No. 01-71662

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HEMP INDUSTRIES ASSOCIATION, ET AL.,

Appellants/Petitioners

v.

DRUG ENFORCEMENT ADMINISTRATION, ET AL.,

Appellees/Respondents

PETITION FOR REVIEW OF AN INTERPRETIVE RULE
ISSUED BY THE DRUG ENFORCEMENT ADMINISTRATION

BRIEF FOR THE APPELLEES/RESPONDENTS

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JURISDICTIONAL STATEMENT

Petitioners assert that this Court has jurisdiction over their Petition for Review pursuant to the administrative appeal provision of the Controlled Substances Act (CSA), 21 U.S.C. 877. Petitioners correctly quote section 877 as providing that "[a]ll final determinations, findings, and conclusions" of DEA under the CSA are subject to review by the United States Court of Appeals. It appears that no United States Court of Appeals has ever entertained an appeal of an interpretive rule pursuant to section 877. Therefore, there is a lack of precedent as to whether a DEA interpretive rule fits in the category of "final determination, findings, and conclusions" subject to review under section 877. Nonetheless, the Government agrees with petitioners that the question of whether the rule is interpretive or legislative is subject to review by this Court under section 877.

Petitioners filed a timely petition for review on October 19, 2001.

STATEMENT OF ISSUES

1. Whether petitioners lack standing to challenge the interpretive rule because they are uncertain whether their products contain the substance, tetrahydrocannabinols (THC), that is the subject of the rule.

2. Whether the rule is a true "interpretive rule" – not, as petitioners contend, a legislative rule.

STATEMENT OF THE CASE

October 9, 2001, DEA published in the Federal Register three separate rules pertaining to THC, which is a schedule I controlled substance under the CSA. 66 Fed. Reg. 51,530; Petitioners' Excerpts of Record (ER) 1-16. The three rules (an interpretive rule, a proposed rule, and an interim rule)

addressed whether, and under what circumstances, products containing THC are subject to control under the CSA. The rule that petitioners challenge here is the interpretive rule. ER 2-6.

Petitioners are a group of companies which make and/or distribute various products marketed as "hemp" products. According to petitioners, these "hemp" products contain materials made from portions of the cannabis plant that are excluded from the CSA definition of marijuana, such as the mature stalks and sterilized seeds of the plant. Petitioners state that some of these products "may" contain THC (Brief of Petitioners, "Br.", at 3) and, if so, are subject to control under DEA's interpretation of the CSA contained in the interpretive rule.

Petitioners disagree with the interpretive rule. To request appellate relief from an otherwise unreviewable agency action, they claim that the interpretive rule is actually a "legislative" rule that was issued without notice and comment.

STATEMENT OF FACTS

A. Statutory Framework

The CSA authorizes the Attorney General to promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient enforcement of his functions under the CSA. 21 U.S.C. 871(a), as set forth in 28 C.F.R. 0.100(b).

The Administrative Procedure Act (APA) contemplates that agencies may issue interpretive rules.[1] 5 U.S.C. 553(b)(A), (d)(2). Although the APA does not define "interpretive rule," the general characteristics of such a

[1] The APA uses the term "interpretative rule." The term "interpretive rule" was used by DEA below and will be used in this brief.

rule are well-established. An interpretive rule "serves and advisory function explaining the meaning given by the agency to a particular word or phrase in a statute or rule it administers." *D.H. Blattner & Sons, Inc. v. Secretary of Labor, Mine Safety and Health Admin.*, 152 F.3d 1102, 1109 (9th Cir. 1998) (citation omitted). Under the APA, interpretive rules are expressly exempt from notice-and-comment requirements. 5 U.S.C. 553(b)(A).

B. Proceedings Below

The interpretive rule at issue was published in the Federal Register by DEA on October 9, 2001. ER 2-6. The rule provided DEA's interpretation that, under the CSA, any product that contains any amount of THC is a schedule I controlled substance, even if such product is made from portions of the cannabis plant that are excluded from the CSA definition of marijuana. *Id.* The rule explained how this interpretation is consistent with the plain language of the CSA, which provides that "any material, compound, mixture, or preparation, which contains any quantity of… [THC]" is a schedule I controlled substance. ER 2 (quoting U.S.C. 812(c), schedule I(c)(17)). The rule also set forth, in exhaustive detail, DEA's analysis of the relevant existing DEA regulations, historical statutes and regulations, case law, and legislative history. ER 2-5.

Simultaneous with the issuance of the interpretive rule, DEA published two related rules: a proposed rule and an interim rule. The proposed rule proposed to revise the wording of the DEA regulations to make clear that the reference to "tetrahydrocannabinols" in schedule I refers to both natural and synthetic THC. The comment period for this proposed rule ended on December 10, 2001, and DEA is currently reviewing the public comments in accordance with the APA.

The third rule, the interim rule, exempts from control certain THC-containing industrial products, processed plant materials used to make such products, and animal feed mixtures. ER 7-12. Under the interim rule, "hemp" products that contain THC but do not cause THC to enter the human body are considered noncontrolled substances (and therefore exempt from all provisions of the CSA). Included in this category of exempt products are items such as "hemp" rope, clothing, paper, body care products (such as soaps and shampoos), industrial solvents, and animal feed mixtures. However, those products that cause THC to enter the human body, such as THC-containing "hemp" foods and beverages, remain schedule I controlled substances.

The effect of the interim rule is that the types of industrial products that Congress intended to permit under the 1937 Marihuana Tax Act remain lawful under the CSA, while products that cause THC to enter the human body (THC-containing foods and beverages), which Congress never intended to permit, remain unlawful. See ER 7-9. This is consistent with the CSA's prohibition on human consumption of schedule I controlled substances outside of FDA-approved research.[2]

Thus, many of the products that petitioners make are noncontrolled, lawful products under the interim rule. The only products that petitioners have identified which might be subject to control under the interim rule are food and beverage products that contain THC. Yet, because petitioners do not provide a clear description of their products, it is not possible to discern whether these products contain THC. The interim rule states clearly that if a

[2] See 21 U.S.C. 823(f); see also *Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 121 S. Ct. 1711, 1718 (2001) (use of schedule I drugs prohibited "outside the confines of a Government-approved research project").

"hemp" food or beverage product does not contain THC, it is not subject to control under the CSA. ER 10.

The proposed rule and the interim rule were issued in accordance with the APA – a fact that petitioners do not challenge.

SUMMARY OF THE ARGUMENT

DEA published in the Federal Register its interpretation of a provision of the law that it administers: the CSA. The issuance of such an interpretive rule is expressly authorized by the CSA and the APA. DEA's interpretation is consistent with the plain language of the statute, which provides that "any material, compound, mixture, or preparation, which contains any quantity of … [THC]" is a schedule I controlled substance.

Petitioners disagree with construing the above-quoted provision of the CSA at face value, as DEA has done in the interpretive rule. But they recognize that mere disagreement with an interpretive rule is not a legal basis to appeal, particularly where the rule is consistent with the text of the statute. Therefore, petitioners attempt to categorize DEA's interpretive rule as a "legislative rule" – even though it clearly is not. Such a categorization enables them to claim that DEA violated the APA by issuing the rule without notice and comment. (Since APA notice and comment procedures are inapplicable to interpretive rules, DEA published the interpretive rule without notice and comment.)

As a threshold matter, petitioners fail to meet their burden of demonstrating standing to appeal. Based on their own statement of the facts, it appears that many of their products are legal, noncontrolled substances under the rules issued by DEA. The only products that petitioners identify which may be illegal under the rules are THC-containing foods and

beverages. However, because petitioners state only that these foods and beverages "may" contain THC, their claim of injury is speculative and therefore fails to impart standing.

Putting aside the question of standing, petitioners' strategy of labeling the interpretive rule – with which they disagree – a "legislative" rule fails because this interpretive rule is, in name, form, and substance, a quintessential example of an interpretive rule. It provides the agency's interpretation of a statute it administers (and of a regulation it has promulgated) while explaining the language, purpose, and legislative history of the statute and regulation. DEA's interpretive rule is not, and does not purport to be, binding on tribunals outside the agency – another hallmark of an interpretive rule.

Even if this Court were to accept petitioners' invitation to second-guess DEA's interpretation of the law it administers, petitioners' approach is inconsistent with basic canons of statutory construction. Rather than starting with the plain language of the statute, petitioners place primary emphasis on portions of the legislative history. Moreover, the legislative history they emphasize is not that of the CSA, but of the CSA's predecessor, the Marihuana Tax Act of 1937. Furthermore, they rely chiefly on statements of individual witnesses over that of the Senate report accompanying the passage of the 1937 Act.

Aside from the foregoing flaws in petitioners' approach to statutory construction, they present (at best) only another possible interpretation of the long-defunct 1937 Act. Given the deference to which an agency is entitled in construing the laws it administers, petitioners' competing view of the law cannot displace DEA's interpretation that is consistent with the plain language of the CSA and reasonable in view of the legislative history. This

is especially so given that the reasonableness of DEA's interpretation is not a matter properly before the Court.

ARGUMENT

I. PETITIONERS LACK STANDING TO APPEAL

Article III, sec. 2, cl. 1 of the Constitution limits the "judicial power" of the United States to the resolution of "cases" or "controversies." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 470 (1982). This Court must presume that it lacks jurisdiction "unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 315 (1991).

As the party seeking to invoke federal jurisdiction, petitioners bear the burden of establishing their standing. *LSO v. Stroh*, 205 F.3d 1146, 1152 (9th Cir. 2000). To do so, plaintiffs must demonstrate each of the "irreducible constitutional minimum[s]" of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992).

> First, plaintiffs must clearly demonstrate that they have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. At 560-561 (citations, internal quotations, and footnote omitted).

In *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134, 1138-39 (9th Circuit 2000) (en banc), *cert. denied*, 531 U.S. 1143 (2001), this Court held that neither the mere existence of a proscriptive statute nor a

generalized threat of prosecution satisfies the "case or controversy" requirement of the standing or ripeness analysis; there must be a "genuine threat of imminent prosecution." The factors employed by this Court to evaluate the genuineness of the claimed threat of prosecution include: (i) whether the party claiming the threat has articulated a "concrete plan" to violate the law in question, rather than an expressed intent to violate the law on some uncertain day in the future – if and when a chance to engage in illegal conduct arises; (ii) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, directed at the particular plaintiffs; and (iii) the history of past prosecution or enforcement under the challenged statute. *Id*. at 1139.

Here, petitioners make no assertion that DEA or any other federal law enforcement agency has seized their products or commenced criminal proceedings against them as a result of DEA's publication of the interpretive rule. Many of the products they describe (such as "hemp" clothing, paper, soaps, shampoos, and animal feed mixtures) are clearly exempt from control under the interim rule. As for their remaining products ("hemp" foods and beverages), petitioners are not even sure if these products contain THC. They state only that their products "may" contain THC. Br. At 3. The interim rule states expressly that any "hemp" product which contains no THC (nor any other controlled substance) is not a controlled substance. ER 10. Petitioners thereby present this Court with a speculative claim of harm that has consistently been held insufficient to establish standing.

II. THE ISSUANCE OF THE INTERPRETIVE RULE WAS A VALID EXERCISE OF DEA'S AUTHORITY UNDER THE CSA AND THE APA

Petitioners claim that DEA's interpretive rule is really a legislative rule and, since it was published without notice and comment, its issuance violated the APA. This claim is mistaken, as explained below.

A. Standard of Review

This Court has stated: "Whether the rule at issue is 'interpretive' or 'legislative' is a question of law, which we review de novo." *Chief Probation Officers of California v. Shalala*, 118 F.3d 1327, 1330. (9th Cir. 1997).[3]

B. Distinguishing Interpretive Rules form Legislative Rules

As this appeal illustrates, under the APA, there is a critical procedural distinction between interpretive rules and legislative rules. When it comes to legislative rules, agencies must publish "notice of proposed rule making" in the Federal Register and give interested persons an opportunity to submit comments on the proposed rules.[4] 5 U.S.C. 553(b), (c). (DEA has done so with respect to the true legislative rules here: the proposed rule and the interim rule. ER 7, 13.) In contrast, interpretive rules are expressly exempt from the notice-and-comment requirements of section 553 and can be made effective immediately upon publication in the Federal Register. 5 U.S.C. 553(b)(A), (d)(2).

Thus, petitioners' chance for success in this appeal rests entirely on their ability to convince the Court that the interpretive rule is actually a

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[3] The CSA provides that, on review of a final determination made by DEA, the Administrator's findings of fact are conclusive if supported by substantial evidence. 21 U.S.C. 877. Here, petitioners do not challenge any factual finding made by the Administrator.

[4] Legislative rules (those rules subject to notice-and-comment procedures) are sometimes referred to as "substantive" rules. For simplicity, the Government will refer here to such rules as "legislative."

legislative rule. If this Court concludes, as the Government asserts, that the interpretive rule is a true interpretive rule, petitioners' calling attention the lack of notice-and-comment proceedings is a non sequitur and their sole basis for this appeal evaporates.

Although the APA defines neither legislative rules nor interpretive rules, the general characteristics of these rules are well-settled. A legislative rule is a rule which "is intended to have and does have the force of law." *National Latino Media Coalition v. F.C.C.*, 816 F.2d 785, 787-788 (D.C. Cir. 1987). "A valid legislative rule is binding on all person, *and on the courts*, to the same extent as a congressional statute." *Id*. (emphasis added). Interpretive rules, on the other hand, "do not have the force of law and even though courts often defer to an agency's interpretive rule they are always free to choose otherwise." *Id*. (citation omitted). This distinction is the very reason that legislative rules may only be issued following notice-and-comment procedures, whereas interpretive rules are exempt from the notice-and-comment requirements. See *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997) ("it is because the agency is engaged in lawmaking [when it issues a legislative rule] that the APA requires it to comply with notice and comment").

This court has said that an interpretive rule "serves an advisory function explaining the meaning given by the agency to a particular word or phrase in a statute or rule it administers." D.H. Blattner & Sons, Inc., 152 F.3d at 1109. The Supreme Court has stated that "a prototypical example of an interpretive rule" is that "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Memorial Hosp*., 514 U.S. 87, 99 (1995) (citation and internal quotation marks omitted). It has also been said that the

"paradigmatic" example of an interpretive rule is one that "relies upon the language of the statute and its legislative history" to determine the congressional intent underlying the statute. *Metropolitan School Dist. v. Davila*, 969 F.2d 485, 492 (7th Cir. 1992), *cert. denied*, 507 U.S. 949 (1993); *see also General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (rule deemed interpretive where agency's "entire justification for the rule is comprised of reasoned statutory interpretation, with reference to the language, purpose and legislative history of [the statute]"), *cert denied*, 471 U.S. 1074 (1985).

The United States Court of Appeals for the Federal Circuit recently examined Supreme Court cases in this area and arrived at a test, which is particularly helpful in this case, for distinguishing interpretive rules from legislative rules. In *Splane v. United States*, 216 F.3d 1058 (Fed. Cir. 2000), the Court concluded that, in order for a rule to have the "force and effect of law" (and thereby be a legislative rule), it must have a "binding effect … on tribunals *outside* the agency, not [simply] on the agency itself." *Id*. at 1064 (italics original).

Viewed against these established standards, it is readily apparent that the interpretive rule at issue here is, in fact, an interpretive rule, *not* a legislative rule. DEA's statements throughout the rule leave no doubt of the agency's intention that the rule be viewed as interpretive, not legislative. DEA titled the rule an "interpretive rule" and refers to it as such throughout the text of the rule. While an agency's characterization of a rule as interpretive "is not controlling, it nevertheless is of weight in determining whether a ruling is legislative or interpretive." *Taunton Mun. Lighting Plant v. Department of Energy*, 669 F.2d 710, 715 (Temp. Emer. Ct. App. 1982). The text of DEA's interpretive rule states exactly what it does: provides

"DEA's view" of the relevant law and regulations. Underscoring its interpretive nature, the text of the rule even points out how "[s]everal members of the public who have corresponded with DEA disagree with [DEA's] interpretation." ER 2.

The rule consists almost entirely of an analysis of the relevant statutory language, regulatory language, legislative history, and case law. In this respect, it fits the "paradigmatic" example of an interpretive rule as described by the court in Metropolitan School Dist., supra. As the interpretive rule states, the primary basis for DEA's interpretation is the plain language of the governing statute (the CSA), which states that "any material, compound, mixture, or preparation, which contains any quantity of … {THC]" is a schedule I controlled substance. ER 2 (citing 21 U.S.C. 812©, schedule I (c)(17)).

The foregoing factors make clear that DEA's interpretive rule neither creates new rights or obligations nor effects a change in existing law. It is telling 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. As the interpretive rule itself states, it is merely DEA's interpretation of existing statutory and regulatory provisions, based upon an extensive examination of the language, purpose, and history of those provisions.

In *Chief Probations Officers of California*, the appellants' claim was strikingly similar to that of petitioners here. The appellants in that case argued that the rule at issue there was legislative, rather than interpretive, "because it constitutes an effectively binding rule that represents an about-face from the Agency's prior position." 118 F.3d at 1332. This Court flatly

rejected this argument in *Chief Probations Officers of California* and specifically addressed the types of contentions made by petitioners here.

First, according to petitioners, a "binding rule" is any published interpretation of the law that the agency plans to apply. See Br. At 33-34. This Court made no such pronouncement in *Chief Probation Officers of California*. Rather, this Court held that the rule in question was not a binding legislative rule because (in part) it "does not purport to have the force of law or to warrant the deference accorded to a regulation that is challenged in the courts." 118 F.3d at 1335. Here, DEA's interpretive rule is clearly titled an "interpretive rule" and states repeatedly that it represents DEA's interpretation of the law. Indeed, for this very reason, DEA simultaneously published for public comment the proposed rule (ER 13), which (in contrast to the interpretive rule) will have the force and effect of law if and when it becomes a final rule.

Petitioners further argue that DEA's interpretive rule must be considered a "binding" (legislative) rule because DEA's announcement of its interpretation of the law will adversely affect their business.[5] The following passage from *Chief Probation Officers of California* thoroughly sets aside such an argument:

> The County argues that [the rule in question] effectively establishes a rule of law that will have a significant impact on its operations in California, as well as the operations of twelve other states…. *[T]his Court has made clear that "impact" is not a basis for finding a rule not to be interpretive*. Thus, we have rejected the argument that, for purposes of imposing notice and comment requirements on the agency for a particular

[5] As explained above, it is unclear from petitioners' brief which, if any, of their products would be illegal under DEA's interpretation of the law. Based on their description of their products, their "hemp" textiles, clothing, and personal care products appear to be exempt from control under the interim rule. Their "hemp" foods and beverages are only subject to control if they contain THC – a fact about which petitioners seem unsure.

> rule, we look to the "substantial impact" of the rule. Although an agency action has a substantial impact on those regulated, it is not subject to notice and comment if it is otherwise exempt under the APA. Simply because agency action has a substantial impact does not mean it is subject to notice and comment if it is otherwise expressly exempt under the APA.

Id. at 1335 (italics added; citations and internal quotations omitted). In another APA case, this Court similarly stated:

> The fact that burdens were imposed on [appellants] only goes to the substantial impact of the statute and the regulations, not whether the regulations created law. That the regulations may have altered administrative duties or other hardships does not make them substantive. In this case, *penalizing the agency for explaining what was for the plaintiffs the bad news about [the governing statute], by labeling the explanation "substantive," would be like killing the messenger*. The regulation imposed no other substantial legal (as opposed to administrative) duties on the plaintiffs other than what the statute already imposed.

Alcaraz v. Block, 746 F.2d 593, 613-614 (9th Cir. 1984) (italics added). The above statement from *Alcaraz* rings particularly true here. What DEA presented in its interpretive rule was the plain language of the CSA, which states that "any material, compound, mixture, or preparation, which contains any quantity of … [THC]" is a schedule I controlled substance. ER 2 (quoting 21 U.S.C. 812(c), schedule I(c)(17)). That petitioners dislike the fact that DEA pointed out this part of the statute and indicated that it planned to enforce it does not allow petitioners to attach the "legislative" label to the rule in order to stifle it.

Petitioners rely heavily on several items that are not part of the record. ER 17-27. Most notably, they refer repeatedly to internal Executive Branch letters containing a legal opinion from the former chief of a section of the

Criminal Division of the Department of Justice. ER 17.[6] Putting aside that the letters are not part of the record, they carry no weight in this appeal for two related reasons. First, the letters fit in the category of "pronouncements of 'underlings'" – not "official" agency pronouncements. See *United States v. Mead*, 533 U.S. 218, 121 S. Ct. 2164, 2177 n. 19 (majority opinion) and 2188 n. 6 (dissenting opinion) (2001).[7] Second, even assuming, *arguendo*, that these letters represent past DEA practice (and there is no such evidence in the record), this Court made clear in *Chief Probation Officers of California* that an interpretive rule may be inconsistent with an agency's "past practice" without rendering the rule a legislative rule. As this Court held, prior agency interpretations, "which themselves did not go through formal rulemaking procedures, cannot be regulations having the force of law." 118 F.3d at 1334. This Court stated: "The prior agency [practice and interpretation] simply represented the Agency's prior (short-lived) interpretation of the statute. The Agency was free to change that interpretation." *Id.*

Petitioners are noticeably unable to point to a prior DEA rule that declared THC-containing products to be legal.[8] This is fatal to their appeal. *D.H. Blattner & Sons, Inc.*, 152 F.3d at 1109 n.2 ("only when a second rule is 'irreconcilable with a prior legislative rule' must the second rule be

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[6] Petitioners fail to explain how they came to possess these internal Executive Branch documents.

[7] In the Mead footnotes cited above, the majority and the dissent (Justice Scalia) agreed that the opinions of "underlings" were not to be accorded the type of deference set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984). However, they disagreed as to what constitutes an "official" agency opinion entitled to *Chevron* deference. See also *Christensen v. Harris County*, 529 U.S. 576, 587 (200) ("Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – doe not warrant *Chevron*-style deference.")

[8] For the same reasons, the other extra-record documents presented by petitioners (ER 21 – 26) have no bearing on this appeal.

deemed legislative") (quoting *Orengo Caraballo v. Reich*, 11 F.3d 186, 196 (D.C. Cir. 1993)) (italics original).

In sum, it is clear that DEA's interpretive rule is a prototypical example of an interpretive rule, "issued by an agency to advise the public of the agency's construction of the statutes and rules which hit administers." See Shalala v. Guernsey Memorial Hosp., 514 U.S. at 99.[9]

C. This Court Need Go No Further than to Decide Whether the Rule at Issue Here is Interpretive or Legislative

The sole basis for petitioners' request for appellate relief is their claim that the interpretive rule is actually a legislative rule and, therefore, DEA violated the APA by issuing the rule without engaging in notice-and-comment. The Government 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. By the same token, it this Court decides, as the Government urges, that the interpretive rule was, in fact, an interpretive rule, petitioners' request for appellate relief must fail. As this issue has been fully briefed above, the Court need not read further to decide this case.

Nonetheless, petitioners devote a considerable portion of their brief toward attacking DEA's interpretation of the law it administers (the CSA)

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[9] Petitioners also contend that the interpretive rule is actually a scheduling action, which requires notice-and-comment rulemaking under 21 U.S.C. 811(a). Br. 38-40. By its express terms, section 811(a) applies only when DEA seeks to add a controlled substance to a schedule or remove one from a schedule. Since the interpretive rule does not change the schedule of THC(it merely expresses DEA's interpretation of the meaning of THC's longstanding placement in schedule I), section 811(a) is inapplicable.

Petitioners also argue that declaring THC-containing "hemp" products to be controlled "simply proves too much" because the same reasoning would lead to the conclusion that poppy seeds are controlled substances, since poppy seeds may contain small amounts of opiates (morphine, thebaine, and codeine). See Br. at 28-29. This statement by petitioners fails to recognize that the CSA and DEA regulations control opiates differently than hallucinogens. In contrast to the way hallucinogenic substances are controlled, it is not the case that anything that contains any amount of opiates is itself a controlled substance. Compare 21 U.S.C. 812(c) Schedule I(c) *with* Schedule II(a).

with the ultimate goal of having this Court accept their interpretation over that of DEA. Rather than standing silent in the face of petitioners' harsh and erroneous criticism, the Government explains below why DEA's interpretation is sound. It bears repeated emphasis, however, that the question of whether DEA's interpretation is reasonable is not before this Court. This case turns entirely on whether the rule is truly interpretive – not legislative.

III. THE INTERPRETIVE RULE IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE CSA AND THE DEA REGUALTION

DEA's interpretive rule speaks for itself in terms of its breadth and sophistication of analysis. Nearly every point made now by petitioners is addressed in the interpretive rule. Although the Government cannot equal the depth of the analysis in the interpretive rule by capsulizing it here, below are some points worth repeating in view of petitioners' brief.

As a preliminary matter, petitioners neglect to mention the standard or review to be employed by this Court when evaluating an agency's construction of the statute it administers.[10] The Supreme Court recently indicated that all agency rules, even those which are not promulgated through notice-and-comment proceedings, are entitled at least to the level of deference articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). See Mead, 121 S. Ct. at 2175 ("*Skidmore*'s holding [is] that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information'

[10] Petitioners cite only the standard of review that applies to the specific question of whether the rule is interpretive or legislative. Br. at 13.

available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires") (citations omitted).

Under even the most minimal deferential standard, DEA's interpretation must be upheld because it flows directly from the plain language of the CSA: "any material, compound, mixture, or preparation, which contains any quantity of … [THC]" is a schedule I controlled substance. ER 2 (quoting 21 U.S.C. 812(c), schedule I(c)(17)). Where the language of the statute is unambiguous, the inquiry ends. As the Supreme Court has stated: "[W]e begin with the understanding that Congress says in a statute what it means and means in a statute what it says there. … [W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce according to its terms. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citations omitted and internal quotation marks omitted).

The interpretive rule is also consistent with the plain language of the pertinent DEA regulation, which tracks the CSA by declaring "any material, compound, mixture, or preparation, which contains any quantity of … [THC]" to be a schedule I controlled substance. 21 C.F.R. 1308.11(d)(27).[11] ER 3-4

Leapfrogging over the plain language of the statute and regulation, which are directly on point, petitioners go first to the legislative history of the 1937 Marihuana Tax Act. DEA's interpretive rule addresses the legislative history of the 1937 Act, but does so (consistent with basic canons of statutory construction) only after examining the text of the statute and

regulation, and then the legislative history of the *current* statute (the CSA). ER 2-4.

It bears emphasis that the CSA repealed and superseded the 1937 Act. Accordingly, the legislative history to the 1937 Act cannot be equated with the legislative history of the CSA itself. Nonetheless, DEA gave careful consideration to the legislative history of the 1937 Act and stated in the interpretive rule:

> The Senate Report to the 1937 Act states:
>
> > The term "marihuana" is defined so as to bring within its scope all parts of the plant having the harmful drug ingredient, but so as to exclude the parts of the plant in which the drug is not present. The testimony before the committee showed definitely that neither the mature stalk of the hemp plant nor the fiber produced therefrom contains any drug, narcotic, or harmful property whatsoever and because of that fact the fiber and mature stalk have been exempted from the operation of law.
>
> S. Rep. No. 900, 75th Cong., 1st Sess., at 4 (1937).
>
> The foregoing legislative history was reiterated by the United States Court of Appeals for the District of Columbia Circuit in a 1975 case, *United States v. Walton*, 514 F.2d 201. The court stated:
>
> > Looking at the legislative history of [the Marihuana Tax Act of 1937], we find that the definition of marijuana was intended to include those parts of marijuana which contain THC and to exclude those parts which do not…. The legislative history is absolutely clear that Congress meant to outlaw all plants popularly known as marijuana to the extent those plants possessed THC.

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[11] The DEA regulation listing THC contains additional language beyond that in the statute, which is discussed at length in the interpretive rule. ER 3-4. This discussion refutes petitioners' attempt to construe this additional language in their favor.

Id. at 203-204

> Thus, it is evident that the 1937 Congress exempted certain portions of the cannabis plant from the definition of marijuana based on the assumption (now refuted) that such portions of the plant contain none of the psychoactive component now known as THC

ER 2-3

Presumably because the above analysis of the Senate report to the 1937 Act contradicts their interpretation of the law, petitioners instead focus heavily on certain statements of individual witnesses, who testified regarding the psychoactive chemical content of those portions of the cannabis plant excluded from the 1937 Act's definition of "marihuana." Br. 17-22. This very testimony was addressed by DEA in the interpretive rule:

> Some members of the public who have corresponded with DEA correctly point out that the legislative history of the 1937 Act contains testimony from witnesses who believed that some portions of the cannabis that were being excluded from the definition marijuana did contain small amounts of the psychoactive drug. Other witnesses who appeared before the 1937 Congress testified to the contrary – that the portions of the plant that were being excluded from the definition of marijuana contained none of the psychoactive drug. In the final analysis, the Senate concluded (as quoted above) that the 1937 Act defined marijuana "so as to bring within its scope all parts of the plant having the harmful drug ingredient, but so as to exclude the parts of the plant in which the drug is not present."

ER 3 n. 2.

Thus, the interpretive rule is consistent with the plain language of the CSA and the DEA regulation, as well as the legislative history of the CSA's predecessor, the Marihuana Tax Act. It is inescapable that (for the reasons explained in the interpretive rule, many of which are restated above)

although Congress excluded certain portions of the cannabis plant from the definition of marijuana, it has always been the case, since the enactment of the CSA in 1970, that "any material," including any cannabis plant material, "which contains any quantity of … [THC]" is a schedule I controlled substance. Accordingly, even if the rule were properly before this Court under the type of deference applied in a *Skidmore* analysis, DEA's interpretation would easily pass muster.

CONCLUSION

For the foregoing reasons, this Court should deny petitioners' request that this Court invalidate DEA's interpretive rule.

Respectfully submitted,

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