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No. 01-71662

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HEMP INDUSTRIES ASSOCIATION, ET AL.,

Petitioners,

v.

DRUG ENFORCEMENT ADMINISTRATION, ET AL.,

Respondents.

ON PETITION FOR REVIEW OF A RULE OF
THE DRUG ENFORCEMENT ADMINISTRATION

BRIEF AMICUS CURIAE OF THE DKT LIBERTY PROJECT IN SUPPORT OF PETITIONERS

Julie M. Carpenter
David A. Handzo
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

INTEREST OF AMICUS CURIAE

The DKT Liberty Project, founded in 1997, is a not-for-profit organization that advocates vigilance over regulation of all kinds, particularly that which unduly interferes with the property rights of private individuals. In this case, the Drug Enforcement Administration ("DEA") has promulgated a Final Rule which immediately and permanently extinguishes Petitioners' rights to make, possess, distribute and use any edible hemp product. Additionally, the Rule destroys whatever property interests Petitioners have in the raw materials, equipment, research and real property associated with the manufacture of those products. The DKT Liberty Project submits this brief to demonstrate both that the Rule, if permitted to stand, would violate the Fifth Amendment's injunction against the taking of private property for public use without just compensation, and that DEA is not authorized to promulgate this Rule this way. Because of the DKT Liberty Project's strong interest in the protection of persons from such government overreaching, it is well-situated to provide the Court with additional insight into the issues presented in this case

SUMMARY OF ARGUMENT

The new DEA rule putting all products made with cannabis seeds, stalks, oil or fiber (which do now and always have contained trace amounts of THC) on Schedule I is government overreaching to accomplish a political objective in the war on drugs. First, the regulation, which dramatically affects property rights in what was previously legal property, violates the Fifth Amendment's prohibition on taking property without compensation and without a legitimate public purpose. Second, although DEA may have authority in a scheduling action to enact such a rule, it does not have the authority to do so simply as an exercise of its administrative authority to implement the CSA. For these reasons, the Court should invalidate the new regulation enacted at 21 C.F.R. 1308.

ARGUMENT

I. THE DEA'S REGULATION IS INVALID BECAUSE IT VIOLATES THE FIFTH AMENDMENT'S PROHIBITION AGAINST UNCOMPENSATED TAKINGS THAT DO NOT SERVE A PUBLIC PURPOSE.

Just like the "Interpretative Rule" the DEA issued in October, 2001, its legislative rule outlawing edible hemp products violates the Fifth Amendment. The rule effects a taking without compensation and without a legitimate public

purpose.

A. The DEA Rule is a New Rule that Changes the Character of Hemp Stalks, Seeds, and Oil From Valuable and Legal to Worthless and Illegal.

As an initial matter, the revisionist history DEA has constructed in its Federal Register notice of 21 C.F.R. 1308 must be put straight. DEA argues repeatedly (as it must to avoid a rescheduling action) that this Rule does not change the controlled status of any substance. 68 Fed. Reg. at 14114. For example, it observes that "some members of the public were under the impression (prior to the publication of the interpretative rule) that the listing of [THC] in schedule I includes only synthetic THC – not natural THC." *Id.* Further, it declares that "it is DEA's view that the CSA and DEA regulations have always (since their enactment more than 30 years ago) declared any product that contains any amount of [THC] to be a schedule I controlled substance." *Id.* at 14115. And finally, it assures that the new Rule is simply to "clarify for the public the agency's understanding of longstanding federal law." *Id.* at 14117. But these protestations deflate in the face of the facts.

When Congress initially enacted the CSA, it included marijuana on Schedule I of controlled substances, but specifically *excepted* marijuana stalk, fiber, sterilized seeds, and oil, (21 U.S.C. §§ 802(16), 812(C)(10))despite the fact

that Congress knew these plant parts contained very tiny amounts of THC. *See* Pet. Br. at ___. At the same time, Congress also included the term "Tetrahydrocannabinols" on the Schedule I. 21 U.S.C. § 812(c)(17). Because it would have been absurd for Congress to explicitly exclude the marijuana stalk, fiber, sterilized seeds, and oil in subsection (c)(10), and then to include them (without saying so) in subsection (c)(17) , the obvious conclusion was that in subsection (c)(17), Congress was referring to THC that came from sources other than the stalk, fiber, sterilized seeds, and oil of the cannabis plant. Given that a very real non-cannabis source of THC was the synthetic manufacture of it, this sensible conclusion was exactly the one the regulations then adopted:

> (d) Hallucinogenic Substances. Unless specifically excepted or unless listed in another schedule…
>
> (19) Marihuana……………………………………………………………7360
> ***
> (27) Tetrahydrocannabinols …………………………………………….7370
> *Synthetic* equivalents of the substances contained in the plant, or in the resinous extractives of Cannabis, sp. and/or *synthetic* substances, derivatives, and their isomers with similar chemical structure and pharmacological activity such as the following:
> Δ1 cis or trans tetrahydrocannabinol, and their optical isomers
> Δ6 cis or trans tetrahydrocannabinol, and their optical isomers
> Δ3,4 cis or trans tetrahydrocannabinol, and its optical isomers
> (Since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions covered.)

21 C.F.R. §1308.11 (emphasis added). This regulation, which quite plainly controls *synthetic* THC was in effect from 1971 to 2003. And while the DEA has made a weak attempt to argue that that regulation actually covered all THC, not just the synthetic THC the regulation refers to, the courts have otherwise. *United States v. McMahon*, 861 F.2d 8 (1st Cir. 1988) (holding "the substance referred to in Schedule I(c)(17) is synthetic, not organic THC"); *United States v. Wuco*, 535 F.2d 1200 (9th Cir.), *cert. denied*, 429 U.S. 978 (1976) (noting that organic THC in marijuana "was not the synthetic THC defined as a Schedule I controlled substance").

Thus, it is not true, as DEA claims, that this new regulation "does not change the legal status of so-called 'hemp' products (products made from portions of the cannabis plant that are excluded from the CSA definition of marijuana)." 68 Fed. Reg. At 14114. In fact, the regulation dramatically and immediately changes the status of those products from legal to illegal, and from property with value to something in which there are now no property rights whatsoever. Before this rule, it was entirely reasonable for business owners to rely (as did the courts and the Department of Justice) on the plain language of the regulations which listed only synthetic THC as a controlled substance, and on the language of the CSA itself, which specifically excepted the stalk, fiber, seeds, and oil from the cannabis plant

from the controlled substance schedule. In addition, there has been no suggestion, through prosecution or threats of it during the statute's and regulation's entire 30-year-history that possessing the expressly exempted stalk, seeds, or oil of the cannabis plant is illegal, although DEA now claims that such possession has been illegal for 30 years. Indeed, if DEA were correct in its view, the entire hemp industry (including rope, paper, and the like) has been illegal since 1971 because it is only now that DEA has "exempted" non-edible hemp products from the "mandated" naturally-occurring THC ban. 68 Fed. Reg. 14119, 14125 (noting "rule [exempting non-edible hemp products] allows economic activity that would otherwise be prohibited.")

In the face of this history of excepting cannabis stalks, fiber, seeds, and oil from Schedule I, the new rule declares that those previously legal and valuable cannabis stalks, seeds, and oil are suddenly controlled substances. In light of these facts, there is little question that DEA's new regulation does in fact significantly change the property rights of those small business owners who reasonably and justifiably sought to develop the nutritional benefits of hemp.

B. The New Rule Effects Both a Physical and a Regulatory Taking.

It is a well-settled tenet of takings law that government regulation

which authorizes the "permanent physical occupation" of private property "is perhaps the most serious form of invasion of an owner's property interests." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). Indeed, when it comes to permanent invasions, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it," the Supreme Court has *always* required compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015.[1/]

"Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" *Loretto,* 458 U.S. at 435 (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)). In the challenged Rule, the DEA declares "any product that contains any amount of tetrahydrocannabinols to be a schedule I controlled substance." *Clarification of Listing of*

[1/]

Although the majority of "physical takings" precedent has evolved in the context of government occupation of real property, *see e.g.*, *Loretto*, 458 U.S. 419 (installation of cables in apartment building), the rule applies with equal force to permanent confiscations of personal property. *Cf. Andrus v. Allard*, 444 U.S. 51, 53-54 (1979) (federal prohibition on sale of eagle feathers not a taking since traders could still possess, transport, donate or devise them) *with Webb's Fabulous Pharmacies, Inc.,* 449 U.S. at 164 (finding a taking where a county appropriated the interest earned by an interpleader fund). In contrast to the regulations at issue in *Andrus*, however, the DEA's Interpretive Rule here "does not simply take a single 'strand' from the 'bundle' of property rights;" rather, it makes off with the entire bundle. *Loretto*, 458 U.S. at 435.

"Tetrahydrocannabinols" in Schedule I, 68 Fed. Reg. 14114, 14115 (March 21, 2003). By so doing, the government has explicitly destroyed *each* of Petitioners' historically recognized property rights in the regulated material. Indeed, the CSA expressly provides that "*no property right shall exist*" in any controlled substance, or in the raw materials, equipment, records, research and real property associated with its production. 21 U.S.C. § 881(a). Thus, as a result of the DEA's interpretation, Petitioners have immediately and irrevocably been stripped of their longstanding rights in existing inventories of edible hemp products (which contain non-psychoactive trace amounts of THC) and the ingredients and equipment used to make them. 21 U.S.C. § 881(a). Indeed, in the wake of the regulation, all this property is now subject to government forfeiture. *Id.* In addition, the manufacture, distribution, possession and use of edible hemp products have all been transformed into criminal offenses. *See* 21 U.S.C. § 841(a) (making it unlawful "for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance"); *id.* § 844(a) (making it unlawful "for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained" for a designated medical purpose). Given this comprehensive decimation of Petitioners' property rights, it is incontrovertible that the DEA's

Rule effects a *per se* physical taking under the Fifth Amendment.

Further, even if this Court should find that the DEA's Rule extinguishing all property rights does not effect a "physical taking," the Rule nevertheless runs afoul of the Fifth Amendment in another way. Traditionally, courts limit takings claims to situations where the government expropriated property or physically occupied it. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 772 n.10 (9th Cir. 2000), *cert. granted in part*, 121 S. Ct. 2589 (2001). In the landmark case of *Pennsylvania Coal v. Mahon*, however, the Supreme Court recognized that a taking also could be found if government regulation of the use of property went "too far." 260 U.S. at 415. The Court gave meaning to this phrase in *Lucas v. South Carolina Coastal Council*, concluding that a regulation goes too far — and thus constitutes a *per se* regulatory taking — when it "denies all economically beneficial or productive use of land."[2] 505 U.S. at 1015, 1019. *But cf. Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (prohibition

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[2] Even where a regulation places limitations on property that fall short of eliminating *all* economically beneficial use, a taking nevertheless may have occurred, "depending on a complex of factors including the regulation's economic effect on the [owner], the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 2457 (2001) (citing *Penn Cent. Transp. Co.*, 438 U.S. at 124); *Tahoe-Sierra Pres. Council, Inc.*, 216 F.3d at 772.

on excavation; no taking where other uses permitted).

To be sure, the Supreme Court has warned that "in the case of *personal property*," because the government traditionally exercises a high degree of control over commercial dealings, owners "ought to be aware of the possibility that new regulation might even render . . . property economically worthless" without triggering the Takings Clause. *Lucas*, 505 U.S. at 1027-28. But the Court has never permitted regulations, like this one, that leave *absolutely no* viable use of Petitioners' property, economic or otherwise. Indeed, the DEA's Rule does not simply make it *commercially impracticable* for Petitioners to continue to sell, manufacture and possess edible hemp products, the Rule makes it *illegal*, and extinguishes all of Petitioners' property rights in those products. Hence, in reality, the *only* remaining use for Petitioners' existing inventories of hemp foods and raw materials is to throw them away. This absolute deprivation of beneficial use is "the equivalent of a physical appropriation." *Id.* at 1017. Accordingly, the regulation constitutes an invalid taking without compensation. *Id.* at 1015; *see also id.* at 1068 (Stevens, J., dissenting) (recognizing that, in the wake of *Lucas*, a government regulation that makes illegal previously legal property, such as asbestos or cigarettes, will amount to a compensable taking).

C. The DEA's Rule Effects an Irremediable, Unconstitutional Taking Because There Is No Showing That it Furthers Any Legitimate Public Purpose.

Unless a government taking is reasonably related to a legitimate public purpose, it is unconstitutional "even if compensated." *Armendariz v. Penman*, 75 F.3d 1311, 1321 n.5 (9th Cir. 1996); *Midkiff*, 467 U.S. at 241; *Penn Cent. Transp. Co.*, 438 U.S. at 127; *McDougal*, 942 F.2d at 676. As discussed above, the DEA's new rule outlawing edible hemp products strips Petitioners of all of their rights in the regulated property. Because the rule does so without furthering any legitimate public interest, it must be invalidated. *Midkiff*, 467 U.S. at 241.

Congress enacted the CSA because the "illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(2). Believing marijuana to be one of those detrimental substances, Congress placed it on the list of scheduled drugs. But Congress carefully defined the term to mean:

> [A]ll parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. *Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any*

> *other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.*

21 U.S.C. § 802(16). As pointed out by Petitioners in their opening brief, the legislative history of the CSA strongly supports the conclusion that when Congress drafted this definition, it was well aware that sterilized hemp seed and oil contain trace amounts of THC. Nevertheless, because the evidence established that the amount of drug present in these materials was not enough to have any harmful effect on anyone, if taken internally, Congress decided to exclude those materials from the definition of marijuana.

The position DEA now urges—i.e., that all "products made from any of the excluded portions of the cannabis plant (such as edible 'hemp' products) [be considered] controlled substances if they cause THC to enter the human body," Interpretive Rule, 66 Fed. Reg. at 51,533—results in government regulation of materials that have not been shown to have any deleterious impact on human health, and that instead offer substantial nutritional benefits. Indeed, recent scientific studies indicate that consuming edible hemp seed and oil, as well as products derived from these ingredients (even in amounts vastly exceeding normal use), does not have any harmful psychoactive effect. *See, e.g.,* Grotenherman,

Leson & Pless, "Assessment of Exposure to and Human Health Risk from THC and Other Cannabinoids in Hemp Foods," (Oct. 11, 2000) (copy attached to comments submitted to DEA from Hemp Industries Association) (concluding "the highest conceivable intake of THC via hemp foods is far below the psychoactive threshold for THC."). Rather, the research tends to show that, given the superior nutritional profile of hemp seed and oil, the consumption of hemp products might actually *benefit* human health. Had DEA conducted a scheduling action to consider scheduling cannabis seeds, stalk, and oil under 21 U.S.C. §811 (assuming, as Congress required, that the Secretary of Human Services had evaluated the medical and scientific evidence and recommended that cannabis stalk, seeds, fiber, and oil be controlled), then of course, DEA could have evaluated the eight statutory factors to determine those cannabis plant parts did, in fact, pose a risk of abuse. Since DEA did not take that route, it has made no findings on whether hemp seeds, stalks, or oil have any effect on the human body. Indeed, the DEA failed to put forth *any* evidence in support of its Rule that would contradict those studies. In the absence of such evidence, the government's action here subverts, rather than advances, the purpose of the CSA.

Furthermore, to the extent the government claims that regulation of certain substances might, in some cases, be necessary to preserve the integrity of the "U.S.

drug testing system," the challenged rule does not reasonably further that goal either. As the extensive evidence subitted to DEA suggests, foodstuffs made from the sterilized hemp seed and oil typically used by the hemp industry simply do not result in positive drug testing results under federal guidelines. *See, e.g.*, Leson, Pless, Grotenhermen, Kalant, and ElSohly, "Evaluating the Impact of Hemp Food Consumption on Workplace Drug Tests," 25 *Journal of Analytical Toxicology*, 691 (Nov./ Dec. 2001); T. Bosy & K. Cole, "Consumption and quantification of delta9-tetrahydocannabinol available in hemp seed products," 24 *Journal of Analytical Toxicology* 562 (2000).

Moreover, if the government had some reason to believe that edible hemp products *could* interfere with current drug testing methods, the DEA's Rule should nevertheless be invalidated because it unnecessarily singles out the makers of edible hemp products to bear a burden not imposed on those in the similarly situated poppy seed industry. Poppy seeds also contain trace elements of a controlled substance—opiates—and are also excluded, by the definition of "poppy" from the controlled substances schedules. Nevertheless, edible products containing these seeds are not regulated under the CSA, and federal authorities have affirmatively adjusted the drug testing thresholds to reduce the probability that poppy seed ingestion would trigger false positives. *See* 62 Fed. Reg. 51118-

51120 (Sept. 30, 1997) (raising acceptable level of opiates in urine sample from 300 parts per billion to 2000 parts per billion before it will be considered a "confirmed positive" to exclude the effects of eating poppy seeds) Thus, just as the government has done in the poppy seed industry, it is clear that the risk of drug testing interference (if any such risk exists) can be eliminated without substantially infringing upon the property rights of hemp food producers.

Again, since it has proceeded under its authority simply to interpret and implement the CSA schedule that Congress established, rather than its authority to add to and delete from the CSA schedule, the DEA has not demonstrated a legitimate public purpose. Because the substantial property restrictions imposed by the new rule do not reasonably further any legitimate public purpose, the rule must be invalidated.

II. THE DEA LACKS STATUTORY AUTHORITY TO "INTERPRET" THE CSA TO INCLUDE WHAT CONGRESS HAS SPECIFICALLY EXCLUDED – IT CAN ONLY ACCOMPLISH THAT BY RE-SCHEDULING.

The Administrative Procedure Act ("APA") provides that the reviewing court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). Agency actions

that do not fall within the scope of statutory delegation are *ultra vires* and will be invalidated under the APA. *Haitian Centers Council, Inc. v. Sale*, 823 F. Supp. 1028, 1046 (E.D.N.Y. 1993). The issue, then, when a regulation is challenged as unauthorized is one of statutory construction: does the statute authorize the regulation?

In reviewing agency action, it is fundamental that "an agency's power is no greater than that delegated to it by Congress." Lyng v. Payne, 476 U.S. 926, 937 (1986). "Agencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature." Railway Labor Executives Ass'n v. National Mediation Bd., 29 F.3d 655, 670 (D.C. Cir. 1994) (en banc), cert. denied, 514 U.S. 1032 (1995). Therefore, "[a]s a matter of statutory construction, statutes granting power to administrative agencies are strictly construed as conferring only those powers granted expressly or by necessary implication." Walker v. Luther, 830 F.2d 1208, 1211 (2d Cir. 1987) (citing N. Singer, Statutes and Statutory Construction, § 65.02 (Sands 4th ed. 1986)). Because its power derives from the statute, an agency cannot add to the statute through regulation "something which is not there." United States v. Calamaro, 354 U.S. 351, 359 (1957); see also California Cosmetology Coalition v. Riley, 110 F.3d 1454 (9th Cir. 1997) ("regulation may not serve to amend a statute").

In determining whether agency action exceeds statutory authority, the court must consider whether Congress has spoken directly to the issue by looking to the statutory language as well as the language and design of the statute as a whole. If Congress has so spoken, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). ("[W]e might invalidate an agency's decision under *Chevron* as inconsistent with its statutory mandate, even though we do not believe the decision reflects an arbitrary policy choice. Such a result might occur when we believe the agency's course of action to be the most appropriate and effective means of achieving a goal, but determine that Congress has selected a different—albeit, in our eyes, less propitious—path." *See Arent v. Shalala*, 70 F.3d 610, 620 (D.C. Cir. 1995) (Wald, J. concurring))[3/] This is so because "agencies surely do not have inherent authority to second-guess Congress' calculations." Public Citizen v. FTC, 869 F.2d 1541, 1557 (D.C. Cir. 1989).

[3/] See also Orca Bay Seafoods v. Northwest Truck Sales, 32 F.3d 433, 436 (9th Cir. 1994) (where Congress did not delegate power Secretary exercised, fact that rule would further purpose of statute was irrelevant because inappropriate to "treat the purpose, and not the operative words of the statute, as the law"); *United States v. Spiropoulos,* 976 F.2d 155, 166 (3d Cir. 1992) (finding that agency action fulfills legitimate purposes of act "does not, however, compel the conclusion that [the agency action] [is] authorized by the Act").

"Whether the policy judgment was right or wrong, Congress made it, and did not delegate it to the Secretary to make, so that is the end of the matter." Orca Bay Seafoods, 32 F.3d at 437.

A. Congress Has Spoken Directly to the Issue of Whether the Seeds, Mature Stalk, and Oil of the Cannabis Plant – and Mixtures of Them – Are Controlled Substances.

The starting point for any exercise of statutory interpretation is, of course, the language of the statute itself. If that language is clear and unambiguous, the Court need look no further. *Demarest v. Manspeaker,* 498 U.S. 184, 190 (1991); *United States v. Valencia-Andrade*, 72 F.3d 770, 774 (9th Cir. 1995); *see also Darby v. Cisneros*, 509 U.S. 137, 147 (1993) ("Recourse to the legislative history of [the statute] is unnecessary in light of the plain meaning of the statutory text."). To determine whether Congress has directly spoken to the precise question at issue on which an agency has acted, courts must also look at the "language and design of the statute as a whole." *Chemical Mfrs. Ass'n v. EPA*, 981 F.2d 1265, 1276 (D.C. Cir. 1990).

Here, both the explicit statutory language, and Congress' definitive role in scheduling substances demonstrate that DEA's new Rule is beyond DEA's administrative authority to implement the CSA. First, the statutory language is quite clear. Congress specifically considered the Cannabis sativa L. plant itself. It

defined the term "marijuana" to be

> all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seeds or resin. Such term *does not include* the mature stalks of such plant, fiber produced from such stalks, oil or cake made from seeds of such plant, any other compound, manufacture, salt, derivative, mixture or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil or cake, or the sterilized seed of such plant which is incapable of germination.

21 U.S.C.§802(10). Thus Congress defines marijuana as a controlled substance, but then excepts not only cannabis stalks, fiber, oil, and seeds, but also "any other compound, manufacture... mixture or preparation" of cannabis stalks, fiber, oil or seed (except resin extracted from them). Thus, under Congress' own language, *products manufactured or prepared from the sterilized seed or oil of the cannabis plant are not marijuana, and are not controlled substances*. Yet DEA has now, simply by its administrative authority, declared that all products made with cannabis oil, seed, or stalk are now schedule I controlled substances. Such tension between a statute and a regulation can only be resolved in favor of the statute.

Second, when enacting the CSA, Congress took a definitive role. Far from asking the DEA to enact specific regulations to carry out a generally-stated purpose, as Congress sometimes does, here, Congress specifically listed and defined every controlled substance, explicitly exempting some defined substances

from the controlled substance list. With regard to those substances listed (and exempted) on the schedules, Congress then delegated to the DEA the authority to enact regulations to carry out the Congressional scheme. 21 U.S.C. §871(b). But that authority to issue interpretive regulations is limited by the statute Congress enacted. "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is ' "the power to adopt regulations to carry into effect the will of Congress as expressed by the statute."'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) (quotes and cites omitted).

To be sure, Congress also delegated to the DEA the *separate* authority to add or delete substances from the schedules. Thus, if the DEA believes it is necessary to change the schedules, it can avail itself of other authority to do so, assuming it acts within the parameters Congress set forth and makes the findings that Congress required. 21 U.S.C. § 811, 812. But DEA cannot include on Schedule I a substance that Congress specifically exempted from Schedule I except by the rescheduling authority.

Nor can DEA create ambiguity to give it administrative authority by pointing, for the first time in 30 years, to the fact that THC is also a controlled substance and listed on Schedule I. This, of course, is what the DEA claims

"mandates" its new regulation. 68 Fed. Reg. at 14117. But to succeed in this argument, DEA must argue that by including the single term "Tetrahydrocannabinols" in Schedule I, Congress intended—without saying so—that the cannabis stalk, fiber, seeds, and oil containing trace amounts of THC (and all products made from those substances)— which it had just exempted from Schedule I—should be included on Schedule I. This argument defies both common sense and the rules of statutory construction. In this context, Congress' reference to THC can only sensibly be understood as a reference to THC existing *outside* of Cannabis sativa L., which Congress had already handled. And because it was (and is) possible to manufacture synthetic THC, Congress had good reason to add THC, as a stand-alone substance, to the schedule without affecting its decision that the excluded parts of the cannabis plant, even if they contain tiny amounts of THC, are nevertheless not controlled substances.

CONCLUSION

The DEA's new rule outlawing edible hemp products that have been widely available for some time must be invalidated. It violates the Fifth Amendment's prohibition on the government taking property without compenation and without a legitimate public purpose. In addition, DEA is not authorized to change add to the CSA schedules substances that Congress explicitly exempted unless it follows the scheduling procedures that Congress has required. Because the new regulation means that products made from cannabis seed, stalk, and oil are now included in Schedule I, when Congress previously defined them out of Schedule I, DEA's regulation is unauthorized and therefore invalid.

Respectfully submitted,

THE DKT LIBERTY PROJECT

BY:

____

Julie M. Carpenter
David A. Handzo
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

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

I certify that:

☐ Pursuant to Fed. R. App. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less,

☐ Is monospaced, has 10.5 or fewer characters per inch and contains not more than either 7000 words or 650 lines of text,

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Dated: June 26, 2002

____
Julie M. Carpenter

CERTIFICATE OF SERVICE

_____I hereby certify that on this 26th day of June, 2003, I caused two true and correct copies of the foregoing *Brief Amicus Curiae Of The DKT Liberty Project In Support Of Petitioners* to be served by First Class United States Mail upon each of the following:

Rose Briceno, Esq.
Criminal Division, Narcotic & Dangerous Drug Section
U.S. Department of Justice
Bond Building
1400 New York Ave., N.W.
8th Floor
Washington, D.C. 20005
(Counsel for Respondents)

Patrick Goggin
1458 Waller Street, #3
San Francisco, CA 94117

Joseph E. Sandler
Sandler, Reiff & Young, P.C.
50 E Street, S.E.
Washington, D.C. 20003
(Counsel for Petitioners)

____
Julie M. Carpenter