. Zoeller ("Zoeller"), and Indiana State Police Superintendent Douglas G. Carter ("Carter") (collectively "Defendants"), on December 18, 2017. This Court, having read Plaintiffs' and Defendants' Motions and each Parties' respective memorandums and proposed orders, having heard oral argument on May 7, 2018, and being otherwise duly advised in the premises hereby issues the following Order:

PROCEDURAL HISTORY

1. On July 8, 2015, Plaintiffs FCOC, Bill Levin, Herbert Neal Smith, and Bobbi Jo Young filed a complaint in this court pursuant to RFRA seeking declaratory and injunctive relief

against enforcement of "provisions of Indiana law relating to possession and use of marijuana." Compl. at 1. Plaintiffs named as defendants the Governor, the Attorney General, the Superintendent of the Indiana State Police (ISP) (collectively, "State Defendants"), the Chief of the Indianapolis Metropolitan Police Department (IMPD), the Mayor of Indianapolis, and the Marion County Sheriff (collectively, "City/County Defendants"), alleging each was responsible for enforcing state statutes and city ordinances (though Plaintiffs did not purport to challenge any such ordinances). Compl. at 2–4.

2. Plaintiffs claimed that FCOC "advocates a religious belief that involves ultimate ideas, metaphysical beliefs, a moral or ethical system, a comprehensiveness of beliefs, and accoutrements of religion" including "important writings, a gathering place, keepers of knowledge, ceremonies and rituals, a structure and organization, holidays, tenets concerning diet and appearance, and proselytizing." Compl. at 4. They alleged that Indiana Code sections 35-48-4-11, -13, and -19 "have substantially burdened and may substantially burden Plaintiffs' exercise of religion in that Plaintiffs are in a position to be prosecuted for the described offenses for use of the sacrament of their religion, even though such burden of Plaintiffs' religion results from rules of general applicability." Compl. at 4–5. They have requested "declaratory relief or injunctive relief that prevents, restrains, corrects, or abates the violations as described in this Complaint, and for all other proper relief." Compl. at 5.

3. On March 18, 2016, Plaintiffs filed their Motion for Partial Summary Judgment in an effort to establish their prima facie case. In their motion, Plaintiffs asked the court to rule on three issues: (1) whether FCOC "is an entity that engages in and advances the exercise of religion," (2) whether the "consumption" of marijuana "is an exercise of religion in the Church" such that the enforcement of Indiana Code sections 35-48-4-11, -13, and -19 "substantially burdens

Plaintiffs' religious practices[,]" and (3) whether "the burden is on the State of Indiana to enforcement of the statutes in question, pursuant to [RFRA], under a standard of strict scrutiny." Pls.' Mot. for Partial Summ. J. ("Pls.' SJ Mot.") at 1–2. In support of this motion, Plaintiffs designated their Complaint, Defendants' Answers, Plaintiffs' Requests for Admissions and Defendants' responses, and an affidavit executed by Plaintiff Bill Levin. Designation of Matters in Support of Pls.' Mot. for Partial Summ. J. at 1–2. At Defendants' request, the court agreed to defer ruling on Plaintiffs' Motion until after completion of discovery and full briefing.

4. Pursuant to this Court's Case Management Plan, the Defendants' filed their Joint Motion for Summary Judgment on December 15, 2017. In their motion, Defendants designated evidence and argued that (1) Plaintiffs are not entitled to summary judgment as to any element of their prima facie case, (2) Defendants are entitled to summary judgment because Indiana's marijuana laws are narrowly tailored to vindicate multiple compelling governmental interests, and (3) Plaintiffs cannot prevail on their claims against the State of Indiana, the Governor, or the Attorney General on sovereign immunity and redressability grounds. *See* Mem. Opp'n to Pls.' Mot. Partial Summ. J. and in Supp. Defs.' Joint Mot. Summ. J. 23–51 [hereinafter Defs.' Summ. J. Br.].

5. The Court held a hearing on the parties' respective motions on May 7, 2018.

6. Proposed orders were submitted to the Court on May 30, 2018.

FACTUAL BACKGROUND

7. Plaintiffs, led by Bill Levin, contend that they constitute a church whose members are entitled to consume marijuana as a sacrament in light of RFRA. Seeking to demonstrate the formal bona fides of their existence, Levin and other church founders filed incorporation papers for the First Church of Cannabis (FCOC) with the Indiana Secretary of State on March 26, 2015—

the very same day that then-Governor Pence signed Indiana's RFRA into law. Ex. 1, Levin Dep. at 148. They also applied to the Internal Revenue Service for status as a non-profit charitable organization under Section 501(c)(3) of the Internal Revenue Code with the assistance of FCOC board member and attorney Jonathan Sturgill. Ex. 1, Levin Dep. at 44. The IRS granted that status on May 21, 2015, thus making donations to FCOC potentially tax deductible to the donor. *See* 26 U.S.C. § 170(a)(1), (c)(2)(D).

8. In addition to donations, FCOC also raises revenue through popcorn sales and a gift shop that sells donated items and t-shirts, bumper stickers, and other paraphernalia bearing the FCOC name. Ex. 1, Levin Dep. at 223–24. Some FCOC funding comes from a fee that prospective "ministers" pay for their ordination, Ex. 3, Smith Dep. at 62, and from fees that comedians, musicians, yoga instructors, and others pay to rent space in the church. Ex. 4, Granny J Dep. at 69–70. FCOC does not have a bank account, and its funds are managed in cash by Jonathan Sturgill and another board member, Janet Golden-Hogan, or "Granny J." as she is known. Ex. 1, Levin Dep. at 226. FCOC does not carry an insurance policy of any kind for its facility. Ex. 9, Pls.' Response to Defs.' First Set of Requests for Production of Documents to All Pls. at 7. The FCOC board consists of Levin, Granny J, and Sturgill. Ex. 1, Levin Dep. at 375.

9. If this lawsuit is successful, FCOC plans to "supply" marijuana for use in its services, Ex. 10, Pl. FCOC, Inc. Responses to Defs.' First Set of Interrogs. to Pl. [FCOC], Inc. at 6, possibly in the amount of "one joint per person" Ex. 1, Levin Dep. at 181. FCOC will also sell marijuana joints in its gift shop. Ex. 1, Levin Dep. at 344–45. During the service, participants could "smok[e] as much . . . or as little as [they] want" but will not be required to smoke marijuana at all. Ex. 1, Levin Dep. at 181. At the point in the service where marijuana is consumed, Levin envisions participants "laughing, having fun, [and] telling jokes." Ex. 1, Levin Dep. at 181.

10. FCOC's incorporation paperwork provides that upon "dissolution or final liquidation[,]" its assets will be distributed to "Re-Legalize Indiana PAC[,]" a "political action committee" that Levin has chaired since about 2008. Ex. 1, Levin Dep. at 204.

11. Defendants submitted and designated expert declarations from five experts in the fields of law enforcement and drug policy.

- Gary Ashenfelter has been the training director of the Indiana Drug Enforcement Association (IDEA), a statewide law enforcement organization that promotes and encourages consistent enforcement of federal and state narcotics laws, since 1994. Ex. 11, Declaration of Gary Ashenfelter ("Ashenfelter Dec.") at ¶¶ 2, 4. He served as IDEA's president from 1987 to 1989. Ex. 11, Ashenfelter Dec. at ¶ 2.
- Thomas D. McKay has been the Prosecutor's Chief Investigator for the Dearborn-Ohio County Prosecutor's office and the Investigative Coordinator for the Dearborn-Ohio County Special Crimes Unit since 2006. Ex. 12, Declaration of Thomas D. McKay ("McKay Dec.") at ¶ 2. He has been a law enforcement officer since 1987. Ex. 12, McKay Dec. at ¶ 2.
- Kevin J. Hobson is a Captain in the Drug Enforcement Section of the Indiana State Police. Ex. 13, Declaration of Kevin J. Hobson ("Hobson Dec.") at ¶ 2. He has been a law enforcement officer since 1995 and supervised the ISP Drug Enforcement Initiative since 2013. Ex. 13, Hobson Dec. at ¶ 4.
- Chelsey Clarke is the Strategic Intelligence Unit Supervisor for Rocky Mountain High Intensity Drug Trafficking Area (RMHIDTA), which is one of twenty-eight High Intensity Drug Trafficking Areas (HIDTA) across the country. Ex. 14, Declaration of Chelsey

Clarke ("Clarke Dec.") at ¶ 2. She is an expert on the impacts of marijuana legalization. Ex. 14, Clarke Dec. at ¶ 2–4.

- Dr. Robert L. DuPont, M.D., has since 1978 served as the President of the Institute for Behavior and Health, Inc., a non-profit organization that works to reduce illegal drug use. Ex. 15, Declaration of Robert L. DuPont, M.D. ("DuPont Dec.") at ¶ 2. He is a co-author of the report "Drugged Driving Research: A White Paper," which was prepared for the National Institute on Drug Abuse, a federal government research institute charged with bringing the power of science to bear on drug abuse and addiction. Ex. 15, DuPont Dec. at ¶ 5.

12. Each of these experts provided factual information and expert opinion regarding the public health and safety hazards of marijuana use, even as a religious sacrament. While plaintiffs nominally disagree with many of their conclusions, they have provided no contrary evidence of their own.

13. Numerous scientific studies have shown that marijuana use "causes impairment in every performance area that can reasonably be connected with safe driving of a vehicle, such as tracking, motor coordination, visual functions, and particularly complex tasks that require divided attention[.]" Ex. 15, DuPont Dec. at ¶ 9. Unsurprisingly, then, marijuana "ranks second (26.9%), only to alcohol (30.6%), in a study on the presence of drugs in accidents involving seriously injured drivers." Ex. 15, DuPont Dec. at ¶ 10.

14. In addition, if RFRA affords an exception to the prohibition against marijuana possession, it would be unclear whether state law enforcement officers "would be permitted to use the scent of marijuana or plants or paraphernalia in plain view as probable cause for a search warrant." Ex. 13, Hobson Dec. at ¶ 7. Such indicators traditionally have been "obvious sources

of probable cause[,]" but a religious exception to the marijuana laws could render them "questionable[.]" Ex. 13, Hobson Dec. at ¶ 7. It is also unclear whether officers would have the authority "to arrest or detain suspects while religious claims are being investigated" without creating grounds for "additional litigation[.]" Ex. 13, Hobson Dec. at ¶ 7. Similarly, Indiana law enforcement officers are not trained "to make case-by-case determinations during criminal investigations as to whether an individual's religious beliefs legally justify" the use of marijuana. Ex. 13, Hobson Dec. at ¶ 6. Indeed, there is currently no other situation in which law enforcement officers would have to evaluate the sincerity of a suspect's religious faith in this fashion. Ex. 13, Hobson Dec. at ¶ 6; Ex. 11, Ashenfelter Dec. at ¶ 9.

SUMMARY JUDGMENT STANDARD

15. Summary judgment is appropriate when "the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). The burden is on "the party seeking summary judgment" to "demonstrate the absence of any genuine issue of fact as to a determinative issue, and only then is the non-movant required to come forward with contrary evidence." *Jarboe v. Landmark Cmty. Newspapers of Indiana, Inc.*, 644 N.E.2d 118, 123 (Ind. 1994). The "court does not weigh the evidence but must indulge every factual inference in favor of the nonmoving party." *Kottlowski v. Bridgestone/Firestone, Inc.*, 670 N.E.2d 78, 83 (Ind. Ct. App. 1996).

DISCUSSION

16. The First Amendment of the United States Constitution provides that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. Const. Amend. 1. Indiana's Constitution provides: "No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of

conscience." Ind. Const. Art. 1 § 3. According to Indiana Code § 34-13-9-5, exercise of religion includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief. Plaintiffs created the First Church of Cannabis and contend that the church should be entitled to consume marijuana as a part of their religion.

17. Indiana, like the majority of States, criminalizes the possession of marijuana. In particular, Indiana Code section 35-48-4-11 provides, in relevant part:

> (a) A person who:
>
> > (1) knowingly or intentionally possesses (pure or adulterated) marijuana, hash oil, hashish, or salvia;
> >
> > (2) knowingly or intentionally grows or cultivates marijuana; or
> >
> > (3) knowing that marijuana is growing on the person's premises, fails to destroy the marijuana plants;
>
> commits possession of marijuana, hash oil, hashish, or salvia, a Class B misdemeanor, except as provided in subsections (b) through (c).
>
> (b) The offense described in subsection (a) is a Class A misdemeanor if the person has a prior conviction for a drug offense.
>
> (c) The offense described in subsection (a) is a Level 6 felony if:
>
> > (1) the person has a prior conviction for a drug offense; and
> >
> > (2) the person possesses:
> >
> > > (A) at least thirty (30) grams of marijuana; or
> > >
> > > (B) at least five (5) grams of hash oil, hashish, or salvia.

18. In 2015, the Indiana General Assembly enacted a new statute, the Religious Freedom Restoration Act, or "RFRA," that Plaintiffs say affords them the right to possess (and consume) marijuana, at least in some circumstances. As enacted, Indiana's RFRA provides:

> (a) Except as provided in subsection (b), a governmental entity may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability.
>
> (b) A governmental entity may substantially burden a person's exercise of religion only if the governmental entity demonstrates that application of the burden to the person:
>
> > (1) is in furtherance of a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.

Ind. Code § 34-13-9-8.

19. RFRA provides both a defense and a private right of action for relief: "[a] person whose exercise of religion has been substantially burdened, or is likely to be substantially burdened, by a violation of this chapter may assert the violation or impending violation as a claim or defense in a judicial or administrative proceeding[.]" Ind. Code § 34-13-9-9. The defense may apply "against any party" but relief is only available against the government entity and "may include . . . [d]eclaratory relief or an injunction or mandate that prevents, restrains, corrects, or abates the violation of this chapter[,] . . . [c]ompensatory damages[,]" and "all or part of the costs of litigation, including reasonable attorney's fees[.]" Ind. Code § 34-13-9-10.

20. A party asserting a claim under Indiana's RFRA must first show that their (1) "exercise of religion" (2) is sincerely felt (3) and "substantial[ly] burdened" by some state action. *Tyms-Bey v. State*, 69 N.E.3d 488, 490–91 (Ind. Ct. App. 2017), *trans. denied.* Only if that showing is made does the burden shift to the state to show that enforcement of the challenged statutes "is in furtherance of a compelling interest and is the least restrictive means of furthering that compelling interest." *Id.*

21. The parties dispute whether FCOC has met its burden of establishing a prima facie case. Plaintiffs seek summary judgment as to their prima facie case by default in view of

Defendants' alleged inadequate responses to requests for admission. Pls.' Resp. Br. 8–12. Defendants maintain that their responses expressly and sufficiently denied that Plaintiffs met their prima facie burden, Defs.' Summ. J. Br. 25–29, and argue that FCOC is not a religion based on the factors laid out in *United States v. Meyers*, 95 F.3d 1475 (10th Cir. 1996). They also argue that Plaintiffs' purported beliefs are insincere, that FCOC is a political organization rather than a religious one, and that Plaintiffs' own statements show Indiana's marijuana laws do not impose a substantial burden on their religious exercise. Defs.' Summ. J. Br. 31–40.

22. The requests for admissions raised in Plaintiffs' Motion for Partial Summary Judgment are more about the Plaintiffs and not about Defendant's actions in the Complaint. Defendants timely responded within the 30 days, despite not having the opportunity to fully conduct their discovery regarding the Defendants. Defendants' responses are sufficient and they "denied" each request with limited information available at the very early stage of discovery. If Plaintiffs felt Defendants' responses were insufficient they should have conferred with the Defendants or utilized the resources in T.R. 26. Plaintiffs failed to exhaust all available remedies for the discovery stage, and instead prematurely filed their Motion for Partial Summary Judgment requesting the Court to deem the requests for admissions "admitted". Furthermore, City/County Defendants response stating they "denied" but an issue for trial is inconsequential as they lacked the opportunity to complete discovery within the 30-day deadline.

23. Plaintiffs argue that Defendants have placed a substantial burden on their exercise of their religion. Plaintiffs specifically contend that they face arrest, prosecution, and imprisonment in the event they use the sacrament of the Church. With marijuana being illegal in our state, it is the Defendants responsibility to ensure that the laws of the state are faithfully executed and not necessarily their intention to put a substantial burden on Plaintiffs. RFRA

allows the government to "substantially burden a person's exercise of religion" so long as "application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." Ind. Code § 34-13-9-8(b).

24. Defendants have shown there is no material factual dispute as to (1) the State's compelling interest in preventing marijuana use, or as to (2) whether enforcement of laws prohibiting the possession and use of marijuana—even in a purportedly "religious" context—is the least restrictive means of serving that compelling interest.

25. Several courts have already concluded that, when it comes to claims of sacramental marijuana use, regardless whether a party can show a substantial burden on a sincerely held religious belief, the government nevertheless has a compelling interest in protecting public health and safety and enforcing marijuana prohibitions—without exception for religious sacrament—is the least restrictive means of advancing that interest. *See, e.g.*, *United States v. Anderson*, 854 F.3d 1033, 1036 (8th Cir. 2017), *cert. denied*, No. 17-6347, 2017 WL 4574191 (U.S. Nov. 13, 2017); *United States v. Christie*, 825 F.3d 1048, 1057 (9th Cir. 2016); *United States v. Israel*, 317 F.3d 768, 772 (7th Cir. 2003); *United States v. Brown*, 72 F.3d 134 (8th Cir. 1995) (per curiam).

26. Judicial recognition of the government's compelling interest in prohibiting the sale, possession and use of illicit drugs predates even the federal RFRA. In 1980, Justice Powell acknowledged that "[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit." *United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring in part and concurring in the judgment). Two years later, the Eleventh Circuit considered that compelling interest in the context of a pre-RFRA religious freedom claim and concluded: "Unquestionably, Congress can constitutionally control the use of drugs that it

determines to be dangerous, even if those drugs are to be used for religious purposes." *United States v. Middleton*, 690 F.2d 820, 825 (11th Cir. 1982). Other federal courts agreed. *See, e.g.*, *Olsen v. DEA*, 878 F.2d 1458, 1462 (D.C. Cir. 1989) ("every federal court that has considered the matter, so far as we are aware, has accepted the congressional determination that marijuana in fact poses a real threat to individual health and social welfare." (quoting *United States v. Rush*, 738 F.2d 497 (1st Cir. 1984))).

27. Subsequent to the enactment of federal RFRA, the Seventh Circuit held that there is a compelling government public-safety interest in forbidding the use of marijuana. In *United States v. Israel*, a convicted felon disputed a condition of his supervised release that required him to refrain from using illegal drugs, arguing his religion (Rastafarianism) encouraged adherents to smoke marijuana. 317 F.3d 768, 772 (7th Cir. 2003). A panel of the Seventh Circuit rejected his federal RFRA claim, citing "ample medical evidence establishing the fact that the excessive use of marijuana often times leads to the use of stronger drugs such as heroin and crack cocaine" and concluding "that the government has a proper and compelling interest in forbidding the use of marijuana." *Id.* at 771–72. "Furthermore, demanding that a convicted felon on parole abstain from marijuana use is a legitimately restrictive means for safeguarding this interest." *Id.*

28. Even if it were appropriate to consider *de novo* whether the government has a compelling interest in preventing marijuana use, Defendants have designated evidence showing that it has such a compelling interest and Plaintiffs have not designated any evidence to rebut it.

29. Other circuits have reached the same conclusion in similar cases. For instance, the Ninth Circuit noted the strong possibility that a religious exception could open the door to unsanctioned uses: "We have little trouble concluding that the government has a compelling interest in preventing drugs set aside for sacramental use from being diverted to non-religious,

recreational users." *Christie*, 825 F.3d at 1057. Particularly, the court noted, "insofar as diverted cannabis could foreseeably fall into the hands of minors, or otherwise expose them to the hazards associated with illegal, recreational drug use, the government's interest in reducing the likelihood of diversion is contained within its compelling interest in protecting the physical and psychological well-being of minors." *Id.* (internal quotations omitted). The Eighth Circuit followed suit in a case where the criminal defendant alleged that he had distributed heroin as part of his religious practice: "[W]e have no difficulty concluding that prosecuting [the defendant] under the CSA would further a compelling governmental interest in mitigating the risk that heroin will be diverted to recreational users." *Anderson*, 854 F.3d at 1036.

30. Just as the federal government has a compelling interest in preventing marijuana use and its concomitant problems, so too do the Defendants in this case. Other courts have already recognized that marijuana use is correlated to health problems and crime, *Olsen*, 878 F.2d at 1462, and is a gateway drug to other dangerous and illegal substances. *Israel*, 317 F.3d at 771. There is also a substantial danger that "religious" marijuana could be diverted to recreational users or even children. *Christie*, 825 F.3d at 1057. These facts are true across the country, and they are no less true in Indiana.

31. The existence of a compelling government interest in preventing marijuana possession and use is not open to reasonable debate. "The determination of whether new evidence regarding either the medical use of marijuana or the drug's potential for abuse should result in a reclassification of marijuana is a matter for legislative or administrative, not judicial, judgment." *Middleton*, 690 F.2d at 823. Marijuana legislation, like other "legislative prohibitory policy," involves "multifarious political, economic and social considerations . . . concerning an array of

medical, psychological and moral issues" best suited for resolution by "the other branches of government." *United States v. Kiffer*, 477 F.2d 349, 352 (2d Cir. 1973).

32. Such studies and decisional holdings are, properly understood, matters of legislative fact, not adjudicative fact susceptible to later "disproof" in court. With respect to "matters of legislative fact, courts accept the findings of legislatures," *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014), because "it is for legislatures, not courts, to decide on the wisdom and utility of legislation," *City of Indianapolis v. Armour*, 946 N.E.2d 553, 561 (Ind. 2011).

33. So long as other courts have recognized the compelling state interest that the government is asserting (and here, they have), those decisions are sufficient to establish as a matter of law that the state's interest is compelling. In other words, the Defendants need not come up with independent factual evidence to support the existence of a compelling state interest that has already received judicial recognition. *See George v. Sullivan*, 896 F. Supp. 895, 898 (W.D. Wis. 1995) (concluding, in reliance upon case law alone, that "there can be no argument that there is a compelling state interest in [prison] security"). The compelling state interest in preventing marijuana use has been established.

34. In addition, as noted, Defendants submitted declarations from five experts in the fields of law enforcement and drug policy and discussed that evidence at length in their opening brief. *See* Defs.' Summ. J. Br. 13–18, 42–47. Plaintiffs designated no evidence to refute those declarations.

35. The undisputed evidence demonstrates that permitting a religious exemption to laws that prohibit the use and possession of marijuana would hinder drug enforcement efforts statewide and negatively impact public health and safety. As noted *supra*, law enforcement would be faced with many new challenges, including whether state law enforcement officers can rely on

their traditional methods of obtaining probable cause for a search warrant based on scents and plain view of marijuana and paraphernalia. Ex. 13, Hobson Dec. at ¶ 7. And drug-detection dogs, which currently alert to marijuana in the same way that they alert to heroin and methamphetamine, would have to be retrained or replaced with dogs that are not trained to alert to marijuana; otherwise, their reliability as sources of probable cause may be called into question. Ex. 13, Hobson Dec. at ¶ 8–9; Ex. 11, Ashenfelter Dec. at ¶ 6. Ultimately, this could put law enforcement officers throughout Indiana in a situation in which they would have to evaluate the sincerity of a suspect's religious faith. Ex. 13, Hobson Dec. at ¶ 6; Ex. 11, Ashenfelter Dec. at ¶ 9.

36. An exception to Indiana's marijuana prohibitions would also create ambiguity regarding the permissible means of using the drug. Ex. 12, McKay Dec. at ¶ 13. During his deposition, Levin stated FCOC "will supply sacrament through the gift shop," said that he anticipated to sell marijuana in the gift shop, and suggested "that there are many growers out there that will give us product." Ex. 12, McKay Dec. at ¶ 11. On this record, FCOC has not made clear who will supply the marijuana, what form or forms its consumption will take, where it will be stored and used, or how (if at all) it would be safeguarded from children, criminals, and recreational users—or even where the dividing line between "sacramental" and recreational use might lie (if one exists).

37. The lack of clarity on how individuals permitted to use marijuana for religious purposes would obtain or grow marijuana would have a negative operational effect on law enforcement efforts. Ex. 12, McKay Dec. at ¶ 12. Among other problems, if Plaintiffs could legally use cannabis as a sacrament, Indiana law enforcement officers would need to combat illegal diversion of "religious" marijuana to non-sacramental uses. Based upon Defendants' experts and the experiences of other states, legalization results in the diversion of marijuana from states where

it is now legal to states where it remains illegal. For example, beginning in 2009, when Colorado legalized marijuana for medical uses, the "poundage of marijuana seized [from U.S. Postal Service shipments] increased annually beginning with zero pounds in 2009 and then increased to 57.20 pounds in 2010, 68.20 pounds in 2011, and 262 pounds in 2012[.]" Ex. 12, McKay Dec. at ¶ 15; *see also* Ex. 14, Clarke Dec. at ¶ 6 (noting an increase of 471% in pounds of marijuana from U.S. Postal Service shipments directed outside the State of Colorado after its legalization in 2013).

38. In addition, a regular gathering of individuals known or reasonably expected to be carrying, and growing, marijuana ready for consumption would be a tempting target for non-believers looking to turn marijuana intended for sacrament into a source for recreational use or illicit trade. Ex. 12, McKay Dec. at ¶ 22. The lack of any security plan or protocol may invite thieves, gangs, and drug dealers to see FCOC as a target for robbery. Ex. 12, McKay Dec. at ¶ 22. Combatting each of these possibilities is a compelling interest of the State.

39. Defendants' unrebutted evidence also shows that States that have legalized marijuana for some or all uses have experienced increases in marijuana-related public health and safety problems, and it stands to reason that if Indiana effectively legalized marijuana for religious uses, it would experience the same problems. Those problems include increased marijuana use in both adults and children, as well as increases in marijuana-related hospitalizations due both to the increased use and to the heightened potency of the drug in the modern era.

40. Some of the public health effects of a religious exception allowing marijuana use would impact non-users of the drug as well. Ex. 12, McKay Dec. at ¶ 17. Based upon Defendants' experts and the experiences of other states, Indiana would likely see more traffic accidents, injuries, and fatalities caused by marijuana-impaired drivers. And with no safe legal limit established for marijuana intoxication, no reliable field test to identify marijuana-impaired drivers,

and no immediate way to assess the validity of a driver's asserted religious defense to an impaired driving charge, law enforcement officers will have little power to address the problem. Ex. 15, DuPont Dec. at ¶ 12–13.

41. Plaintiffs did not designate any evidence in support of their position or rebutting the Defendants' evidence, and without any such evidence, they cannot even under the most lenient standard show the existence of a fact issue sufficient to defeat summary judgment. *See Thomas v. N. Cent. Roofing*, 795 N.E.2d 1068, 1072 (Ind. Ct. App. 2003).

42. Plaintiffs argue that Defendants' numerous declarants "selected and summarized the work of others" rather than performing their own studies, Pls.' Resp. Br. 33, or are "not neutral with respect to marijuana research," Pls.' Resp. Br. 34. But expert witnesses need not perform "new" research or "obtain [their] knowledge based solely on first-hand experience." *Vaughn v. Daniels Co. (W. Virginia)*, 841 N.E.2d 1133, 1138 (Ind. 2006). Rather, "[a]n expert witness can draw upon all sources of information coming to his knowledge or through the results of his investigation in order to reach a conclusion." *Spaulding v. Harris*, 914 N.E.2d 820, 829 (Ind. Ct. App. 2009); *see also Bixler v. State*, 471 N.E.2d 1093, 1099 (Ind. 1984) ("An expert may rely on hearsay in forming his opinion when an expert uses other experts and authoritative sources of information like treatises to aid him in arriving at that opinion.").

43. Similarly, experts need not rely on "neutral" studies. *See Mitchell v. State*, 813 N.E.2d 422, 431 (Ind. Ct. App. 2004) (holding that it was an abuse of discretion for the trial court to exclude expert testimony on the ground that it was not "impartial and unbiased"). If one party introduces expert testimony that the opposing party believes is biased, the proper response is for the opposing party to attempt "to expose any actual bias through cross-examination." *Id.* at 432. Plaintiffs had ample opportunity during the discovery process to depose any of the

Defendants' declarants or take other discovery with respect to their declarations, but chose not to do so.

44. Accordingly, Defendants have, both via case law and with their own expert and factual evidence in this case, demonstrated that enforcing the State's prohibition against marijuana possession, even as to sacramental uses, advances numerous compelling state interests. The only remaining question is whether such enforcement is the least restrictive means for the State to advance those compelling interests, or whether they could still be advanced if the State made accommodation for religious uses of marijuana.

45. There is no way at this time for Indiana to advance its interest in preventing the negative public safety and health effects of marijuana use and marijuana trafficking without fully enforcing its statutory prohibitions against the possession and use of marijuana, without exception.

46. To begin, several federal circuit courts have held that the federal government could not advance its parallel interest without fully enforcing the federal Controlled Substances Act against those who would use marijuana for religious purposes. *See, e.g.*, *Anderson*, 854 F.3d at 1037, (holding that "prosecuting [a defendant who claimed a religious mandate to distribute heroin] under the CSA represents the least restrictive means for the Government to further its compelling interest in mitigating diversion of heroin to recreational users"); *Christie*, 825 F.3d at 1063 (holding that "the government could not achieve its compelling interest in mitigating diversion through anything less than mandating . . . full compliance with the Controlled Substances Act"); *Israel*, 317 F.3d at 772 (holding that "[a]ny judicial attempt to carve out a religious exemption . . . would lead to significant administrative problems for the probation office and open the door to a weed-like proliferation of claims for religious exemptions"); *United States v. Brown*, 72 F.3d 134 (8th Cir. 1995) (per curium) (holding that "the government could not have

tailored the restriction to accommodate [purportedly religious marijuana use] and still protected against the kinds of misuses it sought to prevent").

47. Plaintiffs neither rebut these authorities nor explain how Indiana could permit sacramental use of marijuana and still advance its interest in preventing the negative public safety and health effects of marijuana use and marijuana trafficking. Permitting exceptions to Indiana's laws prohibiting the sale, possession and use of marijuana for religious exercise would undermine Indiana's ability to enforce anti-marijuana laws at all; anyone charged with violating those laws could simply invoke a "religious" exemption, triggering time-consuming (if not practically impossible) efforts to sort legitimate from illegitimate uses.

48. Plaintiffs have suggested they would obtain marijuana from unspecified sources, store it in the FCOC facility with no security, and provide it to their members and others (possibly free of charge). Ex. 1, Levin Dep. 344–45; Ex. 12, McKay Dec. ¶ 22. What is more, Plaintiffs want to designate every home a "sanctuary" for purposes of self-directed "sacramental" use, Ex. 1, Levin Dep. 260, which also raises concern and threatens exponential expansion of the opportunities for abuse, diversion, and other crime. Accordingly, a religious exception to Indiana's marijuana law would undermine the State's objectives; strict enforcement without exceptions is the least restrictive means necessary to achieve them.

49. A religious exception to Indiana's marijuana prohibitions would also create confusion for law enforcement and encourage illegal activity in other ways. Ex. 12, McKay Dec. at ¶ 16. When faced with a person in possession of marijuana, officers may not be able to evaluate in the moment whether that person is engaging in criminal conduct or not. Ex. 12, McKay Dec. at ¶ 13; *see also United States v. Lafley*, 656 F.3d 936, 942 (9th Cir. 2011) ("Requiring continuous monitoring of . . . marijuana use to determine whether the use was recreational or religious would

place an unreasonable burden on a probation office."). Levin himself has admitted that only the marijuana user can know for sure whether the use is "sacramental" or merely recreational: "pretty much you have to ask yourself that, you know. That's – that's within yourself." Ex. 1, Levin Dep. at 351.

50. Similarly, officers may not know whether the distribution of marijuana is still prohibited if it is being distributed to persons whose use is permitted under the exception. Ex. 12, McKay Dec. at ¶ 12. If some individuals are exempted, even for limited purposes, from the prohibition against using marijuana, law enforcement officers and investigators would need to make case-by-case determinations during criminal investigations whether an individual's religious beliefs legally justify that particular use of cannabis. Ex. 12, McKay Dec. at ¶ 9. Law enforcement is not trained or equipped to make this type of determination as to whether an individual is or should be permitted to use cannabis based on their beliefs and is in no position to measure the sincerity of an individual's beliefs–whether religious or not–to make this determination. Ex. 12, McKay Dec. at ¶ 9. Any such discretion will inhibit law enforcement agencies' public safety mission by requiring additional resources and is likely to lead to protracted legal disputes in individual cases. Ex. 12, McKay Dec. at ¶ 9.

51. Accordingly, it is compelling and appropriate to treat the illicit drug market in a unitary way. It would be impossible to combat illicit drug use and trade in a piecemeal fashion that allowed for a religious exception that would become ripe for abuse. Failure to regulate all marijuana in Indiana would leave a gaping hole in our state's drug prohibitions. There is just no way to tailor these laws more narrowly without undermining the entire enforcement scheme. *Cf. Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (observing "that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA" in light of "the

enforcement difficulties" related to distinguishing between local and interstate marijuana, not to mention "concerns about diversion into illicit channels" of "legal" (*i.e.*, locally grown) marijuana").

52. RFRA allows the government to "substantially burden a person's exercise of religion" so long as "application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." Ind. Code § 34-13-9-8(b). Defendants have shown that the challenged statutes are in furtherance of a compelling governmental interest in preventing marijuana use and its accompanying problems, *see Olsen*, 878 F.2d at 1462; *Israel*, 317 F.3d at 771, and that uniform enforcement of those statutes without a religious-use exception is the least restrictive means of furthering that compelling governmental interest, *Christie*, 825 F.3d at 1057; *Israel*, 317 F.3d at 771–72; *Brown*, 1995 WL 732803, at *2. In light of the "impressive amount of legislative and judicial reasoning" concluding "that the government has a proper and compelling interest in forbidding the use of marijuana," *Israel*, 317 F.3d at 772, and in light of the uncontested evidence demonstrating potential for "sacramental" marijuana to be diverted and abused, Plaintiffs' mere disagreement cannot raise a material question of fact, and Defendants are entitled to judgment as a matter of law.

53. Finally, Plaintiffs cannot prevail on any of their claims against the State of Indiana, because it enjoys sovereign immunity from suit, or against the Governor and Attorney General, because they cannot redress Plaintiffs' alleged injuries. At no point have Plaintiffs attempted to refute the Defendants' argument on sovereign immunity and justiciability that the State raised in its Memorandum. Accordingly, the State's arguments on these issues are uncontested.

54. First, the State of Indiana itself "retains common-law sovereign immunity for non-tort claims based on a statute[.]" *Esserman v. Indiana Dep't of Envtl. Mgmt.*, 84 N.E.3d 1185, 1191 (Ind. 2017). And because the State retains common-law sovereign immunity, courts must presume that a statute does not waive that immunity unless it includes express language evincing the opposite intent. *Id.* Indiana's RFRA contains no such language, so sovereign immunity remains intact. Nor can a party bring claims directly against the State for declaratory and injunctive relief. *See, e.g.*, *Sendak v. Allen*, 330 N.E.2d 333, 335 (Ind. Ct. App. 1975) (noting that a declaratory judgment action "may not be brought directly against the State"); *State v. Larue's, Inc.*, 154 N.E.2d 708, 712 (Ind. 1958) (noting that a plaintiff may not bring a declaratory judgment action against the State absent "statutory authority"). Accordingly, Plaintiffs' claims against the State cannot succeed, so the State itself is entitled to summary judgment for this additional reason.

55. As for Plaintiffs' claims against the Governor, they are similarly unavailing. For jurisdiction to exist—and for plaintiff to state a claim on which relief can be granted—plaintiffs must allege an injury "fairly traceable to the defendants" and "likely to be redressed by the requested relief." *See Alexander v. PSB Lending Corp.,* 800 N.E.2d 984, 989 (Ind. Ct. App. 2003). Where plaintiffs' claim is not redressable, it is not justiciable. *See, e.g., Schultz v. State*, 731 N.E.2d 1041, 1046 (Ind. Ct. App. 2000), *trans. denied.*

56. Plaintiffs' alleged injuries are neither traceable to, nor redressable by, the Governor. He has no role in giving effect to the challenged statutes or otherwise in enforcing them. Levin even admitted that, with regard to this lawsuit, the Governor is "doing everything I want him to do." Ex. 1, Levin Dep. at 18. Similarly, the Attorney General has no role in enforcing or giving effect to the challenged statutes, and when asked what he wanted the Attorney General to do or not do with regard to Plaintiffs' Complaint, Levin said "I do not know." Ex. 1, Levin Dep. at 19–

20. Accordingly, a judgment against the Governor and Attorney General would do nothing to redress Plaintiffs' purported injuries, and they are entitled to summary judgment for this additional reason.

CONCLUSION

57. Plaintiffs' request for the Court to deem Defendants' responses to request for admissions "admitted" is Denied.

58. Plaintiffs are not entitled to Partial Summary Judgment as to any element of their prima facie case. In the alternative, even if Plaintiffs were entitled to Partial Summary Judgment as to any element of their prima facie case Defendants prevail in this lawsuit as a matter of law.

59. Plaintiffs' Motion for Partial Summary Judgment is Denied.

60. Defendants have met their burden of compelling government interest and least restrictive means. The "FCOC" can continue to be a church without giving marijuana as a holy sacrament and selling in the gift shop.

61. Defendants' Joint Motion for Summary Judgment is Granted as there are no genuine issues of material facts.

62. IT IS THEREFORE ORDERED, Summary Judgment is Granted in favor of Defendants on all claims.

SO ORDERED THIS 6th day of July, 2018.

Dated: 7/6/18

Sheryl Lynch

Hon. Sheryl Lynch
Judge, Marion Circuit Court

Distribution:

Mark Small
1915 Broad Ripple Avenue
Indianapolis, Indiana 46220
Counsel for Plaintiffs

Bobbi Jo Young
1063 Charnwood Parkway
Beech Grove, IN 46107
Pro se Plaintiff

Thomas M. Fisher
Solicitor General
Matthew R. Elliott
Julia C. Payne
Deputy Attorneys General
Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Counsel for State Defendants

Thomas J. O. Moore
Lauren N. Hodge
Grant E. Helms
Assistant Corporation Counsel
Office of Corporation Counsel
200 East Washington Street, Room 1601
Indianapolis, Indiana 46204
Counsel for City/County Defendants