UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-71662

HEMP INDUSTRIES ASSOCIATION, ET AL.

v.

DRUG ENFORCEMENT ADMINISTRATION, ET AL.

PETITION FOR REVIEW OF RULE OF
DRUG ENFORCEMENT ADMINISTRATION

REPLY BRIEF OF PETITIONERS

SUMMARY OF ARGUMENT

1. Petitioners clearly have standing to seek review of DEA's "Interpretive Rule." They are not required to be criminally prosecuted in order to seek relief. They have already engaged in the conduct—importation or sale of edible hemp seed and oil products—that the rule suddenly makes illegal; it must be assumed DEA intends to enforce a criminal statute; and there is a history of past prosecution.

2. There is no merit to any of DEA's arguments as to why its rule should be treated as interpretive rather than substantive. Contrary to DEA's contention, its rule does not simply "point out" the plain language of the Controlled Substances Act. In fact, the plain language of Schedule I the Controlled Substances Act specifically exempts hemp seed and oil from control. To read another part of the same statute as covering hemp seed and oil as "THC" would render the exemption superfluous.

DEA's rule, criminalizing hemp seed and oil, thus materially changes the law. DEA surely intends its rule to be binding in federal courts in the sense that anyone can be prosecuted in federal court for importing, manufacturing or selling a Schedule I substance. The "Interpretive Rule" has the immediate force and effect of law. DEA has confirmed that the rule instantly makes possession and sale of hemp oil and seed products unlawful, albeit with a "grace period" for producers, distributors and retailers to dispose of existing inventories. Petitioners' argument that the rule is substantive is not based on the rule's impact on their business but on the fact that the rule changes existing law by making illegal what was legal.

Underlying this dispute is the question of what is the current law. That is not a question of the merits of any "interpretation" by DEA but a question necessary to determine whether the rule is interpretive or

substantive—an issue as to which DEA's views are entitled to no deference. In that regard, the opinion of the Department of Justice that the Government cannot prohibit hemp oil or seed under current law is not an "interpretation," that can be changed at whim, but simply a statement of the current law, and thus confirmation that DEA has in fact changed that current law.

3. Petitioners agree with DEA that legislative history is not relevant when the language of the statute is unambiguous, as it is here. But DEA itself has introduced legislative history in an effort to explain away the plain language of the CSA. That history, however, only supports the position that the current law does not cover hemp seed and oil notwithstanding the presence of trace amounts of naturally-occurring THC.

ARGUMENT

I. PETITIONERS HAVE STANDING TO SEEK REVIEW

DEA contends that Petitioners lack standing because DEA has not seized their products or commenced criminal proceedings. DEA Brief at 9-10, citing Thomas v. Anchorage Equal Rights Commission, 220 F.3d 1134, 1140 (9th Cir. 2000)(en banc), cert denied, 531 U.S. 1143 (2001). Contrary to the implication of DEA's argument, however, when contesting a statute, "'[I]t is not necessary that the [plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge the statute. . . .'" Babbitt v. United

Farm Workers National Union, 442 U.S. 289, 298 (1979), citing Steffel v. Thompson, 415 U.S. 452, 459 (1974)(bracketed language in original). See also Doe v. Bolton, 410 U.S. 179, 188 (1973)(persons against whom criminal statutes directly operate in the event they engage in prohibited conduct "assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"); Conant v. McCaffrey, 172 F.R.D. 681, 689-90 (N.D. Cal. 1997)(in challenge to policy regarding enforcement of marijuana laws, plaintiffs subject to policy were not required to await and undergo criminal prosecution in order to seek relief).

Rather, "[i]f 'promulgation of the challenged regulations presents plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous restrictions and risking serious penalties for violation,' the controversy is ripe." City of Auburn v. Qwest Corp., 260 F.3d 1160, 1171 (9th Cir. 2001), cert. denied, 122 S. Ct. 809 (2002), citing Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 (1993). In this case, Petitioners face the immediate dilemma to choose between shutting down their business of selling hemp oil and seed, and oil and seed products, containing trace amounts of THC, and risking serious criminal penalties for

violation of the Controlled Substances Act. For this reason, the controversy is ripe and Petitioners have standing.

Consideration of the relevant factors under Thomas, moreover, leads to the conclusion that there is indeed a "genuine threat of imminent prosecution" in this case. First, there is no question in this case of whether the Petitioners have articulated a "concrete plan" to violate the law in question, Thomas, supra, 220 F.3d at 1139. In the instant case, Petitioners are not merely planning to violate the law; rather they have already, for years, been engaged in the conduct which the "Interpretive Rule" suddenly makes illegal—namely, the manufacture, sale and/or importation of edible hemp seed and oil, and seed and oil products, containing trace amounts of naturally-occurring THC.

Second, the prosecuting authorities have indeed communicated a specific warning that they intend to enforce the "Interpretive Rule." Thomas, supra, 220 F.3d at 1138. As explained in Petitioners' Emergency Motion for Stay filed on February 6, 2002, as the February 6 deadline approached, at least three of the Petitioners received a communication from the largest natural foods supermarket chain in the United States, indicating that this chain, specifically based on "clarification from the DEA," would pull Petitioners' products from their grocery shelves on February 6 unless

the Petitioner companies provided a statement representing unequivocally and without qualification that their products contain no THC. See Petitioners' Emergency Motion at 4 and Declarations of John W. Roulac (Exhibit 1 to Emergency Motion) and Arran Stephens (Exhibit 2 to Emergency Motion). As explained in those Declarations, since the Petitioner companies cannot know for certain whether their products contain THC at levels less than those detected by normal laboratory analysis, it was impossible for the companies to provide such statements, and this chain did pull Petitioners' products from their shelves. Manifestly, DEA has not taken the trouble to issue the "Interpretive Rule" merely as a hypothetical exercise. It must be assumed that DEA intends to continue to enforce what it regards as the drug laws, including the "Interpretive Rule" banning hemp food products which probably contain THC below detectable levels.

As a result of the "Interpretive Rule," importation and sale of hemp seed and oil, and seed and oil products, are now a serious criminal offense. Were that not the case, of course, it would not have been necessary for DEA, in its companion "Interim Rule," to provide a 120-day grace period, until February 6, 2002, for Petitioners and similarly situated companies to dispose of these products. See Interim Rule, 66 Fed. Reg. 51539 at 51543, Excerpts of Record ("ER") at 7. As the February 6 deadline approached, DEA,

having been contacted by this Court's Motions Attorney about its intention to enforce the law, responded by extending the "grace period" for another 40 days. Letter from Daniel Dormont, counsel for DEA, to Susan Christian, February 7, 2002.

In these circumstances, that DEA has not yet actually prosecuted or specifically threatened to prosecute anyone is irrelevant. In Babbitt, supra, the Court held that, even though a criminal penalty provision "has not yet been applied and may never be applied," the controversy was ripe and plaintiffs had standing where plaintiffs had already engaged in the forbidden conduct; the "State has not disavowed any intention of invoking the criminal penalty provision;" and plaintiffs "are thus not without some reason in fearing prosecution for violation of the ban. . . ." 442 U.S. at 302.

Finally, there is indeed a history of past prosecution against Petitioners' products. In August, 1999, a shipment of hemp birdseed which Petitioner Kenex, Ltd. was attempting to export to the U.S. was seized by the U.S. Customs Service based on a DEA advisory that any THC was a controlled substance. See Supplemental Declaration of Jean Marie Laprise, attached as Exhibit 2 to Petitioners' Reply to Opposition of DEA to Petitioners' Urgent Motion for Stay, November 15, 2001, at ¶5. Customs also issued recall notices for fifteen prior shipments of hemp oil, fiber and

nut products, and imposed $500,000 in fines. Id. at ¶8. Customs eventually dropped all charges and fines, and returned the seized shipment (which became worm-infested and worthless while impounded), apparently as a result of concluding that DEA in fact lacked legal authority to impose a zero-content trace natural THC standard on hemp oil and seed products. Id. at ¶¶6-7. The manifest purpose of the "Interpretive Rule" is to confer on DEA precisely the legal authority that was missing in the 1999 Kenex birdseed seizure case.

For these reasons, Petitioners' challenge to the "Interpretive Rule" is ripe and they have standing to seek its review by this Court.

II. DEA'S ISSUANCE OF THE "INTERPRETIVE RULE" VIOLATED THE APA

DEA "readily concedes that *if the interpretive rule were actually a legislative rule*, it must be voided for failure to comply with 5 U.S.C. §553." DEA Brief at 20 (emphasis in original). DEA's "Interpretive Rule" is indeed actually a legislative rule.

A. DEA Has Changed the Law

At the heart of DEA's argument is the contention that, in its "Interpretive Rule," DEA has merely "pointed out" that the "plain language" of Schedule I of the CSA covers any "material, compound, mixture or preparation, which contains any quantity of …" THC. DEA Brief at 4, 6,

17, citing 21 U.S.C. §812(c), Schedule I(c)(17). What DEA overlooks is the plain language of the definition of "Marihuana," in the same part of the CSA, namely, Schedule I, which specifically exempts "oil or cake made from seeds of such plant. . . or the sterilized seed of such plant," i.e., hemp oil and seed. 21 U.S.C. §802(16). And DEA overlooks the introductory language to the relevant part of Schedule I, which provides any material containing any of the listed substances, including THC, is covered, "Unless specifically excepted…" (emphasis added).

"In expounding a statute we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law. . . ." Kelly v. Robinson, 479 U.S. 36, 43 (1986), quoting Offshore Logistics, Inc., v. Tallentire, 477 U.S. 207, 221 (1986). Why would Congress bother to exempt hemp oil and seed from one part of Schedule I only to provide that another part of Schedule I covers hemp oil and seed? A court must be "hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." Kawaaihau v. Geiger, 523 U.S. 57, 62 (1998), quoting Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 837 (1988). If DEA is merely interpreting the "plain language" of the CSA, then the statutory exemption of hemp seed and oil would simply be rendered superfluous.

Further, hemp seed and oil are not a "material, compound, mixture or preparation," words that clearly connote only synthetic or manufactured substances, not parts of a plant. Were that not the case, then poppy seeds would be controlled as "opium"—notwithstanding that such seeds are explicitly exempted from the CSA in the definitions of "opium poppy" and "poppy straw", 21 U.S.C. §§802(19),(20)-- because poppy seeds may contain miniscule trace amounts of opium, any "compound" or "preparation" of which is separately controlled under the CSA (Schedule II(a)(1), 21 U.S.C. §812(c).

Thus the plain language of the CSA clearly provides that Schedule I does not cover hemp seed and oil, notwithstanding that such seed and oil may contain miniscule traces of naturally-occurring THC, a fact of which Congress was well aware as we demonstrate in our opening brief. DEA has not simply "pointed out" or interpreted existing law. DEA has changed the existing law. That is why its rule is substantive and legislative, not interpretive.

B. DEA's Rule Bears All the Hallmarks of a Substantive, Legislative Rule

In its effort to show that its rule is interpretive, DEA first simply cites its own "intention that the rule be viewed as interpretive, not legislative." DEA Brief at 14. But "the label an agency attaches to its pronouncement is

clearly not dispositive." Gunderson v. Hood, 268 F.3d 1149, 1154 n. 27 (9th Cir. 2001). "An agency may not escape the notice and comment requirements. . . by labeling a major substantive legal addition to a rule a mere interpretation." Appalachian Power Co. v. EPA, 208 F.3d 1015, 1024 (D.C. Cir. 2000). Similarly, that the rule consists largely of DEA's analysis of statutory and regulatory language, and legislative history, DEA Brief at 14, says nothing about the issue at hand, which is whether the "Interpretive Rule" has the force and effect of law.

Second, in that regard, DEA contends that Petitioners do not "assert that any federal court or other tribunal outside DEA is bound to follow DEA's interpretation of the law contained in the interpretive rule." DEA Brief at 15. The Controlled Substances Act ("CSA") is, of course, a criminal statute that is routinely enforced through criminal prosecution by the U.S. Department of Justice, DEA's parent agency. The CSA is not a hypothetical ideal. It is a criminal statute, violation of which is a criminal offense. If one could not be prosecuted in federal court for violating a provision of the CSA, then the provision would be meaningless. If DEA did not intend for federal courts ultimately to follow its "interpretation" of the CSA, there would be no point at all in issuing such an interpretation.

Third, contrary to DEA's suggestion, Petitioners do not contend that a binding rule is "any published interpretation of the law that the agency plans to apply." DEA Brief at 16. What we do contend is that the "Interpretive Rule" has "the force and effect of law. . . ." Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 99 (1995). DEA concedes in its Brief that, in the "Interpretive Rule," DEA not only made an interpretation of the statute but "indicated that it planned to enforce it." DEA Brief at 17-18. It could not be clearer that such interpretation is intended to have the effect of law.

DEA notes that it simultaneously published for public comment its "Proposed Rule" which "will have the force and effect of law if and when it becomes a final rule." DEA Brief at 16. DEA's "Interpretive Rule," however, has the "force and effect of law" immediately. DEA states clearly in its "Interim Rule" that companies like Petitioners will, immediately, upon issuance of the "Interpretive Rule," find themselves with inventories of edible hemp oil and seed products that "will be considered controlled under the interpretive rule. . . ." Interim Rule, 66 Fed. Reg. 51539 at 51543, ER at 7.

Indeed, were it not for the fact that the "Interpretive Rule" has the force and effect of law, immediately, it would not have been necessary for

DEA to allow a 120-day grace period—now extended to 160 days[1]—for Petitioners and like companies to dispose of their inventories of edible hemp oil and seed products. And DEA has reconfirmed, to this Court's Motions Attorney, that even during this "grace period," "no person may use any THC containing 'hemp' product for human consumption…; nor may any person manufacture or distribute such a product with the intent that it be used for human consumption within the United States." Letter from Daniel Dormont, counsel for DEA, to Susan Christian, February 7, 2002 at 2. Clearly the "Interpretive Rule" has the full force and effect of law.

Fourth, again contrary to DEA's suggestion, DEA Brief at 16, Petitioners do not contend that DEA's "Interpretive Rule" is a binding legislative rule merely because of its impact on Petitioners' business. That Petitioners' business is suddenly rendered illegal by DEA's rule has nothing to do with "impact;" rather, that fact demonstrates that the rule imposes new obligations and effects a change in existing law—the key indicia of a substantive, legislative rule. See Yesler Terrace Community Council v. Cisneros, 37 F.3d 442, 449 (9th Cir. 1994).

[1] In response to Petitioners' Emergency Motion for Stay Pending Review, filed February 6, 2002, DEA extended the grace period for another forty days. See Letter from Daniel Dormont, counsel for DEA, to Susan Christian, Motions Attorney, February 7, 2002.

Indeed, contrary to the situation in Alcaraz v. Block, 746 F.2d 593 (9th Cir. 1984), in which this Court found that a regulation "imposed no other substantial legal…duties on the plaintiffs other than what the statute already imposed," id. at 614, DEA's rule does impose new duties. The rule changes the law. It makes illegal what was formerly legal.

Finally, DEA attempts to minimize the significance of the letters from John Roth, the Chief of the Narcotic and Dangerous Drug Section of the Criminal Division of the U.S. Department of Justice, clearly affirming that under current law the Government is "not able to regulate or prohibit the importation of 'hemp' products based on any residual or trace content of naturally occurring THC.. . " Letters from John Roth to DEA Administrator and to Commissioner of U.S. Customs Service, March 23 & 22, 2000, ER at 17 and 19.[2] DEA suggests that, as an opinion of an underling, this position is not to be accorded Chevron deference. DEA Brief at 18. DEA further characterizes the Roth letters as a mere "prior agency interpretation," not having the force of law. Id. at 18-19.

The Roth letters are not an agency "interpretation," nor are they evidence of "past agency practice," DEA Brief at 18-19. Rather, the letters

[2] DEA questions how Petitioners obtained these letters. DEA Brief at 18 n. 6. Petitioners were provided these documents by an organization which obtained them through a Freedom of Information Act request.

simply confirm that DEA's "interpretation" is in fact a change of existing law. The letters confirm that the existing law does not cover hemp seed and oil notwithstanding trace amounts of naturally-occurring THC. DEA's putative "Interpretive Rule" changes that existing, substantive law.

DEA suggests that there is no "prior DEA rule that declared THC-containing products to be legal." DEA Brief at 19 (emphasis added). Of course there is such a rule. It is DEA's existing regulation, which references the statutory definitions (21 C.F.R. §1308.02), thus excluding hemp seed and oil, and defines "THC" to include only "[s]ynthetic equivalents of the substances contained in" the marijuana plant, 21 C.F.R. §1308.11(d)(27), thereby underscoring the exclusion of hemp seed and oil containing only naturally-occurring trace amounts of THC—not synthetic THC. DEA's "second rule"—its "interpretive" rule—is thus indeed irreconcilable with a prior legislative rule, DEA's existing regulation. For that reason, too, the interpretive rule must be deemed legislative. D.H. Blattner & Sons, Inc. v. Secretary of Labor, 152 F.3d 1102, 1109 (9th Cir. 1998).

DEA has thus failed to demonstrate that its "interpretive" rule is anything but a legislative, substantive rule.

III. THE LANGUAGE AND HISTORY OF THE STATUTE AND REGULATION ARE RELEVANT ONLY TO ESTABLISHING THAT DEA HAS CHANGED EXISTING LAW

Petitioners agree with DEA that "the question of whether DEA's interpretation is reasonable is not before this Court." DEA Brief at 21 (emphasis omitted). In that regard, DEA completely misconstrues the relevance of the statutory language and history cited by Petitioners in our opening brief.

In this case, Petitioners contend that DEA's "interpretive" rule changed the law. DEA contends it did not. The threshold question, in these circumstances, is what is the current law. That question is unavoidable, but it is not a question of the merits of any "interpretation" by DEA. To the contrary, as to that question, no deference at all is due to DEA's position. Rather, "Whether an agency pronouncement is interpretive or substantive is a legal question that we review de novo." Gunderson v. Hood, 268 F.3d 1149, 1154 (9th Cir. 2001).

This question is not particularly difficult because it is answered by the plain language of the statute. And, as DEA itself points out, "[w]here the language of the statute is unambiguous, the inquiry then ends." DEA Brief at 22. The statute here, the Controlled Substances Act, plainly and explicitly exempts from Schedule I all hemp oil and sterilized hemp seed. 21 U.S.C.

§802(16). DEA's position is that Congress nevertheless intended to nullify that exemption by providing for hemp oil and seed to be covered under another provision of Schedule I, that covering THC, if such seed or oil contain any amount of THC.

The absurdity of that position is highlighted by DEA itself, in the "Interpretive Rule:"

> One might reasonably ask: Why would Congress exempt certain portions of the cannabis plant from the CSA definition of marijuana if such portions would nonetheless be subject to CSA control to the extent they contain THC?

"Interpretive Rule," 66 Fed. Reg. at 51531, ER at 3. DEA's answer is that the Congress that enacted the CSA "did not address the possibility that portions of the cannabis plant excluded from the definition of marijuana might contain THC", id. and that "the 1937 Congress exempted certain portions of the cannabis plant based on the assumption (now refuted) that such portions of the plant contain none of the psychoactive component now known as THC." Id.

It is thus DEA which has introduced legislative history in an effort to explain away the plain language of the CSA. Petitioners agree with DEA (DEA Brief at 22) that such legislative history is not relevant when the language of the statute is unambiguous, as it is here. But DEA has now introduced legislative history to suggest that Congress was unaware that the

excluded seed of the cannabis plant contained trace drug-containing resin. DEA ignores the opening sentence of the report of the Senate Finance Committee: "The flowering tops, leaves and seed of the hemp plant contain a dangerous drug known as marihuana." S. Rep. 900, 75th Cong., 1st Sess. 1, 4 (1937). As Petitioners demonstrate in our opening brief, the 1937 Congress—which enacted the definition of "marihuana" that was adopted verbatim into the CSA--was fully aware that the seeds of the cannabis plant contained trace drug (THC)-containing resin albeit not in "harmful" quantities. Id.

Even if the legislative history analyzed by the DEA in its "Interpretive Rule" were relevant, then, which it is not, that history would only support the position that the current law—the law that has been in effect for over six decades—does not cover hemp seed and oil notwithstanding the presence of trace amounts of naturally occurring THC.

CONCLUSION

For the reasons set forth above and in Petitioners' opening brief, the Court should rule that DEA's "Interpretive Rule" is invalid and order that it be set aside.

Respectfully submitted,

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Dated: February 20, 2002

CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. 32(a)(7) AND CIRCUIT RULE 32-1

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is

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Dated: February 20, 2002 _____

Attorney for Petitioners